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Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland

Bernard Schwartz *

In his recent book, *Original Intent and the Framers' Constitution*, Leonard W. Levy briefly discusses *Bowsher v. Synar*,¹ the Burger Court's most important separation of powers decision. Levy dismisses the Court's holding that the statute at issue violated the constitutional doctrine with the almost cavalier comment: "No Court that cared a fig for original intent and had any historical competence would have declared the Gramm-Rudman-Hollings Act unconstitutional on separation-of-powers grounds."²

Bowsher v. Synar was the culmination of the Burger Court's separation of powers jurisprudence. The Court also decided other cases applying the doctrine to invalidate important Congressional provisions.³ It may indeed be said that it was the Burger Court that transformed the separation of powers doctrine from a moribund axiom of political morality to a crucial rule of constitutional law. But it did so at the cost of the flexibility so vital to governmental operation which had previously characterized the jurisprudence in this area.

The needed flexibility has, to some extent, been restored in the separation of powers decisions of the Rehnquist Court. But that Court's most important decision on the matter cast doubt on an essential presidential power. This has only added to the uncertainty created by the Burger Court's jurisprudence.

This Article will discuss the separation of powers cases in the Burger and Rehnquist Courts. Before that, however, something should be said about the pre-Burger Court separation of powers doctrine—both in the caselaw and in constitutional practice. Historical perspective here will enable us to see more clearly how the far-reaching Burger Court decisions departed from the established law and usage in the matter.

I. The Framers and Separation of Powers

Justice Holmes reminds us that the Montesquieu conception of the separation of powers doctrine was based upon a fiction: "His England—the England of the threefold division of power into legislative, executive and judicial—was a fiction invented by him."⁴ In Britain, with its virtual fusion of executive and legislative powers,⁵ the separation of powers was,

* Edwin D. Webb Professor of Law, New York University School of Law.

1 478 U.S. 714 (1986).

2 L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 391-92 (1988).

3 See, e.g., *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976).

4 M. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 381 (1943).

5 See *id.*

despite Montesquieu, only a political theory. In the United States, it was elevated to the level of constitutional doctrine as soon as full separation from the mother country made a new governmental structure necessary. In May 1776, even before formal independence was proclaimed, the Second Continental Congress adopted a resolution urging the various colonies to set up governments of their own.⁶ Effect was given to the resolution by the drafting of constitutions establishing the new governments called for in each of the thirteen states. The first state to act was Virginia, which adopted a Constitution and Declaration of Rights in June 1776.⁷ Included in the latter was a provision "[t]hat the Legislative and Executive powers of the State should be separate and distinct from the Judicative."⁸ This stated the separation of powers doctrine as a rule of positive law—the first such statement in an organic instrument.

The Virginia provision was followed by similar provisions in other state constitutions. First of these was the Maryland Declaration of Rights, adopted in November 1776, which declared "[t]hat the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other."⁹ One month later, the same provision was included in the North Carolina Declaration of Rights.¹⁰ Then, in early 1777, the Georgia Convention adopted a constitution which, in its first article, provided for the separation of powers in terms that anticipated the famous provision in the Massachusetts Declaration of Rights: "The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other."¹¹

The Massachusetts provision itself was the most famous constitutional statement of the separation of powers doctrine. Massachusetts had, of course, been the leader in the conflict that led to independence. But it was one of the last states to give effect to the May 1776 congressional resolution. The first Massachusetts Constitution was not adopted until 1780. Its separation of powers provision was contained in its Declaration of Rights, which, John Adams later wrote, "was drawn by me, who was appointed alone . . . to draw it up."¹²

The Adams draft declaration ended with a separation of powers provision applicable only to the courts: "The judicial department of the

6 See 4 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 342-58 (1906) [hereinafter CONTINENTAL CONGRESS]; see also 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 229 (1971) [hereinafter B. SCHWARTZ, THE BILL OF RIGHTS].

7 CONTINENTAL CONGRESS, *supra* note 6, at 234.

8 See CONTINENTAL CONGRESS, *supra* note 6, at 342-58; B. SCHWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 229.; see also 1 B. SCHWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 238.

9 3 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS, OF THE UNITED STATES 1686-91 (1909); see also 1 B. SWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 281.

10 See F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS, OF THE UNITED STATES 1409-11 (1909); see also 1 B. SCHWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 286.

11 2 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS, OF THE UNITED STATES 778 (1909); see also 1 B. SCHWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 292.

12 Quoted in R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 69 (1955); see also B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND 82 (1977) [hereinafter B. SCHWARTZ, THE GREAT RIGHTS].

State ought to be separate from, and independent of, the legislative and executive powers."¹³ During the Convention debate, the members voted to substitute for the version contained in Adams' draft what became the most celebrated provision in the Massachusetts Declaration: "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."¹⁴ The Convention Journal unfortunately does not tell us who drafted this substitute or what debate it provoked—saying only that "being put, [it] passed in the affirmative."¹⁵

Madison himself was greatly impressed by the Massachusetts separation of powers provision. When he drew up the amendments which became the federal Bill of Rights, he based his draft largely upon the amendments recommended by the state ratifying conventions, especially those of Virginia.¹⁶ But that was not true of the separation of powers. The Virginia Convention, which ratified the Constitution, proposed amendments which included a provision "[t]hat the legislative, executive, and judicial powers of government should be separate and distinct."¹⁷ A similar amendment was proposed in two other states.¹⁸

Madison did not, however, follow the Virginia model. Instead, the amendment that he introduced in the House of Representatives on June 8, 1789, contained a provision patterned upon the Massachusetts Declaration of Rights: "The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments."¹⁹

Madison's proposed amendments were sent to a select committee (of which Madison himself was a member). The committee changed the separation of powers provision so that it read: "The powers delegated by this constitution to the Government of the United States, shall be exercised as therein appropriated, so that the Legislative shall not exercise

13 JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 197 (1832) [hereinafter MASSACHUSETTS BAY JOURNAL]; see also 1 B. SCHWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 373.

14 MASSACHUSETTS BAY JOURNAL, *supra* note 13, at 227; see also, 1 B. SCHWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 344.

15 MASSACHUSETTS BAY JOURNAL, *supra* note 13, at 49; see also 1 B. SCHWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 367.

16 See B. SCHWARTZ, THE GREAT RIGHTS, *supra* note 12, at 69.

17 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 484 (Elliot ed. 1828) [hereinafter SEVERAL STATE CONVENTIONS]; see also 2 B. SCHWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 841.

18 Similar amendments were proposed in both Pennsylvania and North Carolina. See PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788 463; 3 SEVERAL STATE CONVENTIONS, *supra* note 17, at 211; see also 2 B. SCHWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 666, 967.

19 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 436 (1789); see also 2 B. SCHWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 1028.

the powers vested in the Executive or Judicial; nor the Executive the power vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive."²⁰

In this form, it was debated by the House on August 18.²¹ The report of the debate in the Annals of Congress is skimpy. It tells us only that Madison spoke in favor of the amendment, saying that he "supposed the people would be gratified with the amendment, as it was admitted that the powers ought to be separate and distinct; it might also tend to an explanation of some doubts that might arise respecting the construction of the constitution."²²

On the other side, Roger Sherman, who had been a consistent opponent of a Bill of Rights, "conceived this amendment to be altogether unnecessary, inasmuch as the constitution assigned the business of each branch of the Government to a separate department."²³ In addition, Samuel Livermore, "thinking the clause subversive of the constitution, was opposed to it, and hoped it might be disagreed to."²⁴

The House, sitting in Committee of the Whole, voted in favor of the separation of powers amendment and it was contained in the proposed amendments finally voted by the House and sent to the Senate. But the amendment did not become part of the Constitution, since the Senate voted against it. We do not know anything about the Senate debate. The upper House then sat behind closed doors and there is no report of its debates on the Bill of Rights. The only thing the Senate Journal tells us about the separation of powers amendment is that it "was rejected."²⁵

If the Madison-proposed amendment had been voted by the Senate and ratified, there can be no doubt that a strict separation of powers requirement would have become part of the Federal Constitution. But Madison's proposal, as revised by the select committee, was turned down by the Senate and thus was not included in the amendments which we know as the Bill of Rights.

The legislative history just summarized leads to the conclusion that a strict separation of powers, such as that in the Massachusetts Declaration of Rights of 1780, was deliberately rejected at the outset. Whatever separation of powers may be provided for, it does not compel a bright line separation between the departments, with each of them expressly prohibited from exercising any power appropriate to one of the others. That would have been the case under the Madison-proposed separation of powers amendment, modeled as it was after the Massachusetts provision. Its rejection indicates a more flexible approach to the separation of powers. Such indeed, we shall see, was the approach followed before the Burger Court decisions on the matter.

20 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 760 (1789); see also 2 B. SCHWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 1117.

21 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 760 (1789).

22 *Id.*

23 *Id.*

24 *Id.*

25 See 2 B. SCHWARTZ, THE BILL OF RIGHTS, *supra* note 6, at 1151.

II. The Federalist

The last of the Revolutionary Bills of Rights, that adopted by New Hampshire in 1783, contained the following separation of powers article:

In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.²⁶

The essential truth contained in this New Hampshire provision is that the separation of powers should be interpreted to demand only such a separation as is required for the functioning of a free government and as is consistent with the proper operation of the polity.

This was also the view expressed by Madison in *The Federalist*, which, of course, interpreted the Constitution as written and not in light of his rejected separation of powers amendment. Madison's view is stated in terms of his interpretation of Montesquieu:

[H]e did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.²⁷

Madison refers, to the New Hampshire separation provision and states that it indicates that its draftsman "seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments. [Consequently, H]er constitution accordingly mixes these departments in several respects."²⁸

Hamilton took the same approach in his *Federalist* analysis. The separation of powers, he writes:

has been shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is even, in some cases, not only proper but necessary to the mutual defense of the several members of the government against each other.²⁹

Leonard Levy sums up *The Federalist* discussion by saying that it "allows for shared powers and purposefully fails to keep the separation distinct. The three branches are separate, not necessarily their powers."³⁰ The most important contemporary interpretation of the Constitution

²⁶ 4 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS, OF THE UNITED STATES* 2457 (1909); see also 1 B. SCHWARTZ, *THE BILL OF RIGHTS*, *supra* note 6, at 379.

²⁷ *THE FEDERALIST*, No. 47, at 314-15 (J. Madison) (E. Earle ed. 1941) (emphasis in original).

²⁸ *Id.* at 316.

²⁹ *THE FEDERALIST* No. 66, at 429 (A. Hamilton) (E. Earle ed. 1941).

³⁰ L. LEVY, *supra* note 2, at 391.

thus indicates that it was not based on anything like a rigid separation of powers.

III. Administrative Lawmaking

Rejection of Madison's proposed separation of powers amendment did not mean that the separation of powers itself was to have no place in American public law. On the contrary, as Roger Sherman put it in his statement made during the debate on the Madison amendment, the key point to bear in mind is that "the constitution assigned the business of each branch of the Government to a separate department."³¹ This division into three departments has the separation of powers as its implied corollary. Some of the state constitutions, the Supreme Court tells us, expressly provide for the separation of powers. "Other Constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments."³²

The failure to include the Madison proposal for a strict separation, based on the Massachusetts model, enables the constitutional doctrine to be construed more flexibly than it might have been if the Madison amendment had been adopted. Instead of requiring the division of "the branches into watertight compartments"³³ condemned by Justice Holmes, the pre-Burger Court jurisprudence was essentially a gloss upon the Cardozo gospel: "The separation of powers . . . is not a doctrinaire concept to be made use of with pedantic rigor."³⁴

From this point of view, the pre-Burger Court was following, not the literal Montesquieu dogma, but what Holmes once termed "the whole philosophy of the *Esprit des Lois* Nature always acts slowly and, so to speak, sparingly; her operations are never violent."³⁵ So also, the constitutional doctrine was never intended to work with violent rigor on the governmental structure: "[t]here must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee to-day the developments of tomorrow in their nearly infinite variety."³⁶

The flexibility of the Supreme Court in interpreting the constitutional doctrine is best seen in its administrative law jurisprudence. If the Constitution contained a strict separation of powers provision based on the Massachusetts model and the provision was literally interpreted, the rise of the modern administrative agency would have been impossible. The outstanding characteristic of such an administrative agency is the possession of powers which are both legislative and judicial in nature. The important agencies in the federal administration are vested, on the one hand, with the authority to promulgate rules and regulations having the force of law and, on the other, with the power to render decisions

31 See 2 B. SCHWARTZ, *THE BILL OF RIGHTS*, *supra* note 6, at 1117.

32 *Springer v. Philippine Islands*, 277 U.S. 189, 201 (1928).

33 *Id.* at 211 (Holmes, J., dissenting).

34 *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting).

35 See M. LERNER, *supra* note 4, at 378.

36 *Panama Refining*, 293 U.S. at 440 (Cardozo, J., dissenting).

adversely affecting the person or property of particular individuals. These powers are comparable to those traditionally exercised by Congress and the courts. They have, however, been vested in organs outside the legislative and judicial branches because, without such powers, the agencies could not effectively perform the manifold tasks entrusted to them by the legislature.

If, in private life, we were to organize a unit for the operation of an industry, it would hardly follow Montesquieu's lines.³⁷ Nor can the regulation of industry be adequately carried out under a rigid separation of powers. In the administrative process, the various stages of making and applying law, traditionally separate, have been telescoped into a single agency. As Justice Jackson put it, administrative agencies today "combine delegated rule-making, the investigation and prosecution of complaints, and adjudication, and are supposed to unite congressional judgment as to policy, executive efficiency in enforcement, and judicial neutrality and detachment of decision."³⁸ Legislative and judicial powers have become the chief weapons in the twentieth-century administrative armory. In Justice Douglas' words, "[t]here is no doubt that the agency which determines that a particular individual or company should be brought within the regulatory reach of the law is a law-making authority. It is, in other words, clear that the administrator who by order, by rule, or by regulation extends the civil or criminal sanctions of the law to named parties indulges in legislating."³⁹

The constitutional purist may claim that this sort of authority exercised by the administrator is, at most, only *quasi*-legislative in nature. To soften a legal term by a *quasi* is a time-honored lawyer's device. Yet, in this case, it has become wholly illogical thus to grant the fact of administrative power and still to deny the name.

When the Supreme Court in 1952 upholds an indictment of a trucker for violation of a regulation promulgated by the Interstate Commerce Commission prescribing safety precautions for trucks transporting inflammables or explosives,⁴⁰ perhaps the ICC regulation is only a *quasi*-law. But when the trucker is convicted of violating such regulation, we may be certain that they do not incarcerate him in a *quasi*-cell. As Justice White succinctly noted, "[t]here is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term."⁴¹

The inevitable conclusion is that stated by White: "legislative authority is routinely delegated to the Executive Branch, to the independent regulatory agencies, and to private individuals and groups."⁴² The Supreme Court gave its imprimatur to such delegations. Its decisions "establish that by virtue of congressional delegation, legislative power

37 See J. LANDIS, *THE ADMINISTRATIVE PROCESS* 10 (1938).

38 R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 44-45 (1955).

39 W. DOUGLAS, *WE THE JUDGES* 163 (1956).

40 See *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952).

41 *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 986 (1983)(White, J., dissenting).

42 *Id.* at 984.

can be exercised by independent agencies and Executive departments without the passage of new legislation."⁴³

The Court countenanced extensive delegation to agencies because it recognized "that modern government must address a formidable agenda of complex policy issues."⁴⁴ The Court, like Congress itself, had to acknowledge that the comprehensive regulation required in the contemporary state is too intricate and detailed for direct congressional processes. Such regulation, much of which had previously been thought outside the scope of governmental power, could, as a practical matter, be exercised only through the medium of the administrative agency, vested with significant powers of lawmaking.

The basic theme in this respect was stated by the Court over half a century ago: "[u]ndoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."⁴⁵

Under this approach, it is clear that "Congress may delegate lawmaking power to independent and Executive agencies."⁴⁶ Well before the Burger Court, the cases refused to hold an act of Congress invalid merely because it delegated legislative power to administrative authorities. This view was squared with the constitutional provision vesting *all* legislative powers in Congress by distinguishing the legislative power given to the administrator with that vested in Congress itself. The power to "legislate," it was said, when delegated differs basically from the Congress' own power to legislate. Congress is vested with all of the legislative authority granted by the Constitution. But any power delegated is necessarily a subordinate power, because it is limited by the terms of the enactment whereby it is delegated. Congress, Justice Douglas once explained,⁴⁷ may therefore be said to exercise the *primary* legislative function, the administrative agency a *secondary* one.

To give effect to this theory, the Court developed the requirement that the lawmaking power delegated by Congress had to be limited by a standard: "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard."⁴⁸ As stated by the present Chief Justice, this "doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of

43 *Id.* at 985.

44 *Id.* at 999.

45 *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (Cardozo, J., dissenting).

46 *Chadha*, 462 U.S. at 986 (White, J., dissenting).

47 *See W. DOUGLAS, supra* note 39, at 164.

48 *United States v. Chicago, M., St. P. & P.R.R.*, 282 U.S. 311, 324 (1931).

that authority with an 'intelligible principle' to guide the exercise of the delegated discretion."⁴⁹

For over half a century, the standard requirement has been interpreted in a flexible manner. The thrust of the jurisprudence in this area has been to legitimize the vast delegations of power made to administrative agencies, particularly during and after the New Deal period. Yet, in two 1935 cases,⁵⁰ the Court struck down the National Industrial Recovery Act, perhaps the most important early New Deal measure, because the authority granted under it was not restricted by any real standard. Since that time, however, no federal delegation has been ruled invalid.

The pre-Burger Court all but abandoned the standard requirement as a limitation upon delegations. The changed judicial attitude encouraged Congress to make broader delegations to administrative agencies than had formerly been the wont. Wholesale delegations became the rule rather than the exception; the broad grants made during the later New Deal, World War II, the Cold War period, and our more recent endemic economic crises were all sustained. Even a statute such as the Communications Act of 1934, which limits the authority conferred on the Federal Communications Commission only by the requirement that the Commission act in the "public interest"—plainly no limitation at all—was sustained.⁵¹

But where does this leave the requirement of an ascertainable standard in legislation delegating authority to an administrative agency? The only standard provided in the Communications Act is that of the "public interest, convenience, or necessity;" the FCC is told by the Congress to exercise the powers vested in it as the "public interest, convenience, or necessity" may require. Such a standard is anything but mechanical or self-defining; it leaves the widest possible area of judgment and, therefore, of discretion to the administrator.⁵² Certainly, such a legislative direction adds little to a statute delegating powers. Would the FCC be likely to act any differently in specific cases if the Communications Act did not specifically instruct it to be guided by "public interest, convenience, or necessity"? Or, as Justice Scalia has more recently asked, "[w]hat legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?"⁵³

If delegation without a standard is "delegation running riot,"⁵⁴ such delegation had become normal. The touchstone of American government had, indeed, become the public interest criterion. "The basic theme was simple: economic power . . . must be subjected to the 'public interest' "⁵⁵ as defined by the administrator.

49 *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring).

50 *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

51 *See National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

52 *See, e.g., Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 611 (1950).

53 *Mistretta v. United States*, 109 S. Ct. 647, 677 (1989) (Scalia, J., dissenting).

54 *Schechter Poultry*, 295 U.S., at 533 (Cardozo, J., concurring).

55 C. REICH, *THE GREENING OF AMERICA* 46 (1971).

If excessive delegations of power to administrative agencies were once legal questions, under the pre-Burger Court jurisprudence, they became almost exclusively political. The Court relegated the requirement of a defined standard to the level of a purely formal one, devoid of most of its practical efficacy. Provided that the talismanic form of a standard (even if so vague as to be illusory) was used by Congress, its delegations were upheld.

A. *Buckley v. Valeo*

The delegation cases best illustrate the flexible pre-Burger Court approach to the separation of powers. This does not mean that the separation of powers does not have an important role to play in positive constitutional law. Thus, most commentators approve of *Buckley v. Valeo*,⁵⁶ the Burger Court's first separation of powers decision, since it strikes down a congressional encroachment upon an essential Executive power—the power to appoint officers of the United States. The constitutional position of the President as Chief Executive rests, in large part, upon the authority given him by the Appointments Clause of Article II. It insures that the laws are carried out by officers chosen by the President—that the policies of the executive branch are made and carried out by the President and his appointees. The power to create federal offices may be vested in Congress, but the power to appoint to those offices is vested exclusively in the President. To allow another branch to exercise the power to appoint executive officials would unduly dilute the President's position as head of the Executive Branch.

In *Buckley v. Valeo*, Congress attempted to evade this basic principle by setting up a federal agency and providing for presidential appointment of only a minority of its members. The statute at issue created the Federal Election Commission, composed of six voting members: two to be appointed by the president *pro tempore* of the Senate; two by the Speaker of the House; and two by the President, subject to confirmation by both houses of Congress. The lower court rejected the claim that the statute's appointment provision violated the constitutional requirement for presidential appointment of all federal officers.

Though their final decision on the appointment of FEC members was unanimous, the justices were closely divided on the matter at the post-argument conference, which voted four-to-three in favor of the appointment provision. The lengthy *per curiam* opinion in *Buckley* was what one justice once described as an "opinion by committee."⁵⁷ *Buckley*, the present Chief Justice later wrote, saw "the farming out to several different members of the Court of different portions of the opinion to write."⁵⁸ Different parts of the opinion were drafted in the chambers of different justices. The final draft was reviewed by a committee of clerks

⁵⁶ 424 U.S. 1 (1976).

⁵⁷ B. SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE BURGER COURT 276 (1988) [hereinafter B. SCHWARTZ, UNPUBLISHED OPINIONS].

⁵⁸ Memorandum to the Conference, Dec. 10, 1979, headed, "Re: *Goldwater v. Carter*," at 7 (on file with author).

from the different chambers. As Justice Powell put it in a January 19, 1976 letter, it was the job of "the 'Clerks Committee' to harmonize stylistic and verbiage differences between the several Parts subject, of course, to review by each of us."⁵⁹

The section of the *Buckley* opinion with which we are here concerned—the appointment of FEC members—was written by Justice Rehnquist. His draft striking down the appointment provision was joined by the other Justices, including those who had voted the other way at the conference.

The *Buckley* opinion was based upon a straightforward reaffirmation of the exclusive presidential position in the appointment process. It held that the FEC appointment provision violated the constitutional provision requiring appointment of "Officers of the United States" by the President, subject to senatorial confirmation. The Court construed the term "Officers of the United States" most broadly, stating that, as used in Article II, it was intended to "include 'all persons who can be said to hold an office under the government.' . . . [I]ts fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,'"⁶⁰ and must be appointed in the manner prescribed by Article II—*i.e.*, by the President, unless he is an "inferior officer" whose appointment Congress has by law vested in department heads or the courts. Unless their selection is provided for elsewhere in the Constitution, *all* officers of the United States must be appointed by the President in accordance with the Appointments Clause of Article II.

Buckley v. Valeo lends emphasis to the constitutional role of the President as administrative head of the government. Its principle applies to all federal agencies, even those with predominantly legislative and judicial functions. Though Congress may provide for the independence of such agencies from presidential control,⁶¹ it may not do so through exclusion of the President from the selection process.

B. *INS v. Chadha*

If the *Buckley v. Valeo* decision is considered largely not controversial, the same is not true of the two other important separation of powers decisions of the Burger Court. The first of them was rendered in *INS v. Chadha*.⁶² The statute in question in *Chada* provided for use of the so-called "legislative veto" technique. That technique was basically similar to the British practice of laying administrative regulations before Parliament, where they can be annulled by a resolution passed by either House.

In a comparative study of Anglo-American administrative law published in 1972, I noted that, though "Congress has not adopted anything

⁵⁹ Letter from Lewis F. Powell to William J. Brennan, Potter Stewart, William H. Rehnquist (Jan. 19, 1976) (discussing *Buckley*) (on file with author).

⁶⁰ *Buckley*, 424 U.S. at 126.

⁶¹ See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

⁶² 462 U.S. 919 (1983).

like the British practice of laying regulations before Parliament," the technique of "laying" had been increasingly used under American law.⁶³ The decade after that book was published saw greater use of the technique by the American legislature. Over fifty statutes were enacted by Congress during that period containing "legislative veto" provisions under which executive and administrative action could be annulled by resolution of either or both Houses.⁶⁴

There were some 200 statutory provisions for annulment by congressional resolution at the time of the *Chadha* decision.⁶⁵ During the 1970s the technique was used in efforts to control what had come to be called the "Imperial Presidency,"⁶⁶ resulting from what many saw as over-aggrandizement of presidential power. The War Powers Resolution of 1973⁶⁷ authorized the termination by resolution of both Houses of Congress of uses of the armed forces in hostilities abroad. The Congressional Budget and Impoundment Control Act of 1974⁶⁸ attempted to resolve the problem posed by presidential claims of power to impound appropriations voted by Congress. Under the 1974 statute, temporary impoundments may be disapproved by resolution of either House. The same technique was used in laws dealing with foreign affairs and national security. Statutes passed in the 1970s provided that presidential foreign arms sales, export of nuclear technology, and declarations of national emergencies might be annulled by resolution of both Houses.⁶⁹

According to one court, "[t]he increasing use of provisions allowing for legislative veto of administrative law making is a direct reflection of the growing interest in more effective legislative supervision of agency activity."⁷⁰ In setting up procedures for annulment by legislative resolution, an organization of state legislatures declared, "[I] legislatures will be reasserting their legislative prerogatives and regaining the basic law-making authority granted to them."⁷¹ In 1982, the Senate passed a bill providing for laying of all federal delegated legislation before Congress and annulment by resolution of both Houses.⁷²

Chadha itself arose from a challenge to the one-house veto of an Immigration and Naturalization Service determination that deportation of an alien should be suspended because of extreme hardship. Some of the justices were unwilling to use the case as a vehicle for the broadside invalidation of all legislative vetoes. In a February 25, 1982 letter to the

63 B. SCHWARTZ & H. WADE, *LEGAL CONTROL OF GOVERNMENT* 90 (1972).

64 For a list of these statutes, see *Chadha*, 462 U.S. at 1003-13 (Appendix to White, J., dissenting).

65 *See id.* at 944-45.

66 *See* A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

67 50 U.S.C. § 1541-1548 (1973).

68 Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C.).

69 *See* International Security Assistance Act of 1977, Pub. L. No. 95-92, 91 Stat. 614 (1977); Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (1978); National Emergencies Act, Pub. L. No. 94-912, 90 Stat. 1255 (1976).

70 Opinion of the Justices, 121 N.H. 552, 557-58, 431 A.2d 783, 786-87 (1981).

71 NATIONAL CONFERENCE OF STATE LEGISLATURES, *LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS* 4 (1977).

72 *See* S. 1989, 97th Cong., 2d Sess. (1982).

Chief Justice, Justice Powell stated, "I share the concern expressed by you and others about having to decide the one-house veto issue. The Executive and Legislative Branches have lived with it for decades—even though uncomfortably at times. If there were a principled way to avoid the issue, I would welcome it."⁷³

Justice O'Connor urged that the case should be decided narrowly: "[t]he decision in this case would not necessarily resolve the issue in other cases involving different types of 'legislative vetoes.'"⁷⁴ That would be true if the decision was limited to the legislative veto at issue in *Chadha* itself, which involved only the congressional power to disapprove an agency decision in a particular case. As Justice Powell pointed out in a concurring opinion, "[t]he House's action appears clearly adjudicatory" and the Court could have held that "Congress impermissibly assumed a judicial function."⁷⁵

But the majority recognized that a narrow decision, in Justice Brennan's words, "would not settle the persisting controversy between the Executive and the Congress concerning the lawfulness of these one-house veto provisions."⁷⁶ To settle that issue completely, the Court decided on a categorical invalidation of the legislative veto, regardless of the type. The broad opinion of the Court placed all laws containing legislative-veto provisions beyond the constitutional pale. Chief Justice Burger declared that the exercise by Congress of the power to annul executive or administrative action by resolution of one or both Houses was a patent violation of the separation of powers. The Constitution requires "that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure."⁷⁷ That procedure is by "bicameral passage followed by presentment to the President"⁷⁸ for his signature or veto. "It is beyond doubt that lawmaking was a power to be shared by both Houses and the President."⁷⁹ The legislative veto is invalid because it permits Congress alone to exercise what amounts to veto-proof lawmaking power.

Despite the Court's decision, the Constitution, as already stressed, has never been construed as setting up a rigid separation of powers. Indeed, the very power which the Court asserts was violated by the congressional action—the President's veto power—is a *legislative* power. The constitutional grant to the President illustrates a blending of power, intended to enable a check to be imposed by another branch upon exercises of legislative power by the legislative branch. The key principle is a system of checks and balances—not an impermeable separation between the branches.

⁷³ Letter from Lewis F. Powell to Warren E. Burger (Feb. 25, 1982) (discussing *Chadha*) (on file with author).

⁷⁴ Letter from Sandra Day O'Connor to Warren E. Burger (March 11, 1982) (discussing *Chadha*) (on file with author).

⁷⁵ *Chadha*, 462 U.S. 919, 964, 960 (1983) (Powell, J., concurring).

⁷⁶ Letter from William J. Brennan to Lewis F. Powell (Feb. 25, 1982) (discussing *Chadha*) (on file with author).

⁷⁷ *Chadha*, 462 U.S. at 951.

⁷⁸ *Id.* at 954-55.

⁷⁹ *Id.* at 947.

The *Chadha* opinion is based upon a formalistic construction of the separation of powers doctrine that would have made the rise of modern administrative law impossible. As the dissent by Justice White points out, the Court's decision that all "lawmaking" must be shared by Congress and the President "ignores that legislative authority is routinely delegated to the Executive Branch, [and] to the independent regulatory agencies."⁸⁰ If congressional action under the legislative veto technique is "lawmaking" that must be shared by Congress and the President, why is the same not true of the executive and administrative rulemaking which the technique attempts to control?

The key issue is, indeed, one of control. The great need in an era of expanding administrative authority is to establish effective safeguards outside the executive branch. Congress is the one organ of government both responsive to the electorate and independent of the Executive. The legislative veto enabled the legislature to assume an effective role as supervisor of administration. There is no more important role for the contemporary legislature. "The political philosopher," wrote Woodrow Wilson, ". . . has . . . something more than a doubt with which to gainsay the usefulness of a sovereign representative body which confines itself to legislation to the exclusion of all other functions."⁸¹ Important though the legislative function itself may be, a legislative body is, to paraphrase Sir Winston Churchill, hardly worthy of the title of Congress if it merely grinds out laws as a sausage-maker grinds out sausages.⁸²

However, since our Constitution is what the judges say it is,⁸³ there is not much point in merely criticizing the Supreme Court decision. The Court's condemnation is in such sweeping terms that it leaves no room for any use of the legislative veto technique. "To accomplish what has been attempted . . . in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President."⁸⁴

Yet the problem of control remains. As John Stuart Mill tells us, "the proper office of a representative assembly is to watch and control the government."⁸⁵ What tools are left to Congress by the Supreme Court decision to enable it to perform this function?

None that are as effective as the legislative veto technique. Congress can, to be sure, enact laws limiting executive authority and overruling invalid administrative exercises of power. These will, however, be sub-

80 *Id.* at 984.

81 W. WILSON, CONGRESSIONAL GOVERNMENT 194 (W. Lipman ed. 1952).

82 Compare STUDY ON FEDERAL REGULATION, CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES IX (1977).

83 As so bluntly stated by Charles Evans Hughes (later Chief Justice of the United States), "[w]e are under a constitution, but the Constitution is what the judges say it is." Hughes, *Speech Before the Elmira Chamber of Commerce*, ADDRESSES AND PAPERS 133, 139 (1908), quoted in Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 2. Chief Justice Marshall, in his often quoted phrase, noted that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

84 *Chadha*, 462 U.S. at 958.

85 Quoted in STUDY ON FEDERAL REGULATION, CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES IX (1977).

ject to presidential veto and the President will rarely agree to restrictions upon his own administration's authority. It is also unreal to assume that Congress will now impose detailed restrictions in laws delegating power to the Executive. The modern trend has been entirely the other way. Congress has neither the time nor the expertise needed to draft detailed standards limiting delegated authority. In addition, Congress is too often unwilling to make the hard choices needed to set meaningful policies for the Executive. It has always been easier to pass a statute with vague language about the "public interest"—high-sounding and meaningless in terms of restricting executive power. With the negative resolution technique now gone, it will be all but impossible for Congress to exercise its vital role of what Wilson called "vigilant oversight of administration."⁸⁶ The *Chadha* decision will ensure that Americans realize more than ever that *oversight* is the noun of the verb *overlook* as well as *oversee*.

IV. Separation and Independent Agencies

The last of the Burger Court separation of power cases, *Bowsher v. Synar*,⁸⁷ is important both as the culmination of that Court's rigid approach to the constitutional doctrine and because of its implication for the independent administrative agencies created by Congress during the past century. Since the ICC was first created in 1887, independent agencies have become an essential part of modern government. Because of them, "[t]he Presidency is not the sole power"⁸⁸ in carrying out the laws.

The independence of the ICC-type agency stems directly from the decision in *Humphrey's Executor v. United States*.⁸⁹ It arose out of the removal of a Federal Trade Commission member by President Franklin D. Roosevelt on the ground "that the aims and purposes of this Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection."⁹⁰ The Federal Trade Commission Act provides that members of the FTC are to hold office for terms of seven years and that "[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."⁹¹

The Court ruled that the removal of Mr. Humphrey was illegal. The opinion held that the President's wide removal power over officers appointed by him in the ordinary executive departments did not extend to members of a regulatory commission such as the FTC. The President's removal power was instead limited to removal for the causes specified in the statute.

Pointing to the legislative and judicial functions of the FTC, Justice Sutherland, who delivered the *Humphrey's Executor* opinion, asserted that freedom from presidential control was vital to their successful execution.

86 W. WILSON, *supra* note 81, at 195.

87 478 U.S. 714 (1986).

88 Lewis, *Mr. Bush's Problem*, N.Y. Times, August 14, 1988, § 4, at 23, col. 1.

89 295 U.S. 602 (1935).

90 *Id.* at 618 (quoting letters from F. Roosevelt to W. Humphrey (July 25, 1933)).

91 *Id.* at 620 (quoting Federal Trade Commission Act, ch. 311, 38 Stat. 717, 718 (1914) (current version at 15 U.S.C. § 41 (1988))).

"The authority of Congress," he declared, "in creating quasi-legislative or quasi-judicial agencies, to require them to act independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime."⁹²

That the FTC-type agencies may be largely independent of the President is a direct result of the *Humphrey's Executor* case. The key to independence is security of tenure. For, in the apt words of the *Humphrey's Executor* opinion itself, "it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."⁹³ The fact that the members of an agency such as the FTC do not hold their offices only during the pleasure of the President does permit them to maintain an attitude of independence against the presidential will. In its *Wiener* decision,⁹⁴ which reaffirmed the principle of security of tenure, the Court stated that Congress did not wish to have hanging over commissioners the Damocles' sword of removal at the President's pleasure.

Humphrey's Executor was decided over half a century ago. The decision there, it was thought, had settled the constitutionality of the independent ICC or FTC-type agencies and their insulation from unlimited presidential removal power. In recent years, however, both *Humphrey's Executor* and its position as the charter for agency independence have been subjected to challenge. Just before his Supreme Court appointment, Justice Scalia asserted, "[i]t has in any event always been difficult to reconcile *Humphrey's Executor's* 'headless fourth branch' with a constitutional text and tradition establishing three branches of government."⁹⁵

Scalia's statement was based upon the assumption that "the rationale . . . of *Humphrey's Executor* requires, that the presidential removal for cause permitted under the statute upheld there did not include removal because of the appointee's failure to accept presidential instructions regarding matters of policy or statutory application delegated to him by Congress."⁹⁶ This rationale has, of course, been the foundation for agency independence since it denies presidential power to remove agency members for failure to follow White House instructions.

But Scalia went even further and questioned the very concept of agency independence underlined by *Humphrey's Executor* as one "stamped with some of the political science preconceptions characteristic of its era and not of the present day."⁹⁷ According to Scalia, "[i]t is not as obvious today as it seemed in the 1930s that there can be such things as genuinely 'independent' regulatory agencies, bodies of impartial experts whose . . . decisions . . . so clearly involve scientific judgment rather than political

92 *Id.* at 629.

93 *Id.*

94 *See Wiener v. United States*, 357 U.S. 349, 356 (1958).

95 *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C. 1986).

96 *Id.*

97 *Id.*

choice that it is even theoretically desirable to insulate them from the democratic process."⁹⁸

During the Reagan presidency, leading members of the Administration carried the Scalia animadversion to its logical extreme. In a widely reported speech, Attorney General Meese challenged the very foundation of the ICC-type agency, asserting that its independence from presidential control was contrary to the Constitution. Indeed, according to Meese, the entire system of independent agencies is of questionable constitutionality. "It should be up to the President to enforce the law," Meese declared.⁹⁹ "Federal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or 'independent' that. In the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government."¹⁰⁰ Meese urged that "we should abandon the idea that there are such things as 'quasi-legislative' or 'quasi-judicial' functions that can be properly delegated to independent agencies."¹⁰¹

In *Bowsher v. Synar*,¹⁰² the Solicitor General argued that "executive powers . . . may only be exercised by officers removable at will by the President."¹⁰³ Despite the implications of this argument for the independent agencies, during the *Bowsher* oral argument, the Solicitor General told the justices that the proponents of constitutionality of the challenged Gramm-Rudman Act were trying to "scare" them with the argument that upholding the lower court on the constitutional issue would endanger independent agencies such as the Federal Trade Commission and the Federal Reserve Board. At this, Justice O'Connor interposed: "They scared me with it."¹⁰⁴

The other justices must have felt the same fear, for they went out of their way in *Bowsher* to indicate that their decision did not apply to independent agencies. Yet, as will be seen, though the opinion of the Court did reject the claim that the ICC or FTC-type agency is unconstitutional, its reasoning may well lend support to such a claim.

A. *Bowsher v. Synar*

Bowsher itself dealt with the assignment to the Comptroller General of certain functions under the 1985 Gramm-Rudman Act. The Comptroller General is appointed by the President but may be removed from office by a joint resolution of Congress. Gramm-Rudman was a drastic attempt by Congress to eliminate the now-endemic federal deficit. The Act set a maximum deficit amount for federal spending for each of the fiscal years 1986 through 1991. If, in any fiscal year, the budget deficit exceeded the prescribed maximum by more than a specified sum, the Act required across-the-board cuts in federal spending to reach the targeted

98 *Id.*

99 Washington Post, Jan. 3, 1986, at A17, col. 1.

100 *Id.* at col. 2.

101 *Id.*

102 478 U.S. 714 (1986).

103 *Id.* at 760 (White, J., dissenting).

104 54 U.S.L.W. 3710 (U.S. April 29, 1986).

deficit level. These reductions were to be accomplished under the Act's reporting provisions, which required the Directors of the Office of Management and Budget and the Congressional Budget Office to submit their deficit estimates and program-by-program reduction calculations to the Comptroller General who, after reviewing the Directors' joint report, was to report his conclusions to the President. The President then had to issue a sequestration order mandating the spending reductions specified by the Comptroller General, and the sequestration order became effective unless, within a specified time, Congress legislated reductions to obviate the need for the sequestration order.

The Court voted seven-to-two to invalidate Gramm-Rudman. The Chief Justice assigned the opinion to himself. However, the draft which he circulated stated a more expansive view of presidential power than the other justices were willing to accept. The Burger draft indicated that the President possessed complete removal power over all officers charged with carrying out laws. According to the draft: "because the power of removal over Executive Branch officers resides in the President, Congress may not retain the sole power of removal of an officer charged with the execution of the laws."¹⁰⁵ The implication is that the President must have "sole power of removal" over any such officer. That would also be true of the ICC or FTC-type independent agencies, since they, too, are "charged with the execution of the laws."¹⁰⁶

All of the members of the *Bowsher* majority except Justice Rehnquist objected to the Burger draft's implication in this respect.¹⁰⁷ As Justice Stevens wrote to the Chief Justice, "I think your opinion casts substantial doubt on the legal status of independent agencies and that it would be a serious mistake for the Court to adopt this approach."¹⁰⁸

The consensus on the matter was stated by Justice Brennan in a letter to the Chief Justice. Justice Brennan asserted:

the reasoning of the opinion in this case must be that Congress cannot retain the power to remove an officer charged with executing the law, and that the opinion should not rely on the rationale that the President must have power to remove such officers. Moreover, I think it very important that the opinion explain the basis and importance of this distinction, since it is only by doing so that we shall make clear that we are not questioning the viability of independent agencies.¹⁰⁹

The Brennan letter stressed the need to "make very clear that *Humphrey's* is still good law."¹¹⁰ "I think," Brennan wrote, "that the opinion also should reaffirm the holding in *Humphrey's Executor* that Con-

¹⁰⁵ The Burger draft is reprinted in Schwartz, *An Administrative Law "Might Have Been"—Chief Justice Burger's Bowsher v. Synar Draft*, 42 ADMIN. L. REV. 221, 233 (1990).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Letter from John Paul Stevens to Warren E. Burger (June 2, 1986) (discussing *Bowsher*) (letter on file with author).

¹⁰⁹ Letter from William J. Brennan to Warren E. Burger (June 3, 1986) (discussing *Bowsher*) (letter on file with author).

¹¹⁰ *Id.*

gress can create independent agencies (*i.e.*, agencies staffed by officers not removable at the President's pleasure)."¹¹¹

Chief Justice Burger substantially rewrote his *Bowsher* opinion to meet the objections raised by the other justices. In the first place, the basis of decision was changed from lack of presidential removal power over the Comptroller General to the fact that the Comptroller General was removable by Congress and therefore should not be vested with executive powers. The basic conclusion in Chief Justice Burger's opinion is that

Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws.¹¹²

That is forbidden by the Constitution which "does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess."¹¹³

The *Bowsher* opinion analyzed the Comptroller General's position and found that he is directly subject to congressional control. The critical factor was the congressional removal power. The purpose of reserving that power in Congress was to make the Comptroller General an officer of the legislative branch, and Comptrollers General have so viewed themselves over the years. In view of this, said the Chief Justice, "we see no escape from the conclusion that, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers."¹¹⁴

The opinion then found that the powers assigned to the Comptroller General were, indeed, "executive."¹¹⁵ It rejected the contention that the duties assigned to the Comptroller General were "essentially ministerial and mechanical so that their performance would not constitute 'execution of the law' in any meaningful sense."¹¹⁶ "On the contrary," declared the Court, "we view these functions as plainly entailing execution of the law in constitutional terms."¹¹⁷ The Comptroller General must exercise judgment and interpret the Act in exercising the powers assigned to him. And "interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."¹¹⁸ Gramm-Rudman "gives the Comptroller General the ultimate authority to determine the budget cuts to be made,"¹¹⁹ and that is the type of decision typically made by officers charged with executing a statute.

111 *Id.*

112 *Bowsher*, 478 U.S. 714, 726 (1986).

113 *Id.*

114 *Id.* at 732.

115 *Id.* at 733.

116 *Id.* at 732.

117 *Id.*

118 *Id.* at 733.

119 *Id.*

To sum up the *Bowsher* opinion, Congress may determine the nature of the executive duty imposed by a statute which it enacts. But once Congress makes its choice in passing a law, its role ends. Congress can thereafter control the execution of its law only by passing new legislation. In this case, by placing the responsibility for execution of the statute in an officer subject to only its removal power, "Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion."¹²⁰ The constitutional command that Congress play no direct role in the execution of the laws has been directly violated.

To this observer, the *Bowsher* decision ignores the great truth contained in the famous Holmes statement: "The great ordinances of the Constitution do not establish and divide fields of black and white."¹²¹ Here, as in other areas of our public law, the powers of each branch terminate in a penumbra which shades gradually into the powers of another. *Bowsher* forgets the great truth recognized by Marshall at the outset that there are powers of doubtful classification in the penumbra which are for the legislature to classify.¹²² Instead, the Burger Court adopted a simple (one is tempted to say simplistic) and "distressingly formalistic view of separation,"¹²³ which struck down a power whenever it did not fit into the justices' rigid separation of powers classification. In *Bowsher*, for example, the Court invalidated a congressional attempt which was intended, not to make the Comptroller General subservient to Congress, but to insulate a vital office from political pressures. The alternative left by the Court was to subject the Comptroller General to White House control—the very thing that would destroy the independence and integrity of such an office.

To meet the desire of the majority justices that the opinion should indicate that their decision did not apply to the independent agencies, the Chief Justice added a footnote to his opinion which specifically distinguishes the ICC or FTC-type agencies from the Comptroller General.¹²⁴ According to it, "Appellants . . . are wide of the mark in arguing that an affirmance in this case requires casting doubt on the status of 'independent' agencies because no issues involving such agencies are presented here."¹²⁵ That is true because "statutes establishing independent agencies typically specify either that the agency members are removable by the President for specified causes . . . or else do not specify a removal procedure."¹²⁶ There is "no independent agency whose members are removable by the Congress for certain causes short of impeachable offenses, as is the Comptroller General."¹²⁷

120 *Id.* at 734.

121 *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928).

122 *See Wayman v. Southard*, 10 U.S. (1 Wheat.) 43 (1825).

123 *Bowsher*, 478 U.S. at 759 (White, J., dissenting).

124 *See id.* at 725 n.4.

125 *Id.*

126 *Id.*

127 *Id.*

The key to constitutionality for the independent agencies is the absence of congressional power over the removal of their members. The fact that presidential removal power is limited by the *Humphrey's Executor*¹²⁸ and *Wiener*¹²⁹ cases is not enough to support a challenge to their validity; that this makes them independent of presidential control does not (as Justice Scalia had implied in the lower court) cast doubt upon their constitutionality.

In a letter to Justice Brennan, Chief Justice Burger referred to the *Bowsher* footnote and stated, "I think I've made it clear we are casting no doubt on the SEC, FTC, EPA, etc.." ¹³⁰ Burger thus intended his footnote to deter the assertion of the unconstitutionality of the independent agencies. But there is unfortunately language in the Chief Justice's opinion that supports a contrary view. It is true that *Bowsher* does reject the doctrine "that 'executive' powers of the sort granted the Comptroller by the Act may only be exercised by officers removable at will by the President."¹³¹ This means that Congress has power "to vest authority that falls within the Court's definition of executive power in officers who are not subject to removal at will by the President and are therefore not under the President's direct control."¹³²

But *Bowsher* goes on to interpret statutes limiting removal power in a manner that may signal an ultimate end to the independence of the agencies which the *Humphrey's Executor* case recognized as independent. The statutes governing those agencies limit removal and are basically similar to that at issue in *Bowsher*, so far as the grounds for removal are concerned—*i.e.*, they provide for " 'removal for inefficiency, neglect of duty, or malfeasance in office.' "¹³³ The dissent of Justice White contended that this was an important substantive limitation upon removal power, since it does not permit removal at will: "removal is permitted only for specified cause, with the existence of cause to be determined by Congress following a hearing."¹³⁴

The Court's *Bowsher* opinion, however, rejects the notion that the statutory causes really do limit the removal power: "the dissent's assessment of the statute fails to recognize the breadth of the grounds for removal."¹³⁵ The causes listed in the statute "are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will."¹³⁶ Indeed, the Chief Justice goes so far as to imply "that 'inefficiency' or 'malfeasance' are terms as broad as 'maladministration.' "¹³⁷ This, of course, suggests that, despite the statutory statement of causes,

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

129 See *Wiener v. United States*, 357 U.S. 349 (1958).

130 Letter from Warren E. Burger to William J. Brennan (June 6, 1986) (discussing *Bowsher*) (letter on file with author).

131 *Bowsher*, 478 U.S. at 760 (White, J., dissenting).

132 *Id.* at 761 (White, J., dissenting).

133 *Id.* at 725.

134 *Id.* at 770 (White, J., dissenting).

135 *Id.* at 729.

136 *Id.*

137 *Id.* at 729-30.

the removal power in practice is not limited. If this is true in the case of the Comptroller General, is it not also true of the independent agencies whose members may be removed for the same causes as those specified in the *Bowsher* statute? After *Bowsher*, if the President removes a member of an ICC or FTC-type agency and states that he is doing so for "inefficiency, neglect of duty, or malfeasance in office," is it likely that any court would disagree on the merits of the dismissal?

From a broader point of view, the reasoning in the Chief Justice's *Bowsher* opinion is fundamentally inconsistent with his attempt to seal the Pandora's box of independent agency unconstitutionality. If the power delegated to the Comptroller General had been exercised directly by Congress through provision in the statute for mandatory budget cuts, no one would doubt that the power in question was "legislative" in nature. Why then does the Court hold that it is not the same when exercised by the Comptroller General? The answer seems to be that that is the case because it has not been exercised by the legislature itself. The implication then, since the power is plainly not judicial, is that any power giving effect to a statute that is not exercised by the legislature or the courts must be "executive."

Such an approach may be criticized as reminding one of that followed in the familiar parlor game: "It is not animal. It is not vegetable. Therefore, it must be mineral." More important, however, is its implication, despite the *Bowsher* footnote, for the independent agencies. If the carrying out of a law by someone other than the legislature or the courts must be "executive," why is that not true of the powers delegated to the independent agencies? But, if that is the case, under the Burger Court's increasingly formalistic approach to the separation of powers, how can those powers be exercised by agencies which are independent of the President?

B. *Morrison v. Olson*

The questions just posed were answered by the Court after Chief Justice Burger's retirement in a manner that should finally put an end to the separation of powers attack on the ICC or FTC-type independent agencies. But the Rehnquist Court has begun to construct its own separation of powers Wonderland. The Burger Court's *Bowsher* opinion, despite its express disclaimer, cast doubt on the constitutionality of independent agencies. In *Morrison v. Olson*,¹³⁸ the Rehnquist Court went to the opposite extreme and cast doubt on presidential removal power over executive agencies themselves.

At issue in *Morrison* was a law which provided for the appointment of an "independent counsel" to investigate and, if appropriate, prosecute high ranking government officials for criminal violations.¹³⁹ The Attorney General, upon receipt of information that he determines is "sufficient to constitute grounds to investigate whether any person [covered by the statute] may have violated any Federal criminal law," is required

¹³⁸ 108 S. Ct. 2597 (1988).

¹³⁹ *Id.* at 2602-03.

to conduct an investigation.¹⁴⁰ If the Attorney General then determines that there are "reasonable grounds to believe that further investigation or prosecution is warranted," he is to apply to a special court for the appointment of an independent counsel, who is granted all the powers of a federal prosecutor.¹⁴¹

Under the statute, an independent counsel "may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."¹⁴² There is provision for judicial review of any such removal action.¹⁴³

In *Morrison*, an independent counsel had been appointed to investigate allegations against Department of Justice officials.¹⁴⁴ She caused a grand jury to issue and serve subpoenas on the officials.¹⁴⁵ The officials moved to quash, claiming that the independent counsel law was unconstitutional.¹⁴⁶ Their principal objection was that the statute violated separation of powers principles by impermissibly interfering with the functions of the Executive Branch.¹⁴⁷

The Court held that the statutory provision restricting the Attorney General's power to remove the independent counsel only for "good cause" did not impermissibly interfere with the President's exercise of his constitutionally appointed functions.¹⁴⁸ The key point was that here, as contrasted with *Bowsher*, Congress had not attempted to gain a role in the removal of executive officials. Instead, the Act put the removal power squarely in the hands of the Executive Branch.¹⁴⁹ Nor did the statute's imposition of a "good cause" standard for removal unduly trammel on executive authority. The congressional determination to limit the Attorney General's removal power was essential, in Congress' view, to establish the necessary independence of the office of independent counsel.¹⁵⁰

Hence, the Court concluded, the statute did not violate the separation of powers doctrine since it did not impermissibly undermine the powers of the Executive Branch, or disrupt the proper balance between the different branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.¹⁵¹ Even though the counsel is "independent" and free from supervision to a greater extent than other federal prosecutors, the statute gives the Executive Branch

140 *Id.* at 2603.

141 *Id.*

142 *Id.* at 2604 (quoting 28 U.S.C.A. § 596(a)(1) (Supp. 1988)).

143 *Id.* (quoting 28 U.S.C.A. § 596(a)(3) (Supp. 1988)).

144 *Id.* at 2606.

145 *Id.* at 2607.

146 *Id.*

147 *In re Sealed Case*, 665 F. Supp. 56, 60 (D.D.C. 1987).

148 108 S. Ct. at 2619-20.

149 *Id.* at 2620-21.

150 *Id.* at 2619-20.

151 *Id.* at 2621.

sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.¹⁵²

The Chief Justice's opinion states that *Bowsher* turned upon the retention of the removal power there by Congress itself.¹⁵³ Since that was not the case under the independent counsel statute, it was not subject to the same separation of powers objection.

But then the Rehnquist opinion goes on to indicate that that was also true in *Myers v. United States*,¹⁵⁴ which has been the leading case on presidential power to remove executive officers. The Chief Justice writes that, in *Myers*, too, "the essence of the decision . . . was the judgment that the Constitution prevents Congress from 'draw[ing] to itself . . . the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of the [Appointments Clause] and to infringe the constitutional principle of the separation of governmental powers.'" ¹⁵⁵ In *Morrison*, there was no attempt by Congress to gain a role in the removal of executive officials. On the contrary, says Rehnquist, the independent counsel statute "puts the removal power squarely in the hands of the Executive Branch; an independent counsel may be removed from office, 'only by the personal action of the Attorney General, and only for good cause.'" ¹⁵⁶

Yet, as Justice Scalia points out in his *Morrison* dissent, "[t]his is somewhat like referring to shackles as an effective means of locomotion. As we recognized in *Humphrey's Executor v. United States* . . . indeed, what *Humphrey's Executor* was all about—limiting removal power to 'good cause' is an impediment to, not an effective grant of, presidential control."¹⁵⁷ In *Humphrey's Executor*, limiting the President's removal power over FTC members to removal only for cause was upheld because the Commission exercises adjudicatory functions, which requires absolute freedom from Executive interferences.¹⁵⁸ Now, "[w]hat we in *Humphrey's Executor* found to be a means of eliminating presidential control, the Court today considers the 'most importan[t]' means of assuring presidential control."¹⁵⁹

The *Myers* case itself has been the juristic foundation of the President's position as Chief Executive. The President has the authority to control the operation of the Executive Branch because of his unfettered power of instant dismissal. In this respect might makes right within the Executive Branch. What the President commands will be done by executive officials—at least if they wish to retain their appointments.

In *Morrison*, the Court, in effect, overrules the essential *Myers* holding that Congress may not limit the President's removal power over executive officers. The distinction between *Myers* and *Humphrey's Executor* had

152 *Id.* at 2622.

153 *Id.* at 2616.

154 272 U.S. 52 (1926).

155 *Morrison*, 108 S. Ct. at 2616, quoting *Myers v. United States*, 272 U.S. 52, 161 (1926).

156 *Id.*

157 *Id.* at 2627 (Scalia, J., dissenting).

158 *See id.*

159 *Id.*

always been considered that between “purely executive” officers (where the Constitution vested the President with unfettered removal power) and officers exercising “quasi-legislative” and “quasi-judicial” powers (where Congress could limit Presidential power to removal for cause). In the *Morrison* opinion, this settled distinction is abandoned: “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.’”¹⁶⁰ Instead, the test is not “the functions served by the officials at issue:” “the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.”¹⁶¹

The *Morrison* Court finds that the “good cause” provision does not unduly limit the removal power: “we cannot say that the imposition of a ‘good cause’ standard for removal by itself unduly trammels on executive authority.”¹⁶² It does not impermissibly burden the President’s power to control the independent counsel, as an executive official. “Rather, because the independent counsel may be terminated for ‘good cause’, the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing her statutory responsibilities in a manner that comports with the provisions of the Act.”¹⁶³

Unless the Court is suggesting that, despite the “good cause” restriction, the President’s removal power in practice is not limited,¹⁶⁴ this statement is contrary to both language and law. If the “good cause” language was not intended to limit the removal power, why was it put in the statute? And, if it is a significant limitation, it is contrary to *Myers*, so far as “purely executive” officers are concerned. Under the *Morrison* opinion, congressional power to impose a “good cause” limitation no longer turns on whether the officer involved is exercising “executive” as opposed to “quasi-legislative” and “quasi-judicial” functions. In this respect, the *Morrison* opinion is a standing invitation to Congress to impose “good cause” limitations upon the President’s power to remove “purely executive” officers.

If this analysis is correct, *Morrison*’s ultimate effect may be a weakening of the President’s position as administrative chief of the government. Under *Myers*, Article II “grants to the President the executive power of the government—*i. e.*, the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed.”¹⁶⁵ Under the Rehnquist *Morrison* opin-

160 *Id.* at 2618.

161 *Id.* at 2619.

162 *Id.*

163 *Id.*

164 Just such a suggestion was made in the *Bowsher* opinion. See *Bowsher*, 478 U.S. at 740 (Stevens, J., concurring).

165 *Meyers v. United States*, 272 U.S. 52, 163-64 (1926).

ion, presidential control may be limited by "good cause" provisions even where only "purely executive" officers are concerned.

It should, however, be stressed that whatever may be the effect of *Morrison v. Olson* upon the Executive Branch, it contains the complete legal answer to the claim that the independent agencies are unconstitutional because their members are not subject to unlimited presidential removal power. *Morrison* clearly indicates that statutes limiting the President's removal power to removal for cause are valid. *Morrison* states expressly: "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority."¹⁶⁶ One may, as indicated above, question the applicability of this statement to the Executive Branch itself. But there are no such doubts so far as the independent agencies are concerned. With regard to them, *Morrison* only confirms the *Humphrey's Executor* holding that presidential removal power over the ICC-FTC-type agencies may constitutionally be restricted to removal for cause. *Morrison* thus relegates to legal limbo the argument that the ICC and FTC-type independent agencies are unconstitutional because their members do not serve at the President's pleasure.

V. Sentencing and Separation

The Rehnquist Court also handed down an important separation of powers decision in *Mistretta v. United States*.¹⁶⁷ At issue there were mandatory guidelines promulgated by the United States Sentencing Commission, which was set up by Congress to issue guidelines to control federal judges in their imposition of sentences in criminal cases.¹⁶⁸ The Commission was composed of seven members appointed by the President, three of whom were to be sitting federal judges, and chosen from a list of six submitted by the Judicial Conference.¹⁶⁹

The lower courts had been divided on the constitutionality of the Sentencing Commission and the delegation to it of the power to issue guidelines. In the district courts, over 150 judges held against constitutionality; 115 decided the other way.¹⁷⁰ There were two court of appeals decisions, one in favor of constitutionality,¹⁷¹ and one against.¹⁷² The decision against constitutionality held that the provision for judges to serve as members of the Commission violated the separation of powers because federal judges might not constitutionally perform the rulemaking functions Congress had assigned to them.¹⁷³ The reasoning on this point was the simplistic one followed by those who urge an inflexible separation of powers interpretation: the Constitution gives federal judges only "the judicial Power" and restricts its exercise to "cases" and

166 *Morrison*, 108 S. Ct. at 2619.

167 109 S. Ct. 647 (1989).

168 *Id.* at 649.

169 *Id.* at 652.

170 See N.Y. Times, Jan. 19, 1989, at 1.

171 See *United States v. Frank*, 864 F.2d 992 (3d Cir. 1988).

172 See *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245 (9th Cir. 1988).

173 See *id.* at 1263-66.

“controversies.”¹⁷⁴ Therefore judges may not exercise nonjudicial duties. Here the rulemaking powers of the Sentencing Commission are nonjudicial in nature. Hence they may not constitutionally be performed by federal judges. Q.E.D.!

The rigid approach to separation of powers is reminiscent of the approach followed by the Burger Court. It was, however, categorically rejected by its successor in *Mistretta*, in which the law establishing the Sentencing Commission was sustained.¹⁷⁵ The Court found “that the role of the Commission in promulgating guidelines for the exercise of that judicial function bears considerable similarity to the role of this Court in establishing rules of procedure under the various enabling acts.”¹⁷⁶ Both the sentencing guidelines and the procedure rules are “court rules” which the judiciary may be authorized to issue. “In other words, the Commission’s functions, like this Court’s function in promulgating procedural rules, are clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch.”¹⁷⁷

The *Mistretta* decision is based upon a rejection of the rigid separation of powers approach for what the Court calls a “flexible understanding of separation of powers,”¹⁷⁸ which recognizes “that the greatest security against tyranny—the accumulation of excessive authority in a single branch—lies not in a hermetic division between the Branches, but in a carefully crafted system of checked and balanced power within each Branch.”¹⁷⁹

In this case particularly, the Court’s rejection of the rigid approach is warranted by its undesirable consequences. New Jersey Chief Justice Vanderbilt tells us why there has been a trend in the direction of judicial rulemaking power: “[r]ules of court are made by experts who are familiar with the specific problems to be solved and the various ways of solving them.”¹⁸⁰ Since the judges participate in their making, this also makes for a further benefit: “[r]ules of court, moreover, have the great advantage that not only are they made by experts, but they are interpreted and applied by Judges who are sympathetic with them.”¹⁸¹ If the Sentencing Commission were ruled violative of the separation of powers, this would not be true of rules governing sentencing, which could not be made by “an independent body within the judicial branch staffed in part by federal judges who have expertise in matters involving criminal punishment.”¹⁸²

The rigid approach to separation of powers here would also mean that any body which may be given authority to issue sentencing guidelines would be chosen solely by the President, who would not have to select any independent judges as members. This would, of course, make

174 *Id.* at 1251.

175 *See Mistretta*, 109 S. Ct. at 675.

176 *Id.* at 664.

177 *Id.*

178 *Id.* at 659.

179 *Id.*

180 *Winberry v. Salisbury*, 5 N.J. 240, 253, 74 A.2d 305, 413 (1950).

181 *Id.*

182 *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1257 (9th Cir. 1988).

for an increase in presidential power—which not everyone would consider desirable in an age in which the governmental center of gravity has increasingly moved toward the executive end of Pennsylvania Avenue.

From this point of view, *Mistretta* can only be applauded by a critic of the Burger Court's formalistic separation of powers posture. Both *Mistretta* and *Morrison* represent a welcome post-Burger return to a more flexible interpretation of the constitutional doctrine. Yet there are disturbing implications in both cases. *Morrison*, we saw, raised the question of whether the Court had gone too far in its indication that Congress might limit presidential removal power over "purely executive" officers. In *Mistretta*, there is an unfortunate implication of approval for the undertaking of nonjudicial duties by federal judges.

The decision that the service of federal judges on the Sentencing Commission does not violate the separation of powers doctrine is one with which most public lawyers will agree. The work of the Commission bears a direct relationship to the work of the federal courts. If the judges *qua* judges may be authorized to draft rules governing court operation, it is hard to see why they may not be authorized to do so while serving on an extrajudicial commission.

The *Mistretta* opinion does not, however, stop with approval of judicial service on a body such as the Sentencing Commission. Instead, the Court goes out of its way to refer to "[o]ur 200-year tradition of extrajudicial service [as] additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity."¹⁸³ The opinion lists the extrajudicial duties that have been assumed by members of the highest Court, from Chief Justice Jay's service as Special Ambassador to England, to Chief Justice Warren's presiding over the commission investigating President Kennedy's assassination. The Court also refers to two early cases¹⁸⁴ which are interpreted as "suggest[ing] that Congress may authorize a federal judge, in an individual capacity, to perform an executive function without violating the separation of powers."¹⁸⁵

The *Mistretta* opinion expresses no disapproval of the instances of extrajudicial service listed by it. The unfortunate implication, as already indicated, is *sub silentio* approval of such service. Yet, if anything is clear, both in theory and practice, it is the undesirability of extrajudicial service by judges—at least where the service is not related to the work of the courts. When the Framers set up the judicial department, they set it apart from the political branches, intending that, by withdrawal from the usual temptations of private interest, its members might reasonably be expected to be "as free, impartial, and independent as the lot of humanity will admit."¹⁸⁶ For the judges to accept nonjudicial offices, which have nothing to do with court functioning, is for them to compromise the organic intention in this respect. In Madison's words: "[t]his was break-

183 *Mistretta*, 109 S. Ct. at 669.

184 *Id.* at 670-71 (*referring to* Hayburn's Case, 2 U.S. (1 Dall.) 409 (1792), and *United States v. Ferreira*, 13 U.S. (1 How.) 40 (1852)).

185 *Id.* at 671.

186 *United States v. United Mine Workers*, 330 U.S. 258, 308 (1947).

ing in on a fundamental principle, that is, that you ought to insulate and cut off a Judge from all extraneous inducements and expectations."¹⁸⁷

The policy of our system, with regard to extrajudicial duties, has been well set forth by Justice Cardozo: "[t]he policy is to conserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties."¹⁸⁸ A judge who undertakes official extrajudicial offices in another branch of the government lays himself open to the charge that he is engaging in conflicting activities which may work a diminution in the prestige of the judiciary itself.¹⁸⁹

Perhaps, as *Mistretta* says, "the Constitution, at least as a *per se* matter, does not forbid judges from wearing two hats."¹⁹⁰ But the spirit of the organic document is quite another thing! As Cardozo stated in declining the assumption of other official duties while he was chief of New York's highest court, his acceptance would lead many to "feel that there had been an offense against the spirit. I think I shall best maintain the dignity and fair fame of the great office that I hold if I avoid the occasion and the possibility of debate or misconstruction."¹⁹¹

VI. Conclusion

Justice Scalia starts his *Morrison v. Olson* dissent by quoting the strict separation of powers provision in the Massachusetts Constitution of 1780.¹⁹² He then says that the Framers viewed the constitutional principle similarly.¹⁹³ Justice Scalia's *Morrison* and *Mistretta* dissents are based upon the assumption that the rigid Massachusetts provision is part of the Federal Constitution. The same assumption appears to underlie Chief Justice Burger's *Chadha* and *Bowsher* opinions. Yet, as already stressed, Madison's proposed amendment modeled upon the Massachusetts provision was rejected. That rejection indicates that, to the Framers at least, the Constitution did not provide for any rigid separation of powers. But the Burger Court decisions interpret the Constitution as though it provided specifically for that.

The Burger Court's treatment of the separation of powers brings to mind a striking passage by de Tocqueville: "When we study the history of our Revolution, we see that it was led in precisely the same spirit that produced so many abstract books on government. The same attraction for general theories; complete systems of legislation and exact symmetry in laws; the same disdain for existing facts; the same confidence in theory; . . . the same desire to remake the constitution at one stroke according to the rules of logic and following one single plan, instead of seeking to amend its parts. Frightening spectacle! for what is a quality in the

187 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 120 (1924).

188 *Independence of Judges: Should They Be Used for Non-Judicial Work*, 33 A.B.A. J. 792, 794-95 (1947).

189 See Roberts, *Now Is the Time: Fortifying the Court's Independence*, 35 A.B.A. J. 1, 2 (1949).

190 *Mistretta*, 109 S. Ct. at 671.

191 A. VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* 118 n.63 (1953).

192 See 108 S. Ct. 2597, 2622 (1988) (Scalia, J., dissenting).

193 See *id.*

writer is usually a vice in the statesman, and the same things that often make for beautiful books can lead to great revolutions."¹⁹⁴

In its *Chadha* and *Bowsher* decisions, the Burger Court relied upon an abstract separation of powers theory that the Framers never intended to embody in the Constitution and, with disdain for the facts that had led Congress to act as it did, pushed the theory to its abstract logical extreme. In the process, it invalidated a device increasingly used to control exercises of delegated power by Anglo-American legislatures and struck down an effort to place deficit reduction in the hands of an independent official not subject to White House pressures: all in furtherance of an absolute separation of powers that was possible only in the theoretical writings of a Montesquieu, who looked across at foggy England from his sunny Gascon vineyards, and completely misconstrued what he saw.

It is true that the Burger Court's separation of powers jurisprudence has now been substantially modified by its successor. But if the Rehnquist Court's decisions show a welcome flexibility in its separation of powers approach, they also raise the problems pointed out in our discussion of *Morrison v. Olson* and *Mistretta v. United States*. Like other constitutional doctrines, the separation of powers doctrine should be flexible; but it should not be flaccid.¹⁹⁵ It should not separate government into watertight compartments; but it should prevent encroachment upon the essential functions of each department.

The *Morrison* opinion, we saw, gives Congress a standing invitation to encroach upon the President's essential power to remove even "purely executive" officers. And *Mistretta* contains an unnecessary approval of extrajudicial duties by judges, even those not connected with the work of the courts.

"Curiouser and curiouser!" Even when the Rehnquist Court clarifies the questions raised by its predecessor's jurisprudence, it raises new questions which further confound the observer. Perhaps what is needed is a Lewis Carroll to describe the separation of powers Wonderland being constructed by the highest Court.

194 A. DE TOCQUEVILLE, L'ANCIEN REGIME ET LA REVOLUTION 246-47 (2d ed. 1856) (author's translation).

195 Cf. *Geneva Towers Tenants Org. v. Federated Mortgage Inv.*, 504 F.2d 483, 498 (9th Cir. 1974) ("procedural due process is flexible, but it is not flaccid").

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