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We have prepared this packet of materials in response to numerous requests for information on the Government of the United States. Enclosed is factual material on the United States Government, a list of Federal Information Centers, and a bibliography which contains additional sources of information, many of which may be available in a local library.

A useful source of information on the Federal Government is the *United States Government Manual*, which summarizes the organization and functions of Government agencies and lists the names of major Government officials. It is available at many libraries and can be purchased from the Superintendent of Documents; the address and price are enclosed.

One of this Info Pack's items, *Our American Government; What is It? How Does it Function? 150 Questions and Answers* (published in 1981, and now out of print), is included because it is an excellent source of information on the Federal Government, although some of its information is out-of-date. For example, on pages 25 and 26, it mentions "13 executive departments" and the "Veterans Administration" (VA), when, in fact, there are now 14 departments because the VA became the Department of Veterans Affairs in 1989.

Members of Congress who want further information on this topic may contact CRS at 7-5700. Additional CRS Reports may be identified by looking in the current *Guide to CRS Products* (for congressional use only) under "Executive Organization" and in the latest *Update* under "Government and Politics."

Constituents may find additional information on this topic in a local library through the use of *Readers' Guide to Periodical Literature*, Public Affairs Information Service *Bulletin* (PAIS), and various newspaper indexes. Books on this subject may be identified through the library's catalog or the most recent edition of *Subject Guide to Books in Print*.

We hope this information will be helpful.

Congressional Reference
Division

CRS Report for Congress

The Separation of Powers Doctrine: An Overview of its Rationale and Application

Jay R. Shampansky
Legislative Attorney
American Law Division

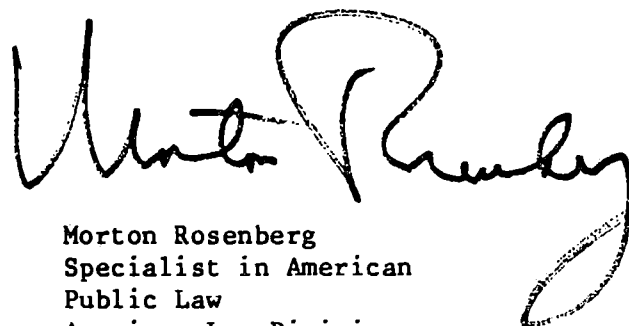
December 4, 1986



ABSTRACT

The separation of powers doctrine is founded on a political philosophy which envisions three relatively distinct types of governmental functions, each of which is to be performed by a different branch in order to avoid a tyrannical concentration of power in any one entity. The three branches created by the Constitution were intended to be independent in some respects and interdependent in others.

by the nomination struggle, make the ultimate outcome problematic.. In the end, time, a change in administration, a change in the Supreme Court's composition, or a political settlement may temper or moot the issue.

A handwritten signature in black ink, appearing to read "Morton Rosenberg". The signature is fluid and cursive, with a large, sweeping "R" at the end. It is positioned above the typed name and title.

Morton Rosenberg
Specialist in American
Public Law
American Law Division

. . . The President is an agent selected by the people, for the express purpose of seeing that the laws of the land are executed. If, upon his own judgment, he refuse to execute a law and thus nullifies it, he is arrogating to himself controlling legislative functions, and laws have but an advisory, recommendatory character, depending for power upon the good-will of the President. That there is danger that Congress may by a chance majority, or through the influence of sudden great passion, legislate unwisely or unconstitutionally, was foreseen by those who framed our form of government, and the provision was drawn that the President might at his discretion use a veto, but this was the entire extent to which he was allowed to go in the exercise of a check upon the legislation. It was expressly provided that if, after his veto, two-thirds of the legislature should again demand that the measure become a law, it should thus be, notwithstanding the objection of the Chief Executive. Surely there is here left no further constitutional right on the part of the President to hinder the operation of a law.¹⁸⁸

The notion of the unitary executive marks the latest chapter in the historic, inevitable clash of the political branches in our system of separated powers. The current controversy takes on added significance and immediacy since it has reached beyond theoretical rhetoric and has motivated executive action on a variety of fronts that directly challenges asserted congressional prerogatives. Definitive judicial resolution has been called for and such resolution is not unlikely given the thus far irresolute posture of the litigants and seemingly inexorable and unavoidable march to the Supreme Court. Although history and legal precedent seem to favor Congress' position, the uncertainties of the litigation process before the High Court, now compounded

¹⁸⁸ 3 W. Willoughby, *The Constitutional Law of the United States* 1502-03 (2d ed. 1929).

popular support as a basis of presidential political power.¹⁸⁶ It is a political concept and has been variously cited to imply a free-floating responsibility unfettered by legal standards, legal review, or legal consequences. This distinction was made early in our history during the intense struggle over the scope of presidential power between President Andrew Jackson and the Senate in 1834. Jackson sent a formal protest to the Senate in response to a resolution of that body censuring him for exercising powers that the Senate believed did not belong to the President. In that protest Jackson described himself as "the responsible head of the Executive Department." Daniel Webster in reply disputed that Jackson meant he was legally responsible because "legal responsibility signifies liability to punishment for misconduct or maladministration." Rather, Webster argued, Jackson was referring to political responsiveness. "Sir, it is merely responsibility to public opinion. It is a liability to be blamed, it is the chance of becoming unpopular, the danger of losing a re-election. Nothing else is meant in the world. It is the hazard of failing in any attempt or enterprise of ambition. This is all the responsibility to which the doctrines of Protest hold the President subject."¹⁸⁷

In contrast, the legal responsibility to carry out congressional enactments imposed by the Constitution on the President seems of a higher order. In this regard Professor Willoughby has commented:

¹⁸⁶ See, e.g., Rockman, *The Modern Presidency and Theories of Accountability: Old Wine and Old Bottles*, 13 *Cong. and the Presidency* 135, 154 (1986) ("Accountability is foremost dependent upon politics, and the real power that presidents have stems from this. That power primarily rests with other elites, but its wellspring is popular sovereignty . . .").

¹⁸⁷ Quoted in Rohr, *To Run A Constitution* 144 (1986).

consistently rejected by the courts since Kendall.¹⁸⁴

This understanding that the President is legally responsible for seeing that congressional enactments are carried out also serves to diminish substantially the Executive's related argument that, since he is the only official elected by all the people, he must be accountable to the people for actions of all executive agencies.¹⁸⁵ The contention confuses political accountability with legal responsibility. The former reflects the notion of

¹⁸⁴ See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("...[t]he President's power to see that the laws are faithfully executed refutes the idea he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.") In re Theodore Olson, 818 F.2d 34 (D.C. Cir., Div. No. 86-1, 1987) ("The 'take care clause' does not require the President (or his delegate) to 'execute the laws.' The President's responsibility may be satisfied by Congress entrusting the power of execution to some other officer while the President's obligation would be satisfied by the right of the President (or his delegate) to remove the individual officer for impropriety." citing Kendall.) (emphasis in original); National Treasury Employees Union v. Nixon, 492 F. 2d 587, 604 (D.C. Cir. 1974) ("That constitutional duty does not permit the President to refrain from executing laws duly enacted by the congress as those laws are construed by the judiciary."); Haring v. Blumenthal, 471 F. Supp. 1172, 1179 (D.C.C. 1979); United States v. Solomon, 419 F. Supp. 358, 372 (D. Md. 1976) ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power", quoting Holmes, J. in Myers v. U.S. 272 U.S. 52, 177 (1926)); Guadamuz v. Ash, 368 F. Supp. 1233, 1243 (D.D.C. 1973) ("[N]owhere does our Constitution extol the virtue of efficiency and nowhere does it command that all our laws be fiscally wise. It does most clearly, however, state that laws, good or bad, be enacted by the Congress, and enforced by the President. '[I]f the power sought here were found valid, no barrier would remain to the executive ignoring any and all congressional authorizations if deemed them, no matter how conscientiously, to be contrary to the needs of the nation.'").

¹⁸⁵ See Habicht Statement, supra at p. 5.

the President "shall take care that the laws be faithfully executed," regardless of who executes them -- arguably a duty quite different from the claim of a single-handed responsibility for executing all the laws. A literal reading of the "take care" clause seems to confirm the President's duty to ensure that officials obey Congress' instructions; it does not seem to create a presidential power so great that it can be used to frustrate statutory congressional intention. In the words of the Kendall Court, where a valid duty is imposed upon an executive officer by the Congress, "the duty and responsibility grow out of and are subject to the control of the law, and not the direction of the President."¹⁸³ Indeed, similar presidential claims of broad substantive authority deriving from the "take care" clause have been

deliberations and the actions of the First Congress. On August 6, 1787, the Committee of Five reported the draft of the Constitution that in art. X, sec. 2, provided for a single executive who "shall appoint officers in all cases not otherwise provided for by this Constitution." 2 Farrand, Records of the Federal Convention 185 (1911). On August 20 proposals were submitted to the Committee of Five for a Council of State consisting of the Chief Justice, the secretaries of domestic affairs, commerce and finance, foreign affairs, war, marine and state. All the secretaries were to be appointed by the President and hold office during his pleasure. 2 *id.* at 335-337. That proposal was rejected because "it was judged that the President by persuading his Council to concur in his wrong measures, would acquire their protection" 2 *id.* at 542. All that ultimately survived of the proposal was the Opinions clause. Two decisions of the First Congress, however, diminish its significance. First, the Congress allowed the President the right of removal of officers he has appointed with advice and consent of the Senate, a decision since accorded constitutional stature. *Myers v. U.S.*, 272 U.S. 52 (1926). Second, Congress made the Treasury secretary, and later other domestic department heads, report directly to the Congress rather than the President. See, *supra*, pp. 14-18. Neither congressional action indicates a perception of any substantial content to the Opinions clause, and indeed, appears to totally devalue it. If Congress had believed the Opinions clause had substantive content, there was no need to statutorily provide for removal. Similarly, if the requirement to report to the President had any real meaning, the congressional dictate to domestic agencies to report directly to it for over a century would surely have engendered some controversy.

¹⁸³ Kendall ex rel Stokes v. U.S., 37 U.S. (12 Pet). 524, 610 (1838).

executive power not textually reserved to the President in article II.

Moreover, article II ensures that Congress will have the choice of vesting the crucial appointment of most "inferior" officers in those department heads.

The strongest support for full presidential control over the executive establishment rests on the provision that the President "shall take care that the laws be faithfully executed." The "take care" clause is not, however, among the major presidential powers set forth in section 2 of article II, and seems at best a modest grant power, and at least a limitation on the office's power. Among the powers explicitly granted to the President is the power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." A broad reading of the "take care" clause would have the effect of reducing this clause -- which appears among the grant of major presidential powers in section two -- to surplusage. If the President was meant to have full control over the executive, including the power to discharge at will, why was the power to request written opinions put in the Constitution?

The Constitution has not been read to have such redundancy. A reasonable interpretation of the Opinions clause is that it exists because it was not assumed, or at the very least not obvious, that the President had absolute power over Heads of Departments.¹⁸² And the "take care" clause says only that

¹⁸² Indeed, a brief review of the origins of the Opinions clause appears to make reliance on it highly questionable. That clause is the modest constitutional residue of a number of efforts at the Philadelphia Convention to surround the President with a Council of State. The clause might have had significance in light of the rejection of a plural executive in favor of a single executive but for the ultimate adoption of the separation of powers and the particularized checks and balances. Important here are the provisions for sharing of the appointment power with the Senate, and the exclusive power of the Congress over the creation and abolition of offices and departments, and appropriations, which effectively vitiate any substantive content the Opinions clause may be speculated to have. This is demonstrated by Convention

Case); it may vest in a subordinate official appointed by the President, and subject to his removal at will, discretionary decisionmaking authority which cannot be interfered with by him (Kendall v. U.S., Public Citizen v. Burke); and it may vest power in a legislative branch officer which may influence the actions of executive officials (Ameron v. Corps of Engineers). One prominent commentator argues that the Bowsher opinion would support insulating sub-cabinet officials, such as the administrator of EPA or the commissioner of the Food and Drug Administration, from removal except for cause.¹⁸⁰

This is, of course, far from denigrating or denying the powerful role the President plays in the policymaking and effectuation processes. The ability to recommend and veto legislation, to appoint and discharge his appointees, to influence (through his powers in the budget and resource allocation process) even those officials not subject to at will removal, and to bring to bear the force of the office on the bureaucracy and the legislature, ensures the Executive's co-equal role in the constitutional scheme. But it does underline the limits of the President's role and subjects the notion of a unitary executive to challenge.

Both literal and structural analysis of the constitutional text, however, fails to suggest a hierarchical executive. The executive power is not uniquely vested in the President alone, just as the President's functions are not solely executive.¹⁸¹ Article II clearly anticipates the creation of an administrative bureaucracy by its mention of "Heads of Departments", and the necessary and proper clause of article I suggests that it would be Congress that would do the creating. Congress can assign to a "Head of Department" any

¹⁸⁰ Verkuil, supra note 22, at 794-95.

¹⁸¹ E.g., the veto power.

In Commodity Futures Trading Commission v. Schor,¹⁷⁷ the Supreme Court indicated that in separation of powers cases where aggrandizement is not in issue, it will weigh the justifications for the congressional scheme in question, including the necessity to maintain "Congress' ability to take needed and innovative action pursuant to its article I powers," against the degree of intrusion on the ability of the President to perform his assigned functions.¹⁷⁸ "'De minimis'" disruptions are insufficient to block an otherwise legitimate congressional objective.¹⁷⁹ In light of the factors just reviewed, it would seem likely that a court reviewing the question would find that the limited potential disruptions identified are justified and necessary and do not create a significant impediment to the President's execution of the law.

V. Conclusion: Congressional Control of Agency Decisionmaking and the President's Duty to Obey the Law

The history of federal administrative practice, and relevant judicial precedent, accord Congress virtually plenary power over the creation of the structure of the administrative bureaucracy and the powers of the offices and officers who are to carry out the legislative will. To summarize the current state of the law, Congress may by statute create so-called independent regulatory commissions headed by officials appointed by the President but not removable by him except for cause (Humphrey's Executor); it may create offices within executive departments whose incumbents are appointed by the department heads or the courts but who are subject to removal only by the appointing authority and not the President (U.S. v. Nixon, U.S. v. Perkins, In re Sealed

¹⁷⁷ 106 S.Ct. 3245 (1986).

¹⁷⁸ 106 S.Ct. at 3258.

¹⁷⁹ Id. at 3260.

enforcement scheme by both Congress and the primary enforcement agency, and its extensive use in the past, at least, has apparently not resulted in such a significant degree of disruption of the target agencies, or the overall coordination efforts of the Executive, to require presidential interdiction.

Second, the President does not seem to have been deprived of his traditional means of pre-decisional influence by the grant of order authority to EPA. He has the power to appoint the Administrator of EPA and thereby assure himself of a person respectful of presidential prerogatives and sympathetic to the President's policies and goals. Through his Office of Management and Budget the President can control EPA's budget submission, personnel ceiling, rulemaking, information gathering, and contacts with Congress¹⁷⁵ -- in short, the life-blood of the Agency. Finally, the President may dismiss the Administrator at will, a power the Bowsher court described as the one an incumbent official "must fear, and, in the performance of his functions, obey."¹⁷⁶

Finally, this is not a situation involving on its face an attempt at congressional aggrandizement. Congress has retained no voice in EPA's day-to-day operations. Thus there is no implication of a Chadha problem. Nor does Congress hold a sword of Damocles threat of removal as in Bowsher. Therefore the case for a discernible attempt to effect a structural shift of constitutional power from the President to Congress would appear questionable.

¹⁷⁵ See Olson, The Quiet Shift of Power: OMB Supervision of Environmental Protection Agency Rulemaking Under E.O. 12,291, 4 Va J. of Nat. Res. Law 1, 5-8 (1984).

¹⁷⁶ Bowsher v. Synar, 106 S.Ct. 3181, 3188 (1986) (quoting Synar v. United States, 626 F.Supp. 1374, 1401 (D.D.C. 1986) (3-judge court)).

understand one point in particular. Without the ability to issue unilateral administrative orders, consent orders, wouldn't it be a problem from the standpoint of other members of the regulated community in damaging EPA's credibility with the states and the public?

Mr. LUCERO. That was another matter that I didn't mention but you are right. That is an issue that we have always perceived. We have two problems.

The private community, we have said is subject to orders, subject to orders with penalties and we will not accept for certain violations and in certain circumstances, voluntary compliance. It will have to be reduced to an order and the penalty will have to be paid. There is the question of fairness. The other problem concerning the states is that we have insisted that the states exercise order authority for certain kinds of violations and to suddenly say that can't be used against a Federal agency or that EPA at least won't use them against a Federal agency, creates a disparity between what we are insisting on for other private parties and Federal facilities.

Mr. WYDEN. Aren't some of these Federal facilities some of the very worse of the RCRA compliance problems?

Mr. LUCERO. Yes.¹⁷³

Testimony presented at congressional hearings also indicates that as of April 1987 some 151 unilateral administrative orders had been issued to 13 federal agencies without objection from the Justice Department.¹⁷⁴ Arguably, then, the administrative order authority is deemed an important part of the

¹⁷³ Testimony of Gene Lucero, Director, Office of Waste Programs Enforcement, EPA, House Energy and Commerce Committee Hearings, supra note 8. To the same effect, see testimony of Richard Mays, Senior Enforcement Counsel, Office of Enforcement and Compliance Monitoring, EPA; and James R. Moore, Counsel, Region X, EPA.

¹⁷⁴ Id.

over time is that an order or a document that at least starts the order process, whether we call it a complaint or something else, is a very important signal to the Federal agency that swift action is necessary. It focuses the attention of the receiving agency that something needs to be done.

We obviously are applying the same approach against other private parties and felt we needed to be consistent. We have always felt that if we had the full range of authorities, that we would be able to use the most effective tools as we could choose at individual sites. We have always felt that the use of orders would be better perceived by the public as being the more serious enforcement and at the same time where we could enter into consent agreements with the parties, whether it be Federal agencies or private parties, that the public would feel that was an appropriate agreement. It would be arm's length. It would be the subject of an order.

Finally, we felt that orders, whether they were consent orders or if they were a final order, would be enforceable. We always felt both for private parties as well as for Federal facilities, that you had to have a process that was enforceable, especially in the case of Federal facilities where EPA can't take the party to court, based on the advice from the Department of Justice, there needed to be a mechanism where someone else in the case of a disagreement or the fact there was non-compliance, could at least raise that issue to get the attention of the agency towards compliance.

We have also heard from a whole number of Federal facilities anecdotally that when they get the order, they are better able to deal with their own bureaucracy and can get attention to what needs to be done.

When we took all of these things on balance and given our prior experience, we concluded in 1984 and 1985 that we really needed to go to a process of utilizing orders against Federal agencies just as we would with other private parties.

Mr. WYDEN. Let me just make sure I

Congress. For instance, federal facilities may be the subject of suits by EPA, state agencies, or private parties. The issuance of an administrative order against an agency facility, however, may facilitate a citizen suit since the order's directives may be deemed part of the statutory requirements that must be followed by the subject agency. Thus, the threat to issue an administrative order may be an effective lever to achieve voluntary compliance by the federal agency. Their selective use is also seen as enhancing the credibility of EPA's enforcement efforts generally. Testimony of EPA officials before Congress supports the efficacy of the orders as an essential enforcement device. In response to an inquiry to explain the need for such orders one EPA official stated:

Mr. LUCERO, Yes, sir. Let me first of all give you a quick background. In the RCRA program, we have found over the last several years, especially prior to 1985, where we were using primarily a compliance agreement and a voluntary approach, that compliance within the RCRA program wasn't very good. We decided in 1984 and 1985 that in order to promote compliance across the board, it would be necessary to go to more formal enforcement practices including the use of orders.

We also felt it was necessary to set up some time frames in which these orders had to be issued and against the certain types of violations. That was because, as I said, we weren't seeing very good compliance.

We have always felt that the way RCRA was established, the requirements that apply to private parties applied to Federal agencies as well. When we determined that we needed to go to more orders or to an order strategy as a formal mechanism, we felt that also should be applied against Federal facilities.

When we got into discussions about why orders versus other types of agreements, it was important for a couple of reasons, I think. In dealing with Federal facilities, what we found

enforcement mechanism for federal environmental statutes enacted in the 1970's, and the rules promulgated pursuant to them, is the federal government's ability to regulate individual sources of pollution, both private and public. These statutes empower the federal government to bring administrative or civil actions, and to seek remedies including injunctive relief and significant civil penalties. Criminal penalties are also available in certain situations. To supplement federal enforcement efforts, environmental statutes usually allow the federal government to delegate primary responsibility for enforcing environmental regulations to state authorities. In addition, at least twelve of these statutes authorize citizen suits against alleged violators, including federal agencies. These statutes usually also permit citizens to intervene as a matter of right in civil suits filed by the government in federal court. One statute even permits citizens to intervene in federal criminal proceedings.¹⁷² This complex enforcement mechanism, which enlists all levels of government and private citizens, may be seen as reflective of Congress' recognition of the enormity of the problem of enforcement. The environment statutes and their implementing regulations sweep so broadly both with respect to substance and jurisdiction that no single enforcement agent is feasible. In one sense the enforcement process has become part of the policymaking process. Since the enforcement resources are so limited and the rules so inclusive, selection of appropriate enforcement targets, enforcement mechanisms, and the remedies to be sought, become critical in the overall effort to achieve maximum voluntary compliance.

In this context, administrative orders may be argued to be an important, integral part of the multi-level, staged enforcement process envisioned by

¹⁷² See, 33 U.S.C. 1515(b)(1)(1982).

core executive responsibility that is peculiarly intruded upon by the unilateral issuance of administrative orders.

Nor is it, or could it, be seriously claimed that Congress is acting outside the scope of its article I powers in legislating with regard to environmental policy in the nation generally, or with respect to the responsibilities and duties in that area of federal agencies in particular. There is no doubt that Congress could direct an agency by law to do what EPA has been authorized to direct an agency to do by its order authority. Thus, the Executive's claim must be that where Congress does not act directly in assigning duties and responsibilities to agencies, but instead vests in an agency the authority to direct orders to other agencies, the President must be free, in order to fulfill his duty to see that the laws are faithfully executed, to intervene in such administrative decisions to ensure the proper coordination of the totality of the priorities, limited resources, competing policy goals, and conflicting jurisdictions and responsibilities of agencies throughout the federal government in a given area of policy concern. To allow one agency among many in an area to make such administrative determinations without supervision or control is disruptive of this constitutionally imposed presidential function and is an intrusion that violates the separation doctrine.

Assuming the posited disruption, a number of factors support the argument that the threat posed is minimal and that any impact is justified by Congress' need to provide an effective scheme of enforcement of the national environmental policy.

First, EPA's administrative order authority may be seen as integral part of the complex environmental policy enforcement scheme. The primary

confronted the separation of powers issue.¹⁶⁷ Thus direct application of separation analysis by the courts may be expected. As was previously described in more detail,¹⁶⁸ in the absence of a specific textual commitment courts evaluate separation of powers claims by applying a two-step test that first inquires whether the action of one branch threatens to prevent another from "accomplishing its constitutionally assigned functions" and then, when a potential for disruption is found to exist, attempts to determine through a balancing of interests whether the intrusion is justified.¹⁶⁹ The weighing process thus assumes some degree of intrusion,¹⁷⁰ and attempts to define the context of dispute with respect to the competing objectives and authorities of the contending branches.

Although the Executive's claim of constitutional right to interdict EPA administrative orders is couched in absolute terms, no constitutional provision expressly authorizes such a broad power nor have courts found it a necessary implication of any of the powers or duties assigned to the President.¹⁷¹ Moreover, as has just been recounted, the long history of congressional control of the administrative bureaucracy and the almost uniform gloss of approval given it by the courts, belies such an expansive power. Thus, the claim of constitutional authority must be, at best, a qualified one deriving from some

¹⁶⁷ President Nixon raised the issue in the Nixon case, see pp. 45-46, supra, but the Court chose not to resolve the justiciability issue on those grounds.

¹⁶⁸ See supra, pp. 10-13.

¹⁶⁹ Nixon v. General Services Administration, 433 U.S. 425, 443 (1977).

¹⁷⁰ See Nixon v. GSA, id.; Commodity Futures Trading Commission v. Schor, 106 S.Ct. 3245, 3258, 3260 (1986).

¹⁷¹ See infra, pp. 60-64 for discussion of the "take care" and opinions clauses.

damages.¹⁶⁵

Finally, the Court noted that while it would not join the Army as defendant, Shell's interests in seeing that the Army pay its proportionate share of the cleanup costs could be protected by the court in this case if Shell filed a counterclaim, or by the court in a suit brought by the State of Colorado (as co-trustee with the Army) in which the Army and Shell are co-defendants.¹⁶⁶

In sum, then, the test established by ICC and its progeny grants a court jurisdiction to resolve an intra-branch controversy where the dispute is concrete, involves issues which are traditionally justiciable, and Congress has not barred the action. The decided cases have encompassed the gamut of potential intra-branch litigants, including officers of the United States who are removable at the pleasure of the President. No case has hinted at a distinction between independent regulatory commissions on the one hand and executive officers subject to at-will removal on the other. In view of this current state of the law, EPA's statutory designation as the guardian of the public's interest that federal agencies obey the national environmental policy, and its empowerment to fulfill that duty, makes it appear likely that a court would take jurisdiction of suit brought by EPA to enforce one of its administrative orders against a sister agency.

B. EPA Administrative Orders and the Separation of Powers

While the justiciability litigation is analogous to and persuasive of the administrative order situation, none of the court's opinions directly

¹⁶⁵ Id. at 1083.

¹⁶⁶ Id.

claims to have spent approximately \$48,000,000 in responding to release of hazardous chemicals at the Arsenal. It is the Army that continues to plan, in consultation with the Environmental Protection Agency, a comprehensive solution to the Arsenal contamination problem. It is the Army that is the designated trustee for natural resources at the Arsenal. If the Army were joined as a defendant, the Army would in actuality, as well as in name, be suing itself.¹⁶⁴

Viewed in this light, there could be no justiciable intra-branch controversy. By statute, the Army is the trustee of the public for the natural resources at the facility. As such, it has fiduciary obligation to the citizens of the nation to see that the facility cleanup is completed and also to accept responsibility, as it apparently had, for its share of the cleanup costs. To join the Army as a defendant would, in actuality, have had it suing itself.

The Court explained:

Here, however, there is no inter-agency dispute presented. The apparent paradox presented by the Army being both a responsible party and a plaintiff in this action arises because the Army in the past committed acts which contaminated the Arsenal but has since recognized the harm it caused and is presently taking action to remedy the problem. A "dispute" between the "new" Army and the "old" Army cannot be adjudicated. There is only one Army before this court. The Army is the plaintiff and the designated trustee for natural resources at the Arsenal. As such, it cannot sue itself, even though it may be a liable and responsible party under CERCLA secs. 107(a) and 107(g), 42 U.S.C. secs. 9607(a) and 9607(g).

The case is not unlike a common comparative negligence case where a defendant asserts that the injured plaintiff's conduct caused some or all of his own injury. Procedurally, the plaintiff is not joined as a defendant; rather the court apportions responsibility for the

¹⁶⁴ Id. at 1082.

. . . There could not be any issue between the TVA and the FHA, both being the United States, which this court could litigate or adjudicate. Any difference between these agencies would at most be interagency disputes which are not subject to settlement by adjudication.

. . . The settlement of interagency problems within the United States government is not a judicial function but rather an administrative function.¹⁶¹

Finally, the most recent decision in the area is illuminating for its reasoned application of the ICC test to the factual context. United States v. Shell Oil Co.¹⁶² was a CERCLA cost-recovery action brought by the United States. Shell moved to join the Army as a defendant, claiming, first, that if it remained the sole defendant, the United States might saddle it with liability that rightfully should be borne by the Army; and, second, that if the Army wasn't joined, there could be an incomplete recovery of costs that would injure the public's interest in a complete cleanup of the site. The court denied Shells' motion, viewing it as a self-serving effort "to reposition the parties to place the United States, as plaintiff, in the posture of suing the Army and Shell, as defendants."¹⁶³ Explicitly adopting the test established by ICC, Nixon, and United States v. FMC, the court first looked "behind the names that symbolize the parties" and determined that in fact it was the Army that was the plaintiff in the case.

When I look behind the "United States," the denominated plaintiff in this case, I find the Department of the Army. It is the Army that

¹⁶¹ 204 F.Supp. at 839.

¹⁶² 605 F. Supp 1064 (D. Colo. 1985).

¹⁶³ 605 F.Supp at 1081.

justiciable.¹⁵⁵

On the other hand, some courts have held nonjusticiable suits between Executive Branch entities where the governmental interest on both sides was found to be the same. In an early case, Defense Supplies Corporation v. United States Lines,¹⁵⁶ the court dismissed for lack of a case or controversy a property damages claim against both United States Lines Co. and the United States by the insurance subrogee of a shipper (Defense Supplies Corporation) which was wholly owned by the United States. The court reasoned that the dispute was "merely about the proper allocation of funds between different parts of the government."¹⁵⁷ The court expressly avoided the question whether such an action, if authorized by statute, would be justiciable.¹⁵⁸

In United States v. An Easement and Right of Way,¹⁵⁹ the Tennessee Valley Authority brought a land condemnation action and attempted to join the Farmer's Home Administration, the holder of a mortgage on the land, as a defendant. The court, viewing the controversy as an intrabranh dispute over allocation of public property resources,¹⁶⁰ denied the motion, stating,

¹⁵⁵ 694 F.2d at 810.

¹⁵⁶ 148 F.2d 311 (2d Cir.), cert. denied, 326 U.S. 746 (1945).

¹⁵⁷ 148 F.2d at 313 note 5.

¹⁵⁸ Id.

¹⁵⁹ 204 F.Supp. 837 (E.D. Tenn. 1962).

¹⁶⁰ The court made clear its view of the nature of the dispute involved when it later reasoned hypothetically that if FHA had foreclosed prior to the action and had obtained a fee simple, no condemnation action could have been filed "as the United States could not condemn lands belonging to the United States, even though different agencies were claiming administrative rights to the property. The fact that FHA's interest is a security interest rather than a fee simple interest does not change the situation" 204 F.Supp at 839.

side of the defendants.¹⁵³

Finally, in United States v. Federal Maritime Commission,¹⁵⁴ the Antitrust Division of the Justice Department brought suit to challenge the FMC's approval of certain pooling agreements between shippers. The Antitrust Division had argued before the Commission that the agreements violated the antitrust laws but the Commission approved them, thereby exempting the shippers from the requirements of the antitrust laws. In response to the intervenors' argument that the article III "case or controversy" prerequisite for federal jurisdiction was not met because the "United States is suing itself," the court, following the rationale of Nixon, held that the real parties in interest were the Justice Department and the Commission and that the dispute over the validity of the Commission's order is a matter courts normally resolve and that the setting assured the kind of adversary confrontation that would allow for a proper presentation of the conflicting points of view. The court explained:

The Department of Justice is the authorized and traditional advocate of antitrust policies in agency litigation, . . . , which policies are implicated by the "public interest" standard of section 15 of the Shipping Act, and the Commission obviously has a role before this court as an advocate of its own perception of the public interest. See 28 U.S.C. 2348 (agency's right to appear as a party). This dispute over the validity of a Commission order raises issues that courts traditionally resolve and the setting assures the concrete adverseness on which sharpened presentation of the issues is thought to depend. The parties' controversy is

¹⁵³ 418 U.S. at 693, citing United States v. Marine Bankcorporation, 418 U.S. 602 (1974) and United States v. Connecticut National Bank, 418 U.S. 656 (1974).

¹⁵⁴ 694 F. 2d 793 (D.C. Cir. 1982).

In United States v. Nixon,¹⁵⁰ the Special Prosecutor sought to enforce a subpoena duces tecum against President Nixon. The President argued before the district court that "the Court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution." The contention was renewed before the Supreme Court, with the President further arguing that the dispute was essentially a jurisdictional one within the Executive Branch which was analogous to a dispute between congressional committees. As such, it was a matter in which the President should be the final arbiter since it involved the preservation of the confidentiality of presidential communications.¹⁵¹ The Court ruled that although the dispute was between officials of the same branch of government, the issues before it -- the production or nonproduction of specified evidence sought by one official of the Executive branch within the scope of his express authority and resisted by the President on the ground of his duty to preserve the confidentiality of communications of the Chief Executive -- were "of a type which are traditionally justiciable"¹⁵² and were raised in a setting that assured "concrete adverseness" of the parties. It might also be noted that the Nixon Court cited approvingly two cases decided just one month before in which it maintained jurisdiction over enforcement actions brought by the Antitrust Division of the Justice Department where the Comptroller of the Currency, an independent officer in the Treasury Department, exercised his statutory authority to approve bank mergers and participated in the litigation on the

¹⁵⁰ 418 U.S. 683 (1974).

¹⁵¹ 418 U.S. 692-93.

¹⁵² 418 U.S. at 697 (quoting U.S. v. ICC, supra, 337 U.S. at 430.

an independent executive officer. Thus in United States v. ICC,¹⁴⁵ the United States, as a shipper, filed a complaint with the ICC against railroads claiming that the rates charged were unreasonable, unjustly discriminatory, and violative of the Interstate Commerce Act. The ICC found the conduct legal and dismissed the United States' complaint. The United States sought review of the order in a federal district court. The court dismissed the case on the theory that the government could not sue itself. The Supreme Court reversed, finding that although the government was nominally suing itself, the basic controversy was whether the railroads had illegally exacted money from the United States. The United States, as a shipper, was actually aggrieved by the independent regulatory agency's decision and order. The Court found the controversy to be of a type "traditionally justiciable."¹⁴⁶

The Court has since followed ICC in a variety of contexts. In Udall v. Federal Power Commission¹⁴⁷ and Secretary of Agriculture v. United States¹⁴⁸ the Departments of Interior and Agriculture, respectively, sought review of adverse administrative orders after participating in the administrative proceedings of independent regulatory agencies. While neither decision directly addressed the justiciability question, both pointedly noted that Congress expressly authorized governmental intervention and participation in the administrative proceedings.¹⁴⁹

¹⁴⁵ 337 U.S. 426 (1949).

¹⁴⁶ 337 U.S. at 430-31.

¹⁴⁷ 387 U.S. 428 (1966).

¹⁴⁸ 347 U.S. 645 (1954).

¹⁴⁹ Udall, 387 U.S. at 433; Secretary of Agriculture, 347 U.S. at 647.

before them is "justiciable," that is, a genuine controversy between the parties to the suit, and that the controversy is appropriate for judicial resolution.¹⁴⁰ There must be a concrete adversity of interest between the opposing parties. The court cannot entertain a collusive action or render an advisory opinion.¹⁴¹

The Supreme Court has developed a fact-specific test to determine justiciability when the United States appears on both sides of a dispute. Courts are directed to look behind the names of the parties to determine the real party in interest. "The mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend upon a surfaces inquiry."¹⁴² "Courts must look behind the names that symbolize the parties to determine whether a justiciable case or controversy is presented."¹⁴³ Therefore, even though a case could be denominated United States v. United States, if "the case involves controversies of a type that are traditionally justiciable," the setting of the dispute assures concrete adverseness, and is not barred by statute, the case may be decided by an article III court.¹⁴⁴

In applying this test the courts have found justiciable intra-branch suits between cabinet agencies and so-called independent regulatory agencies, cabinet agencies and subordinate officials of other departments, and the President and

¹⁴⁰ Baker v. Carr, 369 U.S. 186, 217 (1962).

¹⁴¹ Muskrat v. United States, 219 U.S. 346 (1911).

¹⁴² United States v. Nixon, 418 U.S. 683, 693 (1974).

¹⁴³ United States v. ICC, 337 U.S. 426, 430 (1949).

¹⁴⁴ United States v. Nixon, 418 U.S. at 697; United States v. ICC, 337 U.S. at 430; United States v. Federal Maritime Commission, 694 F.2d 793, 810 (D.C. Cir. 1982).

particularly that involving closely contested questions between the political branches, is often a speculative venture, the foregoing review of relevant case law and administrative history indicates that these waters are not totally uncharted. Those guides allow us to engage in at least an informed analysis of the constitutionality of EPA's administrative order authority. Arguably, the unitary executive theory receives its severest test in this situation since it involves presidential-agency relations at perhaps their most intimate point. Thus, if the Executive cannot sustain its claim of ultimate power here, it is difficult to see where it can be successful.

A. Justiciability of EPA Suits Against Sister Agencies

An initial threshold question raised by the Justice Department is its position with respect to the justiciability of EPA enforcement actions against other agencies, which the Department views as closely linked to EPA's authority to issue administrative orders: "Indeed, the question of the constitutionality of administrative order authority is a variation on the question of the constitutionality of EPA's authority to bring an enforcement action against a federal agency in court. Unilateral administrative orders, like lawsuits, are enforcement tools that interfere with the management of the Executive Branch by the President."¹³⁹ The Department's position, however, would appear to be without substantial relevant case law support.

Where two Executive Branch agencies are on opposing sides of a lawsuit, a court must assure itself that it is not being asked to decide a question that is more properly addressed to the branch of government of which the agencies are a part. Thus in dealing with cases in which the government is apparently "suing itself," the court's have had to satisfy themselves that the controversy

¹³⁹ Habicht Testimony, supra note 8.

notification to the agency involved. The government claimed that the Comptroller's ability to alter the timing of the procurement violated the separation doctrine, relying on Chadha and Bowsher. The appeals court rejected the contention. The court's opinion is important for present purposes for its mode of analysis. Adopting the functionalist approach of Nixon v. GSA and Schor, the court reviewed the entire statutory scheme and the congressional intent behind it and found that the role intended for the Comptroller was one of influence rather than control of the agency procurement process in order to remedy the ills of waste, inefficiency and corruption.¹³⁷ Even conceding that the Comptroller, without substantive authority in the process, would affect the way executive agency decisions would be made, this potential disruption of the proper balance of power was held entirely justified when a balancing of legislative and executive interests is weighed. Determinative in the court's view was the short duration of most delays, the lack of authority of the Comptroller to extend a stay any longer than necessary to decide a bid protest, and the ability of the executive to override a stay. "In light of these factors, we simply do not believe that the executive has shown that CICA creates any significant impediments to the President's execution of the law. In fact, we are persuaded that 'any intrusion' permitted by CICA upon the executive branch can only be termed de minimis," citing Schor.¹³⁸

IV. Assessing the Impact of EPA's Order Authority on the President's Constitutional Role: A Separation of Powers Analysis

While predicting the outcome of constitutional litigation, and

¹³⁷ Compare City of Alexandria v. United States, 737 F. 2d 1022 (Fed. Cir. 1984) (successful congressional pressure to alter procurement process not tantamount to legislative veto).

¹³⁸ 809 F.2d at 997.

privilege. As these acts of the Archivist have been held to be properly within has discretion, the DOJ/OLC opinion cannot be controlling."¹³³ The court concluded that the memorandum was "not compelled by the Constitution" and that it "thwarted the legislative intent of the Act and the regulations promulgated pursuant to the Act."¹³⁴ The court ordered the Archivist not comply with the Justice Department directive.

Finally, the Third Circuit's decision in Ameron, Inc. v. U.S. Corps of Army Engineers,¹³⁵ upholding the constitutionality of the Comptroller General's role in administering the provisions of the Competition in Contracting Act (CICA)¹³⁶ is noteworthy. In that case the Justice Department ordered the agencies of government to refuse to comply with those provisions of the Act which allowed disappointed bidders for government contracts to appeal to the Comptroller General and directed the affected agencies to stay the procurement process pending receipt of the Comptroller's recommendation on the merits of the appeal. The statute provided that an agency could go ahead with the procurement during the period of the Comptroller's consideration if it filed a claim of necessity; and the Comptroller could either lengthen or shorten the statutorily prescribed period of his consideration with

¹³³ 655 F. Supp. at 322

¹³⁴ Id. Congress' ability to insulate subordinate officials' discretionary actions from presidential interference was recognized as early as 1808, see Gilchrist v. Collector of Customs, 10. F. Cas. 355, 356, 363 (C.C.D.S.C. 1808) (No. 5, 420). See also United States ex rel. Accardi v. Shaughnessy, 374 U.S. 260, 267-68 (1954) ("[i]f the word discretion means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience.").

¹³⁵ 809 F.2d 979 (3d Cir 1986).

¹³⁶ 31 U.S.C. 3551-3556 (Suppl III 1985).

September.¹³⁰

The ability of the Congress to insulate the decisions of subordinate executive officials subject to at will removal by the President from presidential interference was the focus of Public Citizen v. Burke.¹³¹ That case involved the Presidential Recordings and Materials Prevention Act,¹³² and regulations promulgated pursuant to its provisions, which govern public access to President Nixon's papers. Regulations issued by the Archivist, tracking the statutory provisions, provided that any claims of executive privilege by the former president with respect to any of the materials must be made to the Archivist, whose decision could be appealed to the courts. The Justice Department issued a memorandum to the Archivist opining that he is required to honor any assertions of executive privilege made by former President Nixon even if the incumbent President either "(a) would not have personally invoked the privilege under the circumstances or (b) does not believe the documents fall within the scope of the privilege." The Justice Department's theory was that the presumptive nature of the privilege was inconsistent with the Archivist's administrative authority to determine that no privilege exists. The court disagreed. It found the Justice Department opinion merely advisory since "under the regulatory scheme, [the Archivist] has the discretion to consider and either accept or reject former President Nixon's claims of executive

¹³⁰ Some indication that the Supreme Court may rule that the Act is constitutional is its decision in Young v. U.S. ex rel. Vuitton et Fils, 107 S. Ct. 2124 (1987), holding, inter alia, that district courts have authority to appoint private attorneys to prosecute criminal contempt of court actions. Interestingly, the Justice Department's brief in the case cited the Independent Counsel statute approvingly as an example of a proper exercise of congressional authority in an analogous situation.

¹³¹ 655 F. Supp. 318 (D.D.C. 1987).

¹³² Pub. L. 93-526, 44 U.S.C. 2111 (1982).

requires a degree of independence for the proper execution of his tasks, citing, among other authorities, Humphrey's Executor. Finally, the court rejected the general separation of powers contention, relying heavily on the Supreme Court's acceptance of the Watergate Special Prosecutor in U.S. v. Nixon¹²⁸ and "common sense and the inherent necessities of governmental coordination." The court concluded:

The Independent Counsel provisions of the Ethics in Government Act represent Congress's measured response to the recurrent question of how to enforce the laws of the United States when they are violated by high government officials. Congress chose to use its authority, well settled under the Constitution and Supreme Court precedent, to create a mechanism to guarantee the integrity and independence of criminal investigations in matters where the Department of Justice has real or apparent conflicts of interest. By carefully assigning the functions necessary for the accomplishment of its purpose, it has constitutionally addressed an important national need. For the United States, the Act represents a landmark effort to instill public confidence in the fair and ethical behavior of public officials.

The court's analysis reflects the pragmatic, functional separation review accorded in the agency insulation cases noted above.¹²⁹ It is likely that this case, or one of the investigations or prosecutions being conducted by Independent Counsels, will reach the Supreme Court for resolution quickly. This case was set for expedited hearing before an appeals court panel in mid-

¹²⁸ 418 U.S. 683 (1973).

¹²⁹ In a similar ruling in In re Theodore Olson, 818 F.2d 34 (D.C. Cir, Ind. Counsel Div.), the Special Division upheld the constitutionality of the Ethics Act as consistent with the separation doctrine and Congress' powers under the Necessary and Proper Clause. It rejected any substantive thrust to the "take care" clause, holding that it does not require the President or his delegate to execute the laws and thus Congress may empower some other officer to execute the laws as long as there is removal for impropriety by either the President or his delegate.

President's unrestricted power to remove the most important of his subordinates in their most important duties; and (3) the insulation of Independent Counsel from the presidential control intrudes upon the Executive's exclusive authority over the enforcement of the law and thus violates the principles of separation of powers.

Initial attempts to challenge the statute by Michael Deaver and Oliver North were dismissed on procedural grounds, *i.e.*, the courts found that the constitutional challenges were not timely and that the "extraordinary" request for a court to halt an ongoing criminal investigation before anyone has been indicted would not be granted. But both courts recognized that one consideration in dismissing the challenges at that time and not granting the injunctive relief was the failure of the plaintiff's to show "a likelihood of ultimate success in the merits" of the claims.¹²⁵ However, on July 20, 1987, in a case deemed ripe for review, a district court upheld the constitutionality of the statute in all respects.¹²⁶ The appointment mechanism was found properly authorized under the Appointments Clause¹²⁷ which allows appointments of inferior officers by the courts. Since the Independent Counsel are appointed for a single task for a limited period it held they are clearly inferior officers encompassed by the clause. In upholding the limited removability of the prosecutors, the court recognized the line of Supreme Court precedent approving insulation of officers from the threat of at will presidential termination where Congress has determined that the officer

¹²⁵ Deaver v. Seymour, 656 F. Supp. 900 (D.D.C. 1987), cert. denied, __ USLW __ (10/5/87); North v. Walsh, 656 F. Supp. 414 (D.D.C. 1987).

¹²⁶ In re Sealed Case, Misc. Nos. 87-0197, - 0205, -0215 (D.D.C., per Robinson, J.).

¹²⁷ U.S. Const., article II, section 2, cl. 2.

An attack on the similar authority of the Securities Exchange Commission was rejected by a district court on the ground that the agencies authority did not "interfere[] with the power of the President to enforce the laws."¹²⁰ No court that has reached the merits of the issue has seriously entertained the contention.¹²¹ However, litigation efforts continue unabated,¹²² and attempts to secure Supreme Court review are likely.

The Iran/Contra controversy has brought to the fore the issue of Congress' power to vest executive officers who are not appointed or removable by the President with important discretionary duties. Under the Ethics in Government Act of 1978,¹²³ Independent Counsel may be appointed upon the request of the Attorney General by a special three-judge division of the U.S. Court of Appeals for the District of Columbia to investigate and prosecute certain specified high ranking government officials. Independent Counsel may be removed by the Attorney General but only for "good cause". Targets of appointed Independent Counsel, and now the Justice Department,¹²⁴ have challenged the constitutionality of the statute on the grounds that (1) the appointment mechanism is defective in that such executive officers must be appointed by the President or at least by one of his appointees; (2) the provision for removal by the Attorney General only for good cause infringes on the

¹²⁰ SEC v. Warner, 652 F. Supp. 647, 649 (S.D. Fla. 1987).

¹²¹ See cases cited in note 16 supra.

¹²² See, e.g., "SEC Civil Authority Challenged," Nat'l L.J., June 15, 1987 at 3 (describing appeal pending before Tenth Circuit in SEC v. Blinder, Robinson & Co., Inc., No. 86-2319 raising the issue).

¹²³ Pub. L. 95-521, title VI, as amended by Pub. L. 97-409, 28 U.S.C. secs. 591-598, and 49.

¹²⁴ See note 7, supra.

and advocacy in legal journals,¹¹⁶ thus far has received summary treatment by the courts and strong rebuttals in the legal literature.¹¹⁷ In FTC v. American Cellular, Inc.,¹¹⁸ the Ninth Circuit Court of Appeals, relying heavily on the Supreme Court's implicit reaffirmation of Humphrey's Executor in Bowsher v. Synar, dismissed a challenge to the FTC's prosecutorial authority.

We find no case purporting to limit or overrule Humphrey's Executor. On the contrary, we note the continuing vitality of that authority as recently shown in Bowsher v. Synar, -- U.S. --, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986). Bowsher held invalid portions of the Balanced Budget and Emergency Deficit Control Act of 1985 (the Gramm-Rudman-Hollings Act) which vested the Comptroller General with the executive function of initiating cuts in the federal budget. Although the Comptroller General is appointed by the President with the advice and consent of the Senate, pursuant to the Appointment Clause of the Constitution, his removal is not by the President, but by a joint resolution of Congress or impeachment. Id. at 3185. Citing Humphrey's Executor, the Bowsher court reasoned that the Comptroller General's powers under the Gramm-Rudman-Hollings Act violated the doctrine of separation of powers, because Congress could not reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. Id. at 3188. We believe implicit in this holding is the proposition that "officers of the United States," including FTC Commissioners, who are appointed by the President with the advice and consent of the Senate, and are subject to Congressional removal only by impeachment, may engage in the enforcement of federal law.¹¹⁹

¹¹⁶ See, e.g., Miller, Independent Agencies, 1986 S. Ct. Rev. 41 (1986); Note, Incorporation of Independent Agencies into the Executive Branch, 94 Yale L.J. 1766 (1965); Scalia, Historical Anomalies in Administrative Law, 1985 Yearbook, Supreme Court Historical Society 106-110; Olson, Founders Wouldn't Endorse Plural Presidency, Legal Times, April 27, 1987 at 11.

¹¹⁷ Froomkin, supra note 48; Steele and Bowman, The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission, 4 Yale J. on Reg. 363 (1987); Hardie, The Independent Agency after Bowsher v. Synar -- Alive and Kicking, 40 Vand. L. Rev. 903 (1987); Verkuil, The Status of Independent Agencies After Bowsher v. Synar, 1986 Duke L.J. 779; Sommer, Independent Agencies as Article One Tribunals: Foundations of a Theory of Agency Independence, 38 Ad. L. Rev. 83 (1986); Tiefer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 B.U.L. Rev. 59 (1983).

¹¹⁸ 810 F.2d 1511 (9th Cir. 1987).

¹¹⁹ 810 F.2d at 1513-14.

aggrandizement is seen as essentially irrelevant. Congress' plenary authority to create agencies and vest them with the necessary executive, legislative and judicial tools to carry out their assigned tasks unquestionably "subtracts" from each actors' powers. That is accepted as a given fact of life in the modern administrative state. The key question in disputes over agency arrangements is whether so much has been taken from the functioning of one constitutional actor as to impair its core function. Thus functional analysis comes into play. The Court sees its task in these cases as assuring itself that the essential lines of authority from the constitutional actors to the agencies remain intact. If Congress can repeal or revise the statute, appropriate or withhold needed resources, and engage in effective oversight; if the President can appoint, consult and influence agency officials; and the courts can engage in meaningful review, the Court will be satisfied that there has been no constitutional disruption. The review of impact on the respective relationships is thus not concerned with aggrandizement but with maintaining the relative functional balance between the constitutional actors and the agencies. In this light, then, recent judicial rulings respecting congressional attempts to insulate a variety of decisions and decisionmakers from presidential control in varying degrees may be seen as consistent applications of this understanding of the theory and application of the separation doctrine.

Direct attacks on the continued legitimacy of the independent regulatory agency, encouraged by statements of the Attorney General,¹¹⁴ court dicta,¹¹⁵

¹¹⁴ See, supra, note 4.

¹¹⁵ See discussion of Synar v. United States, supra, notes 88-94 and accompanying text.

challenged arrangement will have on the balance of power between the named constitutional actors and the performance of the core functions of each. In other words, a far broader, more lenient review seems to be accorded in agency specific situations.

One possible explanation for this dichotomous standard goes far in rationalizing past decisions and lending confidence in predicting the outcome of litigation involving a variety of congressional controls of agency decisionmaking. Where the constitutional actors are in direct opposition it would appear that the Court views the situation as a zero sum game: whether it chooses to validate or deny the arrangement under scrutiny, one (or two) of the actors has a degree of its power subtracted, the other added to. Where the Court feels impelled to make the decision,¹¹³ the use of the formalist approach appears essentially tactical. A formal approach, while it may limit flexibility in the future in the area concerned, has the advantage of simplifying planning, e.g., Congress may not appoint or discharge officers of the United States (Buckley, Bowsher), or take actions which affect the rights and duties of persons outside the legislative branch without complying with the constitutionally mandated legislative process (Chadha). Moreover, the rationale propounded by the Court in such cases is cast to march inexorably from the words or spirit of the Constitution, thus diminishing the sense that it is the judges themselves, rather than the law, that is responsible for the decision. Such an approach thereby encourages acceptance and discourages retaliation.

But where the question of agency functioning is involved, the issue of

¹¹³ C.f., Goldwater v. Carter, 444 U.S. 996 (1979), where a split court, utilizing a number of canons of judicial restraint, declined to decide whether the President could act alone to terminate a treaty.

Bowsher may be read to stand for the unexceptionable proposition that Congress may not fire officers of the United States and nothing more. If so, then no threat to the constitutionality of independent agency remains.

A third, and perhaps more important, lesson to be derived from Schor is that there is a rational basis for reconciling the Court's seemingly contradictory lines of separation of powers decisions. Those rulings juxtapose the constitutional structuralism of Myers, Buckley, Northern Pipeline,¹¹¹ Chadha, and Bowsher with the functional analysis of Humphrey's Executor, Nixon v. GSA, Weiner, Thomas v. Union Carbide Agricultural Products Co.,¹¹² and Schor. Justice O'Connor's opinion clearly suggests the distinction that the former line of cases, each involving direct confrontations between the key constitutional actors -- the President, Congress, or the Judiciary -- raised questions of congressional aggrandizement of power at the expense of a coordinate branch, while the latter line only indirectly involve the key actors through the administrative entities through which the will of the political actors is exercised. In both lines of cases the separation of powers analysis is generally couched in terms of the impact the challenged arrangement has on the balance of power among the three named heads of our government. But when the President, Congress or the Judiciary are arrayed against one another, Court analysis becomes rigid, tending to center on one dominant feature of the relationship. When an agency is involved, however, the analysis is more far-reaching, delving into the whole range of relationships between and among the agency, the President, Congress, and the Judiciary, and the impact the

¹¹¹ Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 568 (1985). See note 95, supra.

¹¹² 473 U.S. 568 (1985).

judiciary."¹⁰⁷ In this case the Court held that "any intrusion...can only be deemed de minimis."¹⁰⁸ The congressional addition to the FTC's adjudicatory powers made a departure from "the traditional agency model" only with respect to its jurisdiction over common law counterclaims, thus giving it "little practical reason to find that this single deviation from the agency model is fatal to the congressional scheme."¹⁰⁹ Finally, the Court took note of its decision that day in Bowsher, distinguishing it as follows:

...Unlike Bowsher, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this case is whether Congress impermissibly undermined, without appreciable expansion of its own powers, the role of the Judicial Branch. In any case, we have, consistent with Bowsher, looked to a number of factors in evaluating the extent to which the congressional scheme endangers the separation of powers principles under the circumstances presented, but have found no genuine threat to be present in this case.¹¹⁰

Schor, then, appears to contain a number of possible lessons. First, the gentle, even flexible treatment of the "traditional [independent] agency model", and the deference to congressional necessities in establishing workable administrative schemes to carry out its article I powers, does not bespeak an imminent High Court threat to the viability of independent agencies. Second, the utilization of a "de minimis" standard in a separation of powers analysis on the same day that the Court had issued an opinion that is highly formalistic in tone and structure, may indicate that we are to look at what Bowsher did rather than what it said to understand its real import. That is,

¹⁰⁷ Id.

¹⁰⁸ Id. at 3260.

¹⁰⁹ Id. at 3258.

¹¹⁰ Id. at 3261.

here."¹⁰⁴ The Court then went on to quote approvingly from Humphrey's Executor and cited the later removal case of Weiner v. United States. It would seem, then, that if the Court in fact entertained serious doubts about Congress' ability to insulate members of independent agencies from at-will removal, basing its decision on Humphrey's Executor's separation rationale did not signal it.

The Court may have given further strong support for the constitutionality of agency independence in Commodity Futures Trading Commission v. Schor,¹⁰⁵ decided the same day as Bowsher v. Synar. In Schor the question before the Court was whether the grant of statutory authority to the Commission -- an independent regulatory agency -- to entertain state law counterclaims in separation proceedings violated article III of the Constitution. The Court held it did not, in language and reasoning that appears to lend strong implicit support to the independent agency form. It rejected the adoption of "formalistic and unbending rules" in determining whether the congressional assignment of article III adjudicatory business to a non-article III tribunal raised separation of powers problems. "Although such rules might lend a degree of coherence to this area of law, they also might unduly constrict Congress' ability to take needed and innovative action pursuant to its article I powers."¹⁰⁶ The Court noted that it weighed a variety of factors in coming to its conclusion, "with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal

¹⁰⁴ Bowsher v. Synar, supra, 106 S. Ct. 3188 note 4.

¹⁰⁵ 106 S. Ct. 3245 (1986).

¹⁰⁶ 106 S. Ct. at 3258.

It would appear, though, that the Synar dictum represents, at least for the moment, the high water mark of efforts to nullify Humphrey's Executor and undermine the legitimacy of independent agencies. Since Synar, the Supreme Court has lent its weight to the continued legitimacy of independent regulatory commissions in two rulings, and a series of lower court decisions have uniformly dismissed direct attacks on the lawfulness of these entities. The Supreme Court and a lower court have also provided authority for wider congressional use of for-cause removal requirements to insulate executive officers from presidential interference; and in one case a court condemned the attempted interference by the Justice Department of the exercise of discretionary authority vested by law in a subordinate agency official removable at the pleasure of the President. A brief review of these most recent judicial rulings indicates a uniform rejection of the asserted basis for a unitary executive.

The potential breadth of the Solicitor General's arguments in his brief in Bowsher v. Synar, and particularly their negative effect on independent officers and agencies, caused such concern (before they were effectively disavowed) that, as the Supreme Court's transcript of the oral argument reflects, Justice O'Connor exclaimed to the Solicitor General, "I'll confess, you scared me."¹⁰³ The Court's majority opinion quickly reassured that the issue at question in the case did not cast doubt on the status of the independent agencies: "Appellants therefore are wide of the mark in arguing that an affirmance in this case requires casting doubt on the status of 'independent' agencies because no issues involving such agencies are presented

¹⁰³ Transcript of Argument, Bowsher v. Synar, S. Ct., April 23, 1986, at 51.

Supreme Court's 1983 decision in INS v. Chadha.⁹⁹ The court commented that "Assuredly some of the language of the majority opinion in Chadha does not lie comfortably beside the central revelation of Humphrey's Executor that an officer such as a Federal Trade Commissioner 'occupies no place in the executive department', and that an agency which exercises only 'quasi-legislative or quasi-judicial powers' is 'an agency of the legislative or judicial departments of the government.'"¹⁰⁰

The Synar court, however, conceded that "The Supreme Court's signals are not sufficiently clear...to justify our disregarding the rationale of Humphrey's Executor,"¹⁰¹ and proceeded with an analysis of the duties conferred on the Comptroller General which led it to its ultimately narrow conclusion that executive powers could not be exercised by officers removable by Congress. But the questions raised by the court's obiter dicta were carried forward to the Supreme Court in the Justice Department's brief in support of the lower court's ruling.¹⁰²

⁹⁹ Id. The opinion approvingly cites the Strauss article, supra note 25. However, the substance and style of the opinion's argument tracks closely the position articulated by Justice (then Judge) Antonin Scalia in an article published in 1985. See, Scalia, Historical Anomalies in Administrative Law, 1985 Yearbook, Supreme Court Historical Society, 106-110. Scalia was a member of the three-judge Synar panel.

¹⁰⁰ Id. at 1399. The court here referenced the explanation in Chadha that the fact that Executive Branch officers perform what might be characterized as "quasi-legislative" or "quasi-judicial" functions does not mean that they are exercising something other than executive power within the meaning of article II. See Chadha, 462 U.S. at 953 n. 16.

¹⁰¹ Id.

¹⁰² See Brief for the United States, Bowsher v. Synar, Nos. 85-1377, 85-1378 and 85-1379 (April 1986) at 44-46 (arguing that apart from the defect of congressional removal, the Comptroller General's "duties...are so central to the administration of the Executive Branch and the responsibilities of the President that they may be performed only by the President or by an Officer of the United States serving at the pleasure of the President."

Rudman-Hollings Act. In an unsigned per curiam opinion the court held that by vesting responsibility for executing the Act in the hands of the Comptroller General -- an officer who is subject to removal only by Congress itself -- Congress had effectively retained control over the execution of the law and thereby unconstitutionally intruded into the executive function. This narrow holding, however, was prefaced by a lengthy obiter dicta attack on Humphrey's Executor and the continued viability of independent agencies. The court characterized Humphrey's Executor as an aberration of New Deal jurisprudence and administrative theory that "is stamped with some of the political science preconceptions characteristic of its era and not of the present day," and questioned the efficacy of the concept of independent agencies:

It is not as obvious today as it seemed in the 1930's that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the Committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that is even theoretically desirable to insulate them from the democratic process. Moreover, "quasi-legislative" and "quasi-judicial" functions can no longer be regarded as extraordinary or even unusual activities of executive agencies.⁹⁷

The court then questioned whether Humphrey's Executor was ever reconcilable with the separation doctrine. "It has in any event always been difficult to reconcile Humphrey's Executor's 'headless fourth branch' with a constitutional text and tradition establishing three branches of government".⁹⁸ It then noted with approval that "[s]ome knowledgeable observers...think that abandonment of the Humphrey's Executor analysis has been presaged by the

⁹⁷ 626 F. 2d at 1398.

⁹⁸ Id.

meant to be "hermetically" sealed from one another, it insisted that "the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution delegated to it."⁹⁴ Thus express constitutional provisions providing for the involvement by one branch in the affairs of another are meant to be exclusive and bar such involvement where it is not affirmatively authorized.⁹⁵

For some, including the Justice Department, the meaning of the legislative veto case was apparent: the strict view of the separation of powers enunciated by Chadha was incompatible with the rationale and result of Humphrey's Executor and thus signalled a return to the expansive view of Executive power contained in Myers. As a consequence, the focus of constitutional removal power with respect to all executive officials must return to the President and the legitimacy of agency independence withdrawn. This view was pressed in a variety of litigation contexts and, for the first time, received a hospitable judicial reception in Synar v. United States.⁹⁶ There a three-judge district court dealt with a challenge to the constitutionality of the triggering mechanism of the Balanced Budget and Emergency Deficit Control Act of 1985, more popularly known as the Gramm-

⁹⁴ Id.

⁹⁵ Id. at 955-56. See also, Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982), where the Court also took a compartmentalized view of the separation doctrine. There the majority rejected as unconstitutional the creation by Congress of special bankruptcy judges that are not part of the judicial branch as created by article III. These judges had powers similar to those of judges in state courts generally, and their decisions were reviewable in federal courts. However, they did not have article III tenure and salary protection. The Court's opinion centered on an attempt to classify the kinds of decisions that were inherently judicial and, with a few exceptions provided for in the Constitution, agreed that adjudicatory decisions could only be rendered by traditional article III courts.

⁹⁶ 626 F. Supp. 1374 (D.D.C. 1986).

The second major decision seen as buttressing a hierarchical view of the executive is INS v. Chadha,⁹¹ where the Supreme Court rejected the legislative veto as a violation of the constitutionally prescribed process for legislative action. It reasoned that since the exercise of the legislative veto is essentially legislative in purpose, it is subject to the article I requirements of bicameral passage and presentment to the President. The majority argued that the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."⁹² The Court, taking a formalistic view of the separation doctrine, emphasized the separateness of the legislative, executive, and judicial powers by insisting that each branch of government "confine itself to its assigned responsibility."⁹³ While conceding that the branches were not

policymaking...the use of E.O. 12,291 to create delays and to impose substantive changes raises some serious constitutional concerns." The court concluded that OMB's use of its review powers to "withhold approval until the acceptance of certain content in the promulgation of any new EPA regulation, thereby encroaching upon the independence and expertise of EPA" was "incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers." Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 570 (D.D.C. 1986). But while finding that OMB caused the delay, the court did not reach the constitutional issue. It did declare, however, "that further review by OMB which creates any delay in meeting the June 30, 1986 deadline is unreasonable and unacceptable." Id. at 571. In a second case, Public Citizen Health Research Group v. Tyson, 796 F. 2d 1499 (D.C. Cir. 1986), the question of the constitutionality of the E.O. 12,291 review process was directly raised by the petitioners and congressional amici. But the court's finding that the agency had "not accumulated substantial evidence to support its decision" prevented it from reaching the issue which it characterized as "present[ing] difficult constitutional questions concerning the executive's proper role in administrative proceedings and the appropriate scope of delegated power from Congress to certain executive agencies." Id. at 1507.

⁹¹ 462 U.S. 919 (1983).

⁹² 462 U.S. at 951.

⁹³ Id. at 951.

executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as the White House.⁸⁷

The court's ruling has been a principal basis of support for the centralized rulemaking review system established by E.O.'s 12,291 and 12,498.⁸⁸

Critics of the Administration's regulatory review process claim that it has the potential for displacing legal authority that Congress has expressly delegated to executive agencies, imposing criteria for the formulation of regulations that are contrary to those intended by Congress, and unduly delaying the promulgation of proposed agency rules in order to induce substantive changes.⁸⁹ There have been few court decisions on these issues thus far. None have reached the question of the constitutionality of the President's claim of power to interdict the rulemaking process.⁹⁰

⁸⁷ 657 F. 2d at 405-06.

⁸⁸ See, e.g., Strauss and Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 *Ad. L. Rev.* 181 (1986); DeMuth and Ginsburg, *White House Review of Agency Rulemaking*, 99 *Harv. L. Rev.* 1075 (1986).

⁸⁹ Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under E.O. 12,291*, 80 *Mich. L. Rev.* 193 (1981); Olson, *The Quiet Shift of Power: OMB Supervision of Environmental Protection Agency Rulemaking Under E.O. 12,291*, 4 *Va. J. Nat. Res.* 1 (1984); Rosenfeld, *Presidential Policy Management of Agency Rules Under Reagan Order 12,498*, 38 *Ad. L. Rev.* 63 (1986); McGarrity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 *Am. U. L. Rev.* 443, 454-463 (1987); Houck, *President X and the New (Approved) Decisionmaking*, 36 *Am. U. L. Rev.* 535 (1987).

⁹⁰ In one case, a district court ruling on a challenge to OMB review of EPA regulations noted that while a "certain degree of deference must be given to the authority of the President to control and supervise executive

States, 295 U.S. 602 (1935)....⁸⁴

III. Recent Litigation Trends

The Reagan Administration and other supporters of the concept of a unitary executive⁸⁵ have found support for their initiatives toward centralization in several judicial rulings since 1981. The first, Sierra Club v. Costle,⁸⁶ adopted an expansive view of the President's article II authority in the context of a contested informal rulemaking proceeding. There the validity of the rulemaking was challenged on the ground, inter alia, of improper presidential intercession after the close of the public comment period. In rejecting the contention, the Court of Appeals for the District of Columbia Circuit emphatically enunciated the broadest view of executive power:

The court recognizes the basic need of the President and his White House staff to monitor the consistency to executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared -- it rests exclusively with the President. The idea of a "plural executive," or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead, the Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source. To ensure the President's control and supervision over the Executive Branch, the Constitution -- and its judicial gloss -- vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy. In the particular case of EPA, Presidential authority is clear since it has never been considered an "independent agency," but always part of the Executive Branch.

The authority of the President to control and supervise

⁸⁴ 424 U.S. at 140-141.

⁸⁵ See, e.g., Strauss, supra note 30; Miller, Independent Agencies, 1986 Sup. Ct. Rev. 41 (Miller).

⁸⁶ 657 F. 2d 298 (D.C. Cir. 1981).

Humphrey's Executor, in its explicit language as well as its implications, precludes such a claim.⁸²

More recently, in 1976, the Court revisited the issue in Buckley v. Valeo,⁸³ and reaffirmed the ability of Congress to invest independent agencies with authority to perform their traditional functions and to shield their members from peremptory dismissal.

All aspects of the Act are brought within the Commission's broad administrative powers: rulemaking, advisory opinion, and determinations of eligibility for funds and even for federal elective office itself. These functions...are of kinds usually performed by independent regulatory agencies or by some department....[E]ach of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law....[T]he president may not insist that such functions be delegated to an appointee of his removable at will, Humphrey's Executor v. United

⁸² Id. at 355-56. The litigation involving the removability of members of independent agencies focused on presidential appointees confirmed by senatorial consent. But the Court has long recognized Congress' authority to limit the Executive's power to remove inferior officers where it chooses to vest appointments in the President alone, department heads or the courts.

We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.

United States v. Perkins, 116 U.S. 483, 485 (1886) (quoting Court of Claims). In Myers v. United States, 272 U.S. 52 (1926), the Court reaffirmed the applicability of its holding in Perkins to inferior officers not subject to Senate confirmation: "The condition upon which the power of Congress to provide for the removal of inferior officers rests is that it shall vest the appointment in someone other than the President with the consent of the Senate. Congress may not obtain the power and provide for the removal of such officer except on that condition." 272 U.S. at 162. See also Nader v. Bork, 366 F. Supp. 104, 108 (D.D.C. 1973), holding that the Watergate Special Prosecutor, having been appointed by the Attorney General, did not "serve[] subject to...Presidential control....Congress therefore had the power directly to limit the circumstances under which Mr. Cox could be discharged," citing Perkins and Myers.

⁸³ 424 U.S. 1 (1976).

reiterating the distinctions it made there. It found that Congress intended the War Claims Commission to be protected from presidential review because it was an adjudicating body charged with deciding claims on the merits, entirely free of influence from any other branch of government.

And what is the essence of the decision in *Humphrey's* case? It drew a sharp line of cleavage between officials who were part of the Executive establishment and thus removable by virtue of the President's constitutional powers and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of government'...as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who were part of the Executive establishment and those whose tasks require absolute freedom from Executive interference.⁸¹

Further, the Wiener Court held that the President lacked authority to remove a member of the Commission even though the enabling legislation contained no removal provision. Because the official performed adjudicative tasks more closely allied to the judicial than the executive power, the Court reasoned that Congress intended to deny the President the power of removal. Justice Frankfurter's opinion for a unanimous Court concluded as follows:

...If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, a fortiori must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing?

For such is this case. We have not a removal for cause involving the rectitude of a member of an adjudicatory body....Judging the matter in all the nakedness in which it is presented, namely, the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a commission, we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it. The philosophy of

⁸¹ 357 U.S. at 353.

United States⁷⁶ that he could remove at will officials performing executive functions as well as those who have "duties of a quasi-judicial character", removed a member of the Federal Trade Commission and challenged the constitutionality of the "for cause" provision of the statute protecting the commissioners from at-will removal. A unanimous Court overruled the language in Myers allowing officers with quasi-judicial and quasi-legislative functions to be removed at will.

The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.⁷⁷

In rejecting the challenge to the statute, the Court stressed the legislative determination that the agency in question must be "non-partisan" and from the very nature of its duties, act with entire "impartiality".⁷⁸ "[I]n the contemplation of the statute," the agency's duties could only be effectively performed "without executive leave" and "free from executive control."⁷⁹ Where an agency or officer performed valuable functions which partook of the attributes of more than one branch and could not adequately be performed absent independence, insulation from political pressures was deemed acceptable and appropriate.

The Court reaffirmed Humphrey's Executor in Wiener v. United States,⁸⁰

⁷⁶ 272 U.S. 52 (1926).

⁷⁷ 295 U.S. at 629.

⁷⁸ Id. at 624, 625.

⁷⁹ Id. at 628.

⁸⁰ 357 U.S. 349 (1958).

Interstate Commerce Commission,⁷³ which became the prototype for the establishment of the Federal Reserve Board (1913), the Federal Trade Commission (1914), the United States Shipping Board (1916), the Federal Radio Commission (1927), and the Federal Power Commission (1930). Interestingly, the "independence" of these agencies did not become a matter of constitutional concern until the 1930's when the New Deal greatly expanded the number of such commissions and agencies, a matter of some significance in light of the narrow constitutional view of Congress' commerce powers that the so-called Lochner-era Supreme Court took during the period between 1895-1935. Indeed, while the Supreme Court was initially inhospitable to both the ICC and FTC in their formative years, drastically limiting their powers through crabbed statutory construction, ultimately the Court accommodated itself to a more expansive congressional intention.⁷⁴

The first constitutional challenge to the independence of such agencies came in Humphrey's Executor v. Federal Trade Commission.⁷⁵ There, the President, relying on the Court's broad ruling nine years before in Myers v.

⁷³ In fact, the ICC actually began its existence as a bureau within the Department of Interior and first became "independent" in 1889. See, R. Cushman, The Independent Regulatory Commissions 60-62 (1941). A substantial argument may be made that the congressional practice of shielding certain functions from presidential control may be dated far earlier than the creation of the ICC. See, for example, the creation of Second Bank of the United States, an entity that may be seen as "functionally identical to the modern practice of vesting such powers in independent agencies." Froomkin, supra note 25, at 807. See also Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (Second Bank of U.S. constitutional); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1817) (same).

⁷⁴ See, generally, Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189 (1986).

⁷⁵ 295 U.S. 602 (1935).

had found owing. The Supreme Court, viewing the Postmaster General's duty to pay the full amount as ministerial rather than discretionary, held that the President had no authority to direct the Postmaster General's performance of his statutory authority.

Despite Kendall's narrow holding, key passages of the opinion reflect the nineteenth-century notion that the President may not in all instances direct the manner in which executive officers carry out their discretionary functions. Where Congress has imposed upon an executive officer a valid duty, the Kendall Court declared, "the duty and responsibility grow out of and are subject to the control of the law, and not the direction of the President."⁷⁰ Underlying the Court's rejection of the contention that the "take care" clause of the Constitution carries with it the power to control executive officials was a strong desire to avoid "clothing the President with the power entirely to control the legislation of Congress."⁷¹ Accordingly, early Presidents and their Attorneys General respected the final and conclusive nature of the independent decisions of the Comptroller.⁷²

In 1887 Congress established the first independent regulatory agency, the

⁷⁰ 37 U.S. (12 Pet.) at 610.

⁷¹ Id. at 613.

⁷² Among the Presidents who expressly foreswore control were President Polk and President Jackson, who wrote on an 1833 report, "[t]he decision of the Second Comptroller is final, over whose decisions the President has no power....", quoted in McGuire, Legislative or Executive Control over Accounting for Federal Funds, 20 Ill. L. Rev. 455, 464 (1926); H.C. Mansfield, The Comptroller General 99 n. 18 (1939) (adding President Tyler to Jackson and Polk). Attorneys General agreed. 1 Op. Att'y Gen. 624 (1823); id. 678 (1824); id. 705 (1825); 2 id. 480 (1831); id. 507 (1832); id. 544 (1832); 4 id. 515 (1846); 5 id. 630 (1852) (surveying prior opinions). 11 id. 14 (1864); 13 id. 28 (1869); 15 id. 94 (1876). But see, contra, 7 id. 453 (1855), an opinion called "extreme" by an early commentator. F. Goodnow, The Principles of Administrative Law of the United States, 81 (1905).

There can be little doubt that Chief Justice Marshall pronounced repeatedly, and with deliberation and care to emphasize its importance in the case, the principle that a quasi-judicial officer with a fixed term could hold office and "not [be] removable at the will of the executive."⁶⁶ After Marbury, the Congress concluded that it could determine whether to confer protections against presidential removal upon officers with mixtures of judicial and quasi-legislative functions, such as the judges of legislative courts. In McAllister v. United States⁶⁷ the Court reviewed Marbury v. Madison and supported that view.

Thereafter, lower courts⁶⁸ and the Supreme Court in Kendall v. United States ex rel. Stokes,⁶⁹ confirmed that Congress could prescribe duties for officers to perform independent of the President's will. Kendall is instructive. There a statute directed the Postmaster General to pay a group of individuals who had delivered the mail for a number of years an amount determined by the Solicitor. The Postmaster General, apparently at the express direction of the President, refused to pay the full amount that the solicitor

⁶⁶ Marbury v. Madison, 5 U.S. (1 Cranch) at 162; accord, id. at 167 ("not removable at the will of the President").

⁶⁷ 141 U.S. 174 (1891).

⁶⁸ Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 356, 363 (C.C.D.S.C. 1808) (No. 5,420); United States v. Smith and Ogden, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,341a). See II G.L. Haskins & H.A. Johnson, History of the Supreme Court of the United States 298-304 (1981) (Gilchrist case); Grundstein, Presidential Power, Administration and Administrative Law, 18 Geo. Wash. L. Rev. 285, 309-21 (1950); Reinstein, An Early View of Executive Powers and Privileges: Trial of Smith and Ogden, 2 Hast. Const. L.Q. 309(1975)("faithful execution" requirements, and account of Smith and Ogden case). See also Butterworth v. United States ex rel. Hol, 112 U.S. 50, 67 (1884) (Independence of quasi-judicial functions).

⁶⁹ 38 U.S. (12 Pet.) 524 (1838).

partakes strongly of the judicial character....⁶¹

Madison concluded from these functions that "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government."⁶²

The Supreme Court confirmed distinctions like Madison's as a matter of fundamental constitutional law in Marbury v. Madison.⁶³ That case concerned, of course, whether William Marbury could mandamus the Secretary of State to provide his commission as justice of the peace for the District of Columbia. In that historic opinion, Chief Justice Marshall noted, and agreed with, the First Congress's view regarding the Secretary of Foreign Affairs as a tool of the President's will.⁶⁴ Chief Justice Marshall recognized, in contrast, an entirely different status for Marbury: an officer who, although not an Article III judge (having only a five-year term), nevertheless had been appointed to an office with a fixed term and quasi-judicial functions. Marbury v. Madison elaborates regarding the non-removability of such an officer:

Mr. Marbury...was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.⁶⁵

⁶¹ 1 Annals of Cong. 611-12 (J. Gales ed. 1789).

⁶² Id. at 612. The Act of September 2, 1789, ch. 12, sec. 3, 1 Stat. 66, gave the Comptroller power to countersign warrants. Without his signature, no monies could be paid out of the national treasury. In 1795, Congress fulfilled Madison's expectations by providing that the Comptroller's decisions would be "final and conclusive," thereby making him independent of presidential direction. Act of March 3, 1795, ch. 48 § 4, 1 Stat. 441, 442 (1795). See notes 60-64, infra, and accompanying text.

⁶³ 5 U.S. (1 Cranch) 137 (1803).

⁶⁴ Id. at 165-66.

⁶⁵ 5 U.S. (1 Branch) at 162 (emphasis supplied).

Perhaps more pertinent for present purposes is the history of the establishment of the independent office of Comptroller in the Treasury Department. Here the understanding of the Framers may be said to have been revealed most clearly when James Madison discussed, in the First Congress, the structure for Treasury operations. It is well rehearsed that when Congress convened in New York in 1789, Madison argued successfully, as the living voice of the Philadelphia Convention two years earlier, that an officer such as the Secretary of Foreign Affairs should be responsible solely to the President's will, and hence subject to removal at will.⁵⁸ But when the First Congress took up the Treasury a week later, Madison distinguished the Comptroller's function as entirely different. As the Supreme Court later noted:

[when] the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611-612.⁵⁹

Specifically, Madison explained the need for "the independent officers of Comptroller and Auditor."⁶⁰ Madison elaborated, respecting the tenure by which the Comptroller was to hold his office:

It will be necessary, said he, to consider the nature of this office...[and] in analyzing its properties, we shall easily discover they are not purely of an Executive nature. It seems to me that they partake of a Judiciary quality as well as Executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of claims and accounts subsisting between the United States and particular citizens: this

⁵⁸ See Myers v. United States, 272 U.S. at 111-31.

⁵⁹ Humphrey's Executor v. FTC, 295 U.S. at 631 (emphasis supplied).

⁶⁰ 1 Annals of Cong. 393 (J. Gales ed. 1789).

the Post Office,⁵³ and the Interior Department.⁵⁴ The Treasury Department statute, for example, did not even mention the President: it required the Secretary to report to Congress "and generally perform all such services relative to the finances, as he shall be directed to perform."⁵⁵ Such direction, the context makes clear, was to come from Congress, not the President. Indeed, for a significant period in our early history, the President did not see departmental budget estimates before the Treasury Department transmitted them to Congress, and the Secretary recommended tax policy directly to Congress.⁵⁶ Similarly, the Postmaster General was given detailed discretionary duties with no suggestion that he was to be under other than congressional direction in performing these tasks.⁵⁷

⁵³ Act of May 8, 1794, ch. 23, § 3, 1 Stat. 357.

⁵⁴ Act of Mar. 3, 1849, ch. 108, § 1, 9 Stat. 395.

⁵⁵ Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66. Pursuant to this mandate, Alexander Hamilton, the first Secretary of the Treasury, submitted seminal reports to the Congress at the direction of the House of Representatives. Each report begins with an acknowledgement of the order of the House which had directed him to report. Report of Public Credit, 2 Annals of Congress, 1991 (1790); Report on a National Bank, *id.*, 2031; Report on Manufactures, 3 Annals of Congress 971 (1791) ("The Secretary of the Treasury, in obedience to the order of the House of Representatives....").

⁵⁶ L. White, *The Jacksonians* 78 (1954); L. White, *The Federalists* 326 (1948).

⁵⁷ 3 W. Willoughby, *The Constitutional Law of the United States* 1480 (2d ed. 1929). Professor Goodnow remarked about this unusual administrative organization as follows:

In the United States, the original conception of the head of department was that of an officer stationed at the center of the government who might have, it is true, in many cases the power of appointment and removal, but who was not supposed to direct the actions of the subordinates of his department...The conception of a hierarchy of subordinate and superior officers was very dim if it existed at all. F. Goodnow, *Comparative Administrative Law* 136-37 (1893).

guided in this area by longstanding relevant historical practice.⁴⁷ In the area of statutory control of agency decisionmakers, such practice is abundant.⁴⁸

Thus, statutes enacted by the earliest Congresses, for example, reveal an assumption that Congress, not the President, should regulate the operation of domestic agencies, and that presidential control over the execution of domestic laws was purely a matter of legislative authorization. In establishing the Departments of Foreign Affairs,⁴⁹ War,⁵⁰ and the Navy,⁵¹ Congress recognized that the President should have full control over those officers who would perform the highly sensitive and political functions that the Constitution explicitly vests in the Chief Executive -- such as the conduct of foreign affairs and the command of the military. The statutes creating those departments explicitly empowered the President to direct and control their activities. Provision for presidential direction, however, was conspicuously absent in the statutes creating domestic departments such as the Treasury,⁵²

⁴⁷ See, e.g., Melcher v. Federal Open Market Committee, 644 F. Supp. 510, 521-27 (D.D.C. 1986) (presence of five members on Open Market Committee who are not appointed pursuant to Article II held constitutional in view of long history of independence on part of national banking officials and political acceptance of that independence).

⁴⁸ See, generally, Froomkin, In Defense of Agency Autonomy, 96 Yale L. J. 743, 805-808 (1987) (Froomkin); Rosenberg, Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under E.O. 12,291, 80 Mich. L. R. 193, 202-205 (1981).

⁴⁹ Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28.

⁵⁰ Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49.

⁵¹ Act of Apr. 30, 1789, ch. 35, § 1, 1 Stat. 553.

⁵² Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66.

removal powers of the President as an aspect of his assigned function to see to the faithful execution of the laws: Myers v. United States⁴²; Humphrey's Executor v. United States⁴³; Wiener v. United States⁴⁴; and Bowsher v. Synar⁴⁵. The standard by which the Court evaluates separation of powers claims in the absence of a specific textual commitment (and sometimes uses as a guide in interpreting express provisions), although not spelled out in these cases, is clearly enunciated and applied in its decisions dealing with the confidentiality of presidential communications. Thus, the Court first asks whether the action of the challenged branch threatens to prevent another "from accomplishing its constitutionally assigned function," and second, where there is a "potential for disruption", it determines "whether that impact is justified by the overriding need to promote objectives within the constitutional power" of the moving branch.⁴⁶

II. Historical and Legal Practice and Precedents Respecting Statutory Direction and Control of Agency Officials

While judicial application of the foregoing standard of separation of powers review will necessarily be in a defined context, courts may well be

⁴² 272 U.S. 52 (1926).

⁴³ 295 U.S. 602 (1935).

⁴⁴ 357 U.S. 349 (1958).

⁴⁵ 106 S.Ct. 3181 (1986).

⁴⁶ Nixon v. Administrator of General Services, supra, 433 U.S. at 442-43, Nixon v. Fitzgerald, 457 U.S. 731, 753-54 (1982).

compartmentalized, checking and balancing would be impossible. When the idea of a rigidly pure separation was suggested to the Framers and debated by them, they consciously rejected it as impractical and unreasonable.³⁷ Recent commentators have emphasized that "[b]y the time of the Philadelphia Convention the doctrine of separated powers had been modified to allow for checks and balances."³⁸ Rather, "the whole power of one department [should not be] exercised by the same hands which possess the whole power of another department."³⁹

The approach followed by the Court in adjudicating separation of powers challenges is two-fold. First, the principle of separation may be embodied in a specific clause of the Constitution; there may be a textual commitment of a function to one branch. The appointments clause at the foundation of Buckley v. Valeo,⁴⁰ and the presentation clause at the focus of INS v. Chadha,⁴¹ represent this strand of separation of powers decisionmaking. Second, in the absence of a specific commitment, the Court must, in determining whether a function may be performed by one branch, derive from context and structure whether the function is inherently exclusive within that or another branch or whether it must be deemed to be exclusively committed to a particular branch in order to protect functions that are exclusive to that branch. Illustrative of this strand of separation of powers analysis are the decisions respecting the

³⁷ See, *The Federalist*, Nos. 47, 51 (J. Madison) (J. Cooke ed. 1961).

³⁸ L. Fisher, *Constitutional Conflicts Between Congress and the President* 14 (1985); Banks, *supra* n. 25, at 632-633.

³⁹ *The Federalist*, No. 47, at 325-26 (J. Madison)(J. Cooke ed. 1961) (quoting Montesquieu).

⁴⁰ 424 U.S. 1 (1976).

⁴¹ 462 U.S. 919 (1983).

This schema is consistent with the Supreme Court's standard for treatment of separation of powers questions. Thus in Nixon v. Administrator of General Services,³¹ the Court rejected the "'archaic view of the separation of powers as requiring three airtight departments of government.'"32 In determining whether a statute disrupts the balance between the coordinate branches, the proper inquiry focuses on the extent to which the act "prevents the Executive Branch from accomplishing its constitutionally assigned functions."33 The "Court has thus been mindful that the boundaries between each branch should be fixed 'according to common sense and the inherent necessities of government coordination.'"34 It has also noted that a "hermetic sealing of the three branches of Government from one another would preclude establishment of a Nation capable of governing itself effectively."35 "Rather, as Justice Jackson wrote: '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.'"36

The Court's rejection of the "archaic view" tracks the pronouncements of the Framers. If the three branches of government were rigidly

31 433 U.S. 425 (1977).

32 Id. at 443.

33 Id.

34 INS v. Chadha, 462 U.S. 919, 962 (1983) (Powell, J., concurring) (quoting J.W. Hampton, Jr. & Co. v. U.S., 276 U.S. 394, 406 (1928)).

35 Buckley v. Valeo, supra, 424 U.S. at 121.

36 Chadha, 462 U.S. at 962 (Powell, J., concurring), (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (concurring opinion)).

Legislative branch."²⁹

Thus, the constitutional constraint that is to be dealt with by the courts in cases involving officer insulation from at will removal, or the vesting of unreviewable discretion in an official subordinate to the President, is the separation of powers, and the discrete question is how far Congress may go in insulating the roles of the agencies and officers of the government from presidential authority.

Here it must be understood at the outset that the Constitution did not establish a division of three branches, each vested with a discrete portion of governmental power and no more. Rather, the Framers established three constitutional divisions: the President, the Congress, and the Judiciary. The document does not talk about the executive, the legislative and the judicial branches. Nor did it create the infrastructure of government. That task it left to the exclusive domain of the Congress. What the Framers were concerned about is the maintenance of a balance of political power between the President and Congress. That is what the separation of powers speaks to. The Framers were also concerned about the means of control to be afforded the branches over the agencies of government. This is what the checks and balances are meant to facilitate. In turn, the checks and balances are to be evaluated in terms of their effect on the nature and degree of control one branch has over the agencies will have on the relative balance between Congress and the President.³⁰

²⁹ Id. at 3191.

³⁰ See generally, Strauss, supra note 22; Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984); Banks, When They Get Close To The Truth: Challenging The Special Prosecutors, 38 Syrac. L. Rev. 623 (1987) (Banks).

arm or eye of the executive. Its duties are performed without executive leave and, in contemplation of the statute must be free from executive control.²⁴

The Court was quick to note that in recognizing that Congress could insulate such officers in this manner from presidential control it was being faithful to the tripartite constitutional scheme:

The 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. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality.²⁵

Subsequent High Court rulings have made it abundantly clear that persons exercising significant authority pursuant to law must find their place within the tripartite design.²⁶ Moreover, as the Court's Bowsher decision observed, "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him that he must fear, and, in the performance of his functions, obey."²⁷ For that reason, in Bowsher the Court identified the provision governing the removal of the Comptroller General as "[t]he critical factor" defining the status of his office.²⁸ In that case, the Comptroller General, although appointed by the President, was by virtue of his removability by Congress by joint resolution deemed to be "an officer of the

²⁴ 295 U.S. at 628.

²⁵ Id. at 629-630.

²⁶ See, e.g., Buckley v. Valeo, 426 U.S. 1 (1976); Bowsher v. Synar, 106 S. Ct. 3181, 3186-3189 (1986).

²⁷ Bowsher v. Synar, 106 S. Ct. at 3188 (quoting Synar v. U.S., 626 F. Supp. 1374, 1401 (D.D.C. 1986) (3-judge court)).

²⁸ Id. at 3189.

President would preside as an active manager.¹⁸ In particular, the Report urged that the President's role be expanded by placing some 100 independent agencies, administrations, boards, and commissions within the executive department. These independent agencies, the Report argued, constituted a "headless 'fourth branch'" acting "under conditions of virtual irresponsibility," thereby frustrating the President's role as "the General Manager of the United States."¹⁹ Contemporary scholars raised constitutional objections to this notion of the President as general manager,²⁰ and Congress did not enact the Report's proposals. But the rubric has persisted,²¹ acting as a useful rhetorical pejorative despite prevailing judicial and scholarly opinion that it is a "constitutional impossibility".²² In this regard the seminal Supreme Court ruling in Humphrey's Executor v. Federal Trade Commission,²³ establishing the non-removability except for cause of members of independent commissions, stated:

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an

¹⁸ U.S. President's Committee on Administrative Management, Administrative Management in the Government of the United States (1937).

¹⁹ Id. at 41-42.

²⁰ Jaffee, Invective and Investigation in Administrative Law, 52 Harv. L. Rev. 1201, 1278 (1939).

²¹ See, e.g., Synar v. United States, 626 F. Supp. 1374, 1398 (D.D.C. 1986).

²² Verkuil, The Status of Independent Agencies After Bowsher v. Synar, 1986 Duke L.J. 779, 798 (1986) (Verkuil); Strauss, Formal and Functional Approaches to Separation of Powers Questions -- A Foolish Inconsistency? 72 Corn. L. Rev. 488, 492-496 (1987) (Strauss); Rohr, To Run a Constitution 152-153 (1986) (critiquing the rhetorical excesses of the Brownlow Report).

²³ 295 U.S. 602 (1935).

relevant pronouncements may be read to signal that it is not yet ready to embrace a constitutional interpretation implying a fundamental structural shift of power as has evolved in American governmental practice vis-a-vis the administrative bureaucracy.¹⁷

But as it is likely that litigation in this area will continue at least into the near future, it is useful at this juncture to attempt to define the issues that will confront the courts and outline the principles and legal and historical precedents that may influence their judicial resolution. We turn first to the critical matter of issue definition.

I. Defining the Issue: Controlling the Bureaucracy in a System of Separated Powers

For more than half a century much discussion on the nature and place of the administrative bureaucracy has been misdirected by the colorful but legally inaccurate appellation attached to independent regulatory agencies by the Brownlow Report, a 1937 study that recommended that the executive branch be reorganized to create an integrated, hierarchical structure over which the

SEC citing Humphrey's Executor); Public Citizen v. Burke, 655 F. Supp. 318 (D.D.C. 1987) (memorandum to Archivist by Justice Department and Office of Management and Budget directing him to honor all claims of executive privilege proffered by former presidents is contrary to law and properly promulgated agency regulations); In re Sealed Case, 665 F. Supp. 56 (D.D.C. 1987) (Independent Counsel statute held constitutional); Deaver v. Seymour, CA. No. 87-0477 (D.D.C., Mar. 17, 1987) ("Independent Counsel statute will probably not be found to offend the Constitution."); FTC v. Engage-A-Car Servs. No. 86-3758 (D.N.J. Dec. 18, 1986) (claim that FTC enforcement authority is unconstitutional is "devoid of merit"); Melcher v. Federal Open Market Committee, 644 F. Supp. 510, 517-24 (D.D.C. 1986) (challenge to constitutionality of appointment of members of FOMC by private individuals rejected), appeal docketed, No. 86-5692 (D.C. Cir. Dec. 16, 1986).

¹⁷ Bowsher v. Synar, 106 S. Ct. 3181 (1986); Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245 (1986).

Branch.¹³

The cumulative impact of these and other executive actions evidences to some a growing threat to Congress' policymaking prerogatives and the rule of law.¹⁴ The high water mark for proponents of a hierarchical executive was apparently reached in early 1986 when a federal court for the first time questioned whether the concept of agency independence could be reconciled with the President's removal power under Article II.¹⁵

However, these aggressive stances have been recently blunted, at least temporarily, by a series of federal district and appellate court rulings that have either rejected the notion of a unitary executive or have seriously questioned its fundamental premises.¹⁶ Moreover, the Supreme Court's latest

¹³ Emphasis in original; footnotes omitted. Assistant Attorney General Habicht made it clear that the Department's position extends beyond the administrative order situation. In response to a Member query whether the President's authority under the theory would extend to independent regulatory agencies, he stated: "[T]he President retains broad authority to direct the operations of federal regulatory agencies, even when Congress has elected to limit his power to remove the officials charged with managing these agencies. In our judgment, it would be unconstitutional for legislation to authorize a federal regulatory agency to assume a core executive function such as law enforcement and to carry out that activity against other elements of the federal government in a manner which in any way hindered the President's ability to resolve disputes within the Executive Branch."

¹⁴ This hierarchical mindset is seen by some as underlying the events chronicled in the Iran/Contra hearings. See, e.g., Drew, Letter From Washington, New Yorker, June 22, 1987, 75-76; Caplan, Annals of the Law: The Tenth Justice, New Yorker, August 10, 1987, 29-30.

¹⁵ Synar v. United States, 626 F. Supp. 1374, 1403 (D.D.C.), aff'd sub nom. Bolwsher v. Synar, 106 S. Ct. 3181 (1986).

¹⁶ See, e.g., In re Theodore Olson, 818 F.2d 34 (D.C. Cir., Ind Counsel Div. 1987) ("Independent Counsel statute is grounded in the 'necessary and proper' clause and the Article II appointments clause of the Constitution" and is "fully consistent with the separation of powers doctrine...."); Federal Trade Commission v. American National Cellular, Inc., 810 F.2d 1511 (9th Cir. 1987) (prosecutorial authority held properly vested in FTC citing Humphrey's Executor v. FTC); Securities and Exchange Commission v. Warner Communications, 652 F. Supp. 647 (S.D. Fla. 1987) (prosecutorial authority properly vested in

power in the President alone."

The President's use of his Article II supervisory powers to resolve disputes among his subordinates also follows from the Framers' intent that the executive power of the United States be exercised in a "unitary and uniform" way. Myers, 272 U.S. at 135. The basic principle underlying Article II of the Constitution, is that the Executive power is vested in a single person, the President, or as James Madison stated during the Great Debate of 1798, "the great principle of unity and responsibility in the Executive department." 1 Ann. Cong. 499 (1798). Simply put, the executive power under our Constitution is based on this principle of the unitary executive. The Framers deliberately chose this principle and deliberately rejected the cabinet (or privy council) alternative, with which they were quite familiar from British practice and from the constitutions of most of the original states.

One of the main reasons the Framers chose to create a unitary executive was that they believed that unity in the executive would promote what today we call "accountability." As Alexander Hamilton pointed out, the more that the executive power is watered down and distributed among various persons, the easier it is for everyone concerned to avoid blame for failure to comply with the rule of law. The Federalist No. 70, at 427-428 (A. Hamilton) (C. Rossiter ed. 1961). Hamilton stated that one of the weightiest objections to a plurality in the executive... is that it tends to conceal faults and destroy responsibility." Id. at 427. To ensure accountability to the President, the Constitution, as interpreted by the courts, vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy.

In our view, if the intentions of the Framers are to be fulfilled, the President must have an unfettered opportunity to take action in the event of disagreements or disputes within the Executive Branch. The President has the responsibility of making certain that that Branch speaks with one voice. He can do that by settling the controversy himself, or by establishing procedures, as he has done by Executive Order, for the resolution of controversies by one of his principal officers. In this way, conflicts within the Executive Branch are resolved internally, under the supervision of the President or his delegate, and not in the courts.

The President is accountable to the American people for the activities of all Executive agencies. Thus, the President has the ultimate duty to ensure that federal facilities comply with the environmental laws as part of his constitutional responsibility under Article II, even though Executive Branch agencies are subject to EPA's regulatory oversight. Accordingly, Executive Branch agencies may not sue one another, nor may one agency be ordered by another to comply with an administrative order without the prior opportunity to contest the order within the Executive Branch. Thus, coercive unilateral order authority is inconsistent with the constitutional principles of unity and unitary responsibility within the Executive

Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).¹⁰ A significant consequence of the issuance of such orders is that they reflect a determination of requirements under the statutes which can be invoked by private citizens in lawsuits authorized to vindicate their statutory rights.¹¹ EPA unilateral administrative orders are therefore an integral part of the intricate, interrelated environmental enforcement mechanism enacted by Congress that authorizes a complex of federal, state, and private administrative and court actions. However, in recent testimony before Congress the Justice Department has directly challenged the constitutionality of vesting such unilateral order authority in EPA, contending that the Constitution mandates that all intrabranch disputes must be resolved either by the President or his delegate.¹² The breadth of the argument presented sweeps beyond the confines of the EPA order situation and reflects the Administration's most definitive statement of the theory of the unitary executive to date. It thus merits extended quotation.

The President's authority to require Executive Branch agencies to submit their legal disputes to him or his delegate for resolution derives from his Article II duty to "take Care that the Laws [are] faithfully executed," as does his responsibility to supervise the affairs of the executive Branch. This obligation necessarily recognizes the President's authority to exert "general administrative control over those executing the law." *Myers v. United States*, 272 U.S. 52, 161-164 (1926). The President, as head of the Executive Branch, must "supervise and guide" executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive

¹⁰ 42 U.S.C. 9609(a) (1982).

¹¹ See, e.g., 42 U.S.C. 6972 (Suppl. III 1985). On citizen suits generally, see Comment, The Rise of Citizen-Suit Enforcement in Environmental Law: Reevaluating Private and Public Attorneys General, 81 *N.W. Univ. L. Rev.* 220 (1987).

¹² Habicht Testimony, *supra* note 8.

to empower the Environmental Protection Agency (EPA) to issue statutorily prescribed unilateral administrative compliance orders to agencies found in violation of environmental laws and regulations applicable to them.⁸

The last mentioned claim of constitutional authority for the President to interdict EPA administrative orders directed at federal agencies with facilities in noncompliance with environmental laws presents a paradigm case study in the growing conflict between the political branches over control of the bureaucratic infrastructure. EPA's authority to issue administrative orders to other federal agencies is contained in section 3008 of the Resource Conservation and Recovery Act (RCRA)⁹ and section 106 of the Comprehensive

various congressional committees. See, "Justice Dept. Attacks Special Counsels", Wash. Post, June 17, 1987, at A1 (Reporting letter to Senate Governmental Affairs Subcommittee Chairman Carl Levin by Assistant Attorney General John R. Bolton stating that "To the extent that the present statute authorizes a prosecutor to investigate and prosecute federal crimes without such accountability [to the President], and makes such a prosecutor subject to the direction and control of a court rather than the executive, we believe it is unconstitutional."); "Oversight of the Independent Counsel Statute," Hearings before Subcomm. on Oversight of Government Management, Senate Comm. on Governmental Affairs, 100th Cong., 1st Sess. 8-18 (1987). Testimony of Assistant Attorney General John R. Bolton before a Senate Governmental Affairs Subcommittee that the "law governing the appointments [of independent counsel is]... 'unconstitutional' in every important respect", and that the President "must retain the unfettered ability to direct and supervise all executive officials"; and "Congress Moves to Amend Special Counsel Act", Legal Times of Washington, Jan. 12, 1987, p. 4, quoting Assistant Attorney General Charles Cooper ("We have raised concerns that the [Independent Counsel] law is unconstitutional because it violates the separation of powers," and that if the constitutionality of the law was "appropriately" challenged in the courts, the Department would join a lawsuit to overturn it).

⁸ Statement of F. Henry Habicht, II, Antitrust Attorney General, Land and Natural Resources Division, before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, Concerning Federal Facility Compliance with Environmental Laws, April 28, 1987. (Habicht Testimony)

⁹ 42 U.S.C. 6928(a),(h) (1987 suppl.).

Budget by executive orders;³ challenging the constitutional validity of independent regulatory agencies;⁴ asserting the inability of Congress to vest discretionary authority in subordinate executive officials that is free from presidential supervision and control;⁵ refusing to implement congressional enactments it deems unconstitutional;⁶ questioning the authority of Congress to vest the appointment of an executive officer in the courts and to provide for removal of that officer only for cause;⁷ and denying the authority of Congress

³ E.O. 12,291 3 C.F.R. 127 (1981); E.O. 12,498, 50 F.R. 1036 (1985).

⁴ Address of Honorable Edwin Meese III, Attorney General of the United States before the Federal Bar Association, September 13, 1985 ("...[F]ederal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or 'quasi' that. In the tripartite scheme of government a body with enforcement powers is part of the executive branch of government. Power granted by Congress should properly be understood as power granted to the Executive." (Emphasis in original)).

⁵ "Access to the Nixon Presidential Materials Should Be Governed by NARA Regulation, Not OMB or DOJ Actions", H. Rept. No. 99-961, 99th Cong. 2d Sess. (1986); Public Citizen v. Burke, 655 F. Supp. 318 (D.D.C. 1987).

⁶ See, Ameron, Inc. v. Corps of Engineers, 809 F. 2d 979, 991 n. 8 (3d Cir. 1986).

⁷ On August 31, 1987 the Department of Justice officially took a position against the constitutionality of the statute (the Ethics in Government Act) establishing the mechanism for appointing Independent Counsels in an amicus brief filed in In re Sealed Case, Nos. 87-5261, -5264 and -5265 (D.C. Cir.). The argument relies heavily on the theory of a unitary executive ("The vesting of the 'executive power' in the President and his duty to 'take Care that the Laws be faithfully executed' (Art II, Sec. 3), give substance to the Framers' agreement that there must be a unitary, vigorous, and independent Executive responsible directly to the people... Unity in the execution of the laws was deemed by the Framers to be a 'leading character in the definition of good government'... absence of unity in the Executives would, in the eyes of the Framers, create a lack of responsibility and accountability... The Ethics Act... contravenes the Constitution by eliminating or strictly limiting the power of the Executive Branch to appoint, control, and remove an Officer charged with the quintessential executive duty of criminal law enforcement. Such a key officer must serve under the direct supervision of the Executive. If the doctrines of separation of powers and the unitary Executive are to have meaning, Officers charged with these law enforcement responsibilities must function within the Executive Branch." pp. 7-8, 10-11).

This position was presaged by testimony of Department officials before

Congressional Control of Agency Decisions and Decisionmakers:
The Unitary Executive Theory and Separation of Powers

Since 1981 the Reagan Administration has aggressively pursued the concept of a highly centralized bureaucratic structure of government. This model of governance envisions a unified and hierarchical executive with the President at its apex and all administrative agencies arrayed below him. It views the President, as the only nationally elected official of the federal government, as the possessor of broad supervisory and managerial powers as well as an encompassing political presence in administrative agencies. The Chief Executive's constitutional duty to see that the laws are faithfully executed is seen as providing both the responsibility and the authority to intervene in administrative decisions in order to set priorities, allocate limited resources, balance competing policy goals, resolve conflicting jurisdictions and responsibilities of agencies, and assure that programs are effectively and efficiently managed.

Motivated by a limited-government, deregulatory ideology¹ and encouraged by judicial rulings interpreted as supportive of the idea of a unitary executive branch,² the Reagan Administration and its supporters have taken a variety of actions to make that idea an accomplished fact. These have included centralizing control of agency rulemaking in the Office of Management and

¹ Eads & Fix, *Relief or Reform: Reagan's Regulatory Dilemma* 1-6 (1984); Tolchin and Tolchin, *Dismantling America* 20-26 (1984).

² Buckley v. Valeo, 424 U.S. 1 (1976); INS v. Chadha, 462 U.S. 919 (1983); Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982); Bowsher v. Synar, 106 S. Ct. 3181 (1986); Sierra Club v. Costle, 657 F. 2d 298 (D.C. Cir. 1981).

ABSTRACT

In support of a variety of actions since 1981 designed to ensure ultimate presidential control of decisionmaking in all executive branch agencies, the Reagan administration has articulated a constitutionally based theory of a unitary executive. This report analyzes and assesses the legal and historical underpinnings of the theory and concludes that Congress' authority to enact legislation directing and controlling administrative decisionmaking has a substantial constitutional basis and that presidential claims of power in this area are unjustified.

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INFO PACK READING GUIDE

August 1990
IP 339C

**Constitution of the United States:
Selected References, 1986-1990**

Tangela G. Roe
Bibliographer, Government and Law
Library Services Division

This bibliography contains sources discussing the history, development, and application of the U.S. Constitution and the Bill of Rights. These references have been selected from the Public Policy Literature Data Base, created by the Library Services Division. Congressional users may order the full text of items by calling 707-5700. Other users should consult their local library.

Bicentennial commemoration of the Bill of Rights. *American criminal law review*, v. 26, spring 1989: 1259-1658. LRS89-12750

Partial contents.--The original purpose of the Bill of Rights: James Madison and the founders' search for a workable balance between Federal and State power, by Arthur E. Wilmarth, Jr.--Collected essays on the origination and development of the Bill of Rights.

The Bill of Rights. *This Constitution*, no. 18, spring-summer 1988: 4-37, 46-57.

LRS88-7466

Partial contents.--James Madison and the Bill of Rights, by Jack N. Rakove.--George Mason's "objections" and the Bill of Rights, by Robert A. Rutland.--The Bill of Rights: protector of minorities and dissenters, by Norman Dorsen.--Slavery at the Constitutional Convention, by Paul Finkelman.--Religion and the Constitution, by A. James Reichley.

The Blessings of liberty: bicentennial lectures at the National Archives. [Edited by] Robert S. Peck and Ralph S. Pollock. [Chicago] American Bar Association [1987] 178 p. LRS87-12503

Partial contents.--Why celebrate the Constitution today?, by A. E. Dick Howard.--The influence of British political thought on the American Constitution: Magna Carta in context, by J. G. A. Pocock.--Launching the ship of state: the First Federal Congress and the Constitution, by Charlene N. Bickford.--The Presidency in the constitutional convention, by R. Gordon Hoxie.--The Civil War: crisis of the Constitution, by Herman Belz.--Women and the Constitution, by Virginia C. Purdy.--A time to celebrate and reflect, by Strom Thurmond.

Bowen, Ezra.

Constitutional Convention, Philadelphia, 1787: 'Something must be done, or we shall disappoint not only America, but the whole world.' *Smithsonian*, v. 18, July 1987: 32-43. LRS87-6042

Summarizes the proceedings of the Constitutional Convention.

Burger, Warren E.

"A republic, if you can keep it": a bicentennial commentary. *Presidential studies quarterly*, v. 18, summer 1988: 467-473. LRS88-14845

Documents events leading to the Constitutional Convention telling of ratification of the Constitution and the beginning of the U.S. Government with the inauguration of Washington in 1789.

Conrad, Stephen A.

Metaphor and imagination in James Wilson's theory of Federal union. *Law and social inquiry*, v. 13, no. 1, 1988: 3-70. LRS88-8480

"American federalism is nothing more--and nothing less--than a metaphor. This was how James Wilson, the most prominent lawyer at the Philadelphia Convention, came to approach the novel problem of understanding and conveying what federalism in a modern republic should mean."

The Constitution. *Wilson quarterly*, v. 11, spring 1987: 96-133, 136-157. LRS87-2964

In three separate articles, Peter Onuf, Jack Rakove, and A. E. Dick Howard "variously recall the troubles of the young Republic that spurred the Founding Fathers to frame a new charter, describe the debates in Philadelphia, and trace the Constitution's evolution through amendment and judicial interpretation over the next 200 years.

The Constitution and American life: a special issue. *Journal of American history*, v. 74, Dec. 1987: whole issue (661-1034 p.) LRS87-11205

Partial contents.--The Constitution and United States foreign policy: an interpretation, by Walter LaFeber.--Wrestling toward the dawn: the Afro-American Freedom Movement and the changing Constitution, by Vincent Gordon Harding.--Outgrowing the compact of the fathers: equal rights, woman suffrage, and the United States Constitution, 1820-1878, by Ellen Carol DuBois.--Labor, liberty, and law: trade unionism and the problem of the American Constitutional order, by Leon Fink.--We, the family: constitutional rights and American families, by Martha Minow.

Debate over constitutional interpretation. *USA today (magazine)*, v. 115, Sept. 1986: 36-45. LRS86-8225

Contents.--Interpreting the Constitution, by Edwin Meese.--Guaranteeing individual liberty, by William J. Brennan, Jr.--The Supreme Court's dilemma and defense, by Raymond Polin.

The Future of the Constitution. This Constitution, no. 18, spring-summer 1988: 58-69.

LRS88-7432

Partial contents.--Constitutional understanding and American culture: future prospects in historical perspective, by Michael Kammen.--Our constitutional future, by James Oliver Horton.

Hutson, James H.

The birth of the Bill of Rights: the state of current scholarship. Prologue, v. 20, fall 1988: 142-161.

LRS88-11496

Reviews the past 30 years of historical research on the Bill of Rights.

The creation of the Constitution: the integrity of the documentary record. Texas law review, v. 65, Nov. 1986: 1-39.

LRS86-13193

Chief of the Manuscript Division of the Library of Congress examines the principal primary sources relating to the Constitution's origins--the Journal of the Constitutional Convention, kept by its secretary, William Jackson; the notes of delegate Robert Yates; the debates in the State ratifying conventions; the notes of James Madison; and the debates on the Bill of Rights in the House during the First Congress--and finds all of them "to be defective in varying degrees."

Jasanoff, Sheila.

Biology and the Bill of Rights: can science reframe the Constitution? American journal of law & medicine, v. 13, no. 2-3, 1987: 249-289.

LRS87-14815

"This paper undertakes a preliminary inquiry into the constitutional issues that are likely to arise as a consequence of foreseeable developments in the biological sciences and how they might be resolved in the light of prevailing patterns of constitutional adjudication."

Jordon, Jerry L.

NABE presidential address: the economic role of government. Business economics, v. 23, Jan. 1988: 14-20.

LRS88-352

The president of the National Association of Business Economists contends that "the U.S. Constitution contains a substantial body of economic doctrine . . . The government has not been successful in regulating economic activity, especially in the area of macroeconomic stabilization. Economists should play a major role in the current debate about the Constitution's meaning in this bicentennial year."

Kaminski, John P.

Ratifying the new Constitution. This Constitution, no. 17, winter 1987: 25-33.

LRS87-12800

"Narrates the course of ratification, using documents from that struggle. Many states ratified making it clear at the same time that they expected their concerns to be met promptly by amendments to the new constitution."

Kickingbird, Kirke. Kickingbird, Lynn Shelby.

Indians and the U.S. Constitution: a forgotten legacy. Vienna, Va., Institute for the Development of Indian Law, 1987. 36 p.

LRS87-12376

History of "the impact Indian people had on the newcomers and on the United States Constitution, and the impact the Constitution has had on the Indian nations."

Kristol, Irving.

"The spirit of '87". Public interest, no. 86, winter 1987: 3-9.

LRS87-8021

Discusses the influence of Protestantism on the U.S. Constitution, exploring how "the Protestant-American impulse to better one's condition" contributes to Americans' ideas about government and economic progress.

Landau, Martin.

A self-correcting system: the Constitution of the United States. This Constitution, no. 11, summer 1986: 4-10.

LRS86-14477

"Describes how the organization of government established by the Constitution ensures a reliable and stable government through the distribution of powers among different branches of government."

The Legacy of the Constitution: an assessment for the third century. Edited by William S. Livingston. [Austin, Tex.] Lyndon B. Johnson School of Public Affairs, 1987. 148 p.

LRS87-14060

"Contributors include former Assistant Attorney General William Bradford Reynolds, head of the U.S. Justice Department's Civil Rights Division; former U.S. Congresswoman Barbara Jordan; and former U.S. Congressman Richard W. Bolling.

Marshall, Thurgood.

Reflections on the bicentennial of the United States Constitution. Harvard law review, v. 101, Nov. 1987: 1-5.

LRS87-9550

Text of a speech delivered by Justice Thurgood Marshall. He argues that "when contemporary Americans cite 'The Constitution,' they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of all persons."

McGuire, Robert A. Ohsfeldt, Robert L.

Self-interest, agency theory, and political voting behavior: the ratification of the United States Constitution. American economic review, v. 79, Mar. 1989: 219-234.

LRS89-6059

Argues "that delegates to the state ratifying assemblies were insulated from their constituents and, thus, could more easily vote their personal economic interests as well as vote their constituents' interests."

Meese, Edwin III.

The moral foundations of republican government. Imprimis, v. 15, Sept. 1986: 1-6.

LRS86-10866

"In this essay, [former] Attorney General Edwin Meese takes issue with the legal realists. He carefully recounts the reasons why the Constitution was written and offers an explanation for its enduring importance in our history. His remarks imply that the authority of the Constitution ought to be restored, and that amendments ought to be put before the states according to the provisions of Article V, not simply enacted in the form of judicial decisions."

The Miracle at Philadelphia: lectures & debates. Utah law review, v. 1987, no. 4, 1988: whole issue (769-994 p.) LRS88-2538

Partial contents.--Introduction, by Warren E. Burger.--Foreword: the appeal of originalism, by Earl Maltz.--The miracle of Philadelphia, by Richard P. McCormick.--Freedom and the Constitution: a second century appraisal, by Henry J. Abraham.--Still adequate for the twentieth century?: a debate, by Orrin G. Hatch and James MacGregor Burns.

Mitchell, Ralph.

CQ's guide to the U.S. Constitution: history, text, index, glossary. Washington, Congressional Quarterly, 1986. 108 p. LRS86-7444

"An index that allows students and other persons to find their way quickly to the constitutional provision of interest to them. To this, [the author] has added a glossary that will help readers understand the terms used."

A More perfect union: essays on the Constitution. Proceedings of the American Philosophical Society, v. 131, Sept. 1987: whole issue (225-340 p.) LRS87-14062

Partial contents.--Reflections on the First Amendment: the evolution of the American jurisprudence of free expression, by Geoffrey R. Stone.--The United States Constitution as social compact, by Louis Henkin.--Franklin, Washington, and a new nation, by John Shy.--"A vehicle of life": the Founders' intentions and American perceptions of their living Constitution, by Michael Kammen.

The New face of the American founding: a symposium. Social science quarterly, v. 68, Dec. 1987: 653-744. LRS87-12836

Partial contents.--The assumptions of the founders in 1787, by Robert Middlekauff.--The changing view of the founding and a new perspective on American political theory, by Donald S. Lutz.--The American constitutional order after two centuries: concluding reflections, by Ellis Sandoz.

Nore, Ellen.

Charles A. Beard's economic interpretation of the origins of the Constitution. This Constitution, no. 17, winter 1987: 39-44. LRS87-12799

"Offers a view of one of the most well-known scholars of the history of the Constitution, Charles A. Beard, whose [1913] thesis about the economic interests of the founders has provoked debate among historians for decades."

Pangle, Thomas L.

The Constitution's human vision. Public interest, no. 86, winter 1987: 77-90.

LRS87-8020

Explores the moral aims of the Founders as they constructed the Constitution.

Principles of the constitutional order: the ratification debates. Robert L. Utley, Jr., editor. Lanham, Md., University Press of America, 1989. 187 p. LRS89-3747

Partial contents.--The Constitutional Convention and the founding principles, by Wilson Carey McWilliams and Dennis B. Hale.--On understanding the Constitution: a historian's reflections (and dissent), by Jack Rakove.--The achievement of the Constitution, as viewed by the leading Federalists, by Thomas Pangle.--The anti-Federalists and the Constitution, by Murray Dry.--"The reasoning spirit of it": the President, the separation of powers, and the laws of reason, by Hadley Arkes.

Research & Forecasts, inc.

The American public's knowledge of the U.S. Constitution: a national survey of public awareness and personal opinion: a Hearst report. New York, Hearst Corporation, 1987. 39 p.

LRS87-13747

"The Hearst survey had four objectives: (1) to measure the American public's knowledge of the history and purpose of the original U.S. Constitution; (2) to assess the public's understanding of constitutional authority as it applies to the American system of government; (3) to determine how well informed Americans are about personal liberties and individual rights; and (4) to document public opinion on certain contemporary issues."

The Shaping of America: 200 years of the Constitution. World & I, v. 2, Sept. 1987: 14-115.

LRS87-12564

Partial contents.--A statement on the Bicentennial, By Ronald Reagan.--To secure the blessings of liberty: the making of the Constitution, by Forrest McDonald.--The organic and moral elements in the American Constitution, by Paul Johnson.--Republicanism and the founding of America, by Marcus Cunliffe.--Judicial review and the Supreme Court, by Walter Berns.--Failed amendments to the Constitution, by Morton Keller.

Soldier-statesmen of the Constitution: a bicentennial series. Washington, Center of Military History, U.S. Army, 1986-1987. 184 p. in 23 v. (CMH Pub. 71-1 - 71-23)

LRS86-13443

Series of 8-page pamphlets with individual biographies of the 22 Revolutionary War veterans who signed the Constitution in 1787, along with the convention's secretary, William Jackson.

Special issue on the public debate over the Constitution. This Constitution, no. 16, fall 1987: 4-21.

LRS87-12840

Contents.--The Federalist, by Jean Yarbrough.--The constitutional thought of the Anti-Federalists, by Murray Dry.--The Constitution as myth and symbol, by Milton M. Klein.

Warren-Findley, Jannelle.

The Federal Constitution, Boys, and Liberty Forever: music and the Constitution. This Constitution, no. 16, fall 1987: 22-31.

LRS87-12802

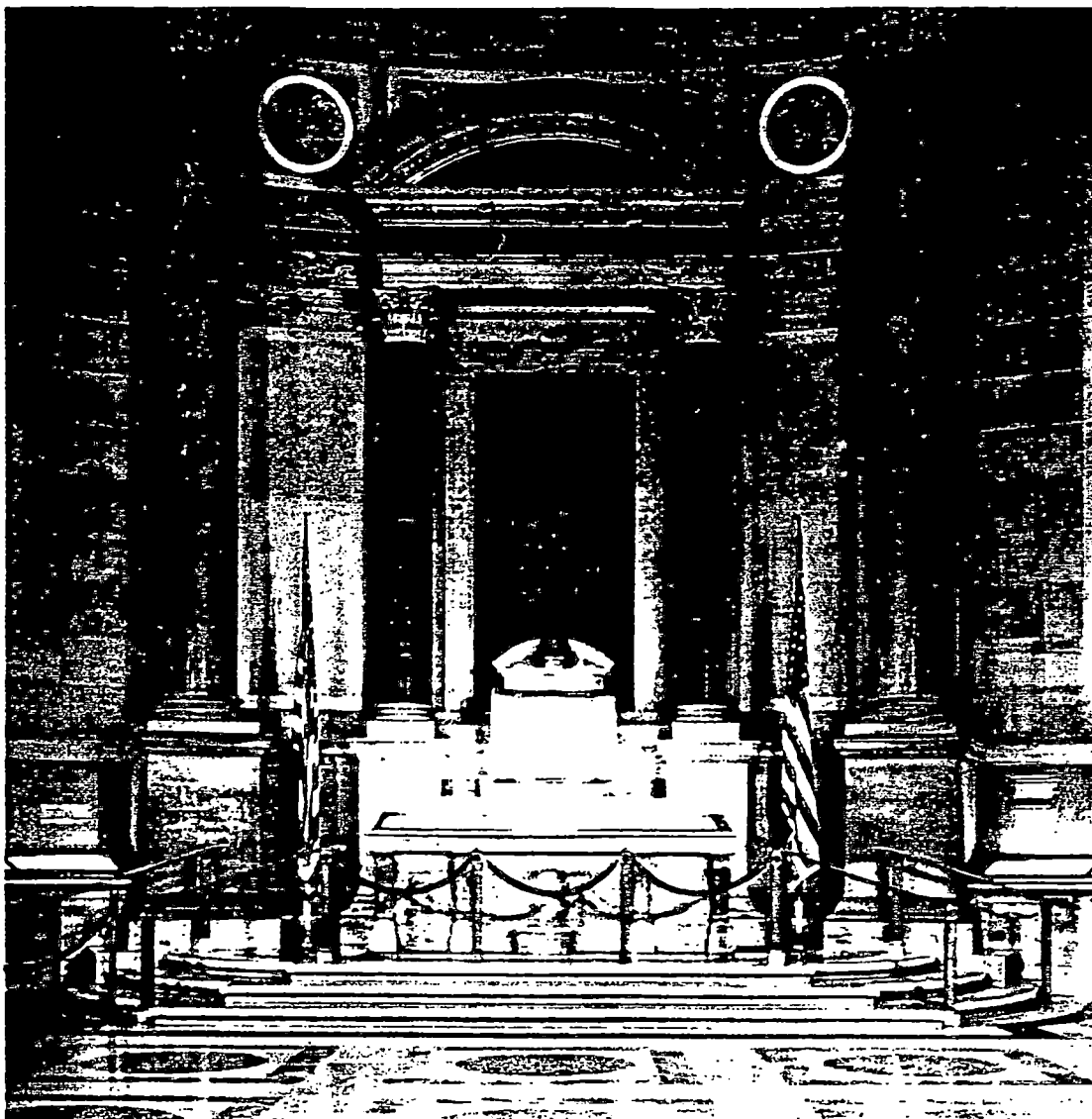
"Reproduces the lyrics of the eighteenth-century songs of the Constitution, giving us a new perspective on the debate and the celebration."

We the people: a celebration of the bicentennial of the United States Constitution.

Howard law journal, v. 30, no. 4, 1987: whole issue (p. 623-962)

LRS87-13123

Thirty-one articles, comments, and lectures in celebration of the bicentennial of the Constitution, covering the broad topics of an Afro-American perspective, leadership, education, fundamental rights, and contemporary decisions.



U.S. Dept. of State (WORLD BOOK photo)

The Declaration of Independence and the United States Constitution provide the basis of the U.S. government. These documents are displayed in the National Archives Building in Washington, D.C. The Declaration stands in an upright case above the Constitution.

United States government

United States, Government of the. The government of the United States represents, serves, and protects the American people at home and in foreign countries. From the nation's capital in Washington, D.C., the U.S. government's activities and influence reach every part of the world.

The three branches of the United States government—executive, legislative, and judicial—are usually represented by the President, Congress, and the Supreme Court. Generally speaking, the President enforces the laws that Congress passes, and the Supreme Court interprets these laws if any question arises.

United States military forces stationed in many parts of the world support American policy and help preserve peace. Representatives of the government work in international organizations, provide technical assistance, and negotiate with other governments. Millions of civil service employees and other workers at home and abroad carry out the programs of the government.

The United States government shares governmental powers with the states under the *federal* system established by the United States Constitution. The national governments of most other countries are *unitary* (centralized). They have final authority in all matters, and

grant only limited powers to state and local governments.

Government in the United States operates on three levels: national, state, and local. The federal government in Washington cannot abolish the states or rearrange their boundaries. It can exercise only powers that are delegated or implied by the Constitution. The states exercise powers reserved to them or not denied them by the Constitution. In some areas, the federal and state governments have *concurrent* powers. That is, they both have the right to exercise authority. The American judicial system keeps the federal and state governments within their proper fields of power.

The United States government makes and enforces laws, collects taxes, provides services for the people, protects individuals and their property, and works for national and international security. But it is noted for the way it encourages the people to take part in government, seeks to protect the rights of the people from the government itself, and assures the self-government of the states. Abraham Lincoln described the United States government in his Gettysburg Address as being "of the people, by the people, for the people."

For a description of the United States, its history, and its Constitution, see *United States; United States, History of the; Constitution of the United States*.

Government in American life

The United States government, through its activities, services, and authority, directly affects the lives of the American people in many ways. It collects taxes and customs duties to finance government work. It borrows money and issues bonds. It coins money and prints currency. It establishes uniform weights and measures. It issues patents and copyrights. The United States government controls immigration and emigration, and naturalizes noncitizens. It operates the postal system, and builds roads and highways. It manages a social security system. It has powers to regulate agriculture, business, and labor through its authority to regulate interstate commerce. The United States government negotiates with other governments, and participates in international organizations to promote peace, health, and edu-

cation. It has the power to declare war and to conclude peace pacts. It maintains the armed forces and can draft citizens for military service. It admits new states into the union. It governs the District of Columbia and the territories, including American Samoa, Guam, and the Virgin Islands.

The United States seeks not only to govern, but also to protect the liberty of the states and the people. The Bill of Rights in the Constitution guarantees that all people shall have freedom of speech and of religion, freedom of the press, the right of assembly, and freedom from arbitrary interference by the federal government. It guarantees a person freedom from arbitrary arrest and imprisonment. The Bill of Rights also guarantees the right to trial by jury and justice in the federal courts. The United States government acts to see that no state deprives any person of life, liberty, or property without due process of law, or denies equal protection of the law. See *Bill of rights*.

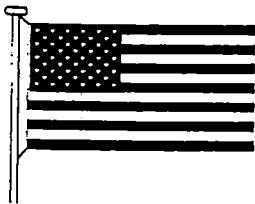
The executive branch

The executive branch of the United States government consists of (1) the Executive Office of the President, (2) the executive departments, and (3) the independent agencies.

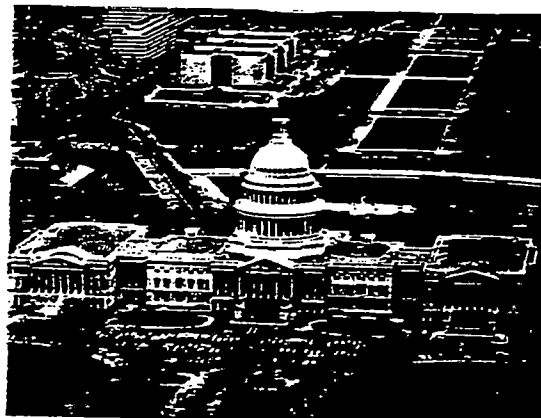
The President of the United States is the nation's chief executive and chief of state. The President lives in the White House in Washington, D.C., and has offices there.

As chief executive, the President has the responsibilities of enforcing federal laws and appointing and removing high federal officials. The President commands the armed forces, conducts foreign affairs, and recommends laws to Congress. The President also appoints American representatives to international organizations and to diplomatic missions in other lands. As chief of state, the President performs many ceremonial duties. Elected by the people to hold office for a four-year term, the President cannot be elected to more than two terms.

The Executive Office of the President includes: (1) the White House Office, (2) the Office of Management and Budget, (3) the National Security Council, (4) the Office of Policy Development, (5) the Council of Economic Advis-



Symbols of the United States include the American flag and the Great Seal. The eagle holds an olive branch and arrows, symbolizing a desire for peace but the ability to wage war. The reverse side bears the Eye of Providence, representing God, and a pyramid dated 1776.



Stacy Pick, © Lensman

The United States Capitol in Washington, D.C., is where Congress meets to make laws. The House of Representatives uses the wing at the left, and the Senate the one at the right.

ers, (6) the Office of the United States Trade Representative, (7) the Office of Administration, (8) the Council on Environmental Quality, (9) the Office of the Vice President, and (10) the Office of Science and Technology Policy. See **President of the United States**.

Executive departments conduct the administration of the national government. These 14 departments are: (1) State, (2) Treasury, (3) Defense, (4) Justice, (5) Interior, (6) Agriculture, (7) Commerce, (8) Labor, (9) Health and Human Services, (10) Housing and Urban Development, (11) Transportation, (12) Energy, (13) Education, and (14) Veterans Affairs. Department heads are appointed by the President, with the approval of the Senate. They form the *Cabinet* (see **Cabinet**). Thirteen are called *secretaries*. The attorney general heads the Department of Justice.

The typical executive department has a deputy or undersecretary and two or more assistant secretaries. The President appoints these officials, and may remove them without giving any reason. High officials usually resign when a new President takes office.

Generally, each executive department is divided into bureaus, bureaus into divisions, divisions into branches, branches into sections, and sections into units. Most officials below the highest level serve under civil service appointments (see **Civil service**). All executive departments have headquarters in Washington, but about 90 per cent of the employees work in *field services* (activities that are not a part of headquarters).

Independent agencies developed with the growth of government regulation. These agencies operate in many fields, including aeronautics and space, nuclear energy, banking and finance, civil service, communications, farm credit, home loans, information services, interstate commerce, labor relations, railroad retirement, science, securities and exchange, selective service, small business, tariffs, and international trade. Administrators or directors head most of the agencies. The regulatory agencies, such as the Interstate Commerce Commission, are headed by people of equal rank, although one may serve as chairperson. The President of the United States appoints the members of these agencies with Senate approval, and must state reasons for removing them.

The legislative branch

The legislative branch of the United States government includes Congress, which consists of the Senate and the House of Representatives. This branch also includes eight administrative agencies: (1) the Architect of the Capitol, (2) the Congressional Budget Office, (3) the Copyright Royalty Tribunal, (4) the General Accounting Office, (5) the Government Printing Office, (6) the Library of Congress, (7) the Office of Technology Assessment, and (8) the United States Botanic Garden.

The Senate and the House of Representatives meet in separate chambers in the Capitol in Washington, D.C. Congress makes, repeals, and amends federal laws. In addition, Congress levies federal taxes and appropriates funds for the government. See **Congress of the United States**.

The Senate has 100 members. Each state, regardless of size or population, has two senators, who serve six-year terms. The Vice President of the United States pre-

sides over the Senate. The Senate has certain exclusive powers. It alone can sit as a court of impeachment to try federal officials impeached by the House of Representatives. It alone has the power to approve the President's nominations for major federal offices. Any treaty made by the United States is subject to the Senate's approval. See **Senate**.

The House of Representatives consists of 435 members. A state's representation is based on population. It ranges from California's 45 members to one each from Alaska, Delaware, North Dakota, South Dakota, Vermont, and Wyoming. The number of representatives from a state changes as its population changes. Reapportionment takes place every 10 years, after each national census in a year ending with zero. Only the House can bring charges of impeachment against high federal officials. It alone can initiate tax bills. See **House of Representatives**.

The judicial branch

The Supreme Court of the United States is the highest court in the land. It has a chief justice and eight associate justices. The President appoints all justices with the approval of the Senate. The justices hold office for life. See **Supreme Court of the United States**.

Other federal courts. About 95 federal *district courts* are located in various cities. Above the district courts are 13 federal *courts of appeals*, often called *circuit courts*. Above the courts of appeals is the Supreme Court. Decisions of a district court may be appealed to an appeals court, and from the appeals court to the Supreme Court. Federal courts decide cases that involve the Constitution and federal laws. Judges of these courts hold office for life. The President appoints them with the approval of the Senate. See **Court**.

Principles of American government

Separation of powers. The Constitution divides the powers of the United States government among the executive, legislative, and judicial branches. Each branch is generally independent of the other two, and has the authority to check or balance the others. *Checks and balances* give each branch some powers that affect the other two. For example, Congress holds a check over the President with its authority to make government appropriations. It checks the courts with its powers to organize courts and create rules for their procedures. One of the President's checks on Congress is the power to veto bills. The President influences the courts by the kind of judges he or she appoints. The courts can check the President and Congress by declaring executive orders and legislative acts unconstitutional. See **Checks and balances**.

A written constitution provides the basis of government in the United States. The Constitution divides powers and duties between the federal and state governments. In addition, it specifies the powers of each branch of the national government. A written constitution is a unique American contribution. British royal governors had ruled the colonies in America under written charters granted by the monarch. However, the idea of a written constitution as the basic law of an independent country was new.

The Constitution not only grants powers, but also

How a bill becomes law in the United States

The drawings on this page and the next three pages show how federal laws are enacted in the United States. Thousands of bills are introduced during each Congress, which lasts two years, and hundreds become law. All bills not enacted by the end of the two-year period are killed.

WORLD BOOK illustrations by David Cunningham

Ideas for new laws come from many sources. The President, members of Congress, and other government officials may propose laws. Suggestions also come from individual citizens; special-interest groups, such as farmers, industry, and labor; newspaper editorials; and public protests. Congressional committees, in addition to lawyers who represent special-interest groups, actually write most bills and put them into proper legal form. Specialists called *legislative counsels* in both the Senate and House of Representatives also help prepare many bills for congressional action.



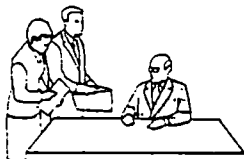
Individual citizens



Public protests



Newspaper editorials



Special-interest groups

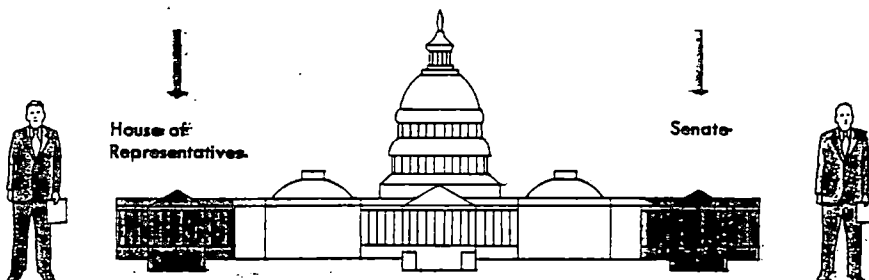


The President



Members of Congress and other government officials.

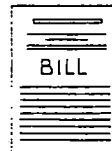
Each bill must be sponsored by a member of the House or Senate. Any number of senators or representatives may co-sponsor a bill. A bill may originate in either house of Congress unless it deals with taxes or spending. The Constitution provides that all such bills must be introduced in the House. The tradition that money bills must begin in the lower house came from England. There, the lower house—the House of Commons—is more likely to reflect the people's wishes because the people elect its members. They do not elect the upper house, the House of Lords. The rule has little meaning in the United States because voters elect both houses.



How a bill goes through Congress

The drawings on this page and the next show the normal path of a bill introduced in the House of Representatives. The process is the same for a bill introduced in the Senate, except that the House action comes after the Senate action. A bill may die at almost any stage of the process if no action is taken on it. A majority of the bills introduced in Congress fail and never become law.

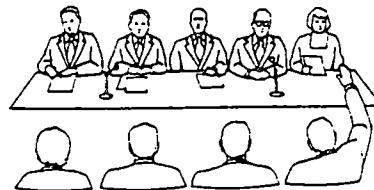
Introduction in the House. A sponsor introduces a bill by giving it to the clerk of the House or placing it in a box called the *hopper*. The clerk reads the title of the bill into the *Congressional Record* in a procedure called the *first reading*. The Government Printing Office prints the bill and distributes copies.



Assignment to committee. The speaker of the House assigns the bill to a committee for study. The House has about 20 *standing* permanent committees, each with jurisdiction over bills in a certain area.



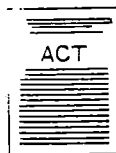
The committee studies the bill and hears testimony from experts and other interested persons. In some cases, a subcommittee conducts the study. The committee may release the bill with a recommendation to pass it, revise the bill and release it, or lay it aside so that the House cannot vote on it. Releasing the bill is called *reporting it out*, and laying it aside is called *tabling*.



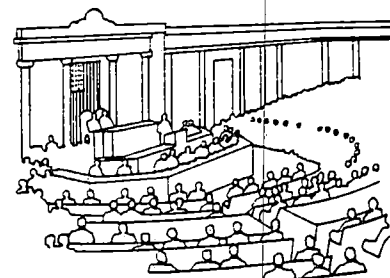
The bill goes on a calendar, a list of bills awaiting action. The Rules Committee may call for quick action on the bill, limit debate, and limit or prohibit amendments. Otherwise, a bill might never reach the House floor.



Introduction in the Senate. To introduce a bill, a senator must be recognized by the presiding officer and announce the introduction of the bill. A bill that has passed either house of Congress is sometimes called an *act*, but the term usually means legislation that has passed both houses and become law.



Consideration by the House begins with a second reading of the bill, the only complete reading in most cases. A third reading, by title only, comes after any amendments have been added. If the bill passes by a *simple majority* (one more than half the votes), it goes to the Senate.



The bill goes to the Senate to await its turn. Bills normally reach the Senate floor in the order that they come from committee. But if a bill is urgent, the leaders of the majority party might push it ahead.



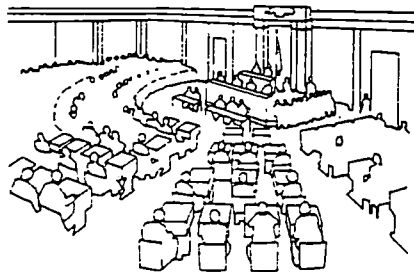
Committee action. The committee or one of its subcommittees studies the bill and may hold hearings. The committee may approve the bill as it stands, revise the bill, or table it.



Assignment to committee. The Vice President of the United States, who is the presiding officer of the Senate, assigns the proposed law to a committee for study. The Senate has about 15 standing committees.



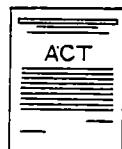
The Senate considers the bill. Senators can debate a bill indefinitely, unless they vote to limit discussion. When there is no further debate, the Senate votes. Most bills must have a simple majority to pass.



A conference committee made up of members of both houses works out any differences between the House and Senate versions of the bill. The revised bill is sent back to both houses for their final approval.



The bill is printed by the Government Printing Office in a process called *enrolling*. The clerk of the house of Congress that originated the bill certifies the final version.



The Speaker of the House signs the enrolled bill, and then the Vice President signs it. Finally, Congress sends the proposed new legislation to the White House for consideration by the President.

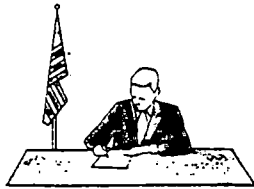


Action by the President

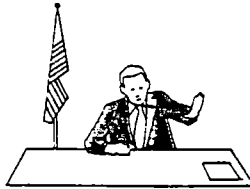
A bill passed by Congress goes to the President, who has 10 days—not including Sundays—to sign or veto it. The President may also let a bill become law by letting 10 days pass without acting.



Approval. After approving a bill, the President signs it, dates it, and often writes *approved* on it.



Veto. A vetoed bill must be returned to Congress with an explanation of the President's objections.



No action. The President might not veto the bill but may fail to sign it to show disapproval of some parts.

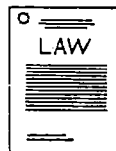


Reconsideration by Congress. If two-thirds of those members present approve the vetoed bill, it becomes law despite the veto.



Ten days pass. If the President holds the bill for 10 days—excluding Sundays—while Congress is in session, it becomes law without the signature of the chief executive. A bill that reaches the President fewer than 10 days—excluding Sundays—before Congress adjourns cannot become law without the President's signature. If the President fails to sign the proposed law, it dies. This procedure is called a *pocket veto*.

The bill becomes law and is given a number that indicates which Congress passed it. For example, a law enacted by the 95th Congress might be designated Public Law 95-250.



limits them. However, it does not answer all questions. For example, who in the government is to say that a state is trying to use a power that belongs to the federal government? Who is to say that the federal government is attempting to exercise a power that belongs to the states? Who is to say that the President, Congress, or the Supreme Court are acting unconstitutionally?

Judicial review is the method used to answer the basic question: Who is to say what the Constitution means in cases of dispute? Courts have the power to declare legislative acts and executive orders (1) constitutional, or legal; or (2) unconstitutional, or illegal.

Judicial review confines the state and national governments within their constitutional limits. Generally, the state courts interpret the state constitutions, and federal courts interpret the U.S. Constitution. The Supreme Court can declare unconstitutional executive orders and legislative acts of the federal or the state governments. The Constitution clearly states that it and all federal laws and treaties are the supreme law of the land.

Popular sovereignty allows the American people to change the Constitution. Congress initiates amendments to the Constitution. A proposed amendment must have the approval of two-thirds of both the Senate and the House of Representatives. It then goes to the states for their approval. Congress may call a national convention to propose amendments, if two-thirds of the state legislatures request it. The amendment becomes a part of the Constitution after legislatures or conventions in three-fourths of the states have ratified it. The American people may adopt an entirely new constitution by calling a new constitutional convention, like the one at Philadelphia in 1787. If such a convention were held, the constitution it adopted would be sent to the states for approval. It would become effective when ratified in the same way as an amendment.

Political parties and elections

The American people have a strong voice in their government. They can exercise their democratic rights by voting in national, state, and local elections, and by working in political parties and campaigns.

The two-party system. The United States has two major political parties, the Democratic and the Republican. Both parties receive support from individuals and groups in all parts of the country. Members of these two parties hold almost all the offices in the national, state, and local governments.

Minor political parties of the United States rarely elect candidates to government offices. They serve chiefly to call attention to problems that the major parties may have neglected. Often, one or both of the major parties may then attempt to solve such a problem. Then the third party, which brought attention to the problem, may disappear. See *Political party*.

National elections to elect a President and Vice President are held every four years on the first Tuesday after the first Monday in November. All members of the House of Representatives and about one-third of the members of the Senate are elected at this same time. Between the presidential elections, all of the representatives and another one-third of the senators are elected. This election is held on the same day in November in even-numbered years.

Federal and state laws regulate elections and the qualifications of voters. Most states hold *primary* elections in which party members nominate candidates for state and local offices. Some states use primary elections to nominate candidates for Congress. National political conventions nominate candidates for President and Vice President. See *Political convention*; *Primary election*.

Presidential elections are held to select electors to the Electoral College (see *Electoral College*). Each state has as many electors as the total of its senators and representatives in Congress. The District of Columbia has three electors. The electors usually vote for the candidate who receives the most votes in their state. A candidate for President must receive a majority of the electoral votes to be elected.

The development of American government

English background. The United States inherited many government practices from the English rulers of colonial days. In England, the people, particularly in the middle classes, had fought their kings to win the right to representative government. They had also won civil rights and liberties that would protect them and their property from arbitrary acts of government.

The English colonists brought with them the ideas of representative government and civil liberties when they came to America. American frontier life produced much individual independence and self-reliance because of the equal opportunity offered each person. Representative government and many civil liberties became even broader than they had been in Great Britain.

Early American government. The colonies became states after the Declaration of Independence in 1776. They founded the first independent general government in the United States under the *Articles of Confederation* (see *Articles of Confederation*). Under the Articles, the 13 states guarded their individual powers so strictly that they failed to give Congress the power to tax or to regulate interstate and foreign commerce. Congress could not even create an army without asking the state governments for men and money. Such leaders as George Washington, Benjamin Franklin, James Madison, and Alexander Hamilton feared that the weak national government would collapse. This concern led to the Constitutional Convention of 1787 in Philadelphia. There, the delegates wrote the Constitution of the United States. The document went into effect on June 21, 1788, when New Hampshire became the ninth state to ratify it.

The Constitution gave the national government more powers than it had possessed under the Articles of Confederation. The federal government exercises these powers directly over the people, not through the state governments, as it had done under the Articles.

The growth of American government. Congress gave the western territories of the United States local representative government as they grew in population. The Northwest Ordinance, passed under the Articles of Confederation in 1787, became a model for future territorial governments (see *Northwest Ordinance*). After a territory had enough people, Congress admitted it into the Union as a state.

The United States purchased Alaska in 1867, and in 1898 it acquired Puerto Rico, Hawaii, and the Philip-



1 Carpenters Hall,
Philadelphia (1774)



2 Independence Hall, Philadelphia
(1775-1776; 1777; 1778-1783)



3 Congress Hall,
Baltimore (1776-1777)

Meeting places of American Congresses

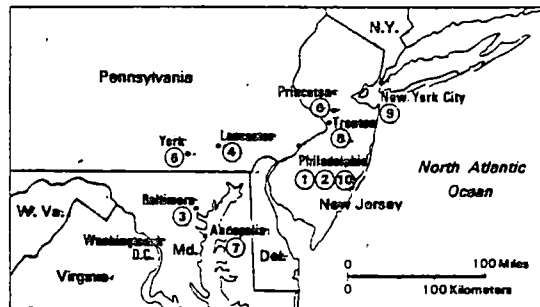
The earliest American Congresses met in the buildings shown here. The Continental Congress first met in 1774 in Carpenters' Hall, Philadelphia. In 1776, Philadelphia's Independence Hall became the first Capitol of the new nation. In 1800, the Congress of the United States moved into the first Capitol in Washington, D.C.



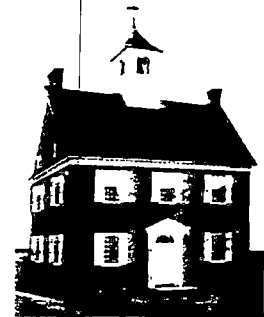
4 Old Court House
Lancaster, Pa. (1777)



10 Congress Hall,
Philadelphia
1790-1800



WORLD BOOK map



5 York County Court House
York, Pa. (1777-1778)



9 Federal Hall,
New York City (1785-1790)



8 French Arms Tavern,
Trenton, N.J. (1784)



7 State House,
Annapolis, Md. (1783-1784)



6 Nassau Hall
Princeton, N.J. (1783)

At first, these territories did not receive as democratic and representative a government as the other territories within the borders of the United States. But the Philippines gained full independence in 1946. Puerto Rico became a commonwealth in 1952. Alaska and Hawaii became the 49th and 50th states in 1959.

Problems of government. Since 1789, all governments—national, state, and local—have taken on more powers and duties. They have been forced to do so by the increase in population, the growth of cities and towns, the development of industries, and the growth of transportation and communications. Problems that were once local, such as conservation and transportation, have become national. The belief has developed that people should use government and other organizations

to provide themselves with services, such as social security, made possible by modern wealth and science. As a result, the federal government has grown even faster than the state and local governments.

Many people object to the expansion of federal authority, particularly over state and local matters. Others insist that public interest demands federal control in cases that involve more than one state. When conflicts arise, the courts must decide how to balance states' rights with the needs of the nation.

William C. Carleton

Related articles in World Book include:

Executive departments

Agriculture, Department of
Commerce, Department of

Defense, Department of
Education, Department of

Energy, Department of
Health and Human Services,
Department of
Housing and Urban Develop-
ment, Department of
Interior, Department of the
Justice, Department of

Labor, Department of
State, Department of
Transportation, Depart-
ment of
Treasury, Department of the
Veterans' Affairs, Department
of

Executive office of the President

Economic Advisers, Council of
Management and Budget,
Office of

National Security Council
President of the United States

Independent agencies

Civil Rights, Commission on
Consumer Product Safety
Commission
Environmental Protection
Agency
Equal Employment Opportunity
Commission
Export-Import Bank of the
United States
Federal Communications
Commission
Federal Deposit Insurance Cor-
poration
Federal Election Commission
Federal Home Loan Bank
Board
Federal Maritime Commission
Federal Mediation and Concilia-
tion Service
Federal Reserve System
Federal Trade Commission
General Services Admini-
stration

Indian Claims Commission
International Trade Commis-
sion, U.S.
Interstate Commerce Com-
mission
National Aeronautics and
Space Administration
National Foundation on the
Arts and the Humanities
National Labor Relations
Board
National Mediation Board
National Science Foundation
Nuclear Regulatory Commis-
sion
Postal Service, U.S.
Railroad Retirement Board
Securities and Exchange Com-
mission
Small Business Admini-
stration
Tax Court, United States
Tennessee Valley Authority

Judicial branch

Court of Appeals
Court of Claims
Court of International Trade,
United States

Court of Military Appeals
District Court
Supreme Court of the United
States

Legislative branch

Congress of the United States
General Accounting Office
Government Printing Office
House of Representatives

Library of Congress
Senate
Vice President of the United
States

Symbols of government

Columbia
E pluribus unum
Flag
Great Seal of the United States

Liberty Bell
Pledge of Allegiance
Star-Spangled Banner
Statue of Liberty
Uncle Sam

Other related articles

American's Creed
Ballot
Bill of rights
Census
Checks and balances
Citizenship
City government
Civil service
Constitution of the United
States
County
Court
Democracy
Electoral College
Foreign Service
Government
Hoover Commission

Immigration
Initiative and referendum
Law
Local government
Money
National debt
Naturalization
Political party
Presidential succession
Public lands
Radio Free Europe/
Radio Liberty
Social Security
Spoils system
State government
States' rights
Statuary Hall

Tariff
Taxation
Territory
United States, History of the
United States capitals
Veto

Voice of America
Voting
Washington, D.C.
White House
Yankee

Outline

- I. Government in American life
- II. The executive branch
 - A. The President
 - B. Executive departments
 - C. Independent agencies
- III. The legislative branch
 - A. The Senate
 - B. The House of Representatives
- IV. The judicial branch
 - A. The Supreme Court
 - B. Other federal courts
- V. Principles of American government
 - A. Separation of powers
 - B. A written constitution
 - C. Judicial review
 - D. Popular sovereignty
- VI. Political parties and elections
 - A. The two-party system
 - B. National elections
- VII. The development of American government
 - A. English background
 - B. Early American government
 - C. The growth of American government
 - D. Problems of government

Questions

How does the United States government differ from most other national governments?

What are the three branches of the United States government?

What is *popular sovereignty*? *Judicial review*? Why are they important in the United States government?

How does each branch of the government exercise its powers of checks and balances?

How does the United States Constitution divide powers among the national and state governments?

What is an *independent agency*? What does it do?

How did the ideas of representative government develop in the colonies?

What steps must be taken to amend the United States Constitution?

What are two exclusive powers of the House of Representatives?

What are some typical questions of government left unanswered by the United States Constitution?

Reading and Study Guide

See *United States Government* in the Research Guide/Index, Volume 22, for a *Reading and Study Guide*.

Additional resources

Level I

Acheson, Patricia C. *Our Federal Government, How It Works: An Introduction to the United States Government*. 4th ed. Dodd, 1984.

Cook, Fred J. *The Rise of American Political Parties*. Watts, 1971.

Coy, Harold. *Congress*. Rev. ed. Watts, 1981. *The Supreme Court*. Rev. ed. 1981.

Elting, Mary, and Gossett, Margaret. *We Are the Government*. Rev. ed. Doubleday, 1967.

Level II

Both Ends of the Avenue: The Presidency, the Executive Branch, and Congress in the 1980's. Ed. by Anthony King. American Enterprise Institute, 1983.

Page, Benjamin I. *Who Gets What from Government*. Univ. of California Press, 1983.

United States Government Manual. U.S. Government Printing Office. Published annually.

Vetterli, Richard, and Bryner, Gary. *In Search of the Republic: Public Virtue and the Roots of American Government*. Rowman & Littlefield, 1987.

[Excerpts]

THE UNITED STATES GOVERNMENT MANUAL 1990/91

Census 1790

Basket Street					
130					
Robert Connel	Age	230	1	2199	3
John	Age	232			
Emmich	Age	234	1		1
Schultz	Age	236	1		4
Elizabeth Robt	Age	238	1		
Hinckle	Age	240	1		1
Margaret	Age	242	1		1
George	Age	244	1		2
Thomas	Age	246	1		2
John	Age	248	1		
Benjamin	Age	250	1		
John	Age	252	1		
Benjamin	Age	254	1		
Benjamin	Age	256	1		
Benjamin	Age	258	1		
Benjamin	Age	260	1		

Revised July 1, 1990

Martha L. Girard,
Director of the Federal Register.

Don W. Wilson,
Archivist of the United States.

Stock Number: 069-000-00033-9
Price: \$21

Preface

As the official handbook of the Federal Government, *The United States Government Manual* provides comprehensive information on the agencies of the legislative, judicial, and executive branches. The *Manual* also includes information on quasi-official agencies; international organizations in which the United States participates; and boards, committees, and commissions.

A typical agency description includes a list of principal officials, a summary statement of the agency's purpose and role in the Federal Government, a brief history of the agency, including its legislative or executive authority, a description of its programs and activities, and a "Sources of Information" section. This last section provides information on consumer activities, contracts and grants, employment, publications, and many other areas of public interest.

The 1990/91 *Manual* was prepared by the Legislative Unit, Office of the Federal Register. Gwendolyn J. Henderson was Managing Editor; Gregory R. Walton, Suzanne L. Meyer, and J.O. Wallace were Assistant Editors.

This year's *Manual* cover observes the bicentennial of the original 1790 census. It illustrates a portion of an authentic enumeration log from a 1790 Pennsylvania tally and contains such prominent names as John Wilson, a signer of the Constitution and an Associate Supreme Court Justice; Thomas Mifflin, then Governor of Pennsylvania; among other notables. The cover is reproduced from the original copy preserved at the National Archives and Records Administration.

THE FEDERAL REGISTER AND ITS SPECIAL EDITIONS

The *Manual* is published as a special edition of the *Federal Register* (see 1 CFR 9.1). Its focus is on programs and activities. Persons interested in detailed organizational structure, the regulatory documents of an agency, or Presidential documents should refer to the *Federal Register* or one of its other special editions, described below.

Issued each Federal working day, the *Federal Register* provides a uniform system for publishing Presidential documents, regulatory documents with general applicability and legal effect, proposed rules, notices, and documents required to be published by statute.

The *Code of Federal Regulations* is an annual codification of the general and permanent rules published in the *Federal Register*. The *Code* is divided into 50 titles that represent broad areas subject to Federal regulation. The *Code* is kept up to date by the individual issues of the *Federal Register*.

The *Weekly Compilation of Presidential Documents* serves as a timely, up-to-date reference source for the public policies and activities of the President. It contains the remarks, news conferences, messages, statements, and other Presidential material of a public nature issued by the White House during the week reported.

A companion publication to the *Weekly Compilation* is the *Public Papers of the Presidents*, which contains public Presidential documents and speeches in convenient book form. Volumes of the *Public Papers* have been published for every President since Herbert Hoover, with the exception of Franklin D. Roosevelt, whose papers were published privately.

IV U.S. GOVERNMENT MANUAL

OTHER OFFICE OF THE FEDERAL REGISTER PUBLICATIONS

The Office of the Federal Register publishes slip laws, which are pamphlet prints of each public and private law enacted by Congress. Slip laws are compiled annually as the *United States Statutes at Large*. The *Statutes* volumes contain all public and private laws and concurrent resolutions enacted during a session of Congress; recommendations for executive, legislative, and judicial salaries; reorganization plans; proposed and ratified amendments to the Constitution; and Presidential proclamations. Included with many of these documents are sidenotes, U.S. Code and statutes citations, and a summary of their legislative histories.

The *Codification of Presidential Proclamations and Executive Orders* provides in one reference source proclamations and Executive orders issued from the Truman through the Reagan administrations that have general applicability and continuing legal effect. The *Codification* is divided into 50 chapters representing broad subject areas. Incorporated into each codified document are all amendments that were in effect on the most recent revision date.

PUBLICATION AVAILABILITY

The publications of the Office of the Federal Register are available for sale by writing:

Superintendent of Documents
Government Printing Office
Washington, DC 20402-9325

and are also sold at Government Printing Office bookstores located in several major cities. Telephone inquiries should be directed to 202-783-3238.

The *Federal Register* and *Code of Federal Regulations* are available in microfiche form as well as bound paper copies. In addition, these publications are available to the public at designated Government depository libraries and many other libraries. For more information, see the "Sources of Information" section of the Government Printing Office's statement in this book.

FURTHER INFORMATION

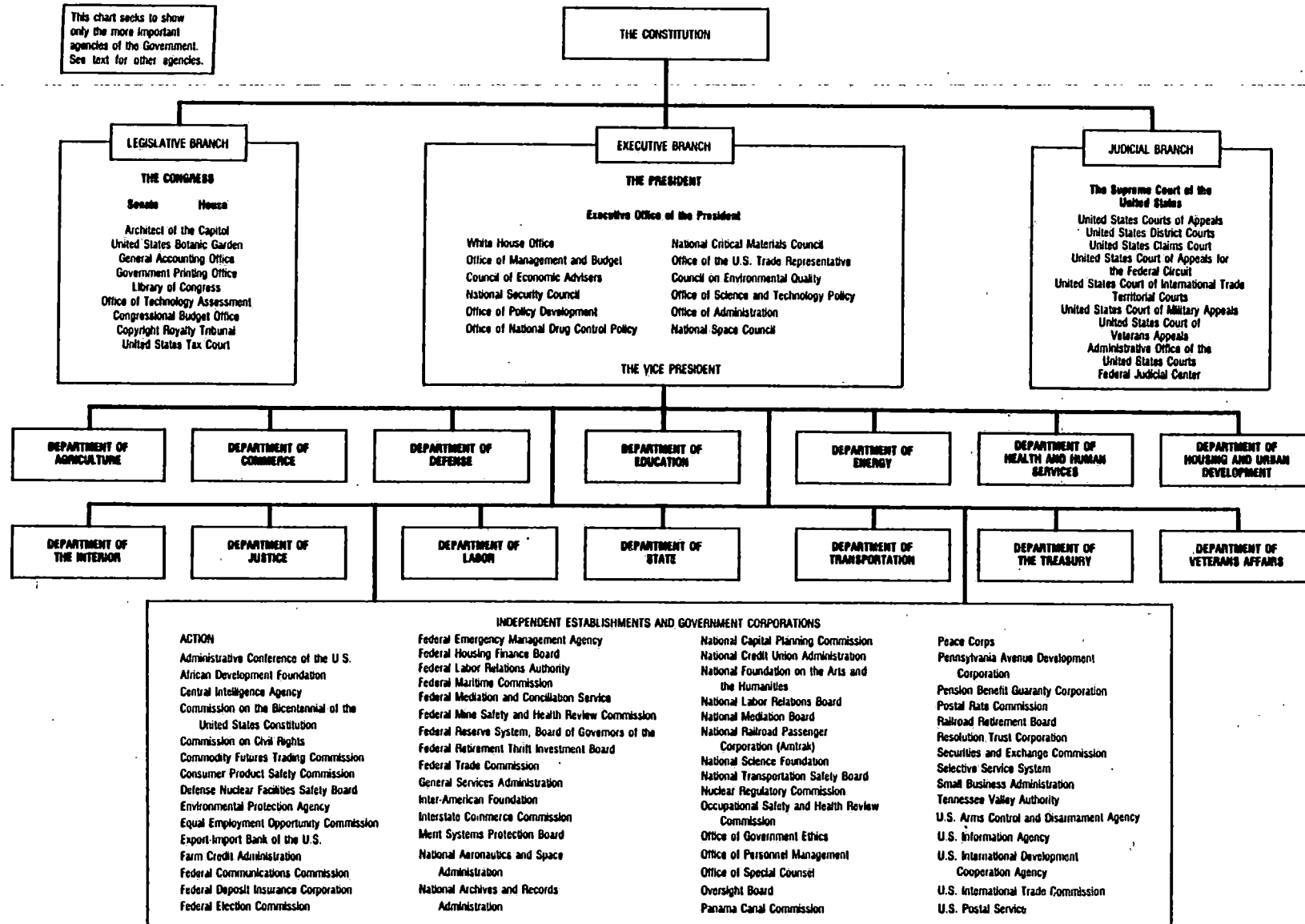
Information on the contents of *The United States Government Manual* and other publications of the Office of the Federal Register may be obtained by writing:

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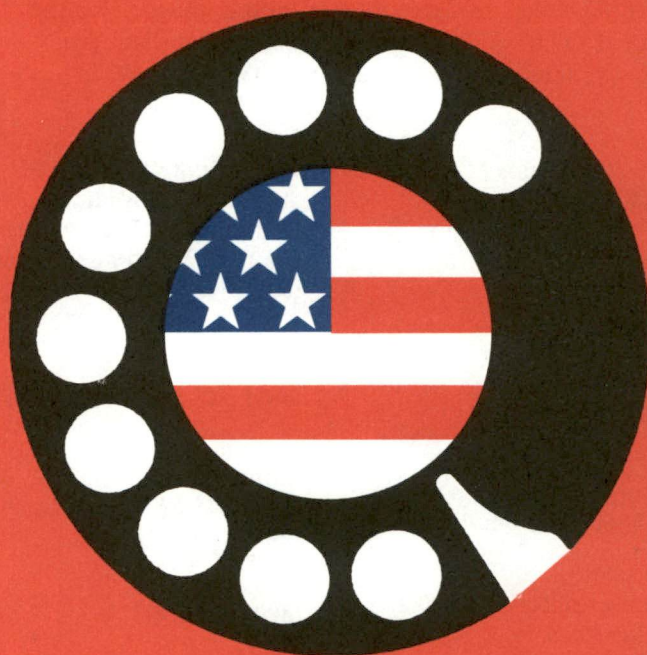
Telephone inquiries concerning the editorial content of the *Manual* should be directed to 202-523-5230.

THE GOVERNMENT OF THE UNITED STATES

This chart seeks to show only the more important agencies of the Government. See text for other agencies.



Federal Information Center



U.S. General Services Administration

Have you ever tried to find an answer to a simple question about the federal government and ended up on a merry-go-round of referrals? Or, have you ever had a question about the federal government that was so difficult that you didn't even know where to begin?

The Federal Information Center is one office that has specially selected and trained its staff to answer your questions or help you find the right person with the answer.

Simply call the telephone number listed below for your metropolitan area or State. If your area is not listed, please call (301) 722-9098. If you would prefer to write, please mail your inquiry to the Federal Information Center, P.O. Box 600, Cumberland, MD 21502. Users of Telecommunications Devices for the Deaf (TDD/TTY) may call toll-free from any point in the United States by dialing (800) 326-2996.

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New York, Rochester,
Syracuse
(800) 347-1997

North Carolina
Charlotte
(800) 347-1997

Ohio
Akron, Cincinnati,
Cleveland, Columbus,
Dayton, Toledo
(800) 347-1997

Oklahoma
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