Mr. Levi at Justice

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Edward H. Levi became Attorney General of the United States on February 7, 1975. At the swearing-in ceremony, President Ford, who had succeeded President Nixon some five months before, spoke of the new Attorney General's responsibilities, particularly his responsibility to make "the Department the great Department that it has been and must be if all of our citizens are to have faith in the laws of our land." That faith, the President said, "is vitally important for our country at this very troubled time."

After taking the oath of office, Mr. Levi recalled his service in the Department of Justice from 1940 to 1945; as special assistant to the Attorney General and as first assistant, consecutively, in the War Division and in the Antitrust Division. He then spoke, perhaps intending an implied contrast with the earlier period, of the circumstances that had occasioned his return:

- We have lived in a time of change and corrosive skepticism and cynicism concerning the administration of justice. Nothing can more weaken the quality of life or more imperil the realization of the goals we all hold dear than our failures to make clear, by word and deed, that our law is not an instrument of partisan purpose and it is not an instrument to be used in ways which are careless of the higher values which are within all of us.²

Just under two years later, with the change in administration following the election of President Carter, Mr. Levi's term as Attorney General ended. In his farewell remarks to the Department, he repeated the sentences quoted above. He then said, "Of course problems remain—that is the life of the law. But we have shown a willingness to confront problems directly, to deal with them as openly as possible, to have placed the administration of justice on


a foundation of fairness and not upon favor."

Mr. Levi’s remarks emphasized an institutional, rather than a personal, achievement—an achievement that renewed the strength of the Department’s tradition. It was, he trusted, a tradition of ideals that would continue to characterize the Department’s work: “fairness, candor, sensitivity to the needs of the people, a willingness to face hard choices, and non-partisanship.”

“We have been engaged,” Mr. Levi concluded, “in a ministry of justice.”

I. THE CRISIS OF LEGITIMACY

The language that Mr. Levi used to describe the problems the Department confronted at the outset of his tenure and what he believed had been accomplished suggest the difficulty of providing any obvious gauge of his achievement. Mr. Levi did not perceive the problems as programmatic in the usual management sense, and the program of the Department—the set of immediate objectives and tasks that guided the Department’s day-to-day activities—remained, at the end of Mr. Levi’s tenure, essentially what it had been at the beginning. In areas of enforcement responsibility and emphasis, there was no significant departure from what had gone before. Nor were the problems in any direct way related to personnel. To be sure, there were comings and goings throughout Mr. Levi’s term, but the changes in general marked no necessary dissatisfaction with what had gone before. The problems, in short, were not of the kind implied by the stock of journalistic phrases—cutting out deadwood, cleaning house, and the like—often used to describe vigorous executive action for reform.

Perhaps it is not very helpful to speak in terms of “problems” at all. The term implies breaches of accepted norms, departures from understood standards of performance. Such problems there had been, of the most serious kind. But by the time Mr. Levi became Attorney General, those problems had been exposed and, in their old form, largely removed. The task Mr. Levi faced was not so much to solve the problems themselves as to address their corrosive aftereffects on the legitimacy and integrity of the Department’s functions in critical areas of its work. Most important was the question of whether such legitimacy could be restored at all so long as the Department remained an integral part of the executive

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* Id.
* Id.
branch.

This “crisis of legitimacy,” as Mr. Levi termed it, ran much more deeply and was much more dangerous than may now appear. Its clearest source was, of course, the complex set of events called “Watergate.” That set of events had many aspects, but a central element was the apparent effort by the White House to avert the Department’s investigation and prosecution of a politically motivated crime by invoking national security considerations. This element of Watergate was seen, in turn, against the backdrop of a profoundly unpopular war—a war peculiarly identified with the executive branch in origin, execution, and consequence. Its history had made invocations of national security to many automatically suspect, to some automatically fraudulent. Indeed, I think it is accurate to say that to some parts of the press, some parts of the public, some parts of the Congress, and even some parts of the executive branch itself, the shock that the Watergate revelations produced was mixed with a certain satisfaction, the kind of satisfaction that comes from having one’s darkest suspicions confirmed.

The Watergate inquiries led to a canvassing of what appeared to be associated episodes and enterprises—the “Plumbers,” the “Enemies List,” the “Huston Plan”—all apparently designed to employ law-enforcement resources, or White House agents in lieu of law-enforcement resources, for political ends. The lines between law-enforcement policy and politics, between protecting the national security and suppressing political opposition, seemed to be deliberately blurred. Other revelations followed pointing to the Justice Department itself. In particular, longstanding rumors about the Federal Bureau of Investigation turned out to have some basis in fact. In Mr. Levi’s first testimony before Congress as Attorney General, he confirmed that former Bureau Director J. Edgar Hoover had maintained dossiers on politically prominent figures and that the Bureau had been used, at various times during Mr. Hoover’s tenure, to gather political intelligence, to investigate con-

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* See id. at 7.

* See id. at 3-7.

gressional critics of the Administration, and to disseminate to the Administration information about critics for possible use in discrediting them.11

The flagrant political use of the Bureau, as well as its use by its own director in ways apparently designed to protect his bureaucratic domain, had no possible justification. But coupled with revelations of such plain abuse came revelations of a different sort. There was information that, on presidential orders, the Bureau had conducted electronic surveillance of present and former executive branch officials and newspaper reporters who were suspected by various Presidents of being involved in leaks of classified information.12 There was information that, for over twenty years, ending only in 1973, the CIA had intercepted mail between United States citizens and residents of the Soviet Union13 and that the National Security Agency, using extraordinarily sophisticated equipment together with a “watch list” of individual names, had monitored international telecommunications.14 These are only a sample of the kinds of practices that came to light. Many had been pursued for decades and some were common knowledge. Yet they came to be discussed as if they were of a piece with the Watergate events, part of a continuum of the threat that Watergate represented to the liberties of the country.

There was an element of truth in that view. Watergate was a peculiar scandal, at least as American political scandals go. It involved, not venality, but the desire to obtain and preserve political power. As in most incidents in history in which extra-legal means have been used to achieve political ends, there is no reason to doubt that the participants thought they were acting for the good of the country—that, in their view, their political causes and the policies needed to save the country were identical. But if this is so, then how much difference is there, in terms of motivation at least, between, for example, the Ellsberg break-in and the Bureau’s wiretaps of National Security Council staff and former staff? Were they not both concerned, in essence, with protecting the Presi-

11 Id. at 11; see also 6 Intelligence Activities, Senate Resolution 21: Hearings Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 1st Sess. 471-82 (1976) (reprinting staff report on political abuse and the FBI) [hereinafter cited as Intelligence Activities].
12 6 Intelligence Activities, supra note 11, at 479-80.
dent's national security program by silencing or discrediting its critics or, what might be even worse, by concealing the program from its critics' view? It was very difficult to keep a grip on the possible differences among the various kinds of conduct that came to be known; it was tempting to view the whole range of conduct as potentially—and given what had come to be known, almost presumptively—corrupt. Against the palpable threat to individual security and liberty there seemed to appear, again and again, only the vague justification of national security. And even if some national security concerns might be real, their precise contours could be known, if at all, only to the very sorts of executive branch officials who, it was widely thought, had proved themselves so ready to abuse their trust. The problem thus was aggravated by the very secrecy that, according to executive branch officials, national security matters inherently require.

All of this had serious consequences for the Department of Justice. In the most obvious way, it called into question programs for which the Bureau and, therefore, the Department, continued to have direct operational responsibility. In a speech toward the end of his term, Mr. Levi described an event that occurred in his first hours as Attorney General:

Just as I was settling into my chair and observing the handsome wood paneling of the office, an FBI agent appeared at my door without announcement. He put before me a piece of paper asking my authorization for the installation of a wiretap without court order and he waited for my approval. . . . I asked the agent to leave the request with me—I think, perhaps, to his surprise—so that I could consult other officials in the Department.¹⁵

Almost every day brought the necessity of like decisions—decisions that had significant consequences both in themselves and in what they said about similar decisions in the past and for the future. Mr. Levi's predecessor, Attorney General Saxbe, had already taken important steps, under the direction of the President, to introduce procedural regularity and to require clear authorization by the Attorney General for all warrantless electronic surveillance within the United States.¹⁶ But, as I shall describe below, the law, so far as it was embodied in statutes and judicial decisions, was uncertain. It

¹⁵ Levi, Address Before the Los Angeles County Bar Association 2-3 (Nov. 18, 1976) (Dep't of Justice News Release).
¹⁶ Id. at 5-6.
left the President and the Attorney General free to act—indeed, required to act—but at risk that their actions subsequently might be found unlawful. And the likelihood of this outcome, to many observers, seemed to have increased in light of the "Watergate" prosecutions, in which various defendants failed to prevail with defenses based on the President's authority to engage in otherwise unlawful acts to protect national security interests.

These cases reflected a distinctive aspect of the Department's dilemma. On the one hand was the Department's responsibility, delegated to it by the President and implemented by the Bureau, to conduct national security investigations. These investigations might occasionally require actions that, absent lawful authority, would have been crimes. On the other hand was the Department's responsibility to enforce the law. The Department was in the position of having to decide both what kinds of national security investigative activities were unlawful and who should be punished for engaging in them. Of course, this was strictly true only with respect to criminal prosecutions; Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics had given a private right of action for violations of fourth amendment rights. Still, the Department was generally left to be the judge of its own cause, and while ordinarily this might seem to be a comfortable position, in the post-Watergate circumstances it was not. Failure to prosecute past Bureau conduct opened the Department to the accusation that it was shielding the unlawful and itself behaving lawlessly.

The heart of the dilemma was the Department's position as a part of the executive branch. To many minds, the position was, inevitably, legally and even ethically ambiguous. The dilemma was most obvious, perhaps, with respect to the Department's own intelligence-gathering responsibilities. But there were other effects, the potential consequences of which were broader and, if possible, more dangerous. Watergate appeared to have demonstrated the susceptibility of the Department to political influence in making its enforcement decisions. For example, the ITT matter suggested to some minds that antitrust settlements might be encouraged by

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partisan considerations.\textsuperscript{20} Even more reprehensible, perhaps, was the thought that criminal prosecutions might be avoided, mitigated, or, worst of all, induced in part or in whole by calculations of political consequence. Watergate—speaking generically—thus opened the Department to contentions that political calculations had been at work in a wide array of cases.\textsuperscript{21}

Here, too, the possible distinctions appeared to be, for many minds, most elusive. The notion seemed to be that if a President had interposed himself in some cases to achieve a partisan political purpose, there was a risk that impermissible considerations inevitably could creep in whenever the President sought to guide the Department's policy decisions. Thus, for example, in civil rights cases—in particular, school desegregation cases—was it permissible for the President to decide what remedies the Department should seek? There was an argument that it was not—that the question of remedies was one of law and therefore could be decided only on the basis of previous judicial decisions. If this was so, the President, as a political officer, could have no voice.

To many who viewed the events of the time, there seemed to be only two institutional possibilities. First, the Department of Justice could remain an integral part of the executive branch, within the President's responsibility and subject to his direction. In that event, however, the Department would be viewed as little more than the President's shill, retailing the views of the law that served presidential prerogative and that happened also to serve the President's political convenience. Alternatively, the Justice Department could be made, in whole or in significant part, independent of the executive branch and effectively converted into the investigative and prosecutorial arm of the federal courts. The latter alternative could take a variety of forms, some of which might require no explicit constitutional change. One device would be merely to establish a pattern of complete operational independence between the Department and the White House, quarantining the Department from presidential direction. Another would be to spin off functions of the Department to independent agencies created by Congress and to make the agencies' actions expressly

\textsuperscript{20} It was alleged that the International Telephone & Telegraph Company had offered a $400,000 contribution to the Nixon Campaign on condition that the Justice Department drop an antitrust suit against the company. See Senate Select Committee, supra note 7, at 127-29; id. at 1175 (statement of Sen. Weicker).

subject to judicial review. At various times in the post-Watergate era, measures were proposed reflecting one or another of these methods.22

In The Coming of the French Revolution, Georges Lefebvre described the revolution’s violence against the French aristocracy as a reaction, not to the aristocracy’s strength, but to its weakness.23 A similar observation has been made about the Presidency of the Watergate era,24 and there is considerable truth to the point. Although the President seems to preside over a vast bureaucratic apparatus, there are very powerful centrifugal forces within the government that resist presidential leadership. The stability and growth of governmental programs are commonly assured through horizontal, tacit alliances among executive branch offices, congressional committees and their staffs, and interest groups that stand to gain from the programs. This is true as much of “legal” programs as it is of others. But legal programs display a very powerful additional element to the same effect. It is not an attack on the good faith or good intentions of government lawyers and officials to suggest that, within the government itself, there are significant pressures to place decisions beyond the control—even beyond the consideration—of policymaking officials by identifying policy questions as questions of law and therefore as peculiarly within the province of the courts.

The intense—and largely legitimate—fears that Watergate raised of an executive branch seemingly incapable of governing itself gave significant impetus to the view that the President, in a wide range of matters, ought to have very little independent authority. The model of the executive branch seemed to be that of a contending force within the government, seeking to secure its own power as against all other branches and institutions, principally by invoking the national security interests that it claimed uniquely to represent. In contrast with this model of the executive branch was an implied model of Congress as the representative of the general

22 See, e.g., H.R. 14,476, 94th Cong., 2d Sess., 122 Cong. Rec. 19,538 (1976) (bill to afford any citizen the standing to ask the Attorney General to appoint a special prosecutor in cases where high executive branch officials have a direct personal stake in the outcome of a proposed criminal investigation or prosecution, and to obtain judicial review of his failure to do so); see also Rogovin, Reorganizing Politics out of the Department of Justice, 64 A.B.A. J. 855, 857 (1978) (advocating civil service appointments of Department officials and an end to Department involvement in the judicial selection process).
and complex interests of the people, defending itself and the people against assertions of presidential prerogative. Finally, there was the model of the courts as the unique institution of law. To be sure, the law was statutory as well as constitutional, and to that extent it required congressional sanction; but the sanction often seemed little more than a general congressional grant to the judiciary of authority to govern. Within these models, the Department of Justice, as part of the executive branch and yet charged directly with enforcement of the law, seemed to sit with some discomfort. How could it be at once in the service of the executive and in the service of the law?

II. RESPONSIBILITIES OF THE EXECUTIVE BRANCH

Anyone who had read The Crisis in the Nature of Law, Mr. Levi's 1969 Cardozo Lecture, would have known that he rejected both this way of posing the question and the concepts on which the terms of the question are based. The grounds of this rejection did not lay in any special faith in the virtues of the executive branch. To the contrary, Mr. Levi expressed deep concern about overweening executive power as one of the phenomena testing the rule of law: "With the almost disappearance of any doctrine of unlawful delegation, the growth of executive orders, the reliance on inherent authority, government executives at many levels pursue good ends as far as compulsion can take them, finding necessity in whatever they do." The grounds of rejection lay, instead, in Mr. Levi's concept of the meaning of the rule of law and its function as the source of governmental legitimacy. The concept, Mr. Levi said, was "old-fashioned." It viewed law in its primary role neither as a social science describing how institutions behave nor as a tool for predicting what courts will say and do. These services, Mr. Levi said, are subsidiary to "law's major commitment." That commitment "is to develop concepts, and to maintain and operate procedures which enable a sovereign community to be governed by rule for the common good, the attainment of human values, and to make that rule effective." Law, in Mr. Levi's view, is the process of thought—the analytical structure with "customary ways and momentum"—that allows the society to order itself, to maintain

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26 Id. at 128.
27 Id. at 132.
28 Id.
29 Id. at 132-33.
its values and to respond to changing patterns and needs. Mr. Levi described the law in these terms, although more formally, in *An Introduction to Legal Reasoning*:

Legal reasoning has a logic of its own. Its structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences or similarities. Social theories and other changes in society will be relevant when the ambiguity has to be resolved for a particular case. Nor can it be said that the result of such a method is too uncertain to compel. The compulsion of the law is clear; the explanation is that the area of doubt is constantly set forth. The probable area of expansion or contraction is foreshadowed as the system works. This is the only kind of system which will work when people do not agree completely.

In the Cardozo lecture, Mr. Levi emphasized that fidelity to the analytical structure and rules of law could impede action, to the possible frustration of those fixed on achieving certain social ends. A central purpose of law is to delimit the legitimate field of official action in light of society’s valuations of the interests it affects; law “assumes and guards particular structures—governmental and private arrangements for determinations; inherited and developing concepts within the legal system for scrutinizing and establishing legitimacy, for protecting the private areas of life, and for selecting and enforcing rules which are backed by the special coercion of the state.”

The concept of law that Mr. Levi described has important implications for legal institutions and their relationships, although the implications are ideals, not always realized in practice. Mr. Levi insisted that the function of law does not belong exclusively to the courts, with all other institutions merely to act as advocates of interests or to set the courts in motion. Instead, the obligations of the law, with the special reasoning and candor it requires, fall on all who exercise public responsibility:

While decrying the decline in quality and status of legislation, and the absence of proper standards or habits for administrative and executive action, there is a natural tendency—in part to avoid the complexity of these interrelationships—to think

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30 Id. at 133.
31 EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 104 (1949).
32 Levi, supra note 25, at 133-34.
33 Id. at 133.
of formal law as reflected solely in the work of courts. But the concerns of a system of law cannot be limited to the work or reactions of courts.\textsuperscript{34}

To limit law in this way, Mr. Levi continued, would overwhelm the courts, placing on them burdens that they are unqualified to carry and posing to them questions that they cannot readily answer—or can answer only in ways skewed by the inherent limitations of their special procedures.\textsuperscript{35} To treat law in this way seems to suppose that other institutions are essentially lawless, except to the extent that their actions are susceptible to judicial review.

For Mr. Levi, the discipline of law must have broader scope; it must inhere in the function of every public officer, indeed of every citizen. It is not something essentially foreign to, and imposed upon, government by the judicial apparatus, but a vital part of the way in which policy is formed and evolves in a freely cooperating society:

If there is any validity to the concept of a commitment of law as a whole upon the workings of society, then law does relate to political realities and to policy, not as an equivalent of social policy, but with special purposes which it seeks to implement. These special purposes . . . go beyond the support and disciplining of legitimacy; they include the guidance of the society into a direct discussion and understanding of values, policies, and their consequences.\textsuperscript{36}

These basic concepts appear repeatedly in Mr. Levi's statements as Attorney General. In his 1975 Law Day address at the University of Nebraska,\textsuperscript{37} Mr. Levi said that "the appeal to the judges as the only spokesmen of justice results from a failure to recognize the more subtle nature of the rule of law in this nation."\textsuperscript{38} The rule of law, "if it means anything . . . , refers to the disciplined application of words or ideas to the situations they are called upon to influence."\textsuperscript{39} Seen in this way, the rule of law could not be the exclusive province of the courts: "The whole society uses and interprets the law. And because of that, the law expresses something deep and important about the values we hold as a

\textsuperscript{34} Id. at 138-39.
\textsuperscript{35} Id. at 139.
\textsuperscript{36} Id.
\textsuperscript{38} Id. at 40.
\textsuperscript{39} Id. at 39.
people."\(^{40}\)

Just as the courts have power to speak the law because of "the unique tone in which they render their judgments,"\(^{41}\) so the other branches of government have their special obligations to the development of the law. In the Law Day address, Mr. Levi emphasized the obligation of the legislative branch to clarify areas of ambiguity in the law by appropriate statutory enactments. In particular, he praised legislation, then pending before the Congress, comprehensively revising the federal criminal laws as "an effort to go deep into the reservoir of our values and take the measure of the rules that are supposed to embody them."\(^{42}\)

For Mr. Levi, the Presidency and the Department of Justice were to be seen within the same framework, as part of the lawmaking structure of the society. "The oath of the President is to defend the Constitution, and the Constitution requires that he take care that the laws are faithfully executed."\(^{43}\) The President, to be sure, is elected, but that does not necessarily make the office or its execution partisan. To the contrary, Mr. Levi said, election makes the President accountable for the exercise of his duties, which include the faithful execution of the laws:

The executive branch—no less than the legislative or judicial—is composed of many persons acting sometimes in concert and sometimes in opposition with one another. But when the executive branch acts, the President is accountable. And that is as it should be. It is one of the strengths of the office we should take care to preserve.\(^{44}\)

There would be—had been—instances of partisanship in the enforcement of the laws, and Mr. Levi in no way dismissed these as unimportant aberrations: "The administration of justice must always be non-partisan . . . . [T]here is nothing more destructive than the belief that justice is to be used by those in power to reward their friends or punish their enemies."\(^{45}\) But the importance of the instances lay precisely in the fact that they were, and should

\(^{40}\) Id.
\(^{41}\) Id. at 40.
\(^{42}\) Id. at 41.
\(^{44}\) Levi, Address Before the University of Chicago Law School Alumni Luncheon/American Law Institute 6 (May 21, 1975) (Dep't of Justice News Release).
\(^{45}\) Levi, Address Before the Dedication Ceremonies of the Texas Law Center 9 (July 4, 1976) (Dep't of Justice News Release).
be perceived as, aberrations, betrayals of the basic functions of the office. Far from demonstrating a need to remove responsibility from the President, they required a renewed understanding and clarity about what that responsibility is—about what it means "faithfully to execute the laws."

In considering the functions of the Presidency, Mr. Levi insisted on a radical distinction between partisanship—the manipulation of law enforcement for political advantage—and the interaction of law and policy. The former it was the precise duty of the President to prevent; the latter it was the President's central duty to further. This most apolitical of Attorneys General might well have been able to operate the Department of Justice, had he chosen to do so, with complete disregard of the President's judgments. He altogether rejected that role. He repeatedly asserted that the policies of the Department were, and had to be, the policies of the President, that the Department was the President's arm in enforcing the laws and in helping to assure the lawfulness of executive branch actions. This last point was perhaps most important. For Mr. Levi, the Presidency and the Department of Justice did not represent isolated or parochial interests—interests somehow distinct from the law's general concerns. To be sure, the President has unique responsibilities to protect the country in times of national peril. But these responsibilities neither require nor allow other values to be ignored. Together with the executive branch's responsibilities, in national security as much as in other matters, comes the obligation to consider all values that the exercise of those responsibilities might affect. This is so, not because executive action might come before the courts and might be found unlawful, but because of the executive branch's independent duty to conform itself to the law and thus to legitimize its conduct. Because of the President's constitutional duty, Mr. Levi said,

[t]he Department has to be a special advocate, not only in defending governmental decisions at law, but in the attempt to infuse into them the qualities and values which are of the utmost importance to our constitutional system. . . . It is sometimes said that, so far as the Department is concerned, courts alone have this duty. I do not agree. 46

If anything, in Mr. Levi's view, the obligation of the President and the Department was at its strongest precisely when executive action was least susceptible to judicial review. It was particularly

strong, therefore, in the area of national security, where the law had created a "realm of ambiguity" about the executive branch's duties and their consequences for individual rights. "Where the values are in conflict, the law is not as clear as it should be, and the matter is of great importance to the safety of our country, the burden upon the Department is heavy." 47

III. GOVERNMENT BY DISCUSSION

In these circumstances, the burden could be carried only by setting out the conflicting values as clearly as possible and by articulating the Department's own tentative efforts toward resolving them:

[A] prime and useful function of the law as it operates is to help explain the conflict in values and often to bring to issue the problems which are involved. This is not always possible; discussion may be difficult. The central position and power of the Department are such that it ought to attempt to be articulate about these conflicts in values. 48

Discussion was the critical term, central to Mr. Levi's conception of what responsible government is all about. In discussing separation of powers—which he frequently was called upon to do in the course of his term—Mr. Levi rejected the notion that the Constitution's model of government was one of constant contentiousness and striving among the branches, with the courts as ultimate umpire: "We are sometimes said to be a litigious people, but the Constitution, while it establishes a rule of law, was not intended to create a government by litigation. A government by representation through different branches, and with interaction and discussion, would be much nearer the mark." 49 What was intended was not the contentiousness of adversaries, but a government by discussion, in which the effort would be made to respect the functions and integrity of each branch and to assist in articulating values and seeking avenues of resolution.

The phrase "a government by discussion" recurs repeatedly in Mr. Levi's speeches and testimony as Attorney General. 50 It would

47 Id. at 5, 64 ILL. B.J. at 216.
48 Id.
50 See, e.g., Address Before the Boston College Bicentennial Convocation 7 (Sept. 28, 1975) (Dep't of Justice News Release); Levi, Address Before the University of Miami School of Law Commencement Exercises 4 (May 18, 1975) (Dep't of Justice News Release).
be very wrong to suggest, however, that Mr. Levi found the ideal of a government by discussion very frequently met. "A major difficulty today," he said, "has been the lack of discussion within society as to the basic problems we face." At one point, Mr. Levi referred to Frank Knight's great skepticism about the frequency of genuine discussion, even in the academy, to say nothing of the institutions of government. In fact, Mr. Levi's model of a government by discussion and the implications of that model for the duties of the President and the Department do not seem widely shared, among either friends or enemies of executive authority. Nonetheless, for two years, Mr. Levi, with the support of the President, conducted a discussion about the Department, about presidential responsibilities, and about the policies of the law—a discussion that frequently was unilateral and, too often, had little apparent result. But much of the value lay in the effort itself.

Robert Bork has said that Mr. Levi's achievement as Attorney General had to do, in significant part, with "the quality of decisionmaking"—the quality that "determines an institution's integrity" but whose "nature can never be reported in the press." Often the decisions themselves could not be publicly disclosed without doing harm to individual reputations and interests or irretrievably defeating the purposes sought to be served. To the press and to the public, the dark figure of the Department's work must always be unknown—investigations not opened, warrants not sought, surveillances not authorized. Even more important to public understanding, and equally impossible to disclose, was the decisionmaking process itself. As Judge Bork described it, the process often took on the appearance of "good seminars... with sensitiv- ity to competing claims and the basic values of law."

Perhaps the most remarkable quality about the process was

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Genuine, purely intellectual discussion is rare in modern society, even in intellectual and academic circles, and is approximated only in very small and essentially casual groups. On the larger scale, what passes for discussion is mostly argumentation or debate. The intellectual interest is largely subordinate to entertainment, i.e., entertaining and being entertained, or the immediate interest of the active parties centers chiefly in dominance, victory, instructing others, or persuading rather than convincing, and not in the impartial quest of truth.
63 Bork, Presentation of Citation of Merit to Edward Levi, YALE L. REP., Winter 1977-1978, at 6, 7.
64 Id.
the perfect congruence between the process itself and the way in which Mr. Levi publicly described its consequences, whenever it was possible to do so. This quality is remarkable, not because it is uncommon in government, then or now, but because a great many observers assume, and continue to assume, that it is. Thus—to take one example—many observers assumed that Mr. Levi’s opinion as Attorney General, informing a Cabinet officer that a statute authorized him to withhold information from a House subcommittee, did not represent Mr. Levi’s considered judgment on the law, but was merely a gambit in a game of confrontation between the executive branch and Congress. These observers were wrong. The opinion, correct or not, was exactly what it purported to be. Moreover, it was based on—and, in Mr. Levi’s judgment, it had to be based on—Congress’s intent in the statute, and not in any way on executive prerogative. The incident was one of many in Mr. Levi’s term in which some observers would not believe what Mr. Levi claimed to be doing, instead regarding his actions as feints or dodges to ward off more severe judicial or congressional restrictions on what the executive branch wanted to do. Uniformly, the observers were wrong. The concept of government by discussion, which Mr. Levi repeatedly described in public statements, was exactly the process that he made to work in the Department of Justice, and it was exactly the process that he hoped to see replicated in public discussion, particularly in discussions with Congress.

There are many examples of these efforts. Thus Mr. Levi sought to develop principles, for the Department’s own governance, to determine when a federal prosecution should follow a state prosecution for the same conduct. In a similar vein, the Department developed principles and procedures to govern subpoenas of reporters’ sources. In each instance, the Supreme Court had upheld the constitutionality of the Department’s prior practice. But that did not, for Mr. Levi, exhaust the obligation of the Department to conduct itself in ways that were sensitive to the

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56 See Levi, Address, 1975 A. Am. L. Sch. Proc. (pt. 2) 101, 104-05 (discussing the reaction to the opinion and Mr. Levi’s attitude toward the decisionmaking process).
58 See Abbate v. United States, 359 U.S. 187 (1959) (upholding federal prosecution, based on same acts that led to prior state conviction, against double jeopardy claim); Branzburg v. Hayes, 408 U.S. 665 (1972) (upholding subpoena of reporter against first amendment challenge).
values that the Department's actions might affect.

In other areas, the affected values were much broader, deeper, and more volatile. For example, Mr. Levi early introduced discussion of the desirability of limited but effective gun control.59 Toward the end of his term, he led in the development of proposed legislation, under the direction of the President, designed to guide use of the busing remedy in school desegregation cases in order to achieve the purposes articulated in the courts' decisions while interfering as little as possible with other values, including, preeminently, the value of local responsibility and autonomy.60

In many respects, but especially in light of the pressures of that period, the most critical of all the efforts that Mr. Levi undertook was the effort to discuss, both within the Department and the executive branch and with Congress, the issues that had been raised concerning abuses of the investigative process. These internal discussions led to singular achievements—in particular, the development of guidelines to govern the most sensitive areas of the FBI's investigative responsibilities.61 The guidelines articulated with care and detail the bases on which investigations properly could be initiated and the circumstances that could justify the use of particular investigative techniques. They also clearly fixed responsibility for initiating (and terminating) investigations and strictly limited the use that could be made of the information that the investigations had discovered. The guidelines addressed complex processes involving vital and sensitive interests. In the domestic security guidelines, they had to balance the danger to society of potentially violent, albeit politically motivated, activity against the risk of suppressing peaceful political dissent. That the guidelines were devised at all—and devised, not in spite of the FBI, but with the Bureau's constant participation—was the result of the conception of government on which Mr. Levi insisted, both in theory and in practice.

To be sure, the guidelines did not receive a uniformly favorable reception. Some of the critics addressed the specific standards the guidelines employed; others objected that certain investigative techniques or preventive actions should be permitted in no

61 See Levi, supra note 56, at 103-04 (discussing the process of developing the investigative guidelines).
circumstances whatsoever. Mr. Levi regarded such criticisms, even if he might have thought them misguided or wrong, as responsible elements in the process of consideration, so long as they were directed to the substance of the issues: “The guidelines are extremely controversial, as is to be expected if they are to mean anything. They speak directly to many issues on which people disagree.” Mr. Levi found nothing surprising or objectionable about such disagreement; areas of disagreement were exactly the areas in which thoughtful efforts at resolution, however temporary, were most necessary.

But there was another kind of criticism that saw the guidelines, not as an effort to help achieve rules for governance of important and sensitive activities, but as a feint to avoid control of the Bureau’s functions by Congress and by the courts. It is true that Mr. Levi vigorously opposed suggestions that courts make day-to-day decisions about the conduct of investigations, suggestions that would radically expand the scope of the fourth amendment’s warrant requirement. He opposed such suggestions, however, not because of an abstract concern about executive prerogative, but because they would distort the functions of both the executive branch and the courts. His response to such suggestions, moreover, had nothing to do with resistance to statutory control. To the contrary, Mr. Levi said that a principal purpose of the effort to establish guidelines was to assist both Congress and the executive branch in determining the areas in which clear statutory authorization and control might be necessary.

For Mr. Levi, legislation governing executive functions did not represent, in itself, a defeat or an invasion of the constitutional power of the President. The effects on the authority conferred by article II depended not on the fact of legislative guidance, but on its content. The critical distinction was between legislation that displaced executive authority—for example, by removing executive authority to independent agencies or to the courts—and legislation that left executive authority intact but established the appropriate bounds and means of its exercise.

Perhaps the best example of this during Mr. Levi’s term was

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41 Id. at 103.
42 See id. at 103-04 (discussing criticism by the New York Times).
44 Levi, supra note 56, at 104.
the effort to develop legislation to govern foreign intelligence electronic surveillance. The practice had gone on, under presidential direction and authorization, for forty years. When it began, it seemed to present no significant legal question, at least in the usual sense, since the Supreme Court, in the *Olmstead* case, had held wiretapping (with or without judicial warrant) to be outside the scope of protection of the fourth and fifth amendments. 6

Forty years later, in *Katz v. United States*, 67 the Court overruled *Olmstead*, holding both that electronic surveillance can invade constitutionally protected interests 68 and that, in general, electronic surveillance could satisfy the fourth amendment’s reasonableness requirement only if undertaken pursuant to a judicial warrant. 69 But *Katz* reserved the question of whether the warrant requirement applied to surveillances undertaken, under authority of the President, for national security purposes. And Congress, in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 196870 to govern electronic surveillance for law enforcement purposes, disclaimed any intention of limiting the President’s constitutional authority to protect the national security against certain foreign or domestic threats. 71 In 1972, in the *Keith Case*, the Supreme Court addressed the President’s power in domestic security cases. 72 It held that, in such cases, particularly because of the risks that unsupervised executive action might pose to domestic political dissent, 73 the fourth amendment requires prior judicial authorization. 74 Again, however, the Court reserved any decision concerning application of the warrant requirement to national security matters involving foreign powers or their agents. 75

Thus, by 1975, both Congress and the Supreme Court had refrained from interfering, even by inference, with the use of electronic surveillance for foreign intelligence purposes, even though such use had been publicly acknowledged. Moreover, the two cir-

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68 Id. at 352-53.
69 Id. at 357-59.
72 United States v. United States Dist. Court, 407 U.S. 297 (1972) (popularly known as the Keith Case after the district judge whose orders were under review).
73 Id. at 314.
74 Id. at 320-21.
75 Id. at 321-22.
cuit courts that had considered the question had squarely held that, at least where electronic surveillance is employed against foreign powers or agents of foreign powers, under presidential authorization, no judicial warrant was required. To be sure, in an extravagant display of judicial overreaching, the plurality opinion in *Zweibon v. Mitchell* purport to find a warrant necessary with respect to all national security surveillances, whether or not they involved criminal offenses, and whether or not they involved foreign powers or their agents. But the holding of *Zweibon*, given the facts of the case and the opinions necessary to the majority, did not go beyond *Keith* itself.

In 1975, therefore, it seemed reasonably likely, although by no means certain, that the Supreme Court would excuse foreign intelligence surveillances from the warrant requirement should it be called upon to decide the question. Given this legal climate, and given the actual practice as of 1975, it may seem difficult, in retrospect, to discern why further action was necessary. The number of foreign intelligence surveillances authorized at any given time was very small: in 1974, there were 190 telephone wiretaps and 42 surveillances by microphone. The surveillances were conducted only with the specific, personal approval of the Attorney General, after elaborate review by other officers of the Department. Mr. Levi approved surveillances only

when the requested electronic surveillance is necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power; to obtain foreign intelligence deemed essential to the security of the Nation; to protect na-

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77 516 F.2d 594, 614 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976). The plurality opinion deserves recognition as a particularly straightforward exposition of a very powerful school of thought concerning the role of the courts in our society. The exposition comes both in the opinion's approach to judicial decisionmaking and in certain candid statements. Consider the following: "[W]e are mindful that the judicial system is the focal point of all the conflicts and controversies of our society, and that the task of a judge, though not always a pleasant or a simple one, is to resolve those controversies in the fairest manner of which he is capable." 516 F.2d at 650-51 (plurality opinion) (emphasis added).

78 *Zweibon* involved wiretaps of the offices of the Jewish Defense League, which, although it had engaged in anti-Soviet activities having an impact on foreign relations, 516 F.2d at 608-09, was not itself the agent of a foreign power. Thus the holding of the case does not reach wiretaps of foreign agents or collaborators. *Id.* at 614. In addition, of the eight judges who sat on the en banc panel, only four endorsed the blanket warrant requirement.

tional security information against foreign intelligence activities; or to obtain information certified as necessary for the conduct of foreign affairs matters important to the national security of the United States.\textsuperscript{80}

In addition, the subject of the surveillance had to be actively and consciously engaged in assisting a foreign power or foreign-based political group, and there had to be assurance that the surveillance would involve the minimum necessary physical intrusion.\textsuperscript{81}

But despite the relative infrequency of the surveillances, and despite the stringent procedures and standards that had been developed, foreign intelligence surveillance received an extraordinary amount of attention in Congress, in the press, and in the legal literature. The reason, I suppose, is clear enough. It was the preeminent area in which important principles of individual rights seemed to conflict with very practical—indeed, critical—national security needs. The last point deserves special emphasis. I believe it is accurate to say that, by the very nature of the foreign intelligence enterprise, electronic surveillance is an essential and irreplaceable tool. Indeed, the terms of the debate seemed almost to assume that this was so. The cases and the commentary seemed to focus on the question of whether the judicial warrant requirement ought to apply, with little if any attention given to the circumstances in which a warrant should issue. The discussion by and large had not addressed whether the criteria articulated by the Attorney General were the right criteria. Instead, the problem, apparently, was that the Attorney General could not be trusted to apply them.

Mr. Levi saw the problem very differently. As noted above, electronic surveillance for foreign intelligence is, at least in some circumstances, of critical importance. At the same time, the surveillance itself and the circumstances that call for it must be maintained in confidence. But this very secrecy presented a basis for fear of possible abuse, abuse the more to be feared because of the difficulty of detection. In sum, the question for Mr. Levi was how to legitimate the use of a vital intelligence technique. The legitimation, in his view, could take place only through discussion and, to the extent possible, agreement concerning the appropriate occasions for surveillance. Moreover, although few commentators

\textsuperscript{80} Id. at 90.
\textsuperscript{81} Id.
seemed to recognize the fact, an understanding of the justifications for foreign intelligence surveillance had a great deal to do with whether a judicial warrant requirement made any sense. If the surveillance were deemed reasonable—hence constitutional—only when the foreign intelligence activity constituted a crime, then application of the ordinary warrant requirement might be justified. But foreign intelligence surveillance has great significance to national security interests even when its purpose is unrelated to gathering evidence for eventual criminal prosecution. Quite unlike law-enforcement surveillances, a principal interest is simply to know what the foreign agent is up to. In short, what supports the reasonableness of the surveillance—if anything—is the value to national security and foreign policy interests of the information sought.

For much of Mr. Levi's term, an effort was made to develop legislation articulating the legitimate purposes of foreign intelligence surveillances and, in light of those purposes, devising procedures that would provide assurances against abuse. The legislation that eventually was proposed sought both to preserve executive responsibility and, at the same time, to provide an independent determination that the objective conditions required for surveillance had been met. The legislation would have required both confirmation by the executive branch that the information sought was necessary for foreign intelligence purposes and a determination by a judicial officer, specially selected and acting under special confidentiality procedures, that the subject of the surveillance was the agent of a foreign power.

There were those who objected vigorously to the proposal—some on the ground that it allowed surveillance without probable cause to believe that the subject had engaged in criminal acts, others on the ground that it called upon courts to exercise power plainly beyond the scope of the authority conferred by article III. As a matter of historical understanding—as a matter, quite possibly, of wise policy in a wiser world—the latter argument almost certainly was correct. Mr. Levi by no means dismissed this con-

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82 One exception was Lacovara, Presidential Power to Gather Intelligence: The Tension Between Article II and Amendment IV, LAW & CONTEMP. PROBS., Summer 1976, at 106, 122.
cern. But he believed that the bill placed the critical obligation to
determine need where it belonged—in those officials who had the
knowledge, experience, and responsibility to make the necessary
judgments. "With such responsibility clearly placed," Mr. Levi
said, "there comes . . . accountability—to the President, of course,
but ultimately to the Congress, and to the people."\textsuperscript{85}

The foreign intelligence surveillance bill did not pass in the
form Mr. Levi had supported. A significantly different bill became
law two years later.\textsuperscript{86} The wisdom of that law—indeed, the wisdom
of the bill Mr. Levi had proposed—is a matter of debate. As Mr.
Levi said of the Guidelines, debate could not be avoided if such
standards of official behavior were to mean anything.

CONCLUSION

Near the end of his term as Attorney General, Mr. Levi spoke
of the possible contribution of the academic world to government:

The greatest influence of [the academy's] collective wisdom on
policy in government may be the demonstration of how in-
quiry proceeds, the patience which can be exercised to find
the truth, the willingness to admit error, the ability to hold
strong views and yet to exercise what Martin Buber in speak-
ing of the requirements for a community of communities
called "a great spiritual tact."\textsuperscript{87}

Looking back now on the period, it may seem doubtful
whether the crisis in American government was as deep as it then
appeared. In part, the doubt may arise from the fact that we
passed through the period without the radical changes in the struc-
ture of government that were seriously discussed and that, at the
time, seemed at least possible. But there have been changes, and
the changes run, I believe, much more deeply than may be sup-
posed. The changes have come in the degree of consciousness of
responsibility for governmental acts, and in a corresponding tem-
pering of the enthusiasm for governmental power, focused not on

\textsuperscript{85} Electronic Surveillance Within the United States for Foreign Intelligence Purposes:
Hearings on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of
the Senate Select Comm. on Intelligence, 94th Cong., 2d Sess. 76, 80 (1976) (testimony of

\textsuperscript{86} Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783
(codified at 50 U.S.C. § 1801 (1982)).

\textsuperscript{87} Levi, Address Before The Conference on the Place of Philosophy in the Life of the
American Nation, The Graduate School of the City University of New York 10 (Oct. 8,
1976) (Dep't of Justice News Release).
the executive branch, but on the arrogation of power generally, whatever branch may engage in it.

Mr. Levi provided, in that critical period, a unique and uniquely powerful voice. He brought to the office of Attorney General a coherent understanding of the meaning of the rule of law and of its implications for public responsibility. From that understanding, he conducted the discussion inside and outside the Department in what may have seemed, to many observers, unaccustomed terms—terms drawn from the basic sources of our legal and constitutional tradition. I do not know, and cannot demonstrate, that Mr. Levi caused significant changes in the way the government works or in the way we think about how the government ought to work. Too many forces and elements have played roles. But the force of coherent understanding can be powerful, especially when it is reflected clearly in public statements and acts, and especially when it is accompanied by “a great spiritual tact.” What mattered most was not the specific proposals or the specific acts but the intellectual and ethical integrity with which they were approached, the insistence on thoughtfulness and candor about the values they might affect. The achievement was perhaps elusive, but there is none of greater service to society.