“Separation of Powers: Legislative-Executive Relations”

and cover memo from Stephen J. Markham, assistant attorney general for the Office of Legal Policy, to Edwin Meese III, re “Separation of Powers,” April 30, 1986

DEPARTMENT OF JUSTICE
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U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

April 30, 1986

TO: Edwin Meese III
Attorney General

FROM: Stephen J. Markman SJM
Assistant Attorney General
Office of Legal Policy

SUBJECT: Separation of Powers

At your request, the Office of Legal Policy has conducted a review of current separation of powers issues involving the relationship between the legislative and executive branches of the national government. The results of that review are contained in the attached report. The report makes two general recommendations, one substantive and one procedural:

° Substantively, the report sets forth principles and guidelines for Administration policymakers to refer to as they consider separation of powers issues. We recommend that the Justice Department's Strategy Planning Group develop from this report a statement of basic separation of powers principles, for adoption by the Domestic Policy Council.

° Procedurally, we recommend that the Strategy Planning Group also develop, for DPC adoption, procedures for ensuring that these principles are followed in separation of powers conflicts. The procedures would call for:

  ° greater formalization of the process for handling these conflicts,

  ° greater articulation in conflict situations of each branch's constitutional authority and its legitimate interests, and

  ° greater coordination of executive branch responses to congressional assertions of authority.

We recommend an enhanced coordination and representation role for the Justice Department.

The report has four parts. As background for our conclusions and recommendations, Part I provides an overview of

the Framers' intent concerning separation of powers and of how it has worked in practice. Supplementing Part I, Appendix A identifies many of the specific areas where these separation of powers issues have arisen by summarizing the major Reagan Administration conflicts with Congress; Appendix B discusses the role of the judiciary in the legislative-executive relationship; Appendix C summarizes the major court cases in the area; Appendix D sets forth the pertinent provisions of the Constitution; and Appendix E collects the relevant Federalist Papers.

Part II of the report offers an analytic framework for approaching separation of powers conflicts, a way of "thinking clearly" about a subject that is generally treated vaguely and imprecisely. Specifically, Part II sets forth principles describing what separation of powers is and what purposes and values it serves, and it suggests guidelines for Administration decision-makers to refer to in conflict situations. Part III of the report summarizes the various ways the Administration can respond to congressional actions.

Concluding the report, Part IV discusses how the approach proposed in Part II can be implemented by the Administration. It first recommends Administration adoption of a statement of basic separation of powers principles derived from this report. It then recommends Administration establishment of procedures to ensure greater formalization, articulation and coordination in separation of powers conflicts. For example, with respect to congressional oversight, which is a major source of disputes, we have concluded that the Administration should formalize the process by requiring that congressional requests be in writing and only come from committee or subcommittee chairmen or congressional leadership. The request should articulate, with reference to specific constitutional provisions, the constitutional power the requester is exercising and the purpose or interest in furtherance of the power that is served by the request; executive responses should similarly state the relevant constitutional authority and legitimate interests. The coordination of executive branch responses should be improved, perhaps by establishing a coordination and review process. The Justice Department may be the appropriate body to direct such a process.

Attachment

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TABLE OF CONTENTS

SEPARATION OF POWERS:
LEGISLATIVE-EXECUTIVE RELATIONS

I. BACKGROUND ON SEPARATION OF POWERS

Much of the unique nature of our system of government derives from the Constitution's mandates for separation of powers, federalism and individual rights -- principles that the Framers formulated through a process of creativity and compromise and that all share the central purpose of limiting the national government. We address in this paper the separation of powers in the national government, focusing specifically on the allocation of power and the relationship between the legislative and executive branches.

A. The Framers' Intent

"[T]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." 1/ We should therefore review the Framers' intent in this area.

This nation was born in a rebellion against the tyranny practiced by the British government against colonists in North America, who perceived that the king dominated parliament. In establishing the structure of our national government, the Framers consciously and explicitly reacted against the concentration of British (and other European) government power in a single institution. Influenced by Montesquieu, 2/ James Madison wrote that:

> [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny. 3/

The Constitution therefore divides (in Articles I, II and III, respectively) the legislative, executive and judicial powers and functions of the national government -- which are inherent in any form of government -- among three separate branches.

1/ Buckley v. Valeo, 424 U.S. 1, 124 (1976).

2/ "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." Montesquieu, The Spirit of the Laws, 38 Great Books of the Western World 70 (Hutchins ed. 1952).

3/ Federalist No. 48, at 385 (Madison) (Cooke ed. 1961).

Although they sought to limit the powers of all three branches and were reacting against strong executive power in the British and other European governments, the Framers were also concerned about unbridled legislative power. The Supreme Court recently cited, in the legislative veto case, "the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed." 4/

Thomas Jefferson, James Madison and Alexander Hamilton all spoke to this concern. Jefferson stated that:

> [t]he tyranny of the legislature is really the danger most to be feared, and will continue to be so for many years to come. The tyranny of the executive will come in its turn, but at a more distant period. 5/

Madison cited the tendencies of legislatures to extend the "sphere of [their] activity" and to draw "all power into [their] impetuous vortex." 6/ He called upon the people to

> indulge all their jealous[ies] and exhaust all their precautions against the enterprising ambition [of legislative power,] which is inspired by a supposed influence over the people with an intrepid confidence in its own strength. 7/

Hamilton was similarly suspicious of legislatures:

> 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 controul over the other departments; and as they commonly have the people on their side,

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4/ INS v. Chadha, 462 U.S. 919, 947 (1983).

5/ Quoted in Gottfried Dietze, America's Political Dilemma viii (1968).

6/ Federalist No. 48, at 333 (Madison) (Cooke ed. 1961).

7/ Id. at 334.

> 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. 8/

Not everyone at the Constitutional Convention agreed with these sentiments, although dissenters were in the minority. Benjamin Franklin cited a "natural inclination in mankind to Kingly Government." George Mason feared "a more dangerous monarchy, an elective one." And Pierce Butler observed that "Gentlemen seemed to think that we had nothing to fear from an abuse of the Executive power. But why might not a Cataline or a Cromwell arise in this country as in others?" 9/ All agreed, of course, on the necessity of devising governmental structures that would effectively contain national authority as a whole.

Thus, to counterbalance the legislature, the Framers contemplated a relatively strong (though limited) Executive. As Hamilton put it,

> Energy in the [E]xecutive . . . 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 high handed 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. 10/

We must remember the historical context in which the Constitution was written. The Framers were certainly reacting to the tyranny they had suffered under the unitary British government. But they were even more immediately reacting to the weak and ineffective government that had been attempted (from 1774 to 1787) under the Articles of Confederation. The response of the Articles to the example of British executive power was the creation of legislative supremacy (and yet weakness) in the form of the Continental Congress, which itself was generally subordinate to the state legislatures. Indeed, the executive domination that the Articles sought to avoid was replaced by state legislative domination:

8/ Federalist No. 71, at 483-84 (Hamilton) (Cooke ed. 1961).

9/ Farrand, Records, vol. 1, p. 83, June 2; vol. 1, p. 101, June 4; vol. 1, p. 100, June 4.

10/ Federalist No. 70, at 471 (Hamilton) (Cooke ed. 1961).

> The supremacy of [state] legislatures came to be recognized as the supremacy of faction and the tyranny of shifting majorities. The legislatures confiscated property, erected paper money schemes, [and] suspended the ordinary means of collecting debts. 11/

In short, while not overreacting and seeking to establish a structure that had the opposite effect, the Framers clearly did intend to strengthen the Executive compared to the situation under the Articles, both relative to the other two branches and as part of a stronger (though still quite limited) central government. 12/

Thus motivated by fear of the tyranny of unified government power, suspicion of legislatures, and a desire for a stronger executive than existed under the Articles, 13/ the Framers added to the institutional separation of powers a complementary system of checks and balances. The most significant executive checks on Congress are the independent election of the President as the sole public official with a genuinely national mandate, executive discretion in the carrying out of the laws, and the presidential veto. The most significant legislative checks on the President are Congress' power of the purse, Senate confirmation of appointments and approval of treaties, and the congressional powers to declare war and remove the President by impeachment. 14/ The Framers contemplated that the checks and balances would foster both cooperation and conflict between the political branches -- producing, in other words, a creative tension.

The checks and balances were intended principally to limit the national government by restricting the expansion of any of its component branches. In Madison's words, "ambition [would] counteract ambition." 15/ They would also limit government by making it more deliberative and less "efficient", and by requiring more consensus in decisionmaking. The Framers realized, too, that for the separation of powers to work, they had to provide

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11/ Edward Levi, Some Aspects of Separation of Powers, 76 Colum. L. Rev. 371, 374-75 (1976).

12/ See generally, Louis Fisher, Constitutional Conflicts between Congress and the President 12-13 (1985).

13/ See INS v. Chadha, 462 U.S. at 944-51.

14/ Appendix D sets forth the constitutional provisions dividing power between the political branches.

15/ Federalist No. 51, at 349 (Madison) (Cooke ed. 1961).

each branch the means of self-defense: the checks and balances. Hamilton's explanation of the importance of the presidential veto is illustrative:

> If even no propensity had ever discovered itself in the legislative body, to invade the rights of the [E]xecutive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self defence.
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> [The veto power] establishes a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body. . . . The primary inducement to conferring the power in question upon the [E]xecutive, is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design. 16/

The separation of powers also had the purpose of encouraging good government by institutionalizing cooperation, not just conflict. As Justice Robert Jackson observed:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. 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. 17/

16/ Federalist No. 73, at 494-95 (Hamilton) (Cooke ed. 1961). See also Federalist No. 51 (Hamilton); Joseph Story, Commentaries on the Constitution of the United States, 3d ed., I, 614-15 (1858).

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

In arguing for self restraint by each of the branches, President Ford's Attorney General, Edward Levi, concluded that the Framers

> 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. 18/

The Supreme Court also has observed that the Framers intended that the branches be interdependent, writing that the Framers recognized that a "hermetic sealing of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." 19/ "The Court thus has been mindful that the boundaries between each branch should be fixed 'according to common sense and the inherent necessities of the governmental coordination'." 20/

In sum, as you stated in your February 27, 1986 lecture at the University of Dallas, "the true purpose of the Constitution was to achieve good and effective, but still popular, limited government." You favorably quoted Louis Fisher of the Library of Congress:

> The Constitution supplies a general structure for the three branches of government, assigns specific functions and responsibilities to each, and reserves certain rights to the people. Armed with powers of self-defense, the branches of government intersect in various patterns of cooperation and conflict. How these basic principles of law operate in practice is a question decided by experimentation, precedents, and constant adaptation and accommodation. 21/

18/ Levi, supra note 11, at 391.

19/ Buckley v. Valeo, 424 U.S. at 121. See also INS v. Chadha, 462 U.S. at 951-52.

20/ INS v. Chadha, 462 U.S. at 962 (Powell, J., concurring), quoting Hampton & Co. v. United States, 276 U.S. 394, 406 (1928).

21/ Fisher, supra note 12, at 27.

B. Separation of Powers in Practice

To understand separation of powers one must understand both the Constitution and politics. This section discusses "separation of powers politics": the political relationship between the legislative and executive branches. We briefly review its history and then offer an institutional analysis.

The history of separation of powers politics is too lengthy and complex to discuss in this report except in barest outline. It has seen periodic shifts in the balance of power between the two branches, shifts that seem to have been based less on constitutional theories than on politics and current events. During the 18th and 19th centuries the balance swung between the branches, and the last century ended with an era of congressional supremacy following the strong Lincoln presidency of the Civil War.

The modern era of the strong president was foreshadowed at the beginning of the 20th century by Theodore Roosevelt. Favoring the "big stick" and the "bully pulpit," Roosevelt transformed the public conception of the presidency. After the turmoil of World War I and the activist Wilson administration, the pace of the national government slowed down in the 1920's and the balance between the branches equalized. During the Depression, however, Franklin Roosevelt resumed the ascendancy of presidential power begun by Theodore Roosevelt and Woodrow Wilson, and the modern presidency assumed the basic shape that we now almost take for granted. "Through a dozen years of unremittant activism," 22/ Roosevelt overwhelmed the Congress in both domestic and foreign policy. With only occasional demurrals, Congress acquiesced in presidential supremacy until the 1970's. In essence, presidents managed the government, provided the leadership on the economy, were almost unchecked on foreign relations, and served a de facto role as chief legislator.

It took the unpopularity of the Vietnam War and the perceived excesses of the Nixon presidency -- as well as the differing partisan leadership of the two branches -- to rouse Congress from its lethargy. In the 1970's the balance of power temporarily swung back to Congress as it regained the power of the purse (however ineffectively) through restrictions on impoundment and reconstitution of the budget process, reasserted itself concerning war powers and foreign policy, exercised tighter control over the administration of the law through oversight and the legislative veto, and effected internal reforms (e.g., creation of budget committees and expansion of staff) that sought to improve its capacity to carry out its responsibilities.

22/ James Sundquist, The Decline and Resurgence of Congress 34 (1981).

Congressional action, of course, coincided with executive inaction as Watergate and its surrounding crises temporarily crippled the presidency.

The strong leadership of President Reagan seems clearly to have ended the congressional resurgence of the 1970's, although there remains the unusually prolonged phenomenon of separate parties in control of the Executive and at least one house of the Congress. Even more significantly, as the issues facing the national government have become more complex and numerous in recent decades -- and as budget battles have ascended to unprecedented primacy because they entail nothing less than the establishment of national priorities -- leaders in both branches have increasingly recognized that institutionally Congress is ill-suited to lead and that therefore a relatively strong President may be necessary.

An institutional analysis of Congress might start with the tunnel vision of many of its members. Although there are some statesmen, generally the system discourages members from having a broad view of national issues. As Bill Brock observed in 1976 (when he co-chaired a Senate ad hoc committee studying reform of the Senate committee system),

> [t]he thing that is missing in the Senate today is that we get caught up so often in these day-to-day debates without a national or a broad perspective, without an overview, or foresight capacity. 23/

Similar sentiments were expressed by his Democratic co-chairman, Adlai Stevenson III:

> We are compartmentalists; we have sliced our daily routines into superficial fragments, and we have divided and subdivided large problems into a host of committee cubbyholes. It is no wonder that there is little consistency or coherence to what we do here. Do we have anything that could fairly be called a "policy" in such fields as energy conservation, environmental protection, or health care? If we do, it would be hard to find evidence of it in our fragmented committee system. 24/

23/ S. Rep. No. 1395, 94th Cong., 2d Sess. 5 (1976).

24/ 122 Cong. Rec. 34018 (1976). For example, an estimated two dozen subcommittees in each house of Congress have some energy policy jurisdiction.

Beyond this inherent problem of congressional fragmentation, and apart from the temporary effects of opposing political parties controlling the two branches, what seems to have happened to separation of powers politics in recent decades is that the political branches have evolved in different directions. The Executive has strengthened itself: communications advances have greatly increased citizen participation in politics and provided presidents with direct and independent popular bases for their national leadership; institutionally, presidents have gained greater control over the executive branch through centralization and other management improvements, and considerable substantive expertise has developed in the executive branch. In contrast, Congress has weakened through a number of developments that more than offset, at least for this purpose, the benefits of its internal reforms of the 1970's: it has become considerably less centralized and organized as a result of the declining power of political parties and committee chairmen; power has been diffused as a result of the decline of the seniority system, the proliferation of committees and subcommittees with overlapping jurisdiction, and the growth of congressional staffs; the institutionalization of the "welfare state" has transformed members of Congress from individuals representing nationally defined interests into individuals acting as ombudsmen for parochial spending interests; and the increasing "sunshine" on the legislative process, through public markups and the like, has further reduced power in the hierarchy. In short, the influence of executive leadership has grown and that of congressional leadership has diminished.

Because our national government does require firm leadership (at least on occasion), even many members of Congress have recognized that such leadership must come from the President. For example, Democratic Senate Majority Leader Mike Mansfield was willing to cede leadership on economic matters to Republican President Gerald Ford:

> We tried to do something about the inflation and the recession through advocating wage, price, rent and profit controls . . . and other matters, but we just can't seem to get the votes. That's why it is necessary, in my opinion, for one man, the President, to take the lead, and for the Congress to cooperate as much as it can [because] 535 men and women in the Congress cannot do so. 25/

25/ "Face the Nation," CBS television program, October 27, 1974. Quoted in Sundquist, supra note 22, at 421.

The case for presidential leadership was well summarized in 1965 -- another period of a strong Executive (albeit of the other party) -- by Democratic Senator Gale McGee:

> I advance the contention, as a member of the Senate, that the need for increasing executive power is very much the requirement of the day. . . . There is no other single repository of responsibility that could be held accountable for what happens. . . . No Senator really has that common responsibility to so many at all levels of the economy, in all segments of the social framework. . . in our political legislative bodies . . . the chance to pass the buck to someone else, to duck the responsibility for failure and, conversely, to seize the credit for success, is one of the dilemmas that face us. . . You can duck responsibility within your committee (and we have all done it); you can blame somebody else's committee; you can disappear behind the facade of your party allegiance, or of the philosophical group within your party to which you belong; or you can blame it on the other House; and if none of those happens to . . . work, you can dump it on the shoulders of bureaucracy and red tape downtown. 26/

The reality of contemporary American politics and government thus seems to require a relatively strong presidency. But as James Sundquist of the Brookings Institution has concluded,

> A presidency strong enough to achieve great ends will inevitably have also the strength to produce abominations. And a presidency hamstrung by checks and balances to prevent abuse of power will be handicapped in exercising constructive leadership. In the end, it is a choice of risks. The optimist will say, "Give the president the power; most of the time it will be wisely used." And the pessimist will answer: "Oh, no! Look at Vietnam and Watergate. Better keep the presidency under wraps. Better safe than sorry." 27/

26/ The Role of Executive Leadership, in Nathaniel Stone Preston, ed., The Senate Institution, 21-22 (1969).

27/ Sundquist, supra note 22, at 8.

It seems to us that the best answer -- dictated by logic and history, but just as much by the Framers' intent -- may lie in the formula put forth in 1979 by retired Senate Foreign Relations Chairman J. William Fulbright:

> Our proper objective is neither a dominant presidency nor an aggressive Congress but, within the strict limits of what the Constitution mandates, a shifting of the emphasis according to the needs of the time and the requirements of public policy. In times of presidential excess, such as in the 1960s, an assertive Congress is a necessary corrective. In a time, such as the present, when Congress is asserting its prerogatives aggressively, but without a commensurate demonstration of public responsibility, there is much to be said for a revival of presidential leadership. 28/

Viewed most generally, therefore, and from the standpoint of politics rather than constitutional law, separation of powers involves a shifting balance of power. As a matter of constitutional law, however, that shifting must occur within parameters established by the Constitution; in other words, there are limits beyond which the balance may not tilt. It must be stressed, moreover, that the shifting is in the overall context of a system of limited national government power.

We now seek to combine the perspectives of constitutional law and separation of powers politics into a framework of analysis, a comprehensive way of "thinking clearly" about separation of powers.

28/ J. William Fulbright, The Legislator as Educator, 57 Foreign Affairs 719, 726-27 (1979).

II. HOW TO THINK CLEARLY ABOUT SEPARATION OF POWERS

The cornerstone for any framework of analysis on separation of powers must be the requirements of the Constitution itself. Thus, the first inquiry must always be whether an action by the legislative or executive branch is constitutional -- an issue of constitutional law. Only when we are satisfied that no constitutional violation is presented can we move to the next level of analysis: policy.

While we must be vigilant in identifying potential constitutional violations, many of the conflicts between the legislative and executive branches do not involve disputed issues of constitutional law, 29/ but rather are largely political disputes resulting from an overlap in the two branches' exercise of their acknowledged constitutional authority. 30/ Unlike

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29/ Appendix A summarizes the events and issues of the following controversies between the legislative and executive branches during the Reagan Administration:

1. Legislative Veto
2. Refusal to Enforce or Defend Unconstitutional Statutes
3. Pocket Veto (Intersession Adjournments)
4. Gramm-Rudman-Hollings
5. Line-Item Veto
6. Presidential Spending Deferrals
7. Congressional Interference with Appointment Power
8. Senate Confirmation
9. Recess Appointments
10. Status of Independent Agencies
11. Regulatory Review
12. Burford/EPA Document Requests
13. Watt/Interior Document Requests
14. Public Access to Presidential Records
15. Congressional Oversight -- Interference with Prosecutions
16. Legislation to Amend F.R.Crim.P. Rule 6(e)
17. Congressional Oversight -- Cornelius Discharge
18. Congressional Impediments to Executive Branch Management
19. War Powers Resolution
20. Strategic Arms Limitation Treaties (SALT)
21. American Cetacean Society

30/ For example, congressional oversight of the administration of government agencies (constitutionally based on its legislative and appropriations functions) may conflict with the Executive's need to protect the confidentiality of its deliberative process (the constitutionally-based executive privilege).

constitutional law questions, which call for interpretivist analysis of constitutional provisions, resolution of these political issues requires a mode of analysis that recognizes the pattern of cooperation and conflict that the Framers intended when they authorized separate branches to exercise different governmental powers and created the complementary system of checks and balances.

The other principal difference between constitutional law separation of powers disputes and conflicts of policy is the forums in which they are resolved. Except in those cases where both a constitutional provision is allegedly violated and a case or controversy exists, the constitutional and political analyses will be used only in executive branch deliberations and legislative-executive dialogues. Only where a justiciable constitutional issue is presented to the courts will the constitutional analysis also be used in court briefs. 31/

In this part of the report we attempt to establish a framework of analysis for approaching separation of powers questions. We first suggest "how to think clearly about separation of powers" by setting forth some basic principles concerning what the concept is and what purposes and values it serves. We then identify considerations to be weighed when separation of powers conflicts arise. We do not mean to suggest that all or even most of our comments represent novel ideas; some are rather obvious. We hope, however, that there is value in collecting them in one place.

A. Basic Principles

1. Definition of Separation of Powers

The following statements attempt collectively to define "separation of powers":

a. Separation of powers is a constitutionally-based doctrine, arising both from the specific provisions and the overall structure of the Constitution. That is, the Constitution

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31/ As discussed in Appendix B, the Framers intended that separation of powers disputes would be contested primarily in the political arena, and that the judiciary would play a limited role in resolving such disputes. Appendix B addresses three issues relating to that role: the political question doctrine, the "separation proposal," and congressional standing. Our view is that although courts have not been assigned the role of umpiring all legislative-executive conflicts, they do have jurisdiction to adjudicate these conflicts when a constitutional case or controversy is properly raised.

establishes a federal system under which three separate branches of the national government are assigned specific powers and functions (e.g., lawmaking to Congress and law enforcement to the President).

b. Separation of powers is the dispersal of defined and limited powers and functions among the three branches of the national government. It represents the apportionment of the limited total power specifically granted to the national government by the people and the states. As the Tenth Amendment makes clear, the powers retained by the people and states cannot be encroached upon by any of the three branches of the national government, acting separately or in concert.

c. The separated powers of the legislative and executive branches do not overlap; however, their exercise often does. That is, the separate and distinct powers of the two branches may often be focused on the same subject areas and the operation of the national government may occasionally involve a blending of government operations, as for example in the interaction between executive agencies and Congress regarding the development of a budget and the appropriations for individual agencies. But there is never a blending of powers or functions: Congress exercises legislative power (to enact laws and appropriate money) and the Executive exercises executive power (to recommend, and have the opportunity to veto, legislation).

d. In other words, the system is not properly viewed as "separated institutions sharing powers" -- as Professor Neustadt has described it 32/ -- but rather as the three branches of the national government being assigned different powers and functions, the exercise of which sometimes overlap and occasionally conflict. The only "sharing of power" is the sharing of the sum of all national government power. But that is not jointly shared; it is explicitly divided among the branches.

e. The overlap in the exercise of the branches' functions in certain subject areas (e.g., legislation, foreign relations and appointments) is a necessary result of the checks and balances. As the Congress and the President go about the government's business, these specific, constitutionally-mandated procedures for the branches injecting themselves into what is principally the other's function (e.g., presidential recommendation and approval of legislation, Senate confirmation of presidential appointees and ratification of treaties) produce a creative tension that fosters interdependence, with both cooperation and conflict between the political branches.

32/ Richard Neustadt, Presidential Politics -- The Politics of Leadership From FDR to Carter 26 (1980).

f. While the checks and balances result in a less than "pure" separation of powers, they do not contradict the separation of powers, but rather complement it. Without the ability to withstand encroachments, which the checks and balances provide, a branch might be unable to perform the functions assigned to it under the separation of powers.

2. Purposes and Values Served By Separation of Powers

a. As you have observed, the overall purpose of the Constitution was "to achieve good and effective, but still popular, limited government." The separation of powers is an element of the constitutional structure that is central to that purpose.

b. There are two closely-related principal purposes of separation of powers. One is to avoid the tyranny of unified, concentrated government power. Arbitrary and autocratic government could result from the unification even of the limited powers granted by the Constitution to the national government as a whole.

c. The other principal purpose of separation of powers is to limit the expansion of the national government as a whole. Federalism's protections of the states and the people could be overwhelmed in practice by a unified national government, which could act with far more coordination and speed than the separate states or the people. To prevent any such federal usurpation, the tension between the branches and the countervailing pressures that result from the separation of powers and the checks and balances retard the expansion of the power of any individual branch of the national government and, thus, the expansion of the national government's overall power.

d. Separation of powers also encourages more deliberative and reflective decisionmaking by requiring more procedural steps and involving more persons and entities with different and often conflicting interests, thus guarding against arbitrary and inadequately considered government actions. In the process, separation of powers also promotes the achievement of decisionmaking through consensus.

e. Although it generally makes government action more difficult, separation of powers may in specific areas promote expertise (and even efficiency) in government through the specialization that results from dividing up the three basic governmental functions (lawmaking, law-execution, and adjudication). For example, it may be that American government leaders have more expertise in public policy than their British counterparts: American politicians are compelled to specialize in either legislation (members of Congress) or administration (cabinet members), while majority party British members of Parliament may simultaneously be cabinet members.

f. Separation of powers also promotes decisionmaking that takes into account other important concerns that underlie the Constitution. As noted above, it strengthens federalism. Pluralism is furthered by the conflicts inherent in divided government. Moreover, our majoritarian democracy may work better if, when Congress is significantly divided, a President can exercise strong leadership to effect the will of the majority that elected him. A countervailing check in this regard is the differing terms in office of Representatives, Senators and Presidents: the popular will prevails over time, but it must not be transitory. Separation of powers thus allows government to be fairly responsive to the changing will of the electorate while maintaining institutional continuity.

3. General Policy Considerations for the Executive

a. The Framers feared government power and specifically intended to limit it. In the context of separating power among the three branches of the national government, the Framers sought to provide each branch with the ability to resist encroachments by the other branches by creating the checks and balances. The prevailing consensus in the 1980's is that, in view of the fractionalization and decentralization of Congress, a relatively strong presidency may be especially necessary now to ensure national leadership. But since an unbridled President would be undesirable, there is also a consensus that the checks and balances must stay fully operational.

b. We need not automatically oppose the historical "blending" trend in government operations, to the extent that it is implicit in the checks and balances. So long as constitutional powers and functions themselves are not blended, such cooperative interaction in governmental decisionmaking is not undesirable. We should also recognize that the less cooperative interaction there is, the more judicial scrutiny of government operations there is likely to be. As the courts are called upon to resolve disputes between the branches caused by unnecessarily rigid "separation" positions, the prerogatives of the executive branch may be infringed upon more substantially by the judicial branch than by the legislative branch.

c. Some executive branch participants in separation of powers conflicts may assume there is some inherent "duty" always to seek to expand executive power. 33/ We reject such an assumption. Our duty should be to seek to preserve the ability of the

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33/ No doubt this is also true of various congressional committee and subcommittee chairmen with regard to legislative power.

executive branch to exercise the powers and functions granted it by the Constitution, and to reaffirm the Constitution's limits on the Executive and on the national government as a whole.

d. Conservatives traditionally have valued separation of powers because it operates to limit government. Liberals have not always appeared to value it as highly, perhaps for the same reason. However, some conservatives now are also finding separation of powers frustrating because it is sometimes an obstacle to the conservative political agenda, thereby serving to preserve the liberal status quo. They are thus inclined to make an exception to their usual respect for separation of powers and advocate a very strong President -- primarily for the practical reason that an activist conservative currently sits in the White House, and they fear he may be the last. We strongly believe that the Administration should take the longer-term view of separation of powers -- that is, as the Framers intended and this report attempts to describe.

e. Similarly, it is appropriate that a conservative administration endorse the judicial role described in this report (see appendix B). Some conservatives might instinctively object to our suggestion that the courts should have a legitimate role in separation of powers disputes involving a constitutional law issue and a true case or controversy. We are not proposing any form of judicial activism, however, but rather that the courts should play their proper role. The point is that while in general the courts have eagerly expanded their role beyond what the Framers intended, they have at the same time tended to abandon one of their core judicial functions: saying what the Constitution means, even if this may upset one of the other branches. 34/ The judicial abdication here is analogous to the national government's performance in general: as it has moved into many new areas of the nation's economic and social life, it has become less effective on such core functions as national defense and law enforcement.

f. Keeping in mind the political aspect of separation of powers, we should recognize that the current partisan split in the national government may color our understanding of separation of powers. Recent decades have seen Congress in the hands of the Democratic Party (the House almost always, the Senate sometimes) and the Executive controlled by the Republican Party (usually). The institutional conflicts that are inherent in the existence

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34/ It is probably no coincidence that the federal courts have generally refrained from questioning the coequal branches of the national government while enthusiastically overseeing the states -- the other, less powerful and less unified "division" of our governmental system.

of separate, coequal branches have been exacerbated and distorted by more transitory (and historically exceptional) partisan divisions in the control of two branches.

g. We should also recognize that separation of powers may recently have evolved in ways that could threaten to undercut its purposes. In short, the Executive has strengthened and the Congress weakened. This congressional weakness may have increased the potential for frequent and irritating disputes between the two branches. Thus, the purposes of separation of powers might be better advanced if the institutional weaknesses of Congress were addressed. It is possible that to the extent that political parties are strengthened and party leadership enforced in Congress, and the trend in Congress toward individualism and decentralization reversed, Congress would become a more rational, coherent institution to deal with. This might reduce the volume of the types of dispute that are all too familiar: those involving "turf" or parochial, personal motivation rather than true policy disagreement. It is ironic, but nevertheless probably true, that a growing number of separation of power problems are a function of growing congressional weakness.

B. Considerations for Conflict Situations

Participants in conflict situations involving separation of powers should first consider certain basic constitutional questions and next a range of policy questions. We now discuss both categories of questions, and then review a number of specific areas where separation of powers issues often arise.

1. General Constitutional Questions

a. Text of the Constitution. Is the action constitutional? The first reference in all separation of powers conflicts must be to the text of the Constitution, to determine whether power to take the action has been granted to the branch that desires to take the action. In this constitutional law context, actions should not be analyzed as violating general separation of powers "principles"; the analysis must be more concrete, founded on specific provisions of the Constitution. Specific questions to aid this determination include:

- what are the limits of the particular power assigned by the Constitution to a specific branch;
- what limitations upon the powers of one branch are implied in those granted to the other; and
- whether authority in certain subject matters is granted both political branches.

b. Scope of Authority. What is the scope of each branch's general (i.e., legislative, executive or judicial) power? The specifically enumerated powers in Articles I-III

express the limits of the national government's power relative to the states and the people. Within those limits, however, the scope of authority for each branch of the national government vis-a-vis the other branches is less clear. There is authority, both in the text and in court precedent, for interpreting executive power more broadly than legislative power (and both more broadly than judicial power). While legislative power is limited to the powers specifically enumerated, the more general, open-ended structure of Article II has been interpreted to suggest that executive power may be construed more broadly. 35/ The basic question is whether the President's Article II powers are limited to those specifically identified, or whether, instead, the first sentence of Article II (the "executive power" shall be vested in the President) is itself a grant of the powers generally understood by the Framers to be associated with the phrase "executive power". Note in this regard the differing formulations of the first sentences of Articles I-III: only Article II is an open-ended grant of power; Article I refers only to "all legislative powers herein granted" and the Article III, Section 1 reference to the "judicial power" is limited by Section 2 ("the judicial power shall extend to . . .").

c. Concurrent Authority. How broad is the President's authority in subject areas where he and the Congress both have authority? Some guidance may be found in the concurring opinion of Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952):

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.
>
> 2. When the President acts in absence of either a Congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.

35/ Myers v. United States, 272 U.S. 52, 128 (1926): "The difference between the grant of legislative power under Article I to Congress, which is limited to the powers therein enumerated, and the more general grant of the executive power to the President under Article II, is significant . . . The executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed."

> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Points (1) and (2) seem accurate enough, so long as they are not read to mean that congressional approval or acquiescence may authorize the Executive to exceed its constitutional power. The validity of point (3) is not immediately apparent without further clarification. At first glance, the last clause of point (3) seems to suggest that the President's constitutional powers may be reduced by the amount of Congress' constitutional powers. This result would be inconsistent with traditional views of the separation of powers, however, because it would establish a permanent congressional supremacy. What point (3) must mean, therefore, is that when the President, pursuant to an express grant of constitutional power, takes measures that conflict with the will or direction of Congress, and Congress also has express constitutional authority over the subject area, the President's ability to take such measures may be limited by a more specific grant of constitutional power to Congress.

d. Delegation. How well defined is a congressional delegation of authority? Conflict between the branches often stems from the uncertainty created for executive branch agencies by overbroad, vague and standardless delegations of regulatory or other administrative authority. Congress should endeavor to be more precise and clear in its lawmaking in general, and its delegations in particular. Conceptually, it is important to recognize (as the Supreme Court did in Chadha, 462 U.S. at 953, n. 16) that the delegation is not of legislative power, that whatever authority is delegated to the executive branch is properly viewed as executive authority.

2. General Policy Questions

a. Procedures. Have the procedural requirements for handling potential separation of powers conflicts been followed? A principal recommendation of this paper is that the process in this area should be formalized to a greater extent. With consistent adherence to rules such as the existing 14-day advance notice that Congress is to provide to executive branch witnesses, fewer conflicts will occur and their resolution will be easier. Our specific suggestions for formalizing the process are laid out in subsection (3), infra, and summarized in Part III. In general, we recommend that both branches should set forth in writing the constitutional authority for their action or request and the nature of the legitimate interests it furthers, and that greater coordination of executive branch positions is needed.

b. Long-Term Interests. How are the permanent interests of the Constitution promoted? And how are the permanent institutional interests of each branch promoted? These different questions should be considered together, and if they conflict, preference should certainly be given to the former. While we should always seek to protect the proper institutional interests of the presidency, it does not necessarily follow that we should always seek to expand executive power or that we should always favor what would appear to be the pro-executive position. Our oath of office is to the Constitution, not merely to its second Article. Similarly, Republican control of Congress would be no reason to relax our interpretation of the Constitution's requirements on separation of powers.

c. Waiver. Is it appropriate to decline to exercise the constitutionally-authorized power? Clearly, a branch's constitutional power cannot be waived or delegated. But as a matter of discretion a political branch may decline to exercise fully its power in particular instances, and the interest in reaching a pragmatic accommodation between the branches may occasionally call for such forbearance. An important conceptual distinction, therefore, is that while a branch may sometimes waive the exercise of a power, it can never waive the power itself or delegate either the exercise or the power. Examples of where the Administration has been careful to preserve its constitutional power, while waiving the power's exercise in a particular circumstance, include our acting consistently with the requirements of the Independent Counsel Act and the War Powers Resolution while reserving our right to challenge the constitutionality of those laws.

d. Precedents. What are the implications of precedents? We should resist claiming that one branch's previous acquiescence in the other's view of a separation of powers issue has a binding effect, because there are many times when the executive branch agrees or acquiesces for expedient reasons while disagreeing in principle. Since we do not want to be charged with permanently abandoning positions when we waive them in particular cases, we should be explicit in stating when we do not intend to establish a precedent. With those caveats, it must be acknowledged that precedents can be quite useful in molding a solution to a comparable conflict. There are limited precedents in many areas since the recent spate of separation of powers controversies is in significant part a function of divided partisan control of the branches for a relatively sustained period of time.

e. Methods of Response. What are the tools each branch can employ to respond to the other branch? In other words, before choosing a course we must consider both our immediate options and those of the Congress, and seek to anticipate future actions and reactions. The principal methods available to the executive branch are enumerated in subsection (3), infra, and Part III.

f. Methods of Resolution. What are the means for resolving the conflict? Except where a constitutional law issue and a justiciable case or controversy are present, the courts are incapable of resolving conflicts between the political branches. Conflicts must be resolved instead by negotiation and settlement, as each branch seeks to identify and accommodate the other branch's proper interests, or else through sheer political power. Even where a justiciable constitutional law issue may arise, litigation should be a last resort, to be undertaken only after political remedies have been exhausted and the other branch embarks upon an unconstitutional action, and sufficient particular injury is caused to support standing. Indeed, since standing will rarely exist in either branch (see Appendix B), as a practical matter the political remedy will almost always be the final one unless an injured private party brings suit.

g. Judicial Role. Will the judicial branch be asked to play a role? As stated above, unless a constitutional violation and standing are present, we must endeavor to reach a political accommodation without resort to the courts. We should not present to the courts separation of powers disputes that do not satisfy the "case or controversy" requirement, and we should strenuously contest on justiciability grounds any congressional resort to the courts in such disputes. The courts are not qualified -- and generally are unwilling -- to adjudicate the conflicts that occur when there is overlap in the constitutionally-acceptable exercise by the political branches of their power.

h. Accountability. Is individual or collective decisionmaking more appropriate in the particular case? Is there a specific need for a high level of accountability? For example, matters such as appropriations require collective decisionmaking (i.e., by both Congress and the Executive) because the general will of the people should control decisions on such overall priorities. More specific matters such as criminal prosecutions have been entrusted to the Executive, where individual accountability is more easily ensured. These questions of accountability and individual versus collective decisionmaking may be relevant to the status of "independent" agencies. Because they lack accountability, some have argued that "independent" agencies should either be brought under the control of the President or abolished.

i. Public Opinion and Partisanship. What regard should be given to public opinion and partisan political considerations? As with any political decision, public opinion will be an important consideration; public support for an administration is significantly affected by its relations with Congress. While party politics should ordinarily not be a factor in separation of powers conflicts (since in the first instance it is an institutional conflict), we should recognize that partisan factors can exacerbate or minimize the conflict. More generally, the current partisan split within the Congress and, longer-term, between the

Congress and the Executive, strongly colors our perceptions of separation of powers.

j. Efficiency. How is government efficiency best promoted? The pragmatic accommodations that are essential to the operation of the checks and balances must include attention to issues such as which branch has more expertise to bring to bear on a matter subject to concurrent authority. As a general matter the executive branch has greater substantive expertise; but the political (i.e., representational) expertise of Congress should not be discounted.

k. Comity. How heavily should comity considerations weigh? While the separation of powers and checks and balances serve important purposes and may often result in less efficient government, the Framers did not contemplate a government based principally on confrontation and an adversary relationship. Thus, comity between the political branches -- the interest in goodwill and cooperative interaction -- is vital and should be more than a slogan. This goal can be furthered through early and frequent communication between the branches on issues of potential conflict.

l. Practical Accommodations. How should we balance the interests in efficient and expeditious government action against the greater deliberation fostered by the separation of powers? The immediate pressures of government decisionmaking will necessarily encourage efficient solutions to interbranch conflicts, and such practical accommodations are desirable so long as they do not violate the Constitution or threaten the long-term interests of our system of government or of the presidency.

m. Facts of the Case. To what extent do the particular circumstances affect the resolution of a conflict? This question serves to underscore the political nature of the separation of powers disputes that do not involve constitutional violations, and the pragmatic nature of their resolution. Each matter can only be resolved under the particular facts and circumstances of the moment and cannot always easily be resolved by a broad theory that ignores that present reality. On the other hand, the resolution must not violate the Constitution or threaten the long-term interests of our system of government or the presidency.

3. Specific Areas of Controversy

To provide a more specific context for application of these general principles and questions, we now make some observations on several of the major areas of recurrent conflict between the political branches. Our suggestions generally reflect current practice, although some are new. It is beyond the scope of this paper to address all significant areas of

conflict, and by omitting any we do not intend to suggest that they are not significant. For example, while the issue of the status of independent agencies is vitally important, we have chosen not to address it because it is already under thorough consideration by the Department. Moreover, we have given modest treatment to foreign relations conflicts because they are generally beyond the jurisdiction of the Justice Department or the Domestic Policy Council.

a. Congressional Oversight

Scope of Oversight Authority

1. Congress may conduct oversight investigations to determine how the executive branch is enforcing the laws, to determine whether existing laws are still necessary or need revision, to determine whether to enact new laws, and to expose corruption, inefficiency and waste in the national government. 36/ The scope of the power of inquiry is as broad and far-reaching as the potential power to enact laws and appropriate funds under the Constitution. 37/

2. Congress' power of oversight, however, is not unlimited. The power of inquiry must be exercised in aid of legitimate legislative functions, and cannot be used to arrogate to Congress functions allocated by the Constitution to the executive branch, or to "micro-manage" the Executive's responsibilities. 38/ Nor can it negate the President's constitutional responsibility for managing and controlling affairs committed to the executive branch. 39/ It is therefore clear, for example, that oversight interfering with open criminal investigations or prosecutions, or other pending litigation, is beyond the scope of permissible oversight.

3. Congressional committees and subcommittees conducting oversight investigations are restricted to the

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36/ Watkins v. United States, 354 U.S. 178, 187 (1957); see also, McGrain v. Daugherty, 273 U.S. 135, 173-77 (1927).

37/ Barenblatt v. United States, 360 U.S. 109, 111 (1959).

38/ Barenblatt v. United States, 360 U.S. at 112; Watkins v. United States, 354 U.S. at 187; Kilbourn v. Thompson, 103 U.S. 168 (1881).

39/ See Myers v. United States 272 U.S. at 135; see also, United States v. Nixon, 418 U.S. 683, 705 (1974) (each branch is supreme within its own assigned area of constitutional duties).

missions delegated to them. That is, their powers are limited to acquiring information to be used by the House or the Senate in addressing a matter that falls within their legislative spheres. No witness can be compelled to make disclosures on matters outside that area. 40/

4. The interest of Congress in obtaining information for general oversight purposes is weaker than its interest in obtaining information for specific legislative proposals. And a generalized interest in obtaining information weighs less heavily in the balancing of the interests of the two branches than a specific, articulated need for information. Thus, for example, Attorney General Smith properly concluded in 1981 that Chairman Dingell's general interest in overseeing Secretary Watt's administration of the reciprocity provisions of the Mineral Lands Leasing Act was outweighed by the Executive's foreign policy and deliberative process interests, which required that State Department diplomatic cables and cabinet council-related documents remain confidential. (See Appendix A, item 13.)

Procedural Requirements

5. To ensure that congressional oversight does not exceed constitutional limitations or encroach on executive branch functions, the Department should formalize the process of congressional oversight inquiries and Department responses -- perhaps through a memorandum of understanding with each house of Congress or with individual committees. The Department already has adopted a number of procedures for responding to congressional inquiries, but they are not comprehensive. We believe that, at a minimum, congressional inquiries or requests for information should be in writing and should:

-- come only from congressional leadership or from chairmen or ranking members of committees and subcommittees, and should not come from other individual members of Congress, staff, or ad hoc panels such as "working groups", "study groups" and caucuses;

-- be addressed to the Department (through the Office of Legislative Affairs), rather than to client agencies or individuals, if the information sought relates to an investigation, prosecution, litigation, or other law enforcement operation, and in all other cases a copy of the request should be sent to the Department;

40/ Watkins v. United States, 354 U.S. at 206; Gojack v. United States, 384 U.S. 702 (1966).

-- articulate, with reference to specific constitutional provisions, the constitutional power the requester is exercising and the purpose or interest in furtherance of that power that is served by the request;

-- be drawn as narrowly as possible, consistent with the identified purpose or interest;

-- allow sufficient time for the Executive to respond properly (e.g., 14-day advance notice rule for executive branch testimony);

-- refrain from calling as witnesses the Attorney General and other high-level officials merely to increase media interest;

-- refrain from duplicating requests by other congressional committees on the same subject;

-- refrain from unnecessarily seeking information that is subject to a claim of privilege or legal prohibition against disclosure; and

-- refrain, to the extent possible, from seeking classified or other sensitive information, or information concerning the details of an open investigation.

6. The executive branch should have the concomitant duty to respond promptly and fully to the request, or to provide in writing its reasons for declining to comply. The response should indicate whether and how the defect can be cured, or at least indicate a willingness to consider an accommodation. In addition to non-compliance with the general requirements in paragraph 5, specific legitimate reasons for refusing to comply with a congressional request would include:

-- the request is unconstitutional because it is not in aid of a legitimate legislative function;

-- the request exceeds the mission delegated to the committee or subcommittee by the House or Senate;

-- the request so interferes with a function constitutionally granted the executive branch (e.g., criminal prosecutions) that it essentially negates the Executive's constitutional responsibility in respect of that function;

-- the request is overbroad, too vague, or unduly burdensome;

-- the request seeks predecisional, deliberative information, and in the particular circumstance the Executive's interest in protecting the confidentiality of its deliberative process outweighs Congress' oversight interest;

-- the request seeks access to information in open investigative or prosecution files, the disclosure of which would jeopardize prosecution (for example, by revealing litigation strategy, disclosing the identity of informants or undercover agents, prompting the flight of targets or witnesses, or generating prejudicial pretrial publicity);

-- the request seeks privileged information or materials whose disclosure is prohibited by law (e.g., grand jury material protected by F.R.Crim.P. 6(e));

-- the request is from an individual Member of Congress in his or her individual capacity (as opposed to committee or congressional leadership capacity) or from unauthorized congressional staff; and

-- the request calls for testimony by career employees.

Executive Privilege

7. Executive privilege is a qualified privilege protecting the confidentiality of presidential communications in the exercise of Article II powers. It is derived from the nature of the enumerated powers of the executive branch. 41/ A claim of privilege is entitled to more deference when it is based on a specific need, such as the need to protect military, diplomatic or sensitive national security secrets, than when it depends on a broad, undifferentiated assertion of the need for confidentiality of presidential communications. 42/ Thus, a generalized assertion of the privilege might have to yield to a demonstrated, specific need for evidence to carry out the functions of another branch, just as a generalized request for information by a legislative panel might have to yield to a specific claim of executive privilege. 43/

8. The President should avoid a constitutional confrontation by invoking executive privilege only as a last resort. If executive privilege is not invoked, and no constitutional issues are presented, executive-legislative disputes should be resolved by pragmatic problem solving, by which each branch seeks to accommodate the other's appropriate interests.

41/ United States v. Nixon, 418 U.S. at 705.

42/ Id. at 706.

43/ See id. at 713.

The courts have agreed that such accommodation and balancing was contemplated by the Framers. 44/

9. Since the "law" of executive privilege is general and non-restrictive, and specifically contemplates political accommodations, 45/ the executive branch has considerable leeway in pursuing its interest of protecting confidential information. The timing, form, venue and conditions of disclosure, not just whether to disclose, can form the basis for an accommodation.

Miscellaneous

10. Congress should not enact legislation to provide a standing civil contempt remedy for enforcement of all congressional subpoenas to executive branch officials. It should instead decide on a case-by-case basis whether to authorize a civil contempt of Congress remedy -- by considering specific jurisdictional legislation such as the statute passed to authorize the Senate Watergate Committee to proceed against President Nixon. A generic remedy would discourage executive-legislative accommodation, tip the balance of power between Congress and the Executive toward the legislative branch, and unnecessarily involve the judicial branch in these political disputes.

11. To reduce the risk of leaks, Congress (or each house of Congress) should adopt uniform rules on handling sensitive information.

12. In most cases, the Executive should retain the discretion to designate witnesses to substitute for witnesses specifically invited by Congress.

b. Appropriations/Budget

1. As the primary integrating and policymaking aspect of modern government, the budget process is -- and will probably remain for some time -- a major battleground of separation of powers. Efforts should be made to improve the process because Congress has tied itself into an ever-tightening knot, crowding out all non-budget matters and not even doing a good job on budget issues.

2. It is therefore inevitable as both branches seek to break the budget impasse that pragmatic and creative procedural approaches will be proposed. The Executive should

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44/ See United States v. A.T.&T., 567 F.2d 121, 127, 130 (D.C. Cir. 1977).

45/ Id.

encourage innovations, subject to the limits of the Constitution. We have seen an innovative legislative proposal, however, in the Gramm-Rudman-Hollings delegation of executive functions to the Comptroller General, which raises constitutional questions. As the Administration did in that case (and with the legislative veto), we must hold the line against legislative shortcuts that violate the procedural requirements of the Constitution. As the district court wrote in striking down part of Gramm-Rudman-Hollings, the separation of powers "consists precisely of a series of technical provisions that are more important to liberty than superficially appears, and whose observance cannot be approved or rejected . . . as the times seem to require." 46/

3. As an alternative to stop-gap shortcuts like Gramm-Rudman-Hollings, the Administration should propose long-term budget process reforms that would force Congress to look at the budget in its entirety. The Congressional Budget and Impoundment Control Act of 1974 attempted to do this, but it has been ineffective so far. The problem may be that the 1974 reforms were merely procedural; there were no truly binding substantive requirements. Therefore, reforms like the balanced budget amendment should be explored. It seems likely that only through substantive requirements of some sort can the spending and taxing functions of the government be effectively linked, and the budget considered as an integrated whole.

4. Moreover, legislative shortcuts in the budget process should on occasion be opposed on policy grounds, even where no constitutional violation is presented. An increasingly serious example of this practice is Congress' use of appropriations riders as a means of forcing the President to accept a "functionally vetoproof" bill. In the evolution of the legislative process, legislation limited to discrete subjects is being abandoned in favor of lawmaking by continuing resolutions and omnibus bills. 47/ In such an environment, the practical effect of attaching controversial and extraneous provisions to essential government funding legislation is to limit the President's ability to exercise his veto power. The implication for separation of powers is that the balance of power between the

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46/ Synar v. United States, Civil Action No. 85-3945, slip op. at 49 (D.D.C. Feb. 7, 1986). But cf. Ameron v. U.S. Army Corps of Engineers, Civil Action No. 85-5226, slip op. at 21 (3rd Cir. March 27, 1986) (GAO "part of headless 'fourth branch' . . . of independent agencies having significant duties in both the legislative and executive branch but residing not entirely within either").

47/ For example, the most sweeping criminal law reform ever -- the Comprehensive Crime Control Act of 1984 -- was passed as part of a continuing resolution.

political branches may shift away from the President by means of a legislative practice that may satisfy the letter of the Constitution but does not seem to comport with the Framers' intent -- confirmed in INS v. Chadha -- that the President must play a meaningful role in all legislative actions. 48/

5. Thus, the Administration should oppose coercive use of appropriations riders. While such riders may serve as a congressional check on executive action (thus limiting government), in some circumstances riders undercut the President's constitutional role in lawmaking. For example, the Department should weigh carefully the enforcement provision in Senator Grassley's bill (S. 1145) on congressional review of rulemaking. That provision would amend congressional parliamentary rules to encourage passage of appropriations riders prohibiting enforcement of agency rules that have been disapproved by Congress but not necessarily by the President. The provision is an attempt to bypass the President, which was the principal defect in the legislative veto, and it would coerce the President by requiring him to veto an appropriations bill rather than just a bill limited to the agency rule in question.

6. We should also oppose the use of appropriations riders to interfere with the President's ability to execute or enforce the law. Examples that directly affected the Department are the restriction on the Antitrust Division's use of appropriated funds to argue its position on resale price maintenance and the proposed denial of funds for Civil Rights Division review of consent decrees after Firefighters Local Union No. 1784 v. Stotts. 49/ Congress may, of course, enact new or different laws, but it may not arrogate to itself the power to interpret and implement existing law, which is a central function allocated by the Constitution to the executive branch. Thus, at least as a matter of policy, Congress ought not to be able to restrict through an authorization or appropriations bill the executive branch's spending on enforcement of laws, while leaving those laws substantively unchanged. 50/

48/ Indeed, the Executive should seek to exercise that role more fully -- for example, by using presidential signing statements more often and increasing its role in legislative affairs by submitting more bill reports and testimony and more actively participating in the creation of legislative history (e.g., helping to write committee reports).

49/ 104 S.Ct. 2576 (1984).

50/ A somewhat related interference -- this time from the judicial branch -- is the issuance of consent decrees that commit the Executive to expend funds that Congress has not

(Footnote Continued)

7. Some believe that the increasingly-evident congressional inability to deal with the budget problems is strengthening the case for the line-item veto. As President Reagan has often said, if Congress cannot make the tough spending decisions, it should give the President the tools -- the line-item veto -- and he will make those decisions. The line-item veto would provide presidential accountability for federal spending and ensure that the national interest is taken into account in a budget process that currently may overemphasize local and special interests because of the orientation of members of Congress; unfortunately, it would also further diminish legislative accountability. We should be careful, of course, to structure the line-item veto in a way that comports with the procedural requirements of the Constitution. The reform can probably be made constitutionally, so long as each "item" that the President would be authorized to veto is technically in the form of separate legislation. However, some may make an opposing policy argument, along the lines of our argument above concerning appropriations riders, that such a procedure would violate the spirit of separation of powers.

c. Advice and Consent

1. In the next two years President Reagan can expect to see renewed attempts by Senate Democrats to inject philosophical criteria into the examination of judicial nominees. In preparation for future Supreme Court confirmation battles, the President's opponents in the Senate will seek to block individual conservative candidates for the lower courts and make philosophical disagreement a legitimate ground of opposition.

2. The Justice Department must be prepared to demonstrate emphatically the historical impropriety of political/philosophical opposition to judicial nominees. This can be done in part by citing chapters of The Federalist (e.g., No. 66) that indicate that the Framers contemplated infrequent rejection of presidental nominees and rejection of only those nominees lacking in merit. The Department should draw attention to the long tradition of Senate deference to the President's lower court nominations, a deference based in part on the Senate's significant role in suggesting suitable candidates to the President.

3. The Department should publicize the findings of leading court scholars such as Henry J. Abraham and Sheldon

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(Footnote Continued)
appropriated and that have not been budgeted for the action in question, or that commit the Executive to seek a particular appropriation or budget authorization. On March 13, 1986 you announced a Department policy against such consent decrees.

Goldman. 51/ Abraham has shown that ideological and philosophical compatibility between Presidents and their nominees has been a leading factor, perhaps the leading factor, in presidential nominations to the Supreme Court. Goldman has shown that the judicial selection policies of this Administration in such areas as age, experience and professional background and competence are comparable to those of our recent predecessors.

4. The Department should insist on more cooperation from Republican Senators. When we defer to district court recommendations put forward by a Republican Senator, it is reasonable to ask for his or her cooperation on other judicial nominations. In addition, when we go forward with a Senator's recommendation, we should not have to bear the entire political burden of advancing the nomination: the Senator should also be required to expend his or her own political capital.

d. Refusal to Enforce or Defend Unconstitutional Statutes

1. The Department should enforce all federal statutes and defend them against court challenges to their constitutionality except when, in the Department's view, the statute (1) may unconstitutionally encroach upon the executive branch or (2) is otherwise clearly unconstitutional. The Department's traditional position -- see Attorney General Smith's April 6, 1981 letter to Senators Thurmond and Biden -- has limited the second exception to when "prior precedent overwhelmingly indicates that the statute is invalid." We do not believe that limiting ourselves to prior judicial precedent is necessarily the only principled approach. If we are convinced that a statute is unconstitutional based on the text of the Constitution, then, pursuant to the President's duty to uphold the Constitution, we should not defend the statute -- whether prior judicial precedent exists or not. Current application of this rule may be called for in federalism cases, for example: the Department must closely examine federal statutes infringing on state sovereignty and determine whether to defend them.

2. A presidential veto is considerably preferable to a Justice Department refusal to defend, however. The Department should therefore hesitate to invoke these exceptions, especially when the current administration has declined to veto the offending statute. It might be alleged that such an administration was bypassing the lawmaking process prescribed by the Constitution and avoiding a veto override by allowing enactment

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51/ See Henry Abraham, Justices and Presidents: A Political History of Appointments to the Supreme Court (1985); Sheldon Goldman, Reorganizing the Judiciary: the First Term Appointments, 68 Judicature 313 (1985).

and then in effect invalidating the statute by declining enforcement and defense. Our response, of course, must be that a failure to veto cannot constitute a waiver of the constitutional duty not to enforce unconstitutional laws.

3. Although presidential vetoes are preferable to Justice Department refusals to defend, vetoes can occasionally be impracticable because an unconstitutional provision is part of essential legislation -- for example, the Competition in Contracting Act, which was part of the essential Deficit Reduction Act of 1984 -- or else is a non-germane rider on a larger legislative measure. In such a case the President should indicate in his signing statement his constitutional objections and desire that the constitutionality be promptly tested in court (or corrected by Congress), and the Department should promptly notify Congress when the issue does arise in litigation. 52/ Congress should be given the opportunity to take timely legislative action to correct the constitutional defect.

e. Foreign Relations

1. The interaction between the President and Congress regarding foreign relations is a vitally important subset of the separation of powers between the political branches -- because of the intrinsic importance of foreign relations and because both branches are granted broad powers, the exercise of which often conflicts. Nonetheless, we make only passing reference to the subject in this paper because the Domestic Policy Council probably does not have jurisdiction to adopt procedures in this area. Moreover, should we wish to develop this subject adequately, we would need to consult the State and Defense Departments, the National Security Council and the Central Intelligence Agency, where the principal expertise and experience lies. We will thus limit ourselves here to a few broad and perhaps obvious observations.

2. In the sphere of foreign relations, a reading of the Constitution discloses no clear definition as to where presidential prerogative ends and legislative authority begins. Certain specific delegations of power are spelled out: for example, the President is the commander-in-chief of the armed forces and has the power to make treaties and appoint ambassadors, but the Senate must give its advice and consent on treaties and ambassadors and Congress has the power to declare war and provide the armed forces. Nowhere in the Constitution, however, is there unambiguous guidance as to which branch of the government has the final authority to conduct external relations.

52/ This course is especially justifiable where, as in the case of Gramm-Rudman-Hollings, Congress has designated an alternative to the questionable provision.

Given the President's broad executive authority, however, we favor interpretation of the Constitution that commits to the President the predominant power over the conduct of foreign relations. 53/ This has historically been the case.

3. Thus, to justify individual foreign relations actions, the Administration should cite the broadest constitutional power or authority available: for example, preferring the "executive" and "commander-in-chief" powers over more limited grants. In addition to substantiating the action most effectively, that would allow flexibility on follow-up actions.

4. Moreover, the President, not Congress or individual members of Congress, should speak and act on behalf of the country in its foreign relations. A prerequisite of an effective foreign policy is the presentation of a single and united position by the United States government on whatever issue is being addressed. Given the broader foreign relations responsibilities granted the President by the Constitution, and Congress' inability to speak with one, accountable voice, the President must be the spokesman.

5. We should seek to preserve the position that a substantial part of the War Powers Resolution is unconstitutional. The Resolution arguably upsets the Constitution's balance of war powers between the President and Congress, and in effect attempts to amend the Constitution by purporting to define the President's powers to commit military forces as limited to specifically enumerated circumstances. In light of the breadth of the "executive power" and "commander-in-chief" clauses of Article II, and the more limited grants of legislative war powers under Article I, we believe that the Constitution grants the President all war (and other foreign relations) powers inherent to a sovereign nation except those specifically granted Congress: principally, the power of the purse and the powers to raise troops and declare war.

6. In any event, in light of the Supreme Court's decision in INS v. Chadha, a strong argument can be made that at least the legislative veto portion of the War Powers Resolution, together with a wide variety of other foreign relations oversight legislation, is unconstitutional.

53/ See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); Federalist No. 64 (Jay) and No. 75 (Hamilton).

III. EXECUTIVE BRANCH METHODS FOR RESPONDING TO CONGRESS

The usual executive branch posture in legislative branch conflicts has been reactive. Typically, in the oversight area for example, a congressional committee requests information that an agency or the White House does not want to divulge; a flurry of executive branch meetings and other activities follow, accompanied by Justice Department advice if executive privilege is being considered; legal posturing and then pragmatic negotiating with Congress come next; and, ultimately, some (or even most) of the information is produced to Congress. The executive branch actors breath a sigh of relief that the publicity and the damage to the executive branch deliberative process were not worse, and they go on to other business.

As we view this scenario, inadequate attention is paid to longer-term constitutional and institutional interests or, just as significantly, to preventing or discouraging future conflicts. The executive branch's options indeed are most limited when, under the pressure of an immediate conflict, it must develop a position and then attempt to work things out with Congress. But the responses need not be as reactive and myopic as they tend to be. To the extent that general procedural understandings can be entered into with Congress (discussed below), the responses in individual cases can be improved.

The specific direct means for responding to congressional encroachments are discussed in Part II of this report, particularly in the section on congressional oversight. More generally, the first step in any individual conflict must be to demand that Congress clearly and precisely identify in writing the constitutional power it is exercising and the legitimate interests under that power that it is seeking to promote. We do not expect that this procedure would necessarily reduce congressional requests, but it might help discipline Congress by at least making members think about what their constitutional duties and responsibilities are. We must undertake, of course, the concomitant obligation to engage in the same analysis when considering whether to contest a congressional action, and if we determine to do so, then to make a similar statement to Congress. An additional general suggestion is that we should attempt to negotiate on individual conflicts with congressional leadership, not just committee chairmen, because the leadership may be more concerned with longer-term institutional interests than are the committee chairmen.

Despite the clear value of the range of possible direct responses to congressional encroachments discussed in Part II, for the most part they are "defensive" measures designed to mitigate our damage. Ultimately, however, even if our immediate interests are not seriously harmed, these direct reactions may be unlikely to avoid the negative public reaction that Congress can generate. One way to go on the "offensive" to some degree in a separation of powers conflict would be to seek to connect (or "link") the congressional action with another issue between the

two branches concerning which we have more leverage or are more willing to make concessions. As with linkage in the foreign relations sphere, of course, this form of "hardball" threatens greatly to politicize or escalate a conflict. There is no doubting, however, that linkage may on occasion be effective, although it will generally require greater coordination of executive branch relations with Congress than currently exists.

We recommend proceeding cautiously on linkage. Relations between the branches are complex and contentious enough as they are; injecting additional, extraneous factors into individual conflicts carries a significant risk of worsening matters. Moreover, so long as relations are primarily with committee and subcommittee chairmen, linkage to matters not directly involving them may be of little avail. In sum, while we should always consider at the time of a dispute whether other pending matters might usefully be brought into the discussion, we should undertake such linkage only after careful consideration of the potential costs.

Beyond linkage, we have identified the following types of indirect, but active (as opposed to reactive) Executive response that may be appropriate in certain cases:

° Bully Pulpit. The President has a unique role as the only nationally-elected political leader. In important separation of powers conflicts, the President could be enlisted to deal directly with Congress (through formal communications or informally by calling or meeting with key members), or to make public statements ("if you can't make them see the light, make them feel the heat"). The latter may ultimately prove necessary if our partisan opponents further delay the confirmation of our judicial appointments.

° Presidential Vetoes. Because of obvious political risks, Presidents are reluctant to use their veto power. We believe that Presidents should be less reluctant to use the veto in the separation of powers context. Vital constitutional principles and interests are at stake when Congress passes a bill that encroaches on the Executive or attempts an "end run" around constitutional procedures. Aggressive use of the veto authority is appropriate in those circumstances.

° Firmer Resolve. As noted above, the executive branch typically "caves in" sooner or later in conflicts with Congress. Perhaps we should not be so ready to do so. We could instead resist more strenuously in appropriate cases, and make it clear to Congress how high the stakes can be in a constitutional confrontation. Congress is also capable of backing down.

° Publicity and Public Opinion. Members of Congress are experienced at using the media and other techniques to gain public support for their actions. The executive branch often

does the same, of course, to enlist support for its policies. We should also consider using such techniques from time to time in separation of powers conflicts.

° Congressional Documents. The Executive does not have an oversight role over Congress comparable to that which Congress exercises over the Executive. In the context of executing the laws, however, it may be appropriate on occasion to request documents from Congress. For example, where necessary for enforcement purposes, we might seek to obtain documents (such as transcripts or staff notes) from congressional committees.

° Crosscutting Laws. Many "crosscutting" laws -- national policy requirements, such as civil rights rules, that apply generically to many different federal and state governmental programs and activities -- do not apply to Congress or its members or institutions. The Executive could highlight this inequitable situation and propose legislation to apply crosscutting laws to Congress, laws which might be administered by the executive branch.

° Political Support. The President has both governmental and political capacities. In his capacity as leader of a national political party, he has the ability to give or withhold support for election campaigns of members of his party. In considering whether to support a re-election campaign of a member of Congress, the President can certainly take into account that member's record in office, including the degree of his cooperation with the executive branch.

In the long run, the most promising method for dealing with Congress on these matters is to improve the relationship through means other than resolution of individual conflicts. We should seek commitments from congressional leadership and committee chairmen to procedural reforms of the sort referred to in this report: formalization of contacts, such as requiring congressional inquiries to come from committee chairmen; written articulation of congressional authority and interests; and, to the extent that a decentralized body like Congress can do so, coordination of congressional actions through required involvement of representatives of the particular house's leadership and counsel's office. Of course, while we may stand firm on the first two points, we are in no position to insist on the third.

In addition to seeking such standing agreements (perhaps through memoranda of understanding), we should persist in stating our views on how these matters should be handled in congressional testimony, bill reports and other formal and informal communications with Congress. These appeals should emphasize the appropriate separation of powers and functions under the Constitution, but should also recognize the need for comity between the branches and for each branch's forbearance where the other's constitutional authority and legitimate interests justify it.

IV. RECOMMENDATIONS

The principles and guidelines proposed in this report are only of academic utility unless actions are taken to implement them, to ensure that Administration policymakers refer to them as they consider separation of powers issues. We therefore make two general recommendations: one substantive, one procedural.

Summary of Recommendations

° Substantively, we recommend that the Justice Department's Strategy Planning Group develop from this report a statement of basic separation of powers principles, for adoption by the Domestic Policy Council -- along the lines of the recent effort in the federalism area by the DPC's Working Group on Federalism.

° Procedurally, we recommend that the Strategy Planning Group also develop, for DPC adoption, procedures for ensuring that these substantive principles are followed in separation of powers conflicts. The procedures would call for:

- ° greater formalization of the process for handling these conflicts,
- ° greater articulation in conflict situations of each branch's constitutional authority and its legitimate interests, and
- ° greater coordination of executive branch responses to congressional assertion of authority.

What we envision for these implementing procedures can be illustrated with respect to congressional oversight, which is the major source of disputes between the legislative and executive branches. Our specific recommendations on handling oversight matters are detailed in Part II, but they can be generally described here. We have concluded that the Administration should formalize the oversight process by requiring that congressional requests be in writing and only come from committee or subcommittee congressional chairmen or leadership. The requests should articulate, with reference to specific constitutional provisions, the constitutional power the requester is exercising and the purpose or interest in furtherance of the power that is served by the request; executive responses should similarly state the relevant constitutional authority and legitimate interests. The coordination of executive branch responses should be improved, perhaps by establishing a coordination and review process.

Discussion of Recommendations

One specific question we especially wish to explore with others in the Department is whether and how the Justice Department should play a greater coordination and representation role in separation of powers conflicts. Currently, the Department becomes actively involved once matters start escalating (as executive privilege is claimed and litigation and other unhappy consequences are contemplated); but OLC and the divisions become involved at an earlier stage -- when we could play important advisory and policy roles -- only on an erratic, "when-asked" basis. If greater uniformity and lasting effect is to come from our efforts in this area, it will be because the Administration moves beyond its reactive posture toward an organized, active one. Earlier Justice Department involvement seems critical for that. We should consider whether that involvement should include enhanced responsibilities in coordination (within the executive branch) and representation (before Congress). Such an expanded role would tax Department resources, but I believe that it could be effectively handled.

It may be helpful to compare the approach we are recommending with the effort the Administration is now undertaking in the federalism area. Through the DPC's Working Group on Federalism, the Administration is attempting both substantive and procedural initiatives to advance the President's federalism philosophy. Substantively, the President has already signed a statement of general federalism principles, which the working group developed, and the group may now prepare more specific principles to assist decisionmaking in various areas of Executive action. Procedurally, the working group is reviewing existing Administration policy development mechanisms to determine whether they are adequate to ensure that the federalism principles are followed.

Similarly, we are proposing both substantive and procedural efforts on separation of powers. Our emphasis may be slightly different, however. In the federalism context, I believe the principles may be somewhat more important than the implementing procedures: the important thing is that Administration policymakers are governed by federalism principles that have been adopted as Administration policy; while Administration procedures for ensuring compliance are important, it may simply be a matter of adjusting existing procedures. In the separation of powers context, the procedural reform would seem to be more important, principally because there are so few procedures currently in place. In viewing the large and varied terrain of separation of powers conflicts, we have been struck most by the ad hoc, informal and decentralized way these matters are generally handled. We are therefore advocating greater formalization, articulation and coordination for the process.

The substantive principles we pay such attention to in Part II are certainly important, but they are not rigid rules on approaching separation of powers. Rather, they constitute an analytic framework, a "way to think clearly" about the subject. As important as they are, we believe that it is even more important that procedures be established so that disputes with Congress are handled on a more principled and coordinated basis.

If the Administration approves the Department's proposals in this area, the next logical steps would be to put into place the coordination system (for individual conflicts) and to begin discussions with the congressional leadership (on general procedures and understandings). In the latter regard, we should first seek agreement with both parties' leadership in each house, but be prepared to acknowledge Congress' decentralization and different committee power centers and thus deal directly with committee chairmen. These efforts should be supplemented by statements of our positions in congressional testimony, bill reports, speeches, articles, and other communications.

I have talked informally with members of the Strategy Planning Group about OLP's separation of powers project, but I hope we will now have the opportunity to work more actively and concretely with them to develop this report's ideas, and of course the ideas that they will bring to the effort. The Department has a unique leadership opportunity in the separation of powers area, and OLP is eager to contribute in any way you request.

APPENDIX A

SUMMARY OF REAGAN ADMINISTRATION CONFLICTS WITH CONGRESS

The purpose of this appendix is to provide a factual foundation and reference for the establishment (in Part II of the paper) of a framework of analysis for approaching separation of powers conflicts. We here catalog the major events and issues of controversies with Congress that have significantly affected the Reagan Administration:

1. Legislative Veto
2. Refusal to Enforce or Defend Unconstitutional Statutes
3. Pocket Veto (Intersession Adjournments)
4. Gramm-Rudman-Hollings
5. Line-Item Veto
6. Presidential Spending Deferrals
7. Congressional Interference with Appointment Power
8. Senate Confirmation
9. Recess Appointments
10. Status of Independent Agencies
11. Regulatory Review
12. Burford/EPA Document Requests
13. Watt/Interior Document Requests
14. Public Access to Presidential Records
15. Congressional Oversight -- Interference with Prosecutions
16. Legislation to Amend F.R.Crim.P. Rule 6(e)
17. Congressional Oversight -- Cornelius Discharge
18. Congressional Impediments to Executive Branch Management
19. War Powers Resolution
20. Strategic Arms Limitation Treaties (SALT)
21. American Cetacean Society

1. Legislative Veto

Over the last six decades -- until 1983 -- Congress often sought to retain control over administrative and other authority that it delegated to the executive branch by including legislative veto provisions in the delegating legislation. In the legislative veto's most common form, executive branch decisions could be reversed, within a specified time period, by a disapproval resolution of one or both houses of Congress (or sometimes even a committee). Advocates of legislative vetoes found them to be pragmatic, efficient accommodations between the two branches by which Congress was willing to give broad discretion to the executive branch in exchange for retaining the opportunity to review and disapprove the executive's exercise of that discretion. Opponents -- including one Justice Department after another -- argued that the legislative veto violated the separation of powers because it interfered with the executive's power to execute the laws and was a legislative shortcut that did not satisfy the provisions of the Constitution governing

legislative actions. They argued that rather than enact open-ended delegations with legislative vetoes, Congress should do the job right in the first place by passing precise delegations limited by clear standards.

In 1983 the Supreme Court held the legislative veto unconstitutional. INS v. Chadha, 462 U.S. 919 (1983). In a broad opinion concentrating on the procedural requirements of the Constitution, Chief Justice Burger wrote for the Court that every legislative action requires bicameral congressional action and presentment to the President. The Court defined "legislative action" broadly to include all actions with the "purpose and effect of altering the legal rights, duties, and relations of persons, including [Executive Branch officials] . . . outside the Legislative Branch." 462 U.S. at 952.

Notwithstanding Chadha, the debate over the legislative veto has continued. The issue now is how Congress can accomplish the goals of the legislative veto using a constitutional means. The most common proposal is for the executive branch to "report and wait" on proposed actions in order to allow Congress to pass a joint resolution of approval (or disapproval), which would be presented to the President. Various congressional parliamentary innovations have been suggested that would make it easier for Congress to include its joint resolution in broader legislation that the President would not find feasible to veto. (For an example, see the Regulatory Review summary in this section describing Senator Grassley's post-Chadha "legislative veto" proposal for congressional review of agency rulemaking.)

The major remaining legislative veto issue in the courts is severability: whether an individual legislative veto provision is severable from its statutory context, or whether instead the entire statutory scheme must be struck down. This issue will be addressed next term in the Supreme Court. Alaska Airlines, Inc. v. Brock, 54 U.S.L.W. 3582 (No. 85-920). The severability issue arises in a variety of important contexts, including the War Powers Resolution and "home rule" for the District of Columbia.

2. Refusal to Enforce or Defend Unconstitutional Statutes

The general rule is that the Department has a duty to defend in court an act of Congress against a challenge to its constitutionality. There are two well-recognized exceptions. In an April 6, 1981 letter to Senators Thurmond and Biden, Attorney General Smith stated that the Department "refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid." The authority for this policy was summarized in Attorney General Smith's February 22, 1985 letter to Chairman Rodino. That letter relied on the fact that in addition to the duty of the President to uphold the Constitution in the context

of the enforcement of acts of Congress, the President also has a constitutional duty to protect the executive branch from encroachment by the other branches. The President's oath to "preserve, protect and defend" the Constitution thus necessarily implies an obligation to resist congressional actions that would impermissibly weaken the executive branch, as well as actions violative of other constitutional mandates.

While this Administration has never invoked the "clearly unconstitutional" exception, it has invoked the "encroaches on the Executive" exception three times. It has challenged the constitutionality of (1) provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984 that sought to continue in office all existing bankruptcy judges (which amounted to congressional appointment of officers of the United States, which is an executive function under the Constitution), (2) provisions of the Competition in Contracting Act of 1984 (CICA) that granted the Comptroller General the authority to lift the stay automatically imposed under CICA when a bid protest is filed (thus, a legislative branch officer binding executive agencies in the bid protest process), and (3) provisions of the Gramm-Rudman-Hollings deficit reduction legislation that vest in the Comptroller General significant executive functions for administering the budget (a legislative officer ordering the executive branch to reduce appropriated spending levels). A presidential veto was determined not to be feasible in these cases, thus necessitating the refusal to defend: the 1984 Bankruptcy Act was legislation to continue the bankruptcy court system after the Bankruptcy Reform Act of 1978 expired in June 1984; CICA was enacted as part of the Deficit Reduction Act of 1984; and the general thrust of Gramm-Rudman-Hollings was deemed critical to breaking the budget deadlock.

3. Pocket Veto (Intersession Adjournments)

The Pocket Veto Clause of the Constitution (Article I, § 7, cl. 2) provides that a bill not signed by the President within ten days of presentment does not become law if "Congress by their Adjournment prevents its Return." The Senate, members of the House of Representatives, and the Speaker and Bipartisan Leadership Group of the House sued the Executive in January 1984 seeking a declaration that the President's pocket veto in November 1983 of H.R. 4042 (a bill extending certain conditions on military aid to El Salvador until September 30, 1984) was invalid and that the bill had become law. The novel issue presented was whether the Pocket Veto Clause applies when Congress is in adjournment between sessions: On the same day (November 18, 1983) that Congress passed H.R. 4042, it also ended the first session of the 98th Congress and adjourned until January 1984; the President did not sign the bill or return it to Congress with a veto message, but rather issued a statement on November 30, 1983 that he was withholding his approval and that under the Pocket Veto Clause the bill had not become law. In August 29, 1984, reversing the district court's dismissal of the complaint,

the court of appeals ordered judgment for the plaintiffs; but it did not issue its opinions until April 1985. Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985). In the interim, however, H.R. 4042 had expired (on September 30, 1984).

On March 3, 1986 the Supreme Court agreed to hear the executive branch's appeal of the court of appeals' decision. Burke v. Barnes, 54 U.S.L.W. 3582 (No. 85-781). The Department is arguing that the court of appeals incorrectly held that the houses of Congress and their members have standing to complain that the President is not treating a bill as law and that the Pocket Veto Clause does not apply to intersession adjournments of Congress. We are also making the threshold argument that the court erred by refusing to vacate its judgment as moot following the expiration of H.R. 4042 and that the opinions it issued after that expiration are just advisory. Arguments in the Supreme Court are not expected until Fall 1986.

4. Gramm-Rudman-Hollings

On December 12, 1985 President Reagan signed into law landmark legislation to reduce the federal government deficit in an orderly fashion in route to a balanced budget by 1991: the Balanced Budget and Emergency Deficit Control Act of 1985, commonly known as the Gramm-Rudman-Hollings Act. When he signed the legislation, however, the President noted that certain of its provisions unconstitutionally encroached on his prerogatives by conferring executive powers upon the Comptroller General, a legislative branch officer not under his control. Specifically, the automatic deficit reduction provisions that would come into play if Congress is unable to meet the deficit targets established by the Act are unconstitutional because they authorize the Comptroller General, who is under the control of the legislative branch, to specify budget reductions that the President must effect through a "sequestration" order to government agencies. The President expressed his hope that the constitutional problems would be "promptly resolved."

Congressman Mike Synar and 11 other Representatives who had voted against the Act then filed suit in federal court challenging the constitutionality of the Act's automatic deficit reduction process. Synar v. United States, Civil Action No. 85-3945 (D.D.C). They alleged violations of the delegation doctrine and separation of powers principles: (1) the delegation to administrative officers and the President of authority to issue the sequestration order is an unconstitutional delegation of legislative power; and (2) the power given to the Comptroller General, a legislative branch officer, is executive power that can only be assigned to an executive branch official. After notifying Congress that it would not defend the constitutionality of the automatic deficit reduction process, the Justice Department filed papers in court arguing that the congressional plaintiffs lacked standing and, on the merits, disagreeing with plaintiffs on point (1) and agreeing on point (2).

On February 7, 1986 the district court found that the congressional plaintiffs had standing and declared unconstitutional the automatic deficit reduction process. The court's standing holding was not surprising because the court had to follow the law of the D.C. Circuit, which recognizes standing in individual Members of Congress based on their personal interest in the exercise of their governmental powers. See Moore v. U.S. House of Representatives, 733 F.2d 946, 952 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 779 (1985). On the merits, the court agreed with both Justice Department positions, finding that (1) delegation of the power to make determinations on which budget cuts would automatically be based was not an unconstitutional delegation of legislative power; but (2) the Act unconstitutionally conferred executive powers on the Comptroller General, who is not independent from the legislative branch since he may be removed by Congress not just by impeachment -- which is the only way that executive branch officers (i.e., "officers of the United States") may be removed -- but also for specified causes, including inefficiency and neglect of duty. The court stayed its order pending the Supreme Court's decision on appeal, which is expected by July 1986.

In a related development, on March 27, 1986 the Third Circuit came to a different conclusion on the status of the Comptroller General, holding that he is "an independent official with duties involving both the legislative and executive branches . . . [who] may constitutionally exercise the powers conferred upon him by [the Competition in Contracting Act]." Ameron, Inc. v. U.S. Army Corps of Engineers, Civil Action Nos. 85-5226 & 85-5377, slip op. at 4 (3rd Cir. March 27, 1986).

5. Line-Item Veto

Repeated proof of congressional inability to resolve the budget crisis is strengthening for some the case for the line-item veto, which would authorize Presidents to veto specific appropriation items and thus free Presidents from the "take it or leave it" dilemma they face when presented with appropriations bills or continuing resolutions. The line-item veto power has been sought by Presidents ever since impoundment -- the executive practice of "impounding" appropriated money simply by not spending it -- was outlawed by the Budget Control and Impoundment Act of 1974. President Reagan has long been an advocate of the line-item veto, and the Administration has endorsed Senator Mattingly's bill (S. 43) to give the President such authority.

Opposition to the line-item veto is based on constitutional and institutional considerations. Opponents claim that the Constitution commits the appropriation and spending power to Congress and that a line-item veto bill like S. 43 would unconstitutionally and unwisely shift this responsibility to the President; but supporters argue that the current congressional practice of routinely incorporating appropriations bills into "unvetoable" continuing resolutions has weakened the presidential

role in budgetary lawmaking beyond the Framers' intent. Opponents also charge, in a reflection of the impoundment debates of the early 1970's, that giving the President unrestricted line-item veto authority would have the effect of giving the president a permanent, unrestricted power to reorder congressionally determined priorities. While strengthening the presidential role in the budget-making process, they argue further that legislative accountability would be sharply diminished. Many advocates of the line-item veto who are concerned about the constitutional objections support a constitutional amendment to provide for the power (see S.J. Res. 162).

6. Presidential Spending Deferrals

In the Administration's budget proposal for FY 1987, the expenditure of about $15 billion of funds already appropriated for FY 1986 was proposed to be deferred until FY 1987. The President's authority to defer spending from one fiscal year to the next was granted by the Budget Control and Impoundment Act of 1974, which included a legislative veto provision to ensure congressional control of deferrals. On February 19, 1986 four Democratic congressmen and certain city interests filed a lawsuit challenging a deferral of $5 billion for housing and urban development grants. City of New Haven v. United States, Civil Action No. 86-0455 (D.D.C). The lawsuit alleges that such control was essential to the deferral scheme contemplated by Congress -- and thus not severable after Chadha ruled unconstitutional the legislative veto -- and therefore the deferral authorization should be struck down. In a related development, the Supreme Court agreed on March 3, 1986 to hear a case that may clarify the rules on severability. Alaska Airlines, Inc. v. Brock, 54 U.S.L.W. 3582 (No. 85-920).

On March 4, 1986 the General Accounting Office notified Congress that it intends to sue the Energy Department to challenge the proposed deferral of $157 million for the Strategic Petroleum Reserve. This amount apparently represents what the Administration proposed to defer last year, which Congress expressly disapproved in DOE's 1985 supplemental appropriation. GAO claims that such an attempted redeferral is not within the authority granted by the 1974 impoundment legislation and that the Administration is using the deferral procedure not as the cash management device Congress intended, but rather as a means to eliminate programs (some programs might need to shut down if they don't receive funding in a timely manner) -- in effect, a line-item veto.

The Administration is opposing legislation (H.R. 4205) that would limit the deferral power by requiring proposed deferrals to be approved by legislation.

7. Congressional Interference with Presidential Appointment Power

The Appointments Clause of the Constitution, Art. II, § 2, cl. 2, provides in pertinent part that the President shall appoint, with the advice and consent of the Senate, all officers of the United States whose appointments are not otherwise provided for, and that the Congress may by law vest the appointment of such inferior officers as it thinks proper in the President alone, in the courts of law, or in the heads of departments.

a. Bankruptcy Amendments and Federal Judgeship Act of 1984

Two sections of this Act constitute the most serious interference with the presidential appointment power in recent years. Replacing the bankruptcy system established by the Bankruptcy Reform Act of 1978, which expired in June 1984, the Act creates a new bankruptcy system and vests the power to appoint bankruptcy judges under that system in the courts of appeals. As an interim provision, however, section 121(e) of the Act extended the term of any bankruptcy judge who was serving when the existing bankruptcy court provisions expired on June 27, 1984 to the day of enactment of the Act (July 10, 1984). Section 106 extends these retroactive appointments so that they will expire on the date "four years after the date such bankruptcy judge was last appointed to such office or on October 1, 1986, whichever is later."

In refusing to defend sections 106 and 121(e) of the Act, the Department took the position that Congress was unconstitutionally attempting to appoint officers of the United States in contravention of the Appointments Clause. See Buckley v. Valeo, 424 U.S. 1, 127 (1976). The bankruptcy judges' offices and terms had expired on June 27, and the July 10 retroactive reappointment was an improper congressional appointment. Although we recognized that sections 106 and 121(e) constituted a more immediate infringement of the appointment power of the judiciary, the Department contended that the potential usurpation of presidential appointment power by Congress was also so substantial that failure to defend the Act was justifiable.

A district court has held the appointment provisions in the Act to be constitutional. In Re Benny, 11 Collier Bankr Cas. 2d. 798 (N.D. Cal. 1984). That decision is currently on appeal before the Ninth Circuit.

b. United States Commission on Civil Rights Act of 1983

This Act interferes with presidential appointment power in two ways. First, some of the Civil Rights Commission members are to be appointed by Congress. To the extent that these commissioners exercise "significant authority pursuant to the laws of the United States" or perform "a significant governmental

duty. . . pursuant to the laws of the United States," they are officers of the United States and must be appointed pursuant to the Appointments Clause. See Buckley v. Valeo, 424 U.S. at 126, 141. Second, the Act interferes with the President's removal powers by providing that commissioners may only be removed for neglect of duty or malfeasance in office.

c. Reconfirmation of Cabinet Members and Other High Officials

The proposed Senate Reconfirmation Act of 1984 (S. 2604) would have subjected cabinet members and other high executive branch officers to reappointment and reconfirmation in the event of a second presidential term. The Department opposed the bill on the grounds that it would violate the longstanding constitutional tradition that cabinet officers serve until removed by the President.

8. Senate Confirmation

Recent confirmation battles involving presidential appointments to the judicial and executive branches have conformed to long-term historical patterns, although the frequency of such battles has increased significantly. Controversial candidates are privately opposed on philosophical grounds but publicly criticized for other, more politically acceptable reasons such as lack of ethics or lack of candor before Senate committees.

a. Judicial Nominees

In the first term of the Reagan Administration, two controversial judicial nominees were Sherman Unger and J. Harvie Wilkinson III. Mr. Unger, a candidate for the Federal Circuit, was actively opposed by the American Bar Association, which rated him "not qualified." Ethical questions were raised concerning the nominee's alleged ex parte meetings with a judge concerning a contested matter in the judge's court and certain supposed tax difficulties. He died of cancer in December 1983 before his nomination battle was resolved. Mr. Wilkinson, a law professor at the University of Virginia and former Justice Department official and Supreme Court law clerk, was nominated for the Fourth Circuit in November 1983. He was immediately attacked by liberal interest groups for his opposition to forced busing, racial quotas, and other "affirmative action" policies. His nomination ran into serious trouble in the Senate, however, over his lack of trial experience and his allegedly improper lobbying activities with the ABA. After repeated delays and testimony relative to the lobbying effort, Mr. Wilkinson was confirmed on August 13, 1984.

In the second term, Senate Democrats have increasingly employed obstructionist tactics. Although there is general agreement that President Reagan has a right to appoint judges who

share his political philosophy (although even that is increasingly being called into question), some Democrats have complained that his nominees are too young, insufficiently qualified, and more rigidly ideological than the nominees of past Presidents. Democratic dissatisfaction coalesced in the movement to block the nomination of Judge Alex Kozinski to the Ninth Circuit. Allegations against Judge Kozinski included lack of judicial temperament due to his activities as Special Counsel to the Merit Systems Protection Board; flaunting the will of Congress by turning the Merit Systems Protection Board from a whistle-blower's agency into one that supposedly stifled dissent among government employees; "red-baiting" activities, because he purportedly claimed that a group opposed to his nomination had Marxist affiliations; and misleading the Senate Judiciary Committee. Despite Senator Thurmond's characterization of the charges against Judge Kozinski as "the puniest, most nitpicking charges of any hearing I have ever held," he was only confirmed by a vote of 54 to 43.

In the fall of 1985 Senate Democrats also put a hold on all judicial nominees until Republicans agreed to extend by two weeks the time (between nomination and committee confirmation vote) during which to examine the backgrounds of judicial candidates. Under the agreement, "controversial" nominees may be placed on a slower track to Senate confirmation. Apparently, any Senator has the power to designate a nominee "controversial."

The first major judicial nomination controversy of 1986 involved Sidney A. Fitzwater, a 32-year-old state judge from Texas nominated for the federal district court in the Southern District of Texas. Fitzwater was accused of racial insensitivity in connection with his posting of signs cautioning against voting fraud. There were also complaints that he lacked sufficient maturity. He was confirmed in March by a relatively close vote of 52 to 42, following a narrowly-clotured filibuster.

Jefferson B. Sessions, III, U.S. Attorney for the Southern District of Alabama, was nominated for the federal bench in that district in October 1985. No action was taken on his nomination in 1985, but the President resubmitted his name to the Senate in January 1986. Attention initially focused on his vigorous prosecution of three long-time civil rights leaders on voting fraud charges. The three were acquitted by a jury. When it became apparent that Sessions had acted properly in bringing the charges, Senate Democrats sought other evidence of racial insensitivity. It was alleged that Sessions had referred to the NAACP and the ACLU as "un-American" groups. In the midst of a criminal case against a Ku Klux Klansman, the candidate jokingly stated that he used to like the Klan until he found out that its members smoked pot. Also, Sessions allegedly agreed with a judge's assessment of a white civil rights attorney as a "disgrace to his race." The Judiciary Committee has not yet taken any action on his nomination.

b. Executive Branch Nominees

Attorney General Meese - Hearings on the nomination of Edwin Meese III as Attorney General began in March 1984. Though several Democratic Senators on the Senate Judiciary Committee attacked Mr. Meese's record on civil rights and civil liberties, attention soon focused on ethical questions surrounding his personal financial dealings. An independent counsel was appointed, pursuant to the Ethics in Government Act, to investigate these charges, and the Senate confirmation hearings were postponed. The counsel, Jacob A. Stein, issued a report in September 1984 clearing Mr. Meese of any wrongdoing. The Office of Government Ethics also cleared him of any ethical wrongdoings. His nomination was resubmitted to the Senate in January 1985 and he was confirmed on February 23. Even after the report of the independent counsel was issued, Mr. Meese was attacked by some Democratic Senators, most notably Senators Metzenbaum and Biden. Ultimately, even the Washington Post supported Mr. Meese's appointment, noting that he had done no wrong and that the President has a right to appoint executive officers who share his philosophy.

William Bradford Reynolds, Assistant Attorney General for the Civil Rights Division, began confirmation hearings for the post of Associate Attorney General in June 1985. As lead figure in the Reagan Administration's opposition to quotas and forced busing, Mr. Reynolds had become a controversial figure by the time of his nomination. Indeed, some of his opponents, including civil rights leaders, openly called for rejection of his nomination on philosophical grounds. Some Senators then claimed "non-ideological" grounds for opposition. The primary public reason for the rejection of Mr. Reynolds was a very strained allegation of misleading the Senate Judiciary Committee. After the Judiciary Committee voted against sending the Reynolds nomination to the floor, several of his opponents rejoiced that he had been rejected on philosophical grounds. Yet it is doubtful the nomination would have been rejected had Mr. Reynolds' opponents not gone to such lengths to manufacture non-ideological instances of alleged wrongdoing.

Ernest W. Lefever was nominated to be Assistant Secretary of State for Human Rights. He withdrew his name from consideration in June 1981, hours after the Senate Foreign Relations Committee voted to recommend that the Senate reject the nomination. Most of the opposition to Lefever was philosophical, based on his criticism of President Carter's "human rights" approach to foreign affairs. But Senate Democrats also focused on an alleged connection between a $825,000 grant from the Nestle Corporation to Lefever's Ethics and Public Policy Center and the Center's subsequent support of Nestle during the infant formula controversy.

Edward A. Curran - The Senate Labor and Human Resources Committee rejected Edward A. Curran's nomination as chairman of

the National Endowment for the Humanities in November 1985. Curran was ostensibly rejected due to lack of academic credentials, but hostility to the candidate dated back to his tenure in the Department of Education where he was an outspoken conservative opponent of certain federal education programs.

Donald J. Devine withdrew his nomination for a second four-year term as director of the Office of Personnel Management when it became apparent that he could not be confirmed. Devine was unpopular with Senate liberals because of the controversial nature of his proposed reforms affecting federal employees. The Senate focused, however, on an accusation by acting OPM Director Loretta Cornelius that Devine had improperly sought to retain his former authority while serving as Cornelius' deputy and had asked Cornelius to claim falsely that she knew and approved of this arrangement.

Other problem nominations have included those of Leslie Lenkowsky (rejected as deputy director of USIA due to alleged blacklisting of people from the agency's overseas speaking program); Kenneth Adelman (appointed director of ACDA despite allegations that he opposed arms control); Lawrence Silberman (appointed to D.C. Circuit after resigning from private club and being cleared of involvement in improper banking activities).

9. Recess Appointments

In 1981 and 1982 the President made 11 recess appointments to the board of the Legal Services Corporation. Six of these appointments were to offices that had become vacant while the Senate was in session. Under the Constitution the President has the power to "fill up Vacancies that may happen during the Recess of the Senate." In appointing six board members to offices that had become vacant while the Senate was in session, President Reagan was relying on longstanding executive branch interpretations of the recess appointments clause. The executive branch has historically maintained that the President may make appointments to fill any vacancies that exist during a Senate recess; the alternative view, long held by the Senate, would only allow the President to fill vacancies that occur during a Senate recess. Recent court opinions support the executive branch position. See, e.g., United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc); United States v. Alloco, 305 F.2d 704 (2d Cir. 1962). Though the President was technically appointing the recess board members to vacancies, the old board members were still in office under the holdover provisions of the Legal Services Corporation Act. They unsuccessfully sought an injunction against the seating of the new members: they did not challenge the President's constitutional power to make the recess appointments, but merely contended that the appointments violated the Act. McCalpin v. Dana, Civ. No. 82-542 (D.D.C. Oct. 5, 1982).

In the fall of 1985, a dispute developed over the Reagan Administration's use of recess appointments. For a period of approximately two months, Senator Robert Byrd held up all Administration appointments due to the President's alleged breach of an agreement with Senator Byrd not to make any recess appointments. According to the Administration, the agreement had only involved a pledge not to make controversial recess appointments. The Administration ultimately decided not to challenge Senator Byrd's interpretation of the agreement.

10. Status of Independent Agencies

In January 1985 the Federal Trade Commission issued a complaint against various title insurance companies alleging that they had fixed prices and restrained competition in violation of § 5 of the FTC Act. The companies responded later in the year with a federal court action challenging the FTC's authority to prosecute a § 5 complaint against them. Ticor Title Insurance Co. v. FTC, Civil Action No. 85-3089 (D.D.C.). They argued that Article II of the Constitution vests the power to "execute the laws" exclusively in the President and in members of the executive branch who are under his supervisory control and subject to his removal. Because the President may not freely remove FTC commissioners from office, plaintiffs argued, the FTC Act's grant of law enforcement power to them is inconsistent with Article II's exclusive grant of such power to the executive branch. The Department moved to transfer the action to the court of appeals on the ground that it has exclusive jurisdiction to review FTC enforcement proceedings under § 5, and it alternatively moved to dismiss the action on the ground that plaintiffs' constitutional challenge would not be ripe for review until the FTC issues a cease-and-desist order. The district court declined to transfer the case, but granted the motion to dismiss for lack of ripeness. Plaintiffs have appealed.

As currently constituted, the so-called "independent agencies" owe no duty to the President or his policies. As a result, there is potential for conflict between the Executive and the independent agencies. In Humphrey's Executor v. United States, 295 U.S. 602 (1935), the Supreme Court held that Congress can establish independent, quasi-legislative or quasi-judicial agencies and can forbid removal of their officers by the President except for cause. Since Ticor represents a direct challenge to the continuing validity of Humphrey's Executor, it could affect the constitutionality of all "independent" agencies. The Gramm-Rudman litigation (Synar v. United States) also touches upon related but distinct issues. There the district court agreed with the Department that the law-execution role of the Comptroller General in the automatic deficit reduction process violates principles of separation of powers because the Comptroller General is a legislative officer subject to removal by

Congress, and not the President. The court raised questions about the constitutionality of "independent" agencies, stating that it has "always been difficult to reconcile Humphrey's Executor's 'headless fourth branch' with a constitutional text and tradition establishing three branches of government." Slip op. at 41.

11. Regulatory Review

A major, perennial conflict between the legislative and executive branches is over control of agency regulatory activities, principally rulemaking. The problem initially stems from the congressional decision to delegate rulemaking authority to agencies: this decision reflects Congress' inability to make the specific but generally applicable policy determinations that federal regulatory laws require; Congress thus assigns that duty directly to federal agencies, but retains the hope that it can control rulemaking through oversight and without undue interference from the President. The resulting tension is inevitable, as the President and Congress each seek to exercise control, or at least influence.

a. Presidential Oversight: OMB Regulatory Review

President Reagan has stressed the importance of political accountability for agency rulemaking and the critical role that he -- the only political leader with a national constituency -- must play in providing that accountability. On February 17, 1981 the President issued Executive Order 12291, establishing a regulatory review process under which executive branch agencies (but not "independent" agencies) submit to OMB for pre-publication review all proposed and final rules and, for "major" rules, include in that filing a cost/benefit "regulatory impact analysis." Then, to ensure earlier and more comprehensive presidential oversight, on January 4, 1985 the President issued Executive Order 12498, establishing a regulatory planning process. That order requires agencies to submit annually to OMB a regulatory overview statement and descriptions of contemplated "significant" regulatory actions, at both the rulemaking and prerulemaking stages of consideration. On the basis of the submissions, the Administration annually publishes the "Regulatory Program of the United States."

Implementation of both executive orders has been controversial, drawing considerable criticism from Congress (especially chairmen of House oversight committees). The basic criticism of E.O. 12291 has been that OMB, by delaying or withholding approval of agency regulatory proposals, has interfered with agency head exercise of discretion granted by Congress. Representative Dingell demanded last year that four major regulatory agencies supply him with copies of their E.O. 12498 filings within three days of submission to OMB; the Administration's practical accommodation was to authorize agencies to release their drafts to Congress after the Administration's

annual "Regulatory Program" was published. OMB's regulatory review role has been so controversial that Representative Brooks has threatened to "zero out" (in the appropriations process) OMB's Office of Information and Regulatory Affairs (OIRA); and Representative Dingell has been reported to have sought to require agencies to inform him of all OMB written and oral comments and actions and, more recently, to be considering proposing legislation to end OMB's review role.

OMB has felt particularly threatened during reauthorization hearings for the Paperwork Reduction Act, which contains OIRA's authorization. Indeed, in a 1984 hearing OMB gave Administration support for the Levin Amendment, which seeks to open up the regulatory review process by requiring that all written communications between OMB and the agencies be made public. This testimony was given over very strong Justice Department opposition based on the threat to the confidentiality of the executive branch deliberative process. OMB Director Miller repeated OMB's support in testimony on January 28, 1986, although this time he noted that others in the Administration question the proposal's "constitutionality and appropriateness." The Levin Amendment is now part of a broader bill recently introduced by Senators Levin, Durenberger and Rudman (S. 2023); that bill would also require that publically-available records be kept of oral communications between OMB and the agencies and would impose a strict time limit on OMB review.

The major court challenge to the regulatory review process, Public Citizen Health Research Group v. Rowland (Civil Action No. 84-1252), is currently on appeal in the D.C. Circuit. In that case five House chairmen filed an amicus brief specifically charging that OMB had unlawfully displaced the Secretary of Labor's decisionmaking power and more generally asserting that the President lacks constitutional and statutory authority to supervise, in the way provided in E.O. 12291, the discretion granted by Congress to agency heads. In addition, the Department is considering appealing the January 28, 1986 district court decision in Environmental Defense Fund v. EPA (Civil Action No. 85-1747), holding that OMB "has no authority to delay promulgation of [EPA hazardous waste storage tank regulations] by withholding approval past statutory or judicial deadlines" (order at 2). The court opined that such OMB action (or inaction) would "encroach upon the independence and expertise of EPA" and could be viewed as a continuation of "unsuccessful executive lobbying on Capitol Hill" on the underlying statute. Slip. op. at 9. The decision jeopardizes OMB's coordinating role and would allow agencies to limit or avoid OMB review by submitting proposed regulations shortly before a statutory deadline.

Another potential issue is whether to require the "independent" agencies to participate in the regulatory review process. The Administration's view so far has been that while the President has the constitutional authority to do that -- under the "unitary executive" view of his control over executive

functions -- it would be politically too controversial at this time because of the strenuous congressional criticism and counter-action it would cause.

b. Congressional Oversight: Post-Chadha Congressional Review of Rulemaking

Until 1983 Congress primarily sought to satisfy its desire to retain control over regulatory power it had delegated to agencies by enacting legislative veto provisions. Under these provisions agency regulations could not become effective until they had "rested" before Congress for a period of time during which one or both houses (or sometimes even a committee) would have the opportunity to "veto" them. In 1983, however, the Supreme Court ruled the legislative veto unconstitutional, holding that such legislative actions require bicameral congressional action and presentment to the President. INS v. Chadha, 462 U.S. 919 (1983).

In the wake of Chadha, Congress has been considering whether to enact a government-wide "regulatory veto," which would attempt to do what the legislative veto did, but in a constitutional manner. The most prominent proposal is that of Senator Grassley (S. 1145), which the Department opposed in July 9, 1985 testimony. Acknowledging that the joint resolution of disapproval mechanism proposed by S. 1145 is constitutional, we nonetheless opposed S. 1145 on policy grounds, arguing that the Framers did not intend Congress to revisit legislative decisions by exercising a veto authority over executive actions implementing those decisions. Rather, the mechanism contemplated by the Framers was the legislative process itself: legislative decisions are to be revised, modified or repealed by new legislation. We also argued that congressional review under S. 1145, just like the legislative veto, would encourage Congress to pass vague and overly-broad delegations of authority -- since Congress would have a "second look" when agency regulations are promulgated. S. 1145 would thus exacerbate the basic difficulty confronting rulemaking agencies: the governing statutory criteria often provide only limited guidance for their exercise of discretion.

The Department especially opposed S. 1145's enforcement provision, which would amend congressional parliamentary rules to provide that as soon as Congress passes a joint resolution disapproving a rule (and before presentment to the President), an appropriations bill for the agency will be subject to a point of order if it does not forbid the agency to spend money to enforce the rule. The effect of the provision would be to encourage passage of appropriations riders prohibiting enforcement of agency rules that have been disapproved by Congress but not necessarily by the President. We argued that the provision is an attempt to bypass the President, which was the principal defect in the legislative veto, and that it would coerce the President by requiring him to veto an appropriations bill rather than just a bill limited to the agency rule in question. The bill's

sponsors were quite candid in revealing their intention to restore the legislative veto as a weapon of the legislative branch against the executive branch. They view the enforcement provision as converting the bill's congressional review mechanism -- which otherwise could be viewed merely as "report and wait" -- into a two-house legislative veto.

S. 1145 has passed Senator Grassley's subcommittee, but has not yet cleared the full Judiciary Committee. However, a conference committee is considering legislation passed by both houses that would extend a similar congressional review system to the rulemaking of two "independent" agencies, the Federal Trade Commission and the Consumer Product Safety Commission.

12. Burford/EPA Document Requests

In March 1982 the Investigations and Oversight Subcommittee (the Levitas subcommittee) of the House Committee on Public Works and Transportation began an investigation of EPA's administration of the "Superfund" for the cleanup of hazardous waste sites. On September 15, 1982 the subcommittee asked to see EPA's Region II files on Superfund. On September 17 the Oversight and Investigations Subcommittee (the Dingell subcommittee) of the House Committee on Energy and Commerce sought Superfund documents for certain sites outside Region II. EPA endeavored to cooperate with both subcommittees, but made it clear that certain sensitive documents in the enforcement files on open cases could not be provided. As informal negotiations faltered, both committees served subpoenas: the Dingell subcommittee on October 21 and the Levitas subcommittee on November 16. On October 25, Assistant Attorney General Olson recommended to the President that he assert executive privilege on the grounds that the documents contained legal and tactical discussions concerning prospective law enforcement actions and thus were predecisional, deliberative process material.

On November 30 Attorney General Smith sent letters to Representatives Dingell and Levitas explaining why EPA would not comply with the subpoenas for sensitive documents in the open law enforcement files, but stating that executive privilege would not be asserted to protect evidence of criminal or unethical conduct. The same day President Reagan advised Burford that he was claiming executive privilege on those sensitive documents and instructed her to refuse to produce the documents but to testify on the matters as fully as she could, consistent with the separation of powers. Burford appeared before the Levitas subcommittee on December 2, but did not produce the documents. During negotiations over the following week, Levitas offered a compromise under which subcommittee staff would review the files and designate documents to be copied, but if Justice or EPA identified any documents as sensitive, they would not be copied and could only be reviewed at EPA, subject to the subcommittee's right to issue further subpoenas for them. The Attorney General declined the offer and countered with a proposal, unacceptable to Levitas,

that EPA would prescreen the documents but any decision to withhold documents would be subject to high-level Administration approval.

The negotiations thus failed and on December 10 the full Public Works Committee recommended that the House hold Burford in contempt; it did so on December 16, referring the matter to the U.S. Attorney for the District of Columbia for prosecution under the contempt of Congress statute. The Justice Department responded by immediately filing a civil action to enjoin further efforts to enforce the subpoena, which it claimed was unconstitutional, and the U.S. Attorney advised the Speaker on December 27 that he could not present the matter to the grand jury while the civil action was pending (on August 5, 1983 it was presented to the grand jury, which voted not to indict). The District Court dismissed the suit on February 3, 1983, holding that the constitutional issue could be resolved in any proceeding to enforce the subpoena. In the meantime, negotiations over the Levitas subpoena had continued and on February 18 a settlement was reached under which the subcommittee received edited copies of all relevant documents, a briefing on their contents, and the opportunity to review unedited documents in closed session.

The Dingell subcommittee investigation was continuing on a parallel track, focusing on possible criminal and ethical misconduct by EPA officials. The political and media controversy over wrongdoing at EPA had greatly intensified by this time. Rita Lavelle, the Superfund Administrator, resigned on February 7. On February 18 the Administration agreed to furnish redacted copies of the sensitive documents. Finally, on March 9 Burford resigned and the Administration agreed to release the unredacted documents to the Dingell subcommittee, subject to certain confidentiality protections. These documents were ultimately provided to the Levitas and other interested subcommittees.

The Burford matter will not easily die. In December 1985, completing an investigation it had started in 1983 at the request of the six House committees that had been investigating EPA, the House Judiciary Committee issued a report strongly criticizing the Justice Department's role in the matter and urging that the Attorney General appoint an independent counsel under the Ethics in Government Act. The committee's general charges are that: (1) the Department, not EPA, made the decision to withhold documents from Congress and persuaded the President to assert executive privilege; (2) the documents withheld under the privilege claim were not properly reviewed and selected; (3) the Department improperly directed the U.S. Attorney not to present the House contempt certification to a grand jury for prosecution; (4) the Department inadequately advised and represented the President, EPA and Burford; (5) and there were conflicts of interest inherent in the Department's role. On April 23, 1986 an Independent Counsel was appointed to investigate the allegations concerning former Assistant Attorney General for

Legal Counsel Theodore Olson, but not the allegations concerning the other individuals named by the committee.

13. Watt/Interior Document Request

In the summer of 1981 the Oversight and Investigations Subcommittee (the Dingell subcommittee) of the House Committee on Energy and Commerce asked the Interior Department for documents relevant to Canada's status under the reciprocity provisions of the Mineral Lands Leasing Act. The subcommittee was reviewing Secretary Watt's ongoing consideration of whether sanctions should be imposed on Canada, which turned on whether Canada was giving American mineral lease investors the same opportunities that Canadian investors in such leases were receiving in this country. In testimony before the subcommittee on August 6, Secretary Watt claimed confidentiality for some of the documents. On September 24 the Interior Department produced about 200 documents but said that executive privilege might be invoked for responsive documents that were not being disclosed. After some fruitless negotiations (during which Interior offered other ways, short of copying, for the subcommittee to learn of the documents' contents), the subcommittee subpoenaed the remaining documents on October 2.

In response to the subpoena, Interior produced 31 more documents on October 9. On October 13, however, relying on an opinion of the same date from Attorney General Smith, President Reagan advised Secretary Watt that he was claiming executive privilege on the remaining 31 documents (State Department diplomatic cables and cabinet council-related papers); Watt advised the subcommittee of this on October 14. The two bases for the executive privilege claim, cited in the President's memorandum to Secretary Watt, were that these documents "deal with sensitive foreign policy negotiations now in process or constitute materials prepared for the Cabinet as part of the executive branch deliberative process through which recommendations are made to [the President]." The Attorney General's opinion noted that (1) since a congressional oversight interest is more generalized than a specific legislative interest, it is entitled to less weight in the balancing of the two branches' constitutional interests that is required by the courts; and (2) "the congressional oversight interest will support a demand for predecisional, deliberative documents... only in the most unusual circumstances" (page 4). He concluded that in this case the executive branch's deliberative process and foreign policy interests outweighed the subcommittee's oversight interest.

During the next few months the subcommittee unsuccessfully sought the Attorney General's testimony concerning his opinion. And continuing negotiations failed to resolve the document dispute. On February 2, 1982 Secretary Watt announced a reciprocity decision favorable to Canada. Since the deliberative process was now over, on February 4 Interior turned over 19 of the 31 withheld documents. Still not satisfied, on February 25

the full Energy and Commerce Committee voted to recommend that the House cite Watt for contempt. Before the House voted, however, a settlement was reached by which subcommittee members (but no staff) were given four hours to read and take notes on (but not copy) the remaining 12 documents.

14. Public Access to Presidential Records

Statutes providing for public access to presidential records raise separation of powers concerns because they interfere with the executive branch's control of its records and invade the executive privilege. The Presidential Recordings and Materials Preservation Act of 1974, 44 U.S.C. 2111, called for the National Archives to preserve tape recordings and other presidential materials of the Nixon presidency and to provide for public access to them pursuant to procedures to be established in regulations issued by the Archives. Prior to 1986 the Archives attempted to issue regulations on five different occasions: the Senate rejected the first two by legislative veto; the third was withdrawn for reconsideration in light of Nixon v. Administrator of General Services, 433 U.S. 425 (1977), which upheld the constitutionality of the Act; the fourth was withdrawn as part of a settlement with President Nixon; and the fifth was successfully challenged in court by former Nixon Administration officials. On February 26, 1986 the Archives once again issued revised regulations. Of most significance from a separation of powers standpoint is the provision that the Archivist has final administrative discretion regarding public access. OLC has opined that implicit in these regulations is the Archivist's duty to follow directions on disclosure given by the incumbent President, including but not limited to an assertion of executive privilege. OLC's opinion further concluded that "an incumbent President should respect a claim of executive privilege asserted by a former President unless the incumbent concludes that respecting such a claim would impair his ability to discharge his constitutional responsibilities."

Subsequent legislation raising similar questions is the Presidential Records Act of 1978, 44 U.S.C. 2201. It establishes as the general rule that the records of President Carter and all future Presidents will be public. There are many exceptions -- most notably, the limitation that during a "restricted access" period of no more than 12 years the Archivist has the discretion, not subject to judicial review, to decide whether to grant public access to presidential records. Since the Archivist is subject to the incumbent President's supervision and control, an incumbent President's authority to control public access to the records of a former President seems substantially the same -- at least for the restricted access period -- as under the law specifically governing the Nixon records.

15. Congressional Oversight--Interference with Prosecutions

a. General Dynamics

In the early 1980's, the Department conducted a grand jury investigation into false claims made by General Dynamics in connection with the construction and delivery dates of submarines purchased by the Navy beginning in the early 1970's. The Department reopened its investigation in the summer of 1984. The Department identified Takis Veliotis, President of Electric Boat (the General Dynamics division that manufactures submarines), as a potential defendant. He fled the country and remains a fugitive.

During the fall of 1984, Senator Proxmire, Vice-Chairman of the Joint Economics Committee, instituted oversight proceedings to look into the Department's handling of several defense procurement investigations, including the General Dynamics investigation. Because the Joint Economics Committee had no subpoena power, Senator Proxmire enlisted Senator Grassley, Chairman of the Senate Judiciary Committee Subcommittee on Administrative Practice and Procedure, and Representative Dingell, Chairman of the House Energy and Commerce Committee Subcommittee on Oversight and Investigations. They sought informally, and then by subpoena, the Department's investigation files in these cases. Even though the Department was in the midst of a grand jury investigation of General Dynamics, the committees insisted that the Department turn over its original files, claiming that they constituted "closed case" files. The Department responded that all its files were open investigative files and that disclosure could jeopardize its case.

The committees also disrupted sensitive Department negotiations with Veliotis, who had potentially incriminating tapes of meetings at General Dynamics. During these negotiations, committee staffers contacted Veliotis and discouraged his cooperation with the Department by suggesting that we were not serious about going forward with the investigation and by holding out the hope that Congress would extend him some sort of immunity.

Congressional interference has caused serious damage to the General Dynamics investigation. By the time the Department obtained the tapes from Veliotis, it had lost all opportunity for surprise against General Dynamics. Congress also limited some of the investigative options available to the Department. Ultimately, the tactics of the committees may expose the Department to charges that its prosecution of General Dynamics was triggered by the congressional investigation. The congressional investigation also may publicly disclose sensitive national security information. Finally, responding to congressional requests had cost the Department between six and eight months in personnel time.

b. Newport News

During the 1970's and 1980's, Newport News Drydock & Shipbuilding Company allegedly submitted false claims to the Navy in connection with the construction of submarines. Following an investigation, the Department declined prosecution in 1983. Senator Grassley's and Senator Proxmire's committees conducted oversight hearings into the manner in which the Department conducted its investigation. In response to congressional requests, the Navy turned over sensitive prosecution memoranda and other documents that the Assistant U.S. Attorney had supplied the Navy. These memoranda were immediately leaked to the press.

c. GTE Investigation

Beginning in 1983, the Department conducted an investigation into allegations that a GTE consultant had stolen and sold to GTE classified information that might have been helpful to the company in the procurement process. The investigation culminated in an indictment in September 1985. In October 1985, only one month before the case was scheduled for trial, Senator Grassley began defense procurement oversight hearings. Senator Grassley sought to call as a surprise witness a former Department case agent to discuss the manner in which our investigation was conducted and the content of our case. The timing and nature of the oversight proceedings were potentially extremely damaging to the Department's case. In the view of some, Senator Grassley came close to jeopardizing the government's case by nearly blowing the Department's cover on the investigation and by divulging our investigative techniques. Senator Grassley's office is believed by some in the Administration to have also mishandled classified information in the course of the investigation. Moreover, during the Attorney General's confirmation hearing, Senator Grassley asked when GTE was going to be indicted. As a result, GTE filed a motion to dismiss the case against it on grounds of congressional pressure to indict.

d. Pratt & Whitney

The United States Attorney's Office for the Southern District of Florida conducted an investigation of Pratt & Whitney (a division of United Technologies) for improperly charging the government for non-compensable expenses. An FBI agent who had talked with congressional people about the investigation was subpoenaed by Representative Dingell to appear as a witness before his committee. The Department had to instruct the FBI agent not to testify on Rule 6(e) and other grounds. The Dingell hearings have had a chilling effect on prosecutorial decision-making: although prosecution will probably be declined, the Assistant United States Attorney in charge of the investigation does not want to make a prosecution decision for fear that he will be called to testify before Dingell's committee.

e. E.F. Hutton

As a result of a Department investigation of E.F. Hutton concerning its cash management practices, Hutton entered pleas of guilty to mail and wire fraud charges. The Department volunteered to conduct briefings on its prosecution decisions for the House and Senate Banking Committees, the House and Senate Judiciary Committees, the Bank Regulatory Commission and the SEC, among others. On June 4, 1985 the House Judiciary Committee Subcommittee on Crime notified the Department that it was reviewing the Hutton matter as part of its review of corporate crime. Rather than proceeding informally, however, the subcommittee began oversight hearings in what some have described as a highly polarized, adversarial manner. Moreover, the committee released its conclusions well before the completion of the hearings.

The subcommittee, chaired by Representative William Hughes, requested the Department to provide numerous documents concerning the Hutton investigation. The Department refused to produce certain categories of documents on the ground that Rule 6(e) precluded their disclosure. The subcommittee then subpoenaed the documents and the Department filed a motion in the grand jury court to determine whether disclosure of the subpoenaed documents would disclose matters occurring before the grand jury. The grand jury court, however, declined to intervene in the dispute.

There has been disagreement within the Department over the propriety of the Department's approach to resolving the 6(e) dispute with Congress. It has been suggested that the Department's motion construed the scope of Rule 6(e) too broadly; that it ceded too much authority to the courts to decide the propriety of disclosing materials arguably subject to Rule 6(e); that it wrongly identified the case or controversy providing Article III jurisdiction as one between the Department and the subcommittee, rather than as between the United States and E.F. Hutton in the original criminal proceeding; that its statement that the dispute was solely between the subcommittee and the Department inadequately addressed the interests of E.F. Hutton; and that its contention that the Department's duty is to represent the grand jury ignored the conflict between the Department's duty to refrain from disclosing Rule 6(e) material and its duty to respond to congressional requests for information in its possession.

The manner in which the Hughes subcommittee conducted its oversight hearings potentially could have had a chilling effect on the decisions of individual Department prosecutors to take certain kinds of cases. Moreover, although there may have been criminal abuses in the way Hutton produced documents in response to grand jury subpoenas, the way in which the Hughes Subcommittee has investigated the case and interviewed witnesses may make it impossible for the Department to prosecute the

responsible individuals for those abuses. In any event, the Department has decided not to pursue a criminal investigation until after Congress concludes its investigation.

f. G.D. Searle

The Food and Drug Administration (FDA) asked the Department to investigate certain food additive petitions, including one for aspartame (NutraSweet) filed by G.D. Searle. In 1978 the United States Attorney for the Northern District of Illinois declined prosecution. Senator Metzenbaum has charged that the U.S. Attorney had improper motives in declining prosecution and that undue delay in considering whether to prosecute also led to the declination. It appears likely that the Searle case will be included in upcoming Senate Judiciary Committee hearings on pharmaceutical industry practices.

g. Syntex

The Department investigated allegations that Syntex violated the Food, Drug and Cosmetic Act by failing to have adequate levels of salt in its infant formula. In 1984 the Department declined prosecution. Senator Metzenbaum wrote to Civil Division Assistant Attorney General Richard Willard asking him to reconsider prosecution because of newly discovered evidence. Willard has referred the case to the U.S. Attorney for the Northern District of Illinois. Syntex may be one of the cases considered in the upcoming pharmaceutical industry hearings.

h. Eli Lilly/Smith-Kline

The FDA conducted an independent investigation of Eli Lilly for failing to report that products it was marketing had resulted in deaths and other injuries. The FDA asked the Department to bring a grand jury investigation because the FDA had insufficient subpoena power. The FDA prepared an internal report summarizing its investigation and detailing litigation strategy.

During the Department's grand jury investigation, the House Committee on Energy and Commerce Subcommittee on Health and the Environment, chaired by Representative Waxman, requested or subpoenaed the internal FDA report. Unbeknownst to the Department, the FDA complied. Sometime thereafter, a lobbyist from Eli Lilly talked to a committee staffer who turned the report over to the lobbyist. Although the subcommittee asked Eli Lilly to return all copies of the report, clearly significant damage to the Department's case against Eli Lilly had already been done. The subcommittee explicitly asked the Department to prosecute Eli Lilly. Eli Lilly ultimately pleaded guilty to misdemeanor charges, and one individual pleaded nolo contendere. But the congressional request for prosecution did not affect the way the case was handled.

In a similar case, Smith-Kline pleaded guilty to misdemeanor charges for failing to report to the FDA that products it was marketing had resulted in deaths and other injuries. Three individuals pleaded nolo contendere. Both the Eli Lilly and Smith-Kline matters will be considered during the pharmaceutical hearings. The individual co-defendant in the Eli Lilly case has informed the Department that he plans to petition the grand jury court to prevent intended disclosures by the Department as violative of Rule 6(e).

i. Ferdinand Marcos

Recently, Representative Solarz's Subcommittee on Asian and Pacific Affairs of the House Committee on Foreign Affairs subpoenaed documents from the U.S. Customs Service relating to the holdings of former Philippine President Ferdinand Marcos. Representative Solarz decided to release the information to the press, but because the Department had opened an investigation of Marcos' financial dealings in the United States, Solarz invited the Department to review the documents before he disclosed them to determine whether disclosure would harm the investigation. The Department refused to participate in any such review, arguing that because its investigation was so new it would be impossible to determine which documents were relevant or could jeopardize the investigation if disclosed. Representative Solarz released the documents the next day.

16. Legislation to Amend F.R.Crim.P. Rule 6(e)

The Supreme Court's decisions in United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), and United States v. Baggot, 463 U.S. 476 (1983), substantially limited the extent to which federal prosecutors may disclose matters occurring before the grand jury to civil attorneys within the Department of Justice and to attorneys in other government agencies. As part of a comprehensive anti-fraud package, the Administration proposed amendments to Rule 6(e) of the Federal Rules of Criminal Procedure to overcome these impediments (S. 1676). The Administration's proposal would (1) permit disclosure of grand jury materials without a court order to Department of Justice attorneys for civil purposes (a practice that was followed before Sells); (2) expand the types of proceedings for which other executive branch departments and agencies could gain court-authorized disclosure to include not only "judicial proceedings," but also other matters within their jurisdiction, such as adjudicative and administrative proceedings; and (3) reduce the "particularized need" standard for court-authorized disclosure to government agencies to a lesser standard of "substantial need" in certain circumstances, if the Justice Department requests disclosure.

Senator Grassley introduced S. 1562, which tracks the Department's bill except in two important respects. S. 1562, recently reported to the full Judiciary Committee, would permit a

congressional committee court-ordered access to grand jury materials if the committee has substantial need to see them, and it would delete the requirement that would permit administrative agencies to obtain court-ordered access to grand jury materials only "at the request of an attorney for the government."

Both the Justice Department and the criminal defense bar have objected to Senator Grassley's congressional access proposal. The Department believes that amendments to Rule 6(e) are necessary to assist the executive branch in its duty to enforce the law through civil or administrative remedies by permitting access to information developed in a grand jury investigation. Congressional access to 6(e) materials, on the other hand, would not aid the executive in fair and efficient enforcement of the laws, but in fact would interfere with the executive's duty to enforce the law. Moreover, the Department has an obligation flowing from the due process clause to ensure that fairness in its prosecutorial decisionmaking is not compromised by excessive congressional pressures. It would be inconsistent with both separation of powers principles and the due process clause for Congress to become a partner in an investigation through its access to 6(e) materials. Finally, congressional access to grand jury materials threatens the traditional secrecy of grand jury proceedings. Secrecy allows the grand jury to conduct its investigations and deliberations without unnecessary interference, it avoids unwarranted publicity that might chill witnesses, prosecutors, and grand jurors in the exercise of their duties, and it protects the rights of subjects of the grand jury's investigation who are ultimately exonerated.

17. Congressional Oversight -- Cornelius Discharge

Former Office of Personnel Management Acting Director Loretta Cornelius was fired on February 5, 1986. Subsequent congressional oversight hearings have sought to inquire into the circumstances surrounding that presidential action. The Justice Department has advised that Congress has no authority to inquire into a presidential removal of an executive branch official appointed by the President. Relying on that advice, current OPM Director Constance Horner declined on March 20 to answer congressional questions (by the Subcommittee on Employment and Housing of the House Committee on Government Operations) on alleged White House pressure to oust Cornelius. She said that discussing such matters would "breach the President's absolute right to terminate [presidential appointees]."

18. Congressional Impediments to Executive Branch Management

Over the years Congress has placed all types of restrictions in appropriations and other bills that limit the flexibility of the President and his agency heads to manage the government. Perhaps the most egregious example during the Reagan Administration was the enactment of provisions in the Competition in Contracting Act of 1984 (CICA) granting the Comptroller

General the authority to lift the stay automatically imposed under CICA when a bid protest is filed. Other existing restrictions include congressional reporting requirements, limitations on agency discretion on procurement matters, and restrictions on management structure and the reprogramming of funds.

The Department responded to the CICA provisions by refusing to defend their constitutionality; they are unconstitutional in our view because they authorize a legislative branch officer to bind executive agencies in the bid protest process. In addition, the Administration's management improvement legislative package in 1985 responded to many of the other encroachments. Reforms were proposed in the areas of productivity improvement, reorganization authority, fraud prevention, payment integrity, procurement, reduction in regulatory and paperwork burdens, and property management. The thrust of the proposals was to remove as many limitations on management flexibility as possible in order to facilitate more efficient government management.

19. War Powers Resolution

On November 7, 1973 Congress enacted the War Powers Resolution over President Nixon's veto. Congress passed the Resolution to ensure that the nation would never again become involved in a military conflict such as the Vietnam War without explicit congressional approval. The Resolution expresses Congress' understanding that the President's constitutional power as commander-in-chief to commit military forces for sustained periods of time is limited to instances where Congress has declared war or conferred specific authority on the President through legislation, or where the United States or its armed forces have been attacked. The Resolution further provides that, absent a declaration of war, the President must report to Congress within 48 hours of introducing U.S. forces into "hostilities" or "imminent hostilities", of introducing forces equipped for combat into the territory, airspace or waters of a foreign nation, or of substantially enlarging the number of combat-equipped forces already located in a foreign nation. Within 60 days after the reporting provision is triggered, the President must terminate the use of military forces, unless Congress grants specific authorization for the operation. The President may extend the 60-day period another 30 days if necessary to ensure the safety of troops in bringing about their prompt removal. The Administration has acted consistently with the War Powers Resolution but, as with predecessor Administrations, has not conceded its constitutionality.

a. Central America

In March 1981 President Reagan sent military advisers to aid the Salvadoran military in its fight against leftist guerilla forces. He did not formally report this action to Congress pursuant to the Resolution but informally assured

Congress that the size of the contingent would be limited. The following year, 29 members of Congress filed a federal court action, seeking a declaratory judgment that the U.S. forces in El Salvador were in a hostile situation and therefore subject to the time limit of the Resolution, and an injunction directing immediate withdrawal of troops. The court dismissed the suit before trial on justiciability grounds: the court felt that the factual issues involved in the case were more properly resolved by the political branches and that, in any event, the case was not ripe because there had not yet been "open and formal consideration of the question [of continued involvement] by both full houses." In dictum, the court expressed doubt that it could ever order a withdrawal of troops. Crockett v. Reagan, 558 F. Supp. 893, 901 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 104 S. Ct. 3533 (1984).

In March 1984, as Congress debated increased military aid to El Salvador, it was disclosed that the number of U.S. military personnel in El Salvador had nearly doubled, that U.S. spy planes based in Honduras were providing intelligence to Salvadoran troops during battles with the rebels, and that U.S. troops had been fired upon at least three times. Senators Kennedy and Sasser moved in the Senate to prohibit further use of troops in Central America without specific congressional approval. This effort was defeated, as were efforts to delay or reduce military aid. Throughout much of this period, the Reagan Administration also provided various forms of "covert" aid for rebels fighting the Sandinista regime in Nicaragua. Although the Resolution was never formally invoked to limit involvement in Central America, some believe that it may nevertheless have had a restricting effect upon the Administration's activities. Limits on the size, orders, and even the combat pay of the detachment of advisers may have been affected by a desire to avoid triggering the Resolution.

b. Lebanon

In September 1982, following the Israeli incursion into Beirut and continuing sectarian violence, the President sent U.S. Marines into Lebanon as part of a "multinational peacekeeping force" (MNF). President Reagan told Congress that U.S. armed forces were not expected to become involved in hostilities, but that they reserved the right of self-defense. He said he was uncertain how long the troops would remain in Lebanon, but that it would be only for a "limited" period. Congress did not challenge the deployment. Indeed, in June 1983 Congress enacted the Lebanon Emergency Assistance Act, tacitly validating the presence of the troops, but requiring congressional authorization for any "substantial expansion in the[ir] number or role."

Attacks on the Marines stationed at the Beirut airport intensified. Two Marines were killed on August 29, 1983 during an exchange of fire with Lebanese rebels, and two more were killed on September 6. Increasingly, members of Congress viewed

Lebanon action as "hostilities" and introduced bills to require compliance with the Resolution. Congress and the White House negotiated an agreement that authorized the Marines to remain in Lebanon an additional 18 months. The agreement limited their mission to restoring "full control by the Government of Lebanon over its own territory," and it incorporated the original limitations (mentioned above) on the MNF.

Less than a month after that agreement was signed into law, a suicide bomber drove a truck loaded with several tons of explosives into the Marine barracks, killing more than 240 men. Congressional and public support for the mission declined further. Eventually, the President ordered the Marines redeployed to U.S. Navy ships standing offshore. In announcing the action, the President said he had authorized U.S. naval gunfire and air support against any units firing into greater Beirut from parts of Lebanon controlled by Syria, as well as against any units directly attacking American or other MNF personnel and facilities. Some members of Congress considered this order, and the heavy shelling that followed, to be a violation of the terms of the 18-month authorization, but Congress took no official action. Within days the shelling was reduced, and then halted. Less than two months later, the President reassigned the ships and Marines and formally notified Congress of the end of U.S. participation in the MNF.

c. Grenada

On October 25, 1983, two days after the bombing of the Marine barracks in Beirut, a U.S.-led force landed on the Caribbean island nation of Grenada. In announcing the action, President Reagan said he was acting to protect American lives (principally some 800 students at the St. George's School of Medicine) and to help in the restoration of democratic institutions in Grenada. In a televised address two days later, the President said that the troop action had come "just in time" to prevent Grenada from becoming a Soviet/Cuban colony to export terror and undermine democracy.

The President informed congressional leaders of his plans the night before the landing, but some of those leaders interpreted it as more of a notification than a consultation. After the landing, he formally notified Congress of the action "consistent with" the Resolution, but without invoking its 60-day time limit. Within days the House passed a resolution "[d]etermin[ing] that the requirements of [the time-limit provision] of the War Powers Resolution became operative on October 25, 1983, when United States Armed Forces were introduced into Grenada." The Senate adopted identical language as an amendment to a bill raising the national debt ceiling. The debt ceiling bill was initially defeated, however, and the compromise version ultimately enacted did not include the Grenada amendment. The House bill never came to the Senate floor for a vote. Congress took no further action on the issue, perhaps because the landing was

proving politically popular, and perhaps because Administration officials, while conceding no obligation under the Resolution, said they expected troops to be withdrawn in less than 60 days. It was nevertheless the first time either house of Congress had formally voted to invoke any part of the Resolution.

d. Libya

On March 24, 1986 three U.S. warships from the Sixth Fleet, 27 smaller escort vessels, and approximately 250 aircraft crossed the so-called "Line of Death" into the Gulf of Sidra during activities that were described as routine training maneuvers. Approximately two hours later, Libya attacked with surface-to-air missiles. United States forces responded with a flurry of action: an air attack on the mainland incapacitated Libyan radar stations, and various Libyan patrol boats were heavily damaged by antiship cruise missiles. On March 27, the Pentagon announced that it was suspending the maneuvers and would leave the gulf.

There is little dispute that, as commander-in-chief of the armed forces, the President is constitutionally authorized to commit the military in the event of direct attack upon U.S. citizens, possessions, or property. While the Gulf of Sidra actions were generally supported by Congress and the public as a reaffirmation of American willingness to respond with military force when directly attacked, the April 21 attack upon Tripoli and Benghazi prompted renewed criticism that, at least in spirit, the War Powers Resolution is being ignored. That attack by F-111 fighter-bombers upon strategic military targets was conducted in response to a determination that Libya had ordered the bombing of a West Berlin disco frequented by American servicemen.

Approximately three hours before the April 21 attack, House and Senate leaders were summoned to the White House for a briefing on the mission. As with the action in Grenada, certain congressional leaders indicated that this amounted to a mere notification of impending military activity, not the "consultation" required by the War Powers Resolution., However, support for the mission remained strong.

20. Strategic Arms Limitation Treaties (SALT)

Neither the 1972 U.S.-Soviet executive agreement limiting nuclear weapons (SALT I) nor the SALT II treaty signed in 1979 has legal force. SALT I expired in 1977 and President Carter put aside his campaign for Senate ratification of SALT II after the Soviet invasion of Afghanistan in December 1979. President Reagan has consistently criticized SALT I as inequitable and SALT II as seriously flawed. Nevertheless, President Reagan has taken the position that the United States would "not undercut" the expired SALT I agreement or the unratified SALT II treaty as long as the Soviet Union exercised equal restraint. Despite the belief by some that the Soviet Union has not fully

complied with several SALT II provisions, the Administration has to this point continued informally to observe SALT II.

The Senate from time to time has sought to pressure the President to continue his policy of informal adherence to SALT limits. For example, shortly before the President announced his decision in June 1985 to dismantle the Poseidon missile launching submarine in accordance with SALT II limits, the Senate voted 90-5 for a "sense of the Congress" resolution that the "United States should . . . continue to refrain from undercutting the provisions of SALT II," though with the express allowance that the United States should take "proportionate responses" to Soviet violations. The vote came on the fiscal 1986 defense authorization bill (S. 1160). Another occasion for congressional pressure may soon arise: the President must decide by May 20 whether to dismantle two more Poseidon submarines because the new Trident submarine begins sea trials on that day.

Similarly, in 1984 the Senate adopted, as an amendment to the 1985 defense authorization bill, the text of a non-binding House joint resolution (H.J. Res. 3) calling for the President to seek Senate approval of two nuclear test ban treaties signed in the mid-1970s but never ratified. H.J. Res. 3 was again scheduled for House action in October 1985, but it was pulled back by House Speaker O'Neill so as not to undermine President Reagan's summit talks with Soviet leader Gorbachev. The House, however, again passed the resolution on February 26, 1986. Senators Pell and Danforth introduced a similar non-binding measure (S.J. Res. 252) last December, calling on the President to seek Soviet agreement to a mutual moratorium on nuclear tests.

Because they were never approved by the Senate, compliance with SALT II limits and unratified test ban treaties is a matter of executive policy, not law. Congressional insistence on presidential adherence to these nonbinding agreements, especially as a condition for defense appropriations, therefore can be viewed as an attempt to interfere with the President's exercise of his treaty-making and other foreign relations powers.

21. American Cetacean Society

Baldrige v. American Cetacean Society (No. 85-954), which was argued before the Supreme Court on April 30, 1986, concerns two statutes that collectively require the Secretary of Commerce to certify if the nationals of a foreign country are conducting whaling operations in a manner that "diminishes the effectiveness" of the International Convention for the Regulation of Whaling. The Supreme Court will consider whether these statutes grant the Secretary the discretion to consider the circumstances surrounding Japan's noncompliance with the treaty's whaling quotas -- including Japan's commitment in an executive agreement with the United States to come into compliance with the treaty by 1988, by terminating its commercial activities by that time -- or whether he must instead automatically certify Japan's

noncompliance. The case primarily involves statutory interpretation of a grant of authority to the Executive in a sphere (foreign relations) in which the Executive has the preeminent role. The Speaker and the bipartisan leadership of the House have filed an amicus brief arguing that allowing the Executive to disregard the mandates of the statutes would violate separation of powers.

APPENDIX B

ROLE OF THE JUDICIARY

The Framers intended that separation of powers disputes would be contested primarily in the political arena, and that the judiciary would play a limited role in resolving such disputes. This appendix discusses three issues relating to that role: the political question doctrine, the "separation proposal," and congressional standing. Our view is that although courts have not been assigned the role of umpiring all legislative-executive conflicts, they do have jurisdiction to adjudicate these conflicts when a constitutional case or controversy is properly raised.

1. The Political Question Doctrine

The political question doctrine holds that in certain otherwise justiciable cases and controversies the federal courts are to avoid resolving constitutional disputes in deference to one or both of the other branches of government. The leading judicial statement of the doctrine was made by Justice Brennan in Baker v. Carr:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 1/

1/ Baker v. Carr, 369 U.S. 186, 217 (1962).

Recent commentators have refined Justice Brennan's formulation and identified essentially three strands of the political question doctrine: (1) constitutional commitment of some constitutional disputes to agencies other than courts; (2) judicial incompetence to resolve certain constitutional disputes due to lack of legally definable standards; and (3) prudential (nonconstitutional) abstention from rendering judgments that would be controversial in nature or difficult to enforce. 2/

The political question doctrine does not refer to the normal deference the federal judiciary displays toward the constitutional opinions of Congress and the President. 3/ Nor does it refer to the truism that political functions, such as the appropriation of funds and the raising of an army, are primarily the responsibility of the political branches. Moreover, nothing in the political question doctrine absolves executive and legislative branch officials of their duty to follow constitutional dictates.

Though often referred to as a function of the separation of powers, the political question doctrine has not prominently come into play in disputes between Congress and the President. Rather, most of the major cases in this field involved Supreme Court refusal to settle political disputes at the state level on the theory that either Congress or the President had the constitutional authority to settle the dispute. 4/

2/ While it is often assumed that invocation of the political question doctrine on grounds of judicial incompetence is not a constitutionally based use of the doctrine, this is not necessarily so. For example, a constitutional provision can provide so few standards for judicial decisionmaking that the Framers, given their views of limited judicial power, would not have intended substantial judicial construction of the provision. The Guarantee Clause is open to this interpretation.

3/ Such deference may very well be constitutionally based. It is not, however, what scholars generally have in mind when they speak of the political question doctrine.

4/ See e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (claim that Rhode Island's charter government contravened the Guarantee Clause); Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912) (claim that Oregon's initiative lawmaking procedure violated the Guarantee Clause); Coleman v. Miller, 307 U.S. 433 (1939) (challenge to Kansas' ratification of the Child Labor Amendment); Colegrove v. Green, 328 U.S. 549 (1946) (challenge to an Illinois statute prescribing congressional districts).

In recent years the political question doctrine has been severely weakened. Two major cases were responsible for this decline. In Powell v. McCormack 5/ the Supreme Court held that Congress could not refuse to seat Representative Adam Clayton Powell, despite clear constitutional language commanding that Congress shall judge the qualifications of its own members. 6/ The decision was a significant blow to the political question doctrine for two reasons. First, the constitutional commitment strand of the doctrine, holding that the Constitution explicitly commits resolution of certain disputes to other branches, was thought to be its strongest underpinning. 7/ In the second place, at a more functional level, the Supreme Court's direct challenge to congressional authority (followed by Congress' acquiesence in the Supreme Court's decision) was an extremely bold move that would have been unthinkable in previous decades. Since much of the political question doctrine was perceived as resting on the Court's institutional prudence (or timidity), Powell v. McCormack was significant practically as well as theoretically.

Just as important was the earlier holding in Baker v. Carr that the political question doctrine did not bar Supreme Court resolution of legislative apportionment questions. The Court had previously refused to decide such questions under the theory that Congress and the President possessed exclusive authority over Guarantee Clause issues. Though Baker and its progeny were literally decided under the Equal Protection Clause, there is truth in Justice Frankfurter's dissenting assertion that Baker involved "a Guarantee Clause claim masquerading under a different label." 8/ On both a practical and theoretical level, Baker v. Carr had an adverse impact on the political question doctrine. Legislative apportionment was perhaps the quintessential "political thicket" where the Court traditionally feared to tread. If this area of political life was now fair game for judicial intervention, what limits were there on the Court's sense of prudence? Not only had legislative apportionment historically been constitutionally committed to Congress' and the States' care under the Guarantee Clause, but also the Court was thought to lack the competence to ascertain or establish meaningful legal standards in the resolution of apportionment disputes.

5/ 395 U.S. 486 (1969).

6/ U.S. Const. Art. I, § 5, Cl. 1.

7/ Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597, 603-04 (1976).

8/ Baker, 369 U.S. at 297.

Baker v. Carr and Powell v. McCormack thus called into question all of the political question doctrine's components. 9/ Indeed, the political question doctrine has long been the subject of academic criticism. 10/ Most of the criticism has centered around the lack of consistency and coherence in the case law making up the doctrine, especially the seeming randomness of the doctrine's invocation, as well as the doctrine's incompatibility with certain classic features of judicial review.

In the latter category, the criticisms by Professor Herbert Wechsler are the most noteworthy. Wechsler believes that the sole basis of judicial review is the Supreme Court's duty, in the words of Chief Justice John Marshall, to "say what the law is." 11/ When the Supreme Court is faced with a conflict between statutory law and the Constitution, it must say what the supreme law, the Constitution, is and nullify any statute in conflict with that supreme law. To Wechsler, any Supreme Court refusal to resolve a constitutional dispute properly before it is a violation of the Court's duty to "say what the law is" unless the refusal was itself based on constitutional interpretation:

> [A]ll the [political question] doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation...
>
> [T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely, whatever factors may be rightly

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9/ Further erosion of the doctrine occurred in United States v. Nixon, 418 U.S. 683 (1974) (rejection of argument that Executive alone has the power to determine the scope of executive privilege), and INS v. Chadha, 462 U.S. 919 (1983) (rejection of argument that Art. I, § 8, cl. 4 gives Congress plenary unreviewable authority over aliens).

10/ See Henkin, supra; P. Strum, The Supreme Court and "Political Questions": A Study in Judicial Evasion (1974); Bean, The Supreme Court and the Political Question: Affirmation or Abdication?, 71 W. Va. L. Rev. 97 (1969); Scharpf, Judicial Review and the Political Question Doctrine: A Functional Analysis, 75 Yale L.J. 517 (1966).

11/ Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

> weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally. That, I submit, is toto caelo different from a broad discretion to abstain or intervene. 12/

Though the political question doctrine has been weakened, it would be a mistake to assume that it is dead. Lower courts occasionally invoke the doctrine and it was widely utilized by lower federal courts in Vietnam War related cases. 13/ Four members of the Supreme Court were willing to refurbish the doctrine in the recent case of Goldwater v. Carter, 14/ involving senatorial challenge to President Carter's revocation of a mutual defense treaty. On the whole, however, the political question doctrine is honored more in the breach than in the observance.

Given the courts' inconsistent application of the doctrine and its current status of disrepute, as well as this Administration's advocacy of an interpretivist approach to judicial review based upon Justice Marshall's opinion in Marbury v. Madison, the Department should be cautious in relying upon the extra-constitutional (or prudential) components of the political question doctrine. 15/

12/ Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 7, 9 (1959).

13/ See Sugarman, Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions, 13 Colum. J. Transnat'l L. 470 (1974).

14/ 444 U.S. 996 (1979).

15/ It may seem ironic that conservatives, who usually criticize judicial activism, would not want to fully utilize a doctrine resulting in judicial restraint. But there is no real irony here. Conservative opposition to judicial activism has always been based on the non-interpretivist nature of such activism. To the extent that the political question doctrine rests on prudential considerations having no basis in the Constitution, it is consistent for conservatives to criticize the prudential approach. Put another way, while the federal judiciary has expanded its role far beyond what the Framers intended, it has abandoned one of its core judicial functions -- saying what the Constitution means, even if that entails potential conflict with a coequal branch.

2. The "Separation Proposal"

Overlapping the concept of a political question doctrine is the principle that the judiciary should avoid resolving conflicts between Congress and the President. Recent proposals from two separate quarters have advocated this approach, which one commentator has dubbed the "separation proposal." 16/

In Goldwater v. Carter, Justice Rehnquist, speaking for four Justices, sought to apply the political question doctrine to direct conflicts between Congress and the President. Goldwater involved a Senator's claim that President Carter lacked constitutional power to abrogate a mutual defense treaty with Taiwan without Senate concurrence. The Court ordered the case dismissed, but no five justices could agree on a rationale for why it was nonjusticiable. There were several facets to Justice Rehnquist's opinion, some involving traditional political question analysis, but his brief examination of legislative-executive conflict focused on the resources available to both sides in waging battle. Since Congress and the President have ample political resources at hand with which to defend themselves and attack each other, Justice Rehnquist considered it inappropriate for the Court to step in and referee such donnybrooks.

Shortly after Goldwater was handed down, Professor Jesse Choper unveiled his separation proposal, which entails across the board judicial abstention from the resolution of legislative-executive conflicts, except in limited circumstances. Professor Choper's primary justification for the separation proposal is the same as Justice Rehnquist's: the ability of Congress and the President to fend for themselves. Choper also asserts that the Framers did not intend for courts to continually step in and resolve legislative-executive disputes.

The various separation proposals are subject to serious criticism. The truism that the legislative and executive branches can protect themselves will often be irrelevant to the question of whether one branch is overstepping its constitutional bounds. For example, a particular Congress may not wish to challenge unconstitutional presidential action infringing congressional rights because a majority of its members deem it politically inexpedient to do so or because the majority belongs to the President's party. The latter situation apparently existed in Goldwater v. Carter. But if the President's action was unconstitutional, and assuming Senator Goldwater had standing, why should the Court not have decided the constitutional issue? Why should the Court have refrained simply because of the temporary make-up of the Senate -- a correlation of political

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16/ J. Choper, Judicial Review and the National Political Process (1980).

forces that had no relationship whatsoever to the intrinsic merits of the constitutional issue at hand? It is important to remember that one of the most compelling rationales for judicial review posits the Court as protecting the rights of the sovereign people, who ratified the Constitution and are its principals, from the unconstitutional actions of the peoples' temporary agents, the members of Congress. 17/ The separation proposal would have the court defer to two sets of temporary agents, simply because they counterbalance each other.

Assuming the Framers intended judicial review at all, the argument that they did not intend judicial review of any legislative-executive conflicts is historically weak. Some Framers apparently contemplated that the other branches would not always obey judicial pronouncements affecting their power, 18/ but that is a far cry from denying the judiciary's right to make such pronouncements. 19/ We conclude that the Framers intended the Supreme Court to invalidate in the course of normal litigation (and subject to normal rules of justiciability) all federal actions that contravened constitutional limitations, whether or not the challenged action involved an inter-branch dispute.

3. Congressional Standing

The intent of the Framers argument is more properly directed against the liberalization of congressional standing concepts. Clearly, the Framers did not intend for the Supreme Court to become a roving policeman continually stepping in to settle all inter-branch disputes. However, the recent broadening of traditional notions of congressional standing threatens this very occurrence.

In recent years, the United States Court of Appeals for the D.C. Circuit has created and gradually expanded the concept of congressional standing. Under this subdivision of general standing doctrine, individual members of Congress have standing to sue executive and legislative branch officials if those officials take actions that impair the lawmaking function of

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17/ Federalist No. 78, at 525 (Hamilton) (Cooke ed. 1961).

18/ See, e.g., id. at 523.

19/ Indeed, Federalist No. 51 acknowledges that there would be occasional clashes among all of the branches and states that each of the three branches must possess the constitutional means to resist encroachments by the other two. Madison thus seems to assume that the judiciary, though weak, will possess some power worth resisting.

congressmen. In Kennedy v. Sampson 20/ Senator Kennedy sued to compel publication of a statute that the President asserted had been killed by a pocket veto; the court found that Senator Kennedy had standing because the veto threatened to diminish his sphere of legislative power. In Goldwater v. Carter 21/ the court found standing on the basis of injury to the congressional plaintiffs' alleged right to a voice in the decision to terminate a mutual defense treaty with Taiwan.

There are several serious problems with the congressional standing concept, all of which are discussed at length by Judge Bork in a dissenting opinion in Barnes v. Kline. 22/ The doctrine is uncontrollable since it can logically be extended to cover members of the federal executive and judicial branches as well as state government officials. The doctrine also contradicts recent Supreme Court dicta reaffirming the strong link between standing and separation of powers. 23/

Most significantly for our purposes, the present congressional standing doctrine ignores the Constitution's extension of judicial power to "cases and controversies" only, and violates long-established separation of powers principles. It is one thing to concede that the Framers intended the courts to invalidate unconstitutional legislative and executive action even if such invalidation involved the courts in legislative-executive disputes; it is another thing entirely to argue that the Framers intended the courts to do this in the absence of a concrete dispute involving an injured party, as the concept of injury was traditionally understood in common law and equity. Under the D.C. Circuit's congressional standing approach, the courts are free to step in and monitor legislative-executive disputes before those branches have had an opportunity to check and balance each other and "shoot it out" in the political arena. Such practical, political checking and balancing is obviously at

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20/ 511 F.2d 430 (D.C. Cir. 1974).

21/ 617 F.2d 697 (D.C. Cir.), vacated 444 U.S. 996 (1979).

22/ 759 F.2d 21 (D.C. Cir. 1985), cert. granted sub nom. Burke v. Barnes, 54 U.S.L.W. 3582 (U.S. March 3, 1986)(No. 85-781).

23/ See Allen v. Wright, 468 U.S. 737 (1984) (Article III standing is built on the single basic idea of separation of powers), and Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) (Article III judicial power is not an unconditioned authority to decide the constitutionality of legislative and executive acts).

the heart of our constitutional system. 24/ As Judge Bork states in his Barnes dissent:

> . . . [I]t is absolutely inconceivable that Framers who intended the federal courts to arbitrate directly disputes between the President and Congress should have failed to mention that function or to have mentioned judicial review at all. The statesmen who carefully spelled out the functions of Congress and the President and the details of how the executive and legislative branches might check each other could hardly have failed even to mention the judicial lynchpin of the constitutional system they were creating -- not if they had even the remotest idea that the judiciary was to play such a central and dominant role. 25/

Judge Bork also noted that giving congressmen standing to sue simply because of their status as congressmen, when citizens would not have standing to bring the same suits, violates the fundamental republican idea that our representatives are our agents and have no special proprietary interest in the offices they temporarily occupy.

We strongly believe that the broad doctrine of congressional standing erected by the D.C. Circuit should be substantially curtailed, as should any doctrines of expanded executive or judicial branch standing based on the reasoning of the D.C. Circuit. While of course limiting the number of legislative-executive disputes reaching the courts, this curtailment would not prevent courts from deciding separation of powers cases. Such issues would come before courts in the normal fashion where a true case or controversy is presented. As Judge Bork wrote, "many of the constitutional issues that congressional or other government plaintiffs could be expected to litigate would in time come before the courts in suits brought by private plaintiffs who had suffered a direct and cognizable injury." 26/ In The Pocket Veto Case, 27/ for example, suit was instituted by Indian tribes who considered themselves unlawfully deprived of monies by the President's intersession veto of an Indian claims bill.

24/ See Federalist No. 51 (Madison).

25/ Barnes, 759 F.2d at 57.

26/ Id. at 61.

27/ 279 U.S. 655 (1929).

The foregoing discussion indicates that complete abdication of judicial responsibility in the area of legislative-executive disputes is inconsistent with the interpretivist approach to constitutional decisionmaking. But a doctrine that sets the courts up as policemen of the other two branches is similarly unwarranted under a fair textual and historical reading of the Constitution.

APPENDIX C

MAJOR SUPREME COURT DECISIONS

Presidential Powers Generally

1. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

Seeking to prevent a strike in the nation's steel mills during the Korean War, President Truman issued an executive order directing his Secretary of Commerce to seize and operate the mills. Congressional approval of the seizure order was not requested. The Supreme Court struck down the seizure order, holding that it was an unconstitutional exercise of the lawmaking authority reserved to Congress. Justice Black's majority opinion stated that the President's power to issue the seizure order must stem either from an act of Congress or from the Constitution itself. The Court did not find a statute authorizing the President to take the property, nor could it sustain the order as an exercise of the President's inherent executive powers or his power as commander-in-chief of the armed forces.

Justice Jackson's concurring opinion in Youngstown is frequently discussed in cases which analyze presidential power. Justice Jackson sets forth a tripartite distinction among presidential actions arguably infringing congressional powers: (1) presidential action pursuant to congressional authority (the most common variety of executive action); (2) presidential action in the context of congressional silence (a zone of twilight in which the President and Congress "may have concurrent authority"); and (3) presidential power to act in the face of contrary congressional directions (where a general presidential constitutional power may have to give way to more specific congressional constitutional power). Id. at 635-38.

2. Dames & Moore v. Regan, 453 U.S. 654 (1981)

Dames & Moore unanimously upheld the American hostage settlement agreement with Iran. Dames & Moore had filed suit in federal district court alleging that "the actions of the President and the Secretary of Treasury implementing the Agreement with Iran were beyond their statutory and constitutional powers." Id. at 667. In light of the legislation Congress had enacted in the area (the International Emergency Economic Powers Act and the Hostage Act), and from the history of acquiescence in executive claims settlements, the Court concluded that the President was authorized to suspend pending claims pursuant to executive order. The Court emphasized the narrowness of its decision, however, by stating that "[w]e do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities." Id. at 688.

Foreign Affairs

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)

In Marbury Chief Justice Marshall distinguished between the political powers of executive branch officers and lesser, ministerial powers. According to Marshall, the Constitution invests the President with important political powers in the exercise of which he has complete discretion. The judiciary cannot question the President or his officers when they act pursuant to these political powers but it can question executive action when it is ministerial in nature. As his prime example of an unreviewable political power, Marshall cited presidential activity in the realm of foreign affairs.

Marshall's dictum has always been considered ambiguous. It arguably stands for nothing more than the truism that the Constitution assigns broad foreign affairs power to the executive. Marbury has not been interpreted to give the President unreviewable freedom to violate individual constitutional rights pursuant to his foreign affairs power.

4. Prize Cases, 67 U.S. (2 Black) 635 (1863)

Although there had been no congressional declaration of war, the Supreme Court held that President Lincoln could blockade Southern ports following the Confederate attack on Fort Sumter. Writing for a 5-4 majority, Justice Grier stated that the President has the power to determine if hostilities are sufficiently serious to compel him to act to suppress the belligerency or to take defensive measures. The majority reasoned that since the President is authorized to resist an attack by a foreign nation, the fact that the attack came from an internal part of the Union rather than from a foreign power did not strip the President of his power to take unilateral action.

5. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)

A joint resolution of Congress in 1934 authorized the President to prohibit the sale of arms and munitions to countries engaged in armed conflict in the Chaco region of South America. President Roosevelt immediately imposed such an embargo. Curtiss-Wright was indicted for conspiracy to sell arms to Bolivia and challenged the joint resolution as an unconstitutional delegation of legislative power to the President.

In holding that the joint resolution was not an unconstitutional delegation of legislative power to the President, the Court stressed the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations..." Id. at 320. The Court reasoned that the need for negotiation, plus the President's special access to sources of information, required "a degree of

discretion and freedom from statutory restriction which would not be admissible where domestic affairs alone are involved." Id.

6. United States v. Belmont, 301 U.S. 324 (1937)

In Belmont the Supreme Court sustained the validity of an executive agreement between the United States and the Soviet Union and held that it took precedence over conflicting state policy. The agreement, which was not endorsed by the Congress, involved the assignment of certain monetary claims by the Soviet Union to the United States Government. The Court concluded that the President had the "authority to speak as the sole organ of [the] government," and that the executive agreement "did not ... require the advice and consent of the Senate." Id. at 330. Moreover, the court noted that an international compact, such as the agreement in Belmont, is not always a treaty requiring the participation of the Senate.

7. Goldwater v. Carter, 444 U.S. 996 (1979)

This case arose after President Carter announced in December 1978 that the United States would recognize the People's Republic of China as the sole government of that country and would simultaneously withdraw recognition of the Republic of China (Taiwan).

Senator Goldwater and other senators brought suit to enjoin President Carter from terminating the Mutual Defense Treaty of 1955 with Taiwan without a two-thirds vote of the Senate. The Supreme Court dismissed the suit, with four justices claiming that the case posed a political question, and a fifth declaring that the case was not ripe. Thus, the Court refused to decide the merits of whether the President can terminate a treaty without the participation of Congress.

Appointment and Removal

8. United States v. Perkins, 116 U.S. 483 (1886)

Perkins established that where Congress vests the power of appointment in some official other than the President, it has the ability to regulate and restrict the manner of removing that appointee. Congress had provided that no officer could be dismissed from the armed services except by court-martial. Invalidating Perkins' dismissal by the Secretary of the Navy, the Court made it clear that "when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest." Id. at 485.

9. Myers v. United States, 272 U.S. 52 (1926)

In Myers, the Court held unconstitutional a statutory provision that certain groups of postmasters, appointed by the

President, could not be removed by the President without the consent of the Senate. In finding the statute an unconstitutional restriction on the President's control over executive personnel, the Court reasoned that the President's right of removal in this context derived from his power "to take care that the laws be faithfully executed." Id. at 122, 164.

The Court said that "as [the President's] selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." Id. at 117. Congress could not divest the President of his power to remove an officer of the executive branch whom he was initially authorized to appoint.

10. Humphrey's Executor v. United States, 295 U.S. 602 (1935)

In curtailing some of the implications of Myers, the Court held in Humphrey's Executor that the President could not remove a member of an independent regulatory agency in defiance of statutory restrictions on removal. The Court distinguished Myers as being limited to purely executive officers, and found that congressional control over the removal of quasi-legislative and quasi-judicial officials was necessary in order to preserve their independence from the executive branch. Thus, the Court upheld the Federal Trade Commission Act, which limited the President's right to remove federal trade commissioners.

11. Wiener v. United States, 357 U.S. 349 (1958)

Wiener involved President Eisenhower's removal of a Truman appointee to the War Claims Commission. In applying the Humphrey's Executor rule, the Supreme Court held the dismissal invalid even in the absence of an express congressional restriction on the President's power of removal. The Court concluded that congressional silence as to whether the President could remove a quasi-judicial officer meant that the President could not do so. Since the War Claims Act barred the President from influencing the Commission in its action on a particular claim, neither could the President influence the Commission's work by removing a Commission member.

12. Buckley v. Valeo, 424 U.S. 1 (1976)

In Buckley, the Supreme Court's per curiam opinion relied on the Appointments Clause (Art. II, § 2, cl. 2) in holding unconstitutional, for most purposes, the composition of the Federal Election Commission (FEC), which was established by the Federal Election Campaign Act. The Act provided that a majority of the FEC members were to be appointed by the President pro tempore of the Senate and the Speaker of the House. The FEC was given "direct and wide-ranging" enforcement powers such as instituting civil actions against violations of the Act as well as "extensive rulemaking and adjudicative powers." Id. at 109-111. The Court held that the tasks performed by the FEC were

executive in nature, and could be exercised only by "officers of the United States." Id. at 118. Since the Congress had no constitutional right to appoint such federal officers, the commission as constituted at that time was invalid, and could not exercise most of the statutorily-granted powers.

Executive Privilege

13. United States v. Nixon, 418 U.S. 683 (1974)

In Nixon, the "Watergate Tapes" case, the Supreme Court recognized in general terms a constitutionally-based doctrine of executive privilege. The Court found the privilege to be based on the need to protect the confidentiality of presidental communications and held that it "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties" and is "inextricably rooted in the separation of powers under the Constitution." Id. at 705-706, 708. The Court found that the privilege is a qualified one, however, and that it was overcome on the facts of Nixon by the specific need for evidence in a pending criminal trial.

The Court rejected President Nixon's claim that "the separation of powers doctrine precludes judicial review of a President's claim of privilege," Id. at 703-04, and held that President Nixon was subject to a subpoena for evidence needed in a criminal case. Quoting Marbury v. Madison, the Court reaffirmed that it is the duty of the judicial branch to "say what the law is." Id. at 705. Thus, the Court, not the President, has the final word on claims of executive privilege.

Although United States v. Nixon concerned judicial-executive relations, the doctrine has also been applied to legislative-executive relations. See Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc). The courts have generally recognized, however, that these matters are best resolved not in the courts but in practical accommodations between the political branches. See United States v. American Tel. & Tel. Co., 567 F.2d 121, 127, 130 (D.C. Cir. 1977).

Congressional Power Over Presidential Papers

14. Nixon v. Administrator of General Services, 433 U.S. 425 (1977)

The Court rejected a range of facial constitutional challenges to the Presidential Recordings and Materials Preservation Act of 1974, which was adopted by Congress to ensure governmental custody of documents and tape recordings accumulated during the tenure of former President Nixon. Writing for a 7-2 majority, Justice Brennan found that Nixon's separation of powers claim and his claim of breach of constitutional privilege were meritless. The Court determined that the touchstone for

determining whether separation of powers principles had been violated was whether one branch's action vis-a-vis another constituted undue "disruption." Id. at 443. Justice Brennan concluded that "whatever are the future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents, nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face." Id. at 444-45.

Impoundment

15. Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838)

In 1838 the Supreme Court considered for the first time whether the President has an inherent power under the Constitution to impound even in the face of contrary congressional mandate. Kendall held that when Congress has expressly directed that sums be spent, the President has no constitutional power not to spend them. The Court found that the constitutional duty of the Executive to faithfully execute the law made it necessary that the congressional mandate be carried out.

16. Train v. City of New York, 420 U.S. 35 (1975)

Train is a modern impoundment case in which a unanimous Supreme Court rejected the government's argument that Congress intended to grant wide discretion to the Executive to control the rate of spending under the Federal Water Pollution Control Act Amendments of 1972. In relying on statutory rather than constitutional interpretation, the Court concluded that Congress had not intended to grant the executive branch wide discretion to control the amount spent under a water pollution bill. Train rejected the power of President to impound for "general welfare" purposes.

Pocket Veto

17. Pocket Veto Case, 279 U.S. 655 (1929)

Article I, § 7 provides that ordinarily, if the President fails within ten days either to sign a bill or to veto it and return it to the house in which it originated, the bill becomes law. However, that section also provides that if Congress by its adjournment has prevented the return of vetoed legislation, the legislation cannot go into effect unless the President signs it. In this situation, the President is given an absolute veto power, known as a "pocket veto." In the Pocket Veto Case the Supreme Court held that the President could constitutionally impose a pocket veto at the end of a session of Congress, as well as at the adjournment incident to the ending of a congressional term.

18. Wright v. United States, 302 U.S. 583 (1938)

The President's right to resort to a pocket veto during a short adjournment -- a holiday recess of a few days -- is uncertain. The Supreme Court noted in Wright, in dictum, that during a short recess (in this instance one of three days) the secretary of the Senate had the constitutional power to receive a veto message. The plain implication of Wright is that a pocket veto cannot properly be applied to an adjournment of only a few days. The Supreme Court should decide next term whether and to what extent the Pocket Veto Clause still applies to intersession adjournments. Burke v. Barnes, 54 U.S.L.W. 3582 (March 3, 1986) (No. 85-781).

Congressional Delegation

19. Field v. Clark, 143 U.S. 649 (1892)

The Tariff Act of 1890 was challenged as an improper congressional delegation of legislative power to the Executive. The Act provided for duty free importation of various commodities, but if the President determined that any country exporting such commodities to the United States imposed "unreasonable" or "reciprocally unequal" duties on United States products, he was to issue a proclamation to that effect and an alternative schedule of duties enacted by Congress would go into operation.

The Court stated that Congress can never delegate legislative power to the President. However, relying on a long line of legislative and judicial precedent, the Court upheld the Act because it only allowed the President to operate in an executive capacity within clear guidelines established by Congress. The Court reasoned that to hold otherwise would deprive Congress of the ability to legislate with reference to contingencies and matters not yet fully developed.

20. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)

Schechter invalidated the National Industrial Recovery Act's provision for "codes of fair competition," to be adopted by trade or industry associations and approved by the President, that would proscribe unfair competitive practices and establish minimum wages and maximum hours.

The Court unanimously agreed that an improper delegation of legislative power had occurred, due to the complete lack of standards for guiding executive action under the Act. Justice Cardozo stated in concurrence, "This is delegation running riot." Id. at 553. Schechter is now seen as part of the Court's unsuccessful resistance to the New Deal. The Court has not invalidated federal legislation on delegation grounds in fifty years. See also Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (excessive delegation of legislative power to ban shipment of "hot oil").

21. Yakus v. United States, 321 U.S. 414 (1944)

Yakus is representative of the modern Court's acceptance of broad congressional delegation. In Yakus, the Court sustained price and rent controls enacted pursuant to the Wartime Emergency Price Control Act. The Act authorized an Administrator to set "fair and equitable" prices that would "effectuate the purposes of this Act," and directed him to "give due consideration to" prices prevailing in October 1941.

The Court upheld the Act in language reminiscent of Field v. Clark. Chief Justice Stone wrote that the Constitution did not require Congress to "find for itself every fact upon which it desires to base legislative action." Id. at 424. See also the discussion of United States v. Curtiss-Wright Export Corp., under the Foreign Affairs heading of this appendix.

22. Kent v. Dulles, 357 U.S. 116 (1958)

Kent is representative of modern cases that read statutes narrowly to avoid delegation problems, particularly in areas affecting liberty interests. In Kent a passport control statute was read narrowly in order to deny the Secretary of State the power to withhold passports on free speech grounds.

Legislative Veto

23. Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983)

The legislative veto is a device used for congressional rescission of administrative actions of the executive branch. Chadha struck down as unconstitutional a one-house legislative veto power because it violated both the Presentment Clause of the Constitution (thus nullifying the President's veto power) and the Constitution's bicameral requirements. Chief Justice Burger, for the Court, held that the Constitution requires that legislation be presented to the President for approval or veto, and since the one-house resolution was effectively legislation, it violated the Presentment Clause (Art. I, § 7, Cl. 2,3). Moreover, the legislative veto, since it could be exercised by a single house, violated the bicameral requirements (Art. I, §§ 1 and 7), by which both houses must pass a bill before it can become law, and thus the principle of separation of powers. Though the legislation at issue in Chadha contained only a one-house legislative veto, it seems clear from the reasoning of the opinion that a two-house veto would also be found violative of the Presentment Clause.

The Court reasoned that the bicameral requirement, the Presentment Clause, the President's veto power, and Congress' power to override that veto were "intended to erect enduring checks on each Branch and to protect people from improvident exercise of power by mandating certain prescribed steps." Id. at

957. The Court noted that it is easier for action to be taken by one house without submission to the President, but that "the Framers ranked other values higher than efficiency." Id. at 959.

The majority also held that the legislative veto provision was severable from the rest of the Act, leaving intact the Attorney General's power to suspend deportation proceedings in the immediate instance. The issue of severability is of paramount importance to the functioning of the government since there are approximately 200 federal statutes containing legislative vetoes. This issue will be addressed next term in the Supreme Court. Alaska Airlines Inc. v. Brock, 54 U.S.L.W. 3582 (No. 85-920).

Congressional Investigatory Power

24. McGrain v. Daugherty, 273 U.S. 135 (1927)

In McGrain the Court upheld the power of Congress to compel a private citizen to appear before it. The case arose out of an investigation of Attorney General Daugherty. The Court held that congressional inquiries are an appropriate part of the legislative function and are valid if undertaken in aid of contemplated legislation.

25. Watkins v. United States, 354 U.S. 178 (1957)

Watkins stands for the proposition that even congressional inquiries must be conducted in accordance with the constitutional rights of citizens. The Court reversed the contempt conviction of a congressional witness because he was not afforded an opportunity to determine if he was within his rights in refusing to answer a question he deemed irrelevant. Under Watkins, Congress must clarify the scope of a congressional inquiry and the relevance of particular questions to that inquiry.

26. Barenblatt v. United States, 360 U.S. 109 (1959)

Barenblatt upheld the contempt conviction of a citizen who contested congressional power to investigate matters touching upon First Amendment associational rights. The case involved an investigation of communist involvement in higher education. The Court also rejected petitioner's contention that Congress has no power to conduct inquiries when it is only trying to "expose" a national problem, rather than to legislate. Though Barenblatt has not been overruled, its continuing validity is uncertain given the vast extension of First Amendment associational rights since 1959.

Constitutional Amendments

27. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798)

Hollingsworth held that presidential approval is unnecessary for a proposed constitutional amendment. Joint resolutions proposing such amendments thus represent the only type of bills or joint resolutions passed by Congress that does not require presentment to the President.

APPENDIX D

Constitutional Provisions Relevant to Separation of Powers

Subject	Legislative Branch [1]	Executive Branch [1]
General	All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. (art. 1, § 1)	The executive Power shall be vested in a President of the United States of America. (art. II, § 1)
Term of Office	The House of Representatives shall be composed of Members chosen every second Year by the People of the several States... (art. I, § 2) The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,] [3] for six Years... (art. I, § 3)	[The President] shall hold his Office during the Term of four Years.... (art. II, § 1) [2]
Dual Office-holding	No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have	The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided. (art. I, § 3)

1/ Provisions that assign powers to both the legislative and executive branches are placed in the column for the branch that in our view has the primary responsibility.

2/ Under the twenty-second amendment, "No person shall be elected to the office of the President more than twice..."

3/ Under section 1 of the seventeenth amendment, the Senators from each State shall be "elected by the people thereof..."

Subject	Legislative Branch	Executive Branch
	been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office. (art. I, § 6)	
Convening Congress	The Congress shall assemble at least once in every Year, and such Meeting shall [be on the first Monday in December,] 4/ unless they shall by Law appoint a different Day. (art. I, § 4)	[The President] may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper... (art. II, § 3)
Legislation	All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House	[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient... (art. II, § 3)

4/ Changed (by section 2 of the twentieth amendment) to the 3rd day of January.

Subject	Legislative Branch	Executive Branch
	shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill. (art. I, § 7)	
Execution of Laws		[The President] may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices... (art. II, § 2) [The President] shall take Care that the Laws be faithfully executed... (art. II, § 3)

Subject	Legislative Branch	Executive Branch
Appropriations	No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. (art. I, § 9)	
Appointments		[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. (art. II, § 2) The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commmissions which shall expire at the End of their next Session. (art. II, § 2) [The President] shall Commission all the Officers of the United States. (art. II, § 3)

Subject	Legislative Branch	Executive Branch
Foreign Relations	[The Congress shall have the power to] regulate Commerce with foreign Nations... (art. I, § 8)	[The President] shall have Power, by and with the Advice and Consent of Senate, to make Treaties, provided two-thirds of the Senators present concur... (art. II, § 2) [The President]... shall appoint Ambassadors, other public Ministers and Consuls... (art. II, § 2) [The President] shall receive Ambassadors and other public Ministers... (art. II, § 3)
War Powers	[Congress shall have the power]... [To] provide for the common Defense... To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;	The President shall be Commander in Chief of the Army and Navy of the United States, and the Militia of the several States, when called into the actual Service of the United States... (art. II, § 2)

Subject	Legislative Branch	Executive Branch
	To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress... (art. I, § 8)	
Impeachments	The House of Representatives... shall have the sole Power of Impeachment. (art. I, § 2) The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. (art. I, § 3) The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdeanors. (art. II, § 4)	[The President] shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment. (art. II, § 2)
Legislative Immunity	The Senators and Representatives... shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and	

Subject	Legislative Branch	Executive Branch
	in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.	
Constitutional Amendments	The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. (art. V)	
Oath of Office	The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution... (art. VI, cl. 3)	Before he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." (art. II, § 1)

Subject	Legislative Branch	Executive Branch
Presidential Disability		[In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law, provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.] 5/ (art. II, § 1)

5/ Modified as to Presidential disability and Vice-Presidential succession by the twenty-fifth amendment.

APPENDIX E

FEDERALIST PAPERS NOS. 47-51

The Federalist No. 47
[46]

JAMES MADISON

January 30, 1788

To the People of the State of New York.

HAVING reviewed the general form of the proposed government, and the general mass of power allotted to it: I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts.

One of the principal objections inculcated by the more respectable adversaries to the constitution, is its supposed violation of the political maxim, that the legislative, executive and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended

From *The Independent Journal*, January 30, 1788. This essay appeared on February 1 in both *The New-York Packet* and *The Daily Advertiser*. It was numbered 47 in the McLean edition and 46 in the newspapers.

in such a manner, as at once to destroy all symmetry and beauty of form; and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal constitution therefore really chargeable with this accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies, has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense, in which the preservation of liberty requires, that the three great departments of power should be separate and distinct.

The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying, and recommending it most effectually to the attention of mankind. Let us endeavour in the first place to ascertain his meaning on this point.

The British constitution was to Montesquieu, what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal Bard, as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged; so this great political critic appears to have viewed the constitution

of England, as the standard, or to use his own expression, as the mirrour of political liberty; and to have delivered in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure then not to mistake his meaning in this case, let us recur to the source from which the maxim was drawn.

On the slightest view of the British constitution we must perceive, that the legislative, executive and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which when made have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him; can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also, a great constitutional council to the executive chief; as on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction, in all other cases. The judges again are so far connected with the legislative department, as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts by which Montesquieu was guided it may clearly be inferred, that in saying "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, 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, the fundamental principles of a free constitution, are subverted. This would have been the case in the constitution examined by him, if the King who is the sole executive magistrate, had possessed also the compleat legislative power, or the supreme administration of justice; or if the entire legislative body, had possessed the supreme judiciary, or the supreme executive authority. This however is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law, nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock, nor any legislative function, though they may be advised with by the legislative councils. The entire legislature, can perform no judiciary act, though by the joint act of two of its branches, the judges may be removed from their offices; and though one of its branches is possessed of the judicial power in the last resort. The entire legislature again can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy; and another, on the empeachment of a third, can try and condemn all the subordinate officers in the executive department.

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body" says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner." Again "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." Some of these reasons are more fully explained in

other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author. 4

If we look into the constitutions of the several states we find that notwithstanding the emphatical, and in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New-Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments; and has qualified the doctrine by declaring "that the legislative, executive and judiciary powers ought to be kept as separate from, and independent of each other *as the nature of a free government will admit; or as is consistent with that chain of connection, that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.*" Her constitution accordingly mixes these departments in several respects. The senate which is a branch of the legislative department is also a judicial tribunal for the trial of empeachments. The president who is the head of the executive department, is the presiding member also of the senate; and besides an equal vote in all cases, has a casting vote in case of a tie. The executive head is himself eventually elective every year by the legislative department; and his council is every year chosen by and from the members of the same department. Several of the officers of state are also appointed by the legislature. And the members of the judiciary department are appointed by the executive department.

The constitution of Massachusetts has observed a sufficient though less pointed caution in expressing this fundamental article of liberty. It declares "that the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never

exercise the legislative and executive powers, or either of them." This declaration corresponds precisely with the doctrine of Montesquieu as it has been explained, and is not in a single point violated by the plan of the Convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very constitution to which it is prefixed, a partial mixture of powers has been admitted. The Executive Magistrate has a qualified negative on the Legislative body; and the Senate, which is a part of the Legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department again are appointable by the executive department, and removeable by the same authority, on the address of the two legislative branches. Lastly, a number of the officers of government are annually appointed by the legislative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the Constitution have in this last point at least, violated the rule established by themselves.

I pass over the constitutions of Rhode-Island and Connecticut, because they were formed prior to the revolution; and even before the principle under examination had become an object of political attention.

The constitution of New-York contains no declaration on this subject; but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments. It gives nevertheless to the executive magistrate a
5 partial controul over the legislative department; and what is more, gives a like controul to the judiciary department, and even blends the executive and judiciary departments in the exercise of this controul. In its council of appointment, members of the legislative are associated with the executive authority in the appointment of officers both executive and judiciary. And its court for the trial of impeachments and correction of errors,

is to consist of one branch of the legislature and the principal members of the judiciary department.

The constitution of New-Jersey has blended the different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature; is chancellor and ordinary or surrogate of the state; is a member of the supreme court of appeals, and president with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council to the governor, and with him constitutes the court of appeals. The members of the judiciary department are appointed by the legislative department, and removeable by one branch of it, on the impeachment of the other.

According to the constitution of Pennsylvania, the president, who is head of the executive department, is annually elected by a vote in which the legislative department predominates. In conjunction with an executive council, he appoints the members of the judiciary department, and forms a court of impeachments for trial of all officers, judiciary as well as executive. The judges of the supreme court, and justices of the peace, seem also to be removeable by the legislature; and the executive power of pardoning in certain cases to be referred to the same department. The members of the executive council are made EX OFFICIO justices of peace throughout the state.

In Delaware, the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice-presidents in the executive department. The executive chief, with six others, appointed three by each of the legislative branches, constitute the supreme court of appeals: He is joined with the legislative department in the appointment of the other judges. Throughout the states it appears that the members of the legislature may at the same time be justices of the peace. In this state, the members of one branch of it are EX OFFICIO justices of peace; as are also the mem-

bers of the executive council. The principal officers of the executive department are appointed by the legislative; and one branch of the latter forms a court of impeachments. All officers may be removed on address of the legislature.

Maryland has adopted the maxim in the most unqualified terms; declaring that the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other. Her constitution, notwithstanding makes the executive magistrate appointable by the legislative department; and the members of the judiciary, by the executive department.

The language of Virginia is still more pointed on this subject. Her constitution declares, "that the legislative, executive and judiciary departments, shall be separate and distinct; so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time; except that the justices of the county courts shall be eligible to either house of assembly." Yet we find not only this express exception, with respect to the members of the inferior courts; but that the chief magistrate with his executive council are appointable by the legislature; that two members of the latter are triennially displaced at the pleasure of the legislature; and that all the principal offices, both executive and judiciary, are filled by the same department. The executive prerogative of pardon, also is in one case vested in the legislative department.

The constitution of North-Carolina, which declares, "that the legislative, executive and supreme judicial powers of government, ought to be forever separate and distinct from each other," refers at the same time to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.

In South-Carolina, the constitution makes the executive magistracy eligible by the legislative department. It gives to the latter also the appointment of the members of the judiciary

department, including even justices of the peace and sheriffs; and the appointment of officers in the executive department, down to captains in the army and navy of the state.

In the constitution of Georgia, where it is declared, "that the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." We find that the executive department is to be filled by appointments of the legislature; and the executive prerogative of pardon, to be finally exercised by the same authority. Even justices of the peace are to be appointed by the legislature.

In citing these cases in which the legislative, executive and judiciary departments, have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several state governments. I am fully aware that among the many excellent principles which they exemplify, they carry strong marks of the haste, and still stronger of the inexperience, under which they were framed. It is but too obvious that in some instances, the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper. What I have wished to evince is, that the charge brought against the proposed constitution, of violating a sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author; nor by the sense in which it has hitherto been understood in America. This interesting subject will be resumed in the ensuing paper.

PUBLIUS.

The Federalist No. 48
[47]
JAMES MADISON

February 1, 1788

To the People of the State of New York.

It was shewn in the last paper, that the political apothegm there examined, does not require that the legislative, executive and judiciary departments should be wholly unconnected with each other. I shall undertake in the next place, to shew that unless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained.

It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completly administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next and most difficult task, is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved.

Will it be sufficient to mark with precision the boundaries

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of these departments in the Constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American Constitutions. But experience assures us, that the efficacy of the provision has been greatly over-rated; and that some more adequate defence is indispensibly necessary for the more feeble, against the more powerful members of the government. The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.

The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth however obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.

In a government, where numerous and extensive prerogatives are placed in the hands of a hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited both in the

extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real-nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature; and the judiciary being described by land marks, still less uncertain, projects of usurpation by either of these departments, would immediately betray and defeat themselves. Nor is this all: As the legislative department alone has access to the pockets of the people, and has in some Constitutions full discretion, and in all, a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

I have appealed to our own experience for the truth of what I advance on this subject. Were it necessary to verify this experience by particular proofs, they might be multiplied without end. I might find a witness in every citizen who has shared in, 1 or been attentive to, the course of public administrations. I might collect vouchers in abundance from the records and

archieves of every State in the Union. But as a more concise and at the same time, equally satisfactory evidence, I will refer to the example of two States, attested by two unexceptionable authorities.

The first example is that of Virginia, a State which, as we have seen, has expressly declared in its Constitution, that the three great departments ought not to be intermixed. The authority in support of it is Mr. Jefferson, who, besides his other advantages for remarking the operation of the government, was himself the chief magistrate of it. In order to convey fully the ideas with which his experience had impressed him on this subject, it will be necessary to quote a passage of some length from his very interesting "Notes on the State of Virginia." (P. 195.) "All the powers of government, legislative, executive 2 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. 173 despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An *elective despotism*, was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that Convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. *But no barrier was provided between these several powers.* The judiciary and executive members were left dependent on the legislative for their subsistence in office, and some of them for their

continuance in it. If therefore the Legislature assumes executive and judiciary powers, no opposition is likely to be made; nor if made can it be effectual; because in that case, they may put their proceeding into the form of an act of Assembly, which will render them obligatory on the other branches. They have accordingly *in many* instances *decided rights* which should have been left to *judiciary controversy;* and *the direction of the executive during the whole time of their session, is becoming habitual and familiar.*"

The other State which I shall take for an example, is Pennsylvania; and the other authority the council of censors which assembled in the years 1783 and 1784.* A part of the duty of this body, as marked out by the Constitution was, "to enquire whether the Constitution had been preserved inviolate in every part; and whether the legislative and executive branches of government had performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are entitled to by the Constitution." In the execution of this trust, the council were necessarily led to a comparison, of both the legislative and executive proceedings, with the constitutional powers of these departments; and from the facts enumerated, and to the truth of most of which, both sides in the council subscribed, it appears that the Constitution had been flagrantly violated by the Legislature in a variety of important instances.

A great number of laws had been passed violating without any apparent necessity, the rule requiring that all bills of a public nature, shall be previously printed for the consideration of the people; altho' this is one of the precautions chiefly relied on by the Constitution, against improper acts of the Legislature.

The constitutional trial by jury had been violated; and

* The Pennsylvania Constitution of 1776 provided for this council, composed of two members from each county, to meet every seven years. It met in the winter of 1783–84 and in the summer of 1784. (Editor)

powers assumed, which had not been delegated by the Constitution.

Executive powers had been usurped.

The salaries of the Judges, which the Constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department, frequently drawn within legislative cognizance and determination.

Those who wish to see the several particulars falling under each of these heads, may consult the Journals of the council which are in print. Some of them, it will be found may be imputable to peculiar circumstances connected with the war: But the greater part of them may be considered as the spontaneous shoots of an ill-constituted government.

It appears also, that the executive department had not been innocent of frequent breaches of the Constitution. There are three observations however, which ought to be made on this head. *First.* A great proportion of the instances, were either immediately produced by the necessities of the war, or recommended by Congress or the Commander in Chief. *Secondly.* In most of the other instances, they conformed either to the declared or the known sentiments of the legislative department. *Thirdly.* The executive department of Pennsylvania is distinguished from that of the other States, by the number of members composing it.* In this respect it has as much affinity to a legislative assembly, as to an executive council. And being at once exempt from the restraint of an individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence; unauthorized measures would of course be more freely hazarded, than where the executive department is administered by a single hand or by a few hands.

* The Pennsylvania Constitution of 1776 provided for a plural executive in the form of the Supreme Executive Council, consisting of one member from the City of Philadelphia and one from each county of the state. (Edi-

The conclusion which I am warranted in drawing from these observations is, that a mere demarkation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

PUBLIUS.

The Federalist No. 49
[48]

JAMES MADISON

February 2, 1788

To the People of the State of New York.

THE author of the "Notes on the state of Virginia," quoted in the last paper, has subjoined to that valuable work, the draught of a constitution which had been prepared in order to be laid before a convention expected to be called in 1783 by the legislature, for the establishment of a constitution for that commonwealth. The plan, like every thing from the same pen, marks a turn of thinking original, comprehensive and accurate; and is the more worthy of attention, as it equally displays a fervent attachment to republican government, and an enlightened view of the dangerous propensities against which it ought to be guarded. One of the precautions which he proposes, and on which he appears ultimately to rely as a palladium to the weaker departments of power, against the invasions of the stronger, is

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perhaps altogether his own, and as it immediately relates to the subject of our present enquiry, ought not to be overlooked.

His proposition is, "that whenever any two of the three branches of government shall concur in opinion, each by the voices of two thirds of their whole number, that a convention is necessary for altering the constitution or *correcting breaches of it*, a convention shall be called for the purpose."

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government; but also whenever any one of the departments may commit encroachments on the chartered authorities of the others. The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers; and how are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves; who, as the grantors of the commission, can alone declare its true meaning and enforce its observance?

There is certainly great force in this reasoning, and it must be allowed to prove, that a constitutional road to the decision of the people, ought to be marked out, and kept open, for certain great and extraordinary occasions. But there appear to be insuperable objections against the proposed recurrence to the people, as a provision in all cases for keeping the several departments of power within their constitutional limits.

In the first place, the provision does not reach the case of a combination of two of the departments against a third. If the legislative authority, which possesses so many means of operating on the motives of the other departments, should be able to gain

to its interest either of the others, or even one-third of its members, the remaining department could derive no advantage from this remedial provision. I do not dwell however on this objection, because it may be thought to lie rather against the modification of the principle, than against the principle itself.

In the next place, it may be considered as an objection inherent in the principle, that as every appeal to the people would carry an implication of some defect in the government, frequent appeals would in great measure deprive the government of that veneration, which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability. If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. The reason of man, like man himself is timid and cautious, when left alone; and acquires firmness and confidence, in proportion to the number with which it is associated. When the examples, which fortify opinion, are *antient* as well as *numerous*, they are known to have a double effect. In a nation of philosophers, this consideration ought to be disregarded. A reverence for the laws, would be sufficiently inculcated by the voice of an enlightened reason. But a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato. And in every other nation, the most rational government will not find it a superfluous advantage, to have the prejudices of the community on its side.

The danger of disturbing the public tranquility by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions, to the decision of the whole society. Notwithstanding the success which has attended the revisions of our established forms of government, and which does so much honour to the virtue and

intelligence of the people of America, it must be confessed, that the experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the antient government; and whilst no spirit of party, connected with the changes to be made, or the abuses to be reformed, could mingle its leven in the operation. The future situations in which we must expect to be usually placed, do not present any equivalent security against the danger which is apprehended.

But the greatest objection of all is, that the decisions which would probably result from such appeals, would not answer the purpose of maintaining the constitutional equilibrium of the government. We have seen that the tendency of republican governments is to an aggrandizement of the legislative, at the expence of the other departments.* The appeals to the people therefore would usually be made by the executive and judiciary departments. But whether made by one side or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments, are few in number, and can be personally known to a small part only of the people. The latter by the mode of their appointment, as well as, by the nature and permanency of it, are too far removed from the people to share much in their prepossessions. The former are generally the objects of jealousy: And their administration is always liable to be discoloured and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They

*See Essay 48. (Editor)

are distributed and dwell among the people at large. Their connections of blood, of friendship and of acquaintance, embrace a great proportion of the most influencial part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the
3 people. With these advantages, it can hardly be supposed that the adverse party would have an equal chance for a favorable issue.

But the legislative party would not only be able to plead their cause most successfully with the people. They would probably be constituted themselves the judges. The same influence which had gained them an election into the legislature, would gain them a seat in the convention. If this should not be the case with all, it would probably be the case with many, and pretty certainly with those leading characters, on whom every thing depends in such bodies. The convention in short would be composed chiefly of men, who had been, who actually were, or who expected to be, members of the department whose conduct was arraigned. They would consequently be parties to the very question to be decided by them.

It might however sometimes happen, that appeals would be made under circumstances less adverse to the executive and judiciary departments. The usurpations of the legislature might be so flagrant and so sudden, as to admit of no specious colouring. A strong party among themselves might take side with the other branches. The executive power might be in the hands of a peculiar favorite of the people. In such a posture of things, the public decision might be less swayed by prepossessions in favor of the legislative party. But still it could never be expected to turn on the true merits of the question. It would inevitably be connected with the spirit of pre-existing parties, or of parties springing out of the question itself. It would be connected with persons of distinguished character and extensive influence in

the community. It would be pronounced by the very men who had been agents in, or opponents of the measures, to which the decision would relate. The *passions* therefore not *the reason*, of the public, would sit in judgment. But it is the reason of the public alone that ought to controul and regulate the government. The passions ought to be controuled and regulated by the government.

We found in the last paper that mere declarations in the written constitution, are not sufficient to restrain the several departments within their legal limits. It appears in this, that occasional appeals to the people would be neither a proper nor an effectual provision, for that purpose. How far the provisions of a different nature contained in the plan above quoted, might be adequate, I do not examine. Some of them are unquestionably founded on sound political principles, and all of them are framed with singular ingenuity and precision.

PUBLIUS.

The Federalist No. 50

[49]

JAMES MADISON
[Alexander Hamilton]

February 5, 1788

To the People of the State of New York.

It may be contended perhaps, that instead of *occasional* appeals to the people, which are liable to the objections urged against

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them, *periodical* appeals are the proper and adequate means *of preventing and correcting infractions of the Constitution.*

It will be attended to, that in the examination of these expedients, I confine myself to their aptitude for *enforcing* the Constitution by keeping the several departments of power within their due bounds, without particularly considering them, as provisions for *altering* the Constitution itself. In the first view, appeals to the people at fixed periods, appear to be nearly as ineligible, as appeals on particular occasions as they emerge. If the periods be separated by short intervals, the measures to be reviewed and rectified, will have been of recent date, and will be connected with all the circumstances which tend to viciate and pervert the result of occasional revisions. If the periods be distant from each other, the same remark will be applicable to all recent measures, and in proportion as the remoteness of the others may favor a dispassionate review of them, this advantage is inseparable from inconveniencies which seem to counterbalance it. In the first place, a distant prospect of public censure would be a very feeble restraint on power from those excesses, to which it might be urged by the force of present motives. Is it to be imagined, that a legislative assembly, consisting of a hundred or two hundred members, eagerly bent on some favorite object, and breaking through the restraints of the Constitution in pursuit of it, would be arrested in their career, by considerations drawn from a censorial revision of their conduct at the future distance of ten, fifteen or twenty years? In the next place, the abuses would often have compleated their mischievous effects, before the remedial provision would be applied. And in the last place, where this might not be the case, they would be of long standing, would have taken deep root, and would not easily be extirpated.

The scheme of revising the Constitution in order to correct recent breaches of it, as well as for other purposes, has been actually tried in one of the States. One of the objects of the

council of censors, which met in Pennsylvania, in 1783 and 1784, was, as we have seen,* to enquire "whether the Constitution had been violated, and whether the legislative and executive departments had encroached on each other." This important and novel experiment in politics, merits in several points of view, very particular attention. In some of them it may perhaps, as a single experiment, made under circumstances somewhat peculiar, be thought to be not absolutely conclusive. But as applied to the case under consideration, it involves some facts which I venture to remark, as a compleat and satisfactory illustration of the reasoning which I have employed.

First. It appears from the names of the gentlemen, who composed the council, that some at least of its most active and leading members, had also been active and leading characters in the parties which pre-existed in the State.

Secondly. It appears that the same active and leading members of the council, had been active and influential members of the legislative and executive branches, within the period to be reviewed; and even patrons or opponents of the very measures to be thus brought to the test of the Constitution. Two of the members had been Vice-Presidents of the State, and several others, members of the executive council, within the seven preceding years. One of them had been Speaker, and a number of others distinguished members of the legislative assembly, within the same period.

Thirdly. Every page of their proceedings witnesses the effect of all these circumstances on the temper of their deliberations. Throughout the continuance of the council, it was split into two fixed and violent parties. The fact is acknowledged and lamented by themselves. Had this not been the case, the face of their proceedings exhibit a proof equally satisfactory. In all questions, however unimportant in themselves, or unconnected with

* See Essay 48. (Editor)

each other, the same names, stand invariably contrasted on the opposite columns. Every unbiassed observer, may infer without danger of mistake, and at the same time, without meaning to reflect on either party, or any individuals of either party, that unfortunately *passion*, not *reason*, must have presided over their decisions. When men exercise their reason coolly and freely, on a variety of distinct questions, they inevitably fall into different opinions, on some of them. When they are governed by a common passion, their opinions if they are so to be called, will be the same.

Fourthly. It is at least problematical, whether the decisions of this body, do not, in several instances, misconstrue the limits prescribed for the legislative and executive departments, instead of reducing and limiting them within their constitutional places.

Fifthly. I have never understood that the decisions of the council on constitutional questions, whether rightly or erroneously formed, have had any effect in varying the practice founded on legislative constructions. It even appears, if I mistake not, that in one instance, the cotemporary Legislature denied the constructions of the council, and actually prevailed in the contest.

This censorial body therefore, proves at the same time, by its researches, the existence of the disease; and by its example, the inefficacy of the remedy.

This conclusion cannot be invalidated by alledging that the State in which the experiment was made, was at that crisis, and had been for a long time before, violently heated and distracted by the rage of party. Is it to be presumed, that at any future septennial epoch, the same State will be free from parties? Is it to be presumed that any other State, at the same or any other given period, will be exempt from them? Such an event ought to be neither presumed nor desired; because an extinction of parties necessarily implies either a universal alarm for the public safety, or an absolute extinction of liberty.

Were the precaution taken of excluding from the assemblies elected by the people to revise the preceding administration of the government, all persons who should have been concerned in the government within the given period, the difficulties would not be obviated. The important task would probably devolve on men, who with inferior capacities, would in other respects, be little better qualified. Although they might not have been personally concerned in the administration, and therefore not immediately agents in the measures to be examined; they would probably have been involved in the parties connected with these measures, and have been elected under their auspices.

PUBLIUS.

The Federalist No. 51

[50]

JAMES MADISON
[Alexander Hamilton]

February 6, 1788

To the People of the State of New York.

To what expedient then shall we finally resort for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be

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one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government: Since it shews that in exact proportion as the territory of the union may be formed into more circumscribed confederacies or states, oppressive combinations of a majority will be facilitated, the best security under the republican form, for the rights of every class of citizens, will be diminished; and consequently, the stability and independence of some member of the government, the only other security, must be proportionally increased. Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger: And as in the latter state even the stronger individuals are prompted by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves: So in the former
5 state, will the more powerful factions or parties be gradually induced by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted, that if the state of Rhode Island was separated from the confederacy, and left to itself, the insecurity of rights under the popular form of government within such narrow limits, would be displayed by such reiterated oppressions of factious majorities, that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In

the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general 6
good; and there being thus less danger to a minor from the will 7
of the major party, there must be less pretext also, to provide for the security of the former, by introducing into the government a will not dependent on the latter; or in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self government. And happily for the *republican cause*, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the *federal principle*.

PUBLIUS.

The Federalist No. 52

[51]

JAMES MADISON
[Alexander Hamilton] 1

February 8, 1788

To the People of the State of New York.

FROM the more general enquiries pursued in the four last papers, I pass on to a more particular examination of the several

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But it is not possible to give to each department an equal power of self defence. In republican government the legislative authority, necessarily, predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative, on the legislature, appears at first view to be the natural defence with which the executive magistrate should be armed. But perhaps it would be neither altogether safe, nor alone sufficient. On ordinary occasions, it might not be exerted with the requisite firmness; and on extraordinary occasions, it might be perfidiously abused. May not this defect of an absolute negative be supplied, by some qualified connection between this weaker department, and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?

If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion, to the several state constitutions, and to the federal constitution, it will be found, that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are moreover two considerations particularly applicable to the federal system of America, which place that
2 system in a very interesting point of view.

First. In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the 3
government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.

Second. It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: The one by creating a will in the community independent of the majority, that is, of the society itself; the other by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole, very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self appointed authority. This at best is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests, of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority. In a free government, the security for civil rights must be the same as for religious rights. It consists in the 4

the means of keeping each other in their proper places. Without presuming to undertake a full developement of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent, is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted, that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies, should be drawn from the same fountain of authority, the people, through channels, having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties however, and some additional expence, would attend the execution of it. Some deviations therefore from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle; first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice, which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a centinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.