

April 1996

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Repository Citation

Douglas S. Onley, *Treading on Sacred Ground: Congress's Power to Subject White House Advisers to Senate Confirmation*, 37 Wm. & Mary L. Rev. 1183 (1996),
<https://scholarship.law.wm.edu/wmlr/vol37/iss3/6>

TREADING ON SACRED GROUND: CONGRESS'S POWER TO SUBJECT WHITE HOUSE ADVISERS TO SENATE CONFIRMATION

The late Senator Sam Ervin, a Shakespeare-quoting country lawyer who chaired the committee that investigated the Watergate coverup, was wary of powerful Washington figures who conducted their business "on the windy side of the law."¹ The lawmaker thus found it "simply ironic" that, in 1973, the Senate required confirmation for second lieutenants in the United States Army but not for the Director of the Office of Management and Budget (OMB), a White House appointee Ervin claimed wielded powers "second only to . . . the President."²

Like many of his colleagues, the North Carolina senator believed that the Nixon Administration had abused its executive authority, particularly in budget matters.³ The *Washington Post* agreed and, in an editorial, called for an end to OMB's "advisory" group immunity.⁴ Congressional concern crystallized in a bill requiring Senate confirmation for the office's director and deputy director.⁵ President Nixon vetoed the bill,⁶ but, in 1974, Congress passed a nearly identical bill.⁷ In the midst of

1. William M. LeoGrande, *Contras Have Probably Lost Congress*, L.A. TIMES, Dec. 2, 1986, at II5 (quoting Sen. Sam Ervin); see WILLIAM SHAKESPEARE, TWELFTH NIGHT act 3, sc. 4, l. 154 (Alfred Harbage ed., Penguin Books 1969) (Fabian: "Still you keep o' th' windy side of the law.").

2. 119 CONG. REC. 3185 (1973).

3. *Id.* at 3185-86. The chairman of the Department of Agriculture Appropriations Subcommittee stated that President Nixon's unilateral action in zero-budgeting agricultural loan programs "does violence to our legislative-executive processes." *Id.* at 3186.

4. *Acknowledging the Status of OMB*, WASH. POST, Feb. 5, 1973, at A20.

5. S. 518, 93d Cong., 1st Sess. (1973), reprinted in *Confirmation of the Director and Deputy Director of the Office of Management and Budget: Hearings Before the House Legislation and Military Operations Subcomm.*, 93d Cong., 1st Sess. 3 (1973) [hereinafter *OMB Hearings*].

6. President's Message to the Senate Vetoing Bill Requiring Senate Confirmation of the Two Positions, 9 WEEKLY COMP. PRES. DOC. 681 (May 18, 1973) [hereinafter *Nixon Veto Message*].

7. Act of Mar. 2, 1974, Pub. L. No. 93-250, § 1, 88 Stat. 11 (codified at 31 U.S.C. § 502(a)-(b) (1988)).

the worst crisis of his administration—the Watergate cover-up—President Nixon signed the bill into law.⁸

Before being overwhelmed by Watergate, the Nixon Administration had viewed Congress's action as a serious threat to executive authority. In his 1973 veto message, Nixon said that the doctrine of separation of powers, as well as policy concerns of control over the executive staff, required the President to retain complete discretion over hiring and firing those who served him in the White House Office (WHO).⁹ A few months earlier, a member of Nixon's Justice Department had stated in testimony before Congress that failure to afford the President complete discretion in choosing and dismissing his domestic and foreign affairs advisers—his "inner circle"—threatened "the integrity of the executive as a coequal branch of the Government."¹⁰ A few years later, President Jimmy Carter used a similar argument to successfully oppose bills¹¹ that would have required the Senate to confirm the President's nominees for the National Security Adviser (NSA) and his deputy.¹²

Nixon's and Carter's stances were rare examples of chief executives energetically opposing congressional incursions into the President's traditional prerogative to select his own staff.¹³ Cur-

8. On the day the law was enacted, a federal grand jury indicted seven men, all former members of the Nixon Administration or the President's 1972 reelection campaign, on charges of conspiracy. In addition, six were charged with obstruction of justice, two were charged with perjury, and three were charged with making false statements to the Federal Bureau of Investigation, the grand jury, or both. Anthony Ripley, *Federal Grand Jury Indicts 7 Nixon Aides on Charges of Conspiracy on Watergate*, N.Y. TIMES, Mar. 2, 1974, at A1.

9. Nixon Veto Message, *supra* note 6, at 681.

10. OMB Hearings, *supra* note 5, at 107.

11. S. 586, 96th Cong., 1st Sess. (1979); see H.R. 11,786, 94th Cong., 2d Sess. (1976); H.R. 10,745, 94th Cong., 1st Sess. (1975).

12. See Letter from President Carter to Representative Frank Church, Chairman, Senate Foreign Relations Committee (June 4, 1979) [hereinafter Carter Letter], reprinted in *The National Security Adviser: Role and Accountability: Hearing Before the Comm. on Foreign Relations*, 96th Cong., 2d Sess. 129 (1980) [hereinafter *NSA Hearing*]. Carter claimed that the proposal encroached on the President's traditional authority to select those officials who are a "direct extension of the Presidency." *Id.* at 130.

13. See Robert H. Bork, *Foreword* to THE FETTERED PRESIDENCY ix, ix (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (claiming that recent presidents have allowed Congress "to establish easements across the constitutional powers of the presi-

rently, only a fraction of more than 4500 political positions are made by the President without the requirement of Senate confirmation.¹⁴ Those few positions, however, are critical to the operation of the executive branch¹⁵ and generate a disproportionate amount of attention from critics in Congress who seek to control the executive branch through "the first weapon in the armory of congressional oversight."¹⁶

The executive branch operates with the constant potential for disruption. In April 1995, for example, a group of Republican lawmakers, irritated by a National Security Council (NSC) staff member's work to ease trade sanctions on Cuba, proposed legislation to make the NSA and various top aides subject to Senate confirmation.¹⁷ In addition, federal lawmakers periodically introduce low-profile bills to require confirmation of existing members of the executive hierarchy.¹⁸ Recently, with Republican

dency"); TERRY EASTLAND, *ENERGY IN THE EXECUTIVE* 141 (1992) ("[I]n approving presidential nominees, the Senate has often expressed and even imposed its views upon the President as to how it wants something done.").

14. ROGELIO GARCIA, CONG. RESEARCH SERV., NO. 92-820, *POLITICAL APPOINTEE POSITIONS: TYPE AND NUMBER* (1995). The Congressional Research Service (CRS) report claims that only twenty-five positions are appointed by the President without confirmation by the Senate. *Id.* That number apparently does not include numerous political appointees who hold the title of "Assistant to the President." See OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES AND RECORDS ADMIN., *THE UNITED STATES GOVERNMENT MANUAL* 1993-94, at 94 (1993) [hereinafter *THE UNITED STATES GOVERNMENT MANUAL* 1993-94]. All totalled, more than 400 advisers and staff work in the White House Office. *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1993: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 102d Cong., 2d Sess. 366 (1992) (statement of Paul W. Bateman, Deputy Assistant to the President for Management).

15. See THOMAS E. CRONIN, *THE STATE OF THE PRESIDENCY* 244-45 (2d ed. 1980) (attributing the growth of the President's staff to "the belief that critical societal problems require that wise men be assigned to the White House to alert the president to appropriate solutions and to serve as the agents for implementing these solutions"); JOHN A. MALTESE, *SPIN CONTROL* 108 (2d ed. 1994) (describing Nixon's White House operational staff as making "a White House-centered system of government possible").

16. JOHN HART, *THE PRESIDENTIAL BRANCH* 140 (1987).

17. See John McCaslin, *Inside the Beltway*, WASH. TIMES, Apr. 7, 1995, at A5.

18. See, e.g., H.R. 9, 104th Cong., 1st Sess. (1995) (requiring confirmation for the head of OMB's Office of Administration and Regulatory Affairs); H.R. 4000, 103d Cong., 2d Sess. (1994) (requiring confirmation for the United States Postal Service Inspector General); S. 373, 103d Cong., 1st Sess. (1993) (requiring that the Register of Copyright be subject to senatorial approval); H.R. 897, 103d Cong., 1st Sess.

majorities in both houses of Congress and an ongoing investigation into Whitewater by an independent prosecutor,¹⁹ the profile of top White House officials has been raised a notch above even the usual frenetic scrutiny.²⁰ For example, following the 1994 resignation of former White House Counsel Bernard Nussbaum over his contacts with federal officials investigating a failed Arkansas savings and loan,²¹ a political commentator recommended that Nussbaum's successor push to abolish the Counsel's position.²² The editorial could have applied the same arguments in calling for Congress to rein in the WHO by requiring the President to submit future appointees to the Senate for confirmation.²³

(1993) (requiring that the Register of Copyright be subject to senatorial approval). In addition, fear of growing power at the White House prompted lawmakers in 1991 to introduce a bill that would have mandated sweeping disclosure requirements for presidential advisers engaged in the "evaluation . . . or coordination of agency rulemaking." S. 1942, 102d Cong., 1st Sess. § 2(2) (1991). In a report accompanying the bill, the Senate Governmental Affairs Committee said that the history of regulatory review centers on an "increasingly systematic effort to shape regulatory policy at the presidential level." S. REP. NO. 256, 102d Cong., 2d Sess. 4 (1992). The measure would have included virtually any official serving in the White House or Executive Office of the President, a requirement that would have been "unprecedented in scope and intrusiveness." Letter from Frank Hodsoll, Deputy Director for Management, to Senator William Roth (Feb. 25, 1992), *reprinted in id.* at 54.

19. Susan Schmidt, *Whitewater Counsel Probes Question of Foster Documents Removal*, WASH. POST, Apr. 20, 1995, at A3.

20. See Toni Locy, *Probe of Clinton Aide Sought in Travel Case*, WASH. POST, Feb. 14, 1996, at A12 (reporting that David Watkins, the former director of White House administration, felt "enormous pressure" in 1993 from First Lady Hillary Clinton, then-Chief of Staff Thomas F. "Mack" McLarty, and former Deputy White House Counsel Vincent Foster to fire employees of the White House travel office); Susan Schmidt, *White House Aide, D'Amato Spar Over Testimony on Whitewater Discussions*, WASH. POST, Feb. 23, 1996, at A6 (reporting that Senator Alfonse D'Amato, the Republican chairman of the Senate Banking Committee, accused White House Deputy Chief of Staff Harold Ickes of being untruthful in previous testimony concerning Whitewater).

21. Douglas Jehl, *10 Clinton Aides Called in Inquiry on Arkansas S.&L.; Nussbaum To Quit*, N.Y. TIMES, Mar. 5, 1994, at A1.

22. Michael Ruby, *The Last White House Counsel?*, U.S. NEWS & WORLD REP., Mar. 21, 1994, at 98.

23. The editorial argued that the President should consult either a private attorney or the Justice Department when faced with legal questions, and the Office of Governmental Ethics when faced with ethics questions. *Id.* Academics have argued similarly in calling for the Counsel's power to be curtailed and for a reassertion of the President's traditional legal adviser, the Justice Department's Office of Legal

This Note explores the limits that the Constitution, particularly under Article II and the separation of powers doctrine, places on Congress's power to require the President to submit White House advisers to the Senate for confirmation and to affix conditions to his power to discharge those advisers. The first section analyzes Congress's Article II power to pass laws establishing offices in the executive hierarchy.²⁴ The next section discusses the historical respect accorded to the President in the selection of his own advisers and details the legislative history behind the current law that "authorizes" the President to choose his own staff. The third section examines the President's power to remove advisers. The fourth section develops the theory that the separation of powers doctrine bars Congress from requiring

Counsel (OLC), whose director is confirmed by the Senate. *See, e.g.,* Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 488-89 n.127 (1993). No one has addressed the issue more frankly than Yale University's Harold Koh, who in 1993 chastised two pro-OLC conference papers for their "undertone of self-congratulation." *See* Harold Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 513 (1993). He urged the current leadership at the Justice Department to

take special pains to ensure that OLC does not come to play the same role vis-a-vis the White House Counsel's Office that the State Department has too often played with regard to the National Security Council in recent administrations, namely, the President's legal counselor of second, rather than first, resort.

Id. at 523. Koh's parallel between the OLC and the National Security Council is striking, for it was fear of the NSA's growing authority that prompted Senator Edward Zorinsky in 1979 to amend an appropriations bill to require the Senate confirmation for the NSA and his deputy. *NSA Hearing, supra* note 12, at 129 (quoting Senator Zorinsky as stating that the Senate must "[c]ome to grips with the fact that there are two Secretaries of State within the Executive Branch").

24. Taxonomy is critical to this discussion. Core presidential advisers and assistants are part of the WHO. The WHO includes the Chief of Staff, White House Counsel, senior policy advisers, and assistants and deputy assistants to the President for legislative affairs, communications, management and administration, political affairs, domestic and economic policy, and science and technology. The First Lady's office also is part of the WHO, as is the Assistant to the President for National Security Affairs, who is also a member of the NSC. The WHO and the NSC are part of a larger entity, the Executive Office of the President (EOP). *See* THE UNITED STATES GOVERNMENT MANUAL 1993-94, *supra* note 14, at 91-94, 98. Among other things, the WHO is distinguishable by its lump sum appropriation. *See Treasury, Postal, and General Government Appropriations for Fiscal Year 1994: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 103d Cong., 1st Sess. 266 (1993) (statement of Patsy L. Thomasson, Special Assistant to the President) [hereinafter Thomasson Statement].

confirmation of many White House advisers. The final section suggests a standard by which federal courts may judge whether the legislative branch has gone too far in requiring confirmation of an adviser. The Note concludes with a recommendation that the President aggressively defend his office against proposals that poach on his authority by vetoing bills that fail this standard.

THE LANDSCAPE OF CONGRESSIONAL CONTROL

Twenty years ago, a commentator noted that there was "no discoverable federal statutory or judicial rule dealing with the limits of congressional power to abolish and create offices,"²⁵ and little has changed in two decades to clarify the proper division of legislative and executive power.²⁶

Opposing Camps

Only a handful of legal scholars have examined Congress's power to make a presidential adviser subject to Senate confirmation. To date, only defenders of congressional power have advanced comprehensive arguments on the subject,²⁷ focusing on the broad grants of legislative power contained in the Necessary and Proper Clause²⁸ and the Appointments Clause.²⁹

25. Richard A. Cirillo, Comment, *Abolition of Federal Offices As an Infringement on the President's Power To Remove Federal Executive Officers*, 42 *FORDHAM L. REV.* 562, 586 (1974).

26. Some authorities treat the issue as settled. See HENRY J. MERRY, *FIVE-BRANCH GOVERNMENT* 62 (1980) (stating that the Appointments Clause gives Congress the power to "decide which offices shall exist and . . . whether or not the appointment of particular officers requires senatorial approval").

27. See, e.g., LOUIS FISHER, *THE POLITICS OF SHARED POWER* 98 (3d ed. 1993) (claiming that the Necessary and Proper Clause gives Congress "broad powers . . . to place restrictions on the president's powers of removal, appointment, organization, and reorganization").

28. U.S. CONST. art. I, § 8, cl. 18 (giving Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

29. Article II provides that the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be estab-

According to this view, Congress may pass a law that "establishes" an office within the WHO or Executive Office of the President (EOP),³⁰ prescribes its duties, and requires Senate confirmation for its director, deputy, or other senior positions.³¹ Lawmakers have passed such legislation a number of times,³² often drawing cries of legislative overreaching from their Capitol Hill colleagues.³³

If a particular office already exists, Congress potentially could follow one of two paths. The first would be to pass a law declaring that the office holder must be appointed by the President with the Senate's consent. The second option would be to abolish the current office and reestablish it through legislation.³⁴

In piecemeal fashion, proponents of executive authority have argued that historic practice,³⁵ Article II's grant of executive

lished by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments.

Id. art. II, § 2, cl. 2.

30. See *supra* note 24.

31. RICHARD EHLKE, CONG. RESEARCH SERV., CONGRESSIONAL CREATION OF AN OFFICE OF NATIONAL SECURITY ADVISOR TO THE PRESIDENT (1980), *reprinted in* NSA Hearing, *supra* note 12, at 133.

32. For example, 15 U.S.C. § 1023 established the Council of Economic Advisors and provided that its members, including its chairperson, would be appointed by the President with the Senate's consent. Other statutes creating executive offices or entities with members subject to Senate confirmation include: 31 U.S.C. § 502 (1988) (Office of Management and Budget); 42 U.S.C. §§ 4321, 4372 (1988) (Council on Environmental Quality); *id.* § 6612 (Office of Science and Technology); and 50 U.S.C. § 402 (1988) (NSC).

33. See, e.g., *Reorganization Plan No. 2 of 1970: Hearing Before the Subcomm. on Executive Reorganization and Government Research of the Comm. on Government Operations*, 91st Cong., 2d Sess. 29 (1970) (stating that Congress has a duty not to interfere with the President's power over "the men close to him") (statement of Sen. Abraham Ribicoff, chairman of the subcommittee).

34. See, e.g., *Reorganization Plan No. 1 of 1965*, 5 U.S.C. app. 1516 (1994) (abolishing all offices in the Bureau of Customs that were appointed by the President with the advice and consent of the Senate).

35. See John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 399 (1993) (noting the Framers' belief that "the President would use his power of legal interpretation to safeguard his own office").

authority,³⁶ and the separation of powers principle³⁷ restrain, and at times forbid, congressional incursions into the "[e]xecutive establishment."³⁸ Policy considerations such as the President's need for discretion in operating his own staff so as to "take Care that the Laws be faithfully executed,"³⁹ his implied authority to discharge appointees,⁴⁰ and his legal authority to invoke executive privilege⁴¹ also play into the issue.

Buckley v. Valeo: *Power To Create*

A 1979 Congressional Research Service (CRS) paper supporting a bill that would have established the already existing NSA post and subjected nominees to Senate confirmation claimed that Congress had the authority to hook a member of the President's staff into its confirmation orbit.⁴² The CRS based its position on a 1976 Supreme Court ruling, *Buckley v. Valeo*,⁴³ which stated that Congress "may undoubtedly under the Necessary and Proper Clause create 'offices' in the generic sense and provide such method of appointment to those 'offices' as it chooses."⁴⁴

The CRS memo, however, read *Buckley* selectively. Congress's power under the Necessary and Proper Clause is "inevitably bounded" by the Appointments Clause.⁴⁵ Thus, those officials

36. U.S. CONST. art. II, § 1, cl. 1 (stating that the "executive Power shall be vested in a President of the United States of America").

37. See *OMB Hearings*, *supra* note 5, at 107.

38. See *Wiener v. United States*, 357 U.S. 349, 353 (1958).

39. U.S. CONST. art. II, § 3, cl. 1.

40. See *infra* notes 94-122 and accompanying text.

41. Executive privilege refers to presidents' historic practice of resisting disclosure of certain information to private parties and other branches of government. PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER* 162 (1988). The Constitution does not specifically allow the President to withhold information from Congress. However, the Supreme Court held in *United States v. Nixon*, 418 U.S. 683 (1974), that the President's interest in withholding information to protect confidentiality with his advisers is implied: "[T]o the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based." *Id.* at 711.

42. EHLKE, *supra* note 31, at 133.

43. 424 U.S. 1 (1976) (per curiam).

44. *Id.* at 138 (finding that members of the Federal Election Commission (FEC), who had not been appointed by the President and thus not appointed pursuant to the Appointments Clause, could not exercise certain executive powers).

45. *Id.* at 139.

exercising executive power—defined as the authority “to enforce [the laws] or appoint the agents charged with the duty of such enforcement”⁴⁶—must be “Officers of the United States,” and therefore must be appointed by the President and confirmed by the Senate.⁴⁷ Under Article II, Congress has the discretion to vest the appointment of “inferior” officers in the President, courts of law, or department heads.⁴⁸ The Court in *Buckley*, however, said that the term “Officers of the United States” is one “intended to have substantive meaning,”⁴⁹ prohibiting Congress from upgrading a position to officer status unless the officer in that position exercises executive powers.

Objectively, White House advisers cannot be classified as principal officers.⁵⁰ They possess virtually no power outside that which the President grants⁵¹ and cannot enforce laws or appoint other law enforcers.⁵² Presidents commonly reshuffle

46. *Id.* (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928)).

47. *Id.* Such officers often are distinguished as “[p]rincipal,” *id.* at 132, or “[s]uperior” officers, *Freytag v. Commissioner*, 501 U.S. 868, 884 (1991). In practice, the Supreme Court has allowed this distinction to slip at times. See *United States v. Eaton*, 169 U.S. 331, 343 (1898) (stating that a vice-consul appointed by the President to perform the duties of a principal officer for a limited time was not a principal officer); *Marjorie M. Whiteman*, 7 DIGEST OF INTERNATIONAL LAW § 3, at 33-35 (noting “personal rank” ambassadorial appointments, made by the President without the Senate’s advice and consent, may negotiate with foreign governments).

48. U.S. CONST. art. II, § 2, cl. 2; LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* 241 (Stephen J. Wayne ed., 2d ed. 1995) (explaining that Article II grants Congress the option of dispensing with advice and consent).

49. *Buckley*, 424 U.S. at 125-26. The majority opinion made it clear that FEC commissioners should not be designated inferior officers, as the Court spoke of the FEC’s “enforcement power, exemplified by its discretionary power to seek judicial relief.” *Id.* at 138.

50. The Court in *Morrison v. Olson*, 487 U.S. 654 (1988), reaffirmed a nineteenth century standard that drew the line between an inferior and a principal officer based on his or her “tenure, duration, emolument, and duties,” *id.* at 672 (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1879)).

51. See *infra* notes 116-18 and accompanying text.

52. Commentators have warned of the danger of presidential advisers placing themselves between the President and his Cabinet. SHANE & BRUFF, *supra* note 41, at 22-23. Senior White House advisers, however, do not exercise the authority of department heads, who may appoint inferior officers if so vested by Congress. *Burnap v. United States*, 252 U.S. 512, 515 (1920). This is not to say presidential counselors do not exercise significant authority. The White House’s oversight of federal agencies’ regulatory duties, particularly the activities of the now-defunct Council on Competitiveness, attracted an enormous amount of attention. See, e.g., Michael

responsibilities among officers; thus, individuals may wield power disproportionate to what their titles suggest.⁵³ Appointees "serve at the pleasure of the President,"⁵⁴ and the chief executive should have unlimited discretion to discharge those who no longer can serve as "an arm or an eye of the executive."⁵⁵

Because Congress generally may require confirmation of inferior officers,⁵⁶ the inferior-principal distinction is not truly meaningful from an executive power perspective. Indeed, the distinction is relevant only if Congress classifies an adviser as a principal officer. The Executive would then have a weaker argument for resisting legislative branch control. Lawmakers do not always consider this distinction in drafting laws, perhaps believing they have the power to designate arbitrarily a federal official as principal or inferior.⁵⁷

As the next three sections demonstrate, however, legislative discretion is limited. History, Supreme Court precedent curtailing attempts to attach conditions to the President's power to discharge appointees,⁵⁸ and the separation of powers doctrine⁵⁹

Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 249-50 (1993) (describing the "overlapping authority and influence" of the Competitiveness Council, OMB, the White House Counsel, the Chief of Staff, and the head of the Council of Economic Advisors in a "gruesomely messy" turf fight over a proposed environmental regulation).

53. THE WHITE HOUSE: ORGANIZATION AND OPERATIONS 66-67 (R. Gordon Hoxie ed., 1971) (noting that Ted Sorensen, who held the title of Special Counsel in the Kennedy Administration, had "an informal portfolio known as 'the domestic policy and program bag'").

54. It is generally agreed that Congress may not impose restrictions on, or remove, executive officers who serve at the President's pleasure. Paul R. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779, 794; see *infra* notes 94-122 and accompanying text.

55. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935); see also CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775-1789*, at 146-53 (1969) (describing James Madison's argument that only the President should have removal power over his officers).

56. FISHER, *supra* note 48, at 241.

57. In 1974, when Congress passed legislation requiring Senate confirmation for the OMB Director and Deputy Director, lawmakers said that they merely had taken back power that they had vested in the President more than 50 years earlier. Missouri Democrat John Melcher claimed that "[h]aving decided in 1921 that the OMB's predecessor was an inferior agency, [Congress] can reverse itself." *OMB Hearings*, *supra* note 5, at 25.

58. See *infra* notes 94-122 and accompanying text.

59. See *Morrison v. Olson*, 487 U.S. 654, 675-76 (1988) (noting that "separation-of-

combine to create an inviolable core of administrative control over the White House staff.

HISTORIC RESPECT

White House advisers technically hold their jobs courtesy of an obscure 1939 statute allowing the President to appoint "administrative assistants" who "shall perform such duties as the President may prescribe."⁶⁰ The current system appears to be constitutionally compatible with the statute: the President appoints his own staff by virtue of Congress's having "vest[ed]" that power in him.⁶¹ The existence of this law implies that the President's advisers and their assistants are inferior officers, and, because the statute is silent with respect to White House officials' tenure or the conditions under which they may be removed, the President retains complete discretion to discharge them.⁶² Such an interpretation, however, fails to protect the President's autonomy to select his own staff. His authority is under constant threat of erosion because what Congress may do, it presumably may undo, either by divesting the President of his authority to choose his key advisers without submitting their names to the Senate for confirmation⁶³ or by deciding that a certain adviser has attained principal officer status.⁶⁴ As the

powers concerns . . . would arise if such provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches"; *infra* notes 123-59 and accompanying text.

60. Reorganization Act of 1939, ch. 36, § 301, 53 Stat. 561, 565 (current version at 3 U.S.C. § 105(a)(1) (1994)).

61. *United States v. Germaine*, 99 U.S. 508, 509 (1879). The Court required officeholders to be appointed either as Officers—so-called "principal" officers—or inferior officers under Article II. The Court later carved out exceptions to this one-or-the-other rule, including postings for "expert" assistants. See *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); see also 3 U.S.C. § 105(c) (1994) (authorizing the President to "procure" temporary experts and consultants).

62. See *Kalaris v. Donovan*, 697 F.2d 376, 398-401 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983).

63. *United States v. Perkins*, 116 U.S. 483, 485 (1886) ("The constitutional authority in Congress to thus vest the appointment [of inferior officers in the heads of departments] implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact . . .").

64. See Chuck Alston, *Bush Crusades on Many Fronts To Retake President's Turf*, CONG. Q., Feb. 3, 1990, at 295 (discussing the statement of House of Representatives

next section demonstrates, Congress's historic hands-off treatment of White House officials and lawmakers' goals in passing the 1948 law imply a grant of complete presidential discretion over a basic core of advisers.

Focus on Efficiency

The fight over presidential appointees—the question of which branch of government controls their service—dates to the earliest days of our democracy.⁶⁵ Before the Reorganization Act of 1939, no law “authorized” the President to select his own staff, and the legislative history of the law confirms that Congress was oblivious to the Article II gap that had existed for the previous 150 years.⁶⁶ The purpose of the law was efficiency. The WHO, as an entity, was not even mentioned in the law until a 1964 amendment.⁶⁷ The 1939 version merely permitted the President to appoint up to six “administrative assistants” at a maximum salary of \$10,000 per year.⁶⁸ Although the law stated that the

Counsel Steve Ross that “Congress can withdraw power it delegates”).

65. See FISHER, *supra* note 27, at 88-90 (quoting George Washington's assertion that cabinet-level departments were agents of the President and James Madison's warning that Congress must take “proper care . . . to regulate and check the exercise” of department heads).

66. The brief legislative history states that the law's purpose was to “codify and enact into law the present provisions of law” relating to the President. S. REP. NO. 1623, 80th Cong., 2d Sess. (1948), *reprinted in* 1948 U.S.C.C.A.N. 2027, 2028. It passed without debate.

67. Act of Aug. 14, 1964, Pub. L. No. 88-426, § 304(b), 78 Stat. 400, 422 (current version at 3 U.S.C. § 105(a)(1) (1994)).

68. Reorganization Act of 1939, ch. 36, § 301, 53 Stat. 561, 565 (current version at 3 U.S.C. § 105(a)(1) (1994)). The \$10,000 salary cap suggests that Congress had positions other than typists in mind, and it appears that Congress chose the number six believing that Roosevelt had six close aides who served him in the White House. See William C. Spragens, *White House Staffs (1789-1974)*, in ORGANIZING AND STAFFING THE PRESIDENCY 7, 26 (Bradley D. Nash et al. eds., (1980)). However, Spragens's contention that positions such as the White House press secretary became “legislatively mandated,” *id.*, is questionable. The Reorganization Act does not mention specific positions, and Roosevelt had more than six advisers in his free-wheeling White House. See ARTHUR M. SCHLESINGER, JR., THE COMING OF THE NEW DEAL 533-52 (1958). Furthermore, although a new version of the 1939 law, passed a few years later, maintained the six assistant maximum, Act of June 25, 1948, ch. 644, § 106, 62 Stat. 672, 678-79 (current version at 3 U.S.C. § 105(a)(1) (1994)), President Truman by that time was relying on the talents of more than a dozen close advisers. Spragens, *supra*, at 28-29.

assistants would "perform such duties as the President may prescribe,"⁶⁹ the 1937 report that recommended the statute contemplated that the assistants would "have no power to make decisions or issue instructions in their own right."⁷⁰ The so-called "Brownlow Report," written by a presidential panel that included congressmen, also stated that the new assistants "would not be interposed between the President and the heads of his departments. . . . They would remain in the background, issue no orders, make no decisions, emit no public statements."⁷¹ The history of the act indicates that lawmakers did not intend it to apply to presidential counselors such as Roosevelt advisers Harry Hopkins or Samuel Rosenman, who was the first White House legal adviser.⁷² "[N]othing changed the fact that presidential aides with special entree who were confidants of the President would have great influence, whether or not they held an official title."⁷³

Rather, the driving forces behind subsequent amendments to the 1939 law were primarily fiscal concerns, including Congress's anxiety that executive branch salaries were lagging behind the legislative and judicial branches and the private sector. The Senate report that accompanied a 1964 amendment noted:

Fair and reasonable pay throughout the Federal Government is a matter of highest national importance. Since assuming office, President Johnson has vigorously supported comprehensive pay legislation as the most effective step which the Congress can take to assist him in his determined drive for economy in Government.⁷⁴

From 1939 to 1978, a period during which the White House

69. Reorganization Act § 301.

70. THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* 5 (1937).

71. *Id.*

72. See Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, *LAW & CONTEMP. PROBS.*, Autumn 1993, at 63, 65-66.

73. Spragens, *supra* note 68, at 26-27.

74. S. REP. NO. 1121, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 2730, 2731.

accrued power and notoriety,⁷⁵ Congress amended the Reorganization Act seven times but never with the intent to cabin the President's power to select his personal staff.⁷⁶ Today, presidential assistants give daily briefings,⁷⁷ appear before Congress,⁷⁸ make personnel decisions,⁷⁹ and promote policy actions.⁸⁰ The current function of the WHO undermines the theory that, fifty-five years ago, Congress intended to assert its authority under the Appointments Clause by vesting in the President the power to appoint advisers.

Deference by First Congress

The tradition of respect for complete executive independence in selecting key advisers has deep roots, as noted by Louis Fisher, an authority on the subject of shared powers and one of the few academics to examine the issue presented in this Note. In a CRS memo commenting on the bills to make the NSA subject to Senate confirmation, Professor Fisher pointed out that the First Congress intended that the President have autonomy in selecting advisers.⁸¹ Representative John Lawrence, from New York, for example, spoke for many of his colleagues in 1789 when he objected to a bill providing compensation for President Washington because it contained an itemized budget.⁸² Lawrence elo-

75. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984*, at 135 (Randall W. Bland et al. eds., 5th ed. 1984).

76. 3 U.S.C. § 105 (1994) (noting previous amendments).

77. See, e.g., Ann Devroy, *Clinton Says He'll Sign GOP Bill on Tax Breaks*, WASH. POST, Apr. 7, 1995, at A1, A13 (quoting White House Press Secretary Michael McCurry during his daily briefing of reporters).

78. See, e.g., John McCaslin, *Whitewater Twist*, WASH. TIMES, Aug. 9, 1994, at A6 (referring to members of the White House Counsel's Office who testified before the Senate Banking Committee on the Whitewater affair as the "White House 10").

79. See, e.g., Nancy E. Roman, *White House Weighing Altman's Fate, Panetta Says*, WASH. TIMES, Aug. 15, 1994, at A4 (quoting White House Chief of Staff Leon E. Panetta as considering ousting Treasury Secretary Roger Altman).

80. Linda Feldman, *Clinton Faces Wrath of Left and Right on Racial Hiring*, CHRISTIAN SCI. MONITOR, Apr. 11, 1995, at 1, 8 (quoting William Galston, then the President's deputy assistant for domestic policy, as promoting childhood immunization, nutrition, and education programs).

81. See LOUIS FISHER, CONG. RESEARCH SERV., MEMO: CONFIRMATION OF NATIONAL SECURITY ADVISOR TO THE PRESIDENT (1979), reprinted in *NSA Hearing*, *supra* note 12, at 135.

82. See *id.* (citing 1 ANNALS OF CONGRESS 633-34 (Joseph Gales ed., 1789)).

quently defended the need for a lump-sum appropriation: an itemized list "will be improper, because it infringes [the President's] right to employ a confidential person in the management of those concerns, for which the Constitution has made him responsible."⁸³ The WHO still enjoys such budgetary discretion,⁸⁴ a fact noted by President Carter when he opposed the NSA bill.⁸⁵

Although Professor Fisher acknowledges this historic support, he maintains that a bill subjecting any presidential adviser to Senate confirmation would be constitutional. He accords Congress a virtual free hand in passing legislation to eliminate executive branch offices—thereby effectively firing incumbents—and in setting conditions on appointments.⁸⁶ Furthermore, he does not acknowledge any constitutional basis for arguing that the President has the power to appoint close advisers free from Senate advice and consent. Professor Fisher claims that Congress has honored a tradition "favor[ing] a clean separation between Congress and the White House"⁸⁷ only when presidential advisers have kept their place: "[t]he 'autonomy' of the White House Office depends very much on its own behavior. Violations of trust, misapplication of funds, obstruction of legis-

83. *Id.*

84. See Thomasson Statement, *supra* note 24.

85. See Carter Letter, *supra* note 12, at 129-30. Unlike the OMB director, whose post had been made subject to Senate confirmation in 1974, the NSA and his deputy "are among the individuals paid from the Special White House Office Appropriation." *Id.* at 130.

86. See Louis Fisher, *The Allocation of Powers: The Framers' Intent*, in SEPARATION OF POWERS IN THE AMERICAN POLITICAL SYSTEM 19, 28 (Barbara B. Knight ed., 1989) (arguing that *Crenshaw v. United States*, 134 U.S. 99 (1890), empowers Congress to "remove an individual by abolishing the office" statutorily and to effectively fire an executive officer by enacting a law reducing or eliminating his or her term); see also FISHER, *supra* note 27, at 98 (asserting that the Necessary and Proper Clause gives Congress "broad powers . . . to place restrictions on the President's powers of removal, appointment, organization, and reorganization"). Indeed, Professor Fisher's only concession to the chief executive appears to be that Congress may not designate a person to fill an office. See *id.* at 98; see also *United States v. Ferreira*, 54 U.S. (13 How.) 40, 51 (1852) (stating that only the President may appoint officers of the United States, with the advice and consent of the Senate). Congress, however, may appoint members to commissions or agencies whose powers are "essentially of an investigative and informative nature." *Buckley v. Valeo*, 424 U.S. 1, 137 (1976).

87. See FISHER, *supra* note 81, at 136.

lative programs, and competition with departmental assignments are some of the actions that encourage Congress to circumscribe White House operations, at times through the confirmation process."⁸⁸

In other words, it is a freebie thrown the President's way. While Congress's interest in the activities in the West Wing and the Old Executive Office Building rises and falls with such factors as those Professor Fisher lists, his views do not comport with the historical record.⁸⁹ Representative Lawrence's comments before the First Congress demonstrate that the Framers were not concerned about the President's personal staff.⁹⁰ At the time Article II was written and debated, their first priority was the establishment of the future departments of the United States government.⁹¹ Given Congress's traditional noninterference in the President's power to choose his advisers, rigid pro-Congress views⁹² misdraw the constitutional starting line by severing the Appointments Clause from its critical history. The President's authority in this area is a "systematic, unbroken, executive practice" pursued with Congress's knowledge and thus

88. *Id.* at 138.

89. In dealing with separation of powers issues as they intersect with the Appointments Clause, the importance of history and the motivations of the Framers cannot be overstated. Historical analysis undergirds, or at least influences, virtually all cases and commentaries dealing with these constitutional subjects, regardless of the writer's perspective concerning the weight to be given original intent. See Samuel W. Cooper, *Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361, 362 (1994).

90. See *supra* notes 82-83 and accompanying text.

91. See CHRISTOPHER H. PYLE & RICHARD M. PIOUS, *THE PRESIDENT, CONGRESS, AND THE CONSTITUTION* 154 (1984) ("The text indicates that the framers fully expected that the agencies of government would be established by legislation and that their powers would be defined by law."). Congress created the first executive departments of State, Treasury, and War by statute. See *id.*

92. See, e.g., A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1346-47 (1994) (claiming that all executive branch officials except the President and Vice President "occupy posts and exercise powers that owe their existence to an act of Congress" and that Congress "can abolish the job of any unelected official in the executive branch if it chooses"); cf. Alan L. Feld, *Separation of Political Powers: Boundaries or Balance?*, 21 GA. L. REV. 171, 175 (1986) ("[N]o express provisions grant the President a zone of exclusive activity in which to conduct affairs of the executive branch without congressional interference."). Feld, however, acknowledges that the separation of powers principle requires that "each branch [be able to] defend itself against subjugation by the other." *Id.* at 177.

should be treated as a "gloss" on his executive power.⁹³ The Reorganization Act of 1939 should not be read as vesting in the President the power to choose his own staff. The President did not acquire that authority by virtue of congressional fiat; he already possessed it at the time the law was enacted.

THE EXECUTIVE'S REMOVAL POWER

If there is any merit to the argument that the President has total discretion to appoint members of his own staff, then that power ought to include the authority to discharge advisers and other White House staff members who cannot, or refuse to, follow his directives.⁹⁴ The current set-up, however, is awkward given the legislature's power to attach conditions to the removal of inferior officers, for example by requiring that the President may only fire a particular official for "good cause."⁹⁵

Evolution of Authority

Except for the provision granting Congress the power to impeach "civil Officers of the United States,"⁹⁶ the Constitution contains no reference to a power to remove government officials from office. In *Myers v. United States*,⁹⁷ the Supreme Court held that Congress may legislate removal criteria only for inferior officers.⁹⁸ Chief Justice Taft, grounding his opinion in the

93. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

94. See *Myers v. United States*, 272 U.S. 52, 119 (1926) (finding that the Advice and Consent Clause does not confer upon the Senate any right to interfere in the removal of purely executive advisers); *Shurtleff v. United States*, 189 U.S. 311, 316 (1903) (upholding the chief executive's power to go beyond statutory removal language based on the "universal practice of the government for over a century"); see also David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 ADMIN. L.J. AM. U. 309, 315 (1993) (quoting CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775-1789*, at 158-59 (1922), and arguing that the President's power of removal was derived from the general executive power of administrative control).

95. See *Morrison v. Olson*, 487 U.S. 654, 685-93 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935); *Myers*, 272 U.S. at 160-64.

96. U.S. CONST. art. II, § 4.

97. 272 U.S. 52.

98. *Id.* at 162.

Article II grant of executive power and the Take Care Clause,⁹⁹ found that the power to remove is a necessary adjunct to the power of appointment.¹⁰⁰ The Court granted the executive complete latitude in firing members of his own staff, as long as Congress retained its authority to confirm the nominee.¹⁰¹ Nine years later, the Court confined its holding in *Myers* to "purely executive officers"¹⁰² and allowed Congress to fix the terms of or limit the President's power to fire appointees whose nominations were confirmed by the Senate, if the official exercised "quasi-legislative or quasi-judicial" power.¹⁰³ The removal power thus became conditioned on the "character of the office."¹⁰⁴

More than a half century passed before the Court's latest revision. In *Morrison v. Olson*,¹⁰⁵ the Justices threw out the executive/quasi-legislative framework¹⁰⁶ and held that the analysis turned on a concern reminiscent of that in *Myers*: ensuring that Congress, in attaching removal conditions, does not encroach on either the President's exercise of "executive power"¹⁰⁷ or his

99. *Id.* at 163-64.

100. *Id.* at 119.

101. *See id.* at 163 (stating that, until Congress "is willing to vest [officers'] appointment in the head of the Department, they will be subject to removal by the President alone"). The opinion does not state clearly whether a law vesting the authority to appoint an officer in the President, as opposed to a department head, would have allowed Congress to restrict removal, and Taft's conclusions have been heavily criticized. *See* Edward S. Corwin, *The President As Administrative Chief*, in *PRESIDENTIAL POWER AND THE CONSTITUTION* 72, 97-103 (Richard Loss ed., 1976). Former Chief Justice Warren Burger, however, felt that *Myers* still held lessons for the modern era of interbranch power struggles. *See* Bernard Schwartz, *An Administrative Law "Might Have Been"—Chief Justice Burger's Bowsher v. Synar Draft*, 42 ADMIN. L. REV. 221, 224 (1990) (quoting Burger as telling his colleagues that the Court in *Myers* "said the power of removal was crucial to the Presidency").

102. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935) (describing a purely executive officer as "one who [is] responsible to the President, and to him alone").

103. *Id.* at 629.

104. *Id.* at 631.

105. 487 U.S. 654 (1988).

106. *See* Peter E. Quint, *Reflections on the Separation of Powers and Judicial Review at the End of the Reagan Era*, 57 GEO. WASH. L. REV. 427, 443 (1989) (noting the Court's abandonment of the *Humphrey's Executor* test in favor of its current "open formula").

107. *Morrison*, 487 U.S. at 689-90. This nebulous provision of Article II may be read as conferring broad and general powers on the President as chief executive. *See* U.S. CONST. art. II, § 1, cl. 1; Steven G. Calabresi & Kevin H. Rhodes, *The Struc-*

"constitutionally designated duty to 'take care that the laws be faithfully executed.'"¹⁰⁸ The test is whether a statutory limitation on the President's authority to discharge a key White House counselor—for example, for "good cause" only—leaves the executive branch "sufficient control . . . to ensure that the President is able to perform his constitutionally assigned duties."¹⁰⁹ *Morrison* is unequivocal that "some 'purely executive' officials . . . must be removable by the President at will if he is to be able to accomplish his constitutional role."¹¹⁰ In *Morrison*, however, the Court found that the good cause removal provision for the Independent Counsel did not "unduly trammel[] on executive authority" because the officer had limited jurisdiction and tenure and had no "policymaking or significant administrative authority."¹¹¹ Although this statement sounds like the job description of an inferior officer,¹¹² mere status as an inferior officer is not the test for determining whether Congress may restrict presidential control to discharge. *Morrison's* chief effect was to require a case-by-case review into the relationship between a particular adviser's function and presidential supervisory needs.¹¹³ The Court held that "there are no rigid categories of officials" that Congress may protect from at-will employment status;¹¹⁴

tural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1153, 1165 (1992) (claiming that the President's executive power, "together with the Take Care Clause . . . creat[es] a hierarchical, unified executive department"). According to this view, the President's subordinates derive their power from the President, not from statute, and thus "must perform their official functions under his supervision and direction." Charles J. Cooper & Michael A. Carvin, *The Price of "Political Independence": The Unconstitutional Status of the Legal Services Corporation*, 4 B.U. PUB. INT. L.J. 13, 24 (1994). Alternatively, the grant of executive power may "simply designate the president as the person who shall exercise whatever executive powers Congress may choose to confer upon him." PYLE & PIOUS, *supra* note 91, at 49.

108. *Morrison*, 487 U.S. at 689-91 (holding that a "good cause" removal standard for the Independent Counsel did not unduly trammel executive authority).

109. *Id.* at 696.

110. *Id.* at 690.

111. *Id.* at 691.

112. *Id.* at 670 (concluding that the Independent Counsel was an inferior officer).

113. Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 538 (1989).

114. Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 645 (1989).

the test is whether the "exercise of that discretion is so central to the functioning of the Executive Branch" that the officer must be terminable-at-will.¹¹⁵

All the President's Personnel

A presidential adviser is an extension of the President himself. As Lee White, a former adviser to Presidents Kennedy and Johnson remarked, "a White House staff man is only a reflector; he is only a user of another man's power . . . another man's responsibility."¹¹⁶ Advisers are devoted to the President's problems and often serve as a counterweight against the "parochialism of experts and department heads."¹¹⁷

These few assistants are the only other men in Washington whose responsibilities both enable and require them to look, as [the President] does, at the government as a whole. . . . [B]y working closely with departmental personnel, by spotting, refining, and defining issues for the President, they can increase governmental unity rather than splinter responsibility. A good White House staff can give a President that crucial margin of time, analysis, and judgment that makes an unmanageable problem more manageable.¹¹⁸

The President's manifest need to supervise the men and women who serve him should bar Congress from attaching removal conditions to advisers who work in the White House Office,¹¹⁹ regardless of whether they are classed as inferior officers. If "performance depends on people," as President Gerald Ford's chief of staff was fond of saying,¹²⁰ then courts should prohibit Congress from legislatively assuming the role of superintendent over White House personnel. Commentators who have examined *Humphrey's Executor* and *Morrison* generally have agreed that

115. *Morrison*, 487 U.S. at 691-92.

116. THE WHITE HOUSE: ORGANIZATION AND OPERATIONS, *supra* note 53, at 71.

117. See Theodore C. Sorensen, *Presidential Advisers*, in THE PRESIDENTIAL ADVISORY SYSTEM 3, 8 (Thomas E. Cronin & Sanford D. Greenberg eds., 1969).

118. *Id.*

119. See *supra* note 25.

120. Donald H. Rumsfeld, *Rumsfeld's Rules*, in THE PRESIDENCY IN TRANSITION 33, 37 (James P. Pfiffner ed., 1989).

the President has "at-will control" over his advisers,¹²¹ but even supporters recognize that it remains an open question.¹²²

SEPARATION OF POWERS

Virtually all questions dealing with the federal appointments process crystallize around separation of powers concerns.¹²³ The issue in *Morrison* was not Congress's power to declare an appointee inferior or principal, which the Supreme Court has never satisfactorily addressed,¹²⁴ but whether the accoutrements of the office created by the Ethics in Government Act indicated into which category the Independent Counsel fell.¹²⁵ The Court then applied a separation of powers analysis to determine if the Attorney General's limited power to remove the official "impede[d] the President's ability to perform his constitutional duty."¹²⁶

121. See Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 291 n.107 (1993) (noting that the "traditional wisdom" is that "the Constitution requires the President to have at-will control of his or her cabinet").

122. Compare Verkuil, *supra* note 54, at 794 (stating that "nearly everyone would agree that Congress cannot impose removal restrictions on some executive officials, such as cabinet officers") with Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 338 (1989) (acknowledging that "an argument remains that unfettered removal is not an automatic incident of the President's power under article II").

123. *Freytag v. Commissioner*, 501 U.S. 868, 882 (1991) (noting that "the principle of separation of powers is embedded in the Appointments Clause"); see also Note, *Congressional Power Under the Appointments Clause After Buckley v. Valeo*, 75 MICH. L. REV. 627, 647-48 (1977) (arguing that Congress's power under the Necessary and Proper Clause to specify qualifications of officeholders is limited by separation of powers concerns).

124. Andrew Owen, Note, *Toward a New Functional Methodology in Appointments Clause Analysis*, 60 GEO. WASH. L. REV. 536, 537 (1992) (arguing that the Court's current test "invites an ad hoc and standardless classification by the judiciary of various federal officials"); see also *Morrison v. Olson*, 487 U.S. 654, 671 (1988) (noting that "the line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn").

125. See *Morrison*, 487 U.S. at 670-73.

126. *Id.* at 691. The Court also stated that the Appointments Clause gives Congress "significant discretion" to determine whether an executive official's appointment should be vested outside the executive branch. *Id.* at 673. Because the Constitution does not require the appointment of officers to be vested in the executive branch, see *id.* at 674 (citing *Ex Parte Siebold*, 100 U.S. 371, 397-98 (1880)), Article II appears to grant Congress the power to place the appointment of White House officials in a

The Three-Layer Marble Cake

The separation of powers doctrine is not stated expressly in the Constitution; rather, it is implied in the allocation of legislative, executive, and judicial power under Articles I, II, and III of the Constitution.¹²⁷ This design was intentional. The principal authors of *The Federalist*, Alexander Hamilton and James Madison, believed power struggles among the branches would restrain each branch and protect citizens from governmental overreaching.¹²⁸

The origin of separation of powers is somewhat obscure,¹²⁹ and scholars disagree about the implied doctrine's utility¹³⁰

department head outside the Executive Office of the President—such as a cabinet member or a judicial official. This absurd possibility may give comfort to the position that the President has no control over his core staff other than that which Congress lends him, but it also validates the view that separation of powers shields the chief executive from such mischief. See *Special Prosecutor and Watergate Grand Jury Legislation: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary on H.J. Res. 784 and H.R. 10937*, 93d Cong., 1st Sess. 253 (1973) (testimony of Acting Attorney General Robert Bork that such reshuffling would “alter the fundamental distribution of powers dictated by the Constitution”); Eric R. Glitzenstein & Alan B. Morrison, *The Supreme Court's Decision in Morrison v. Olson: A Common Sense Application of the Constitution to a Practical Problem*, 38 AM. U. L. REV. 359, 366 (1989) (noting that *Morrison* requires that interbranch appointments be scrutinized for separation of powers concerns).

127. Fisher, *supra* note 86, at 20-21.

128. Quint, *supra* note 106, at 428.

129. The subject of philosophical discussions in both the old and new worlds since the early seventeenth century, the separation of powers principle appears in the Maryland and Virginia declarations of rights, which were drafted before the Constitution was adopted. Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 213 (1989). Whereas Montesquieu is the most frequently cited philosopher on the subject, the structure of the national government “owes its existence to the experiences of the framers . . . [who] used Montesquieu selectively The product was more theirs than his.” LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 7 (1991).

130. See Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 CARDOZO L. REV. 313, 313 (1993) (noting that the boundaries of government established by the Constitution are few and that “the living must settle their own affairs”); see also Charles M. Hardin, *The Separation of Powers Needs Major Revision*, in SEPARATION OF POWERS—DOES IT STILL WORK? 90 (Robert A. Goldwin & Art Kaufman eds., 1986) (arguing that the current implementation of separation of powers may threaten constitutional government). But cf. Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 402-03 (1989) (noting that the Supreme Court's focus on separation of

and the respect it should be accorded in enforcing constitutionally allocated powers.¹³¹ The Supreme Court's approach to separation issues has divided along two philosophically dissonant lines—formalism and functionalism.¹³² Formalism “reasons logically” from the fact that the first three Articles of the Constitution define separate powers, as well as from the Framers’ “acknowledged purpose to create three independent branches with distinct functions.”¹³³ Advancing this approach in 1935, the Supreme Court wrote, “[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.”¹³⁴

Formalism often is criticized as rigid,¹³⁵ yet President Nixon adeptly invoked the doctrine's spirit in vetoing the 1973 bill¹³⁶

powers increased dramatically from 1960 to 1989).

131. Compare Quint, *supra* note 106, at 430 (“The text of the Constitution . . . is particularly delphic about the distribution of powers between the President and Congress.”) with J. Woodford Howard, Jr., *Supreme Court Enforcement of Separation of Powers: A Balance Sheet*, in SEPARATION OF POWERS IN THE AMERICAN POLITICAL SYSTEM, *supra* note 86, at 83 (“The main structural limits on national authority were the principles of enumerated and separated powers.”).

132. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987). In the modern era, Justice White was considered the foremost functionalist, see *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting), whereas Justice Scalia is the Court's chief formalist, see *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). Analysts have developed different paradigms, often analogous to the formalist-functional breakdown, with which to analyze separation of powers issues. See Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 108-09 (1988) (arguing that the Court has followed “evolutionary” and “de-evolutionary” traditions in its separation of powers jurisprudence); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 52-58 (contrasting “pragmatic” and “neoclassical” approaches to separation of powers analysis).

133. Bruff, *supra* note 113, at 536. For a less flattering description, see E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 518 (1989) (describing the Court's formalist approach in *Chadha* as the sort of “rigid, sanctimonious attitude typical of priesthods . . . when they have lost touch with the substance of their religion”).

134. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

135. See, e.g., Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 494 (1987) (criticizing the Supreme Court's formalist analysis in *Chadha* and *Bowsher* as “far too mechanical”).

136. Nixon later signed a nearly identical bill that applied only to future nominees

that would have required the OMB Director and Deputy Director to be confirmed by the Senate: "The responsible exercise of the separate legislative and executive powers is a demonstration of the workability of the American system. . . . [I]f it is to remain workable, I must continue to insist on a strong delineation of power and authority" ¹³⁷ Nixon's Justice Department, while acknowledging that the Constitution does not envision "total separation between the branches," argued that failure to afford the President exclusive control over his immediate advisers would "thwart" the separation of powers system and move the United States "a long way toward a parliamentary system." ¹³⁸

Functionalism seeks to preserve a "reasonable balance" among the three branches, given the realities of overlapping authority inherent in the modern governmental organism. ¹³⁹ The approach draws energy from contemporary history, in particular the abuses by the executive branch during the Watergate era, ¹⁴⁰ and recognizes that, "if the strength of one branch has

for Director and Deputy Director. Act of Mar. 2, 1974, Pub. L. No. 93-250, § 1, 88 Stat. 11, 11 (codified at 31 U.S.C. § 502(a)-(b) (1988)). This result corrected the Nixon Administration's concern that the bill not be "a backdoor method of circumventing the President's power to remove." Nixon Veto Message, *supra* note 6, at 681. The law, however, did not address the White House's and Republican lawmakers' primary constitutional objections, which were grounded in the separation of powers principle. See *OMB Hearings*, *supra* note 5, at 7 (statement by Rep. Frank Horton that separation of powers and "orderly relations" between the two branches are good reasons to allow the President to have a personal staff that does not have to stand for Senate confirmation).

137. Nixon Veto Message, *supra* note 6, at 681.

138. *OMB Hearings*, *supra* note 5, at 107.

139. Quint, *supra* note 106, at 444.

140. The dispute between President Nixon and Congress over the OMB bill should not be overshadowed by Nixon's well-documented overstepping of executive authority and Congress's subsequent reassertion of power vis-à-vis the executive branch. See Miller, *supra* note 130, at 409-10. While this may have been the larger context in which the confrontation over presidential advisers arose, the legal arguments put forward by the President and his lawyers were pragmatic and balanced compared, for example, with the Nixon Administration's rigid view regarding executive privilege. See *Nixon v. Administrator of Gen. Servs.*, 408 F. Supp. 321, 341 (D.D.C. 1976) (noting the Nixon Justice Department's argument that Congress could not require the Administrator of General Services to take possession of the President's tapes because the three branches of government are "totally distinct and autonomous, and . . . the separation of powers doctrine bars actions by one branch that even

become clearly overpowering in reality, innovative countermeasures might be permissible to redress the balance."¹⁴¹

Many commentators lament that the Supreme Court has refused to embrace a particular mode of analysis or delineate clearly the circumstances that merit using one approach over the other.¹⁴² Two 1986 decisions,¹⁴³ which were released the same day, suggest that the Court will use a formalistic analysis when the constitutional actors are in direct confrontation¹⁴⁴ but will use a functional approach when two branches clash indirectly—for example, over the duties assigned to administrative agencies.¹⁴⁵

Focus on Congressional Motivations

Legislative impositions on executive power are far more likely to pass constitutional muster if Congress works its will through an executive or independent agency, as opposed to a legislative scheme that results in the "encroachment or aggrandizement" of congressional power at the expense of the executive.¹⁴⁶ The latter situation would include either a law requiring confirmation of presidential advisers or a law accomplishing the same objective by abolishing, then recreating, an office. The Court might

indirectly impinge upon another"), *aff'd*, 433 U.S. 425 (1977).

141. Quint, *supra* note 106, at 444.

142. See, e.g., Elliott, *supra* note 133, at 507 ("The Court has reached a collection of results in separation of powers cases—some sensible and pragmatic, others utterly asinine."); Strauss, *supra* note 132, at 489.

143. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (holding that the separation of powers doctrine was not violated by statute giving independent regulatory agency power to hear state law counterclaims in reparation proceedings); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that the separation of powers doctrine was violated by assignment of executive powers to the Comptroller General under the Gramm-Rudman Deficit Control Act because Congress retained removal authority over the officer).

144. See Rosenberg, *supra* note 114, at 643; see also *In re Sealed Case*, 838 F.2d 476, 524 (D.C. Cir.) (Ginsburg, J., dissenting) ("Where one branch appropriates the functions of another . . . a straightforward, 'formalistic' analysis is indeed the order of the day."), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988).

145. See Rosenberg, *supra* note 114, at 643 (noting that the Court's separation of powers analysis becomes less rigid when an agency is involved); see also *Schor*, 478 U.S. at 855 (maintaining that Congress may create a "quasi-judicial mechanism" in an administrative agency without violating separation of powers principles).

146. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam).

view such a direct confrontation between Congress and the President as the sort of "zero-sum game" that would demand a formalistic analysis.¹⁴⁷

An intrusion into the President's historic prerogative to choose and exercise control over his advisers likely would fail a functionalist analysis as well. The Court in *Morrison* stated that the test is whether the law "impermissibly undermine[s]" the President's powers,¹⁴⁸ a standard borrowed from *Commodity Futures Trading Commission v. Schor*.¹⁴⁹ When *Morrison* was decided at the appellate level, then-Judge Ruth Bader Ginsburg voted to uphold the Independent Counsel law, a position at odds with the majority of her colleagues on the D.C. Circuit, but one with which the Supreme Court agreed on review.¹⁵⁰ In concluding that the statute did not violate separation of powers,¹⁵¹ Judge Ginsburg carefully applied three factors laid out in *Schor*: (1) the extent of removal (or "siphoning off"¹⁵²) of executive power from the President, (2) whether the limitation affects a "core executive function," and (3) the purpose of the legislation.¹⁵³

The first of the *Schor* factors tips in favor of presidential autonomy in selecting his own advisers and staff. Assuming no congressional aggrandizement (in which case the Supreme Court would apply a stricter formalist approach¹⁵⁴), a federal law requiring the President to submit for confirmation White House advisers would drain his authority by giving Congress the power to check a central—indeed, personal—exercise of executive power. With respect to the second element, Judge Ginsburg explained that the President's "core" functions are his enumerated

147. See Rosenberg, *supra* note 114, at 643.

148. *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (quoting *Schor*, 478 U.S. at 856).

149. 478 U.S. 833 (upholding a congressional delegation of judicial power to an independent agency).

150. *In re Sealed Case*, 838 F.2d 476, 528 (D.C. Cir.) (Ginsburg, J., dissenting), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988).

151. *Id.*

152. *Id.* at 524.

153. *Id.* at 525.

154. *Id.* at 524. The Court probably would not find aggrandizement in such a case because the legislative branch would appear to be exercising its constitutional powers under the Appointments Clause.

powers,¹⁵⁵ suggesting that congressional interference does not violate separation of powers because Article II does not list authority over staff among the President's powers and, in fact, provides that Congress will share the appointment responsibility. Judge Ginsburg also stated, however, that the question of whether the power is a "core" function depends on whether "the job must be kept, in any and all cases, under the President's wing and cover,"¹⁵⁶ a phrase that eloquently describes the position of White House advisers.¹⁵⁷

Resolution of the issue posed in this Note under a functionalist analysis would seem to turn on whether Congress, in passing a law that requires Senate confirmation for a presidential adviser or future adviser, has a legitimate purpose in mind, or whether Congress is motivated by a desire to dilute presidential control. This question is exactly what state courts have consistently asked in ruling on the legitimacy of state assemblies' attempts to curtail governors' authority over their staffs.¹⁵⁸ The state court standard, discussed in the next section, supplements the Supreme Court's functionalist standard; it is specific to legislative attempts to make executive advisers subject to advice and consent, an issue not squarely addressed in any Supreme Court opinion.¹⁵⁹

155. *Id.* at 526; see also Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 343 (1989) (stating that the Necessary and Proper Clause allows Congress to permit governmental actors to share power in any fashion so long as the scheme "does not interfere with the performance of its 'core functions' by one of the named actors").

156. *In re Sealed Case*, 838 F.2d at 526.

157. See *supra* notes 116-20 and accompanying text.

158. See *infra* notes 160-74 and accompanying text.

159. The closest the Supreme Court came to addressing this issue was in *United States v. Lovett*, 328 U.S. 303 (1946), in which three executive branch employees challenged an act of Congress that cut off their pay due to a finding by a House committee that they were "guilty" of engaging in subversive activities, *id.* at 311-12. The law would have allowed the plaintiffs to be compensated if the President reappointed them with the Senate's advice and consent. The Court held the law unconstitutional as a bill of attainder and took no position on the petitioners' separation of powers claim. *Id.* at 315-18. In a concurring opinion, Justice Frankfurter suggested that the employees' de facto removal from office—the cutting off of their salaries—raised a "serious" question about the "constitutional distribution of power over removal" between the executive and legislative branches. *Id.* at 327-28 (Frankfurter, J., concurring); see also Brief for Petitioner at 30, *United States v. Lovett*, 328 U.S.

STANDARDS FOR LEGISLATIVE TINKERING

Congress treads on less-than-solid ground when it attempts to "create" an office that already exists, either by abolishing and then recreating it, or by enacting a statutory overlay on the present position.¹⁶⁰ In 1974, the Nixon Justice Department found itself opposing two challenges to the President's power to select his key advisers: a bill to require that the OMB Director and Deputy be confirmed by the Senate, including a limit on their terms to four years,¹⁶¹ and a substitute measure that would have abolished the positions, then reestablished them subject to the requirement of Senate confirmation.¹⁶²

Relying entirely on state court rulings striking down similar laws passed by state legislatures, the Justice Department conceded that a legislature would be acting lawfully if it completely abolished an executive office or if it abolished an existing post, then recreated in its place a substitute office with "substantially new, different, or additional functions."¹⁶³ The Justice Department's analysis concluded, however, that "when the functions and powers of the new office are substantially identical with those of the office which has been abolished, it will be implied that the purpose 'was to abolish the officer and not the office.'"¹⁶⁴ A "merely colorable" abolition of an office is an infringement on an executive's control over his or her staff.¹⁶⁵

A CRS analysis, which supported the 1979 bill to recreate the

303 (1946) (Nos. 809, 810, 811) (maintaining that *Humphrey's Executor* "nowhere suggests that any officer . . . may be directly removed by Congress itself").

160. See *NSA Hearing*, *supra* note 12, at 135 n.19.

161. H.R. 3932, 93d Cong., 1st Sess. (1973), reprinted in *OMB Hearings*, *supra* note 5, at 5.

162. See *OMB Hearings*, *supra* note 5, at 22.

163. *Id.* at 110.

164. *Id.* (quoting *State ex rel. Hammond v. Maxfield*, 132 P.2d 660, 664 (Utah 1942)).

165. *Hammond*, 132 P.2d at 664 (holding that whether legislation removing an incumbent is a "bona fide reorganization" depends on "good faith"); see also *Hunziker v. Kent*, 168 A. 825, 826 (N.J. 1933) ("The abolition of an office or position must . . . be bona fide."); *Smith v. Sells*, 3 S.W.2d 660, 660 (Tenn. 1928) (defining "colorable" as a change in which the differences between the old and new offices "are confined to mere matters of detail" and do not alter "the nature or identity of the office").

NSA's position,¹⁶⁶ arrived at a similar conclusion: "[I]t is questionable whether Congress" may pass a law "solely as a means to remove a particular incumbent," but it may remove an incumbent if it acts with a "legitimate organizational purpose," such as efficiency.¹⁶⁷

Both appraisals are compelling support for a protected core of White House officials shielded from congressional confirmation grabs, especially because the analysts represent opposing sides of the debate. Many of the same state court rulings relied on by Nixon's Justice Department appear in support of the CRS's conclusion.¹⁶⁸ These opinions, from Pennsylvania,¹⁶⁹ Utah,¹⁷⁰ and New York,¹⁷¹ examined state laws that terminated executive posts—so-called "ripper bills"¹⁷²—and concluded that a legislative body must act "pursuant to a valid reorganization plan or other legislative purpose and must operate to abolish *completely and perpetually* the office involved."¹⁷³ If the office's "powers, duties and functions . . . remain in existence in a single office under the same or a different name, it would be impossible to claim abolition."¹⁷⁴ The ripper bill thus would be unconstitutional.

Given the harmony of the state court approach with *Schor's* focus on the concerns that lead Congress to act, federal courts using a functionalist separation of powers approach should apply

166. See *supra* notes 11-12, 23 and accompanying text.

167. EHLKE, *supra* note 31, at 134.

168. See *NSA Hearing, supra* note 12, at 134 n.16.

169. *Suermann v. Hadley*, 193 A. 645 (Pa. 1937); *Commonwealth ex rel. Kelley v. Clark*, 193 A. 634 (Pa. 1937).

170. *State ex rel. Hammond v. Maxfield*, 132 P.2d 660 (Utah 1942).

171. *O'Connor v. Greene*, 21 N.Y.S.2d 631 (Sup. Ct. 1940).

172. See DEPARTMENT OF JUSTICE POSITION ON PROPOSED SUBSTITUTE OF CONGRESSMAN BROOKS FOR H.R. 3932 AND S. 518 (1973), in *OMB Hearings, supra* note 5, at 109.

173. Cirillo, *supra* note 25, at 593 (cited in *NSA Hearing, supra* note 12, at 134) (emphasis added); see cases cited *supra* note 165.

174. See Cirillo, *supra* note 25, at 593 (cited in *NSA Hearing, supra* note 12, at 134). One exception would be if an office has no incumbent officer at the time the act becomes effective. In this case, Cirillo suggests that any question of violation of executive power would be moot because no constitutional issues dealing with removal could be raised. See *id.* at 593 n.197. This, however, does not preclude a separation of powers argument based on an issue other than removal. See *supra* notes 146-59 and accompanying text.

a "merely colorable" standard—requiring a valid purpose for the action—and strike down attempts to require confirmation of appointees to newly created offices unless the new office's authority is substantially different from that of the old office. Such a standard would prevent legislative intrusions into the President's personal staff while preserving for the legislative branch a tool to curb overreaching executive branch officers by allowing the legislative branch to abolish offices it has already created.¹⁷⁵ Under the current system, no presidential adviser in the WHO¹⁷⁶ could be touched because these advisers' positions are not statutorily created, with the exceptions of the Assistant to the President for Science and Technology¹⁷⁷ and the Director of the White House Office on Environmental Policy.¹⁷⁸ Within the EOP, of which the WHO is a part,¹⁷⁹ most of the advisers are the heads of statutorily created departments and must be confirmed by the Senate. The NSA and the United States Trade Representative are exceptions.¹⁸⁰ Congress may not pass a law requiring advice and consent for an EOP adviser who is appointed solely by the President or a law abolishing, then recreating, the same position, unless Congress acts pursuant to a valid organizational purpose and either abolishes the old office or replaces it with a new office with substantially altered jurisdiction or authority.

Such a requirement would force lawmakers to consider their actions more carefully, compelling them to consider whether it is better to do without a particular office or to allow the President to have absolute authority over the appointee in that office.

175. The President, of course, is free to consult with whomever he wishes and could recreate any advisory position abolished by statute. As former Secretary of State Dean Rusk noted, the President "is entitled to seek and get advice from any source whatever, including his chauffeur." Letter from Dean Rusk to Senator Frank Church, Chairman, Senate Foreign Relations Committee (Mar. 28, 1980), *reprinted in NSA Hearing, supra* note 12, at 140.

176. *See* THE UNITED STATES GOVERNMENT MANUAL 1993-94, *supra* note 14, at 93-94.

177. 42 U.S.C. § 6612 (1988).

178. *Id.* § 4372(a).

179. THE UNITED STATES GOVERNMENT MANUAL 1993-94, *supra* note 14, at 91-106.

180. *See id.* at 100. The United States Trade Representative was created by executive order and reorganized by an act of Congress, but the position is not subject to senatorial confirmation. *Id.*

Public scrutiny would increase because Congress would be barred from "circumvent[ing] by indirection" the President's power to select and control his advisers.¹⁸¹ The workability of this model may be demonstrated by applying the standard to the two most prominent attempts to subject presidential advisers to senatorial advice and consent—the successful OMB law and the bills introduced in 1979 and 1980 dealing with the NSA.

The successful attempt to extend the Senate's advice and consent role to the OMB Director and Deputy Director was a legitimate exercise of Congress's authority. The bills introduced in 1973 were animated by a concern that OMB had been taking on increasingly nonadvisory functions and coincided with Capitol Hill leaders' frustration over the Nixon Administration's practices of impounding funds, zero budgeting, and engaging in "far-reaching" reorganizations of the executive branch without congressional approval.¹⁸² President Nixon used OMB to cut the traditional lines of communication between department heads and their agents in the field, thus thwarting congressional intent.¹⁸³ As one former Kennedy Administration counselor warned, the White House staff must not "replace the role of a Cabinet official or block his access to the President."¹⁸⁴ Indeed, this was the command issued by President Roosevelt when formally creating the WHO in 1939.¹⁸⁵

181. See *OMB Hearings*, *supra* note 5, at 110 (quoting *State ex rel. Hammond v. Maxfield*, 132 P.2d 660, 664 (Utah 1942)).

182. See *id.* at 1. Chairman Chet Holifield stated that the President had "precipitated what many believe is a constitutional crisis in this country." *Id.* Similar criticisms have been levelled at the former Reagan Administration. See, e.g., LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 142 (1992) (describing the efforts by political appointees at the Justice Department, the White House, and OMB to establish a "unitary executive" in which the President would enjoy "total control over all executive agencies").

183. See HAROLD SEIDMAN, *POLITICS, POSITION, AND POWER* 111 (4th ed. 1986).

184. Sorensen, *supra* note 117, at 8.

185. See Exec. Order No. 8248, 4 Fed. Reg. 3864 (1939) ("In no event shall the Administrative Assistants be interposed between the President and the head of any department or agency . . ."). In the modern era, however, Cabinet officials' power has "declined precipitately," and apparently irreversibly, as the presidential office has experienced a corresponding expansion in size and authority. See CORWIN, *supra* note 75, at 135; see also Margaret J. Wyszomirski, *The Waning Capital of Cabinet Appointments*, in *THE PRESIDENCY IN TRANSITION*, *supra* note 120, at 147, 155 (arguing that the White House staff has become the "locus of political skills capital rather

In contrast, the proposals by Senator Edward Zorinsky to "create" the post of NSA and Deputy NSA were motivated by the Senator's desire to control an adviser whose influence in foreign policy deliberations had increased, due in part to Zbigniew Brzezinski's access to the President.¹⁸⁶ President Carter successfully opposed this intrusion into his executive authority.¹⁸⁷ The "merely colorable" test might have been satisfied had Senator Zorinsky's bill been introduced during the latter days of the Reagan Administration, when the NSC was at the center of extraordinary efforts by the White House to evade the law in its arms-for-hostages deal with Iran.¹⁸⁸ News reports do not indi-

than the cabinet").

186. See John M. Goshko, *Senate Voice Sought on Brzezinski's Successors*, WASH. POST, May 11, 1979, at A2; see also Thomas M. Franck, Comment, *The Constitutional and Legal Position of the National Security Adviser and Deputy Adviser*, 74 AMER. J. INT'L L. 634, 636 (supporting the Zorinsky proposal as a means to "psychologically condition the nominee" to be more receptive to congressional oversight and claiming that a nominee "could even be required to pledge, in writing, compliance with specific congressional policies").

187. 125 CONG. REC. 22,311 (1979) (statement of Sen. Church explaining that the President felt the NSA "was so important to him and was regarded as so much a part of the President's staff that he would either veto the bill or insist on a reciprocal right to pass judgment on the chiefs of staff of the two respective committees"). The amendment was deleted in conference. *Id.*

188. See 100-7 *Iran-Contra Investigation: Joint Hearings Before the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Comm. To Investigate Covert Arms Transactions with Iran*, 100th Cong., 1st Sess. 180 (1987) (statement of former NSC staff member Oliver L. North) ("I participated in preparation of documents for the Congress that were erroneous, misleading, evasive and wrong, and I did it again here when I appeared before that committee convened in the White House situation room . . ."); 100-8 *id.* at 152 (statement by former NSA John Poindexter) ("[T]he Boland Amendment [does] not apply to the NSC staff."). See generally LAWRENCE E. WALSH, *IRAN-CONTRA: THE FINAL REPORT* 105, 112-22 (1994) (detailing the evidence that supported a 12-count indictment against Oliver North). After Iran-Contra was exposed, Democratic leaders revived the idea of making the NSA subject to Senate confirmation. See Sara Fritz, *Congress Members Predict Move To Curb President's Secret Diplomacy*, L.A. TIMES, Nov. 15, 1986, at 9. However, the President would have no obligation to appoint a security adviser under such a law and could fill the post "with a minor figure and rely on a predominant foreign-policy adviser installed by his own free choice in the White House." Philip Geyelin, *Only the President Can Fix It*, WASH. POST, Dec. 7, 1986, at D8. Interestingly, Harold Koh, who has suggested a string of reforms in the wake of Iran-Contra, never proposed requiring senatorial confirmation for the NSA or Deputy NSA. See HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 161-207 (1990).

cate exactly what Republican lawmakers intend to accomplish with their most recent bill.¹⁸⁹ If their efforts are due only to a disagreement over the Clinton Administration's foreign policy, then the bill will not have a valid legislative purpose.

CONCLUSION

Protecting the President's "inner circle" does not require federal courts to ignore the Appointments Clause and its command that the task of appointing members of government be shared by the President and Congress. The modern practice follows a technically constitutional scheme in which Congress "grants" the President authority to appoint his own advisers. This arrangement, however, mocks the design of the Framers because Article II, read without reference to history or the separation of powers doctrine, appears to permit Congress to revoke the President's vesting power and demand that the appointment of a personal adviser be confirmed by the Senate. Furthermore, on its face, the Appointments Clause does not appear to bar a statute "creating" an existing executive post subject to the Senate's advice and consent authority or to prevent Congress from limiting the President's power to discharge White House officials.

All of these scenarios would strip the President of control over the eyes and ears of his executive organization. This Note argues that such legislative overreaching would buck an established historical record of complete presidential autonomy in choosing advisers and would be contrary to the separation of powers principle, as clarified by recent Supreme Court rulings. Separation of powers *independently* bars the legislative branch from venturing too deeply into the presidential woods when attempting, either directly or by circuitous routes, to pass laws requiring senatorial confirmation for White House counselors. The doctrine forbids actions that merely dress up old advisers in new uniforms.

This Note also urges a workable standard drawn from state courts: to be constitutionally sound, such laws must be designed to improve organization or efficiency of an office and must com-

189. See McCaslin, *supra* note 17, at A5.

pletely abolish the old office in question. If a court determines that a new office is not substantially different from the old office, it should strike down the statute as a mere colorable abolition. This test is consistent with the Supreme Court's approach in *Commodity Futures Trading Commission v. Schor*, which focused on the President's performance of his core duties and scrutinized legislative motives.¹⁹⁰ At least one member of the Court, Justice Ruth Bader Ginsburg, can be expected to argue for scrutinizing congressional motives in ruling on the constitutionality of such laws.¹⁹¹

The President, of course, has the power to veto bills that would limit his control over the White House staff. Should it become necessary, the chief executive should not hesitate to forcefully defend his office's historic prerogatives and should explain his actions with reference to history and the separation of powers doctrine. If Congress acts with an authentic motive—one aimed at improving efficiency or curbing abuses of executive power by presidential appointees—then courts should allow the Senate to exercise its advice and consent role; but, if mere anxiety over executive branch officials' influence or policies undergirds such proposals, those laws that survive the veto pen should be struck down as unconstitutional.

Douglas S. Onley

190. See *supra* notes 149-57 and accompanying text.

191. See *supra* text accompanying notes 150-53.