ARTICLES

THE INCOMPATIBILITY PRINCIPLE

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TABLE OF CONTENTS

Introduction 225
I. Constitutional History...231
II. Incompatibility and Standing to Sue..236
III. The Legislative Veto: A Boundary Defined by Process 242
IV. The Line Item Veto: A Misnomer 249
V. Executive Appointments and Removals...251
VI. The Effects of the Incompatibility Principle...................................265
Conclusion...268

INTRODUCTION

American legal scholars, after examining our separation of powers jurisprudence, have deemed it a mess.[1] They point to the Supreme Court's modern cases, which tend to oscillate between two incompatible doctrinal approaches without explaining why one is chosen.[2] The "formalist" cases stress the undoubted purpose of the Constitution's Framers to create three separate and distinct branches of government.[3] Formalism is a process of

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1. *See, e.g.*, E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989).

2. *See generally* Symposium, *Reviving the Structural Constitution*, 22 HARV. J.L. & PUB. POL'Y 3 (1998); Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491 (1987); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

3. *See* THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (stating that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the

reasoning logically, and often narrowly, from the text of the Constitution and the emphasis on the need for three autonomous branches. One goal is to draw clear lines of authority. Other cases are "functionalist," stressing the Framers' equally apparent purpose to allow some blending of power.[4] Functionalism responds to the modern-day perception of a need to allow for diverse government structure, especially below the level of the three constitutional branches themselves. Functionalists stress the blending of powers in the Constitution and the Framers' arguments for checks and balances. They ask such questions as whether a particular institutional arrangement aggrandizes the power of a branch or invades the "core functions" of another branch—if not, they would uphold it.

Apart from the Court's doctrinal inconsistency, there are defects in each of its favored approaches. Formalism is very fierce; it consumes statutes that may serve real needs of government. Functionalism is quite permissive; it blesses statutes that may contain serious flaws. The way out of this mess, I believe, is for the Court to identify principles establishing when it should take a strict approach to statutes, and when it should not. That task, once completed, can lead to a judgment that our separation of powers jurisprudence is not a "mess" after all—it is merely complicated and, like all law, imperfect in some particulars.

The Framers of the Constitution had three broad purposes in mind as they constructed a scheme of partly separated powers. First, they hoped to ensure the rule of law as a government "of laws not men."[5] Second, because oppression can result from duly enacted laws as well as from despots, they searched for means to preserve their newly-won liberties. Third, they hoped to create a republic that would be marked by public virtue and promotion of the public, not private, interest.[6] The complex and original means that the Framers chose to achieve these purposes was a government featuring three branches that were partly autonomous but also partly accountable to each other. The Framers hoped that the effect of this unique structure would be a balanced government. Indeed, they wanted this form of government to reflect the traditional "mixture" theories they had endorsed as the way to avoid tyrannical power concentrations.[7]

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same hands, . . . may justly be pronounced the very definition of tyranny").

4. *See id.* at 302 ("[Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other.").

5. *See* M.N.S. SELLERS, AMERICAN REPUBLICANISM, ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION 69-70 (1994) (attributing the phrase to Livy). In England, it was taken up again by James Harrington in The Commonwealth of Oceana (1656). *See* POLITICAL WORKS OF JAMES HARRINGTON (J.G.A. Pocock ed., 1977).

6. GARRY WILLS, EXPLAINING AMERICA (1981).

7. *See, e.g.*, I. BERNARD COHEN, SCIENCE AND THE FOUNDING FATHERS 215-17 (1995) (explaining that among the Framers, John Adams, drawing on arguments for balanced government from the works of Machiavelli and Harrington's *Oceana*, placed special emphasis on balance). Traditional mixture theories, dating from Polybius, used a balance of

American courts, and especially the Supreme Court, have translated these general purposes and structural characteristics into a body of law concerning separation of powers. After more than two centuries of case law, the resultant doctrines fall into four broad categories, each of which can be tied to the original purposes of the separation of powers doctrine. First, some leading cases promote the rule of law by forcing the executive to obey statutes and Congress to obey the Constitution.[8] This is not, however, an uncomplicated task. The rule of law must always accord an appropriate place for discretion; judgments about the appropriate tradeoffs between the two values are inevitable.[9] Second, other leading cases balance the need for the autonomy of each branch against the equally evident need that it be accountable to the other branches and to the people in essential ways.[10] The question here is what particular kinds of autonomy and accountability should be recognized. Third, the courts engage in a general review of legislation to detect any aggrandizement of power or disturbance of the overall balance that might have escaped the other two inquiries.[11] Not surprisingly, this rather unanchored third test is often assailed for its subjectivity.

To review the jurisprudence that has been generated by these first three inquiries is a separate subject.[12] In this Article, I isolate a fourth portion of the Supreme Court's doctrine and suggest a principle by which it can be understood, guided, and critiqued. The focus of this body of law is the need to maintain the essential structure of the Constitution while allowing construction of a complex modern government. I begin, as the Framers did, with a foundational choice about the structure of the national government: that it would be a system of separated powers instead of the blending that characterizes parliamentary government.[13] My thesis is that the Court should enforce the formal separations between Congress and the executive that establish the boundaries between these two branches, and

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the elements of monarchy, aristocracy, and democracy to prevent the dominance of any one of them. The American republic, lacking monarchs and nobles, had to balance government branches to achieve a similar effect.

8. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

9. A major role of modern administrative law, especially after the expansion of standing in the second half of the twentieth century, is to allow citizens and organizations to serve as a check on the government's compliance with statutes.

10. *See, e.g.*, United States v. Nixon, 418 U.S. 684 (1974).

11. *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988).

12. I have explored the subject in HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE (2006).

13. The Framers' equally foundational choice of federalism is not pertinent to my discussion, as it involves the relationship of the national government to the states. For a ringing endorsement of the parliamentary form for nations contemplating new governments, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

that most other relationships among the branches be left to Congress to adjust by statute. To understand why, it is necessary to begin at the beginning.

In his famous discussion of the separation of powers in *The Federalist*, James Madison asked: "Will it be sufficient to mark, with precision, the boundaries of these [three] departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?"[14] Experience had taught that the answer was "no." Instead, "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition."[15] A primary mechanism to achieve these goals was the Incompatibility Clause in Article I, § 6, providing that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." The Clause assures that different persons will write and execute the laws, creating the means and motives that keep the branches separate.

The Incompatibility Clause has never been interpreted by the Supreme Court. That does not trivialize the Clause, however. Our system of government rests on textual provisions of the Constitution that have never been litigated because their clarity has forestalled controversies that the Framers intended to prevent.[16] The Incompatibility Clause ought to be much more important to judicial interpretation of our system of separated and checked powers than its history of neglect by the courts suggests. Most of the Supreme Court's formalist cases can be explained and justified by reference to the policies that underlie the Clause. I call these policies the incompatibility principle to distinguish them from the narrower textual force of the Clause itself. The principle has lain just below the surface even where the Court has chosen to rely on other, related constitutional provisions such as the Appointments Clause.[17] The primary effect of the

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14. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

15. *Id.* at 322.

16. For example, Article I assures Congress the right to meet every year, as well as the right to control who sits as a member. These provisions responded to abuses that had occurred in seventeenth century England, when a king prorogued Parliament for eleven years and Cromwell's generals sat at the door of Parliament, determining who could enter. *See generally* CHRISTOPHER HILL, THE CENTURY OF REVOLUTION, 1603-1714 (1961). Hence, fundamental guarantees of the autonomy of Congress lie partly in constitutional commands that have (happily) laid beyond controversy.

17. The Court's tendency to rely on constitutional text that it has frequently interpreted, to the exclusion of more obscure, but perhaps more relevant provisions, is well known. *See, e.g.*, CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 165 (1969) ("But to a Court which depends on a document for its authority, it is not clear that the structural simplicity achieved by having a few clauses dominate constitutional adjudication

principle on constitutional adjudication should be to require strict separations between legislative and executive personnel and functions.[18] Thus, the Court's use of a permissive balancing, or "functional," approach to approve blended powers in contexts not involving the legislative-executive boundary can be explained and justified by the limits of the incompatibility principle.

The Incompatibility Clause has prevented the development of a semi-parliamentary form of government in the United States, in which many or all members of the president's cabinet might sit simultaneously in Congress.[19] The election of the president by the people, as refracted through the electoral college, precludes any full parliamentary system. The autonomy of each of the two political branches has persisted through all the stresses and strains of our history. Even though, at the nadir of presidential power in the late nineteenth century, Woodrow Wilson could describe our system as "Congressional Government," the subsequent revival of an independent and forceful executive needed only the firm hands of Theodore Roosevelt on the reins of the presidency.[20]

This Madisonian tension and competition between the branches depends on two kinds of separations between them. First, there are formal relationships. The executive branch selects its officers, promotes them, dismisses them, and assigns them to particular activities, all within the parameters allowed by law. Congress does the same for its own agents. Control follows these basic features of employment, and would be vitiated or lost if some or all were absent. Second, the informal aspects of separation, although dependent on the formal aspects, are no less important. The two branches have their own distinct cultures, which they transmit to

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is preferable to the directness with which decisions could be explained from the constitutional text if more clauses were permitted to play a role.").

18. *See infra* notes 81-91 and accompanying text (discussing, in connection with *INS v. Chadha*, 462 U.S. 919 (1983), that the principle could also call for separating legislative and judicial functions).

19. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994) (discussing the background and effect of the Incompatibility Clause, and arguing for the extension of its principle to joint executive-judicial and federal-state office holding).

20. *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 6 (1885) ("The noble charter of fundamental law given us by the Convention of 1787 is still our Constitution; but it is now our *form of government* rather in name than in reality, the form of the Constitution being one of nicely adjusted, ideal balances, whilst the actual form of our present government is simply a scheme of congressional supremacy."). By 1900, Wilson perceived change: The president was once again "at the front of affairs." *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 22 (15th ed. 1900) ("He [the president] may be both the leader of his party and the leader of the nation, or he may be one or the other."). "If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it." *Id.* When he reached the presidency, Wilson certainly tried to play this role, and often succeeded. *See* AUGUST HECKSCHER, WOODROW WILSON (1991).

new employees through training, peer pressure, and daily exposure to the arguments favoring their own branch. Officers of the political branches soon form loyalties to and share the values of their own branch; they readily believe that their branch is right and the other is wrong about the enduring issues. All lawyers experience this kind of effect when they participate in adversary procedures. Indeed, many workers in all fields generate loyalty to their employers—at least if the company treats them decently.

Members of Congress and their staffs see Congress as the "first branch," tied closely to the people and exercising the primal function of legislation.[21] From Capitol Hill, the executive branch appears arrogant and secretive, dangerous in its capacity for sudden action, and strangely unresponsive to the people's will as embodied in Congress. In contrast, the president and his cabinet see themselves as representing the nation in a way that local politicians in Congress cannot, and they certainly consider themselves sufficiently open to outside influences from many quarters, including Congress and the general public. From the White House and its environs, Congress appears meddlesome, suspicious, and fractured. Both of the branches tend to descend into self-righteousness when relating to each other. This characteristic confirms the Madisonian tension, but at the cost of impeding working relationships.

Lawyers for a branch of government are immersed in a longstanding legal tradition of shared views about their branch's powers and perquisites. The body of precedents that their predecessors have generated is known to them, and is self-perpetuating because no one wants to waive or undermine traditional institutional arguments. In addition, career advancement within the branch is more likely for those who strongly champion its interests. Finally, there is never an absence of competing views from the other branch and private parties, which to the government lawyer seem to be skewed by interest and clearly erroneous on the merits. These competing arguments create compensatory aggressiveness in interpretation and argument. On the other hand, opposing views may check irresponsible arguments by exposing their flaws.

The effectiveness of the combination of formal and informal means of control is especially clear when a long-time member of one branch moves to the other.[22] For example, when Senator John Ashcroft became Attorney General Ashcroft, no one should have expected him to remain a

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21. *See, e.g.*, ABNER J. MIKVA & PATTI B. SARIS, THE AMERICAN CONGRESS, THE FIRST BRANCH (1983).

22. For example, Abner J. Mikva served as a member of Congress, U.S. Circuit Judge, and White House Counsel, a separation of powers trifecta. He seems to have adjusted his loyalties appropriately with each new post.

congressional loyalist, nor did he. The most that should have been expected is sympathetic understanding of the interests of the branch formerly occupied. The Framers understood the mutability of loyalty, as they demonstrated by their prohibition of joint but not sequential office holding in the two branches.

I. CONSTITUTIONAL HISTORY

The original purpose of the Incompatibility Clause was to protect, rather than to confine, legislative power.[23] The Framers, who kept a close eye on British political developments, followed a longstanding controversy over "corruption."[24] The term had several meanings in that era, centering on the use of public office to produce private gain over public virtue. After restoration of the monarchy in the seventeenth century, English kings searched for ways to control the surging power of Parliament. They began "corrupting" Parliament by offering its members lucrative executive positions, in hopes of securing influence over them in their legislative capacity.[25] The Framers learned about government in Great Britain largely through the writings of the opposition, the "outs," who were fearful of placemen and of Parliament's habit of expanding government by making

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23. *See* Calabresi & Larsen, *supra* note 19, at 1052-77.

24. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 80-81, 174-75 (1992); *see also* Margaret A. Banks, *Drafting the American Constitution—Attitudes in the Philadelphia Convention Towards the British System of Government*, 10 AM. J. LEGAL HIST. 15, 31 (1966).

25. *See* J.H. PLUMB, ENGLAND IN THE EIGHTEENTH CENTURY 47 (1950) (noting that in the early eighteenth century, "the relationship between executive and legislature bewildered contemporary Englishmen"). He explains:

> Bolingbroke, the chief expositor of constitutional theory in the early decades, felt that the executive had no right to be in Parliament which was to be the judge of its acts, but the practical wisdom of Walpole and Newcastle saw that, if any continuity of policy was to be achieved, the executive needed to be in control . . . . Nor was there any party organization as we know it. Hence, left to its own devices, Parliament would have been an anarchy of individual minds and wills, swayed by the tide of circumstance.

Id. The solution, Plumb explains, was to give the King's supporters places, "usually sinecures, such as Master of the King's Tennis Court or Taster of the King's Wines in Dublin," in return for which they voted as desired and helped "in piloting government measures through the Commons." *Id.* at 47-48; *see also* W.S. Holdsworth, *The Conventions of the Eighteenth-Century Constitution*, 17 IOWA L. REV. 161, 163-70 (1932) (discussing influence as a link between the Crown and Parliament). In the eighteenth century, the Cabinet was a loose link; Parliament could oust a minister or demand an appointment, but defeat of a program would not cause resignation of the group. Cabinet government and collective ministerial responsibility had not yet developed, and emerged only well into the nineteenth century. In the eighteenth century, the Crown used patronage which checked Parliament and kept it from dominating completely.

new places to fill.[26] Hence, to our founding generation, joint office holding threatened to afford the executive undue influence over the legislature.[27]

The subsequent history of Great Britain demonstrated that "corruption" works both ways. Joint office holding soon became the mechanism by which Parliament worked its will with the executive. This point about the potential effects of blended functions is fundamental to the incompatibility principle. Drawing a bright line between our own legislative and executive branches assures the autonomy of each from the other. The temporary political ascendancy of one branch cannot be converted into a permanent institutional one, as has occurred in Britain.

In America, both the post-revolutionary state governments and the Articles of Confederation banned joint office holding.[28] Without controversy, the Constitutional Convention adopted the Incompatibility Clause to prevent it. There was, however, spirited controversy over the companion Ineligibility Clause which, as eventually adopted, provides that "[n]o Senator or Representative shall, during the Time for which he was

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26. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (noting that English opposition thought was "devoured by the colonists," and was very familiar to them throughout the eighteenth century). He further states that this was the set of beliefs "from which would issue the specific arguments of the American Revolution." *Id*. at 44. Key elements were natural rights, the contract basis of society, and the value of the mixed constitution of England. Opposition writers of both left and right "viewed their circumstances with alarm, . . . and dwelt endlessly on the evidences of corruption they saw about them and the dark future these malignant signs portended." *Id.* at 46. They saw political stability under Walpole as based "on the systematic corruption of Parliament by the executive, which, they warned, if left unchecked, would eat away the foundations of liberty." *Id.* at 48. They "hammered away" at this "obsessive concern" and found a receptive audience in the colonies, where their heated descriptions were received as fact. *Id.*

27. There was a related concern among the colonists about multiple office holding in general, regardless of whether it produced a technical incompatibility. The poster child for this concern was Thomas Hutchinson of Massachusetts, who held numerous royal offices simultaneously. *See* FRED ANDERSON, CRUCIBLE OF WAR 605-06, 669 (2000).

28. *See* Calabresi & Larsen, *supra* note 19, at 1056-58 (explaining that in the Colonies, Royal Governors used patronage to buy support for the Crown, and that eleven of thirteen state constitutions had strict incompatibility clauses, with New York and South Carolina being the exceptions); *see also* GORDON S. WOOD, THE AMERICANIZATION OF BENJAMIN FRANKLIN 164 (2004) (reporting Franklin's republican purity in urging the state constitution's drafters in Pennsylvania to adopt an article that "expressed a view of government that his witnessing corrupt English politicians seeking lucrative royal offices had taught him"). As enacted, it condemned "'offices of profit, the usual effects of which are dependence and servility unbecoming freemen, in the possessors and expectants; faction, contention, corruption, and disorder among the people.'" WOOD, *supra*, at 164. Wood concludes that "Americans in 1776 thought that the Crown had used money and influence to buy up the House of Commons and had corrupted the English constitution. They meant to prevent that corruption in their own new republican state constitutions." *Id*. at 165. Article V of the Articles of Confederation accordingly forbade every delegate to Congress to hold "any office under the United States, for which he, or another for his benefit, receives any salary, fees or emolument of any kind." ART. OF CONFEDERATION art. V.

elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time."[29]

The Virginia Plan, with which the Constitutional Convention began, rendered members of Congress ineligible for "any office . . . under the authority of the United States . . . during the term of service," and for an unspecified time thereafter.[30] Thus, joint office holding would be barred, and sequential office holding limited. Debate, which focused on the sequential barrier, harkened back to the British experience. The Convention's most ardent republicans, Gerry and Mason, stressed the proven dangers of executive corruption and thought a strong ineligibility provision was essential to protecting the people's liberty.[31] Hamilton, invoking Hume, responded that the executive needed some means of influence to preserve the overall balance among the branches.[32] Wilson cautioned that a rigid ineligibility rule could deprive the nation of its best military leaders in wartime if they happened to be serving in Congress—and everyone knew he was referring to Washington. Madison opposed ineligibility because he thought the prospect of subsequent executive office would attract more able candidates for Congress. He crafted a characteristically elegant compromise by proposing the clause as it was eventually adopted. He thought that congressional nest-feathering, and not

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29. U.S. CONST. art. I, § 6, cl. 2. *See* Calabresi & Larsen, *supra* note 19, at 1062-77 (charting the constitutional history of the Incompatibility and Ineligibility Clauses); *see also* THORNTON ANDERSON, CREATING THE CONSTITUTION, THE CONVENTION OF 1787 AND THE FIRST CONGRESS 143-48 (1993); 2 THE FOUNDERS' CONSTITUTION 346-73 (Philip B. Kurland & Ralph Lerner eds., 1987) (offering a selection of original sources bearing on the Clauses).

30. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20-21 (Max Farrand ed., rev. ed. 1987) (May 29, 1987) [hereinafter FARRAND].

31. *See* WOOD, *supra* note 28, at 216-17 (demonstrating how Benjamin Franklin exemplified republican purity by his proposal that members of the executive in the new nation serve without pay). Franklin

> had long believed that there were 'two Passions which have a powerful Influence in the Affairs of Men . . . *Ambition* and *Avarice*; the Love of Power and the Love of Money.' Each separately was a forceful spur to action, but when united in the minds of some men they had the most violent effects . . . . Franklin's evidence for his views was England. For many years he had believed . . . that 'the Root of the Evil' in England's politics lay 'in the enormous Salaries, Emoluments, and Patronage' of its 'Great Offices.'

Id. The American counter-example, of course, was Washington, who had served as Commander in Chief for eight years without pay. Franklin's "classically republican" motion was seconded, tabled, and forgotten. "'It was treated with great respect,' Madison noted, 'but rather for the author of it than from any conviction of its expediency or practicability.'" *Id.*

32. *See* FARRAND, *supra* note 30, at 381 ("We have been taught to reprobate the danger of influence in the British government, without duly reflecting how far it was necessary to support a good government.") (quoting Alexander Hamilton).

ordinary ambition, was the abuse to be remedied.[33] It was only late in the Convention, however, that disagreements over ineligibility were resolved and Madison's compromise adopted.[34]

The Incompatibility and Ineligibility Clauses were linked closely to the Appointments Clause in the minds of the Framers.[35] The joint operation of these three provisions would promote the delicate balance of power that suffuses the Constitution. Congress could create or enhance offices but could neither fill them itself nor press for nomination of its members to new offices.[36] The president, holding an important patronage power, could

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33. *See id.* at 386, 388 (calling his position a "middle ground," Madison "supposed that the unnecessary creation of offices, and increase of salaries, were the evils most experienced . . . ."). If "the door was shut" against them "it might properly be left open" for other appointments as an inducement to "the Legislative service." *Id.* at 386. This raises the possibility that the Ineligibility Clause can be satisfied (or evaded) by depriving an appointee of the increase in emoluments that occurred during his or her congressional service. *See* Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907 (1994) (providing an account of the recurrent controversy about this issue and a strict view of the Clause).

34. *See* FARRAND, *supra* note 30, at 166 (showing how The Committee of Detail Report still had a bar on joint offices during congressional terms, and another year for senators). On August 14, 1787, that provision was considered. *Id.* at 283-90. Pinkney, arguing that the bar was a waste of talent and a disincentive to serve, moved to replace it with an ineligibility clause such as the one earlier proposed by Madison. Mason thought this would encourage a "mercenary and depraved ambition." Mercer argued the executive's need for influence by the power to offer appointments. Gouverneur Morris urged a simple incompatibility clause: "Why should we not avail ourselves of their services if the people chuse to give them their confidence." The issue was postponed until the Committee of Eleven reported, providing for ineligibility during the term of congressional office, along with a simple incompatibility clause. *Id.* at 483. On September 3, 1787, it was taken up and amended into essentially its final form. *Id.* at 492.

35. *See* THE FEDERALIST NO. 76, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (closing his discussion of the president and the appointment power, and noting that the check of senatorial confirmation was not the Constitution's "only reliance" for controlling the president's appointments). The Incompatibility and Ineligibility Clauses "provided some important guards against the danger of executive influence upon the legislative body." *Id.* Madison called the Ineligibility Clause a way to prevent the president from suborning the "virtue" of the House. *See* THE FEDERALIST NO. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961); *see also* H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1037-43 (1975).

36. *See* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 483-84 (1989) (Kennedy, J., concurring) (refusing to countenance statutory restrictions on the President's process for selecting judicial nominees). Kennedy thought the role of Congress under the Appointments Clause was closely limited.

> By its terms, the Clause divides the appointment power into two separate spheres: the President's power to "nominate," and the Senate's power to give or withhold its "Advice and Consent." No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment.

Id. at 483. Kennedy buttressed his viewpoint by invoking the words of Alexander Hamilton:

> In the act of nomination, [the President's] judgment *alone* would be exercised; and as it would be his *sole* duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as *complete* as if he were to make the final appointment.

Id. (quoting THE FEDERALIST NO. 76, at 456-57 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (emphasis added).

> It will be the office of the President to *nominate,* and, with the advice and consent

fill offices with the Senate's consent, but could neither create them nor offer them to someone who would also remain in Congress.[37] Hence, the functions of generating and applying the laws would be placed in separate hands, reducing the potential for arbitrary treatment of citizens.[38]

The fear of corruption remained evident in the early Republic, the period of the Framers-in-government. Jefferson's visceral opposition to Hamilton's financial program at the new Treasury Department grew out of his understanding of British history: Walpole had built his own power by expanding the Treasury and linking it to both the Commons and commercial interests.[39] There were even concerns regarding a proposal to have Hamilton report his recommendations on raising revenue to Congress out of a fear of undue executive influence.[40] In these early days, the Washington Administration's practice of appointing members of Congress to the European ministries raised old fears of executive patronage, even though they resigned to take the offices. The fact that appointments were being made only from the President's party seemed corrupt as well.[41] The new Constitution contained no bar against joint judicial-executive service, probably because the judiciary was only beginning to be separated clearly from its executive roots in England.[42] Yet, republican purists objected to

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> of the Senate, to *appoint.* There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice he may have made.

Id. (quoting THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). "Indeed, the sole limitation on the President's power to nominate these officials is found in the Incompatibility Clause . . . ." *Id.* at 484.

37. *See* THE FEDERALIST NO. 69 (Alexander Hamilton) (defending the presidency as less powerful and dangerous than the British monarchy on a number of grounds, including the monarch's ability both to create and fill offices, whereas the president was only allowed to nominate to existing offices, with the Senate checking him in that function).

38. *See* THE FEDERALIST NO. 47 (James Madison) (Clinton Rossiter ed., 1961) (offering the classic statement of this purpose of separation of powers).

39. *See* BERNARD BAILYN, TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS 49-50 (2003). Jefferson

> understood the threatening implications immediately; they squared perfectly with his historical memory and his political beliefs and fears. He, like radical theorists in Britain, believed it had all happened before, early in the century, in Walpole's buildup of the power of the British Treasury in collaboration with [banking and commercial interests.] That alliance, he knew, had allowed Walpole to buy the votes he needed in the House of Commons, overthrow the famed separation of powers of the government, and usher in an age of limitless greed and political squalor."

Id. The engine of corruption was to be the Bank of the United States. "The bank's stockholders, like those of the Bank of England, would forever be able to manufacture a legislative majority to suit them and so corrupt the Constitution and reshape it 'on the model of England . . . . Hamilton truly believed, Jefferson wrote, 'that corruption was essential to the government of a nation.'" *Id.*

40. JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 104 (1999).

41. *Id.* at 172-73.

42. *See* Case of Hayburn, 2 U.S. (2 Dall.) 409, 413 (1792) (holding that no court could

the appointment of the first two Chief Justices, Jay and Ellsworth, to be ambassadors while continuing to serve on the Court.[43]

Throughout American history, the Incompatibility Clause has been mostly self-enforcing. No one thinks that he or she can hold another major federal office while in Congress. Thus, at the outbreak of the Civil War, several members of Congress resigned to join the Army, hoping, no doubt, soon to return triumphant.[44] In addition, "the President's duty to take care that the law of the Incompatibility Clause is observed requires him or her to ensure that appointments and legislation creating governmental positions are consistent with the Clause."[45] The Department of Justice does not object to the service of members of Congress in other offices that are "advisory or ceremonial," such as the Commission on the Bicentennial of the Constitution.[46] For more substantial posts, the Department can treat acceptance of a seat in Congress as an implied resignation of the executive office.[47] Nevertheless, political delicacies can forestall strict enforcement of the Clause, as can be seen in the Supreme Court's only flirtation with the merits of an incompatibility controversy.[48]

II. INCOMPATIBILITY AND STANDING TO SUE

In *Schlesinger v. Reservists Committee to Stop the War*,[49] and its companion case, *United States v. Richardson*,[50] the Court declined to reach the merits of separation of powers cases on grounds that the plaintiffs lacked standing. *Schlesinger* involved a claim that the Incompatibility

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perform an executive task reviewable by the Secretary of War, but several Justices thought that individual judges could perform such service).

43. LYNCH, *supra* note 40, at 137, 211. *See generally* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH (1995).

44. Those members who resigned to join the Confederate Army encountered an incompatibility of truly unique proportions.

45. Memorandum from Assistant Attorney General Walter Dellinger, Office of Legal Counsel, U.S. Dep't of Justice, on The Constitutional Separation of Powers Between the President and Congress*, reprinted in* H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 653 (1999).

46. *Id.*; *see also* Appointments to the Commission on the Bicentennial of the Constitution, 8 Op. Off. Legal Counsel 200 (1984) (providing advice about compliance with the Clause).

47. *See, e.g.*, Case of the Collectorship of New Orleans, 12 Op. Att'y Gen. 449 (1868).

48. *See* Memorandum Opinion for the Counsel to the President, Members of Congress Holding Reserve Commissions, 1 Op. Off. Legal Counsel 242, 244 n.11 (1977) ("In 40 Op. Atty. Gen. 301 (1943), Attorney General Biddle advised President Roosevelt that the power to enforce Art. I, § 6, Cl. 2, rested with Congress and that the House of Representatives had in the past disqualified Members who accepted military commissions for active service. He concluded that it would be a 'sound and reasonable policy' for the President to avoid any possible conflict with the clause by not permitting Members of Congress to serve on active duty. We do not know what action, if any, the President took in response to the opinion.").

49. 418 U.S. 208 (1974).

50. 418 U.S. 166 (1974).

Clause forbade members of Congress to hold commissions in the Armed Forces Reserve. The plaintiffs, an antiwar group, had sought mandamus against the Secretary of Defense to force him to remove members of Congress from the reserve lists. They alleged injury as war opponents, citizens, and taxpayers, caused by undue executive influence over Reserve officers who were also members of Congress.

The posture of the case reveals an immediate difficulty with judicial enforcement of the clause. Its text—forbidding those holding offices to be members of Congress—appears to be addressed to Congress, yet the plaintiffs sued the military for relief. The reason is obvious: They were trying to avoid the Speech or Debate privilege that protects members of Congress from certain kinds of lawsuits.[51] To be sure, the Court has allowed suit directly against members of Congress in contexts not within the privilege.[52] Even by steering well clear of that reef, however, the plaintiffs could not hide the lurking presence of congressional autonomy interests that the executive, for its part, had not been willing to confront.[53] The Court would not confront them either.

Chief Justice Burger's opinion for the Court characterized the plaintiffs' claim as involving "only the generalized interest of all citizens in constitutional governance, and that is an abstract injury."[54] Of course, the plaintiffs had tried to articulate an interest not shared with the public, and had plausibly done so. Hence, Justice Marshall's dissent would have grounded standing on the plaintiffs' antiwar stance, which they did not share with everyone. They had, according to Marshall, "alleged a right, under the Incompatibility Clause, to have their arguments considered by Congressmen not subject to a conflict of interest by virtue of their positions in the Armed Forces Reserves."[55] Nevertheless, the majority mischaracterized their claim as a generalized grievance in a way that it often does in standing cases.[56] Gliding on, the Court said that a concrete injury was necessary to give the courts a factual context that would aid

51. *See* U.S. CONST. art. I, § 6 (stating "for any speech or debate in either house, they shall not be questioned in any other place").

52. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111 (1979) (allowing a defamation action for a press release).

53. After *Schlesinger* was decided, a Member of Congress wrote the President asking that he enforce the Clause against reservists in Congress. The Department of Justice opined that "the exclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress." *See* Memorandum Opinion for the Counsel to the President, *supra* note 49, at 242. The opinion distinguished the president's usual refusal to make appointments contravening the Clause from this situation, in which the contested appointments had already occurred.

54. *Schlesinger*, 418 U.S. at 217.

55. *Id.* at 239 (Marshall, J., dissenting). Justice Brennan, also dissenting, would have upheld taxpayer standing. *Id.* at 235-38 (Brennan, J., dissenting).

56. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984).

sound judgment by revealing the consequences of a controversy. Moreover, judicial restraint minimized conflict between the branches—in this case, the Court feared potential conflict with both other branches. The Court concluded that "[t]he proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries."[57] If the consequence was that no one had standing, the issue would be remitted to the political process.

Justice Douglas's dissent reached the merits. He argued that, as Hamilton had pointed out, "the Incompatibility Clause had a specific purpose: to avoid 'the danger of executive influence upon the legislative body.'"[58] Accordingly, the Framers "set up constitutional fences barring certain affiliations."[59] This was to protect the interests of citizens, whose "'personal stake' in the present case is keeping the Incompatibility Clause an operative force in the Government by freeing the entanglement of the federal bureaucracy with the Legislative Branch."[60]

The companion case, *Richardson*, involved a taxpayer's attempt to compel publication of the Central Intelligence Agency's (CIA) budget. He invoked the Constitution's requirement in Article I, § 9, that a "regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[61] The CIA Act authorized secrecy for the agency's accounts.[62] In another opinion by Chief Justice Burger, the Court denied Richardson standing to sue. The Court declined to extend *Flast v. Cohen*,[63] which allowed taxpayers to challenge federal spending, beyond the Establishment Clause context in which it arose. The Court argued that because Richardson was not directly challenging an exercise of the taxing or spending power, but rather the statutes regulating the CIA, there was no "logical nexus" between his status as a taxpayer and Congress's failure to require the executive to supply a more detailed report of CIA expenditures. Although Richardson wanted more detailed

57. *Schlesinger*, 418 U.S. at 227.
58. *Id.* at 232.
59. *Id.* at 233.
60. *Id.* at 234. He continued,

> The interest of the citizen in this constitutional question is, of course, common to all citizens. But as we said in *United States v. SCRAP*, 412 U.S. 669, 687-688 [(1973)], "standing is not to be denied simply because many people suffer the same injury . . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."

Id. at 235.
61. U.S. CONST. art. I, § 9, cl.7.
62. The Act permitted the Agency to account for its expenditures "solely on the certificate of the Director." 50 U.S.C. § 403j(b) (2000).
63. 392 U.S. 83 (1968).

information so that he could monitor the government, "the impact on him is plainly undifferentiated and 'common to all members of the public.'"[64] The Court accordingly remitted him to the political process.[65]

As these cases reveal, American courts have not adopted the concept of the "public action," a right of any citizen to hold the government accountable to law.[66] In *Schlesinger*, the majority revealed its concern that citizenship standing to contest constitutional violations would have "no boundaries." Justice Powell's concurrence in *Richardson* gave a classic exposition of judicial hesitancy to start down that road. He feared making the judiciary a free-floating Council of Revision whose excessive power would only invite retaliation from the political branches.[67] Nevertheless, the *Flast* criteria for taxpayer standing are invented ways to allow Establishment Clause challenges to federal spending without opening the gates to other taxpayer or citizen suits. It is possible to do something similar for separation of powers cases.

As it has done in reapportionment cases, the Court could look for situations where the political process will not correct a problem. In the companion cases, both political branches profited from allegedly unconstitutional arrangements. Secret spending protects both branches

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64. United States v. Richardson, 418 U.S. 166, 176-77 (1974). The Court quoted *Ex parte Lévitt*, 302 U.S. 633, 634 (1937), a case involving the Ineligibility Clause. The Court described *Lévitt* as follows:

> There Lévitt sought to challenge the validity of the commission of a Supreme Court Justice [Hugo Black] who had been nominated and confirmed as such while he was a member of the Senate. Lévitt alleged that the appointee had voted for an increase in the emoluments provided by Congress for Justices of the Supreme Court during the term for which he was last elected to the United States Senate. The claim was that the appointment violated the explicit prohibition Art. I, §6, cl. 2, of the Constitution . . . . Of course, if Lévitt's allegations were true, they made out an arguable violation of an explicit prohibition of the Constitution. Yet even this was held insufficient to support standing because, whatever Lévitt's injury, it was one he shared with "all members of the public."

Richardson, 418 U.S. at 177-78 (internal footnote omitted).

65. In *FEC v. Akins*, 524 U.S. 11 (1998), the Court subsequently upheld standing based on an "informational injury" that is very difficult to distinguish from the injury alleged by Richardson. In *Akins*, however, Congress had attempted to confer standing to challenge the FEC's actions, as it had not done in *Richardson*.

66. *See* LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-500 (1965) (distinguishing public and private rights of action).

67. Justice Powell argued that "allowing unrestricted . . . citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." *Richardson*, 418 U.S. at 188. Repeated confrontations between the courts, with their limited political capital, and the political branches would harm both sides. If courts were to employ the potent power of judicial review imprudently, "we may witness efforts by the representative branches drastically to curb its use." *Id.* at 191. Justice Stewart, who dissented in *Richardson*, concurred in *Schlesinger*. He argued that "unlike *United States v. Richardson*, . . . the respondents do not allege that the petitioners have refused to perform an affirmative duty imposed upon them by the Constitution." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228-29 (1974) (Stewart, J., concurring). Justice Powell's concurrence demolished this distinction between affirmative and negative constitutional duties.

from accountability for their actions; military commissions for members of Congress give each branch influence in the other. Obviously, discussing political incentives of other officers to violate the Constitution is not an activity the courts relish. Nevertheless, a responsible judgment that a plaintiff can be left to invoke the political process does demand a corollary judgment that the asserted constitutional violation has not vitiated that very process.

Thus, standing could vary according to the perceived purposes of particular constitutional provisions and how proximately they affect the public.[68] Citizen standing to enforce the Incompatibility Clause could be grounded on three premises. First, the purpose of the Clause is to prevent consensual arrangements by the political branches that violate its command. Second, violations would likely skew legislative behavior in ways that affect citizens. Third, there is likely no other available plaintiff. For a contrary example, consider a citizen's attempt to review a decision by Congress concerning whether to expel a member for misconduct on the floor. If expelled, the member would provide a superior plaintiff; if not, the interests of the public in policing this aspect of congressional behavior seem far more remote than an incompatibility controversy. Moreover, Congress can claim an autonomy interest in controlling its internal processes, an interest that would not be present in other constitutional contexts.

Standing is a doctrine that identifies parties who may sue, as compared to other possible parties. When all citizens share the same interest in a possible constitutional violation, as in *Richardson*, a denial of standing equates to a determination that an issue is a political question. In *Schlesinger*, the Court remarked that the "more sensitive and complex task of determining whether a particular issue presents a political question" influenced courts to prefer standing analysis.[69] Perhaps this preference deters some abuses by leaving the other branches to wonder whether the Court might someday find a suitable plaintiff if sufficiently tempted to do so.

These two doctrines can, however, produce different outcomes, as the companion cases illustrate. *Richardson* may have presented a political question, given the sensitive judgments that underlie secret spending and the limited capacity of courts to review them intelligently. If some secret spending is legitimate, courts probably lack manageable standards for determining how much to allow. Alternatively, the cloak-and-dagger

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68. Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1162 (1993).
69. *Schlesinger*, 418 U.S. at 215.

aspects of national security spending fairly invite a reviewing court to announce that the issue is textually committed to the political branches.

In contrast, the Incompatibility Clause presents no barrier to the articulation of manageable legal standards. The opinion by Judge Gesell that the Supreme Court reversed in *Schlesinger* provides an example.[70] Reaching the merits, he noted that most congressmen were in the Standby or Retired components of the reserve. All were subject to a call to active duty without their consent. Standby status carried no pay but allowed participation in training and accrual of promotion and retirement credits. Retired members could receive pay. Gesell decided that the purposes of the Clause barred these affiliations—it meant to erect "an inflexible barrier" against the holding of "any other office" by members of Congress.[71] He cited a report by the House Judiciary Committee that forbade a Representative to serve in the National Guard and that rejected an argument for a *de minimis* exception to the Clause on grounds that "no line can be drawn between the large and the small office. The Constitution prohibits a Member of Congress from holding 'any' office under the United States . . . ."[72]

A bright line is certainly a manageable standard. For good measure, Judge Gesell added an argument based on degrees of influence: "[G]iven the enormous involvement of Congress in matters affecting the military, the potential conflict between an office in the military and an office in Congress is not inconsequential."[73] In addition, members of the reserves were disproportionately represented on congressional committees that dealt with military affairs.

I agree that the Framers would have considered "corruption" through influence purchased by offices to be a matter not of degree but of kind—hence the force of Justice Douglas's argument about "constitutional fences." The mutuality of influence that stems from joint office holding creates conflicts of interest in both federal branches, as it did in *Schlesinger*. A reservist member of Congress experienced conflicting incentives both within the military itself—solidarity with the war effort versus fear of callup—and between military and legislator status—loyalty to military needs versus demands of civilians. High defense officials experienced incentives to curry favor with reservist congressmen regardless of whether that behavior accorded with military principles. The usual response to such conflicts is to forbid them, rather than to assess whether they have, in fact, produced the evils feared.

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70. Reservists Comm. to Stop the War v. Laird, 323 F. Supp. 833 (D.D.C. 1971).
71. *Id.* at 838.
72. H.R. REP. NO. 64-885, at 7 (1916).
73. *Laird*, 323 F. Supp. at 838-39.

The fact that the Department of Justice declined to consider the merits of the very issue involved in *Schlesinger* reveals that the executive is not free of its own debilitating conflicts in considering these issues.[74] Unless the courts are willing to reach the merits of incompatibility controversies, the Clause may not be enforced even when vital interests of the public are at stake. Congress can receive some deference by judicial crafting of a *de minimis* exception. Thus, Congress allows uncompensated service by its Members as trustees of public institutions and in similar functions.[75] Some kinds of honorific extra-legislative service are harmless and even laudable, but I would not allow service with any entity that has any role in implementing federal law.

III. THE LEGISLATIVE VETO: A BOUNDARY DEFINED BY PROCESS

A longstanding constitutional controversy over the legislative veto, which was eventually settled by the Supreme Court in a landmark case, reveals the need to define where legislation ends and execution begins. By drawing a bright, formal line between these two constitutional functions, the Court has clarified their allocation between legislative and executive officers. The Court's distinction is essential to the operation of the incompatibility principle.

Legislative veto is a shorthand phrase for any mechanism through which Congress employs a resolution of one or both of its houses to approve or disapprove an executive exercise of delegated authority.[76] These resolutions purport to have mandatory effect, although they are not submitted to the President for his possible veto. For example, using a "one-house veto," Congress may delegate to an agency the authority to promulgate a rule, but provide that the rule shall not go into effect if it is disapproved by either house of Congress. A two-house veto takes the form of a concurrent resolution, which is a resolution of both houses not submitted to the president.[77]

The use of legislative vetoes resulted from congressional frustration with the problem of delegating power to the executive. Congress has never been comfortable with broad grants of statutory power because they are so difficult to modify or retract in the face of the president's veto. The power of the president's veto is great: Throughout American history, Congress has

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74. *See supra* note 53.

75. Dellinger, *supra* note 46; CONGRESSIONAL RESEARCH OFFICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. NO. 99-16, at 131 (1987).

76. For a comprehensive history of the legislative veto, see Watson, *supra* note 35. There also have been vetoes assigned to committees in either of the houses of Congress.

77. In contrast, a *joint* resolution is presented to the president and is essentially the same as ordinary legislation. It creates no constitutional issues.

overridden only about seven percent of presidential vetoes.[78] At the same time, Congress has not wanted to confine executive discretion so closely in advance that national needs might go unmet. To Congress, the veto device offered a very attractive alternative to this dilemma—an initial, broad delegation could be made, but with legislative veto authority retained. Then Congress could monitor executive implementation of the statute and veto particular actions that it disapproved. Between the eve of the New Deal, when the device first became prominent, and 1983, when the Supreme Court considered the constitutional issue, it was embedded in over 200 statutes.[79]

Presidents from Franklin Roosevelt through Ronald Reagan resisted legislative veto provisions on both constitutional and policy grounds, while often signing bills containing veto provisions. The primary constitutional objection was always that legislative veto resolutions have the effect of law because they invalidate otherwise effective executive actions, yet they are not presented to the president for his veto or signature. Ironically, the veto, designed to *increase* congressional control of the executive, *decreased* that control whenever Congress did not give active review to an executive action because it encouraged Congress to make broader delegations than it would have done in the absence of the veto reservation.[80]

The Supreme Court finally considered the issue in *Immigration and Naturalization Service v. Chadha*.[81] A provision of the Immigration and Nationality Act authorized the Immigration and Naturalization Service (INS) to suspend an alien's deportation on grounds of "extreme hardship," and allowed either house of Congress to pass a resolution to invalidate any suspension. Chadha, an alien who was deportable because his student visa had expired, sought and obtained suspension of deportation from INS. At an adjudicative hearing within INS, he proved hardship by establishing that

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78. PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 151-55 (2d ed. 2005) (discussing the extent of presidential veto power and noting that by 2003, there had been a total of 2,550 such vetoes—1,484 regular and 1,066 pocket). The figure of seven percent does not include pocket vetoes, which are absolute. *Id.* at 153.

79. *See* James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977):

> Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940-49, nineteen statutes; between 1950-59, thirty-four statutes; and from 1960-69, forty-nine. From the year 1970 through 1975, at least one hundred sixty-three such provisions were included in eighty-nine laws.

Id.

80. Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977) (characterizing the legislative veto as a "negative check on policies proposed by the agencies, not a means for making policy directly").

81. 462 U.S. 919 (1983).

he might suffer discrimination if deported. The Chairman of the House Subcommittee on Immigration subsequently introduced a resolution opposing several suspensions of deportation, including Chadha's. The House passed the resolution by voice vote after a floor statement by the Chairman arguing that these individuals did not meet the statutory standard for hardship.

When Chadha's challenge to the congressional veto reached the Supreme Court, Chief Justice Burger's majority opinion began by reviewing the purposes of the clauses in Article I of the Constitution that define the legislative process and require presentation of bills to the President. Both the bicameral structure of Congress and the president's veto, he said, were designed with two goals in mind: to check congressional encroachment on the executive by providing the President a means of self-defense, and to promote wise legislation by filtering it through three separate constituency bases. This much was not controversial.

The Court then stated that the bicameralism and presentment requirements of Article I applied only to exercises of "legislative power." The House resolution regarding Chadha was legislative because it "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch."[82] In other words, the resolution had legal effect like a statute; therefore, it had to be processed like a statute. Because Congress had granted statutory authority to the INS to suspend deportations, the Court held that it "must abide by its delegation of authority until that delegation is legislatively altered or revoked."[83] Accordingly, the one-house legislative veto offended both the bicameralism and presentment requirements of Article I.[84]

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82. *Id.* at 952.

83. *Id.* at 955.

84. In his concurring opinion, Justice Powell observed that the Court had swept away all other legislative veto provisions, as none of them provided for presentation to the president. He would have invalidated the challenged statute on a narrower ground. "When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers." *Id.* at 960. He stressed constitutional history—the early state legislatures had assumed and abused judicial powers, much to the distress of the Framers of the Constitution. They had responded with the general safeguard of separated powers and, more specifically, the Bill of Attainder Clause in Article I, § 9. Both were intended to prevent trial by legislature. Justice Powell stated that in this case, the House clearly did not enact a general rule; rather, it determined that certain persons did not meet specific statutory criteria. Consequently, the House had exercised unchecked power. Its action lacked the substantive and procedural constraints that force administrative agencies and courts to treat individuals fairly. Even the political check that attends enactment of general rules that bind everyone was lost. Justice Powell provided a persuasive explanation of the inappropriateness of the legislative veto in cases involving individuals. Even so, Congress does decide many particular matters by legislation, and there is little chance that these statutes will be held to violate the separation of powers. Moreover, congressional review of executive action through the legislative veto virtually always

Justice White, in a long dissent, defended the legislative veto.

> [I]t has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches—the concerns of Madison and Hamilton. Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Art. I as the Nation's lawmaker.[85]

He stressed the practical devolution of lawmaking power to the executive under the broad delegations of power that created the administrative state. This led him to see executive actions, for example in promulgating vast numbers of regulations, as true changes in law upon which Congress attempted to retain a modest check.

Hence, Justice White regarded an executive action such as the suspension of Chadha's deportation as a proposed change in law, which would then be effective only if both houses of Congress accepted it. This met the requirements of Article I, he argued, although in reverse order.[86] This "reverse legislation" theory has an irony.[87] It might justify a one-house veto because majorities in both houses must support an executive action for it to survive. Yet it would not support a two-house veto, which at least satisfies the need for bicameral action. The reason for this discrepancy is that if a proposed change in law is effective when either house supports it, passing legislation is far easier than the Framers intended it to be.

Justice White's "reverse legislation" theory has another fundamental defect. Executive actions that implement statutes are not merely proposals for legislation. They are the core of executive power in the constitutional sense. It is the executive who is charged to "take Care that the Laws be faithfully executed."[88] The Court tried to make this point in a rather

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considered broad policy concerns that are distinct from the limited purposes of judicial review. Therefore, the majority was correct to focus on Article I.

85. *Id.* at 974. Justice Rehnquist also dissented, arguing that Congress did not intend the legislative veto provision to be severable from the rest of the statute (even though the statute contained a provision favoring severability). Therefore, Chadha could not prevail because even if he won his constitutional point, no suspension authority would remain, and he would be deported.

86. Justice White also argued that the veto mechanism meets Article I requirements because it is merely a condition contained in a statute that is passed in full constitutional fashion. Certainly, statutes condition executive action on a myriad of events, but it begs the question of the validity of the legislative veto mechanism to uphold it on the basis of the process that its authorizing statute has undergone. Instead, the issue is the validity of the particular condition, just as it would be for a condition containing a defect that is unrelated to congressional process.

87. *See* Peter M. Shane, *The Separation of Powers and the Rule of Law: The Virtues of "Seeing the Trees,"* 30 WM. & MARY L. REV. 375, 380-81 n.27 (1989) (further discussing the "reverse legislation" theory).

88. U.S. CONST. art. II, § 3.

clumsy and conclusory footnote.[89] It correctly stated that executive actions, except for those based on the president's independent constitutional powers, draw their legal effect from an authorizing statute and may not exceed its scope. Congress can decide a policy issue directly through legislation or delegate it to the executive. To the extent it does the latter, the delegated discretion is executive in nature until Congress removes the authority through legislation.

The Court's decision in *Chadha* has received sharp criticism.[90] It is easy to fault the majority opinion for its conclusory and formalistic approach. The Court stated a syllogism: legislation must follow the constitutional path; legislative veto resolutions have legal effect; therefore, they are unconstitutional. Perhaps the majority was correct in finding that *Chadha* was an easy case, dictated by the plain meaning of the Constitution.[91] Many observers, however, disagree.

The *Chadha* Court never did connect its conclusions to the purposes of bicameralism and presentation. By making that connection, it is possible to articulate a more complete rationale for the Court's action. The structure of Article I serves three purposes, of which the Court identified two—preventing encroachments on the executive and dampening the effects of

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89. The Court said:

> To be sure, some administrative agency action—rulemaking, for example—may resemble "lawmaking." . . . This Court has referred to agency activity as being "quasi-legislative" in character. . . . When the Attorney General performs his duties pursuant to § 244, he does not exercise "legislative" power. The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7. . . . It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act. Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. . . .

INS v. Chadha, 462 U.S. 919, 953-54 n.16 (1983) (citations omitted).

90. *See, e.g.*, E. Donald Elliott, INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 134-35, 144-47; Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789; Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 5-9 (1984).

91. Peter M. Shane, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, 36 AM. U. L. REV. 573, 585-86 (1987).

> It is difficult to see how two-house vetoes, not presented to the President, can pass muster under [the Presentment Clauses]. . . . If that is true, then the question in *INS v. Chadha* was essentially, is there any reason to think that one-house vetoes are more permissible than two-house vetoes? . . . No matter what purpose is ascribed to article I, section 7, I cannot imagine an affirmative answer to that question.

Id. See Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988) (arguing that the Constitution prescribes, in a way that is capable of relatively formal implementation, how and when each branch may act, but leaves open to a balancing analysis those cases where one branch acts within express constitutional constraints, although in a manner that intrudes on another branch's domain); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 52-58.

faction.[92] The third is to reduce the amount of legislation that would burden the people. The legislative veto interferes with the realization of all three.

When Congress sent the President a bill containing a legislative veto provision, it simultaneously contravened two of the purposes of Article I. First, it proposed an encroachment on executive power. In both theory and practice, legislative veto provisions gave Congress a share in the execution of the law in a way that infringed on the incompatibility principle. Without legislative veto authority, the executive bears sole legal responsibility for statutory implementation. With a veto, one or both houses share that responsibility through their power to choose whether to override executive action or to allow it. In practice, programs containing veto provisions featured much more direct participation by congressional committees in formulating executive actions than is otherwise the case.[93] The committees possessed this increased leverage because it was relatively easy to pass a veto resolution compared to ordinary legislation. This leverage was not based on the fact that the other house and the president were not needed, but occurred because a veto resolution did not call for an affirmative and perhaps controversial statement of policy by the house passing it. The veto resolution could simply reject the particular executive policy in question, and could be justified by the institutional congressional need to keep the executive under control.

If legislative vetoes encroached on executive power, why did presidents sign so many statutes containing them? The reason is that the executive wanted power that Congress would not delegate without a veto condition. Hence, statutes containing vetoes expanded the power of the federal government as compared to ordinary legislation. Presidents yielded to the temptation to enter into improper bargains with Congress, receiving increased executive power but sharing it with Congress. This pattern evaded the attempt of the Framers to make the legislative process cumbersome enough to minimize federal legislation, leaving the states and the people free to govern themselves.

The Court could also have pointed out that the Incompatibility Clause forbids Congress from engaging in execution. To the framing generation, the spectacle of Congress and the president bargaining to expand their joint power by trading on mutual influence and evading the limits of the Presentation Clauses would have seemed like "corruption" at its worst. Moreover, the Framers-in-government debated the permissible limits of congressional delegation of power to the executive in quite modern terms,

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92. *See* Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 220-22 (1984).

93. *See* Bruff & Gellhorn, *supra* note 80, at 1378-81.

revealing their shared view that the boundary between the legislature and executive required enforcement.[94]

Supporters of the legislative veto can rejoice, however, as Justice Holmes once pithily remarked: "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."[95] It is certainly true that the president is entitled to no particular substantive content in the statutes empowering the executive, at least outside the realm of his independent constitutional powers over foreign policy and war-making. At the same time, not every procedural condition on delegation is automatically valid, as the Holmes position suggests.[96] The presence in our Constitution of both the Presentation Clause and the Incompatibility Clause requires us to find some boundary between legislation and execution. That boundary is necessarily one of process.

Agencies perform functions that resemble all three constitutional archetypes of power: they adjudicate cases as do the courts, promulgate rules as does Congress, and take enforcement action as does the executive.[97] Hence, there is no coherent functional definition of the boundary between legislation and execution. The one available boundary is that of statutory process: While a statute delegating power to the executive exists, that power is executive in the constitutional sense, until and unless modified or revoked. This boundary recognizes only contingent executive authority, but in light of the practical power of the president's opportunity to veto rescinding legislation, that authority is substantial. The process boundary also reflects the conventional understanding of the limits of congressional and executive oversight of agency action: Informal political pressure may influence an agency within the limits of authority conferred by statute, but may not induce a contravention of that authority.[98]

After *Chadha*, Congress has continued to include legislative veto provisions in new legislation, especially appropriations statutes. Although the executive claims that these have no legal effect, Congress clearly expects informal compliance with them and often obtains it.[99] This

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94. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS, THE FEDERALIST PERIOD 1789-1801 147-49, 246-47 (1997).

95. Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); *accord id.* at 292 (Brandeis, J., dissenting) ("The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.").

96. Thus, the quote from Holmes' dissenting opinion in *Myers*, *id.* at 177, was offered in support of a statute requiring the Senate's advice and consent to remove an executive officer, a condition that the Supreme Court did not allow Congress to impose.

97. *See generally* RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE, ch. 2 (2002).

98. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

99. LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 180-81 (2000);

phenomenon reveals a fundamental difference between substantive legislation and appropriations, one that reveals why enforcement of the process boundary for substantive statutes is important. Most appropriations require yearly renewal if they are to continue.[100] This primal fact brings the executive to Congress to seek funds just as the presence of the president's veto brings Congress to the White House when it wishes to legislate. In the yearly appropriations cycle, the executive often wishes to "reprogram" funds from one budgeted purpose to another within a statutory appropriations account.[101] To do so, it consults the appropriations committees within Congress, lest retaliatory budget-slashing occur the next year. Adding a legislative veto provision to this tradition provides emphasis but little more. In other words, for yearly appropriations, the presence or absence of a legislative veto has little legal or practical consequence.

To maintain the reciprocal binding effect of the president's veto for substantive legislation and Congress's power of the purse for appropriations on the branches, each branch needs autonomy within its sphere. The president needs the unimpaired bulwark of his veto opportunity for substantive legislation as much as Congress needs its power to deny funding by the simple expedient of doing nothing.

IV. THE LINE ITEM VETO: A MISNOMER

Proposals granting the President a statutory line item veto circulated for many years before Congress initiated such an experiment in 1996. The impetus behind these proposals was that the president, with his national constituency, was not subject to the incentives that caused members of Congress to package spending provisions favorable to localities into omnibus, "pork barrel" legislation. The Line Item Veto Act authorized the President to "cancel" three types of provisions in enacted appropriations statutes: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit."[102] A cancellation would be effective if not overturned by enactment of a special disapproval bill by both Houses, subject to presidential veto.

Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288-91 (1993).

100. *See generally* ALLEN SCHICK WITH FELIX LOSTRACCO, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS (rev. ed. 2000).

101. Since the executive's budgetary promises about the use of funds within a statutory appropriations account appear in the legislative history and not the statute, they lack direct legal effect. Lincoln v. Vigil, 508 U.S. 182 (1993).

102. 2 U.S.C. § 691(a) (2000).

In *Clinton v. City of New York*,[103] the Supreme Court invalidated the Act. The President had cancelled two spending provisions; in response, the Court held that "[i]n both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each."[104] Under *Chadha*, repeal of statutes, like enactment, had to follow the full dictates of Article I. Hence, the Act was unconstitutional. Justice Stevens' majority opinion struggled to distinguish traditional statutory delegations of authority to the President. For example, he said that *Field v. Clark*,[105] in which the Court upheld presidential power to suspend exemptions from import duties, was a case involving the execution of a congressional policy, rather than a presidential action rejecting a congressional policy. That distinction, however, omits attention to the statutory policy contained in the Line Item Veto Act. Furthermore, the majority would not compare the Act to the president's traditional authority to withhold some spending authorized by appropriations statutes. The difference was that "this Act gives the President the unilateral power to change the text of duly enacted statutes."[106]

Clinton is thus a formalist opinion much in the style of *Chadha*. This time, though, the Court was wrong. The two former professors of administrative law on the Court, Justices Scalia and Breyer, who were joined by Justice O'Connor, furnished the correct analysis. They characterized the Act as making a delegation to the executive that was subject to the usual need for legislative standards, which were present. Justice Scalia remarked that the title of the Line Item Veto Act "has succeeded in faking out the Supreme Court."[107] In both *Chadha* and *Clinton*, the statutory authorizations for legislative or item vetoes had been enacted through the full constitutional process for legislation. The difference lay in the identity of the recipient of the delegated power. In *Chadha*, power flowed to one or both houses of Congress to control the implementation of executive power in violation of the incompatibility principle. In *Clinton*, power flowed to the president to make policy choices within the range of discretion conferred by statute, in compliance with the incompatibility principle. This distinction also accords with traditional practice under the Constitution. Appropriating funds is clearly a function

103. 524 U.S. 417 (1998).
104. *Id*. at 438.
105. 143 U.S. 649 (1892).
106. *Clinton*, 524 U.S. at 447.
107. *Id*. at 469.

solely for Congress;[108] spending those funds is an executive function that is controlled by the appropriations statutes but ordinarily contains substantial amounts of discretion.[109]

V. EXECUTIVE APPOINTMENTS AND REMOVALS

The body of Supreme Court doctrine that most often implicates the incompatibility principle is that concerning the appointment and removal of executive officers. The Appointments Clause of Article II works closely with the Incompatibility Clause to separate legislation from execution. The Supreme Court has consistently allowed Congress to restrict, but not assume, executive powers of appointment and removal. Again, the effect is to keep legislation and execution in separate hands.

The Constitutional Convention gave serious attention to the method of executive appointments. The initial draft constitution by the Committee of Detail gave the Senate power to appoint ambassadors and Supreme Court Justices; the president could appoint other officers.[110] Late in the Convention, the Committee of Eleven took up unfinished business and reported back the Appointments Clause in essentially its present form. Evidently a compromise had occurred. The Senate's proposed hegemony of foreign policy and the judiciary was replaced by authority in the president to nominate all officers, subject to the check of the Senate's advice and consent for principal officers. The Convention adopted the change.[111]

It is interesting to speculate about the changes in American history that would have resulted had the Convention adopted the initial version of the appointments scheme. The president would have controlled an executive branch for domestic but not foreign policy. A foreign policy dictated by scores of masters would have been notably less coherent at any given time than has been the case. To compensate, the overall direction of foreign policy might have been stabilized by the absence of sharp reversals as the presidency changed hands. The courts would have lacked the insulation from Congress that stems from executive nomination, with some loss of their independence. The road to the Supreme Court would have gone through the Senate. A Supreme Court closely allied to the Senate might have articulated a narrow view of executive power under the Constitution. Such a Court probably would not have taken a strict view of the Incompatibility Clause.

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108. U.S. CONST. art. I, § 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").
109. *See* SCHICK WITH LOSTRACCO, *supra* note 100.
110. FARRAND, *supra* note 30, at 171-72.
111. *Id.* at 533.

For many years, Congress made no effort to strip the president of his role in executive appointments.[112] In *Buckley v. Valeo*,[113] however, the Supreme Court invalidated such an effort. It refused to allow Congress to appoint members of the Federal Election Commission (FEC), which regulates campaigns for federal elective office. Congress had required the FEC, an independent regulatory agency, to have two Commissioners appointed by the president, two by the House of Representatives, and two by the Senate. Each of the three appointing authorities had to select one person from each political party; a majority of both houses of Congress would then vote to confirm the nominees. The Secretary of the Senate and the Clerk of the House were also to serve as ex officio, nonvoting members. This unique arrangement undoubtedly reflected the political sensitivity of the FEC's duties, which are to regulate members of Congress and presidential candidates themselves. The FEC's center of gravity would surely have been on Capitol Hill, from which a majority of its members were to come.

The Court decided that this scheme violated the Appointments Clause, which does not authorize congressional appointments of executive officers.[114] The majority did not discuss the Incompatibility Clause. Justice White thought that the two clauses operated in tandem to establish the "fundamental tenet . . . that the same persons should not both legislate and administer the laws."[115] The Court held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Appointments Clause.[116] The Court said that congressional appointees could perform investigative and informative tasks of the sort that congressional committees do, but that only "Officers of the United States" could do the FEC's duties of bringing civil enforcement actions, promulgating regulations, and deciding administrative adjudications.

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112. In *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928), the Court held that the Legislature of the Philippine Islands could not provide for legislative appointment to executive agencies.

113. 424 U.S. 1 (1976).

114. The Court rejected an argument that Congress's power over federal elections, combined with the Necessary and Proper Clause, justified the scheme:

> Appellee Commission . . . finally contend[s] . . . that . . . Congress had ample authority under the Necessary and Proper Clause of Art. I to effectuate this result . . . . Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in § 9 of Art. I.

Id. at 134-35.

115. *Id.* at 272-73 (White, J., concurring in part and dissenting in part).

116. *Id.* at 126 (majority).

The Court's sharp distinction between investigative and administrative tasks allows Congress to perform its vital investigative functions, whether directly or through special entities it may create. Moreover, the test is easy to apply. It does allow Congress to use the power of information about an agency's activities to influence its policy—in that sense, the distinction is not as clear in practice as it is in theory.[117] Among functions that do constitute execution of the law, the Court included the "quasi-legislative" activity of rulemaking and the "quasi-judicial" activity of adjudication, rejecting an argument that these were not executive in the constitutional sense.[118] This part of the opinion was consistent with *Chadha*'s emphasis that all exercises of delegated statutory power that have legal effect constitute execution of the law.

Buckley was formalist in approach—the Court started with the text of the Appointments Clause, added a premise about what officers do, and concluded that Congress could not share this power because it was not on the list of those who may appoint executive officers.[119] The Court did not ask the questions usually associated with functional analysis: Whether core executive functions are threatened, how much, and with what justification. The Court could easily have written a purely functionalist opinion, however, because the President would retain little control of administration if Congress could place ordinary regulation in the hands of its own agents. The opposite result in *Buckley* would have shifted a large portion of control over the agencies from the executive to Congress, producing, in fact, the "congressional government" that Woodrow Wilson described in the late nineteenth century. Hence, the Court's choice of an analytic approach in *Buckley* did not affect the outcome.

In *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc. (MWAA)*,[120] the Supreme Court overturned another

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117. Regarding investigative functions, consider the United States Commission on Civil Rights. Under 42 U.S.C. § 1975c (2000), the Commission's duties are to "study and collect information" and then to "make appraisals of the laws and policies of the Federal Government" concerning civil rights violations, and to report its findings to Congress and the President. 42 U.S.C. § 1975a. Following a controversy over President Reagan's removal of several Commission members, the Commission was reconstituted by Congress. *See* Comment, *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449, 476-80 (1987). Under 42 U.S.C. § 1975(b)(1), four members are appointed by the president, two by the President pro tempore of the Senate, and two by the Speaker of the House. *See* 42 U.S.C. § 1975(b)(1)-(4). Even though the Commission's activities are investigative, the president could argue that he should be able to appoint all the members of a body that functions as a watchdog over federal civil rights enforcement. Congress would respond by saying that is a good reason for the current composition of the Commission.

118. *See* Buckley v. Valeo, 424 U.S. 140-41 (1976).

119. *See* Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1155-61 (1988) (criticizing the Supreme Court's approach in appointments cases); Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1041-44 (1987) (same).

120. 501 U.S. 252 (1991).

congressional involvement in administration through appointments. In *MWAA*, Congress authorized the transfer of control over two major airports near the District of Columbia from the Federal Aviation Administration to the MWAA, a regional authority established by a Virginia-D.C. compact. To assume control of the airports, the MWAA had to create a Board of Review with the power to veto its decisions. The nine members of the Board of Review were required to be members of Congress, "serving in their individual capacities" as representatives of airport users. Litigation arose over approval of a master plan for expansion of National Airport.

The Supreme Court decided that the Board of Review's power to veto decisions of the MWAA represented federal action taken on behalf of Congress.[121] Turning to the permissibility of the Board's composition, the Court disclaimed direct reliance on either the Appointments Clause or the Incompatibility Clause. Instead, Justice Stevens' majority opinion relied on general separation of powers principles. He noted the Framers' fears of the legislature:

> To forestall the danger of encroachment "beyond the legislative sphere," the Constitution imposes two basic and related constraints on the Congress. It may not "invest itself or its Members with either executive power or judicial power." And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered, procedures" specified in Article I.
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> . . . The Court of Appeals found it unnecessary to discuss the second constraint because the court was satisfied that the power exercised by the Board of Review over "key operational decisions is quintessentially executive." We need not agree or disagree with this characterization by the Court of Appeals to conclude that the Board of Review's power is constitutionally impermissible. If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7.[122]

The majority felt no need to determine which constituted the better characterization—the Act served as "a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role."[123] I think the Board was exercising executive power by applying law generated by Congress or the states, and *MWAA* could therefore have been framed as an

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121. Justice White and two others dissented, arguing that it was implausible to regard Board of Review members as agents of Congress because Congress did not appoint them, continuity in Congress or on any committee was not a condition for completion of service on the Board, Congress could not remove Board members, and Board members had no legal obligations to Congress. *See id.* at 277-93 (White, J., dissenting).

122. *Id.* at 274-76 (citations omitted).

123. *Id.* at 277.

Incompatibility Clause case. The Court, however, held back, probably because the Clause does not forbid members of Congress from holding state executive offices and the conclusion that the Board performed federal action was strained enough to counsel against further exploration of its implications.

Congress responded to *MWAA* by removing the requirement that the Board be composed of members of Congress, although it still restricted its membership to congressional nominees. Congress also removed the Board's veto authority, but allowed the members to have nonvoting participation at meetings of the airport Directors. Congress further authorized the Board to make recommendations to the Directors which, if not adopted, would subject the Directors' actions to joint resolutions of disapproval by Congress. In *Hechinger v. Metropolitan Washington Airports Authority*,[124] the D.C. Circuit struck down the new arrangement. It correctly concluded that the Board still served as an agent of Congress and still exercised federal power as defined in *MWAA*.

In *Federal Election Commission v. NRA Political Victory Fund*,[125] the D.C. Circuit strictly interpreted *Buckley* and *MWAA* by finding unconstitutional the continuing presence on the FEC of the two nonvoting congressional appointees—a matter not discussed in *Buckley*. The court held that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution"[126] because the congressional agents would necessarily influence the other commissioners. As in *MWAA*, the court thought that the danger of congressional encroachment on the executive justified a strict separation of powers approach.

Two related issues in *NRA Political Victory Fund* concerned the constitutionality of congressional moles within executive agencies. The first issue dealt with whether executive officers have a substantive right to be free of direct congressional pressure while engaging in policy formulation. This interest in executive autonomy implicates the incompatibility principle directly; the court correctly valued this interest highly. The second issue, primarily procedural in nature, concerned the confidentiality of policy dialogue. Although Congress opened many of the deliberations of multi-member agencies like the FEC to public view through the Sunshine Act,[127] the Act contains exceptions allowing confidential discussions, which would lose much of their efficacy if congressional monitors were present for discussions among the Commissioners. A constitutional issue lurks in the background. Executive

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124. 36 F.3d 97 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).
125. 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed,* 513 U.S. 88 (1994).
126. *Id.* at 827.
127. 5 U.S.C. § 552b (2000).

privilege has fallen on bad days,[128] and the Court has never decided whether the independent agencies may avail themselves of its protection. The basic constitutional privilege recognized in *United States v. Nixon*,[129] however, still shields policy debate in at least some precincts. The values underlying both executive privilege and the incompatibility principle suggest the need for some zone of privacy for executive deliberation.

Thus, the courts have made it clear that Congress may not administer the laws it enacts, either directly through its own members (*MWAA*), or indirectly by appointing persons who thereby become its agents (*Buckley*). Nor may Congress take legislative action without presentation to the president (*Chadha*). When Congress is not trying to seize the reins controlling ordinary regulation from the executive, the Court has not taken a strict formalist view of the Appointments Clause. Thus, the Court has upheld the use of private arbitrators to apply statutory norms in some federal programs.[130] Because these cases concerned adjudicative functions, the Court's concerns centered on the requisites of Article III and due process, not the Appointments Clause. The Court has also blessed an executive agreement that transferred claims pending in federal court to international arbitral panels composed partly of foreign citizens who are emphatically not "Officers of the United States."[131] Historical practice and the nation's needs for effective international claims settlement mechanisms took precedence over a literal interpretation of the Appointments Clause.

Once an officer is appointed, he or she can be removed by Congress through the impeachment power. However, everyone understands that this power is too limited and cumbersome to serve as an everyday tool for supervising an officer's conduct. As a result, most controversies focus on the availability and nature of other means of removing executive officers. The assumption throughout has been that the branch that can remove an officer controls the officer for constitutional purposes.

The Constitutional Convention did not discuss the subject of removal, except for the question of impeachment. The First Congress considered the removal issue in 1789 in the process of constructing the new executive departments. The result has been called the "decision of 1789," a name that obscures an important ambiguity in the decision that actually occurred.[132] In the House, Madison moved for the creation of departments

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128. *See* Symposium, *Executive Privilege and the Clinton Presidency*, 8 WM. & MARY BILL RTS. J. 535 (2000).

129. 418 U.S. 683 (1974).

130. *See* Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985); Schweiker v. McClure, 456 U.S. 188 (1982); *see also* Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 446-48 (1989).

131. Dames & Moore v. Regan, 453 U.S. 654, 686-87 (1981); Harold H. Bruff, *Can* Buckley *Clear Customs?*, 49 WASH. & LEE L. REV. 1309 (1992).

132. *See* CURRIE, *supra* note 94, at 36-41; MILLER, *supra* note 17, at 52-70, app.

of war, treasury, and foreign affairs. Each was to be headed by a secretary, who would be appointed by the president with the advice and consent of the Senate and who would "be removable by the President." Madison thought that removal was an exclusively executive power, serving the "great principle of unity and responsibility in the Executive department."[133] He confronted substantial opposition from two disparate groups, however. Some Representatives thought that removal lay in the control of Congress, to be conferred or restricted by statute. Others thought that, like appointment, the removal of a principal officer should require the consent of the Senate. This last group could cite *The Federalist No. 77* as authority, in which Hamilton, quite uncharacteristically, took that very position.[134] During this controversy, Hamilton sent word to Congress that he had since changed his mind![135]

Given his status as a good legislative general, Madison divided the opposition and won a partial victory over one group and a complete victory over the other. Through an ally, Madison crafted a substitute for his original text. The new text identified the subordinate who would run the Department "whenever the principal officer shall be removed" by the President. The provision, which added the support of those who thought Congress could confer or deny removal to those who thought it an executive function, became law.[136] This terminology allowed Madison to hope that his position would eventually be vindicated, and indeed it would be. The only position in the debate that had been definitely rejected was the one that Congress could always participate in particular removals by refusing to consent to them.

An unlitigated removal controversy that presented the issue of senatorial participation in removals culminated in our first impeachment of a President. Andrew Johnson's impeachment and near removal from office resulted from his defiance of the Tenure of Office Act of 1867, which forbade presidential removal of cabinet members without the consent of the Senate.[137] Johnson vetoed the bill on the grounds of its unconstitutionality, and his veto was immediately overridden. He then removed Secretary of

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133. 1 ANNALS OF CONGRESS 499 (Joseph Gales ed., 1789).

134. THE FEDERALIST NO. 77, at 372 (Alexander Hamilton) (Terrence Ball ed., 2003) ("The consent of [the Senate] would be necessary to displace as well as to appoint. A change of the chief magistrate therefore would not occasion so violent or so general a revolution in the officers of the government, as might be expected if he were the sole disposer of offices.").

135. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 350 (1996).

136. The same statutory technique regarding removal of the secretary was used in forming all three of the original departments—State, War, and Treasury. *See* LEONARD D. WHITE, THE FEDERALISTS, A STUDY IN ADMINISTRATIVE HISTORY 118-31 (1948).

137. MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1973).

War Stanton, who had opposed his Reconstruction policies. The House impeached Johnson for his act of defiance; the Senate fell one vote short of the two-thirds majority needed for conviction and removal. The courts never entered the fray.

Johnson's acquittal, at a time when he was extremely unpopular in Congress for his activities during the presidential phase of Reconstruction, has provided an important political precedent for the nation.[138] Impeachment could have become a rough form of a no-confidence vote about a presidency, moving our system toward a parliamentary executive. If even Andrew Johnson could escape—after he had gone far toward squandering the fruits of military victory in the Civil War by a policy of appeasement of the defeated South—no merely unpopular President would have to fear impeachment.

On the merits of the action that served as the basis for the impeachment, Johnson correctly perceived the unconstitutionality of the Tenure of Office Act. If a president cannot remove a Secretary of War or a Secretary of State who undermines and defies him—as Stanton had Johnson—he cannot implement his independent constitutional powers relating to war and foreign affairs. Nor would such a diminished president be able to discharge his general duty to assure that the laws are faithfully executed. Both appointments and incompatibility principles suggest that legislation and execution would not effectively be kept in separate hands if Congress could require the Senate's consent to the removal of members of the president's cabinet.

Almost sixty years after Johnson's impeachment, a remaining fragment of the Tenure of Office Act finally produced litigation that reached the Supreme Court. Although the proceeding involved a minor official—a postmaster—the Court gave extensive and scholarly attention to the underlying issues. The result must have comforted the ghost of Andrew Johnson. *Myers v. United States*[139] involved a statute that provided for presidential appointment of postmasters with the advice and consent of the Senate and forbade their removal without the consent of the Senate. These were important patronage appointments and Congress was unwilling to leave the political benefits of distributing them to the president or his department heads.

Woodrow Wilson appointed Frank Myers postmaster first class for Portland, Oregon, in 1917, for a term of four years. Some irregularities in the administration of the Portland post office led Wilson to demand Myers's resignation in 1920. Myers refused. Wilson directed his

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138. *See* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992).
139. 272 U.S. 52 (1926).

Postmaster General to remove him, but decided not to present the matter to the Senate. When Myers sued for his lost salary, the Supreme Court ruled against him on the grounds that Congress could not condition removals on the consent of the Senate. Chief Justice Taft, the only former President ever to serve on the Supreme Court, wrote the majority opinion in *Myers*. To Taft, the "decision of 1789" constituted a clear endorsement of the president's unrestricted constitutional power to remove executive officers. The actual historical record, of course, was far cloudier. Buttressed, he thought, by constitutional history, Taft proceeded to state a broad theory of executive power. His approach was quite formalist: No branch should have implied power to participate in functions assigned by the Constitution to another branch. Because removal is an executive function, the Senate may not share it. Therefore, the president has an illimitable power to remove those executive officers whom he has appointed.

Taft considered removal to be an executive power because the president needs it to perform his own constitutional duties, for which he must have loyal subordinates.[140] Surely there is a core of truth to this, but Taft did not explain why the president needs an unlimited removal power that extends to the Portland postmaster. It appears that Taft's underlying concern involved the possibility that allowing Congress to block particular removals would destroy the autonomy of the executive branch. He repeatedly quoted Madison's statements in 1789 to the effect that Congress may define, but not fill, executive offices.[141] The incompatibility principle strengthens that

140. Taft argued that the Senate's check on appointments is a much lesser intrusion on executive power than a check on removals would be. "The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties . . . because the President usually has an ample field from which to select for office, according to his preference, competent and capable men." *Id.* at 121.

141. Taft rejoined to the argument that Congress could invoke the necessary and proper clause to participate in removals.

> Another argument urged against the constitutional power of the President alone to remove executive officers. . .is that, in the absence of an express power of removal granted to the President, power to make provision for removal of all such officers is vested in the Congress by section 8 of Article I.
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> Mr. Madison, mistakenly thinking that an argument like this was advanced by Roger Sherman, took it up and answered it as follows:
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>> He seems to think . . . that the power of displacing from office is subject to Legislative discretion; because, having a right to create, it may limit or modify as it thinks proper. . . . [W]hen I consider that the Constitution clearly intended to maintain a marked distinction between the Legislative, Executive and Judicial powers of Government; and when I consider that if the Legislature has a power, such as is contended for, they may subject and transfer at discretion powers from one department of our Government to another; they may, on that principle, exclude the President altogether from exercising any authority in the removal of officers; they may . . . vest it in the whole Congress; or they may reserve it to be exercised by this house. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I can not subscribe to it. . . .

Id. at 125-26 (citation omitted). Again, he cited Madison, "If there is any point in which the

position, discouraging any implication that the Senate may decide whether to allow the President to dismiss particular officers. The Tenure of Office Act and the fate of Andrew Johnson demonstrate the danger that Congress may attempt to capture the allegiance of executive officers from the president. Restrictions on the power of the president to remove officers without cause, however, present a distinct problem because the president retains the removal power, albeit within limits.

Three dissenting Justices took an approach resembling a modern functional one. Stressing Congress's undisputed power to define the powers of offices and determine appropriations for them, the dissenters argued that Congress should be able to organize the executive largely as it pleases, under the grant of power in the "necessary and proper" clause.[142] They also argued convincingly that the president did not need plenary removal power extending to the Portland post office to discharge his responsibilities.

Myers, like many broad decisions, would not long survive unscathed. In *Humphrey's Executor v. United States*,[143] the Court limited the scope of the president's plenary power of removal to "purely executive" officers, and held that Congress could constitutionally forbid the president from removing members of the Federal Trade Commission without cause. Of course, *Humphrey's Executor* is best known for its sweeping dicta asserting a special constitutional status for the independent regulatory agencies, whose officers, the Court said, were to be independent of the president "except in [their] selection."[144] This is not the place to rehash the endless debate over the independent agencies. Suffice it to say that the distinguishing structural characteristics of these agencies do not offend the incompatibility principle. Statutes do not place execution in the hands of Congress or its agents when they blur political partisanship by forming multi-headed agencies that are politically balanced and protected by cause requirements for removal.

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separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices." *Id.* at 116 (citation omitted). And again:

> As Mr. Madison said in the First Congress:
>
> > The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature . . . .

Id. at 128 (citation omitted).

142. *See supra* note 94 and accompanying text.
143. 295 U.S. 602 (1935).
144. *Id.* at 625.

In more recent times, the Supreme Court has considered whether Congress may vest executive functions in an officer who is removable only by congressional joint resolution. *Bowsher v. Synar*[145] was a challenge to a very complex statute, the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act.[146] The Act attempted to eliminate federal budget deficits by setting declining yearly targets for them, and by creating an elaborate enforcement mechanism. Each year, the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) were to independently estimate the amount of the deficit for the next fiscal year and report their conclusions to the Comptroller General. After considering these figures, the Comptroller was to arrive at a final estimate. If the projected deficit exceeded the target, the president was then required to issue an order reducing spending in many federal programs according to a statutory formula.

This cumbersome enforcement mechanism reflected separation of powers tensions and directly implicated the incompatibility principle. Congress would not trust estimates by the president's agency, OMB, yet it could not use its own appointees in CBO to execute the law. Hence, it delegated the final decision to the Comptroller, an officer of the United States nominated by the president and subject to senatorial confirmation. Unlike other federal officers, however, the Comptroller is not removable by the president, but by joint resolution for stated causes of the usual sort.[147] Because it takes the equivalent of a statute to remove the Comptroller, the decision to do so lies with Congress, subject to the president's veto. It was this obscure feature of the scheme that sparked a successful challenge by Representative Synar and others.

Chief Justice Burger's opinion for the Court concluded that the Act unconstitutionally vested executive functions in the Comptroller. The Court emphasized that the Constitution authorizes Congress to remove executive officers only by impeachment. A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.[148] This case, stated the Court, resembled *Myers*, not *Humphrey's Executor*, because the latter concerned the power of Congress to limit the president's powers of

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145. 478 U.S. 714 (1986). *See generally* Symposium, Bowsher v. Synar, 72 CORNELL L. REV. 421 (1987); David P. Currie, *The Distribution of Powers After* Bowsher, 1986 SUP. CT. REV. 19; Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699 (1987).

146. 2 U.S.C. §§ 901-907d (2000).

147. A Comptroller General may be removed by joint resolution for "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1) (2000).

148. *Bowsher*, 478 U.S. at 723.

removal. Therefore, the Court determined that it could invalidate this statute without casting doubt on the constitutionality of ordinary independent agencies.[149]

Without relying explicitly on the Incompatibility Clause, the Court invoked its values. "To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws."[150] Because Congress could not execute laws, it could not grant its own officer that power. The Court cited the history of this removal provision to support its conclusion that Congress meant to control the Comptroller.[151] The Court also analogized to *Chadha*, reasoning that allowing officers controlled by Congress to execute the law would be the equivalent of a forbidden legislative veto because Congress could threaten to remove an officer who ignored its wishes. Finally, it was clear to the Court that the statute assigned the Comptroller executive powers. "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[152] The Court concluded that the Act violated "the command of the Constitution that the Congress play no direct role in the execution of the laws."[153]

Justice Stevens wrote an odd concurrence. First, he agreed with the majority that the Comptroller was an agent of Congress, but was so because of the sum of his assigned statutory duties and not because of the "dormant" removal power—no one had ever tried to remove a Comptroller. There was much to this point—the very reason that Congress selected the Comptroller to make final deficit estimates was that this officer is mostly, although not entirely, an agent of Congress. For other agencies, however, an approach that questions whether an officer's "center of gravity" is in Congress or in the executive would not yield clear answers compared to the

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

150. *Id.* at 726. The Court quoted the District Court's opinion. "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." Synar v. United States, 626 F. Supp. 1374, 1401 (D.D.C. 1986).

151. The removal provision came from the Budget and Accounting Act of 1921, ch. 18, § 303, 42 Stat. 20, 23-24. An earlier version of the bill allowed removal only by concurrent resolution of the two houses of Congress. After President Wilson objected that this would be unconstitutional, it was changed to the present form. *See* H.R. DOC. NO. 805-66, at 1 (1920). The Court said that "Congress created the office because it believed that it 'needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations.'" *Bowsher*, 478 at 730-31 (quoting HARVEY C. MANSFIELD, THE COMPTROLLER GENERAL: A STUDY IN THE LAW AND PRACTICE OF FINANCIAL ADMINISTRATION 65 (1939)).

152. *Bowsher*, 478 U.S. at 733. The Court also correctly determined that "the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute." *Id.*

153. *Id.* at 736.

majority's formalism. Where, for example, does the Board of Governors of the Federal Reserve System lie?

Second, Justice Stevens could not agree that the Comptroller's functions under the Act were executive, or that characterizing them was even essential. This was the most innovative part of his opinion. He pointed out that Congress could have made estimates itself, in which case the power would have been legislative. Yet, when the Comptroller did the same thing, the majority characterized it as executive. Although he could see no clear line between legislative and executive functions, this line exists. As *Chadha* establishes, it is a matter of process—not, as Justice Stevens assumed, of the nature of the decision involved. Until and unless Congress assigns a policy determination to the executive, it is legislative in nature. Once Congress enacts a statute delegating the determination to the executive, it becomes executive power until withdrawn or modified by another statute. The Comptroller's actions under the Act were executive for constitutional purposes. Justice Stevens concluded that "when Congress, or a component or an agent of Congress, seeks to make policy that will bind the Nation, it must follow the procedures mandated by Article I of the Constitution."[154] Not quite. When Congress makes binding policy, that is legislation, and indeed it must follow Article I. When a congressional agent acts pursuant to a statutory delegation, that is execution and is forbidden by the Incompatibility Clause.

Justice White, dissenting, agreed that congressional agents may not execute the law. He, however, could not agree that the Comptroller was such an agent. Instead, he saw the Comptroller as independent of both political branches, in part because removal would be so difficult to effectuate.[155] He thought that the Comptroller would have far more reason to fear Congress's ordinary powers of legislation and appropriation than the presence of removal authority.[156]

Moving on to general separation of powers analysis, Justice White, taking a loose, functional approach, perceived no congressional usurpation or disruption of executive prerogatives. Like Holmes and Brandeis in *Myers*, he thought that the executive was entitled to the tools conferred on

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154. *Id.* at 737.

155. Majorities in both houses would be required if the Comptroller had displeased the president also; if not, two-thirds majorities would be needed. *Id.* at 771-72.

156. *See id.* at 774-75. Justice Blackmun, also dissenting, would have invalidated the removal provision, if ever exercised, rather than the Deficit Control Act. *Id.* at 775 n.14. In the wake of *Bowsher*, doubts surrounded the GAO's other statutory functions. *See, e.g.*, Comment, *The New Separation of Powers Jurisprudence and the Comptroller General: Does He "Execute the Law" Under the Federal Employees' Retirement Act?*, 9 GEO. MASON L. REV. 35 (1986). Congress could amend the removal provision to make the Comptroller removable by the President for cause. *See* Paul R. Verkuil, *The Status of Independent Agencies After* Bowsher v. Synar, 1986 DUKE L. J. 779, 802-04.

it by Congress, and no more. Conflating spending with appropriation, Justice White greatly understated the amount of executive spending discretion that normally exists, and that may have a constitutional basis. Whether to appropriate money ordinarily lies in the absolute discretion of Congress; whether to spend appropriated funds is an executive decision, within limits conferred by the appropriation. The Act, by allowing the Comptroller to dictate spending cuts to the president for large areas of the federal budget, may have invaded executive authority.[157] The majority did not reach the issue, and Justice White dismissed it too quickly.

In an opinion issued the same day as *Bowsher*, the Court described the decision as based on congressional aggrandizement.[158] Although the *Bowsher* majority phrased its opinion formalistically and made no such assertion, that position represents an accurate characterization of the statute it invalidated. Use of a congressional agent to perform vital executive functions was enough both to constitute an aggrandizement and to contravene the incompatibility principle. The *Bowsher* majority could have avoided the constitutional issue of the removal provision by construing the statute to allow the president to remove a Comptroller for reasons related to the president's performance of his own constitutional duties. That approach would have brought the majority to the thicket Justice Stevens entered: the question of finding the Comptroller's center of gravity. Justice Stevens, however, did resolve that issue correctly in *Bowsher*. A majority opinion based on this rationale would have been more persuasive than the majority's blank formalism and would have drawn a line between executive and legislative agencies that would not have imperiled most agencies.

Since *Bowsher*, the Court has followed a functional approach in two important cases. Neither result contravenes the incompatibility principle. In *Morrison v. Olson*,[159] the Court upheld the use of independent counsel to investigate and prosecute crimes committed by senior executive officers. The counsel were court-appointed, and could be removed by the Attorney General for cause. The appointment portion of this scheme complied with the Constitution's authorization of courts to appoint inferior officers. It was also consistent with the incompatibility principle, since Congress was not allowed to appoint the counsel. Regarding removal restrictions, the

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157. *See* E. Donald Elliott, *Regulating the Deficit After* Bowsher v. Synar, 4 YALE J. ON REG. 317 (1987).

158. In *Commodity Futures Trading Commission v. Schor*, Justice O'Connor stated: "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 litigation is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch." 478 U.S. 833, 856-57 (1986).

159. 487 U.S. 654 (1988).

Court reformulated the constitutional test: Henceforth, they are invalid only if they "impede the President's ability to perform his constitutional duty."[160] Indeed, that has always been the pertinent question, whatever the verbal formulation. The Court decided that the executive branch retained sufficient powers over independent counsel to justify the counsels' performance of prosecutorial duties, which were clearly executive in nature. The Court found comfort in the fact that "Congress retained for itself no powers of control or supervision over an independent counsel."[161] This statutory scheme, which deeply intruded on executive autonomy, could be justified only by the well-established need to control executive misbehavior and by the conflicts of interest that attend self-investigation.[162] As the controversy over the investigation of President Clinton demonstrates, however, the Act created a prosecutorial scheme remarkably free of control by any of the constitutional branches, a concern pertinent to functional analysis.[163]

In *Mistretta v. United States*,[164] the Court upheld the composition of the United States Sentencing Commission, which regulates the imposition of criminal sentences by lower federal courts. The Court found that the unique structure of the Commission, which combines federal judges serving extrajudicially with executive officers, did not disturb the overall balance of powers. It noted that although the Incompatibility Clause would forbid policymaking by a combination of congressional and executive officers, judges were not forbidden to perform executive functions when not sitting on the bench, and many had done so.[165]

VI. THE EFFECTS OF THE INCOMPATIBILITY PRINCIPLE

In its appointment and removal cases, the Court has strictly enforced the incompatibility principle that Congress and the executive must employ separate personnel. Although the Court has always invoked other provisions of the Constitution in explaining these rulings, prohibiting

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160. *Id.* at 691.
161. *Id.* at 694.
162. *See* Harold H. Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539, 539-43 (1988).
163. *See* Eleanor D. Kinney, *The Independent Counsel Statute*, 51 ADMIN. L. REV. 627 (1999); Christopher H. Schroeder, *The Independent Counsel Statute: Reform or Repeal?*, 62 LAW & CONTEMP. PROBS. 1 (1999); Jerome J. Shestack, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 GEO. L. J. 2011 (1998).
164. 488 U.S. 361 (1989).
165. In earlier cases, two circuit courts split regarding the propriety of President Reagan's Appointment of Circuit Judge Irving Kaufman as chair of the President's Commission on Organized Crime. *See In re* Scaduto, 763 F.2d 1191 (11th Cir. 1985) (determining that service on the Commission involved a pro-government stance that ill-fitted judicial neutrality and that might generate information that would also undermine neutrality); *In re* Scarfo, 783 F.2d 370 (3d Cir. 1986) (noting that recusal in particular cases could protect the work of the courts).

incompatibility provides both a common thread and a link to a firm purpose of the Framers. Congress may not control executive officers by assuming the president's power to nominate or remove them (*Buckley*, *Myers*, *Bowsher*). Congress may, however, constrain presidential removal in ways compatible with his duty to ensure faithful execution of the law (*Humphrey's Executor*, *Morrison*). The Court has been strict in drawing the line between legislative and executive functions. Congress may not participate in execution by overriding executive actions with nonstatutory processes (*Chadha*, *MWAA*). Yet, Congress remains free to employ innovative structural arrangements that do not draw its Members into execution (*Mistretta*). Thus, the Court has largely contented itself with preventing our government from evolving into a parliamentary model at the instance of Congress.

Overall, the constitutional law that governs separation of powers remains unconfining. Many of the largest issues remain unresolved. For example, what is the set of executive functions that Congress may shield from plenary presidential supervision? For purposes of maintaining a system of separated powers, it is enough to know that the president retains his constitutional claim to exert enough supervision to ensure that he can perform his constitutional duties (*Morrison*). What this may mean in a particular context awaits assessment in the light of the facts of a particular controversy.

In the shadow of persisting uncertainty about these ultimate issues, the branches negotiate problems of everyday power. The dominance of a bargaining relationship between Congress and the executive has allowed our government to operate effectively through the years. The two most likely determinants of the balance of power over a given issue, the president's veto power and Congress's power of the purse, lie at the heart of our system but outside judicial supervision. These two great stabilizers work to prevent power struggles between the branches from spinning out of control: The president's possession of the veto forces Congress to deal with him if it wants to legislate. Congress's possession of the power of the purse forces the president to deal with it if he wants the means to execute. Thus, our system is one of bargaining under the strong practical constraint that flows from mutual dependency.

If Congress had been allowed to blur the line between the branches, the Madisonian competition of loyalties and values would have weakened or evaporated as well. An "executive" officer appointed by Congress, removable by Congress, and whose decisions are subject to legislative veto, would be unlikely to display significant loyalty to the executive or meaningful resistance to informal congressional pressure. Perhaps the kind of legislative dominance that marked the revolutionary state governments

would have evolved. Even if that failed to occur, our system could be fundamentally different from its present form.

The political branches often make informal compensations for even the clearest legal rules, which can undermine the law as it appears on the books. Examples include the propensity of Congress to continue enacting forbidden legislative vetoes—expecting informal executive compliance with them—and the practice of the executive to clear judicial nominations in advance with the Senate.[166] Nevertheless, a legal rule matters even when custom vitiates it. Some of the Court's most important decisions that enforce the incompatibility principle tend to protect the beneficiaries of legal rules against themselves. That is, the executive holds nomination and removal authority and cannot formally cede them to Congress, nor may the executive accord a legislative veto formal effect. Constitutional responsibility for all of these matters clearly remains with the executive, wherever practical power may place choice for the time being. The Court's rules stand as reminders to the other two branches, and to the people as well, about where particular constitutional duties lie.

The incompatibility principle suggests corollaries for doctrines other than the ones that most obviously define the boundary between the legislature and executive. First, if the executive is to remain fully independent of Congress, impeachment must be restrained enough that it does not evolve into a rough vote of no confidence for politically unpopular presidents.[167] Although it is a bit early to pronounce history's verdict on the Clinton impeachment, one careful observer believes that its effect will be to make it more, not less, difficult to impeach future presidents for behavior that does not obviously rise to high crimes and misdemeanors.[168] Second, any revival of the statute that creates independent counsels to prosecute high-level executive branch crimes must ensure better controls on the counsels than those found in the version upheld in *Morrison*. Independent prosecution, as the *Clinton* case shows, serves as a weapon of sufficient force to jeopardize the independence of the executive. Third, doctrines of executive immunity from damages should be structured to channel partisanship into politics not litigation. *Nixon v. Fitzgerald*,[169] granting presidents immunity from damages for their official actions, has

166. To the founding generation, the modern practice of executive-congressional negotiations over appointments might well have seemed the sort of mutual influence that they condemned as "corruption."

167. Chief Justice Rehnquist's book about impeachments, *supra* note 138, makes this point forcefully. *See generally* RICHARD POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (1999).

168. *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 194 (2d ed. 2000).

169. 457 U.S. 731 (1982).

that effect, but *Clinton v. Jones*,[170] by exposing presidents to lawsuits for conduct unrelated to their duties, makes it all too easy for the president's enemies to manufacture harassing litigation. Fourth, executive privilege disputes between the executive and Congress should be left largely to political adjustment, as they are now.[171] The executive privilege cases involving judicial subpoenas have become routine losses for the executive.[172] Enforcement of judicially determined showings of need for information is a limited invasion of executive autonomy; judicial sanction for free-ranging congressional desires for information might not be subject to effective constraint.

CONCLUSION

In short, good fences make good neighbors. If the Court reserves its formalist rigor for situations that fit the incompatibility principle, it will have done almost enough by way of constitutional definition of the essential separations of power. The possibility of aggrandizement beyond these situations remains, however. The Court can remain alert to such dangers, reviewing statutes with appropriate deference, as it so often does today.

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170. 520 U.S. 681 (1997).

171. LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 1 (2004).

172. *See* Iain R. McPhie, *Executive Privilege and the Clinton Presidency*, 8 WM. & MARY BILL RTS. J. 535 (2000); Randall K. Miller, *Presidential Sanctuaries after the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647 (1999); Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 MD. L. REV. 205 (2001).