

# William & Mary Law Review

---

Volume 30 (1988-1989)  
Issue 2 *The American Constitutional Tradition  
of Shared and Separated Powers*

---

Article 11

February 1989

## Separation of Powers and the Limits of Independence

Richard J. Pierce Jr.

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#)

---

### Repository Citation

Richard J. Pierce Jr., *Separation of Powers and the Limits of Independence*, 30 Wm. & Mary L. Rev. 365 (1989), <https://scholarship.law.wm.edu/wmlr/vol30/iss2/11>

Copyright c 1989 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

## SEPARATION OF POWERS AND THE LIMITS OF INDEPENDENCE

RICHARD J. PIERCE, JR.\*

President Verkuil provides valuable insights on separation of powers controversies by making three related points. First, formal analysis of disputes under separation of powers is not very helpful and can cause considerable mischief.<sup>1</sup> If powers truly were separated so that each branch of government could exercise only a discrete set of powers to the exclusion of the other branches, the Nation would be ungovernable. Nothing in the delphic language of articles I, II and III, or in the ambiguous and ambivalent genesis of the concept of separation of powers dictates this result.<sup>2</sup> Second, to provide both content and boundaries to the concept of separation of powers, separation of powers disputes must be analyzed functionally with reference to other, more specific constitutional law doctrines.<sup>3</sup> Third, procedural due process, though by no means self-defining and free of ambiguity itself, provides an excellent vehicle for analyzing separation of powers disputes.<sup>4</sup>

I find far more to praise than to criticize in Verkuil's paper. Yet, I will take my responsibility as a commentator seriously by accentuating the negative. My one reservation about Verkuil's framework for analysis lies in his third point. I readily concede that due process provides an excellent vehicle for analyzing many separation of powers issues. Indeed, his paper has convinced me that due process is a far more powerful tool for this purpose than I had supposed previously. Specifically, the due process framework provides a markedly superior alternative doctrinal basis for the holdings in many of the most celebrated (and problematic) separation of pow-

---

\* George W. Hutchison Professor of Law, Southern Methodist University.

1. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303 (1989).

2. *Id.* at 307. See also Casper, *An Essay in Separation of Powers: Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989).

3. Verkuil, *supra* note 1, at 307-08.

4. *Id.* at 317.

ers cases which include *Commodities Future Trading Commission v. Schor*,<sup>5</sup> *INS v. Chadha*,<sup>6</sup> *Humphrey's Executor v. United States*,<sup>7</sup> *Schechter Poultry Corp. v. United States*,<sup>8</sup> and *Carter v. Carter Coal Co.*<sup>9</sup> I was also pleasantly surprised to discover how well Verkuil's method of analysis accommodates the perplexing new issue of the constitutionality of independent counsel.<sup>10</sup> Verkuil's approach to this important dispute seems more promising than any of the alternatives previously developed.<sup>11</sup> More generally, Verkuil's analysis of separation of powers disputes through a due process prism seems to work well whenever the subject of the dispute is adjudication.

My reservation about Verkuil's third point arises when he tries to apply his due process test to disputes concerning allocation of the power to make policy decisions. He applies his framework of analysis to three issues of this type—legislative vetoes of agency policy decisions,<sup>12</sup> standardless delegations of policy-making power to agencies,<sup>13</sup> and policy making by agencies that are independent of presidential control.<sup>14</sup> In each case, the due process analysis seems strained, and a functional approach based on other constitutional law doctrines seems more promising.

Verkuil argues that legislative vetoes of agency policy decisions could, and should, have been held unconstitutional on the basis that frequently legislators have conflicts of interest in this setting.<sup>15</sup> They are biased decision makers, then, in contravention of one of the most important principles of procedural due process. I am uncomfortable with this argument on two related grounds. First, I had thought it well-settled by *Bimetallic Investment Co. v.*

---

5. 478 U.S. 833 (1986).

6. 462 U.S. 919 (1983). Verkuil's reference to *Chadha* for this purpose is limited to the specific issue resolved by the holding in *Chadha*, that is, the constitutionality of a congressional veto of the Attorney General's decision not to deport an individual.

7. 295 U.S. 602 (1935).

8. 295 U.S. 495 (1935).

9. 298 U.S. 238 (1936).

10. Verkuil, *supra* note 1, at 326.

11. See *In re Sealed Case*, 838 F.2d 476 (D.C. Cir.), *rev'd sub nom. Morrison v. Olson*, 108 S. Ct. 2597 (1988).

12. Verkuil, *supra* note 1, at 313-14.

13. *Id.* at 317-22.

14. *Id.* at 322-26.

15. *Id.* at 313-14.

*Colorado*<sup>16</sup> and *Londoner v. Denver*<sup>17</sup> that procedural due process protects only individuals or small numbers of individuals from arbitrary government actions that single them out for adverse action. In contrast, when a government action affects a large number of people, their recourse is through the political process.<sup>18</sup> Second, the problem of legislator conflicts of interest is not confined to the legislative veto context. Rather, it seems to be ubiquitous in virtually every context in which legislators act.<sup>19</sup> Verkuil's approach to this issue thus appears to suffer from the same flaw that he documents in formal separation of powers analysis—it proves too much and, carried to its logical conclusion, threatens to render the nation ungovernable.

Concededly, the formal separation of powers analysis the Court used to resolve the legislative veto issue is unsatisfactory, yet other functional approaches seem more illuminating than a strained attempt to apply the conflict of interest strand of due process analysis. Breyer's functional analysis of the legislative veto,<sup>20</sup> based on the purposes of bicameralism and presentment and on the effects of the legislative veto on the constitutional system of checks and balances, exemplifies an analytical framework more helpful than due process in evaluating the constitutionality of legislative vetoes of agency policy decisions.

Verkuil's due process analysis of the nondelegation doctrine seems similarly strained.<sup>21</sup> He finds the executive exercise of policy-making power under standardless delegations offensive to both the rule of law and the conflict of interest components of due process. Yet, he recognizes that his due process analysis of standardless delegations shares the flaw of formal separation of powers analysis. It is open-ended and, hence, its uniform application

---

16. 239 U.S. 441 (1915).

17. 210 U.S. 373 (1908).

18. See *Minnesota Bd. of Community Colleges v. Knight*, 465 U.S. 271, 285 (1984); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 542 (1978); *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 244 (1973). See also R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW & PROCESS* 248-55 (1985).

19. See E. DREW, *POLITICS AND MONEY* (1983).

20. Breyer, *The Legislative Veto After Chadha*, 72 *Geo. L.J.* 785 (1984). See also Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 *Duke L.J.* 789.

21. Verkuil, *supra* note 1, at 317.

would render the nation ungovernable. He concludes that broad delegations to the executive should be held invalid only if they offend the Constitution in some more specific manner. I like the result, but the initial step in the reasoning process—broad delegations offend due process but we must tolerate them anyway—causes me to question again the value of applying due process analysis to policy making.

Verkuil's analytical approach to the third policy-making context—the constitutionality of policy making delegated to officials independent of the President—incorporates some of the constitutional considerations other than due process that are central to any dispute concerning allocation of policy-making power. Verkuil recognizes that “policy-making prerogatives of the executive branch” are what article II is meant to protect,<sup>22</sup> and that “[t]oo much independence can undermine the executive function and become constitutionally counterproductive.”<sup>23</sup> These considerations lead him to conclude that the President must be able to control policy making notwithstanding the due process advantages he sees in agency independence of the President. Verkuil then defines policy making in an unusually narrow way, however. Foreign relations is the only governmental function that he recognizes as the kind of policy making that cannot be performed by an official who is beyond the President's control.<sup>24</sup> He explicitly includes rulemaking among the activities that require independence from the executive office, apparently on due process grounds.<sup>25</sup> If I understand this point correctly,<sup>26</sup> I disagree. Taken to its logical extreme, this approach to allocation of policy-making power has the potential to create a form of government that might not even bear comfortably the label “democracy.”

I will construct a simple hypothetical to illustrate this point, as well as the other concerns I have expressed about application of

---

22. *Id.* at 334.

23. *Id.* at 337.

24. *Id.*

25. *Id.* at 339.

26. I interpreted Verkuil's prior writings to suggest an important role for the President in a wide range of policy-making/rulemaking contexts. See Verkuil, *The Status of Independent Agencies after Bowsher v. Synar*, 1986 DUKE L.J. 779; Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

due process analysis to disputes concerning allocation of power to make policy decisions. I hope my hypothetical is not prophetic, but it seems well within the realm of conceivable future congressional action. The plausibility of my hypothetical is premised on two characteristics of Congress as an institution: (1) it has difficulty resolving policy disputes; and (2) it does not trust the President to resolve policy disputes.

Assume that Congress continues to experience serious problems in its efforts to balance the budget. Congress sees some variation of Gramm-Rudman<sup>27</sup> as the only vehicle for keeping the deficit from soaring. Yet, it sees a flaw in the original version of Gramm-Rudman that it must correct.<sup>28</sup> The original method of allocating mandatory spending cuts among thousands of budgetary accounts was almost entirely mechanical.<sup>29</sup> For instance, spending for drug enforcement purposes had to be reduced in the same proportion as spending for the Justice Department's community relations function and the Coast Guard's reserve training function.<sup>30</sup> Assume, as I believe, that Congress ultimately would find this method of apportioning budget cuts too rigid. To eliminate this rigidity, Congress must confer upon the Comptroller General considerable discretion to allocate the aggregate spending reductions mandated by Gramm-Rudman in a manner that corresponds to the constantly changing needs of the country. To accomplish this purpose, assume that Congress returns to one of its traditional ways of delegating power to an agency and instructs the Comptroller General to allocate spending reductions among functions by promulgating allocation rules that are consistent with the "public convenience and necessity." Now Congress must make one further decision. At present, the Comptroller General serves for a term of fifteen years and cannot be removed by the President for any reason—an ex-

---

27. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified in scattered sections of 2 U.S.C.).

28. I am referring to a flaw in addition to the flaw the Supreme Court identified as a matter of constitutional law in *Bowsher v. Synar*, 478 U.S. 714 (1986).

29. Spending must be reduced by proportional amounts in each of thousands of non-exempt budgetary accounts. 2 U.S.C. § 901(a)(3)(C)(ii)(II) (Supp. IV 1986).

30. Each of these functions is subject to a separate account. OMB, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1987 §§ I-01 to I-030, I-R46 to I-R49 (1987).

traordinary degree of independence from the President.<sup>31</sup> Should the President be able to control the person who is granted discretion to determine by rulemaking the manner in which federal money will be spent, or should that person be completely "independent" of the President?

Under Verkuil's framework of analysis, as I understand it, Congress would be free to answer that question either way. Verkuil would consider the two alternative versions of Gramm-Rudman constitutionally equivalent save in one important respect. To satisfy Verkuil, Congress could not delegate to an official independent of the President the power to make spending decisions that relate to the foreign relations function.<sup>32</sup> Assuming, however, that Congress limited the scope of its grant of rulemaking power to domestic spending, the analysis of the two alternatives would be identical using Verkuil's due process principles. The delegation of power to reduce domestic spending either to an official controlled by the President or to an official completely independent of the President would offend the rule of law component of due process. We might have to tolerate the offense, however, because the rule of law principle is too open-ended to apply.<sup>33</sup>

To me, the two alternatives I have hypothesized differ dramatically in significant ways under the Constitution. I have no difficulty reconciling the concept of democracy with congressional conferral of considerable policy-making power on the elected President or on someone subject to his control. Yet, it seems totally inconsistent with democratic principles for Congress to confer comparably broad policy-making power—foreign relations or domestic—on a person who is "independent" of any elected official.<sup>34</sup>

---

31. See Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 519-21 (1987).

32. Verkuil, *supra* note 1, at 337.

33. *Id.* at 322.

34. See Strauss, *supra* note 31, at 495. I have been intentionally vague in referring to officials "independent" of the President versus officials subject to presidential control. I agree with Verkuil's argument that Congress sometimes has good reason to limit the President's power to remove an official; for example, due process may dictate some degree of independence from the President for officials who adjudicate cases. Verkuil, *supra* note 1, at 333. As long as "cause" includes failure to comply with the President's policy directives, I consider an official who is subject to presidential removal for cause sufficiently within the President's control to exercise policy-making power delegated by Congress.

I would hope the Court would hold unconstitutional my hypothetical version of Gramm-Rudman that would grant discretion over domestic spending to a Comptroller General with a fifteen-year tenure who is not subject to any form of Presidential control. The Court could do so easily by invoking the principle Verkuil recognizes: "policy-making prerogatives of the executive branch" are what article II is meant to protect.<sup>35</sup> In this sense, my only quarrel with Verkuil lies in his stingy definition of policy making that explicitly includes only foreign relations and explicitly excludes domestic policy rulemaking.<sup>36</sup>

The other alternative version of Gramm-Rudman—congressional conferral of significant spending discretion on a Comptroller General who is subject to presidential control—seems entirely consistent with our form of constitutional democracy. In outline form, the Court's opinion upholding this hypothetical new version of Gramm-Rudman could include the following elements: (1) no procedural due process concerns exist when the government makes a policy decision that affects a large number of people;<sup>37</sup> (2) article I's command that "all legislative powers . . . shall be vested in a congress"<sup>38</sup> is not helpful in resolving this issue, because policy decisions can be made without exercising "legislative powers," whatever that term may mean; (3) the exercise of significant policy-making power and discretion by an official who is subject to presidential control is entirely consistent with the concept of an

---

The seemingly polar terms "independent" and "subject to control" actually mark the outer bounds of a long continuum of possible relationships. The President can exercise significant control over many officials who have some degree of tenure. See Strauss, *supra* note 31, at 519-21. Conversely, even an official who can be fired at will by the President frequently has a high degree of de facto independence from presidential control because his dismissal by the President would have a high political cost to the President. In a sense, then, the infamous firing of Archibald Cox demonstrated simultaneously his dependence and his independence of presidential control. To illustrate the point another way, if the Federal Reserve Board members were made subject to presidential removal at will, as several Presidents have urged, would Ronald Reagan actually have fired Paul Volcker because of their disagreement on monetary policy? Would Volcker have changed his method of controlling monetary policy because the President might fire him? I suspect the answer to both questions is no.

35. Verkuil, *supra* note 1, at 334. See also *Bowsher v. Synar*, 478 U.S. 714, 759-76 (1986) (White, J., dissenting).

36. Verkuil, *supra* note 1, at 337-38.

37. See authorities cited *supra* notes 16-19.

38. U.S. CONST. art. 1, § 1.

elected President and the concept of a unitary executive, both of which are embedded firmly in the Constitution;<sup>39</sup> (4) the people are not threatened by the existence of significant policy-making discretion in the President, because it is they who choose the President based on their preference for his policies;<sup>40</sup> (5) the carefully crafted system of constitutional checks and balances is not threatened by a congressional grant of policy-making discretion to the President, because Congress can revoke, limit or modify its grant of power through legislative action at any time;<sup>41</sup> and, (6) every President exercised broad discretion over federal spending in various ways, without constitutional challenge, until Congress embarked on its experiment in unilateral congressional control of federal spending in 1974.<sup>42</sup>

My analysis of policy making through rulemaking would be the same in the two contexts Verkuil cites as "prime candidates" for independence from the President—environmental regulation and food and drug regulation.<sup>43</sup> If Congress wants to delegate major policy decisions to the President we have elected, I see nothing in the Constitution inconsistent with his exercise of that delegated power. I am extremely uncomfortable, however, with the notion that major domestic policy decisions can be made in a democracy by a person who can hold office for as long as fifteen years and is accountable neither directly nor indirectly to the electorate.

Let me conclude by putting my criticism of Verkuil's treatment of separation of powers in context. I agree with all three of his

---

39. See Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 460 (1987).

40. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984); *Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring).

41. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring); Verkuil, *supra* note 1, at 318.

42. See L. FISHER, *PRESIDENTIAL SPENDING POWER* 37-38, 40-44, 60-71, 75-118, 152-53, 165-67 (1975); McDonald, *Line Item Veto: Older Than Constitution*, Wall St. J., Mar. 7, 1988, at 16, col. 4.

43. Verkuil, *supra* note 1, at note 339.

major points, and believe that his insights help to focus considerably the often sterile and abstract debates concerning separation of powers issues. My disagreements are limited to: (1) his attempt to analyze issues concerning allocation of policy-making power through a due process prism; and, (2) his narrow definition of policy making for purposes of deciding what types of policy decisions cannot be delegated to an official independent of the President.

At the risk of oversimplification,<sup>44</sup> I can summarize my views on this matter briefly. Congress and the President always will compete for the power to make policy decisions. Sometimes, in some contexts, Congress will prevail by making a policy decision through the legislative process<sup>45</sup> that the courts will enforce against a President with different policy preferences. Sometimes, in some contexts, the President will prevail because Congress decides to cede policy-making power to the President. As a matter of constitutional law, the precise allocation of policy-making power between the two institutions at any point in time seems insignificant. Because both branches are accountable to the public through the electoral process, policy making by either branch is entirely consistent with the concept of constitutional democracy. Congress cannot decide to declare the perpetual rivalry between the two politically accountable branches a draw, however, by refusing to make a policy decision and delegating the choice of policies to a person who is beyond the control of either of the politically accountable branches of government, without jeopardizing the democratic principles that lie at the core of the values embodied in the Constitution.

---

44. *But see* Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).

45. Recently, the Supreme Court has emphasized the importance of the caveat that Congress can make policy decisions only through the legislative process, subject to the structural safeguards of bicameralism and presentment. *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983).