

William & Mary Law Review

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

Article 8

February 1989

Separation of Powers, The Rule of Law and the Idea of Independence

Paul R. Verkuil

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



Part of the [Constitutional Law Commons](#)

Repository Citation

Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 Wm. & Mary L. Rev. 301 (1989), <https://scholarship.law.wm.edu/wmlr/vol30/iss2/8>

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, THE RULE OF LAW AND THE IDEA OF INDEPENDENCE

PAUL R. VERKUIL*

The “celebrated maxim”¹ of separation of powers frustrates analysis because of its abstract dimensions. It is not really accurate as a description of how our government works—the phrase “shared powers” says it better—and the maxim has so many historical parents that its lineage is almost impossible to trace.² Yet the maxim has profound present day implications. The Supreme Court invokes it with increasing frequency,³ and it has spawned academic rethinking of the organization of governmental powers under the Constitution.⁴ In this period of constitutional celebration, citations to *The Federalist* have become commonplace in briefs and opinions.⁵ Our judicial vocabulary is replete with originalist references that make return to first principles a seductive proposition. Seemingly, the gulf between then and now is eclipsed by a constitutional vision that shines from the founding period. In this atmosphere, it is imperative to assess whether and how the maxim of separation of powers can be employed to help resolve tensions among the

* President and Professor of Law and Government, College of William and Mary. A.B., College of William and Mary, 1961; LL.B., University of Virginia, 1967; LL.M., New York University, 1969; M.A., The New School, 1971; J.S.D., New York University, 1972.

1. THE FEDERALIST No. 47, at 316 (J. Madison), No. 81, at 524 (A. Hamilton) (Mod. Lib. ed. 1939).

2. See Sharp, *The Classical American Doctrine of “The Separation of Powers,”* 2 U. CHI. L. REV. 385 (1935) (tracing the doctrine back to Aristotle).

3. Since 1982 the Court has had a major separation of powers case on its docket annually. That trend continued this term as well. See *Mistretta v. United States*, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989) (dealing with the constitutional status of the United States Sentencing Commission).

4. See Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19 (questioning constitutionality of article I courts and independent agencies); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (questioning constitutionality of independent agencies). See also *infra* pp. 316-17, 330-36 (discussing these themes). See generally *A Symposium on Administrative Law: “The Uneasy Constitutional Status of the Administrative Agencies,”* 36 AM. U.L. REV. 277 (1987).

5. The citations to *The Federalist* are now so frequent as to make any law school education without reference to that work deficient.

branches as they exist today. Put another way, can separation of powers be "demaximized"?

The debate typically arises over congressional and executive initiatives in governmental administration, but the judicial branch has a fundamental stake in the outcome. The question for the judiciary is how closely should it umpire the activities of the policy-making branches. Should separation of powers remain a proposition of positive law or should it return to the realm of politics? Should it do a little of both? Either way the Court faces the difficult task of turning a maxim into a viable doctrine of constitutional jurisprudence. Put in terms of academic disciplines, the question is how far principles of political science ought to be translated into rules of law. For a judiciary that has dealt with and to some extent absorbed the discipline of economics,⁶ and has sociology and psychology pressing for recognition,⁷ this is not an unfamiliar challenge. Certainly broad propositions of republican and democratic government, premised on the thoughts of profound political thinkers and our constitutional forebears, are appealing departure points; but they are also unrelentingly open ended. Left without context, they prove too much. Maxims produce slogans, not workable themes of jurisprudence.

We need a way of thinking about separation of powers that reduces its abstractness and provides a doctrinal foothold. The analysis should respect the historical context, yet relate separation of powers to the way government functions in today's world. If successful, the analysis should help explain current issues, to which the Supreme Court has or will turn its attention, such as the constitutionality of the independent counsel and whether the independent agencies are compatible with the constitutional plan.⁸ The analysis should also help clarify the vocabulary to be employed in

6. The success of the law and economics movement is best personified by Professor and Judge Richard Posner. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

7. See generally J. MONAHAN & L. WALKER, *SOCIAL SCIENCE IN LAW* (1985).

8. See *Mistretta v. United States*, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989); *Morrison v. Olson*, 108 S. Ct. 2597 (1988); *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987) (challenging constitutionality of independent agencies); see also *In re Sealed Case*, 838 F.2d 476 (D.C. Cir.) (declaring the independent counsel unconstitutional), *rev'd sub nom.* *Morrison v. Olson*, 108 S. Ct. 2597 (1988); *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir.), *aff'd*, 107 S. Ct. 3177 (1987); *North v. Walsh*, 656 F. Supp. 414 (D.D.C. 1987) (challenging constitutionality of independent counsel), *cert. denied*, 108 S. Ct. 753 (1988).

arguing about the role and purpose of separation of powers in our political system.

I. SEPARATION OF POWERS AND THE RULE OF LAW

The importance of separation of powers from an historical perspective may be explained in several ways. Two explanations are in effect opposed diametrically. In the earliest formulations, powers of government were separated for efficiency purposes. It was difficult for a legislature or parliament to execute laws due to the cumbersomeness of size, the lack of secrecy and the infrequency of sessions.⁹ The executive became a logical necessity for government to function effectively. The lesson that efficient government requires an executive branch was given practical dimensions in our experience under the Articles of Confederation. During that period, Congress had to perform all the functions of government due to the lack of an executive or judicial branch.¹⁰

During the constitutional period the other side of this approach was emphasized: separate powers were needed to check powerful coalitions even if efficiency was thwarted. This approach became a central message of *The Federalist* at least partially because its authors were trying to assure a dubious public that the newly conceived government would not be a danger to liberty.¹¹ Years later Justice Brandeis' oft-quoted version of separation of powers elevated the counterefficiency argument to the status of dominating principle when he said that the purpose of separation of powers was "not to promote efficiency but to preclude the exercise of arbitrary power."¹² The exclusive focus on the checks and balances as-

9. See, e.g., J. LOCKE, *OF CIVIL GOVERNMENT* (Great Books Foundation ed. 1948) (1st ed. 1689).

10. Thomas Jefferson appears to have been more worried about the absence of executive authority under the Articles of Confederation than about the potential for political tyranny that an aggressive executive could produce. See J. BOYD, *THE PAPERS OF THOMAS JEFFERSON* 603 (letter to James Madison), 272 (letter from John Jay on same subject) (1954); see also L. FISHER, *THE POLITICS OF SHARED POWER, CONGRESS AND THE EXECUTIVE* 1-3 (2d ed. 1987); W. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 34 n.2 (1965).

11. See *THE FEDERALIST* No. 51, at 337 (J. Madison) (Mod. Lib. ed. 1937) in which Madison refers to the necessity for separate branches (and checks and balances) so that "[a]mbition [may] be made to counteract ambition."

12. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Brandeis' statement a few pages earlier in his *Myers* dissent is sometimes ignored: "The separation of

pect turned the original purpose for separation of powers on its head.¹³ The Supreme Court seems to have tilted toward the counterefficiency argument in two of its recent separation of powers decisions: "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."¹⁴ The qualifying phrase "standing alone" appears almost as an afterthought and makes it difficult to refute the tyranny argument with one based on the efficiency principle.

Even though efficiency is an historically based rationale for separation of powers, in a sense both the efficiency and counterefficiency, or tyranny, rationales are correct. They are really offsetting arguments for separating the branches, rendering them inadequate to extract the separation of powers debate from the realm of maxim. A tie breaking rationale is needed—one that is equally valid historically and that resolves the intellectual impasse between the efficiency and tyranny rationales.

William Gwyn offered another explanation in his excellent study, *The Meaning of the Separation of Powers*.¹⁵ In this work, separation of powers is usefully analyzed from several perspectives, including efficiency and tyranny. The most intriguing alternative analysis, however, suggests that the purpose of separating the branches is to neutralize conflicts of interest inherent in the governmental process. Gwyn calls this the "rule of law version" of separation of powers, a term that has deep and multiple meanings in Anglo-American legal thought. Gwyn offers the rule of law version as the strongest or "purest" basis for the doctrine, but approaches the whole venture with some diffidence, questioning "whether, even if valid in some general sense, the separation of powers doc-

the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial." *Id.* at 291.

13. See L. FISHER, *supra* note 10, at 12, calling it a "half-truth."

14. *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

15. W. GWYN, *supra* note 10, at 128. Gwyn uncovers five different versions of the separation of powers in English political thought: efficiency, common interest, impartiality, accountability, and balance of powers. *Id.* at 127-28. The impartiality version is based on the rule of law in that no one can be a judge in his own cause. He argues that only the rule of law version requires separate powers to succeed; it is the "pure version" of the doctrine.

trine is specific enough to be a useful constitutional standard."¹⁶ That question must be addressed as well. However, the proposition that the rule of law version offers the best chance of doctrinal success is worth pursuing.

Focusing on the rule of law rationale for separation of powers has several analytical advantages. First, it has deep historical roots. The rule of law is at the heart of the English constitutionalism that forms the backdrop to our own constitutional experience. The Glorious Revolution of 1688 made the independence of the judiciary a linchpin of constitutional government.¹⁷ Prior to the arrival of William and Mary, the royal prerogative was used by the Stuart Kings to suspend or displace laws and even judges.¹⁸ By accepting judicial independence as a condition of their monarchy, William III and Mary II became the first constitutional monarchs. This emphasis on the rule of law is tied to our own constitutional experience through the ideas of John Locke,¹⁹ who, as the political theorist of the Glorious Revolution, had a profound intellectual impact upon our Declaration of Independence and Constitution.²⁰ The rule of law version of separation of powers was at the core of Locke's justification for civil society: "no man in civil society can be exempted from the laws of it."²¹

Second, the notion that no man can be a judge in his own cause was among the earliest expressions of the rule of law in Anglo-American jurisprudence. Early in the seventeenth century, and well before the constitutional revolution of 1688, Lord Coke in *Bonham's Case*²² emphasized the importance of separating interests to avoid conflicts of interest. Coke and Blackstone were the English jurists who had the most influence upon the many lawyer

16. *Id.* at 128.

17. See Act of Settlement of 1701, 12 & 13 W. & M., ch. 2; W. Gwyn, *supra* note 10, at 5-8; cf. Currie, *supra* note 4, at 24-25 (outlining the supremacy of statutes and their binding effect on other agencies).

18. See W. Gwyn, *supra* note 10, at 7-10. The Declaration of Rights, to which William and Mary acceded when they accepted the throne, declared "that the pretended Power of dispensing with Laws, or the Execution of Laws, by Royal Authority, as it hath been assumed and expressed of late, is illegal." 12-13 JOUR. BK. PARL. 29 (1688).

19. See generally J. Locke, *supra* note 9.

20. See M. White, *Philosophy, The Federalist, and The Constitution* (1987).

21. J. Locke, *supra* note 9, at 57.

22. 8 Co. Rep. 113b, 118a, 77 Eng. Rep. 646, 652 (1610).

statesmen who drafted the Constitution. Moreover the principle Coke expounded is no historical relic. It still has fundamental meaning today.²³ Conflicts of interest destroy the independence that is the hallmark of the judiciary, and by extension of all public officers. Yet the judiciary must internalize that principle because judges are the arbiters of justice; if they fail, civil society in Locke's sense fails, and we revert to a state of nature.²⁴

Using the rule of law approach to define the operational limits of the separation of powers doctrine, namely, prevention of conflicts of interest, has the further advantage of tying separation of powers analysis to the English concepts of natural justice. Natural justice embodies two principles that are part of our concept of due process: a rule against bias (or conflicts of interest²⁵) and a rule of fair hearings.²⁶ This connection between the rule of law and natural justice places the analysis of separation of powers questions on more familiar analytical ground. For one thing, it invites separation of powers discussions that are more functional than formal in their analysis.²⁷ For another, it illuminates the relationship between separation of powers and other express constitutional guarantees, such as the due process clause, that are directly concerned with the problems of conflict of interest and fairness. This connection suggests that separation of powers concerns can be addressed in well established and often less disruptive ways than the broad application of the maxim itself. It makes sense to ask whether due process can do the work of separation of powers.²⁸ Of course the rule of law has meanings that transcend the conflict of interest

23. See *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (White, J., dissenting to the Court's refusal to apply the rule of *Bonham's Case* to preliminary administrative hearings); Verkuil, *Crosscurrents in Anglo-American Administrative Law*, 27 WM. & MARY L. REV. 685, 697 (1986).

24. J. LOCKE, *supra* note 9, at 56.

25. *Bonham's Case* is the best example of the bias rule in action. Dr. Bonham of Cambridge successfully challenged a fine by the College of Physicians in London for practicing without a license because the College benefitted from the fines collected and therefore became a judge in its own cause. This principle has long been accepted in the United States. See *Tumey v. Ohio*, 273 U.S. 510 (1927).

26. See H.W.R. WADE, *ADMINISTRATIVE LAW* 413-20 (5th ed. 1982); see generally Verkuil, *supra* note 23, at 697-705.

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

28. See *infra* text accompanying notes 31-50.

context. In his great work on the English constitution,²⁹ Dicey defined the rule of law to include concepts such as the supremacy of law and of the courts in rendering legal decisions. These concepts are themselves maxims that cannot do more than provide useful background and context.³⁰

To analyze separation of powers problems, the rule of law must be focused on conflicts of interest. Conflicts occur at three levels: those between the branches; those within a particular branch; and those involving an individual's personal stake in the outcome of a proceeding. In each situation the presence of a conflict of interest argues in favor of branch separation or, at the individual public official level, of separation of functions within the particular branch. In fact, separation of functions can be viewed as the micro analogue to separation of powers. Put another way, separation of functions answers the problem of combining the legislative, executive and judicial branch functions that Dicey saw as the insurmountable flaw of the administrative state. Separation of functions becomes the technique whereby separation of powers interests can be compromised without undermining the values they serve.

A. The Constitution and the Rule of Law

Separation of powers is not mentioned in the Constitution, nor, for that matter, is the rule of law. The concern with separation of powers derives from the structure of the Constitution (which establishes three branches in articles I, II and III) and from contemporaneous political tracts like *The Federalist*.³¹ Deriving a doctrine of separation of powers from structure and political ideas encourages open-ended and abstract arguments that are difficult to apply and which must be reconciled with countervailing notions of shared powers. In some ways it is easier to make a textual case for

29. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 183-205 (10th ed. 1959). Dicey's work adopts the perspective of his last full edition in 1908.

30. The latter principle led to a rejection of the idea of administrative decision making that took generations to overcome. Professor E. C. S. Wade in his 1958 preface to the Dicey book explained that the author's antagonism towards administrative government (particularly the "droit administratif" of France) was premised upon notions of lack of government power and process that no longer hold true today. Wade, *Preface to A.V. DICEY, supra* note 29, at x-xi.

31. See G. WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981).

the rule of law. Although the rule of law is not mentioned expressly in the Constitution, several provisions articulate a concern for the conflict of interest problems that can arise in the operation of government. Moreover, the Bill of Rights with its due process clauses expresses a rule of law concern that is as historically significant as that of separation of powers itself.³²

The starting point in article III is the guarantee of independence for the judiciary, a legacy from the Glorious Revolution and the English Declaration of Rights.³³ The importance of lifetime appointments on good behavior to the rule of law can hardly be overstated. By freeing federal judges from continuing review by appointing authorities, conflicts of interest are minimized. An independent judiciary is the hallmark of the constitutional state. The great cases of our system, from *Marbury v. Madison* to *United States v. Nixon*,³⁴ testify to the bolstering value of independence to the judicial process. Although one might formulate counterexamples,³⁵ it is fair to say that our Supreme Court rises above the challenge of political pressure. Conversely article III also contains the "case or controversy" requirement, which is intended to restrain the courts from moving beyond the "judicial power."³⁶ From an interbranch conflict of interest perspective, this requirement ensures that judges confine themselves to concrete cases and do not needlessly decide matters that are the business of political branches.³⁷

The Constitution also places limits on the political branches, which reinforce the prohibitions against conflicts of interest. Limits on Congress are especially evident. The bill of attainder provi-

32. Professor Vile states: "The belief that 'due process' is an essential part of constitutional government is of great antiquity, and it runs parallel with ideas of mixed government and the separation of powers, but has relatively rarely been explicitly linked with those ideas and made an integral part of those theories." M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS*, 19-20 (1967).

33. See *supra* notes 17-18 and accompanying text.

34. 5 U.S. (1 Cranch) 137 (1803); 418 U.S. 683 (1974); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

35. The reader can provide her own candidates, but the question is: where would the Court be without the protection of lifetime tenure.

36. U.S. CONST. art. III, § 2, cl. 1; see *Warth v. Seldin*, 422 U.S. 490 (1975) (holding rules of standing require petitioner make out a "case or controversy").

37. See Nichol, *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987).

sion prevents Congress and state legislatures from executing the laws they enact.³⁸ This prohibition against legislative punishment is designed to insure that no one is denied a fair trial.³⁹ It prevents the legislature from serving in two capacities—law creator and law enforcer—because the dual role might tempt it to act as a judge in its own cause. The provision thus buttresses the underlying rationale for the rule of law version of separation of powers. The clause forbidding *ex post facto* laws works a similar purpose.⁴⁰ Significantly these rule of law restraints apply both to federal and state government. They are unconstrained by principles of federalism that retarded application of the Bill of Rights provisions to the states and restrict the separation of powers doctrine today.⁴¹ The express rule of law provisions of article I therefore offer more thorough-going protections against conflicts of interest than the doctrine of separation of powers alone, a point we shall turn to later.⁴²

The impeachment power grants expressly to Congress the judicial power to try the President and others for "Treason, Bribery, or other high Crimes and Misdemeanors."⁴³ Oddly, that power sets up the very conflict that other provisions (such as the bill of attainder clause) seek to avoid. The Constitution takes that conflict into account, however. By separating the House of Representatives and the Senate into prosecutorial and decisional tribunals, and by requiring the Chief Justice of the United States to preside at the impeachment trial (at least of the President), the Constitution in

38. See *United States v. Brown*, 381 U.S. 437 (1965) (applying the bill of attainder provision to federal legislation); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (applying the bill of attainder provision to the states).

39. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 492 (1978).

40. U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1.

41. The application of separation of powers analysis to conflicts of interest at the state level could only be triggered by the republican form of government provision that has been held to be nonjusticiable. U.S. CONST. art. IV, § 4. See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (holding the question whether a state government is "republican" under the guarantee clause to be "political"). The political question doctrine is itself under considerable attack but that aspect has not been questioned. See Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976). In *Elrod v. Burns*, 427 U.S. 347, 352 (1976), Justice Brennan stated unequivocally: "The short answer to this argument is that the separation-of-powers principle, like the political-question doctrine, has no applicability to the federal judiciary's relationship to the States."

42. See *infra* text accompanying notes 55-78.

43. U.S. CONST. art. I, § 2, cl. 5, § 3, cl. 6; art. II, § 4.

effect minimizes by what is really a separation of functions technique the internal conflicts inherent in a single entity (Congress) assuming total control. The power to impeach granted to one branch is a constitutional compromise made necessary for political reasons. Even though it requires one branch to do the duties of the other two,⁴⁴ the impeachment clause is careful to divide power within the branch. It also limits the remedy to political consequences only (the loss of office). Impeachment is the Constitution's compromise with strict separation of powers; in effect it enshrines the idea of separation of functions, a concept that administrative agencies borrow when they combine aspects of the prosecutorial and judicial functions within the executive branch. Other provisions of article I prevent members of Congress from assuming or receiving gifts, titles or offices that might create conflicts of interest in the personal bias or interest sense.⁴⁵

The powers of the executive branch are not as carefully constrained for conflicts of interest in article II as Congress' powers are in article I. To some degree this fact reflects the framers' belief that the power of the President was not as great a concern.⁴⁶ Thus the executive power is granted to a President in article II whereas the legislative power is both granted and limited by article I. The restraints upon the executive branch were presumably to be filled in over time by Congress through the enactment of legislation and by the Supreme Court through the exercise of the power of constitutional interpretation.⁴⁷ Moreover, by interpreting the provisions of the Bill of Rights, the Court can apply the rule of law, and its conflict of interest concerns, to the executive branch, because that branch is usually the one that affects individual rights and interests. The due process clauses of the fifth and fourteenth amendments also require federal and state governments to honor the rule

44. Even after *Morrison v. Olson*, the power of prosecution remains largely with the executive branch; the power to judge, of course, belongs to the judicial branch.

45. See U.S. CONST. art. I, § 6, cl. 2 (the ineligibility or emoluments and incompatibility clauses); art. I, § 9, cl. 8 (the foreign gifts or titles clause).

46. See L. FISHER, *supra* note 10, at 2.

47. The Ethics in Government Act offers a vivid contemporary application of that early vision. See 28 U.S.C. §§ 591-594 (1978), *amended by* The Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 28 U.S.C.A. §§ 591-599 (West Supp. 1988).

of law. As the rule of law concept incorporates the English idea of natural justice, the rules against bias or interest and the right to a fair hearing are made a part of our constitutional scheme and help control the exercise of executive power.

By tying the doctrine of separation of powers to the rule of law, our Constitution invites us to ask whether and in what circumstances the due process clauses can do the work of a separation of powers doctrine. The question then becomes to what extent is separation of powers needed as an independent technique for creating positive law. To some commentators, such as Professor K. C. Davis, it should never be so used;⁴⁸ to others it has vivid juridical meaning.⁴⁹ One can even postulate a middle ground position. It is possible to view separation of powers as a doctrine held "in reserve" to be employed only when more focused constitutional provisions such as those described above are unavailable. Whatever approach is selected must incorporate recent Supreme Court decisions that infuse new life into the doctrine of separation of powers.⁵⁰ These cases must be reconciled with the rule of law version before we can decide whether that version of the doctrine holds greater promise than efficiency or counterefficiency.

B. The Supreme Court and the Rule of Law

In the last five years, the Court has invigorated the separation of powers doctrine to the point that its status as a political question has largely been mooted. Some of the decisions are formal in their reasoning, relying more on almost tautological expressions of branch purpose than on the practical reasons behind the need for separation.⁵¹ The Court's approach in *Bowsher v. Synar* and *INS*

48. See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2:6, at 77-78 (2d ed. 1978) (calling separation of powers "an empty receptacle for answers that have to be invented" and claiming that Montesquieu was wrong).

49. Miller, *supra* note 4.

50. *Morrison v. Olson*, 108 S. Ct. 2597 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1 (1976).

51. See Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 493 (1987) ("The formalist approach is vulnerable to a wide range of objections relating to the appropriate characterization of the framers' intent, the problem of interpretive intent, and the question how intent should be treated in unforeseen circumstances." (footnotes omitted)).

v. Chadha that "efficient, convenient, and useful" legislation cannot stand if it contravenes the allocation of formal powers assigned to the branches in the Constitution⁵² begs the question of *why* such powers are so assigned and *whether* the judiciary should intervene to readjust them. Other decisions, however, including the recently decided independent counsel case, *Morrison v. Olson*,⁵³ and *Commodity Futures Trading Commission v. Schor*⁵⁴ employ a more functional analysis. The Court is obviously searching for a sure guide to decisions in this area.

Under the formalist approach the underlying issue of why a particular statute offends separation of powers may be irrelevant. However, addressing that question remains a necessary step in defining the limits of separation of powers analysis. Limits are needed because a purely formal analysis ultimately goes too far, as *Morrison* and *Schor* testify. Clashes with the political accommodations of the modern state accumulate at an increasingly uncomfortable rate in a formalist world. An alternative separation of powers rationale, structured along the rule of law lines suggested here, can contain and even relieve the separation of powers doctrine of its mounting burden to produce positive law.

The strongest candidate for an alternative analysis is *INS v. Chadha*, but to do so one must begin with Justice Powell's concurring opinion.⁵⁵ Powell explored the purpose of separation of the branches and determined that restraints on legislative punishment expressed in the bill of attainder provision was a fundamental theme. He concluded that on the facts of *Chadha*—legislative reversal of an executive decision to grant an individual the right to remain in the United States—the legislative veto worked a purpose forbidden under the Constitution. The bill of attainder provision is designed to eliminate the bias potential inherent in a legislative trial. As discussed earlier,⁵⁶ it forms the basis of the rule of law approach to separation of powers. What was offensive about *Chadha's* treatment by (one house of) Congress was that he was, by all appearances, arbitrarily singled out for harsh treatment. He

52. See *supra* text accompanying note 14.

53. 108 S. Ct. 2597 (1988).

54. 478 U.S. 833 (1986).

55. 462 U.S. 919, 959 (1983) (Powell, J., concurring).

56. See *supra* notes 38-39 and accompanying text.

was one of only six otherwise deportable aliens (out of a total of 339) whose suspended deportation Congress reversed.⁵⁷ In this setting, when Congress acts adversely upon individuals without explanation, due process and bill of attainder concerns mesh to form a reinforcing rationale for judicial intervention. The rule of law is in effect offended doubly by a legislative practice that creates a conflict of interest situation while at the same time challenging the President's own prerogatives under article II.

An argument against this approach to the legislative veto is that it is incremental; it leaves the veto standing in contexts unrelated to the bill of attainder.⁵⁸ This criticism is convincing only if one believes that the legislative veto has no redeeming value. The conflict of interest approach, however, can be usefully extended beyond the bill of attainder context. It might also be applied to the most controversial application of the legislative veto—that of second guessing agency rulemaking. The evil of this kind of legislative intervention is that it permits congressional committees to act for Congress the second time around. The interests who failed in the agency, and in the courts on review, approach the congressional committees responsible for oversight of the agency involved for what amounts to a final appeal. Only this appeal is not as much on the merits as it is on the basis of financial influence and pressure through political contributions.⁵⁹ The conflict of interest possibilities in this setting have been well documented.⁶⁰ If one views these payments as producing bias or interest in the decision process, the conflict of interest rationale might justify judicial overruling of the legislative veto in the focused context of agency rulemaking as well.⁶¹

57. 462 U.S. at 964.

58. The majority also questioned Justice Powell's use of the bill of attainder analogy. *Id.* at 957 n.22.

59. See E. DREW, *POLITICS AND MONEY* (1983). Although rulemaking and adjudication involve different process dimensions, the small number of interests intensely affected by agency rules may also raise bill-of-attainder type concerns.

60. See Bruff & Gelhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1372-81 (1977); see also Sunstein, *supra* note 51, at 495-96.

61. See *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983).

The conflict of interest rationale weakens considerably when other uses of the legislative veto, which do not directly involve private interests, are challenged. For example, Congress has utilized the legislative veto in reorganization acts, in the budget process, and in foreign affairs.⁶² In these applications it is worth asking whether the legislative branch or its members are placed in conflict by the application of the veto. If the legislative veto produces a balanced political compromise between the branches and does not invite legislative second guessing of a corrupting or arbitrary character, it may be worth preserving. At least it may be worth asking that question.

Admittedly, the conflict of interest focus lacks the dramatic finality of the formalist separation of powers approach. There is something cathartic about saying article I means what it says. The incremental approach makes a positive contribution only if something exists in the veto worth preserving.⁶³ Yet that question cannot be answered unless it is asked. Perhaps by *a priori* reasoning the Court can conclude that a step-by-step conflict of interest analysis is not worth the judicial and legislative investment. Decisive decision making is a virtue, but it is very elusive. As a practical matter, Congress has refused to accept the *Chadha* decision as decisive even though the Court has so ruled. Although it has rewritten some statutes expressly to provide for bicameralism and presentment,⁶⁴ it nonetheless continues to enact laws containing legislative vetoes and the President continues to sign them.⁶⁵ Resolution of these questions still eludes finality. If the Supreme Court had given more focused attention to separation of powers questions in the legislative veto context, judicial efficiency would not have been compromised.

62. See, e.g., War Powers Resolution, 50 U.S.C. § 1544(c) (1982).

63. Is there, as Professor Strauss asks, a baby in the bath water? See Strauss, *supra* note 27.

64. See, e.g., The Federal Salary Act, 2 U.S.C. §§ 351-361 (1967) (amended 1985) (replacing one house veto with a provision that gives Congress 30 days to supercede a President's salary decision by legislation); *Humphrey v. Baker*, 665 F. Supp. 23 (D.D.C. 1987) (upholding constitutionality of Act).

65. See Fisher, *Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case*, 45 PUB. ADMIN. REV. 705 (1985); Fisher, CRS Report No. 87-389 (listing 102 legislative vetoes enacted after *Chadha*).

The conflict of interest rationale can also be employed to re-analyze *Bowsher v. Synar*.⁶⁶ Here the conflict of interest is at the interbranch level between Congress and the President. Once one determines that the Comptroller General exercises executive powers in implementing the budget cuts contained in the Gramm-Rudman-Hollings Act, then congressional control over the removal process places that branch theoretically in the position to participate in the execution of laws. The combination of law creation and law execution is a conflict of interest. The hard question is whether the conflict is real or apparent. Does the reservation of removal power in the Congress constitute sufficient control of the Comptroller's activities? If the Comptroller is, as Justice White described him,⁶⁷ the most independent person in government, the conflict may be more imagined than real.

Moreover, this analysis assumes that independence is a constitutional value worth recognizing and preserving, a topic to be explored shortly.⁶⁸ A better approach to *Bowsher* may be to recognize that the structural relationship sets up the possibility, if not likelihood, of interbranch conflict and thereby justifies judicial overruling simply on that basis alone. Why run the constitutional risk that Congress could exercise direct control over the executive powers of budget implementation through the use of the removal device? In this situation, which, unlike the case with legislative vetoes, involves only one statute and a single relationship, formalist decision making promotes a clarity of analysis and a final outcome. The unusual nature of the arrangement (it being one of the few examples of congressional removal still extant⁶⁹) makes incremental analysis inappropriate.

One could take a similar approach to examining the authority of article I judges to hear judicial business, as the Court did in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁷⁰ The argument that bankruptcy judges cannot constitutionally handle

66. 478 U.S. 714 (1986).

67. *Id.* at 773 (White, J., dissenting).

68. See *infra* notes 100-118 and accompanying text.

69. Even the statute in *Myers v. United States*, 272 U.S. 52, 176 (1926), requiring Senate concurrence for presidential removal of postmasters, had allowed the President to participate, but was nevertheless held unconstitutional.

70. 458 U.S. 50 (1982) (plurality opinion).

article III matters because their independence is not assured by the constitutional protection of life tenure raises a rule of law issue with strong historical overtones. Independence of judges is the first principle of democratic government established by English constitutionalism.⁷¹ This argument could be employed to eliminate article I "judges" altogether. The difficulty with accepting this full impact of *Northern Pipeline*, as some have urged,⁷² is that to do so places in jeopardy administrative decision systems (including regulatory commissions) that have functioned well for one hundred years. This situation makes incremental analysis imperative. With so much at stake, it must be asked whether the rule of law requirement for judicial independence can be satisfied otherwise than by life tenure.

The critical inquiry from a rule of law perspective is whether anything short of life tenure can adequately protect decision makers against conflicts of interest. The judicial independence question has profound implications for established administrative arrangements as well as the entire state judicial system. It also has due process overtones that can be used to sharpen or even displace separation of powers analysis. How far must Congress go to guarantee the equivalent of judicial independence in an attempt to insure independence for rule of law purposes?

In the administrative setting, Congress's enactment of the Administrative Procedure Act with its emphasis upon separation of functions and the use of administrative law judges⁷³ has done much to allay due process concerns in that setting. Although not the equivalent of life tenure, the fourteen-year terms for bankruptcy judges provide substantial protection against conflicts of interest arising from dependency upon the appointing power.⁷⁴ These situations express a congressional commitment to judicial

71. See *supra* text accompanying notes 17-18 on the Glorious Revolution.

72. See Currie, *supra* note 4, at 37-40 (crediting *Northern Pipeline* with "a long step in the right direction").

73. See 5 U.S.C. §§ 554-556 (1982). The independence of administrative law judges is currently before Congress in the bill to establish an Administrative Law Judge Corps. See H.R. 1554, 100th Cong., 2d Sess. (1988).

74. States rarely have terms of service for their judges that exceed 14 years. Moreover, those states that elect judges become immersed in problems of conflict of interest over various matters including campaign contributions.

independence that have satisfied due process standards of independence.⁷⁵ Perhaps this realization was behind the Court's reluctance in *Commodity Futures Trading Commission v. Schor*⁷⁶ to read *Northern Pipeline* expansively so as to upset other areas of administrative decision making that seem to be working well.

The rule of law version of separation of powers focuses the critical inquiry on the protection against bias or conflicts of interest afforded by the arrangements creating judicial independence. Even at the time of *Bonham's Case*, the issue was not whether the London College of Physicians had the power to decide whether one of their members could practice (acting in effect like an administrative court) but instead was whether the fee arrangements assured a fair outcome in the particular case.⁷⁷ While concerns about unbiased decision making implicate separation of powers concerns, the issue can be better resolved as a due process inquiry, because individual interests are at stake. When due process and separation of powers serve congruent interests, why should the latter be offended if the former is satisfied. We will return to this question when the independent agencies are discussed.⁷⁸

C. The Rule of Law and the Nondelegation Doctrine

The rule of law version of separation of powers also helps resolve the tension between Congress and the executive branch over the exercise of legislative powers. It is as unsatisfactory for the executive branch to make legislation as it is for Congress to execute the laws. Tyranny exists whenever one branch controls the primary functions of the other. Yet no provision equivalent to the bill of attainder clause exists in article I restraining the President from exercising legislative power in article II. The constraints must be implied from the grant in article I of all "legislative power" to the

75. See, e.g., *Richardson v. Perales*, 402 U.S. 389 (1971) (approving the multipurpose functions of an administrative law judge in Social Security desirability hearings over due process challenges).

76. 478 U.S. 833 (1986) (permitting an independent article I commission to hear state law counterclaims).

77. See *supra* text accompanying notes 22-23.

78. See *infra* notes 138-161 and accompanying text.

Congress and from the responsibility placed upon the President in article II to "take care that the laws be faithfully executed."⁷⁹

When Congress is silent, or has legislated to the contrary, the exercise of executive power is scrutinized most closely, as Justice Jackson's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*⁸⁰ reminds us. In these circumstances, the President seeks to preempt the legislative branch, thereby raising the warning signs of executive hegemony that triggered the Glorious Revolution and its American counterpart.

When Congress legislates affirmatively to grant power to the President, however, it places the Executive in the strongest position under Justice Jackson's tripartite analysis.⁸¹ The President is fulfilling his constitutional role of faithful execution and operates with article II's full support. Yet even in this situation the vagueness or imprecision of the congressional directive can cause separation of powers problems. The courts can review the quality of the delegation to ensure that legislative power is not unintentionally divested. In this role, the Court acts paternalistically, to protect Congress from itself. Utilizing the rule of law approach to separation of powers helps raise some useful questions. Why should the Court forbid voluntary grants of legislative power to the executive branch? Doesn't the legislative act itself negate the inference of conflict of interest? If Congress wants the President to act and so instructs him, where is the conflict? After all, what Congress gives it can take away, again by the act of legislating. Moreover, in the days before the demise of the legislative veto, Congress could even monitor the President's performance.⁸²

Structural concerns do exist with this arrangement, however. Legislation to overcome misguided prior delegations bears the potential onus of the President's veto. Even if the legislation remains in place, vague grants of power provide opportunities for the exercise of discretion by the executive that can offend the rule of law.

79. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Black emphasized the limiting nature of the "take care" clause upon the President's legislative ambitions: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.* at 587.

80. See *id.* at 634 (Jackson, J., concurring).

81. *Id.* at 635.

82. See *supra* text accompanying notes 55-57.

One cannot, then, discount entirely the separation of powers concerns raised by the nondelegation doctrine. Yet once again the Court is faced with the dilemma of implementing an open-ended proposition. Separation of powers in this context knows no effective limits.

Perhaps for this reason, the nondelegation doctrine has an academic life far more robust than its judicial life. The two cases that mark its zenith brought down Congress' attempt to have President Roosevelt reorganize the economy through the National Industrial Recovery Act.⁸³ Since then the doctrine has been discussed actively but invoked rarely.⁸⁴ One of its staunch proponents, however, Theodore Lowi, utilizes the rule of law as the basis for his argument about the doctrine's relevance today.⁸⁵ Because the rule of law version of separation of powers is at the heart of arguments made by this Article, how the nondelegation doctrine fits with the other judicial applications of separation of powers already discussed must be considered.

Lowi argues that the rule of law demands substantive control of excessive delegations lest legal authority be turned into patronage.⁸⁶ He coins the colorful term "legiscide" to describe Congress' surrendering of legislative power to the Executive.⁸⁷ The nondelegation doctrine is seen as the best means of preventing this self-destruction. By requiring Congress to delegate power with care and precision, the doctrine forces the Executive to adhere to the rule of law. The problem with using the rule of law to avoid legiscide, however, is that the judicial branch then becomes a potential felon as well. By participating in the allocation of power, the courts are in danger of destroying the legislative will. Deciding what delegations are excessive (a process Lowi admits is a matter of degree) can put judges in an untenable position. If they go too far, they

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

84. See generally *A Symposium on Administrative Law*, *supra* note 4.

85. See T. Lowi, *THE END OF LIBERALISM* 92 (2d ed. 1979); Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U.L. REV. 295, 296-99 (1987).

86. By patronage, Lowi means to describe the feudal process whereby patrons allocate privileges, in contradistinction to liberal society when the rule of law defines rights. Lowi, *Two Roads to Serfdom*, *supra* note 85, at 321-22.

87. *Id.* at 299.

frustrate the very relationship between the political branches that the separation of power doctrine is designed to protect.⁸⁸ Moreover, delegation to the executive branch subjects that branch to the political accountability of the electoral process, whereas judicial intervention in the process of legislation offers no comparable political check.⁸⁹

The rule of law concept, thus, cannot dictate how much delegation is appropriate. If one applies the conflict of interest rationale to delegation problems, it cannot be said, except in the most extreme case, that conflicts between the Congress and President exist when power is conferred voluntarily. When Congress offers the President legislative direction, it is solving a perceived problem of governance. Political transactions that are freely arrived at are not prone to charges of conflict of interest unless an allegation of collusion or conspiracy between the political branches exists. This result rarely occurs simply because politics virtually ensures a competitive relationship.⁹⁰

It cannot be said that the rule of law is unconcerned with the proper delegation of power, but in an operational sense, the rule of law and delegation must coexist. This approach suggests that other more precise constitutional dictates, such as the bill of attainder provision and even the due process clauses, can better preserve the values of separation of powers than can the nondelegation doctrine. Even in its most extreme applications in the era of the NIRA, the concern was as much with the delegation of administrative power to the President without procedural protections as it was with the scope of the power delegated.⁹¹ When the delegations

88. See Stewart, *Beyond Delegation Doctrine*, 36 AM. U.L. REV. 323 (1987) (describing a return to "constitutional-fundamentalism" and rejecting a revival of nondelegation because of an absence of judicially manageable criteria).

89. See Pierce, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U.L. REV. 391 (1987). Pierce makes the intriguing point that the demise of the legislative veto will help force Congress to write better legislative standards.

90. Even in the New Deal period when FDR had substantial majorities in each house, his attempts to make Congress do his bidding often failed (for example, the Court packing plan). Certainly, in recent times Congress has rarely been of like mood (or party) with the President.

91. Delegation directly to the President, rather than to an administrative agency with procedural protections, was a large part of the Court's concern in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). See *infra* text accompanying notes 95-97.

were to private parties whose interests conflicted with others being regulated, the concern was even greater.⁹² Indeed, in *Carter v. Carter Coal Co.*,⁹³ the Court equated due process with nondelegation: "The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this Court which foreclose the question."⁹⁴

The evil of delegation in these circumstances is based more on process failures and the potential for conflict of interest in a biased decision-making sense than on legislative abdication or interbranch conflicts of interest. This conclusion suggests that the underlying theme of *Schechter Poultry Corp. v. United States*⁹⁵ deserves greater prominence. In *Schechter*, the Court distinguished the NIRA from the independent agency: "In providing for codes, the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of an analogous character."⁹⁶ This process deficiency was cured by the quasi-judicial format of an independent agency like the FTC, which is one of the reasons why that agency survived nondelegation challenges itself.⁹⁷ Indeed it may also have been the reason why the Court, on the same day it decided *Schechter*, ruled the way it did in *Humphrey's Executor*.⁹⁸ This approach shifts the focus from a wide-open nondelegation challenge to one based on the validity of the independent agency (or its procedural equivalent), a topic yet to be addressed.⁹⁹

If the due process clause better achieves the goals of the non-delegation doctrine, then one must ask whether that doctrine, like

92. In *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), the Court upset a delegation of regulatory power to private groups: "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."

93. 298 U.S. 238 (1936).

94. *Id.* (citing *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

95. 295 U.S. 495 (1935).

96. *Id.* at 533. The Court was also concerned with the wider scope of the delegation to the NIRA than to the FTC ("fair competition" versus "unfair competition").

97. See *FTC v. Keppel & Bros., Inc.*, 291 U.S. 304 (1934); *FTC v. Raladam Co.*, 283 U.S. 643 (1931).

98. See *infra* discussion accompanying notes 139-48.

99. See *infra* notes 139-61 and accompanying text.

the maxim of separation of powers itself, is not better left at the level of political theory. To do so does not offend the rule of law because that concept, as we have seen, is related to principles of natural justice that are themselves fundamentally concerned with due process.

II. SEPARATION OF POWERS AND THE IDEA OF INDEPENDENCE

Independence and separation of powers are linked concepts. One cannot have separate branches unless they are independent of each other. Yet independence is also a relative concept; a branch is only independent of or from another branch for certain purposes or to some degree. Given the tradition of shared as well as separate powers in our Constitution, independence is often countered by interdependence.¹⁰⁰

The strongest expression of the value of independence is an independent judiciary, an achievement of the Glorious Revolution, the English Bill of Rights and the Act of Settlement of 1701. Freedom of judges from removal and intimidation, and supremacy of the rule of law over the royal prerogative were basic tenets of the constitutional monarchy.¹⁰¹ The rule of law and independence bear a close relationship as the purpose of an independent judiciary is to avoid the conflicts of interest inherent in a situation in which the deciders are dependent upon the litigants for their well-being and position. The constitutional values embodied in article III attest to the importance of judicial independence and the rule of law in our system.

Independence also relates to the political branches in a variety of ways not always recognized. To some extent, the legislative and executive branches are meant to be independent of each other in their functions. This is the reason, for example, that the President's appointment power in article II has been protected against congressional intrusion,¹⁰² that the incompatibility clause¹⁰³ ex-

100. Justice Jackson stated: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

101. See *supra* discussion accompanying notes 17-19.

102. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

103. U.S. CONST. art. I, § 6, cl. 2.

pressly forbids members of Congress from holding executive offices, and that the ascertainment clause¹⁰⁴ protects the salary determinations of members of Congress from presidential control.

Beyond these express protections lies a belief that independence is a healthy condition for assuring branch parity. For example, when budgetary projections are felt to be tightly controlled by the executive (in the OMB), Congress creates the Congressional Budget Office to provide independent (or dependent) advice. The difficulty is relating the idea of independence to the question of which functions of the branches should be separate and which should be shared. Moreover, independence of officials within the branches can have a negative impact upon the ability of that branch to perform its constitutionally assigned duties as well as to maintain its independence from the others.

Another dimension to the independence idea, then, involves not so much the separation of authority between the political branches as the division between matters of politics and administration within the branches, especially the executive branch. In the nineteenth century, progressive thinkers such as Woodrow Wilson and Frank Goodnow believed that administration of government could be depoliticized and converted into an objective undertaking later to become the "science" of public administration.¹⁰⁵ Wilson, unlike Goodnow, even went so far as to suggest that, because of the difficulty of drawing a line between politics and administration, cabinet members should become part of the permanent civil service.¹⁰⁶ This school of thought deemphasized separation of powers as a check upon government and highlighted professional service. Politics was defined as the expression of the state's will, and adminis-

104. *Id.* art. I, § 6, cl. 1. See *Humphrey v. Baker*, 665 F. Supp. 23, 26 (D.D.C. 1987) (tracing the clause to Parliament's struggle to use the power of the purse to free itself from the divine right of Kings). See also *id.* art. II, § 1, cl. 7 (presidential salary clause).

105. See F. GOODNOW, *POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT* 25-26, 38-87 (1900) (arguing that administrators should be given the same independence as judges); W. WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 264-91 (1885).

106. One wonders whether Wilson would have felt the same way about cabinet "independence" after he became President. For a thorough discussion of these matters, consult J. ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* 66-68, 86-87 (1986).

tration as the execution of that will.¹⁰⁷ The belief was that administration could be made into a nonpolitical, expert profession by virtue of this functional distinction.

The triumph of the idea of administrative independence came with the adoption in 1883 of the civil service system that protected government employees from arbitrary dismissal.¹⁰⁸ The division between politics and administration later became a legal barrier with the passage of the Hatch Act, which forbade certain administrators from "tak[ing] any active part in political management or in political campaigns."¹⁰⁹ However, the Act distinguished between those who were to be free from (or independent of) politics and those who as top policy makers could not be so isolated.¹¹⁰ Legislatively mandated independence of the President's inner policy circle from politics, despite Woodrow Wilson's earlier speculations, was seen so to weaken the White House as to jeopardize the executive function. Moreover, legislation isolating top advisors from politics could well be unconstitutional under standards of political autonomy that Chief Justice Marshall expressed in *Marbury v. Madison*.¹¹¹ The need to have some intimate advisors whose loy-

107. See M. VILE, *supra* note 32, at 276-80.

108. Pendleton Act, ch. 27, 22 Stat. 403 (1883) (codified as amended in scattered sections of 5 U.S.C.).

109. 18 U.S.C. § 61h. (1946) (codified as amended at 5 U.S.C. § 7324 (1982)). See *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding constitutionality of the Hatch Act against first amendment challenge).

110. The Act exempted the following persons from its coverage:

For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

18 U.S.C. § 61h. (1946) (codified as amended at 5 U.S.C. § 7324 (1982)).

111. In *Marbury*, Chief Justice Marshall emphasized that some acts of the Secretary of State were "political" in that the Secretary's acts are the President's. The Secretary "is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts." 5 U.S. (1 Cranch) 137, 166 (1803). By a parity of reasoning, therefore, the legislature could not condition the removal of the Secretary of State because that would require the courts to *examine* the President's will. See *infra* discussion accompanying notes 112-17.

alty and discretion are paramount qualities transcends any countervailing notions of independent or objective government.

In this context, the idea of independence clashes with equally compelling notions of branch accountability under the separation of powers doctrine. But the question of how many advisors are within the smaller accountability circle rather than the larger independence circle has never been answered decisively. Surely the inner circle includes the Secretaries of State and Defense, who from the inception of the constitutional state were viewed as executive rather than legislative officials¹¹² and who deal in the presumptively executive domain of foreign affairs.¹¹³ Other cabinet officials are not necessarily as close to the President,¹¹⁴ however, and statutory independence has even been suggested for the Attorney General.¹¹⁵

Congress can and does restrict presidential control of administrative officials, even those who under *Buckley v. Valeo*¹¹⁶ remain subject to the President's appointment power over senior administrative officials. Congress conditions the removal of officials by a good cause requirement whether the officials are independent com-

112. Louis Fisher documents how during the First Congress the Secretaries of State and Defense were accepted as being peculiarly within the President's power, whereas the Secretary of the Treasury was viewed partly as a legislative agent. See L. FISHER, *supra* note 10, at 124.

113. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

114. No particular reason exists why the Secretaries of Transportation or Education, for example, must be cabinet officials. Congress has legislative leeway to decide whether executive or independent officials should be selected to carry out its will. It can even change its mind, as it did when it converted the administration of the postal service from a political (cabinet) function to an "independent establishment of the executive branch." 39 U.S.C. § 201 (1982).

115. The President is said to have an "inner" and "outer" cabinet. See L. FISHER, *supra* note 10, at 147. The former contains the Secretaries of State, Defense, Treasury, and the Attorney General. Congress even introduced legislation after Watergate to make the Justice Department independent. S. 2803, 93d Cong., 2d Sess. (1974) (limiting removal of the Attorney General, Deputy Attorney General and Solicitor General to "neglect of duty or malfeasance in office"). See *Removing Politics from the Administration of Justice: Hearings on S. 2803 Before the Subcomm. On Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974). See L. FISHER, *supra* note 10, at 148-49. No action was taken on this bill. The constitutionality of its broad-based insulation of the prosecutorial functions from executive control has been questioned. It was labeled by the majority opinion in *In re Sealed Case*, 838 F.2d 476, 505 (D.C. Cir. 1988), as a "*reductio ad absurdum*" of the argument justifying an independent counsel. But see *infra* note 169.

116. 424 U.S. 1 (1976).

missioners or appointees subject to the civil service.¹¹⁷ Constitutional limitations upon congressional powers to restrict removals do exist but have never been definitively determined. The exceptions from the Hatch Act¹¹⁸ give some indication about congressional sensitivity to the issue of control of policy-making officials. A rough decision rule is that restrictions upon executive removal are less offensive the further away from intimate and essential executive policy making the appointed official stands. The conflict of interest rationale for separation of powers suggests that some advisors are so close to the President's innermost thoughts on policy that restricting their dismissal compromises their loyalty and frustrates national policy making. In this formulation, the potential for conflict is tied to the office itself. An intimate advisor can have only one loyalty, that to his or her superiors. Independence becomes an invitation to divided loyalties.

For present purposes the independence versus accountability calculation need not be limited to Cabinet officers. The focus here is whether the need for independence holds true for two prominent kinds of executive officials: the independent counsel and the independent commissioner.

A. *The Independent Counsel*

The conflict of interest approach to separation of powers seems designed to answer the independent counsel inquiry. The Ethics in Government Act¹¹⁹ has been justified on the basis of preventing conflicts of interest within the executive branch. Indeed Congress rooted the Act in the very principle that *Bonham's Case* espoused: "[N]o man can be prosecutor or judge in his own case."¹²⁰ By legislating to prevent conflicts arising from executive oversight of executive wrongdoing, Congress has by all appearances vindicated the rule of law version of separation of powers.

117. See *infra* discussion accompanying notes 132-36.

118. See *supra* note 110.

119. See The Ethics in Government Act, 28 U.S.C. §§ 591-594 (1978), amended by The Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 28 U.S.C.A. §§ 591-599 (West Supp. 1988).

120. S. REP. NO. 170, 95th Cong., 1st Sess. 5 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4221. Archibald Cox testified that "[t]he pressures, the divided loyalty are too much." *Id.*

However, the separation of powers issue is not so neat, as the decision of the District of Columbia Circuit in *In re Sealed Case*¹²¹ demonstrated. The majority opinion took the view that whatever conflicts of interest exist in the executive exercise of prosecutorial powers are inherent in the constitutional scheme.¹²² By this argument, the constitutional protection against a presidential failure to confront corruption in the executive branch is exclusively provided for in the impeachment clause.¹²³ To go beyond that express check is to violate the doctrine of separation of powers. On this reading of the doctrine, the notion of prosecutorial independence within the executive branch has little value. Indeed it serves to undermine the established relationship among the branches.

The Supreme Court in *Morrison v. Olson* declared the last word on the independent counsel.¹²⁴ Nevertheless, the future relationship of the independent counsel to the conflict of interest approach bears further study.

The argument comes down to the question whether Congress can cure an *intrabran*ch conflict of interest without producing a greater *interbranch* separation of powers crisis in the process. Watergate stands for the proposition that tampering with the exercise of the discretion to prosecute can compromise the public expectation of sound government. Independence of prosecutors, like independence of the judiciary, is a reassuring response to a valid public concern. However, does the remedy go too far and thereby jeopardize deeper constitutional values? The intrusion upon executive autonomy must be measured against the value of independence. How much intrusion upon executive power is acceptable in the exercise of efforts to improve the governmental process? A useful approach is that of the least restrictive alternative, more familiar to first amendment analysis.¹²⁵ Two questions are relevant in this approach: do the restrictions upon the executive prerogatives serve some vital government interest, and are they the least restrictive means of achieving that end.

121. 838 F.2d 476 (D.C. Cir. 1988). .

122. "The conflict of interest such as it is, is found in the Constitution itself." *Id.* at 507.

123. *Id.* at 506.

124. 108 S. Ct. 2597 (1988).

125. See *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *Elrod v. Burns*, 427 U.S. 347, 362 (1976); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 95 (1947).

The idea of independence captured in the Ethics in Government Act is tailored carefully to the problem at hand; the Act is not absolute. The Attorney General remains free as an executive official to advise the President on any matter of law or policy. The power of prosecution, which the Attorney General exercises for the executive branch, also remains in the executive branch. Under the Act, the Attorney General must first determine by a preliminary investigation whether to prosecute. If he or she "determines that there are no reasonable grounds to believe that further investigation is warranted,"¹²⁶ that decision is not subject to review.¹²⁷ The essential responsibility for the decision not to prosecute remains with the Attorney General or with someone in her or his office.¹²⁸ In this way, the Act moderates its intrusion upon executive prerogatives by respecting the traditional role of the Attorney General.

Only when the decision is made to prosecute—in other words once the discretion has been exercised—does the Attorney General lose some control over the management of the prosecution. The exercise of prosecutorial discretion is to this extent restricted. Assuming that the critical moment of executive intervention is the one that triggers the formal prosecution or investigation,¹²⁹ that choice remains in the hands of the executive branch. Admittedly, however, the independent counsel once launched has more freedom from executive oversight than would the usual assistant attorney general or United States attorney. That degree of independence is, however, the very point of the legislation.

After the special court selects the independent counsel, he or she is imbued with all the powers of prosecution granted to attorneys

126. 28 U.S.C.A. § 592(b)(1) (West Supp. 1988) (amending 28 U.S.C. § 592(b)(1) (1978)).

127. Although the discretionary decision not to prosecute is hedged with reporting requirements to the court and Congress, *id.* §§ 592(b)(1), 595(a)(2), no judicial review of the decision not to prosecute is contemplated. *Banzhaf v. Smith*, 737 F.2d 1167, 1169-70 (D.C. Cir. 1984).

128. See Judge Ginsburg's dissent in *In re Sealed Case*, 838 F.2d 476, 518 (D.C. Cir. 1988), emphasizing that Congress did not try to compel the Attorney General to appoint an independent counsel. If the Attorney General is implicated personally in the allegations, the decisions must be made by the next senior official, 28 U.S.C.A. § 591 (West Supp. 1988), but that would presumably be the case whether or not the Ethics Act applied.

129. In *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965), the court held that a U.S. attorney could not be forced to sign an indictment triggering a criminal prosecution. The discretion to decide whether to commence a prosecution was described as "an incident of the constitutional separation of powers." *Id.*

in the Department of Justice.¹³⁰ At this juncture the independent counsel earns the title "independent,"¹³¹ and thereby jeopardizes the article II interests of the President. However, as the Court emphasized in *Morrison*,¹³² the loss of control over the independent counsel by the Attorney General is in no way absolute. The Court made it clear that the use of the removal device went only as far as necessary to achieve the direct result of independence. It was, in other words, the least restrictive alternative:

Here, as with the provision of the Act conferring the appointment authority of the independent counsel on the special court, the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.¹³³

The independent counsel can be removed by the Attorney General "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."¹³⁴ This removal provision, although more restrictive than that which usually applies to Justice Department officials,¹³⁵ is with its "good cause" requirement part of a tradition of restraints upon removal of executive officials that goes back at least seventy years. The good cause requirement, after its endorsement initially in *Humphrey's Executor v. United States*¹³⁶ and now in *Morrison v. Olson*, has become part of the fabric of

130. 28 U.S.C. § 594(a) (1982).

131. The independent counsel must, however, "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." *Id.* § 594(f).

132. 108 S. Ct. 2597, 2608-10, 2621-22 (1988).

133. *Id.* at 2620.

134. 28 U.S.C. § 596 (1982).

135. The President can remove U.S. attorneys *at will*, *id.* § 541(c), and the Attorney General can so remove assistant U.S. attorneys, *id.* § 542(b). Of course if the government official is entitled to civil service protection there are restrictions on removal, but presumably not on transfer, or reassignment or other techniques that might be used to assert control over the prosecution.

136. 295 U.S. 602 (1935).

independence in government as it relates to the administrative agencies.

Much of the argument in *Morrison v. Olson* is over the relevance of the independent agency to the independent counsel in this respect.¹³⁷ The crucial issue of whether the precedent justifying independence of agency commissioners is applicable to the independent counsel situation was answered affirmatively. Moreover, in answering this question in the affirmative, the Court has gone a long way towards resolving the question of whether good cause removal is an inherent weakness of the independent agency under article II.

B. The Independent Agency

The condition that makes the independent agency truly independent is a statutory restriction on removal for cause.¹³⁸ The Supreme Court upheld that restriction over fifty years ago in *Humphrey's Executor v. United States*¹³⁹ and has recently endorsed that decision in *Bowsher v. Synar*¹⁴⁰ as well as in *Morrison v. Olson*.¹⁴¹ In order for the challenge to the independent counsel to have been sustained, *Humphrey's Executor* would have to have been rejected or distinguished.¹⁴² It was not, but that does not end the matter because the separation of powers relationship between the independent counsel and the independent agency is not exactly alike.

From the rule of law/conflict of interest perspective of separation of powers, the statutory restrictions on good cause removal in the independent counsel setting are arguably more critical than

137. 108 S. Ct. at 2617-20; *id.* at 2627 (Scalia, J., dissenting).

138. This argument involves an extensive debate over the appointments clause of article II, § 2, cl. 2. *See id.* at 2608-11; *id.* at 2631-32 (Scalia, J., dissenting). But it need not be pursued here because the focus is upon the executive power and the independent official.

139. 295 U.S. at 629. The Federal Trade Commission Act provides: "Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41 (1914). Other statutory requirements that help make agency commissioners independent are term of years and bipartisan appointment provisions. *See* L. FISHER, *supra* note 10, at 166.

140. 478 U.S. 714, 724-25 (1986).

141. 108 S. Ct. at 2617.

142. *See* Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779.

they are in the context of the independent agency. It is precisely because the Attorney General may remove an independent counsel for unstated reasons in order to protect against a counsel who ferrets out executive branch wrongdoing that the provision is employed. The removal restriction amounts to a check against arbitrary or culpable executive counteraction. It strikes a balance between the President's exclusive right to remove and protections against self-interested execution of the laws.

In the context of the independent agency, the separation of powers motivation for restricting executive removal runs in a different direction. The executive or prosecutorial responsibilities of independent commissioners and their agencies do not really demand protection as much as their responsibility for adjudication.¹⁴³ In *Humphrey's Executor*, therefore, it is the quasi-adjudicative and legislative aspects of the FTC Commissioners' responsibilities that were emphasized, not the executive or prosecutorial aspects.¹⁴⁴ The adjudicative responsibilities are important in a separation of powers sense because of due process concerns. The arbitrary removal of judges who decide cases in ways the Executive may not like must be prevented. This protection is the very basis for judicial independence established by the Glorious Revolution and the Constitution.

As a practical matter, the prosecutorial decisions of commissioners and their staff seem less critical from an independence perspective because the Department of Justice prosecutes many of the same laws that the FTC does without comparable removal restrictions placed upon the Attorney General. Moreover, the real concern with the exercise of prosecutorial powers by the staff of the FTC is the *combination* of that function with the adjudicatory one. From a conflict of interest perspective an *intrabran*ch not *inter*-branch conflict exists. Without the strict rules on separation of

143. Ironically, one of the appellants in *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988), Theodore Olson, commenced (as a private practitioner,) *Ticor Title Ins. Co. v. FTC*, 625 F. Supp. 747 (D.D.C. 1986), *aff'd in part and vacated in part*, 814 F.2d 731 (D.C. Cir 1987), which argued that the prosecutorial functions of the FTC are unconstitutional due to the good cause requirement for removal. Mr. Olson was also a former assistant attorney general for the Office of Legal Counsel, which rendered opinions on the unconstitutionality of this practice. 838 F.2d at 478.

144. 295 U.S. at 628.

functions contained in the Administrative Procedure Act,¹⁴⁵ serious due process concerns would arise from the combined exercise of powers by a single agency.¹⁴⁶

It was largely on the basis of function that Judge Silberman's opinion in *In re Sealed Case*¹⁴⁷ sought to distinguish *Humphrey's Executor* from *Myers v. United States*,¹⁴⁸ which struck down senatorial concurrence in the executive removal of purely executive officers. The Supreme Court rejected this approach in *Morrison v. Olson* in emphatic terms:

We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But 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.¹⁴⁹

The interesting aspect of this ambiguous statement is, again, its concern with the need to balance the importance of removal restrictions against the President's ability to perform his constitutional duties. If the least restrictive alternative is chosen by Congress, it will be respected.

The analysis of functions as opposed to a "functional"¹⁵⁰ analysis is a largely self-defeating exercise in any event. Although it may justify removal restrictions for certain purposes, it does not necessarily refute the use of those restrictions for other purposes as well. It should be constitutionally valid for Congress to restrict presidential removal to cause for certain functions that independent agency commissioners perform, namely judicial-like ones, and also

145. 5 U.S.C. §§ 552-558 (1946). I am indebted to one of my students, Alan Resolute, Marshall-Wythe Class of 1988, for the insight that the APA separation of functions protections may not fully satisfy due process concerns because their application is restricted to the formal adjudication setting.

146. The importance of due process concerns (which in a separation of powers sense emanates from article III) was made clear in *Weiner v. United States*, 357 U.S. 349 (1958), when the Court held the President bound to show cause for removal of War Claims Commissioners even when Congress had not enacted a removal statute. Because the basis for the Court's decision could not be statutory, it must have been constitutional.

147. 838 F.2d 476, 487-501 (D.C. Cir. 1988).

148. 272 U.S. 52 (1926).

149. 108 S. Ct. 2597, 2619 (1988).

150. See *infra* discussion accompanying note 180.

apply those restrictions to other functions that are not otherwise constitutionally protectable, such as the prosecution or rulemaking functions. When quasi-judicial or legislative functions are mingled with executive or prosecutorial ones in the same officer, Congress should be able to assure against unrestricted removal for all functions in order to protect those functions where it has a clear interest in official independence. The President (or Attorney General in the independent counsel setting) might say one thing and do another; ostensibly removing an official for executive or policy-making purposes, but really intending to punish him or her for unsatisfactory adjudicative or legislative decisions. Because one cannot easily discern motives, even a broad removal restriction should be a valid protection against arbitrary removal, so long as the combinations of functions commissioners perform is not itself a constitutional violation.

Of course, *Ticor Title Insurance Co. v. FTC*¹⁵¹ tried to establish just that point in seeking a ruling that restrictions on removal of independent commissioners in agencies like the FTC is unconstitutional insofar as it applies to the prosecutorial function.¹⁵² Yet that analysis simply begs the question of whether for cause restrictions on prosecutorial removal are valid here and now. Moreover, FTC Commissioners exercise executive functions as well, a fact Justice White pointed out in *Bowsher*¹⁵³ and that the Court endorsed in *Morrison*.¹⁵⁴ Unless *Humphrey's Executor* itself is upset in the future (which appears highly unlikely), the for cause removal provision seems to be broadly validated for all independent agency purposes.

However, distinctions between the scope of the good cause restrictions in the two settings must be considered. The FTC for cause provision has never been tested because no President has

151. 814 F.2d 731 (D.C. Cir. 1987).

152. The question posed in *Ticor Title Ins. Co.* has been deferred on ripeness grounds. *Id.* If the merits are reached, the answer must focus on whether the separation of functions provisions satisfy due process. If they do, then the power of prosecution reserved for executive officials who cannot be removed at will is not problematic because they are still removable for other policy relevant reasons (e.g., inefficiency, malfeasance). This power protects executive branch interests. See Verkuil, *supra* note 142, at 803-04.

153. 478 U.S. 714, 761 n.3 (1986) (White, J., dissenting).

154. 108 S. Ct. 2597, 2618 n.28 (1988).

sought to remove a commissioner for cause. *Humphrey's Executor* involved a removal by FDR for no reason, which was premised on his supposed executive power in this regard emanating from *Myers*.¹⁵⁵ The scope of the provisions or even their susceptibility to judicial review has not been tested.¹⁵⁶ This fact has led to speculation that "cause" (inefficiency, neglect of duty, or malfeasance) might be interpreted to include failure to follow policy directives of the President.¹⁵⁷ If "cause" is so construed, much of the intrusion upon executive power is negated, because policy-making prerogatives of the executive branch under article II would be protected.

The scope of the good cause requirement for removal of the independent counsel is worded differently and is arguably more restrictive than that which applies to the independent agencies. It is also made expressly subject to judicial review.¹⁵⁸ The removal provision mentions "good cause" and eschews the more vague term "inefficiency."¹⁵⁹ Moreover, the legislative history seeks to define good cause as something more than "failing to obey any presidential order."¹⁶⁰ The obvious purpose of this further restriction is to

155. *Humphrey's Executor v. United States*, 295 U.S. 602, 626 (1934). After *Myers*, even Congress believed that for cause removal of executive officials (i.e., those appointed by the President as officers of the United States) was forbidden. New Deal Era independent commissions, such as the Securities and Exchange Commission and the Federal Communications Commission, contained no for cause restriction on removal. See 15 U.S.C. § 78d(a) (1934); 47 U.S.C. § 154(c) (1934).

156. In *Bowsher v. Synar*, 478 U.S. at 729 n.8, the Court noted that *Humphrey's Executor* involved nonstatutory judicial review only. In a dissenting opinion, Justice White assumed that statutory review would lie should a President ever seek to remove a commissioner for cause. *Id.* at 770 (White, J., dissenting).

157. See Verkuil, *supra* note 142, at 796-97 (discussing maladministration as a basis of for cause removal).

158. 28 U.S.C. § 596(a)(3) (1978), amended by The Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 28 U.S.C.A. § 596(a)(3) (West Supp. 1988).

159. *Id.* § 596(a)(1).

160. Independent Counsel Reauthorization Act, H.R. CONF. REP. NO. 100-452, 100th Cong., 1st Sess. 37, reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 2185, 2203. The conference report reads as follows:

While the conferees remain extremely concerned about recent erroneous statements by the Department of Justice that an independent counsel may be fired for failing to obey any Presidential order—even an order which would compromise the very integrity of an independent counsel's proceedings—the conferees are confident that any court reviewing the removal of such an independent counsel would reject the Department's reasoning.

Id.

prevent a President from removing a counsel who, like Archibald Cox, was hot on the trail of executive branch wrongdoing. Whether it would be so construed by the courts is an open question, but some concession must be made to the need for oversight of the reason behind the President's exercise of removal power.

However, this judicial power to second guess executive removal should not and need not be construed to prevent removal of an independent counsel who exceeds his authority or jeopardizes other executive branch functions. A good example of this kind of valid executive removal of the independent counsel for policy-making failure might involve intrusions upon foreign policy prerogatives. An independent counsel who exceeds the authority of his office in this way, as Whitney North Seymour arguably did in the Deaver investigation,¹⁶¹ might well trigger a valid exercise of the removal provision by the Attorney General. The judicial role on review would be to determine whether the removal was for *good* cause—for instance, competency—or forbidden cause—for instance, efforts to short circuit an investigation that is about to reveal executive wrongdoing. This inquiry might be more intrusive than it would be in the case of independent agency commissioners, but not so different in kind. In the latter situation, the issue would be whether cause removal ostensibly for poor policy making or planning is really a cover for removal based upon adjudicative or legislative decisions the administration disfavors.

In both situations, cause needs to be defined by the courts as the cases arise. It does not appear *a priori* that the cause determination in the independent counsel setting has to be more intrusive than it would be in the independent agency setting. If it is not, then the validity of the cause restrictions from an article II perspective should be about equal. Because the challenge to the independent agency was rebuffed on this issue over fifty years ago in *Humphrey's Executor* and because the Court in *Morrison* embraced *Humphrey's Executor* in the course of analyzing the cause requirement in the independent counsel setting, one can feel quite

161. Seymour subpoenaed the Canadian Ambassador and created a diplomatic crisis. See "Canada Protests Attempt to Subpoena Envoy, Wife," Wash. Post, May 28, 1987, at A20, col. 1. Assuming no valid basis for his action, that could be disqualifying cause.

comfortable with the constitutional status of the independent agency in this respect.

C. Constitutional Limitations Upon the Cause Requirement

The problem with the above analysis is that, like the separation of powers doctrine itself, it is relentlessly open ended. It justifies statutory for cause restrictions upon the removal of certain executive officials whether they be "inferior" officers, as in the case of the independent counsel, or Officers of the United States, as in the case of independent agency commissioners. It also justifies restrictions upon removal no matter what function the official performs. In this setting, institutional interests in objective or "independent" decision making overcome countervailing executive interests in having absolutely loyal and discretionary employee advisors.

How far can that argument be taken and how many top executive officials can it reach? In a fascinating colloquy between the majority in *Morrison* and Justice Scalia in dissent, the Court dismissed the broad proposition that all officials performing executive functions must be removable at will by the President.¹⁶² At the same time, however, the Court acknowledged that "*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role."¹⁶³ Where does that leave the analysis of which executive officials *must* be protected from any intrusion upon presidential removal?

To say that independence in the form of removal restrictions is good policy for prosecutors of executive wrongdoing or agency officials such as the Board of Governors of the Federal Reserve System or Commissioners of the Federal Election Commission is relatively easy. What about members of the President's cabinet or White House officials whose loyalty to the administration is a core value of their service? Too much independence can undermine the executive function and become constitutionally counterproductive. Where is the line to be drawn?

162. 108 S. Ct. 2597, 2618 n.29 (1988); *id.* at 2626 (Scalia, J., dissenting).

163. *Id.* at 2618.

The starting point, as earlier mentioned,¹⁶⁴ is with the Secretary of State, who as the President's closest advisor in foreign affairs (at least in some administrations¹⁶⁵) must be subjected to absolute executive control. In other words, no first amendment protection against dismissal can exist for a Secretary who speaks out on foreign policy matters in a way that displeases the President. Dismissal for no reason at all is the only way to vindicate the President's power over this kind of policy-making official.

This much is implied by the "Decision of 1789" when James Madison and the first Congress struck from a bill establishing the Department of Foreign Affairs the references to the President's authority to remove the Secretary. This action was taken to make plain that the President possessed inherent authority to dismiss the Secretary under the Constitution.¹⁶⁶ This "decision" coupled with the protections afforded executive officials for "discretionary" acts declared in *Marbury v. Madison*¹⁶⁷ serve to insulate intimate policy makers from congressional limitations on removal even for cause. Who, then, should be included in this inner circle of advisors? Presumably the Secretary of Defense and Secretary of State would qualify, but would it also include the other members of the President's "inner" cabinet: the Secretary of Treasury and the Attorney General? The Secretary of the Treasury has had close ties to Congress from the start.¹⁶⁸ And we have learned from the fine paper submitted by Gerhard Casper in this symposium¹⁶⁹ that dur-

164. See *supra* discussion accompanying notes 111-12.

165. In other administrations, Nixon's and Carter's for example, the National Security Advisor, a White House Aide, has assumed more control over the foreign policy-making process than the Secretary of State.

166. See 1 ANNALS OF CONG. 591 (1789); An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs, ch. 4, 1 Stat. 28 (1789); *Myers v. United States*, 272 U.S. 52, 109-32 (1926); see generally Gifford, *The Separation of Powers Doctrine and the Regulatory Agencies After Bowsher v. Synar*, 55 GEO. WASH. L. REV. 441, 456-58 (1987).

167. "The province of the Court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

168. 272 U.S. at 111 (citing 1 ANNALS OF CONG. 370-71 (1789)).

169. Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989). Interestingly, after Watergate the Senate considered making the Attorney General subject to removal for cause as an alternative to establishing an independent prosecutor. S. 2803, 93d Cong., 1st Sess. (1973). See *supra* note 115.

ing the first Congress the Attorney General almost became subject to a for cause removal provision. At least, an argument remains that unfettered removal is not an automatic incident of the President's power under article II even for some members of the original inner circle of cabinet officials, let alone those added over the years to form the present cabinet ranks. These newer and arguably less crucial cabinet officials might be subject to good cause removal restrictions should Congress dare to enact them.¹⁷⁰ However, this speculation only serves to focus attention on the flexibility Congress has for restructuring removal of officials below the Cabinet level.

Beneath these top officials, the opportunities for Congress to restrict discretionary removals are considerable. As the Court stated in *United States Civil Service Commission v. National Association of Letter Carriers*, "the judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the government is to operate effectively and fairly."¹⁷¹

In another context, the Court has dealt with the extent to which patronage jobs ought to survive first amendment challenge. As with the related situation of the civil service,¹⁷² the issue is how far to protect against arbitrary removals without jeopardizing equally important values of executive authority over program implementation. In *Elrod v. Burns*,¹⁷³ the Court accepted the argument "that representative government need not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate,"¹⁷⁴ but nonetheless determined that "[n]o clear line can be drawn between policymaking and nonpolicymaking positions."¹⁷⁵ The Court concluded

170. Why Congress chooses to place some functions in independent agencies when good cause is an accepted qualification, and others in cabinet departments, when it is not, has never been clear. However, there is little reason why a head of the EPA, or even HUD, for example, could not be made independent should Congress choose to do so. See Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257.

171. 413 U.S. 548, 564 (1973).

172. See *supra* discussion accompanying note 135.

173. 427 U.S. 347 (1976).

174. *Id.* at 367.

175. *Id.*

that "[t]he nature of the responsibilities is critical"¹⁷⁶ and left determinations to case-by-case analysis. This approach was similar to that taken in *Humphrey's Executor*.¹⁷⁷

This kind of analysis counsels in favor of removal restrictions for cause when the officials operate at policy-making levels that require independence from the executive office, such as agency commissioners who adjudicate and make rules as well as implement policy within their congressional mandates. These officials are not entitled to be protected from executive removal, but only from unchallenged executive removal. Presumably other policy-making officials who have similar responsibilities may be so treated even if they are not designated as independent agencies. The independent counsel is, of course, a good example now that the Court has spoken in *Morrison*. The Administrator of the Environmental Protection Agency or the Commissioner of the Food and Drug Administration should also be prime candidates, because both agency heads have significant adjudicative and rulemaking, as well as policy-making, responsibilities.

In terms of the independent counsel, the issue is whether the traditional exercise of executive control over the power to prosecute can be modified in carefully circumscribed ways so as to effectuate the public purpose of investigating executive wrongdoing. Here the question is one of necessity.

The outcome of these cases will likely turn on whether the Court after *Morrison* favors *Humphrey's Executor* or *Myers*. While *Myers* stakes out a broad claim for unchecked executive removal in Chief Justice Taft's elaborate majority opinion, Justice Brandeis' equally lengthy dissent explored the tradition of congressional control upon removal going back to the Tenure in Office Act of 1867.¹⁷⁸ If one reads the two opinions carefully they are virtually at a standoff on questions of the framer's original intent. The Justices speak from two different frames of reference, Taft as the former President and Brandeis as the civil service reformer. In the independent counsel context, Brandeis' message has more currency, as the Court acknowledged impliedly.

176. *Id.*

177. 295 U.S. 602 (1935).

178. 272 U.S. 52, 252-70 (1926) (Brandeis, J., dissenting).

The challenge presented by endorsing *Humphrey's Executor* is a manageable one, so long as Congress does not read *Morrison* too aggressively. *Humphrey's Executor* and *Morrison* carve out a limited category of executive officials who, due to special duties, are entitled to some protection against arbitrary executive removal. They should not be read to jeopardize those pure policy-making or political officials, including White House advisors and "inner" cabinet officials, whose accountability to the White House must be of paramount concern.

III. CONCLUSION

The role of separation of powers in shaping the law of the Constitution remains ambiguous. Although it has a powerful hold on the psyche of those who framed and today defend our system of government, questions about its decisional force remain.¹⁷⁹ To some extent the rationale behind the doctrine needs focus, necessitating the rule of law version that emphasizes the problem of conflict of interest. The conflict of interest rationale offers a way to view separation of powers that gets beyond the offsetting themes of efficiency and tyranny. It also helps explain why the idea of independence, both among and within the established branches, deserves recognition.

How does this approach fit into the current debate? Professor Sunstein has recently identified three approaches to separation of powers analysis: formalism, Holmesianism, and functionalism.¹⁸⁰ The rule of law approach suggested here is, by itself, no more than a formalist analysis. To strengthen its analysis it should be related to the structural questions that the functionalists quite properly ask. Justice O'Connor strikes a convincing functionalist note in *Commodity Futures Trading Commission v. Schor*¹⁸¹ when she approved over article III objections the hearing of state court counterclaims by an independent agency. Focusing upon "practical rea-

179. See generally SEPARATION OF POWERS-DOES IT STILL WORK? (R. Goldwin & A. Kaufman eds. 1986).

180. See Sunstein, *supra* note 51, at 493-500. The formalist approach is based on the text of the Constitution and intent of the drafters; the Holmesian approach argues for making separation of powers a political question; and the functionalist approach analyzes the basic structural principles rather than language or intent alone.

181. 478 U.S. 833 (1986).

sons" and the limited nature of the intrusion rather than "formalistic and unbending rules," she reached a result satisfactory to seven members of the Court. The merit of this approach was recognized by the Court in *Morrison*.¹⁸² It is now apparent that in both the independent counsel and the independent agency situation intrusions upon article II prerogatives will be tolerated if they are limited in nature and tailored to a specific congressional need.

The Holmesian political question approach also has merit,¹⁸³ especially when there are Bill of Rights claims to back up the separation of powers ones. As has been suggested here, much of the work of the separation of powers doctrine can be done by the due process clause. This analysis means, in effect, that the separation of powers doctrine can play a reserve role and allow a focus on individual interests first. Although Justice Scalia¹⁸⁴ might prefer "both checks" in all cases, there may be a value in ordering the constitutional priorities in this increasingly complex area of litigation. If the due process or individual rights perspective fails, then it is fair to ask whether the idea of separation of powers should become a rule of positive law. The answer should transcend formalism, even that variety introduced here that incorporates the rule of law and the multilayered concept of conflict of interest.

The Court must continue to struggle with the appropriate response to this truly "political" question of what the separation of powers demands in the multivarious settings of modern government on a case-by-case basis. It could hardly do much better given the abstractness of the question itself. For a 200-year-old maxim, separation of powers is full of life. Perhaps that says enough. So long as we continue to worry about the relationship between and among the branches we keep tyranny at bay. It is only when the "political" question becomes a nonjusticiable political question that executive or legislative hegemony becomes a possibility. This is why the third branch must play an important, though limited, reserve role. Conflicts of interest and the rule of law are traditional concepts with the potential for useful service in this cause.

182. 108 S. Ct. 2597, 2620 (1988).

183. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 273-314 (1980).

184. See *Young v. United States ex rel. Vuitton*, 107 S. Ct. 2124, 2146 (1987) (Scalia, J., concurring).