

## SEPARATION OF POWERS IN THE U.S. GOVERNMENT: COOPERATION AND COMPETITION AMONG THE BRANCHES

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### I

I am deeply honoured to have been chosen by the American selection committee to be the fourth Menzies Lecturer, continuing the series of exchanges launched four years ago when Sir Anthony and Lady Mason visited the University of Virginia. In its short life, this series has brought two distinguished Australian jurists to Thomas Jefferson's academical village, and an eminent American judge — the Honourable Collins Seitz — to your shores. And I should remark, as well, the visit to Virginia of Sir Zelman Cowen, who, under the auspices of the Menzies Trust, inaugurated the discussions that led to the establishment of this series of lectures. My appointment as Judge Seitz's successor surely strains the standards reflected in prior selections. But I share his enthusiasm for the experience and express my thanks to the Trustees and to this fine law school for the opportunity to be here.

The Menzies Lectures have not only afforded opportunities for audiences in each country to meet and hear from prominent figures in the law; they have also cemented the bonds that Sir Robert Menzies established when he was a visiting faculty member at my law school following his retirement as Prime Minister of Australia. His precedent has brought other Australian scholars and students to Charlottesville, and several of my own colleagues — Walter Wadlington, Glen Robinson, and Jeffrey O'Connell among them — to your impressive capital and university. My wife, Lissa, and I, feel especially privileged to share in this admirable tradition.

### II

My topic this evening has the twin virtues of providing insights into the continuing tensions between American law and American politics and of illuminating current disputes over the structure of our government. We Americans are just about to elect a new President, who will be responsible during the next four years for directing — if directing is possible — the executive branch. He will assume office at a time of renewed debate about the scope of Presidential power and the contours of legislative-executive relationships. During the past decade our Supreme Court has, to an unprecedented degree, been drawn into this debate as efforts of the political branches to gain or retain dominance have confronted the Justices with several opportunities to re-examine the boundaries — and the ties — between them.

It is perhaps fitting that we are at the same time in the midst of celebrating the bicentennial of the United States Constitution — which was drafted in 1787 and ratified by the original constituent States during the next three

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years. While the Constitution incorporated, it in no sense comprehensively defined, the concept of separated powers. Indeed, the Constitution's very silence set the stage for the current debate over the powers of, and boundaries among, the branches of the federal government.<sup>1</sup>

The current interest in the debate over separation of powers is, however, not primarily a product of celebration. Rather, it reflects two intersecting political struggles, one memorialised under the caption 'Watergate' and the other continuing from the 1976 election. The investigations that precipitated President Nixon's resignation rekindled suspicion of Presidential power among members of Congress of both parties. Such suspicion is not of course anything new, but Watergate quite clearly legitimated, and thus strengthened, congressional resistance to Presidential domination of the national government.

Suspicion of Presidential authority has accompanied, and perhaps nurtured, a popular belief that government — and the federal government in particular — was the source of more problems than solutions. Both President Carter and President Reagan, as candidates, often voiced this belief. Both campaigned 'against Washington', portraying themselves as outsiders who would again make government the servant, rather than the regulator, of the people. By 'government' they chiefly meant the million-plus civilian employees who administer the hundreds of domestic federal programs which dispense benefits, collect taxes, and regulate private economic activity. Ironically, however, efforts to exert control over this apparatus involved enlarging the powers of the President — the only government officer who had the obligation to oversee and the capacity to restrain the operations of governmental agencies. President Carter and, much more successfully, President Reagan, took steps to coordinate and direct policy-making by their appointees and their subordinates.<sup>2</sup>

The efforts of recent Presidents to secure centralised direction of domestic policy formulation — and to resist competitive efforts by Congress — have tested accepted limits on Presidential power.<sup>3</sup> And this during the very era when vivid memories of Presidential malfeasance have strengthened the resolve of members of both House of Representatives and the Senate to protect government administrators — and civil servants — from White House intrusion and influence. It is hardly surprising, therefore, that these competing drives have generated conflicts requiring judicial resolution.

### III

Before turning to these conflicts, and to the Supreme Court's resolution of them, an examination of the Constitutional text is in order. Our Constitution describes the three repositories of central power — the Congress, the President, and the Supreme Court — in different articles, thereby perhaps implying

<sup>1</sup> P Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch" (1984) 84 Columbia L Rev 573. I acknowledge my substantial reliance on Professor Strauss's probing analysis but at the same time absolve him of any errors of translation or application.

<sup>2</sup> For discussion of these efforts, see J Mashaw and R Merrill, *Administrative Law: The American Public Law System* (1985), 143-155, 160-163.

<sup>3</sup> See H Bruff, "Presidential Power and Administrative Rulemaking" (1977) 88 Yale L J 451; P Strauss and C Sunstein, "The Role of the President and OMB in Informal Rulemaking" (1986) 38 Admin L Rev 181.

their operational separation.<sup>4</sup> These articles define what might be termed the competencies of these entities, and Art I also specifies the procedures for the enactment of legislation. But each article leaves a good deal to the imagination — or at least to future invention. As Professor Strauss has written:

[O]ne scanning the Constitution for a sense of the overall structure of the federal government is immediately struck by its silence . . . [I]t says almost nothing at all about the unelected officials who . . . would necessarily perform the bulk of the government's work.<sup>5</sup>

Article II, which creates the executive branch, mentions specifically only the President and Vice President. The President is vested with "the executive power",<sup>6</sup> but this power is not elaborated.<sup>7</sup> Outside the spheres of foreign and military affairs, the President is given the following specific powers or responsibilities:

to appoint those "Officers of the United States . . . which shall be established by Law," subject to the requirement of Senate confirmation and to the possibility that Congress might effectively limit this power to appointing the "Heads of Departments" [by vesting them or the courts with the power to appoint "inferior officer"];

to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of Their respective Offices"; "from time to time give to the Congress Information of the State of the Union, and recommend to their consideration" proposed legislation; and to "take Care that the Laws be faithfully executed."<sup>8</sup>

The Constitution says little more about what the President may or must do. Nor, apart from indicating that there will (or may) be "executive departments",<sup>9</sup> does it say what those departments are to do, how they are to be organised, how they are to relate to Congress — or, for that matter, to the President — or what, if any, other administrative entities there may be.

This spare text was the product of deliberations at the Constitutional Convention that explored, but ultimately rejected, more detailed and concrete descriptions of government structure.<sup>10</sup> Even so, Professor Strauss argues that the Constitution was intended to embrace certain key judgments about executive organisation. The President was to be a unitary, politically accountable head of government. Furthermore, "[a] central, co-ordinating and overseeing role for the President in relation to all government 'officers' [was] required . . . to permit that office to serve as an effective check on the otherwise to be feared authority of Congress."<sup>11</sup>

Even with this elaboration, the text of the Constitution provides quite uncertain guidance for resolving the struggles between the President and Congress for control of the government that the Framers clearly anticipated. And if the language of 1789 seemed to have left a good deal to political expedience, it appears even more delphic two centuries later as Americans

<sup>4</sup> US Constitution, Arts I, II, and III.

<sup>5</sup> P Strauss, *supra* n 1, 597.

<sup>6</sup> US Constitution, Art II, § 1, cl 1.

<sup>7</sup> J Mashaw and R Merrill, *supra* n 2, 110 ff.

<sup>8</sup> P Strauss, *supra* n 1, 598.

<sup>9</sup> US Constitution, Art II, § 2, cl 1.

<sup>10</sup> P Strauss, *supra* n 1, 599-600, and sources cited therein.

<sup>11</sup> *Ibid.* 602.

confront a national government whose size and complexity surely surpass the anticipations of those early draftsmen.

#### IV

Contemporary debates over what authority the President can exercise and what limits Congress can legitimately impose on his powers inevitably are coloured by awareness of what *is*, that is, of what Presidents *have done*, of what limits Congress has *successfully imposed*, and, most significantly, of the complex edifice of agencies, offices, and relationships that comprise our national government. No successful theory of separation of powers can threaten two hundred years of history. Reconciling theoretical arguments with the existing landscape of American government has, accordingly, challenged both scholars and, perhaps more obviously, Supreme Court Justices.<sup>12</sup>

Several features of the current federal establishment are noteworthy. Most obvious, of course, the existing apparatus is vastly larger than the tiny workforce that served the first Presidents. More significantly, perhaps, the current work of government is performed largely by officials (and offices) other than those named in the Constitution.<sup>13</sup> The President may personally decide large questions and directly oversee the performance of a handful of major activities, but delegation of day-to-day — and operationally much final — responsibility is the hallmark of the United States government, and indeed of every other modern government. While the Framers appears to have worried chiefly about the relationships among the President, members of Congress, and ‘judges’ of the Supreme Court, those that now matter most are the relationships among lesser officers, and between these officers and the President or Congress.

Almost as diverse as the activities of our contemporary national government are the institutional forms Congress has created to do the work:

It has created cabinet departments, cabinet-level agencies headed by individual administrators responsible to the President, independent regulatory commissions, federal corporations, independent regulatory commissions with cabinet departments, and more . . .<sup>14</sup>.

Moreover, “the allocation of law-administration among these forms does not follow simply functional lines. . . . [R]egulatory and policymaking responsibilities are scattered among independent and executive branch agencies in ways that belie explanation of the work agencies do”.<sup>15</sup>

This diversity of organisational form, however, disguises important similarities in the powers these agencies have been given — similarities that may at first seem problematic. Most law-administering agencies in the American government exercise the power to adopt rules having the force of law over the individuals or businesses with which they deal. Most perform functions that we might characterise as ‘executive’ — conducting investigations,

<sup>12</sup> For examples of recent scholarly discussion of the general topic and of the validity of specific experiments in governmental structure, see “Symposium: The Independence of the Independent Agencies” [1988] Duke L J 215; “A Symposium on ‘The Uneasy Constitutional Status of the Administrative Agencies’ ” (1987) 36 American U L Rev 277.

<sup>13</sup> P Strauss, *supra* n 1, 598.

<sup>14</sup> *Ibid* 583-584.

<sup>15</sup> *Ibid* 584.

gathering information, formulating policies, and initiating proceedings to apply or enforce the rules and policies they have adopted. And a large number also adjudicate the resulting disputes over the applicability of these rules and policies in concrete cases. In short, most agencies in some fashion combine the chief, ostensibly separated, powers of government.

It is important to remember that the dispersal of central authority, the diversity of organisational form, and the common commingling of powers are the products of political decisions made by Congress and agreed to, or, in a few instances, unsuccessfully opposed, by the President. Thus, they can be said to represent the product of the cooperative exercise of constitutionally separate powers. But clearly each agreed-upon arrangement within this apparatus — the creation of an ‘independent’ commission to regulate interstate transportation, the siting of a tribunal with power to licence and price sales of energy within an existing Cabinet department, the establishment of a new Cabinet department for education, or the aggregation of responsibility for all pollution-control laws in a single Presidential appointee outside all existing departments — was dictated largely, if not exclusively, by political expedience. Concern for the constitutional propriety of specific arrangements has not played a major role.<sup>16</sup>

## V

Even though choices about the location, responsibilities, or appointment of federal agencies and officers have not routinely been debated in constitutional terms, they have not infrequently been challenged on constitutional grounds.<sup>17</sup> Space does not allow review of the 19th century cases,<sup>18</sup> but one cannot assess the Court’s recent decisions without a brief review of two pre-World War II cases that have been prominent guideposts for both scholars and politicians. Both cases involved the power of Congress to restrict the President’s authority to remove subordinate officials.

It should be noted that the Constitution says nothing about the President’s removal power. It specifies that “Officers of the United States” are to be *appointed* by the President, subject to Senate confirmation, but that the *appointment* of “inferior Officers” may, if Congress so determines, be lodged in the President alone, in the heads of departments, or in the courts.<sup>19</sup> By this century, however, it was accepted that the President had authority to remove, for any or no reason, department heads and other high-ranking officials whom he had appointed — so long, of course, as he was willing

<sup>16</sup> *Ibid* 585.

<sup>17</sup> Eg, G Gunther, *Constitutional Law* (11th ed 1985) 337-362, 377-382; E Corwin, *The President: Office and Powers* (4th ed 1957).

<sup>18</sup> *Kendall v United States* 37 US (12 Pet) 524 (1838); *United States v Perkins* 116 US 483, 700 (1886); *Wayman v Southam* 23 US (Wheat) 1 (1825).

<sup>19</sup> US Constitution, Art I, § 1, c1 2:

... [H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Counsels, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they may think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

to pay the political price that often accompanies the firing of prominent allies.<sup>20</sup>

The two cases, *Myers v United States*<sup>21</sup> and *Humphrey's Executor v United States*,<sup>22</sup> were triggered by Presidential efforts to remove officers for whom Congress had purported to provide some job protection — and, in consequence, some independence from the President. Professor Strauss has summarised the first of these decisions succinctly:

*Myers* concerned a postmaster appointed to a four-year term under a statute which for fifty years had required senatorial assent to both appointment and removal of these officials. The President sought to remove him before the expiration of his term, without obtaining senatorial concurrence. . . . A divided Court found that reserving congressional participation in the removal of an executive officer unconstitutionally invaded the President's executive function. The Court's opinion, written by a former President [William Howard Taft], suggested that the President enjoyed an inherent authority to remove every officer of government he was empowered to appoint (other than a judge protected by article III). It appeared to eradicate [any] executive/administration distinction by establishing the President's disciplinary control as universally available. Congress acknowledged the apparent sweep of this decision by ceasing to provide removal protections in statutes creating new government agencies.<sup>23</sup>

Nine years later, in *Humphrey's Executor*, the Court was confronted with another President's effort to remove a rather higher-ranking official whose term had not expired. Humphrey was a Commissioner of the Federal Trade Commission (FTC), one of the several so-called 'independent agencies', whose 1914 organic statute provided for terms of seven years and purported to restrict the President to removal only for "cause."<sup>24</sup> Unlike the statute involved in *Myers*, however, the FTC Act did not reserve any role, of concurrence or veto, for either house of Congress. President Franklin Roosevelt suggested no cause for Humphrey's removal other than his suspected lack of sympathy for the administration's program, and Humphrey fought to remain in office through the end of his term.

A unanimous Supreme Court, repudiating the broad statements about Presidential removal power in *Myers*, held that Congress could validly restrict the President's authority to remove members of the Federal Trade Commission. The Court stressed that Congress had created the FTC to perform functions — legislative and adjudicatory as well as executive — whose performance it legitimately desired to insulate from partisan political influence.<sup>25</sup>

Echoing *Myers*, the opinion in *Humphrey's Executor* asserted the constitutional necessity "of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others . . .".<sup>26</sup> This compartmentalised view required the Court to determine the location of the FTC, which it described as "an

<sup>20</sup> On the President's personnel powers generally, see J Burkoff, "Appointment and Removal under the Federal Constitution: The Impact of *Buckley v Valeo*" (1976) 22 Wayne L Rev 1335.

<sup>21</sup> 272 US 52 (1926).

<sup>22</sup> 295 US 602 (1935).

<sup>23</sup> P Strauss, *supra* n 1, 609-610.

<sup>24</sup> Federal Trade Commission Act, 38 Stat 717, 15 USC § 41.

<sup>25</sup> 295 US 602, 625, 628-629 (1935).

<sup>26</sup> *Ibid* 629.

agency of the legislative or judicial department of the government," whose administrative responsibilities — which included the power to initiate proceedings to enforce the FTC Act's proscriptions of anticompetitive practices — involved, according to the opinion, only "executive functions" rather than the exercise of "executive power in the constitutional sense".<sup>27</sup>

Constitutional scholars have never ceased debating the soundness of *Humphrey's Executor*.<sup>28</sup> But, academic dispute notwithstanding, for many years the decision was taken as confirming Congress's authority to create agencies that operated beyond immediate Presidential control — at least so far as control was epitomised by the power to remove their heads. To be fair, the notion of such independence was hardly shocking; the model for the Federal Trade Commission — the Interstate Commerce Commission — was created in 1887.<sup>29</sup>

## VI

I come now to a cluster of recent, and closely studied, Supreme Court decisions on attempts by Congress to retain influence over the administration of government programs or to insulate decision-makers from Presidential direction. By aggregating these cases for purposes of discussion, I do not mean to suggest that they reflect a coordinated effort by the legislature to subordinate the executive. They involve statutes enacted at different times by different Congresses. But the cases explored a common theme. Each tested the validity of a congressional effort to devise an arrangement for law administration that would elude Presidential direction or allow enhanced legislative influence.

The first of these cases, *Buckley v Valeo*,<sup>30</sup> involved the constitutionality of the 1971 Federal Election Campaign Act<sup>31</sup> and the Federal Election Commission (FEC) that it established. The Act represented the first federal legislative effort to blunt the impact of private financing of political campaigns — including, centrally, campaigns for the Presidency. The FEC was given

<sup>27</sup> *Ibid* 628. The Court recognised that the distinction it was drawing could be elusive, observing that "to the extent that, between the decision in the *Myers* case, which sustained the unrestricted power of the President to remove purely executive officers, and our present decisions that such power does not extend to an officer such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise."

<sup>28</sup> *Eg.* J Burkoff, *supra* n 20; P Strauss, *supra* n 1; and B Raffel, "Presidential Removal Power: The Role of the Supreme Court" (1959) 13 *Miami L Rev* 69. For trenchant criticisms of the *Humphrey* decision, see D Currie, "The Distribution of Powers after *Bowsher*" [1986] *Sup Ct Rev* 19; G Miller, "Independent Agencies" [1986] *Sup Ct Rev* 41.

<sup>29</sup> See J Mashaw and R Merrill, *supra* n 2, 64-68. *Humphrey's Executor* was followed two decades later by *Weiner v United States*, 357 US 349 (1958), where the Court overturned President Eisenhower's attempt to remove a member of the War Claims Commission, a collegial body established by Congress to adjudicate claims against seized assets of the World War II Axis Powers. The statute creating the Commission specified terms of service, but said nothing about Presidential removal with or without "cause." A majority of the Court, speaking through Frankfurter J, concluded that the functions assigned the Commission required an independence that was inconsistent with vulnerability to plenary Presidential discipline.

<sup>30</sup> 424 US 1 (1976).

<sup>31</sup> 86 Stat 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat 1263, 2 USC § 431 ff.

authority both to investigate campaign conduct and to adopt, and bring proceedings to enforce, rules restricting campaign financing.

Several challenges to the constitutionality of this novel legislation were brought — including claims that it abridged First Amendment rights of political expression — but the one of immediate interest here centred on the manner by which members of the Commission were to be appointed. To prevent the President from dominating an agency that might be called on to investigate the very activities that got him elected,<sup>32</sup> the Act empowered the presiding officers of the two houses of Congress — the President *pro tem* of the Senate and the Speaker of the House of Representatives — each to appoint, without Presidential concurrence,<sup>33</sup> two members of the six-person Commission.<sup>34</sup>

The Supreme Court held that this arrangement violated the 'Appointments Clause' of Article II of the Constitution, quoted above.<sup>35</sup> The enforcement power conferred on the Federal Election Commission constituted "a significant governmental duty exercised pursuant to public law" which, the Court stated, had to be performed only by "Officers of the United States" — that is, by persons subject to appointment by the President or by the head of one of "the executive Departments".<sup>36</sup> The Act's conferral on officers of Congress of the power to appoint two thirds of its voting members could not be squared either with the text of the Constitution or the principles of separate powers that it embodied.

Like other of the Court's decisions in this rocky field, the opinion in *Buckley v Valeo* sent discordant signals. The Court seemed concerned, in the tradition of *Humphrey's Executor*, to locate the Federal Election Commission within one of the "three essential branches of Government".<sup>37</sup> The Commission's important policy-making and law-enforcing responsibilities, the Court concluded, clearly placed it within the executive branch. Thus, Congress's effort to control the appointment of its membership could not be sustained.<sup>38</sup> But the Court apparently also wished to avoid casting doubt on the ruling in *Humphrey's Executor*, which implicitly upheld the constitutionality of "independent . . . agencies".<sup>39</sup> The Court accordingly appeared more troubled by the Act's attempt to preserve Congressional influence over the work of the Commission than by its failure to recognise any Presidential claim to exclusive control over federal law enforcement.

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<sup>32</sup> See 424 US 1, 134 (1976).

<sup>33</sup> The President was empowered to appoint the remaining two voting members, subject to concurrence by both houses.

<sup>34</sup> The legislation nominally provided for eight members, but two — the Secretary of the Senate and the Clerk of the House, neither of whom is an elected member of Congress — were to be *ex officio* members without the power to vote. See 424 US 1, 113 (1976).

<sup>35</sup> *Supra* n 19.

<sup>36</sup> 424 US 1, 141 (1976).

<sup>37</sup> *Ibid* 121.

<sup>38</sup> *Ibid* 139-140.

<sup>39</sup> "While the President may not insist that such functions be delegated to an appointee of his removable at will . . . none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law to allow it to be performed by the present Commission": *ibid* 141.

## VII

The Supreme Court's next serious examination of the contemporary meaning of separation of powers came just a few years later in *Immigration and Naturalization Service v Chadha*,<sup>40</sup> widely known as the 'legislative veto' case. The immediate facts of the case appealed to popular interest in a way that major disputes about governmental structure rarely do.

Chadha had entered the United States as a student from Kenya in 1966. After his student visa expired, the Immigration and Naturalization Service (INS) — a part of the Department of Justice — began proceedings to deport him. Conceding that he had overstayed his visa, Chadha applied for suspension of his deportation on grounds of extreme hardship. An Immigration Judge — an executive branch officer with power to hear and decide such claims — ruled in Chadha's favour in 1974. Under the statute empowering the INS to suspend deportation of aliens illegally resident in the country,<sup>41</sup> the Attorney General was then required to report all such decisions to Congress, where either house could adopt a definitive resolution of disapproval — a so-called 'one-house veto'.

The INS decision that Chadha should not be deported was duly reported to Congress in 1975, among 340 similar cases. On 16 December 1975, the House of Representatives — without debate or recorded vote<sup>42</sup> — adopted a resolution disapproving the suspensions of deportation of Chadha and of five other of the 340 aliens. The House action had the effect of overruling the INS's suspension order and reviving its statutory duty to see that Chadha and the other five were deported.

Chadha sought judicial review, arguing that the House's veto of the Attorney General's suspension of his deportation was unconstitutional.<sup>43</sup> The Ninth Circuit Court of Appeals, in an opinion by Judge (now Supreme Court Justice) Anthony Kennedy, upheld Chadha's claim. The INS — that is to say the Department of Justice — had supported Chadha's position in the lower court.<sup>44</sup> The court had also allowed counsel for the House and the Senate to participate as *amici curiae*, and it was they who initiated proceedings to secure Supreme Court review, an effort in which the INS joined.<sup>45</sup>

By 1983, when Chadha's case reached the Supreme Court, legislative veto provisions could be found in more than 200 federal statutes. These statutes covered a wide range of governmental activities, including sales of armaments to foreign nations, Presidential authority to reorganise executive departments,

<sup>40</sup> 462 US 919 (1983).

<sup>41</sup> Immigration and Nationality Act, 66 Stat 216, 8 USC § 1254(c).

<sup>42</sup> 462 US 919, 927 (1983).

<sup>43</sup> *Ibid* 928.

<sup>44</sup> This accurately reflected the announced position of the Department of Justice, at that time and for many years previous, that the legislative veto was unconstitutional. See sources cited at n 49 *infra*.

<sup>45</sup> For a discussion of the case by counsel for the Congress, see M Davidson, "Reflections from the Losing Side" (1983) 7 Regulation, July/August 23. For a contrasting view, by a US Assistant District Attorney General who was later to become personally embroiled in a major separation of powers controversy, see T Olson, "Restoring the Separation of Powers" (1983) 7 Regulation, July/August 19.

and dozens of programs for regulating private business activity.<sup>46</sup> By the 1970's it had become almost routine for Congress to attach some form of veto right to any new grant of administrative authority to adopt rules regulating business conduct.

These veto provisions took several different forms. Many, like the provision of the Immigration Act at issue in *Chadha*, empowered either house alone to reject an agency's ruling. Some required the concurrence of both houses. A few allowed the committee of Congress with substantive jurisdiction over the program in question to veto administrative decisions.<sup>47</sup>

Many members of Congress became strong proponents of such arrangements, claiming that they afforded the legislative branch — charged by the Constitution to enact national policy — an opportunity to correct the misguided exercise of power that necessarily had to be delegated to administrators in broad terms. In short, it was claimed, legislative veto provisions were a means of assuring political accountability.<sup>48</sup> By contrast, Presidential spokesmen almost invariably resisted all forms of legislative veto and asserted their unconstitutionality.<sup>49</sup>

The *Chadha* case proved an appealing vehicle for those who claimed that the legislative veto violated the Constitution's separation of powers.<sup>50</sup> The political accountability argument, which was invoked to justify the veto in regulatory legislation, possessed almost no force in the deportation context.<sup>51</sup> The INS was not formulating important domestic policy under an open-ended delegation from Congress. While the criteria for suspending an alien's deportation were hardly precise, it was difficult to be concerned about the absence of electoral accountability for decisions involving individual aliens. Furthermore, the Immigration Act's veto provision had an unsavoury odour, for it appeared to allow either house to substitute its own subjective assessment of the claims of individual aliens for that of the INS — without any opportunity for a hearing or obligation to provide reasons. This impression was strengthened by the history of *Chadha's* case, which suggested that the

<sup>46</sup> For an illustrative survey, see A Miller and G Knapp, "The Congressional Veto: Preserving the Constitutional Framework" (1977) 52 Indiana L Rev 367. Justice White's dissenting opinion in the *Chadha* case contains an appendix listing some of the programs over which Congress had attempted to maintain a modicum of control through the creation of a veto, all of which he believed would be nullified by the Court's ruling.

For an interesting empirical study of the operation of legislative veto provisions, see H Bruff and E Gellhorn, "Congressional Control of Administrative Regulation: A Study of Legislative Vetoes" (1977) 90 Harv L Rev 1369.

<sup>47</sup> See the dissenting opinion of White J, 462 US 919, 968-974 (1983).

<sup>48</sup> Eg, J Javits and G Klein, "Congressional Oversight and the Legislative Veto: A Constitutional Analysis" (1977) 52 NYU L Rev 455 (1977); J Abourezk, "Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives" (1977) 52 Indiana L Rev 323; J Pearson, "Oversight: A Vital Yet Neglected Congressional Function" (1975) 23 Kansas L Rev 277.

<sup>49</sup> Eg, R Dixon, "The Congressional Veto and Separation of Powers: The Executive on a Leash?" (1978) 56 North Carolina L Rev 423 (Mr. Dixon was Assistant Attorney General in the Nixon and Ford Administrations); A Scalia, "The Legislative Veto: A False Remedy for Systems Overload" (1979) 3 Regulation November/December 19 (Mr., now Justice, Scalia, served as Assistant Attorney General during the Ford Administration). See also (1977) 43 *Opinions of the Attorney General* No 10, 2.

<sup>50</sup> P Strauss, "Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision" [1983] Duke LJ 789.

<sup>51</sup> D Martin, "The Legislative Veto and the Responsible Exercise of Congressional Power" (1982) 68 Virginia L Rev 253.

chairman of the House subcommittee — aided if not inspired by his staff — acted on the basis of undisclosed reports from people who reputedly knew Chadha.

Few observers were shocked, therefore, when the Supreme Court struck down the Immigration Act's one-house veto. What was more surprising was the majority's failure to focus on the distinctive features of that statute and the facts of the case. It had even been predicted that this veto provision might be invalidated under the due process clause or, as Justice Powell's concurring opinion suggested,<sup>52</sup> as an encroachment on judicial power; that is, on the authority of Article III courts to adjudicate the validity of executive decisions affecting important individual rights.

Instead, Chief Justice Burger's majority opinion not only struck down the Immigration Act veto but cast serious doubt, soon confirmed,<sup>53</sup> on the validity of every variant that Congress had enacted. To reach this sweeping result, the majority passed by grounds on which the case might have been decided in Chadha's favour without reaching the broad separation of powers issue.<sup>54</sup>

Chief Justice Burger's reasoning has been criticised as formalistic.<sup>55</sup> His opinion begins with the proposition that the Constitution divides federal powers into "three defined categories, Legislative, Executive, and Judicial."<sup>56</sup> While acknowledging that these categories are not "hermetically" sealed from one another, the Chief Justice asserted that "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." When the House of Representatives voted to reject the suspension of Chadha's deportation, therefore, it was presumed to be exercising legislative power.<sup>57</sup> This presumption was confirmed by the effect of the House's action, which fundamentally altered Chadha's 'legal rights' by exposing him again to deportation.<sup>58</sup>

Having established that the House's veto amounted to a legislative alteration of legal rights, Burger CJ had little difficulty concluding that the action violated the requirements for legislation laid down by the Constitution. His Honour reasoned that the Constitution contains "[e]xplicit and unambiguous"<sup>59</sup> provisions governing law-making by Congress. Before a bill may become law, it must be presented to the President, affording him the opportunity to exercise *his* veto. This requirement applies not only to Bills but also to "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate

<sup>52</sup> 462 US 919, 960-962 (1983).

<sup>53</sup> Within a matter of months, the Court laid to rest any doubts about the breadth of its *Chadha* ruling by declining review of two District of Columbia Circuit Court of Appeals decisions invalidating veto provisions in the Natural Gas Act and the Federal Trade Commission Act. See *Process Gas Consumers Group v Consumers Energy Council of America* 463 US 1216 (1983) (denying review of 673 F2d 425); *United States Senate v Federal Trade Comm'n* 463 US 1216 (1983) (denying review of 691 F2d 575).

<sup>54</sup> See P Strauss, *supra* n 1, 637-639. See also the dissenting opinion of White J, 462 US 919, 974 (1983).

<sup>55</sup> P Strauss, *supra* n 1, 635; P Strauss, "Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency?" (1987) 72 Cornell L Rev 488; D Elliott, "*INS v Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto" [1983] Sup Ct Rev 125.

<sup>56</sup> 462 US 919, 951 (1983).

<sup>57</sup> *Ibid* 952.

<sup>58</sup> *Id.* According to the Chief Justice, the House's veto altered the 'rights' of the Attorney General and other officials of the executive branch as well.

<sup>59</sup> *Ibid* 955.

and House . . . may be necessary".<sup>60</sup> Furthermore, the Constitution vests the legislative power in a bicameral legislature: to become law, a bill must pass both the House and the Senate.<sup>61</sup> The House's action vetoing the Attorney General's decision to suspend Chadha's deportation lacked the concurrence of the Senate and had never been presented to the President.

As both Justice Powell, who concurred in the result,<sup>62</sup> and Justice White, who dissented,<sup>63</sup> pointed out, by equating the House's action with the enactment of legislation, the majority jeopardised every device by which Congress had attempted to reserve for either or both houses the opportunity to correct an agency's exercise of delegated power.<sup>64</sup> In a plea for functional rather than formal analysis, Justice White began by answering the majority's textual arguments. The House's action was not the equivalent of a statute, he argued, because Congress has reserved a veto in the delegation and hence the veto did not make a change in the 'legal status quo'.<sup>65</sup> Chadha's 'right' not to be deported, following the Attorney General's suspension, was expressly contingent on the failure of both houses to reject his decision.<sup>66</sup>

Justice White also offered a broader theory for rejecting the majority's conclusion. He described the legislative veto as a means Congress had devised, generally with Presidential acquiescence, to facilitate the delegation of law-making power necessary to modern government, while preserving "its designated role under Art I as the Nation's law-maker".<sup>67</sup> Characterising the rise of the administrative state as "the most significant legal trend of the last century",<sup>68</sup> White J considered the legislative veto to be a potentially legitimate device to assure political accountability for the exercise of unavoidably dispersed law-making power. White J would not have sanctioned all forms of the veto; each would have to be analysed individually to determine whether it was "consistent with separation-of-powers principles".<sup>69</sup>

## VIII

Chief Justice Burger's opinion in *Chadha* emphasised the divisions between the political branches rather than their collaborative roles in the formulation and implementation of domestic policy. His broad ruling not only nullified all forms of the legislative veto,<sup>70</sup> but strengthened doubts about the constitutionality of other arrangements that linked the two branches or conveyed power to institutions ostensibly independent from them. The

<sup>60</sup> US Constitution, Art I, § 7, cl 3, discussed in the majority opinion at 462 US 919, 946-948 (1983).

<sup>61</sup> US Constitution, Art I, § 1; § 7, cl 2; § 7, cl 3, discussed at 462 US 919, 948-951 (1983).

<sup>62</sup> Powell J concurred with the narrow theory that the Nationality Act's veto provision allowed either house of Congress to encroach upon the courts' jurisdiction to adjudicate claims that an administrator has erroneously administered the law. See 462 US 919, 960 ff (1983).

<sup>63</sup> *Ibid* 967 ff.

<sup>64</sup> "[T]he Court . . . sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a legislative veto": *ibid* 967.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Id*.

<sup>67</sup> *Ibid* 962. See also *ibid* 972-973, 974, 978.

<sup>68</sup> *Ibid* 984 (quoting the dissenting opinion of Jackson J in *Federal Trade Commission v Ruberoid Co* 343 US 470, 487 (1952)).

<sup>69</sup> *Ibid* 1002. At n 15 of his opinion, (462 US 919, 978 (1983)), White J acknowledges serious doubts about the validity of veto provisions that purport to allow a single committee of one house to reject administrative decisions.

<sup>70</sup> See P Strauss, *supra* n 50.

institution thought to be most vulnerable was the independent regulatory commission, epitomised by agencies like the Federal Trade Commission, from which President Roosevelt had tried to remove Commissioner Humphrey.

But, while challenges to such legislative efforts to insulate law enforcing agencies from Presidential influence soon began to reach the courts,<sup>71</sup> it was a more recent innovation in governmental design that provided the Burger Court with its next opportunity to explicate the contemporary meaning of separation of powers. The case is *Bowsher v Synar*<sup>72</sup> decided on the Chief Justice's final day in office.

*Bowsher v Synar* involved the constitutionality of an important piece of legislation, the 1985 Balanced Budget and Emergency Deficit Control Act, popularly known as Gramm-Rudman.<sup>73</sup> Enacted to curb the United States budgetary deficit, the Act incorporated a complex decision-making procedure that was designed to neutralise the political incentives of individual members of Congress and of the President that had usually frustrated efforts to restrain domestic spending. The named parties to the case were the Comptroller General of the United States, occupant of an office Congress had created in 1921,<sup>74</sup> and Michael Synar, a Congressman from Oklahoma who had opposed this mechanism in the belief that it was unconstitutional.<sup>75</sup> The House and the Senate were both represented, and the Solicitor General appeared nominally on behalf of "the United States" to defend the objections to the Act that President Reagan had expressed even as he signed it.<sup>76</sup>

Briefly summarised,

[The Deficit Control Act] empowered the Comptroller General to resolve differences between the Director of the President's Office of Management and Budget and the Director of the Congressional Budget Office over the extent to which proposed budgetary legislation met the deficit-reducing standards of the Act. The Comptroller General was to also make final [and binding] calculations of the revisions the Act required [in such legislation] should these projections fail to meet the deficit-reducing standards.<sup>77</sup>

<sup>71</sup> *Ticor Title Insurance Co v Federal Trade Commission*, 814 F2d 731 (1987).

<sup>72</sup> 106 SCt 3181 (1986).

<sup>73</sup> Pub L 99-177, 2 USC § 901. The colloquial title comes from the names of Senator Philip Gramm (Rep-Texas) and Senator Warren Rudman (Rep-New Hampshire), who were the Act's chief authors. To theirs was also often added the name of Senator Fritz Hollings (Dem-South Carolina), whose endorsement was instrumental in securing the support of many Senate and House Democrats.

<sup>74</sup> 31 USC § 703.

<sup>75</sup> There were other parties as well, including members of a union of government employees whose automatic cost-of-living wage adjustments were curtailed by other provisions of the Act. Because of their clear-cut stake, though not so obviously a stake in the controversy over the mechanism for effecting annual expenditure reductions, the Court did not rule on the standing of Congressman Synar and other members of the House who joined his lawsuit: 106 SCt 3181, 3186 (1986).

<sup>76</sup> Though he signed the legislation, President Reagan issued a statement expressing his belief that the role assigned to the Comptroller General rendered its primary budget reduction procedure unconstitutional. Statement of President Reagan on Signing HJ Res 372 into Law, 21 Weekly Compilation of Presidential Documents (1985), 1491.

The Solicitor General's appearance on behalf of "the United States" drew a barbed reference from Justice White, who dissented. He recharacterized the Solicitor General's role as "more properly" representative of the "Executive departments." 106 SCt 3181, 3602 n 2 (1986).

<sup>77</sup> P Strauss, "Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?" (1987) 72 Cornell L Rev 488, 496.

This arrangement was challenged as violative of separation of powers because the officer assigned these important functions, the Comptroller General, was not automatically subject to removal by the President.<sup>78</sup> The suit began in a three-judge Federal District Court, of which one member, who reportedly authored its opinion striking down the budget reduction provision, was then-Circuit Judge, now Supreme Court Justice, Antonin Scalia.<sup>79</sup>

The Supreme Court, in Chief Justice Burger's final opinion, affirmed. In the Chief Justice's view, the Deficit Control Act conferred on the Comptroller General authority to implement its requirements by binding decisions; an officer with such authority necessarily exercises the "executive power" which the Constitution confers on the President.<sup>80</sup> But, though appointed by the President,<sup>81</sup> the Comptroller General functioned in most respects as an agent of Congress. This was evident from the provisions of the 1921 Act creating the office, setting its term, and insulating the occupant from removal except for cause — and then only if both houses concurred. This arrangement, Burger CJ found, effectively made the Comptroller subservient to Congress, a conclusion confirmed by the office's other responsibilities and close historical connections to the legislative branch.<sup>82</sup> The delegation of executive authority to such an officer was unconstitutional.

The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. . . . Congress cannot reserve for itself the power of removal of an officer charged with execution of the laws except by impeachment. . . .<sup>83</sup>

This conclusion provoked both concurrences and a dissent. Justice Stevens, joined by Justice Marshall,<sup>84</sup> agreed that the Act's assignment of final authority to determine the level of budget reductions to the Comptroller General was

<sup>78</sup> 31 USC § 703(e) provides that the Comptroller is to be nominated by the President for a single term of 15 years from among three candidates recommended by the Speaker of the House of Representatives and the President *pro tem* of the Senate. It goes on to provide that the Comptroller may be removed by impeachment or by Joint Resolution — requiring action by the President and the concurrence of both houses of Congress — on account of disability, inefficiency, neglect of duty, malfeasance, or conviction of a felony connoting moral turpitude. Though a Joint Resolution must be presented to the President for his assent, it may be carried over his veto by votes of two-thirds of each house. Accordingly, the Chief Justice concluded, it was appropriate to view the statute as allowing removal by Congress alone. So far as the record reveals, no attempt has ever been made to remove a Comptroller General.

<sup>79</sup> *Synar v United States* 626 FSupp 1374 (1986).

<sup>80</sup> 106 SCt 3181, 3192 (1986).

<sup>81</sup> The Chief Justice did not appear troubled by the 1921 law's restriction of the President's choices to three candidates recommended by leaders of Congress. Perhaps this was because he found the statute's restricted grounds for removal and the role it accorded Congress in the process more offensive.

<sup>82</sup> 106 SCt 3181, 31911 (1986).

<sup>83</sup> *Ibid* 3187, 3188. Essentially agreeing with this conclusion, Blackmun J arrived at a different result. He would not have struck down the budget-reduction mechanism of Gramm-Rudman but instead invalidated the removal provision of the older statute creating the Office of the Comptroller General: *ibid* 3215, 3218-3220. The Chief Justice discussed but rejected this option. Because Congress had, in Gramm-Rudman itself, provided for an alternative mechanism (requiring passage of a Joint Resolution with presentment to the President) in case the role assigned to the Comptroller General was declared unconstitutional, the Chief Justice concluded that the legislature had left no doubt what it wished to happen if that result occurred.

<sup>84</sup> *Ibid* 3194.

unconstitutional — but not for the reason relied on by the majority. Stevens J was unpersuaded that Congress's potential role in his removal gave it any significant control over the Comptroller's decisions.<sup>85</sup> Acknowledging that "governmental power cannot always be readily characterised"<sup>86</sup> as "executive" or "legislative", Stevens J nonetheless concluded that in performing his role under the Act the Comptroller General was part of the legislative branch performing a legislative function.<sup>87</sup> This arrangement violated the Constitution because Congress had thereby evaded the constitutional constraints on the legislative process. "If the Legislative Branch decides to act with conclusive effect, it must do so through . . . enactment by both Houses and presentment to the President."<sup>88</sup>

The reasoning of both the Chief Justice and Justice Stevens could have threatened the constitutionality of the independent regulatory commissions,<sup>89</sup> which exercise administrative authority and adopt binding rules of prospective general application — though their members are not generally removable at will by the President and their rules do not require bicameral endorsement or presentment to the President. Thus Burger CJ took pains to assert, essentially without explanation, that the majority implied no doubts about the independent agencies.<sup>90</sup> Stevens J, for his part, distinguished between attempts by Congress to concentrate legislative power in one of its components and delegations of such power to external officers who operate within statutory boundaries, subject to judicial review.<sup>91</sup>

Justice White again lamented the majority's "willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of government objectives . . .".<sup>92</sup> Accepting the majority's conclusion that the Comptroller performed an executive function, White J found the job protections he had been accorded indistinguishable from those provided by statute for regulatory commissioners.<sup>93</sup> For Justice White, the central issue was a functional one: did either the assignment of power to the Comptroller or the barriers to his removal by the President "prevent the Executive Branch

<sup>85</sup> *Ibid* 3194-3195. Comparing the removal provisions in the 1921 statute creating the Comptroller's office with the protections accorded members of the Federal Trade Commission, Stevens J asserted that *Humphrey's Executor* demonstrated that "the prescription of 'dereliction-of-duty' standards does not impair the independence of the official subject to such standards": *ibid* 3195-3196.

<sup>86</sup> *Ibid* 3200.

<sup>87</sup> *Ibid* 3194. The Act "assigns to the Comptroller General the duty to make policy decisions that have the force of law": *ibid* 3203.

<sup>88</sup> *Ibid* 3205. Stevens J argued that Congress has betrayed its own understanding of the role initially assigned the Comptroller General by including in the Act a so-called 'fallback' procedure in case its reliance on the Comptroller were declared unconstitutional. Under this procedure, final budget reductions were to be determined through Joint Resolution, thus requiring the concurrence of both houses and presentment to the President.

<sup>89</sup> See D Currie, *supra* n 28; G Miller, *supra* n 28. See also Duke L J "Symposium" *supra* n 12.

<sup>90</sup> 106 SCt 3181, 3188 (1986) n 4: "Appellants are wide of the mark in arguing that an affirmation in this case requires casting doubt on the status of 'independent' agencies because no issues involving such agencies are presented here. The statutes establishing such agencies typically specify either that the agency members are removable by the President for specified causes . . . or else do not specify removal procedures. . . . This case involves nothing like these statutes, but rather a statute that provides for direct Congressional involvement over the decision to remove the Comptroller General".

<sup>91</sup> *Ibid* 3202-3204.

<sup>92</sup> *Ibid* 3205.

<sup>93</sup> *Ibid* 3213-3214.

from accomplishing its constitutionally assigned functions”<sup>94</sup> White J could discern no such threat. Congress had clearly, and in his judgment legitimately, sought a delegate whose independence would assure that his calculations would not be “coloured by political considerations”.<sup>95</sup> White J concluded:

[A]n unyielding principle to strike down a statute posing no real danger of aggrandizement of congressional power is extremely misguided and insensitive to our constitutional role. . . . [T]he role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the law-making power and the power to execute the law.<sup>96</sup>

## IX

*Bowsher v Synar* was not the only separation of powers case decided by the Supreme Court at its final sitting in July 1986. The same day the Court announced its decision in *Commodity Futures Trading Commission v Schor*<sup>97</sup> and the majority's contrasting approach in that case makes its opinion worthy of attention. *Schor* involved the constitutionality of the Commodity Futures Trading Commission (CTFC) rule,<sup>98</sup> which asserted Commission jurisdiction to adjudicate defensive counterclaims in administrative proceedings brought against commodity brokers by dissatisfied customers. Congress had given the CTFC authority to adjudicate suits by customers who claimed losses at the hands of brokers who allegedly violated its rules.<sup>99</sup> As a matter of efficiency, the agency held itself out as willing also to decide brokers' responsive counterclaims (for example, for breach of contract or nonpayment) growing out of the same transactions.<sup>100</sup> It was understood that such counterclaims would necessarily be based on State law, since no federal statute gave brokers a right to be paid. Ordinarily, State law claims can be brought only in a State court or in a federal District Court if the parties are of diverse citizenship.

Schor had filed a complaint with the CTFC charging his broker with violations of its rules. The broker promptly counterclaimed for nonpayment of fees, and simultaneously withdrew a breach-of-contract suit it had previously filed in court. Only when the Commission ruled against him and for the broker did Schor object to the consolidation of these disputes. He argued that Article III of the Constitution — which lodges the “judicial power of the United States” in judges appointed with lifetime tenure — precluded

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<sup>94</sup> *Ibid* 3207. At this point White J took note of, and agreed with, the majority's unwillingness to accept the Solicitor General's argument that ‘executive’ powers may only be exercised by officers who are removable at will by the President.

<sup>95</sup> *Cf ibid* 3207-3208.

<sup>96</sup> *Ibid* 3214-3215.

<sup>97</sup> 106 SCt 3245 (1986).

<sup>98</sup> 17 CFR § 12.23 (1983).

<sup>99</sup> Commodity Exchange Act § 14, 7 USC § 18 (1986).

<sup>100</sup> The Court found that the Commission's rule was within its delegated power; thus it could not avoid deciding the underlying constitutional question whether Congress could confer such jurisdiction on a regulatory body.

Congress from assigning jurisdiction over common law claims (like his broker's counterclaim) to an administrative tribunal such as the CTFC.<sup>101</sup>

The *Schor* case presented a very different sort of constitutional dispute than *Bowsher*, or for that matter than *Buckley v Valeo* and *Chadha*, all of which involved challenges to arrangements worked out to facilitate the administration of government programs that Congress and the President competed to control. *Schor* posed the question whether, or to what extent, the political branches could devise schemes that arguably diminished the powers of the judiciary. The special interest of the case lies in the Court's discussion of the principles of separation of powers.

Although Congress has enacted dozens of laws conferring adjudicatory powers on administrative bodies, *Schor's* challenge to the CTFC's assertion of counterclaim jurisdiction was not patently spurious. Four years earlier, in *Northern Pipeline Construction Co v Marathon Pipe Line Co*,<sup>102</sup> the Supreme Court had struck down a key provision of a new federal bankruptcy statute that empowered federal bankruptcy judges — who do not enjoy the protections of so-called Article III judges — to resolve State law contract claims in the course of administering a bankrupt's estate.<sup>103</sup> A majority of the Justices, though unable to agree in their reasoning,<sup>104</sup> concluded that this arrangement amounted to the unconstitutional delegation of *judicial* power to the *executive* branch.<sup>105</sup>

Three years after *Northern Pipe Line*, the Court muddied the water by upholding a provision of the federal pesticide law<sup>106</sup> which forces pesticide manufacturers to submit to binding arbitration, ie to non-judicial resolution, all disputes over the amount they should be compensated for the use of their test data in approving marketing applications from competitors.<sup>107</sup> A majority of the Court<sup>108</sup> thought that entitlement to compensation was a

<sup>101</sup> Art III, § 1 of the US Constitution provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their services, a Compensation, which shall not be diminished during their Continuance in Office.

<sup>102</sup> 458 US 50 (1982).

<sup>103</sup> Bankruptcy Act of 1978, 92 Stat 2549 ff, § 241(a), 28 USC § 1471.

<sup>104</sup> Brennan J authored the Court's chief opinion, which had support from Marshall, Blackmun, and Stevens JJ. Rehnquist J joined by O'Connor J, wrote separately in favour of the result. White J authored a dissent, in which Powell J and Burger CJ joined.

<sup>105</sup> For an insightful discussion of the *Northern Pipe Line* case, and its progenitors, see M Redish, "Legislative Courts, Administrative Agencies, and the *Northern Pipe Line* Decision" [1983] Duke LJ 197.

<sup>106</sup> *Thomas v Union Carbide Agricultural Products Co* 473 US 568 (1985).

<sup>107</sup> Federal Insecticide, Rodenticide, and Fungicide Act, 61 Stat 163, 7 USC § 136, 136a(c). This statute (FIFRA) allows the agency responsible for approving new pesticides, the US Environmental Protection Agency, to consider the data supporting the safety of A's product in evaluating B's application to market a like product. This arrangement makes obvious sense if B's product contains the same active pesticide ingredient as A's. But allowing EPA to rely on A's data saves B both time and money, and thus deprives A of a marketing advantage that it would enjoy if it could withhold permission to consider its data, data in which it may have invested heavily. Thus Congress has thought it appropriate to recognise a sort of 'property' interest in such data, defined (at least in part) by a statutory right to fair compensation for its use. But the statute does not specify how such compensation is to be computed, and disputes between competing pesticide manufacturers are common.

<sup>108</sup> O'Connor J wrote the Court's opinion. Brennan J, with Marshall and Blackmun JJ, wrote separately, concurring in the judgment, as did Stevens J.

product of the statutory scheme — and thus a ‘public right’ whose adjudication Congress could constitutionally assign to a tribunal other than an Article III court.<sup>109</sup>

The decision in *Schor* was awaited with more than usual interest because of the seeming dissonance between these recent cases. The majority opinion, which garnered six votes, was written by Justice O’Connor, who had, without separate statement, joined the majority in *Bowsher*. The contrast between these cases in both style and reasoning was striking. Justice O’Connor emphasised that *Schor*’s separation of powers claim was to be assessed with “practical attention to substance than doctrinaire reliance on formal categories”.<sup>110</sup> The issue was whether Congress’s conferral of counterclaim jurisdiction on the CTFC would “emasculat[e] constitutional courts” or allow “the encroachment or aggrandizement of one branch at the expense of the other”.<sup>111</sup> Claiming that “the Court has declined to adopt formalistic and unbending rules”<sup>112</sup> to resolve such questions, Justice O’Connor found no impermissible intrusion into judicial authority.<sup>113</sup> The CTFC’s assertion of jurisdiction was closely confined, directly linked to its central responsibilities, and designed to contribute to the accomplishment of Congress’s central purpose — promoting compliance with federal restrictions on trade in commodity futures through the efficient resolution of customer-broker disputes.<sup>114</sup>

Professor Strauss, among others, found it difficult to reconcile Chief Justice Burger’s formalism in *Bowsher* with Justice O’Connor’s pragmatic functional approach. He wrote:

It . . . appears that a majority of the Court . . . sought to have it both ways on the subject of separation of powers. For five of the Justices — Chief Justice Burger and Justices Rehnquist, Powell, O’Connor, and Stevens — the proper approach in *Bowsher* appeared to be quite formal: figure out which “branch” the actor is in (or which branch’s function he is exercising) and then see whether the formal requirements that ensue from that inquiry are inconsistent with the provisions of the statute under challenge. However minor or understandable that inconsistency might be, it condemns the statutory scheme. If these five Justices had undertaken the same inquiry in *Schor* . . . they would have been forced to conclude that the CTFC was exercising a judicial function (by resolving a legal dispute arising between two private parties under state common law) outside the article III judiciary. But the only question asked in *Schor* was whether this convenient and well-controlled

<sup>109</sup> 473 US 568, 589 (1985).

<sup>110</sup> 106 SCt 3245, 3256 (1986) (citing her own opinion in *Thomas* 473 US 568, 587 (1985)).

<sup>111</sup> 106 SCt 3245, 3257 (1986). O’Connor J had previously laid to rest any suggestion that *Schor* himself had been prejudiced by invocation of the CTFC’s jurisdiction, pointing out that the Commission’s rule merely provided an alternative, not an exclusive, tribunal for the adjudication of counterclaims, and stressing that it was *Schor* himself who had first insisted that the disputes be consolidated in the administrative proceeding he had initiated.

<sup>112</sup> *Ibid* 3258.

<sup>113</sup> O’Connor J stressed the similarity between the CTFC’s authority to adjudicate disputes over the violation of its rules and the comparable powers of other regulatory agencies, suggesting that it was only the additional sliver of jurisdiction claimed by the Commission — but not to the exclusion of the courts — that presented any difficulty.

<sup>114</sup> 106 SCt 3245, 3258-3260 (1986).

arrangement unavoidably threatened one branch's . . . performance of its most central constitutional functions.<sup>115</sup>

## X

The Supreme Court's latest discussion of separation of powers occurred last June in the widely reported 'independent counsel case', *Morrison v Olson*.<sup>116</sup> The statute involved, the 1978 Ethics in Government Act,<sup>117</sup> embodies one of the most controversial encroachments on the President's historical authority, and the majority opinion — authored by the new Chief Justice, William Rehnquist, and eliciting but a single dissent — may forecast the future direction of the Court in separation of powers cases.

Alexia Morrison was the independent counsel (sometimes termed 'special prosecutor') appointed under the provisions of the Ethics in Government Act to investigate alleged law violations, including, centrally, the asserted obstruction of a congressional inquiry, by three former officials of the Department of Justice. One of them, Theodore Olson, served as Assistant Attorney General for the Office of Legal Counsel, often viewed as the President's, and the Attorney General's, lawyer. Notably, this position was occupied in the Nixon administration by William Rehnquist and, later, by Antonin Scalia, who became protagonists for sharply conflicting views within the Court.

The Ethics in Government Act, passed with President Carter's endorsement and the support of members of Congress of both parties, reflected concern about the conduct of high-ranking executive branch officials and, in particular, about their frequent ties — prior to appointment and post-employment — with business organisations and professional firms that had regular dealings with the government. The Act imposes strict financial disclosure requirements on incumbent and would-be appointees, and restricts the dealings that former officials may have with their old agencies.<sup>118</sup> Alleged violations of some of these provisions have since led to the prosecution of such prominent ex-White House officials as Bert Lance, Lynn Nofziger, and Michael Deaver.

To facilitate the investigation and, where appropriate, the prosecution of such offences, the Ethics in Government Act codifies an arrangement that was used at the time of Watergate.<sup>119</sup> This is the provision authorising appointment of an 'independent counsel', who is empowered to investigate alleged law violations by executive branch officials and initiate prosecution if he concludes that the facts so warrant. This provision was defended by

<sup>115</sup> P Strauss, *supra* n 77, 510. O'Connor J appeared to have no difficulty reconciling the two cases:

Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a co-ordinate branch. Indeed, the separation of powers question presented in this case is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch. In any case, we have, consistent with *Bowsher*, looked to a number of factors in evaluating the extent to which the congressional scheme endangers separation of powers principles under the circumstances presented, but have found no genuine threat to those principles to be present in this case: 106 SCt 3245, 3261.

<sup>116</sup> 108 SCt 2597 (1988).

<sup>117</sup> 28 USC §§ 49, 591 ff.

<sup>118</sup> For discussion of the origins and terms of the Act, see J Mashaw and R Merrill, *supra* n 2, 60-64.

<sup>119</sup> *Ibid* 125-128.

members of Congress as a necessary means of enforcing the Ethics Act's prohibitions, which applied to officials and former officials whose personal ties to an administration might allow them to escape vigorous enforcement.

Neither the Act's affirmative prohibitions nor the independent counsel provision applies to members of Congress or their staffs.<sup>120</sup> They thus can be viewed collectively as a congressional device for policing the behaviour of executive branch officials. And it is hardly surprising that in some quarters the Act was believed to subvert the balance of power between Congress and the executive branch.

The independent counsel provision requires the Attorney General, upon receipt of information that he concludes presents "grounds to investigate whether any [executive official covered by the Act] may have violated any Federal criminal law", to conduct a preliminary investigation.<sup>121</sup> Within 90 days, the Attorney General is required to submit his report to a special court created by the Act. This Court is staffed by sitting judges designated, on a rotating basis, by the Chief Justice. If the Attorney General determines that no further investigation is warranted, the court has no authority to appoint an independent counsel. But if the Attorney General concludes that there are "reasonable grounds to believe that further investigation or prosecution is warranted", he "shall" request that the court appoint an independent counsel to carry on the investigation. The court thereupon "shall appoint an appropriate independent counsel and shall define his jurisdiction".<sup>122</sup>

With respect to all matters within his jurisdiction, the independent counsel is granted by the Act "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice". He may conduct grand jury proceedings, initiate and pursue civil and criminal court proceedings, and appeal any decision in cases in which he is a formal participant — all functions that ordinarily fall within the control of the Attorney General.

The independent counsel's authority can be terminated in two ways. It expires automatically when he notifies the Attorney General that he has completed his investigation or when the special court concludes (ordinarily after receiving a report from the independent counsel) that the investigation is substantially completed. Otherwise, the independent counsel can be removed, other than by impeachment, "only by the personal action of the Attorney General" and only for "extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs [his] perform-

<sup>120</sup> President Reagan, in his final weeks in office, vetoed legislation that would have tightened the Act's strictures on post-employment conduct and made all of its requirements applicable to the legislative branch. Though he endorsed broadening the Act's coverage, Reagan expressed concern that tightening other provisions would make it more difficult for executive branch agencies to retain and recruit employees: Memorandum of Disapproval for the Post-Employment Restrictions Act 1988, (1988) 24 Weekly Compilation of Presidential Documents 1562.

<sup>121</sup> The operative sections of the Act are to be found at 28 USC § 49, and in Title VI, §§ 591-599. My summary of their operation closely tracks that of Rehnquist in CJ in his opinion for the Court.

<sup>122</sup> Those appointed to serve as independent counsels are invariably attorneys from the private sector, though many have had prior experience as federal prosecutors. The two who successively oversaw the Watergate investigation, Archibald Cox and Leon Jaworski, though obviously not appointed under the terms of the 1978 Act, rank among the most distinguished American lawyers, and this tradition of generally appointing figures of prominent reputation has continued.

ance . . .".<sup>123</sup> The Act obliges an independent counsel to keep designated committees of Congress apprised of his work. It also empowers designated committee representatives "to request in writing that the Attorney General apply" for the appointment of an independent counsel, and obliges the Attorney General within a fixed time to respond to such requests.

This elaborate scheme, designed to place the power to investigate alleged official wrongdoing in hands removed from any malign influence by administration officials, seemed under the Supreme Court's precedents to pose serious constitutional questions. Power to appoint an "officer of the United States" charged with law enforcement functions was assigned to a special court, rather than to the President or the Attorney General. Moreover, that officer would not work for the Attorney General or be subject to summary removal by the President. Furthermore, the Act arguably encroached on the judicial power by assigning to Article III judges the duties of appointing and overseeing the independent counsel.

The case arose originally when Olson declined to respond to Ms Morrison's demand for information, inviting a charge of contempt and providing an opportunity to attack the authority under which she was proceeding.<sup>124</sup> Olson's challenge to the statute under which Morrison was appointed had the support of three former Attorneys General, who appeared as *amici curiae*.<sup>125</sup> Olson argued that the independent counsel provisions of the Ethics in Government Act violated the Appointments Clause, abridged Article III's limitations on judicial power, and interfered with the President's executive power under Article II. Most observers thought that the Supreme Court would have real difficulty with the case.

The Court's decision was thus a surprise, if not in outcome, surely in tone. Chief Justice Rehnquist, whom many Court-watchers would have expected to find among the statute's sharpest critics,<sup>126</sup> almost casually upheld it, and was joined by six other Justices. Justice Scalia filed a lengthy and angry dissent.<sup>127</sup> The newest member of the Court, Justice Kennedy, did not participate and, as is customary, offered no explanation.<sup>128</sup>

Chief Justice Rehnquist appeared to have little difficulty with any of Olson's arguments. He thought that the statute complied with the Appointments Clause because the independent counsel was an "inferior Officer", whose appointment Congress could lodge in the head of a department *or*, as here, in the courts. Ms Morrison was "inferior", for this purpose, because she was potentially subject to removal (albeit not freely) by a cabinet officer, the Attorney General; required to adhere to Justice Department policies

<sup>123</sup> This language was intended to avoid the uncertainty surrounding the tenure of the first modern independent counsel, Archibald Cox, who was appointed by then-Attorney General Elliot Richardson to direct the Watergate investigation. See *Nader v Bork* 366 FSupp 104 (1973). See also V Kramer and L Smith, "The Special Prosecutor Act: Proposals for 1983" (1982) 66 Minnesota L Rev 963.

<sup>124</sup> *In re Sealed Case* 838 F2d 476 (1988).

<sup>125</sup> The three were Edward Levi, Attorney General under President Ford; Griffin Bell, Attorney General under President Carter; and William French Smith, President Reagan's first Attorney General and the man responsible for Mr Olson's appointment.

<sup>126</sup> As noted, *supra*, he had himself served as Assistant Attorney General, and he joined the majority opinions in both *Chadha* and *Bowsher*.

<sup>127</sup> 108 SCt 2597, 2622-2641 (1988).

<sup>128</sup> *Ibid* 2622.

governing criminal investigations; and restricted in her jurisdiction.<sup>129</sup> The fact that she owed her appointment to a body in another branch — a novel issue for the Court — did not in Rehnquist CJ's view defeat the scheme.<sup>130</sup>

While Rehnquist CJ conceded that, under Art III, the judicial power extended only to "cases and controversies", he found in the Appointments Clause independent authority — when conferred by Congress — for the appointment function performed by the special court. And the residual oversight responsibilities assigned to the court did "not impermissibly trespass on the authority of the Executive Branch".<sup>131</sup> The Chief Justice puzzled longer over the law's assignment to the court of power to terminate the independent counsel's appointment, but ultimately concluded that this, too, did not amount to a "significant judicial encroachment" upon executive power.<sup>132</sup>

Turning to Olson's broadest claim — that the independent counsel statute invaded the President's constitutional authority to oversee all federal law enforcement and to remove officials engaged in it — Rehnquist CJ quickly distinguished *Bowsher* and *Myers*:

Unlike both, this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch . . . In our view the removal provisions of the Act make this case more analogous to *Humphrey's Executor v United States* . . .<sup>133</sup>

This distinction did not fully meet Olson's objection, however, for he claimed that the role performed by members of the Federal Trade Commission was a far cry from the "core executive function"<sup>134</sup> assigned to the independent counsel. Rehnquist CJ's response to this argument reflected a softening of, perhaps even a retreat from, the Court's prior language:

We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the official involved in *Humphrey's Executor* . . . from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II. . . .<sup>135</sup>

After acknowledging that "there are some 'purely executive' officials who must be removable by the President at will",<sup>136</sup> the Chief Justice turned to the question whether the independent counsel was such an official. He was not persuaded that "the President's need to control the exercise of [the counsel's discretion] is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at

<sup>129</sup> *Ibid* 2608-2609.

<sup>130</sup> *Ibid* 2609-2611.

<sup>131</sup> *Ibid* 2612-2613.

<sup>132</sup> *Ibid* 2614-2615.

<sup>133</sup> *Ibid* 2617.

<sup>134</sup> *Id.*

<sup>135</sup> *Ibid* 2618.

<sup>136</sup> *Id.*

will by the President.”<sup>137</sup> The President’s power, through the Attorney General, to terminate an independent counsel for cause conferred “ample authority to assure that the counsel is competently performing her statutory responsibilities in a manner that comports with the provisions of the Act.”<sup>138</sup>

Evaluating the statutory scheme in all its dimensions, Rehnquist CJ rejected the claim that it unduly interfered with the role of the executive branch. Though he reaffirmed “the importance in our constitutional scheme of the separation of government powers into three coordinate branches”, the Chief Justice cited three reasons why the independent counsel law did not violate this principle. The law betrayed no effort by Congress to enlarge its own powers at the expense of the executive. The limited authority of the special court did not threaten “judicial usurpation” of “properly executive functions”. Finally, the limits on the counsel’s jurisdiction, coupled with the Attorney General’s specified powers of oversight, assured that the scheme did not “impermissibly undermine” the executive power.<sup>139</sup>

Only one other Justice wrote in the independent counsel case. In a biting dissent, Justice Scalia asserted the centrality to the constitutional scheme of the equilibrium among the three branches that the Framers had so carefully crafted.<sup>140</sup> It was this diffusion of power that assured that no branch would gain strength enough to endanger freedom. Scalia J then proceeded to recount the events leading to Ms Morrison’s appointment to investigate Mr Olson’s conduct, ending with this summary:

[B]y the application of this statute in the present case, Congress has effectively compelled a criminal investigation of a high-level appointee of the President in connection with his actions arising out of a bitter power dispute between the President and the Legislative Branch [over executive privilege]. Mr Olson may or may not be guilty of a crime; we do not know. But we do know that the investigation of him has been commenced, not necessarily because the President or his authorised subordinates believe it is in the interest of the United States, in the sense that it warrants the diversion of resources from other efforts, and is worth the cost in money and possible damage to other government interests; and not even, leaving aside these normally considered factors, because the President or his authorized subordinates necessarily believe that an investigation is likely to unearth a violation worthy prosecuting; but only because the Attorney General cannot affirm, as Congress demands, that there are *no reasonable grounds to believe* that further investigation is warranted.<sup>141</sup>

“If to describe this case is not to decide it”, Justice Scalia’s exasperated dissent continued, “the concept of a government of separate and coordinate powers no longer has meaning”.<sup>142</sup>

## XI

The immediate controversy over Mr Olson’s conduct in his dealings with Congress that gave rise to Ms Morrison’s investigation has ended with the filing of her report, which, while it fails fully to exonerate him, concludes

<sup>137</sup> *Ibid* 2619.

<sup>138</sup> *Id.*

<sup>139</sup> *Ibid* 2620-2621.

<sup>140</sup> *Ibid* 2622.

<sup>141</sup> *Ibid* 2625.

<sup>142</sup> *Id.*

emphatically that prosecution on a charge of perjury is not warranted.<sup>143</sup> Thus her constitutional authority to investigate proved a much larger issue than any of the obligations that inspired her appointment in the first instance.

The Supreme Court's decision in *Morrison v Olson* will surely not end academic or political debate over the Constitution's allocation of powers among the three branches of our national government. The case is perhaps best characterised as the newest buoy in an indistinct channel that future experiments in administrative structure, and unresolved challenges to existing arrangements, will probe. Whether Chief Justice Rehnquist's opinion marks the middle of this channel is unclear. One has difficulty discerning a coherent course from *Myers* to *Morrison*. At the same time, the Court's treatment of separation of powers controversies suggests that one should be slow to conclude that any precedent no longer influences its thinking.

Until *Morrison*, it appeared that the most vulnerable of the Court's prior decisions was *Humphrey's Executor*, itself an apparent departure from *Myers* and frequently questioned by constitutional theorists. In *Buckley v Valeo*, *Chadha*, and *Bowsher*, substantial majorities had struck down arrangements in which Congress had attempted to neutralise Presidential (or at least executive) political influence over the making and implementation of policy — precisely what the job protections provided members of the Federal Trade Commission were intended to accomplish. In *Morrison*, however, the Court upheld a statute which allows the appointment of officials who are to perform functions ordinarily performed by Presidential appointees, and who will often — as in that case — operate from a posture hostile to the political, if not the institutional, interests of the sitting President. Moreover, in reaching this result Chief Justice Rehnquist seemed to breathe fresh life into *Humphrey's Executor* by treating it as controlling precedent.

Yet — to continue my metaphor — one is reluctant to conclude that the Court is navigating without lights. A court six of whose current members, including the author of the majority opinion in *Morrison*, joined in rejecting the role of the Comptroller General under Gramm-Rudman is not likely to have arrived at a different understanding of the Constitution just two years later. Are there distinctions between these legislative schemes that justify different results?

In its decisions up to *Bowsher* — putting aside *Humphrey's Executor* — the Court consistently rejected schemes by which the legislative branch sought to dilute Presidential or executive control over government policy. But the statutes overturned had another feature that, *Morrison* implies, helps account for their rejection. In each instance Congress attempted to dilute Presidential control by retaining control itself — such as by appointing members of the Federal Election Commission, by asserting the right to reject decisions of the Attorney General, or by according an official likely to be friendly to congressional views the final power to fix the level of budget reductions.

The independent counsel statute in issue in *Morrison* appears to have survived even though it undoubtedly dilutes — indeed largely defeats — Presidential control over a class of criminal investigations because independence from the executive is accomplished without enhancing the power

<sup>143</sup> P Shenon, "Special Prosecutor Drops E.P.A. Case Without Indictment" *New York Times* August 27 1988, 1; B McAllister and R Marcus, "Olson's Indictment Won't Be Sought" *Washington Post* August 27 1988, A1.

of Congress. The message seems to be that Congress may establish offices or agencies that are insulated from the political oversight of the President so long as it does not thereby enlarge its own political influence. It is arrogation of the power of the legislature at the President's expense, rather than dilution of the traditional functions of the executive, that the Constitution prohibits. To be sure, Chief Justice Rehnquist suggests that there are some executive functions — and some executive officials — that Congress could not insulate from immediate Presidential direction and control.

This interpretation may help to explain the Court's recent decisions but it is not altogether satisfying. First, it does not quite fit the facts of *Morrison v Olson*. For the independent counsel statute is not designed solely to insulate investigations of criminal wrongdoing by executive officers from Presidential influence — (though it surely does this), and the law clearly strengthens the hand of Congress. It does this partly by exclusion; its prohibitions do not apply to members of the legislative branch, nor, though members of Congress are subject to other laws whose violation could subject them to prosecution, are they among those officials whose conduct an independent counsel can be appointed to investigate. Furthermore, the Ethics in Government Act accords members of Congress special status in its implementation. An independent counsel is obliged to keep designated committees apprised of the progress of his investigation, and any official request from a member of Congress for appointment of an independent counsel must command prompt attention from the Attorney General. Moreover, as Justice Scalia's impassioned dissent recounts, the investigation of Mr Olson grew out of a dispute between the Administration and Congress. Under the circumstances, Chief Justice Rehnquist's assurance that the independent counsel provisions of the Act do not represent an attempt by Congress to enlarge its power at the expense the executive rings just a bit hollow.

## XII

Other challenges to existing or still-to-be-devised institutional arrangements will surely reach the Supreme Court. Indeed, two candidates seem likely to receive early attention. First, several scholars<sup>144</sup> and some litigants continue to assert that, *Humphrey's Executor* notwithstanding, the statutory independence of the regulatory commissions violates the Constitution to the extent that it prevents the President from overseeing and directing their enforcement of the law. It had been traditionally assumed that the President (or his immediate subordinates) could not intervene in the law enforcing activities of such agencies as the Federal Trade Commission, for example, to urge the bringing or abandonment of a case, or even to offer advice on their priorities, but *Buckley v Valeo*, coupled with language in *Chadha* and *Bowsher*, gave credence to the suggestion that this assumption, even if supported by statutory language and history, was unsound as a constitutional matter. Though Chief Justice Rehnquist's opinion in *Morrison* raises new doubts about the likely success of the claim that the independent agencies violate separation of powers, such a challenge may soon reach the Court.

<sup>144</sup> Eg D Currie, *supra* n 28; G Miller, *supra* n 28. For an emphatically contrary view, see G. Robinson, "Independent Agencies: Form and Substance in Executive Prerogative" [1988] Duke L J 238, 240-241.

Another separation of powers controversy seems an even more likely candidate for litigation. Efforts by both President Carter and President Reagan to exert greater control over policy-making by executive branch agencies, such as the Environmental Protection Agency, have raised suspicions among members of Congress, and provoked charges of illegal interference from groups that support more vigorous economic and social regulation. These have included claims that the President — or, more accurately, his White House advisors, have subverted statutory mandates by ordering agencies to change regulations, suspend regulations, or delay their issuance. Claims of this sort have surfaced in lawsuits but none have yet reached the Supreme Court.

It is possible, too, that a Democratic Congress might fashion new procedural requirements for regulatory agencies that would be designed to prohibit White House ‘interference’ or force it onto the public record where it would be less effective. Claims that existing statutory delegations of authority to subordinate executive officers, for example, to the Administrator of the Environmental Protection Agency, implicitly bar direction by the President or his advisors might well get sidetracked by a Court anxious to avoid the lurking constitutional question. But if Congress should attempt, by statutory enactment, to curb consultation between the President (and his advisors) and the formal delegates of administrative power — the departmental secretaries and agency heads — the constitutional issue could not easily be avoided.

Nor, based on past practice, would it be avoided. Whatever may be said about its constitutional reasoning, the Supreme Court has shown that it is comfortable in its role as constitutional arbiter of the continuing struggle between the President and Congress. In *Chadha*, a majority reached out to decide the case on the broadest possible ground. In *Bowsher*, essentially the same majority undertook to set aside a political compromise that had commanded the support of both the President and Congress less than a year earlier. In none of these cases has any Justice suggested that the Court should be reluctant to defer to the constitutional judgements of the political branches or to the accommodations that political considerations prompt them to reach. Clearly, the Justices view it as their role to resolve disputes over the limits of Congressional and Presidential authority — a posture that contrasts with the Court’s general willingness, in cases testing the boundaries of national power, to rely on what Professor Wechsler has termed the “political safeguards of federalism”.<sup>145</sup>

It is not obvious that the Court should play the role of referee so vigorously. None of the statutes that it struck down — from *Myers* through to *Bowsher* — were the product of a political process in which the President was powerless. Each bore the signature of some President, sometimes one who claimed at least partial credit for the legislation in question. It is arguable that the Court ought to play a less forward role, accepting more readily the results of political compromise that emerge from a process whose fundamental structure embodies all the ‘separation’ that the Framers thought necessary to protect individual liberty.

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<sup>145</sup> See H Wechsler, “The Political Safeguards of Federalism” (1954) 61 Columbia L Rev.