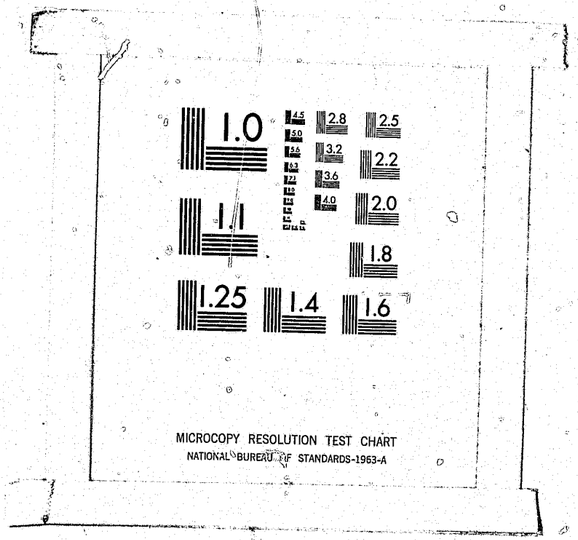

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"POST-WATERGATE LEGISLATION IN RETROSPECT"

The Alfred P. Murrah Lecture
on the
Administration Of Justice

BY

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"POST-WATERGATE LEGISLATION IN RETROSPECT"

In 1928 France began to prepare for renewed conflict with Germany. Its leaders were determined to avoid the mistakes they had made in the last war. They abandoned their traditional commitment to headlong offensive strategies -- a commitment they had pursued in 1914 and 1915 with devastating consequences on both sides -- and they developed a defensive plan. The plan was simple and majestic. France would rebuild the Western Front along a line from Switzerland to the Ardennes. The line would be fashioned in concrete and studded with guns and armor. It would stand against any German attack. The space between the Ardennes and the sea would be defended by the forests and hills, the natural fortifications that had proved to be impenetrable in the last war.

The plan was accepted. The work was begun, and it was completed ten years later. You know the rest. War broke out the following year. The Nazis struck with fearful efficiency through the Ardennes, using new machines -- tanks and aircraft -- that were unaffected by the natural impediments upon which the French had relied. The Maginot line was bypassed. France was utterly overthrown in a matter of days.

With that lightning strike through the Ardennes, the grand design of those earnest French planners passed

into history as a model of failed policy. Where did they go wrong? The dangers they perceived were real enough. Their fortified line was effective in itself. They were intelligent men. My theory is that they were too preoccupied with the past. They were so moved by the human tragedy of the Great War -- the carnage on the Western Front -- that they resolved to fight that war again and win it again, this time using a system that would make the fight less costly. In their search for that system, they depleted their resources; they lost sight of new developments; and they committed their nation to a rigid posture from which it could not soon recover. France became a prisoner of its own defenses. It had understood the dangers of the past; but when the time came, it could not respond effectively to new dangers on new fronts.

I am drawn to the image of that great fortified line because it provides a striking illustration of a common mistake in public decisionmaking. It is a mistake we make as we respond to disaster and take precautions against its recurrence. Disaster occurs; we seek a remedy; but in the process we lose sight of other needs or seize upon a solution so heroic and rigid that it opens new dangers in itself.

During the years between the Kennedy Administration and the resignation of Richard Nixon in 1974 our Nation

experienced a series of reversals. They were catastrophes in the true Greek sense. They overturned policies and personalities. They overturned assumptions about our place in the world. They began with military set-backs abroad, and they culminated in the complex series of discoveries we call Watergate.

I shall not attempt to trace these catastrophes in detail or to say what their causes were. I am here to discuss one of their most dramatic effects. They produced a great body of reform legislation that deserves to be studied and understood by any serious student of American law and government. The Freedom of Information Act, the Privacy Act, the Ethics in Government Act, the special prosecutor provisions of the Ethics in Government Act, the "whistleblower" provisions of the Civil Service Reform Act, the tax information disclosure provisions of the Tax Reform Act of 1976, the War Powers Resolution, the Hughes-Ryan Amendment, the Right to Financial Privacy Act, the proposed charters for the FBI and the CIA -- all of these measures were enacted, amended, or proposed during the last ten or twelve years for the purpose of providing remedies against abuses in government. All of them were supported by a perception that government was malfunctioning, and this perception was supported in turn by abundant evidence supplied by the catastrophic events to which I have referred.

We have lived under the regime of these statutes for only a few years, but we are beginning to learn how they work. My thesis is that we are now in a position to examine them critically and to determine whether we legislated well. These measures were proposed and enacted to avert specific dangers. Did we assess those dangers correctly? Did we lose sight of other needs? In choosing remedies against the great evils of the past, did we leave ourselves free to respond creatively to new dangers on other fronts?

This is a large subject. I am going to be selective in reviewing the relevant evidence. From this great body of legislation I have chosen five different statutes and five separate points of inquiry. Each is important in itself; but I hope you will see before I am through that they are parts of a whole. They are connected, one with another, like beads on a string.

I.

My first exhibit is the Freedom of Information Act. It was passed and approved in 1966, on the leading edge of the reform movement with which I am concerned; and it was amended and strengthened in 1974, when the need for making the Government more open had become especially clear. Indeed, in that same year, 1974, Congress enacted a companion

statute, the Privacy Act, that operates in tandem with FOIA in some of the areas I propose to discuss. For the sake of simplicity, I shall limit my discussion to FOIA.

As you may know, the Act is very simple in theory. It is an open records law. It gives "any person" a judicially enforceable right to obtain any "agency record," and it imposes only one qualification on that general right. A record may be withheld by an agency if it falls within the scope of one of nine specific exemptions set forth in the Act. These exemptions are described in language that occupies only three or four column inches in the United States Code. Given the multitude and diversity of Government records, given the diverse purposes for which their disclosure may be requested, given the eccentricities of the agencies that have custody of them, it is not at all surprising that the legal effect of this slender text has been hotly debated within the Government itself and among concerned private citizens.

From the beginning, the Department of Justice has been responsible for enforcing the Freedom of Information Act. It provides guidance to other agencies regarding the interpretation of the Act. It makes many of the important litigation decisions that must be made when a request for a record is denied and the requester takes his case to court. These responsibilities, as Attorney General Levi

affirmed in 1975, are among the most important responsibilities the Department of Justice is called upon to perform; and as Attorney General Bell taught us, our duty is to cultivate the spirit of the Act, not simply to enforce the letter of the law. I affirm that view. Open Government and democratic government go hand in hand.

With all its virtues, the Freedom of Information Act is not easy to administer. I want to discuss some of the difficulties that have become apparent in recent years from our vantage point at the Department of Justice. Many of them probably could not have been foreseen at the time FOIA was drafted. They have been revealed by subsequent experience; and if I may say so, they illustrate the elementary point I attempted to make in my introductory remarks. Having adopted a great remedy against a great evil, we must not abandon our creative faculties. We must be sensitive to all our needs, and we must review our work critically from time to time so that we can respond to other dangers as experience makes them evident.

The Department of Justice, like every law enforcement agency, finds it necessary to protect certain kinds of law enforcement information against premature disclosure. The scriptures teach us, of course, that all things will be made known in the last days; but until those days come, we find it necessary to hold some information in confidence

against the real dangers that can result from disclosure out of season. Congress has recognized this necessity. The most elaborate of the nine exemptions set forth in the Freedom of Information Act permits an agency to withhold "investigatory records" that have been compiled for "law enforcement purposes" whenever the agency can show that disclosure of the records would produce a specific harm of a kind described in the statute. In addition to this "law enforcement exemption," FOIA contains several other exemptions that can apply to law enforcement information in some circumstances. On the whole, this statutory treatment reflects a conscientious attempt by Congress to balance the general need for openness in Government against the specific needs of law enforcement.

We are learning, however, that the statutory machinery does not always work. Consider, for example, the problem of preventing criminals from discovering how we investigate crime. The Department of Justice uses manuals, written instructions, and summaries of technical information relevant to crimes and investigatory techniques to educate and direct government personnel in the performance of their investigatory duties. This is information that criminals must not be permitted to obtain. It is almost laughable that in a legal system that purports to be well regulated there could be a serious argument over the

question whether the Government has a legal duty to provide the general public with materials that are, in effect, do-it-yourself guides for crime; but our courts have encountered some difficulty in their attempt to find in the language of FOIA a basis for protecting information of this sort. In my opinion, we have simply made a legislative error here, and we need to find new statutory language that will take care of the problem. There is nothing in the ideal of open Government that demands that we instruct the public regarding the proper techniques for, say, sabotaging a nuclear plant or intercepting communications by wire.

The Act presents other difficulties that are not as straightforward as the one I have just mentioned. Let me describe two of them for you. These are "gestalt" phenomena. They are not created by any specific element or elements in the statutory text. They are created instead by the public perception of the Act as a whole and by the operation of the system it creates.

Law enforcement has always depended on the willingness of private citizens to assist in the apprehension of criminals. In the very earliest days we resorted to crude compulsory systems under which law officers could actually require the participation of private citizens in the apprehension of felons. Today, we rely on voluntary measures, and we recognize that the primary service a private citizen

can render in aid of law enforcement is to provide law officers with the information they need to do their duties. We also recognize that a voluntary system cannot work unless we are in a position to provide some measure of assurance to private individuals that their cooperation will not result in unacceptable personal risks. One way we provide such assurance is to promise them, in proper cases, that their cooperation will not become publicly known.

The Freedom of Information Act takes all of this into account. It permits a law enforcement agency to withhold an agency record if disclosure of the record would identify a confidential source or disclose confidential information furnished by a confidential source. In theory, this exemption provides an adequate basis for protecting the confidentiality of sources. Indeed, to our knowledge no source of ours -- no individual who has supplied law enforcement information to us in confidence -- has ever experienced physical harm as a result of a release under the Act. We are learning, however, that the public perception is otherwise. People are beginning to tell us -- and here I am referring not simply to underworld informants in the detective-story sense, but to ordinary private citizens, businessmen, public officers in state and local governments -- that they will not provide us with information because they fear that the information, or the fact that they have

disclosed information, will come to light as a result of some disclosure under the Act.

This is a very serious problem. I cannot tell you how much information we are losing. We have no way to measure the loss. In a sense, that is part of the problem. What I can tell you is that the loss is sure to be greatest in the areas in which we need the cooperation of private citizens most. I am referring to the areas of organized crime and foreign counterintelligence. Individual sources in these fields are usually well-educated people. As a rule, they have a general understanding of the law, and they are extraordinarily sensitive to public disclosures from our files. They are beginning to refuse to cooperate with us because of their perception that FOIA may require disclosure of their identities or of the information they provide us, and in many instances they fear that disclosure will jeopardize their standing in the community, their livelihood, or even their lives.

This brings me to my last point. The people who work in the Department of Justice are human beings. In responding to a FOIA request for law enforcement information, they are required to scrutinize the relevant records, to apply the specific standards set forth in FOIA, and to disclose any nonexempt information that is "reasonably segregable" from the rest. This is not an easy job. We

make errors. Very often we know less about the relevant facts than the requestor himself. Information that seems innocuous to us may provide the requestor with the missing piece of a puzzle he is trying to decipher, and that risk is especially great in the sensitive areas to which I have already referred -- foreign counterintelligence and organized crime. This problem is built into the system itself. It strengthens the perception of insecurity to which I have just referred, and I believe that we ought to do what we can to correct it.

What is the solution? We have just completed a detailed study of these and other FOIA problems. We believe that changes can be made that will help to solve these problems without sacrificing any of the principles that FOIA was intended to secure. For example, the problem presented by the disclosure of sensitive manuals and instructions could be cured simply by amending exemption two of FOIA, which protects records dealing with internal agency rules and practices, to make it clear that sensitive technical manuals and instructions are within the protected class. The problem of protecting confidential sources and the integrity of information in investigatory files is more difficult. I have concluded that we should consider a number of remedies, including a simple three-year moratorium on requests for the investigatory records

generated in any particular case. A moratorium would ease the administration of what everyone concedes is a necessary exemption, and it would provide a good measure of additional protection against the dangers of premature disclosure.

II.

One of the specific abuses disclosed during the Watergate period was the deliberate use by high government officials of personal tax returns and tax return information for improper purposes. The revelations were chilling. We learned that private information concerning personal finances, supplied to the Government for tax purposes, could be obtained and used by capricious officers in Government to advance political and personal objectives.

At the time these abuses occurred, there was little in the law itself that prevented tax return information from being used in this way. Tax returns were inaccessible to the general public -- they were confidential in that sense -- but there was no effective measure regulating their disclosure and use within the Government. In fact, as we came to learn, tax returns were routinely disclosed and used within the Government for a number of purposes, both good and bad.

All of this changed in 1976. Responding to Watergate, Congress inserted into the Tax Reform Act of 1976

a collection of strict limitations on the authority of government officers to disclose and use tax return information within the Government. Unlike the Freedom of Information Act, which deals with a very large subject in very short order, these disclosure provisions deal with a small subject in a grand and expansive way. I have time to discuss only one of these provisions, the one that regulates the disclosure of tax return information to law enforcement agencies.

Before the Tax Reform Act of 1976, financial information in the possession of the Internal Revenue Service -- information filed by taxpayers as well as information collected by the Service in the course of its audits and investigations -- was an important resource for criminal investigators and prosecutors in the Department of Justice. Money is the medium in which most crimes are transacted, and this is especially true of the federal crimes that merit the greater part of our investigatory effort -- organized crime, and white-collar crime and narcotics trafficking. Before the Tax Reform Act of 1976, financial information in the possession of the Internal Revenue Service helped us to piece together and prove in court the paper trails -- the illicit financial transactions -- that are characteristic of these crimes. Moreover, the skilled personnel of the Internal Revenue Service were and still are the best and

most numerous financial investigators in the Federal Government, and before the Tax Reform Act of 1976 we relied upon them heavily to unravel the complex transactions that conceal both tax and nontax crime. But the disclosure restrictions imposed by the Tax Reform Act of 1976 have limited our access both to the financial information in the possession of the IRS and to the assistance of these experts.

This is a subject that has received a good deal of publicity recently. I do not want to overstate the problem, but there have been some celebrated instances in which we have been far more successful in cracking the crime itself than in penetrating the wall of secrecy between the IRS and the Department of Justice. A major drug case in New York, prosecuted to a successful conclusion only a year or so ago, provides a colorful illustration of what I mean. We began asking for the tax returns of the defendant six months before the trial began. In the middle of the trial we obtained the returns and learned what the IRS had known all along -- that the defendant had actually reported as miscellaneous income over $250,000 in drug profits in a recent tax year. That information would have been of some use to us going into the case.

The statutory restrictions take the following form: Whenever a prosecutor in this Department wants access to

tax information for use in a nontax criminal investigation, an Assistant Attorney General must authorize him to apply to a court for an order authorizing the disclosure. That in itself is not a problem. The problem is that the Act requires the applicant to show that he has reason to believe that the tax information is probative of a matter in issue and that the information cannot reasonably be obtained from any other source. But if the applicant has never seen the information, how can he make that showing? And if he can make it, why does he need the information? This is Catch-22, and in my view, it is an unnecessary complication.

The Act creates other hurdles as well, most of them of a procedural nature. I shall not bore you with all the details, but will give you an idea of what I think should be done. All of these revisions could be made, in my view, without resurrecting the spirit of Watergate or making it possible for bad actors in the Government to use tax return information for personal or political purposes.

First, I think it is appropriate that a judge or magistrate review the legitimacy of requests by law enforcement officers for tax information in the possession of the Internal Revenue Service; however, I think the officers should not be required to prove, as a precondition to access, that they already know what the information will show. They should be permitted to base their application

on knowledge that they can reasonably be expected to possess before seeing the return. They should be permitted access if they can demonstrate (1) that they have independent evidence of a crime; (2) that tax information is or may be relevant to the investigation or prosecution of that crime; and (3) that they are seeking access to the information exclusively for that purpose. If they can make that showing, the judge or magistrate should be empowered to order that disclosure be made in a timely fashion and that it extend to all information coming into the possession of the IRS within the scope of the order, regardless of its source. Third, I think there is certain nonconfidential, nonprivileged information possessed by the IRS that should be available to law enforcement agencies on oral or written request from an appropriate law enforcement official, who certifies that the information is sought exclusively for the purpose of a criminal investigation or proceeding. Within this category I would include information supplied by third parties, the taxpayer's name, his address and Social Security number, information indicating whether he filed a return for a given year, and information indicating whether there has ever been a criminal tax investigation of him. Finally, I think it ought to be made clear that the Service has an affirmative duty to report to law enforcement agencies evidence of crime derived from information falling within one of these nonprotected categories.

After long study by officials of the Justice Department, the Internal Revenue Service and the White House Staff, the Administration has reached agreement on legislative proposals with Senator Nunn, who has been leading the effort in Congress to amend the Tax Reform Act. These proposals, which incorporate the suggestions I have just outlined, would remove most of the impediments to law enforcement created by the Tax Reform Act while still maintaining the same protection for the privacy of individuals' tax returns and financial records. The bills are now pending before the Senate Finance Committee, and I am hopeful that action will be taken in the post-election session of Congress or early in the 97th Congress next year.

III.

From almost any perspective, the Freedom of Information Act and the Tax Reform Act are technical, mechanical measures. They are important; they engage the mind; but the problems they solve and the problems they create are not front page news. I now turn to a measure of a far different sort, the special prosecutor provisions of the Ethics in Government Act. I am not going to explore this legislation in every detail. It has been in effect for only two years. Because of the commands of the statute itself as well as considerations of propriety, I am not free to say very much about our recent experience with it. I am bringing it to your attention because it is important in itself and because it deserves the consideration of every thoughtful student of American law. It illustrates as well as any of the statutes I will discuss today the difficulties -- the paradoxes -- that we encounter in the process of reform.

The special prosecutor provisions are a recapitulation of the main drama of Watergate itself. You will remember that in the winter and spring of 1973 there was a very substantial question in the public mind whether the criminal investigation of the Watergate burglary had been adequately pursued. The actors in the burglary itself had been apprehended and prosecuted, but many people believed that there was a

connection between the burglary and larger events; and it was plain that the connection, if it existed, should come to light. The Department of Justice had presided over the original investigation. If that investigation and the resulting prosecution had been inadequate, the Department of Justice was to blame; and it was for that reason among others that the new Attorney General, Elliot Richardson, promised the Senate during his confirmation hearings that he would appoint an independent, disinterested lawyer of national reputation to renew the investigation and prosecute any wrongdoer who had not yet been brought to book. Attorney General Richardson kept his promise. He appointed Archibald Cox. The theory was that Cox, a distinguished outsider, would not be subject to the political and institutional influences that some felt had impeded the Department of Justice in the diligent pursuit of the truth.

The appointment of Archibald Cox as special prosecutor was not utterly unprecedented; but as far as I know, there was only one clear precedent in the entire history of the Republic. It occurred during the famous Teapot Dome scandal. President Harding's Attorney General, Harry Daugherty, had himself been implicated in the fraud; and President Coolidge appointed a private lawyer, Owen Roberts, to prosecute some of the resulting cases.

I should add in passing that the appointment of special prosecutors has never required special legislation. Attorney General Richardson appointed Archibald Cox under a general statute, still on the books, that gives the Attorney General authority to appoint lawyers outside the Department of Justice to handle government business in special cases. The Attorney General exercises this authority with some frequency in civil matters, but as I have said, it is very rare for him to appoint a private attorney to investigate and prosecute a criminal case.

In 1973, with the support of this Administration, Congress enacted the special prosecutor provisions to which I have referred. These were part of a larger piece of post-Watergate reform legislation, the Ethics in Government Act, which is an interesting study in itself. The purpose of the special prosecutor provisions was to spell out in statutory language and make mandatory for covered positions the extraordinary procedures that had been devised in the Watergate case under the Attorney General's existing discretionary authority to appoint special attorneys for special purposes.

The provisions work in roughly the following way: First, they define a class of officers whose affairs are subject to investigation by special prosecutors. That class includes the President, the Vice President, the heads of the

major executive departments, all of the individuals working in the Executive Office of the President above a specified salary level, and certain high officers in the Department of Justice. Second, the statute provides that whenever the Attorney General receives specific information that any person in this class has violated any federal criminal law, he shall, unless the violation is a petty offense, conduct a preliminary investigation. If he finds at the end of this investigation that the specific information he received is so unsubstantiated that no further investigation or prosecution is warranted, he notifies a designated court. With that notification, the procedure comes to a halt. If he finds on the other hand that the matter warrants further investigation or prosecution, he must apply to the court for appointment of a special prosecutor. The special prosecutor is then appointed, and he is required to investigate the case, to initiate a prosecution, or to dispose of the case in some other fashion, as the evidence or his judgment warrants, all in accordance with the terms of his appointment, as defined by the court. Finally, the statute provides that the special prosecutor shall have independent authority to exercise all the investigatory and prosecutorial powers of the Department of Justice. The statute provides that in the exercise of this power the special prosecutor shall, to the extent he deems it appropriate,

comply with the written policies of the Department of Justice regarding enforcement of the criminal law.

It helps to think of the special prosecutor procedure as a mandatory recusal procedure. In the end, that is what it is. Its purpose is not to change rules of decision, but to change decisionmakers, and thereby provide independent assurance that the rules will be observed. Its purpose, in short, is to protect the criminal justice system from the danger that many perceived in the events of Watergate itself -- the danger that the Department of Justice cannot or will not enforce the criminal law in the high offices of the Government. The theory of the procedure is that this danger can best be avoided -- that the perception and the reality of evenhanded justice can best be ensured -- if the Department is required to recuse itself in these sensitive cases in favor of another decisionmaker, the special prosecutor.

There is irony here -- irony in abundance. To ensure regularity and objectivity in the administration of the criminal law, we have found it necessary to create a special office, a special jurisdiction, a special procedure; yet special sections have never held an honored place in our jurisprudence. They are rightly condemned for their tendency to promote irregularity and special treatment, unequal application of law and policy, arbitrary action without

accountability or review, the very things that the special prosecutor provisions are designed to prevent. My firm belief is that the special prosecutor provisions serve an important function; but I also believe that we must keep our principles before us. We have taken arms against a great evil; but we have selected a weapon that must be used with care.

My experience with the Act has convinced me that we need to consider several changes. First, if we believe (as I do) that the special prosecutor process necessarily creates inequality, we should look to the scope and extent of its application and attempt to limit its use to circumstances in which countervailing considerations clearly justify the special treatment that it tends to produce. The special prosecutor process should be used, in my view, only in cases involving those high offices and those allegations of serious crime that can fairly give rise to a public perception that favoritism will or may be accorded to the powerful in Government. Second, we should remove from the process the unnecessary elements that increase the potential for uneven justice. Lastly, we should add safeguards that are consistent both with the ideal of equal justice and with the basic purposes of the Act.

With regard to the first point, I note that the Act now covers a wide range of officers and employees -- from the President, the Vice President and the Cabinet Officers, to the

individuals in the Executive Office of the President who are paid at a rate not less than Level IV positions in the Executive Departments. In all, some 240 persons are covered. Most of them are unknown to the public and to the Department of Justice. Most hold considerably subordinate positions. In my view, we should consider limiting the coverage of the Act, insofar as it applies to the Executive Office, to truly high level positions.

In addition, the Act now covers officeholders even after they leave the Government. It covers them for the full term of the President who appointed them and for that President's second term, whether they are still in the Government or not. It also covers them for the full term or terms of the successor President if he or she is of the same party. Thus, an individual can be subjected to these special provisions for as long as 16 years regardless of when he leaves office. In my view, there can be no realistic fear or perception of favoritism if an individual has been out of office for that long, and I would therefore propose that the Act be amended to cover officeholders only for the term of the President who appointed them or for three years after they leave office, whichever is longer.

Because the Act is triggered whenever the Attorney General receives specific information about any crime, except petty offenses, three unnecessary dangers are created: a

significant number of meritless preliminary investigations are required, there is a substantial risk that the process will be invoked for trivial matters, and there can be an undue proliferation of individual special prosecutors operating outside the safeguards of the regular prosecutorial process. It seems to me that we could ameliorate these difficulties, while sacrificing none of the objectives of the Act, if we removed misdemeanors from the coverage of the Act and limited the scope of the preliminary inquiry to cases in which the Department has received specific information sufficient to constitute a reasonable ground to investigate an allegation that a federal felony has been committed. Felonies are commonly understood to be serious offenses associated with moral turpitude. Removal of the misdemeanor class of offenses from the coverage of the Act will help to ensure that special prosecutors are appointed only in the serious cases that justify a special process.

My next point concerns the relation between the procedure itself and the normal exercise of prosecutorial and investigatory discretion by the Department of Justice. In normal circumstances, the Department of Justice does not investigate or prosecute every possible felony that comes to our attention. We exercise discretion. We stay our hand in individual cases, not for the purpose of advancing or threatening personal interests, but for the purpose of doing justice and advancing the common

good. This discretion is one of the great prerogatives that devolves upon us under the common law. It is enormously important, and it is honored every day in tradition and practice.

Any discretionary power can be abused; and if our investigatory and prosecutorial discretion could be exercised capriciously or irregularly, it would threaten, not advance, the interests it is designed to serve. For that reason we have developed guidelines that structure and restrain the exercise of our discretion in individual cases, thereby introducing a measure of principle and regularity into a sensitive, subjective process. In some instances these guidelines take the form of explicit, written standards concerning specific statutes and specific kinds of offenses and procedures. In other instances they are unwritten understandings or policies that are followed within the Department.

What is the point? If the purpose of the special prosecutor provisions is to ensure that the high officers in the Government will receive fair and impartial treatment at the hands of the Department of Justice, I am not sure that the statute goes as far as it might to accomplish that objective. It does not expressly take into account the normal patterns of investigatory and prosecutorial decisionmaking. Consider the question of mandatory investigations. The Attorney General is required by the statute to conduct an investigation whenever he receives "specific information" that an individual in the covered class has committed a federal offense other than a petty offense. This

is true whether or not the offense is one that the Department would investigate or prosecute in the normal course. By the same token, unless the Attorney General finds that the charge is so unsubstantiated that no further investigation or prosecution is warranted, he must apply for appointment of a special prosecutor, who must usually conduct an additional investigation on his own. The net result is clear: Whenever a high officer has the misfortune to be the target of a specific accusation, he may be subjected to a full-blown criminal investigation by federal authorities when an officer of lower rank, or a private citizen regardless of station, would be left alone. Moreover, since investigations are always difficult to complete, there is a danger of proliferation of special prosecutor appointments simply because there are some investigative steps that cannot be completed within 90 days, the time allowed for completion of the preliminary investigation.

I submit that from the standpoint of ensuring regular, impartial administration of the law, this result should give us pause. Anyone who has been subjected to a federal criminal investigation knows that it is no laughing matter. It can exact a great cost from the target himself and from the Government as well. The question that deserves creative thinking from all of us is whether this cost is unavoidable given the salutary objectives the special prosecutor provisions are designed to secure. I note that the statute already allows the Attorney General some measure of discretion. He can bring the procedure to a halt if

he determines after the preliminary investigation that the charge is so unsubstantiated that further action is unwarranted, and we are protected against abuse of that discretion by the requirement that he report his decision and the reasons for it to the court. Without expanding on that principle unduly, it might also be possible to permit the Attorney General to bring the process to a halt if, after receiving a specific accusation and conducting a preliminary investigation, he can say with assurance in a report to the court that the offense is not one that the Department would investigate or prosecute under the standards that govern investigatory and prosecutorial decisions in ordinary cases.

How should the procedure work once the special prosecutor is appointed? If my thesis is correct -- if the purpose of the exercise is to ensure that the target of the investigation will receive the same treatment in the end that any other person would receive at the hands of an impartial Department of Justice -- then that principle should be made a part of the special prosecutor's commission. The statute should make it clear, for example, that the special prosecutor's duty is to follow the established written policies of the Department governing the conduct of all criminal investigations and the prosecution of all offenses. Moreover, the statute should not only authorize but encourage the special prosecutor to confer with appropriate officers in the Department to ascertain their views regarding the effect of departmental policy in cases similar to the one under investigation. To be sure, any process of consultation cannot

be permitted to impair the independent judgment of the special prosecutor. But independent judgment is not enough. Judgment, even independent judgment, must be informed so that it can be fair.

IV.

I now turn to a much simpler problem, although it is one that affects more people far more directly than the esoteric business of special prosecutors. It is the problem of balancing, on the one hand, the Government's need to acquire financial information for legitimate governmental purposes against, on the other hand, every citizen's need for privacy in the business and personal records that are held by his bank and the other financial institutions with which he must deal day to day.

In 1978 Congress enacted, and the President approved, the Right to Financial Privacy Act. This was another star in the constellation of post-Watergate reforms. It was not linked as closely to the specific events of Watergate as some of the others, but it was fostered by the climate of opinion that grew out of Watergate. It was fostered, in particular, by the belief that officers of government cannot be trusted to deal justly and fairly with sensitive personal information. Left to their own devices, they will acquire it for improper purposes; they will disclose it for improper purposes; and they will keep it and use it for improper purposes.

The Right to Financial Privacy Act provides a remedy against the improper acquisition, disclosure, and use of

financial information generated by dealings between private individuals and financial institutions. It does this by creating a series of procedures that must be followed by the Government, and by the financial institutions themselves, whenever the Government seeks to obtain personal financial information in their possession. These procedures are designed to permit government access whenever access is sought for a legitimate purpose, but they require that access be obtained through an orderly process, and they generally require that notice be given to the individual in question before the disclosure to the Government occurs. The purpose of pre-disclosure notice is to enable the individual to go into court and contest government access if there is some basis in law for contesting it. The Act provides generally that if the individual does object to the disclosure, the Government must be in a position to show that it has reason to believe that the information in question is relevant to a legitimate investigation.

The difficulty with the Act lies not so much in the legislative intention as in the consequences the Act has generated. I have already referred to the critical role that financial information plays in the detection of major federal crimes -- organized crime and white-collar crime in particular. The Act recognizes the Government's need for information of that sort. It permits the Department

of Justice to file with banks and other financial institutions formal written requests for financial information relating to legitimate law enforcement investigations, and it permits the institutions to comply with these requests, assuming the procedural requirements of the Act have been satisfied. But through some legal and social chemistry we have not yet fully understood, the Act or its offspring in the States have produced a sea-change in the willingness of financial institutions to comply with mere requests for information. Some of them are willing to comply, but many of them are not.

What we have, then, is a system that has the effect of requiring us to resort to compulsory process in some cases in which, under the old regime, we could have proceeded by simple request. That in itself would not be a problem if the Department of Justice had power to issue compulsory process against financial records for general investigatory purposes. We do not. It is true that we can rely in proper cases on grand jury process and trial subpoenas. But the province of the grand jury process is a special one, and the process of the grand jury should be used only for grand jury purposes. Likewise, the trial subpoena is of limited use in the early stages of a case. I think it would not be an overstatement to say that in too many instances the Right to Financial Privacy Act can have the unintended effect

of denying financial information to the Department of Justice for use in legitimate criminal investigations at the pre-grand jury, pre-trial stage.

What is the solution? We can do three things. We can accept the situation. We can gut the Act. Or we can give Department of Justice investigators a right to demand, not simply request, financial records. I favor the last course. That is the approach taken in the proposed FBI charter, and I support it.

Additional difficulties arise under the Act when and if the Government is in a position to demand, not simply request, access to financial information. The Act provides that whenever a subpoena or an administrative summons is issued for financial information, then, as a general rule, the individual in question must be given notice and an opportunity to raise legal objections to disclosure. This is reasonable as a general requirement applicable to the Government at large. The Act also provides that there are cases in which pre-disclosure notice need not be given, and to that end it permits a court to order that the notice be delayed if the Government applies for a delay and demonstrates in its application that a delay is warranted.

The difficulty lies with the way the notice-delay procedure operates in fact. The simplest problem in the criminal law enforcement field is that the conscientious

preparation, submission, and defense of a full-blown application for a court order, even an ex parte order, is an awkward process in the best of circumstances; and this is especially true in the early stages of a criminal investigation, when timing and finesse are of the greatest importance. I should add in all candor that the burden of this procedure is probably not made lighter by the willingness of the participants to bear it. Courts and federal prosecutors comply with the law, but these ex parte applications do increase the work load of the courts, and in some instances they inject the courts into the investigatory process at an unusually early stage. That sort of early intervention -- intervention by the very body that may later have to judge the case -- is something that meets with resistance on both sides of the bench, and rightly so.

Apart from the awkwardness of the procedure itself, there are the substantive requirements that must be satisfied before the court can act on the Government's application and order that notice be delayed. The Government must be in a position to provide the court with information showing that pre-disclosure notice would (a) endanger lives, (b) cause a flight from prosecution, (c) lead to destruction of evidence or intimidation of witnesses, or (d) otherwise seriously jeopardize the

investigation by causing some similar obstruction. In a sense, these requirements are akin to the disclosure requirements of the Tax Reform Act of 1976. They seem to require the Government to know beforehand what it is trying to find out. Is the individual in question a crook? Will he threaten lives? Will he destroy evidence? Will he flee the jurisdiction? Will he do something else that will threaten the investigation in a similar way? In many cases we are not in possession of hard evidence that will answer these questions beforehand, and we must therefore either forego access to financial records or risk notice.

The problem presented by the awkwardness of the procedure itself could be substantially reduced if notice could be deferred on a written finding by the Attorney General or by the head of the relevant agency that there is reason to believe that pre-disclosure notice would result in one or more of the adverse consequences already specified in the Act. This is the approach taken in the proposed FBI charter, and I support it.

I am not sure what to do about the larger problem. The theory of the Act seems to be that the decision whether to defer notice or not should be made on a case-by-case basis and that delayed notice should be justified by facts already in the Government's possession, unique to the investigation in question, tending to establish that pre-

disclosure notice will result in some gross obstruction. But does that theory really make sense for all categories of investigations? One could argue with some cogency that in light of all the safeguards that are already built into the criminal process, there is no overriding necessity that requires the target of, say, a federal felony investigation to be given notice of the investigation as a condition of access to relevant evidence in hands of third parties. To be sure, the Government should document the access, an identifiable official should be held accountable for it, the access should be disclosed in due course, and there should be a judicial remedy for any impropriety. But with those safeguards, it seems to me that if we are willing to admit the right of the Government to obtain the information in the first place, we need to ask ourselves whether there is any compelling interest to be served by erecting a disclosure procedure that sacrifices one of the oldest principles in criminal investigation: the principle that you do not inform the target that he is under investigation until the time is right.

V.

The last statute I want to discuss is the so-called Hughes-Ryan Amendment. I have decided to discuss it because it is important, and because I want to demonstrate that I am not so captivated by the special interests of the Department of Justice that I can think of nothing else.

The Hughes-Ryan Amendment was a response to a second set of discoveries that were made during the Watergate period -- the discoveries relating to the CIA and its covert operations abroad. Alarmed by the prospect that significant foreign operations by the CIA -- operations other than those ordinarily involved in the process of gathering foreign intelligence -- could proceed in secrecy indefinitely, without review in the legislative branch and beyond the power of anyone but the President to recall or control, Congress enacted the Hughes-Ryan Amendment. This statute, as originally enacted, required among other things that the President make certain findings regarding proposed covert foreign actions by the CIA and that he report them in timely fashion to "the appropriate committees of the Congress." The statute was implemented in such a way as to require reporting to a number of different committees, Senators, Representatives, and staff members.

Until very recently, the Hughes-Ryan Amendment was the subject of considerable debate. That debate revolved around two basic issues, among others: First, to whom should the covert action reports be given? Second, should the Executive be permitted to begin a covert action before the relevant report had been filed?

As regards the first issue, it became apparent some time ago that the Hughes-Ryan Amendment no longer served a useful purpose insofar as it required that covert action

reports be given to an indeterminate number of committees, Senators, Representatives and staff members. Given the approval and reporting system that evolved after passage of Hughes-Ryan, and given the intervening creation of the two intelligence committees in the House and the Senate, which included members from the various committees that received these reports directly, it seemed advisable to narrow the reporting requirement to those two committees. That would provide greater security for covert activities important to U.S. interests abroad, while preserving congressional oversight.

The issue of when these reports should be provided to Congress was a thorny one. Under the general practice that evolved, the Executive provided notice of the required Presidential finding prior to the initiation of the activity itself, even though the Amendment required only "timely" notice. This practice satisfied the interests of the Congress, yet it allowed the Executive the flexibility to delay a report if delay was advisable in a particular case. Legislation requiring prior reporting in every case would have altered the accepted practice and removed this flexibility. Thus, this Administration took the position in discussions with Congress that new legislation should not require prior notice in all cases, but should embody the accepted practice and not impair the constitutional positions of the two branches. Certainly there was ambiguity in the accepted practice, but this ambiguity simply reflected

the dynamic constitutional relation between legislative and executive power in the conduct of foreign affairs.

I am pleased to state that the House and Senate have passed, and the President signed on October 14, new legislation dealing with congressional oversight of the intelligence agencies. The new statute amended the Hughes-Ryan Amendment to require that reports of Presidential findings be given only to the House and Senate Intelligence Committees. Further, the statute and its legislative history make clear the intention of Congress to adopt, not alter, the current practice and to preserve an important measure of flexibility for the President and the Executive Branch.

VI.

Every public speaker has a privilege and a duty. His privilege is to improve on the truth where the truth itself is bald and unconvincing. His duty is to have a point of view and to state it clearly. I will let you judge whether I have used my privilege to good advantage. I can say with assurance that I have attempted to do my duty. I trust that my point of view -- the special angle of vision I bring to this subject as Attorney General -- has been evident throughout my discussion. If it has not, I want to make a full and open confession before I close.

Commentators speak occasionally of "the pendulum" of reform. They are referring of course to the swings in public

mood and political action that occur over time. I admit that this metaphor -- the pendulum -- has some appeal, but I am not beguiled by it. The pendulum is a closed system. It has a capacity for movement but not a capacity for creative change. It oscillates around a center that is fixed. It perpetually abandons one position for another, but it never takes a position that is really new. It takes only those positions that have already been taken, and abandoned, in previous cycles.

I prefer a different model. Society is an organism. It moves and changes over time. It swings and shifts in direction, correcting errors, adjusting to new conditions; but if it is healthy, these changes are part of a process of growth; and they lead in time, not to old positions, but to new ones -- positions that are stronger and more mature. A healthy society, in the process of reform, is not a pendulum. It is a tree growing toward the light.

When I say that we should look critically at the post-Watergate reforms, it is this creative process that I have in mind. I am not a revisionist. I do not want to revert to some prior position or to oscillate around a fixed center. To the extent that law alone can make them stronger, my belief is that our democracy and our legal system are stronger today than they were fifteen years ago; and I believe we can make them stronger still. The reforms of the post-Watergate period have carried us forward. Our task is simply to continue that process.

If we can draw any lesson from our study of the post-Watergate reforms, it is the lesson of the unintended consequence. When a nation takes great action in a new legislative field, we must expect that the action will generate consequences that we did not adequately foresee, and we must therefore be willing to subject the action to examination after the fact, when all the consequences are known. We cannot be complaisant. We cannot be content to congratulate ourselves on the purity of our original legislative intentions, the soundness of our values, the beauty of our policies in theory. We must find out how our policies actually work. We must acquaint ourselves with facts. We must be pragmatists.

This is a congenial prescription. Americans are pragmatists by nature. I have a second and final prescription that is less congenial, but no less important.

American lawyers are trained in the Whig tradition. We tend reflexly to think of civil liberty as something that results from a limitation on the power of Government, and from the earliest days of the Republic we have labored long and well to cultivate the notion that law can impose that limitation, at least in part. The legislation we have discussed today is in that grand tradition. It was erected to limit the power of the Government and to prevent the abuse of power.

In reviewing this legislation, however, we need to remember that law, in its relation to Government has a

second function. It does not exist simply to limit the Government's power. It creates and confers that power in the first instance. Law confers power so that Government can act in a regular and efficient way, the better to secure what the Framers of the Constitution called the "blessings of liberty."

This is a lesson that is brought home to me daily at the Department of Justice. I have spoken today of a number of things but particularly of the criminal law and our duty to enforce it. We lawyers are not inclined to think of, say, criminal law as something that exists to secure civil liberty, but plainly it does. The evidence is all around us. Our free traditions give us the right to vote; but what would that right be worth if our elected officials could be coerced or bribed with impunity? Our free traditions give us the right to pursue happiness in the economic world; but how could we enjoy that right if it could be taken from us by frauds and conspiracies in the market place? The power of the Government -- even the everyday sort of power that the Department of Justice exercises in the investigation and prosecution of mundane federal crimes -- can and must be used effectively, under law, the better to secure liberty; and if I could leave you with one thought, it would be this: that whenever law confers power and enables the Government to exercise it effectively, it can render the same service

in the cause of liberty as the restraints on power that are the glory of our free tradition.

In the end, we are not required to choose between a Government so restrained that it will not work and a Government so unrestrained that its power becomes abusive and intolerable. Both of those evils are a threat to liberty, and in erecting defenses against the one, we need not embrace rigid systems that will prevent us from dealing with the other. The danger is a common danger. A range of acceptable responses, is open to us, and we are free to choose among them. What is required is that we maintain our creative faculties, that we exercise steady, pragmatic judgment, and that we remain sensitive to all the needs that must be met if our country is to be healthy and strong.

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