ARTICLES

AN INDUCTIVE UNDERSTANDING OF SEPARATION OF POWERS

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INTRODUCTION

Separation of powers is one of the least understood doctrines in U.S. law and politics. Underlying a great deal of separation of powers analysis is the conventional view that the United States Constitution requires a strict separation between the three branches of government and that efforts within one branch to influence or control the exercise of another branch's powers are illegitimate and should be rejected whenever possible. Although its simplicity might be appealing, this image of strict separation is inconsistent with the Framers' understanding of separation of powers[1] and with the law as developed by the Supreme Court in the face of the explosive growth of the regulatory state over more than a century. Every so often, a decision or series of decisions by the Supreme Court raises the specter of movement toward a strict view of separation of powers, but ultimately any such movement sputters to a halt, and in retrospect it usually turns out that the appearance of movement was more in the nature of wishful thinking than actual change. In fact, the Supreme Court has been remarkably consistent in rejecting judicial enforcement of strict separation of powers.

The Court's recent decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* (*PCAOB*),[2] striking down one feature of the structure of the Board on separation of powers grounds, may be another such decision. The opening paragraph of Chief Justice Roberts's opinion for the Court contains the strongest indication in recent years that the Supreme Court might embrace a strict view of separation of powers. The paragraph invoked three key elements of a pro-executive-power version of strict separation of powers that has become known as the unitary executive

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1. This Article is about the current understanding and application of separation of powers norms and not about any originalist separation of powers doctrine. It is worth noting, however, that it does not appear that the Framers intended to adopt a strict version of separation of powers. In *Federalist 48*, James Madison described the general theory of separation of powers as follows:

> It was shewn in the last paper, that the political apothegm there examined, does not require that the legislative, executive and judiciary departments should be wholly unconnected with each other. I shall undertake in the next place, to shew that unless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice be duly maintained.

THE FEDERALIST NO. 48, at 101 (James Madison) (J. & A. McLean eds., 1788).

2. 130 S. Ct. 3138 (2010). The Court upheld the process for appointing members of the Board but struck down the provision prohibiting the Securities and Exchange Commissioners from terminating members of the Board without cause. This is discussed in more detail below. *See infra* Part II.A.

theory: government power is divided into "three defined categories";[3] the executive power is vested in the President; and executive branch officials, even in independent agencies, are constitutionally understood as assisting the President in discharging his duties. Taken to its extreme, as the unitary executive theory does, the logical end of these three propositions would be to pronounce unconstitutional the independence of independent agencies and all efforts to insulate the execution of the law from complete presidential control.[4]

While previous Supreme Court opinions have adverted to the government's three-branch structure in ways that point toward a strict separation of powers,[5] the *PCAOB* opinion is notable for invoking the Vesting Clause of Article II.[6] The Vesting Clauses of the Constitution's first three articles provide a blueprint for the structure of the government, but they have not been particularly important to the resolution of actual disputes over the separation of powers.[7] To the contrary, the Vesting

3. *See Free Enter. Fund*, 130 S. Ct. at 3146. The Court's reference to "three defined categories" of governmental power was not new. In this particular case, the Court quoted a passage in the *Chadha* decision. *See* INS v. Chadha, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.").

4. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242 (1994) ("[I]f a statute vests discretionary authority directly in an agency official (as do most regulatory statutes) rather than in the President, the Article II Vesting Clause seems to require that such discretionary authority be subject to the President's control."). *But see* Kendall v. United States, 37 U.S. (12 Pet.) 524, 610 (1838) (noting that executive branch officials are not all under the exclusive control of the President); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (hypothesizing that delegation directly to an agency indicates congressional intent not to have the President in charge of administering the statute).

5. *See, e.g.*, *Chadha*, 462 U.S. at 919.

6. U.S. CONST. art. II, § 1, cl. 1.

7. The Vesting Clauses of Articles I and II are invoked more often in concurring and dissenting opinions than in the Court's majority opinions. The most prominent example of this may be Justice Scalia's invocation of Article II's Vesting Clause in his dissenting opinion in *Morrison v. Olson*, concerning the constitutionality of the Independent Counsel provisions of the Ethics in Government Act. *See* 487 U.S. 654, 698–99, 705 (1988) (Scalia, J., dissenting). In that opinion, after quoting Article II's Vesting Clause for the second time, Justice Scalia exclaimed, "As I described at the outset of this opinion, this does not mean *some of* the executive power, but *all of* the executive power." *Id.* at 705. The Vesting Clause of Article II is cited in majority opinions as the source of the nondelegation doctrine which, as described *infra* notes 97–99, embodies a relatively lenient constraint on Congress's ability to confer discretion on the Executive Branch. *See, e.g.*, Touby v. United States, 500 U.S. 160, 164–65 (1991); Mistretta v. United States, 488 U.S. 361, 371–72 (1989). The Vesting

Clauses lurk in the background while the Constitution's numerous structural and procedural provisions occupy center stage, creating a governmental system best described as separation of powers with checks and balances. The Court has never decided separation of powers controversies by determining the nature of a power and then assigning it to the appropriate branch as specified in the Vesting Clauses. Rather, by and large, the Court has strictly enforced the structural and procedural requirements for action by each branch while being very deferential to Congress when ruling on whether a more general principle of separation of powers has been transgressed. If the Vesting Clauses are brought to the foreground in the future, we might see a new form of separation of powers analysis, under which powers are assigned to branches and little or no interbranch interference is tolerated.

The Court in *PCAOB* did not deliver on the opening paragraph of the opinion's promise of a major reform in the law of separation of powers. The Court did not read Article II's Vesting Clause as requiring that the PCAOB be brought under complete presidential control or that PCAOB members be appointed by the President or be removable without cause by the President. To the contrary, the Court reaffirmed its longstanding general approach to separation of powers issues, showing great flexibility with regard to the appointment of the PCAOB members and tightening up only modestly with regard to their removal.[8]

The purpose of this Article is to provide a description of current separation of powers doctrine as embodied in precedent and common understandings of the practice of separation of powers in the government of the United States.[9] The idea is to provide a general understanding of

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Clause of Article III is invoked often in the Court's majority opinions concerning the scope of the judicial power.

8. *See Free Enter. Fund*, 130 S. Ct. at 3164. The Public Company Accounting Oversight Board (PCAOB) was created in 2002 as part of the Sarbanes–Oxley Act's reform of regulation of the accounting industry. *See* Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 101, 116 Stat. 745, 750 (codified at 15 U.S.C. § 7211 (2006)). The Board consists of five members appointed and removable only for serious cause by the Securities and Exchange Commission (SEC). 15 U.S.C. §§ 7211(e)(1), 7217(d)(3). The PCAOB's function is to enforce the aspects of the Sarbanes–Oxley Act and other laws and regulations that apply to the accounting industry. The PCAOB was modeled on private self-regulatory agencies such as the New York Stock Exchange, and although the Act declares that the PCAOB members are not government officers or employees, they clearly are for purposes of the Appointments Clause. Its members are very well paid for government officials, with pay ranging from $547,000 to $673,000. *See Free Enter. Fund*, 130 S. Ct. at 3147 n.1.

9. Because the goal of this Article is to take a fresh look at the practice and practical understanding of separation of powers in the government of the United States, I do not engage the voluminous scholarship that exists on the subject. Although the picture painted here may strike some readers as novel and somewhat unconventional, it shares some

separation of powers as it actually structures the distribution of power within the federal government of the United States of America. The Article is inductive, deriving separation of powers principles from the caselaw concerning how the government is structured, rather than deductive, which would entail deriving the proper structure from abstract principles. I have chosen this methodology for two related reasons. First, in my view, there is no set of abstract principles from which an appropriate governmental structure consistent with separation of powers could be derived. Second, even if it were possible to construct an appropriate governmental structure from separation of powers principles, it would not take into account the particulars of the Constitution of the United States and thus would be of limited utility in understanding how separation of powers actually works under that Constitution.

In my view, current law creates a pretty good governmental structure that is not patently inconsistent with a normatively desirable understanding of the meaning of the Constitution. But I do not mean to state a normative theory of separation of powers, understood either as an efficiently functioning government or a correct understanding of the Constitution's requirements. Rather, the idea of this Article is to describe and analyze separation of powers as actually practiced by the government of the United States under the constitutional constraints recognized by the Supreme Court. The *PCAOB* decision, as the Court's latest pronouncement on separation of powers fundamentals, is highlighted somewhat, although this Article's focus is well beyond *PCAOB*.

This Article proceeds as follows. Part I sets forth seven propositions concerning the law of separation of powers in the United States and elaborates on the first two to lay out this Article's general view of separation of powers. Part II addresses separation of powers controversies concerning the appointment and removal of executive officials and discusses the role of the Vesting Clauses in the Supreme Court's separation of powers jurisprudence. Part III sets forth the argument that conceptual analysis is not important to separation of powers law in the United States, i.e. that the law of separation of powers does not involve describing the nature of a governmental power and assigning it to the proper branch. Rather, as this

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attributes with M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001), and Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). John Manning paints a similar picture of separation of powers in an article written roughly contemporaneously with this one, although Manning's analysis of governmental powers is more conceptual than the one presented in this article. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011); *see also* Arnold I. Burns & Steven J. Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575 (1987).

Part elaborates, most governmental actions can be taken by more than one branch as long as each branch obeys the Constitution's structural and procedural provisions that apply to it. Part IV addresses how powers are actually assigned to branches, if conceptual analysis is not the key. Finally, Part V lays out some minor corollaries to the general understanding of separation of powers presented in this Article.

I. SEPARATION OF POWERS BASICS

Separation of powers is one of the pillars of government in the United States. The federal government and all state governments are structured around the principle of separation of powers.[10] Yet, a general theory of separation of powers has proven elusive. There is, of course, the basic principle of separation of powers and the idea that each branch exercises its own powers and does not intrude on the powers of the other branches, but this understanding is not complete for several reasons. For one, it does not incorporate the principle of checks and balances, which is designed to prevent or hinder branches of government from acting unilaterally. Further, it does not account for the near impossibility of matching activities to their proper branch. Finally, it fails to recognize that different branches often take actions that, while procedurally and structurally distinct, function identically as a matter of substance.

Some basic propositions, elaborated upon in the course of this Article, underlie the view of separation of powers espoused here. They are:

(1) The bulk of separation of powers analysis comprises the application of the various specific procedural and structural provisions contained in the Constitution, and not an overarching theory of separation of powers.

(2) Building on proposition (1), the courts generally enforce the procedural and structural provisions of the Constitution strictly. When, however, a separation of powers controversy cannot be resolved with reference to a particular provision of the Constitution, the courts apply a very forgiving standard and are unlikely to find a violation of the general principle of separation of powers.

(3) The Vesting Clauses of Articles I, II, and III of the Constitution are not among the procedural or structural provisions of the Constitution that tend to be strictly enforced. They thus have little or no substantive bite. In

10. State separation of powers law is similar but not identical to federal law. In one area of significant difference, some state courts have recognized substantive separation of powers limits on legislative reform in areas of traditional judicial control, such as damages in personal injury cases. *See, e.g.*, Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1078 (Ill. 1997) (statutory damages cap on noneconomic injuries violates Illinois separation of powers doctrine).

other words, it is rarely, if ever, possible to rely on a Vesting Clause to provide an answer to a separation of powers controversy.

(4) As a corollary to proposition (3), in general, separation of powers controversies are rarely, if ever, resolved by determining which branch of government is the proper branch to engage in a particular activity. In other words, separation of powers controversies are not resolved by determining the nature of a government action and then assigning the performance of that action to the branch with the power to engage in that category of action.

(5) Building on propositions (3) and (4), most government actions can substantively be performed by more than one branch. Each branch must observe the constitutional procedural and structural requirements that apply to it.

(6) Building on proposition (5), the identity of the actor performing the action and not the nature of the action itself usually determines what sort of action is being performed. For example, when Congress acts it is legislating, and when an administrative agency acts it is executing the law, even if the action taken is, in substance, identical.

(7) The strongest evidence that a power is assigned to a particular branch is an explicit textual commitment of that action to the branch, not a more general principle of separation of powers. When a power has been assigned to a particular branch, no other branch is allowed to exercise that function unless the Constitution explicitly permits it to.

These are the most important propositions to the understanding of separation of powers presented in this Article. There are, in addition, a pair of minor propositions that help understand how separation of powers understandings have developed. These are:

(8) Informal pressure on the holder of a power to exercise it in a particular way does not violate separation of powers; and

(9) Separation of powers norms may be underenforced judicially. In other words, the constitutional ideal may involve a stricter understanding of separation of powers than what the federal courts are willing to enforce.

A. Separation of Powers Particulars

I begin by elaborating on proposition (1): *The bulk of separation of powers analysis comprises the application of the various specific procedural and structural provisions contained in the Constitution, and not an overarching theory of separation of powers.*

Although the principle was clearly on the minds of the Framers, the Constitution of the United States, unlike many state constitutions, does not refer directly to separation of powers. Rather, the Constitution contains

numerous particular structural and procedural provisions that create a government under which, by and large, separation of powers is observed. By "structural and procedural provisions," I mean those constitutional provisions that specify the structure of the government, such as the clause specifying that the Congress consists of the Senate and the House of Representatives[11] and those provisions that specify the procedures for taking a particular governmental action, such as the clause specifying that that bills must be presented to the President before they become laws.[12] While nearly all of the Constitution's structural and procedural provisions bear some relation to separation of powers, some focus specifically on separation of powers issues.[13]

When separation of powers controversies arise, they almost always turn on the meaning and application of one or more of the Constitution's particular structural or procedural provisions, rather than on a general separation of powers standard. Perhaps this is because the Framers foresaw many potential threats to separation of powers and addressed them in the Constitution. The best example of this is the Incompatibility Clause, which prohibits simultaneous service in Congress and another branch of government.[14] Perhaps it would violate a general principle of separation of powers for a member of Congress to serve in the Executive Branch as

11. U.S. CONST. art. I, § 1.

12. *Id.* art. I, §7, cl. 2.

13. The key separation of powers provisions of Article I include the Incompatibility Clause, which prohibits members of Congress from also serving in any other federal office; the procedures in Article I for passing bills and presenting them to the President for signature or veto; the enumerated powers of Article I, § 8 (including the Necessary and Proper Clause); and the prohibition on bills of attainder. In Article II, the key separation of powers provisions include the prohibition against changing the President's compensation during the term; the designation of the President as Commander in Chief; the clause allowing the President to require written opinions from department heads; the grant to the President of the power to make treaties and appoint officers of the United States, both with Senate confirmation; the provision empowering the President to receive foreign ambassadors; the imposition on the President of the duty to take care that that laws are faithfully executed; the provisions, now amended, providing for independent election of the President; and the provision making clear that the President and Vice President are subject to impeachment and removal for treason, bribery, and "other high Crimes and Misdemeanors." Article III's key separation of powers provisions include the specification that the inferior courts are "ordain[ed] and establish[ed]" by Congress; that the federal judges serve "during good Behavior" at a compensation that cannot be diminished; and that Congress has the power, subject to limits, to declare the punishment for treason. While there are numerous additional provisions that relate in some way to separation of powers, these are the most important.

14. U.S. CONST. art. I, § 6, cl. 2.

well.[15] Because of the existence of the Incompatibility Clause, we will never need to explore that issue. Although separation of powers principles are relevant to construing the Clause, the primary element of analysis, should a dispute over congressional service arise, would be the Clause itself, not general principles.

The particular structural and procedural provisions of the Constitution establish a form of government that is best described as separation of powers with checks and balances. These provisions do not map neatly onto a particular set of legal doctrines because they are not all vital to the creation of such a governmental structure. The key structural elements of this form of government are: no simultaneous service in the Legislative and Executive Branches of government;[16] independent election of the President and Congress;[17] an independent judiciary with life tenure and protected compensation;[18] the requirement that all laws be passed by both houses of Congress and presented to the President, who has the power to veto them;[19] appointment of executive branch officials, ambassadors, and the like by the President with the advice and consent of the Senate;[20] the Constitution's specification of the President's military and foreign affairs powers;[21] and the imposition on the President of the duty to faithfully execute the laws.[22] While there are many additional elements that help shape the structure of the government, these features provide a fairly good outline. Change one

15. Even though the separation of legislative and executive personnel might seem fundamental to Americans, it is unclear whether it would really violate separation of powers to allow members of Congress to serve also as officers of the United States. Ronald Krotoszynski has pointed out that this aspect of the U.S. Constitution has not been adopted elsewhere. *See generally* Ronald J. Krotoszynski, Jr., *The Shot (Not) Heard 'Round the World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers*, 51 B.C. L. REV. 1 (2010). Congresional service as officers of the United States would not necessarily concentrate legislative and executive power in the same hands because passing laws would still require positive votes from hundreds of legislators not serving in the Executive Branch. But such a system would be difficult to police without a strict numerical limitation on the number of members of Congress allowed to serve in the Executive Branch. Thus, a complete ban may be the more sensible rule.

16. U.S. CONST. art. I, § 6, cl. 2.

17. *Id.* art. II, § 1; *id.* art. I, § 2, cl. 1.

18. *Id.* art. III, § 1.

19. *Id.* art. I, § 7, cl. 2–3.

20. *Id.* art. II, § 2, cl. 2. Appointment of judges by the President is not necessary for the system of separation of powers. Judicial independence is ensured by their tenure and protected compensation. However, given that the Appointments Clause allocates the power to appoint judges to the President, any effort by Congress to appoint judges or delegate their appointment away from the President is likely to fail as violating a particular structural or procedural provision of the Constitution.

21. *Id.* art. II, § 2, cl. 1.

22. *Id.* art. II, § 1, cl. 8.

of these provisions and the form of government would begin to look different from what we have; change a few and we have a different system.

There are separation of powers issues that do not turn on the application of one of the particular structural or procedural provisions, such as the degree to which Congress may limit the President's power to remove officials executing the law; the nondelegation doctrine, which regulates how much discretion Congress may delegate to others; and the limitations on adjudication outside of Article III courts. As we shall see, when analysis turns away from the application of a particular provision to a more general separation of powers standard, the courts tend to be very forgiving, finding a violation of separation of powers only in extreme circumstances.[23]

Elaboration of proposition (2) will help understand this important aspect of separation of powers law. (2) *Building on proposition (1), the courts generally enforce the procedural and structural provisions of the Constitution strictly. When, however, a separation of powers controversy cannot be resolved with reference to a particular provision of the Constitution, the courts apply a very forgiving standard and are unlikely to find a violation of the general principle of separation of powers.*

During the 1980s, there was a revival of attention to basic principles of separation of powers. Devices Congress had used to augment its influence and control (and decrease that of the President) over the execution of the law were challenged in court on constitutional grounds.[24] By and large, success in these attacks turned on whether a particular provision had been violated. When an attack boiled down to an alleged violation of the general principle of separation of powers, it usually failed.[25]

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23. There is some chance that we are about to witness substantial changes in separation of powers analysis. In the *PCAOB* decision, the Court struck down a removal provision on separation of powers principles separate and apart from the Constitution's specific procedural and structural provisions. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3164 (2010). Perhaps the law will move in a stricter direction, but for now, that decision appears consistent with prior law and differs, if at all, at a certain rhetorical level, but not as a matter of substance.

24. *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983) (striking down the legislative veto).

25. Justice Kennedy's concurring opinion in *Public Citizen v. U.S. Department of Justice*, 491 U.S. 438 (1989), may be the most explicit statement of this understanding at the Supreme Court. Justice Kennedy explained that the Court is strict when Congress attempts to interfere with the President's exercise of a textually committed executive power and is much more forgiving when the President can claim interference only with "the general grant to the President of the 'executive Power.'" *Id.* at 484 (Kennedy, J., concurring) (quoting U.S. CONST. art. II, § 1, cl. 1). Unfortunately, in my view, Justice Kennedy erred in that case when he concluded that it would violate separation of powers to apply the Federal Advisory Committee Act (FACA), 5 U.S.C. app. (2006), to the President's utilization of the American Bar Association (ABA) for advice on judicial appointments. *See Pub. Citizen*, 491 U.S. at 482–89. In Justice Kennedy's view, requiring the ABA Standing Committee on the Federal Judiciary to abide by FACA's organizational, openness, and recordkeeping

The best example of this is the decision in *INS v. Chadha*,[26] in which the Supreme Court invalidated the legislative veto. The legislative veto is a device designed to increase Congress's control over the execution of the laws. Laws containing legislative veto provisions allowed Congress or a subset of Congress, such as a single house or in extreme cases a single committee, to disapprove of executive action without participation of the President. The legislative veto had been employed in many contexts, including review of agency regulations and oversight of agency spending. In Chadha's case, after the Department of Justice decided to suspend Chadha's deportation, the House of Representatives invoked the legislative veto provision of the Immigration and Nationality Act[27] and vetoed the suspension. Under the terms of the Act, the House's vote was legally sufficient to invalidate the suspension, which would result in Chadha being deported pursuant to the presuspension finding of deportability.

The Court's reasoning in *Chadha* spelled the end of all legislative vetoes. The decision was not, however, based on a general principle of separation of powers. Rather, the Court held that the legislative veto violated two particular structural provisions of the Constitution: the presentment and bicameralism requirements.[28] Presentment requires that all laws passed by Congress be presented to the President for signature or veto. Bicameralism provides that any bill or other congressional action be passed by both houses before it can become law. Reliance on bicameralism invalidated all one-house vetoes.[29] Reliance on presentment invalidated legislative vetoes altogether.[30]

The most difficult issue in *Chadha* was determining that bicameralism and presentment actually applied to the legislative veto. To do this, the Court had to construct a definition of legislation to which the two requirements apply. Had the Court constructed a substantive definition of

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requirements "would constitute a direct and real interference with the President's exclusive responsibility to nominate federal judges." *Id.* at 488. Because nothing in FACA limits the President's choice of nominees, I disagree with Justice Kennedy's characterization of application of FACA as a "direct and real interference" with the President's appointment power. If anything, it is indirect since it does not address the appointments themselves but only a part of the process of deciding on a nominee. I do not mean to venture an opinion on whether application of FACA in this and other contexts constitutes an unconstitutional interference with the President's powers under the more general separation of powers standard.

26. 462 U.S. 919, 958–59 (1983).

27. 8 U.S.C. § 1254 (1994) (repealed 1996).

28. U.S. CONST. art. I. § 7, cl. 2–3.

29. *See Chadha*, 462 U.S. at 955 (discussing limited exceptions to the general bicameral requirement).

30. *Id.* at 958.

legislation and then stated that all such actions are subject to bicameralism and presentment, proposition (1) would be incorrect and proposition (2) would be beside the point. But the Court did not construct a substantive definition of legislation. Rather, it constructed a procedural and highly practical definition, stating that the House exercised legislative power in *Chadha* because it "took action that 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."[31] Stated more generally, Congress, or a subset of Congress, exercises legislative power whenever it acts in a way that changes anyone's legal rights outside the Legislative Branch of government.

This understanding of the nature of the legislative power is built upon the underlying separation of powers premise that Congress does not have the power to do anything but legislate, at least when it wants its actions to have legal effect. Basically, the Court said that anything Congress intends to have legal effect constitutes the exercise of Congress's legislative power and is thus subject to the bicameralism and presentment requirements. There is no conceptual analysis of the nature of legislative power whatsoever.[32]

This aspect of the opinion has been criticized as formalistic.[33] This attack is more effective when combined with the sensible argument that the legislative veto actually supports separation of powers principles because it allows Congress to effectively supervise the exercise of delegated power. However, because this argument is built on general separation of powers principles, it was irrelevant to the Court's decision.

Did *Chadha* take a formalistic view of legislative power? In one sense it did not. It did not depend on a highly abstract conceptual concoction concerning the nature of particular exercises of power. Rather, it fashioned an effects test under which the determination of whether a congressional action is legislative is made based on the purported impact of the action, not on its nature or form. In another sense, however, it was somewhat formalistic because the Court did not support its analysis with arguments drawn on the policies underlying separation of powers or on the practical effect of outlawing the legislative veto. Justice White's dissenting opinion made the very practical, nonformalistic point, mentioned above, that the legislative veto can be restorative of separation of powers because it allows

31. *Id.* at 952.

32. The *Chadha* Court's explanation for why agencies are not required to utilize bicameralism and presentment when they take actions that change people's rights and duties is discussed *infra* Part III.A.

33. *E.g.*, Bernard Schwartz, *"Apotheosis of Mediocrity"? The Rehnquist Court and Administrative Law*, 46 ADMIN. L. REV. 141, 143–44 (1994).

Congress to supervise executive exercise of delegated power.[34] However, the invalidation of the legislative veto can be supported by the same argument—the legislative veto concentrated power in the hands of the entity exercising the veto. For example, allowing the House of Representatives unilaterally to veto the cancellation of Chadha's deportation or override an agency regulation concentrates power in the House, and for all the reasons power is divided and subject to checks and balances, is inferior to requiring those actions to go through bicameralism and presentment.

The criticism of *Chadha* and similar opinions as formalistic is a plea for more flexibility, for allowing the Constitution to adapt to changes either in society or in the way the structure of government has developed. The main argument in favor of the legislative veto is that the Constitution should be allowed to adapt to the increase in delegation of discretionary power to agencies. What we have seen and shall see is that the Court is not receptive to this sort of argument when it appears that Congress has designed a process that is inconsistent with one of the specific structural elements of the Constitution that forms the separation of powers.

Because the Court found that the legislative veto violated the specific constitutional procedure for the exercise of the legislative power, it did not reach more general questions of separation of powers. Much the same can be said for the other separation of powers decisions in recent times. In this area, the Court is remarkably consistent—it strictly applies the particular structural or procedural provisions, and if it finds no violation of one of these provisions, it upholds the government action on a very forgiving standard. Decisions regarding the exercise of the appointments power are the best remaining examples here.

In several decisions, the Court has reviewed the constitutionality of the appointment of officers of the United States. In *Buckley v. Valeo*,[35] Congress specified an unorthodox procedure for appointing members of the Federal Election Commission. Appointments were made, two each, by the Speaker of the House, the President Pro Tempore of the Senate, and the President of the United States, all subject to confirmation by both houses of Congress.[36] This was contrary to the Appointments Clause, which specifies that officers of the United States are appointed by the President with the advice and consent of the Senate, or, if Congress specifies for inferior

34. *Chadha*, 462 U.S. at 967–68 (White, J., dissenting). Justice White consistently argued for flexibility in separation of powers analysis. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 759–60 (1986) (White, J., dissenting).

35. 424 U.S. 1 (1976).

36. *Id.* at 113.

officers, by the President, a department head, or court of law, acting alone.[37] Confirmation by both houses was also arguably contrary to the Constitution's specification that the power to "advise and consent" be held by the Senate alone. The Court had no trouble holding that officials appointed in this manner were not officers of the United States and thus could not exercise authority pursuant to the law.[38] Again, because it found the process contrary to the Appointments Clause, the Court did not find it necessary to consider more general separation of powers considerations.

The decision in *Clinton v. City of New York*,[39] invalidating the Line Item Veto Act,[40] followed the pattern of *Chadha* and *Buckley*. The Court found that the line item veto procedure created by the Act was inconsistent with the Constitution's process for making (and amending) law, and thus it was not necessary for the Court to address general separation of powers questions.[41] The Line Item Veto Act specified that within five days after signing an appropriations bill or a bill containing targeted tax benefits the President could specify particular items in the bill for cancellation, which under the Act would then lose their legal effect.[42] The Court viewed this as inconsistent with the Constitution's veto provision under which the President must sign or reject bills in their entirety, and with the process for making law under which bicameralism and presentment are required to alter anything in a bill that has been signed by the President.[43] Once the President signs a bill, each and every provision it contains becomes law, and there is nothing the President can do unilaterally to alter its legal effect. All the practical arguments about the necessity for an effective method of deficit reduction and the degree of discretion Presidents traditionally have over the actual spending of appropriated funds were not relevant to the basic structural reality.[44]

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37. U.S. CONST. art. II, § 2, cl. 2.

38. *Buckley*, 424 U.S. at 143. Other methods of appointment may be applied to officials of the other branches who do not exercise authority pursuant to the law. For example, Congress may appoint officials who help in the process of legislation. *See id.* at 137–38.

39. 524 U.S. 417 (1998).

40. 2 U.S.C. § 692 (2000), *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998).

41. *Clinton*, 524 U.S. at 448.

42. *Id.* at 436–37.

43. *Id.* at 447–48.

44. The President's exercise of the line item veto under the Act could be defended as execution of the law (the Line Item Veto Act) rather than amendment of the appropriations or tax benefit bill that had already been signed. The Court characterized the veto as the latter, and in this and perhaps other separation of powers controversies, the Court's characterization was decisive. For example, in *Bowsher v. Synar*, 478 U.S. 714, 726–27 (1986), the Court held that an official removable by Congress could not execute the law.

In all of these cases, the Court applies the *expressio unis* canon to the procedural and structural provisions of the Constitution, disallowing innovation with regard to those matters spelled out in the text of the Constitution.[45] This helps explain why innovations such as the legislative veto and the line item veto are unconstitutional, and why Congress may not require approval of presidential appointments by the House of Representatives.

B. Separation of Powers Leniency

As stated in proposition (2), once it is clear that no particular procedural or structural provision of the Constitution has been violated, separation of powers analysis becomes highly forgiving and deferential to Congress's determinations of appropriate governmental structure. Just how forgiving is best illustrated by the Court's nondelegation doctrine jurisprudence and by the controversy over the appointment and removal of the Independent Counsel (IC) in *Morrison v. Olson*.[46] The nondelegation doctrine is discussed in connection with propositions (3), (5), and (6), below. Here I elaborate on appointment and removal in *Morrison*.

The position of IC was created in reaction to corruption in the administration of Richard Nixon, during which special prosecutor Archibald Cox was fired when his investigation got too close to the President.[47] Under the relevant provisions of the Ethics in Government Act, Congress specified that on the request of the Attorney General, after finding cause to investigate whether an executive branch official had violated the law, an IC would be appointed by a special panel of the United States Court of Appeals for the District of Columbia Circuit.[48] The IC was not subject to direct supervision by the Attorney General or any other government official and could be removed only for cause and only by the personal action of the Attorney General.[49]

But the official, the Comptroller General, could be removed only through the exercise of the legislative process. *Id.* at 730–32. Had the Court characterized Congress's role as legislative, perhaps it would not have invalidated the law at issue in *Bowsher*.

45. John Manning makes a similar point. *See generally* Manning, *supra* note 9.

46. 487 U.S. 654 (1988).

47. *See* Steven L. Carter, Comment, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 107–08 (1988) (discussing the background of the passage of the provisions providing for the independent counsel (IC)); Orrin G. Hatch, *The Independent Counsel Statute and Questions About Its Future*, 62 LAW & CONTEMP. PROBS. 145, 145 (1999) ("The primary impetus for our nation's first independent counsel statute was the firing of then-Watergate Special Prosecutor Archibald Cox in 1973 by President Nixon.").

48. *See* 28 U.S.C. §§ 49(a), 591(a) (2006).

49. *See id.* § 596 (a)(1).

Appointment by a court of law is permissible under the terms of the Appointments Clause if the IC is an inferior officer, which the Supreme Court found to be the case.[50] Once that was settled, the remaining question was whether the entire arrangement (including the appointment method, the lack of supervision and the removal restriction) violated separation of powers. In this regard, the operative question became whether the Act violated the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the IC too much. The Court asked "whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with role of the Executive Branch."[51]

This discretionary and forgiving standard invited the Court to make an independent judgment concerning whether the traditional presidential control over the machinery of prosecution had been interfered with too much. Despite strong dissenting arguments from Justice Scalia that the presence of an IC would undermine the ability of the President to command the loyalty of executive branch officials who might be subject to an IC investigation,[52] the Court found that the combination of some presidential control and other structural features surrounding the IC saved the Act from unconstitutionally infringing on the separation of powers.[53] The Court's scrutiny, under general separation of powers principles, was thus very deferential to the congressional judgment that the IC was necessary and not excessively intrusive into presidential prerogatives.

It should be noted that the Court's generally forgiving treatment of alleged separation of powers transgressions in *Morrison* extended beyond the removal question, which is governed only by the general "undue interference" standard and extended to interpretation and application of the Appointments Clause itself.[54] Although the Court strictly requires anyone exercising authority pursuant to the law to be appointed under the procedures required by the Appointments Clause, it has not been very strict when applying the provisions of the Appointments Clause that govern the appointment of inferior officers, including the basic determination of which

50. *Morrison*, 487 U.S. at 671.

51. *Id.* at 693.

52. *Id.* at 712–13 (Scalia, J., dissenting).

53. *Id.* at 695–96 (majority opinion) (citing the Attorney General's removal authority, the statutory requirement that the IC follow Department of Justice guidelines when possible, and additional features of the appointment and conduct of the IC).

54. Removal of officers of the United States is one of the most significant areas not governed by a particular procedural or structural provision of the Constitution. The separation of powers aspects of removal are discussed in connection with propositions (3) and (7), below. *See infra* Parts II.B, IV.A.

officers are inferior and who has the power to appoint them. The Court appeared to bend over backwards to determine that the IC was an inferior officer within the meaning of the Appointments Clause even though the IC was not subject to much in the way of supervision by any superior.[55] The Court has also deferred to Congress's judgment concerning the appropriate appointing authority for inferior officers by allowing Congress wide latitude in assigning appointment to a court and in designating departments and heads of departments for appointments purposes.[56]

The *PCAOB* decision also illustrates this leniency concerning the definition of inferior officers and the designation of departments and department heads with appointive authority.[57] PCAOB members are appointed by the Securities and Exchange Commission (SEC), an independent, bipartisan agency headed by five commissioners, one of whom serves as Chair.[58] The constitutionality of this appointment process depended on two issues: first, whether PCAOB members are inferior officers; and second, whether SEC Commissioners are department heads. On both scores, the Court ruled in favor of SEC authority. The Court found that PCAOB members are inferior officers because they are subject to removal and supervision by the SEC, even though removal is only for pretty extreme cause, much more protective of Board members than the standard governing removal of most independent agency heads and the IC.[59] And on whether the SEC Commissioners are department heads capable of appointing inferior officers, the Court adopted a practical definition of *department* as including any "freestanding component of the Executive Branch, not subordinate to or contained within any other such component."[60] Under this definition, the Court determined that nothing in the Appointments Clause is inconsistent with such a department being headed by multiple commissioners.[61]

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55. The IC was subject to removal for cause by the Attorney General and was required to follow Department of Justice policy to the extent possible. *See* 28 U.S.C. §§ 594(f)(1), 596(a)(1) (2006).

56. *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 892 (1991) (upholding appointment of inferior officers by the chief judge of the Tax Court).

57. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3163 (2010) (determining that the SEC is a department for Appointments Clause purposes).

58. 15 U.S.C. § 78d(a) (2006).

59. *Free Enter. Fund*, 130 S. Ct. at 3162. After the Court determined that PCAOB members must be subject to at will removal by the SEC, it applied the standard it had announced in *Edmond v. United States*, to determine that PCAOB members were inferior officers subject to appointment by, inter alia, "Heads of Departments." *Id.* (citing Edmond v. United States, 520 U.S. 651, 662–63 (1997)); *see also* U.S. CONST. art. II, § 2, cl. 2.

60. *Free Enter. Fund*, 130 S. Ct. at 3163.

61. *Id.* at 3163–64.

This leniency concerning the interpretation and application of the provisions of the Appointments Clause is somewhat inconsistent with this Article's general description of separation of powers as consisting of strict application of particular procedural and structural provisions and leniency when no such provision applies. This must be motivated either by an undisclosed ranking of the relative importance of the Constitution's provisions or an understanding that the text and history of the Appointments Clause do not demand a different analysis. In any case, it is accurate to conclude that the Court is not always very strict when it interprets and applies the particular structural and procedural provisions, but once it arrives at an interpretation, it is not forgiving if it finds that the provision has been violated.

II. GENERAL SEPARATION OF POWERS CONTROVERSIES

A. The Removal of Officers of the United States

The Court's acceptance of congressional power to restrict the removal of officers of the United States both tests and illustrates the claim that the Court is generally lenient when applying separation of powers standards not embodied in a particular procedural or structural provision of the Constitution. No provision in the Constitution addresses the routine removal of officers of the United States. It would be implausible to argue that impeachment is the exclusive removal provision, as that would place the tenure of all officials on par with that of federal judges whose lifetime tenure (absent impeachment) is explicitly provided for in the text of the Constitution.[62] This would also be incompatible with the long tradition of patronage, under which a new President would appoint loyalists to virtually every position in the federal government.

Because there is no constitutional clause governing the routine removal of executive branch officials, controversies over removal test the proposition that general notions of separation of powers have little bite. To appreciate this, a somewhat extended look at the Court's jurisprudence concerning restrictions on presidential removal of executive officials is necessary.

For many years, Congress statutorily required the advice and consent of the Senate for the removal of certain officials, and the House impeached President Andrew Johnson for refusing to obey one such provision.[63]

62. *See* U.S. CONST. art. III, § 1.

63. *See* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1383–84, 1462–63 (2010) (describing the Tenure in Office Act, the impeachment of President Andrew Johnson for violating it, and the repeal of the Tenure in Office Act in 1887); *see also* Myers v. United States, 272 U.S. 52, 107 (1926) (describing a

However, in the early twentieth century, in *Myers v. United States*,[64] the Court categorically rejected any role for the Senate in the removal of officials, declaring such participation contrary to separation of powers, which continues to be established doctrine.[65] Much of the language of the *Myers* opinion, written by Chief Justice and former President William Howard Taft, supports relatively stringent review of congressional efforts to interfere with the President's supervision of the Executive Branch. The Court also relied on the Take Care Clause, implying that requiring Senate permission to remove an executive branch official would unduly interfere with the President's ability to faithfully execute the law.[66]

The primary argument made in defense of the requirement of senatorial advice and consent for removal of executive officials was that since the Senate had the power to participate in the appointment of officers of the United States, the Senate could also participate in the removal, through similar advice and consent power. There is apparently good historical evidence that this was the understanding at the time the Constitution was adopted.[67] The Court rejected this argument based on constitutional text, the President's need to supervise officials engaged in the execution of the laws, and the Court's reading of particular constitutional history on the subject.[68]

The Court distinguished senatorial participation in removal from participation in appointments on three bases. The first is that the only

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statute passed in 1876 requiring the advice and consent of the Senate before the President could remove certain postmasters). As is discussed below, *Myers* held this provision unconstitutional.

64. 272 U.S. 52 (1926).

65. *See id.* at 176 (holding that the Tenure Act was unconstitutional and "that subsequent legislation of the same effect was equally so").

66. *Id.* at 122 ("The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal."). The Court further observed that without the power to remove, the President could not "discharge his own constitutional duty of seeing that the laws be faithfully executed." *Id.* at 135.

67. The dissenting opinions of Justices McReynolds and Brandeis in *Myers* argue, based on constitutional history and consistent practice, that the Constitution allows Congress to require the advice and consent of the Senate for the discharge of inferior officers. *See id.* at 178–239 (McReynolds, J., dissenting); *id.* at 240–95 (Brandeis, J., dissenting). Justice Holmes's brief dissent argues that senatorial advice and consent is appropriate because Congress created the office to which the requirement applies. In other words, the greater power to abolish the office includes the lesser power to require the Senate's advice and consent to discharge the officer. *Id.* at 177 (Holmes, J., dissenting).

68. *Id.* at 175–76 (majority opinion).

reason the Senate is allowed to participate in the latter is that the Appointments Clause explicitly so provides.[69] The lack of a textual reference to senatorial participation in removal strongly implies that the Framers did not anticipate any such participation, especially in light of the specific reference to Senate advice and consent on appointments. *Myers* refutes the notion that the advice and consent power over appointments implies an advice and consent power over removals. To the contrary, the Court explained that there were specific reasons for requiring the Senate's advice and consent over appointments, and those reasons do not apply to removal.[70] Second, the Court relied on the President's need to supervise the execution of the laws.[71] While the President may not find it ideal that the Senate has power to reject nominees to executive positions, once an official is confirmed and appointed, the President's strongest guarantee of efficiency and loyalty is the removal power. If the President is forced to share that power with the Senate, the President is effectively sharing the executive power with the Senate. This is not true with regard to Senate participation in appointment, since once the nomination is confirmed, the Senate loses virtually all formal control over the official.

Third, the *Myers* Court found specific constitutional history in support of its view that the Senate could not participate in the removal of executive officials.[72] The Court examined the debates surrounding the advice and consent power and the general issue of removal of officials and found strong evidence that the Framers meant to lodge the removal power exclusively with the President, mainly for the practical reason discussed above. The opinion relies for its bottom-line rejection of senatorial advice and consent for removals on this specific evidence more than on the general notion that removal is by nature an executive function. In fact, the Court concluded that Senate participation in removal was specifically rejected.[73]

Therefore, *Myers* is not contrary to the portrait of separation of powers offered in this Article. The primary bases for finding a constitutional problem with senatorial advice and consent for removal were the effect on the President's ability to take care that the laws are faithfully executed and the specific rejection by the Framers of a role for Congress in removal. Thus, although there is language in *Myers* and perhaps other opinions that supports a more conceptual form of separation of powers analysis, the

69. *Id.* at 164.

70. *See id.* at 161–62.

71. *Id.* at 164.

72. *Id.* at 119–29.

73. *See id.* at 167 (citing the insistence of "Mr. Madison and his associates in the First Congress . . . that the power of removal of executive officers by the President alone was essential in the division of powers between the executive and the legislative bodies").

bedrock separation of powers principle for which the decision stands is the same as under current law: that Congress may not take action that unduly interferes with the President's ability to execute the law. There are two rules in this area, one that dates back to *Myers* and one that dates back only to the *PCAOB* decision. First, Congress, or a subset of Congress, may not participate in the removal of executive officials through any sort of advice and consent requirement. Second, if an official can be removed only for cause by a lower level official, the official with removal power must be subject to at-will removal by the President.[74] Given the lenient attitude the Court has taken toward removal restrictions—largely reaffirmed in the *PCAOB* decision—the more conceptual elements of *Myers* are insufficient to undercut the explanation of separation of powers offered here.

Regardless of its basis or bases, the *Myers* decision's restrictive view of Congress's authority to restrict the removal of officials did not last long. After *Myers*, the Court twice approved restrictions on the removal of independent agency personnel,[75] once even reading the removal restriction into a statute that did not actually contain one.[76] On a conceptual level, the Court did not abandon the *Myers* Court's view that the President must have complete control over those engaged in executive functions. In *Humphrey's Executor*, the Court instead found that the President did not need control over officials engaged in what it termed "quasi-legislative" and "quasi-judicial" functions because agencies performing such functions "cannot in any proper sense be characterized as an arm or an eye of the executive."[77] These decisions apparently left intact the *Myers* Court's endorsement of

74. It is not clear whether the Court will apply this rule to administrative law judges (ALJs) who are often protected by two layers of for-cause restrictions. The Court stated that its analysis did not necessarily apply to ALJs because they might be employees rather than Officers of the United States and they "perform adjudicative rather than enforcement or policymaking functions." Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3160 n.10 (2010). If the characterization of ALJs as performing adjudicative functions ultimately determines that the rule against double for-cause restrictions does not apply to them, the analysis will be inconsistent with the Court's recent rejection of conceptual analysis as the basis of decisions concerning the constitutionality of removal restrictions. *See supra* Part IIA. Kevin Stack suggests that *PCAOB* does signal a return to the conceptual analysis of *Humphrey's Executor* insofar as the Court would not apply its ban on double for-cause removal restrictions to "dedicated adjudicators" such as ALJs. *See* Kevin M. Stack, *Agency Independence after* PCAOB, CARDOZO L. REV. (forthcoming 2011).

75. *See* Wiener v. United States, 357 U.S. 349, 356 (1958) (stating that the President may not remove a member of the adjudicatory War Claims Commission even though the statute does not explicitly address removal standard); Humphrey's Ex'r v. United States, 295 U.S. 602, 623 (1935) (ruling that Congress may restrict removal of Federal Trade Commissioner to "inefficiency, neglect of duty, or malfeasance in office").

76. *See Wiener*, 357 U.S. at 353–54.

77. *Humphrey's Ex'r*, 295 U.S. at 628; *see also Wiener*, 357 U.S. at 352.

complete presidential control over the removal of officials exercising purely executive functions, such as delivering the mail, or, presumably, investigating and prosecuting alleged criminals.

The distinction of *Myers* in *Humphrey's Executor* is the exact sort of conceptual analysis (sorting powers and assigning them to branches) that I claim is *not* the mode of analysis the Supreme Court applies today to separation of powers controversies.[78] Under *Humphrey's Executor*'s reasoning, restrictions on the removal of officers of the United States engaged in purely executive functions would be unconstitutional while restrictions on the removal of officials engaged in other functions, such as adjudication, would not only be constitutional, they would be desirable to protect the adjudicators from undue presidential influence.[79] This changed, however, with the Court's approval of restrictions on the removal of independent counsels in *Morrison v. Olson*.[80] In that decision, the Court discarded the executive versus quasi-judicial and quasi-legislative mode of analysis of removal restrictions in favor of application of the general separation of powers standard: "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."[81] The President's constitutional duty is to "take Care that the Laws be faithfully executed."[82] Thus, removal restrictions are unconstitutional only if, in the Court's judgment, they unduly hinder the President's ability to fulfill the constitutional role of the presidency.

Although the *PCAOB* decision did not, on its face, adjust the standard for evaluating the constitutionality of restrictions on the removal of officers of the United States, it appears to be at least a modest step toward stricter application of the standard. By law, PCAOB members are removable only by the SEC Commissioners and only for pretty extreme cause.[83] SEC Commissioners are removable by the President but only for cause under

78. *Humphrey's Executor* is thus inconsistent with the second half of proposition (2), at least with regard to separation of powers controversies concerning removal restrictions.

79. *See Wiener*, 357 U.S. at 356 ("Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.").

80. 487 U.S. 654, 696 (1988).

81. *Id.* at 691.

82. U.S. CONST. art. II, § 3; *see also Morrison*, 487 U.S. at 669. In similar language, the Court declared that "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority" and "we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." *Morrison*, 487 U.S. at 691–92.

83. *See* 15 U.S.C. § 7217(d)(3) (2006) (listing conditions for removal).

the standard governing removal of Federal Trade Commissioners evaluated in *Humphrey's Executor*.[84] In evaluating this situation, the Court asked whether the Board was sufficiently accountable to the President.[85] Although the Court did not recite the general separation of powers question of whether the removal restriction unduly interferes with the President's ability to fulfill the constitutional functions of the presidency, that was clearly the motivation for concern over whether the President had sufficient control over the Board's activities.[86]

At a rhetorical level, the *PCAOB* Court seemed very concerned that restrictions on removal of officials executing the law must not be so great that the President cannot, as a practical matter, control their work at least to some extent. The Court declared the for-cause restriction on SEC removal of Board members unconstitutional because the President could not remove SEC members without cause.[87] Under the Court's reasoning, Congress may entrust removal of officials to a subordinate of the President, but when it does so, either the official so entrusted must be removable at will by the President or the official subject to removal must be removable at will by the official with removal power. Because PCAOB members were removable only by the SEC, which is headed by commissioners removable only for cause by the President, the Court held that PCAOB members must be removable without cause.[88]

This understanding is a particularized application of the principle that no branch may prevent another from fulfilling its constitutionally assigned function. In the case of removal, Congress could cripple the President's ability to take care that the laws are faithfully executed by preventing the President from removing incompetent, corrupt, or disloyal officials. Normally this standard is not very demanding and is rarely violated.

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84. No statute actually provides SEC Commissioners with this protection from discharge, but the Court accepted the parties' agreement to this standard for purposes of the litigation. This is discussed further *infra* at notes 93–95 and accompanying text.

85. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3146–47 (2010).

86. *See id.* at 3147 ("[T]he President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him.").

87. *Id.*

88. *Id.* at 3161 (holding the offending for-cause removal provision severable from the otherwise valid act).

However, in the *PCAOB* decision, the Court appears to have created a per se rule against double for-cause restrictions.[89]

Does this signal a tightening of norms governing the permissibility of removal restrictions? It's much too early to tell, although, in general, an affirmative answer appears unlikely. There is one signal in the Court's opinion that is consistent with a tightening of standards—the Court's novel invocation in the separation of powers context of a potential lack of political accountability for PCOAB decisions if Board members are insulated from control by either the SEC or the President.[90] However, other signals point in the opposite direction, especially the Court's willingness to imply a for-cause restriction on removal of SEC Commissioners even though no statute protects SEC Commissioners from removal without cause.[91]

According to the applicable statute, the President, with the advice and consent of the Senate, appoints SEC Commissioners for five-year terms.[92] Removal of Commissioners is not mentioned in the statute. The Court relied on an agreement of the parties that Commissioners may not be fired without cause, based perhaps on a long-term understanding that Congress intends to protect heads of independent agencies from at-will presidential removal.[93] This presents something of a puzzle. The basis for the Court's

89. *See id.* at 3164. Another way in which the *PCAOB* decision appears novel is that the Court itself reformed the removal provision, declaring that PCAOB members are removable without cause by the SEC. In the past, rather than reform the offending removal or appointment provision, the normal practice has been for the Court to declare that improperly appointed or removable officials cannot engage in execution of the law. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 736 (1986) (holding that an official removable by Congress cannot execute the law); Buckley v. Valeo, 424 U.S. 1, 143 (1976) (stating that officials appointed by members of Congress cannot execute the law).

90. *See Free Enter. Fund*, 130 S. Ct. at 3155 ("Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" (quoting THE FEDERALIST NO. 70 (Alexander Hamilton))). This concern for clear lines of political accountability is the underlying normative basis for the Court's prohibition on federal commandeering of state and local officials to enforce federal law, which the Court created as a limitation on Congress's power to regulate interstate commerce in the 1990s. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

91. *See Free Enter. Fund*, 130 S. Ct. at 3148–49 ("The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard . . . and we decide the case with that understanding.").

92. *See* 15 U.S.C. § 78d(a) (2006).

93. *Free Enter. Fund*, 130 S. Ct. at 3148–49. A test of this understanding would occur if the President discharged a member of the Commission without cause and defended a suit by the terminated commissioner on the basis that no statute protects the Commissioner's tenure. It would be surprising if the Court stuck to its view in *PCAOB* and held that a for-cause restriction on removal is implicit for independent agency members in the absence of legislation to that effect. Perhaps the Court would view it as implicit in appointment of

disapproval of double for-cause protection for officials exercising executive power is to ensure that the President has some level of control over the execution of the law. But with regard to single for-cause protection of independent agency heads, not only did the Court not express any reservation about the typical for-cause limitation on discharge of independent agency heads, it embraced it by consenting to an implied for-cause restriction for SEC members. If a strong principle of presidential removal existed, it would seem that Congress should at least be required to explicitly legislate protection from discharge for independent agency heads. Thus, if there is anything revolutionary about the *PCAOB* decision, it may be that the independence of independent agencies appears to have achieved a quasi-constitutional status, such that Congress would have to explicitly grant the President unlimited removal power to overcome the presumption of protection. This is clearly inconsistent with a newly restrictive view of separation of powers.

In sum, although the *PCAOB* decision may be somewhat stricter than had been the case with regard to restrictions on the President's power to remove officers of the United States, separation of powers jurisprudence has not been demanding when no particular procedural or structural provision of the Constitution is implicated. This brings us to proposition (3).

B. The Vesting Clauses

(3) *The Vesting Clauses of Articles I, II, and III of the Constitution are not among the procedural or structural provisions of the Constitution that tend to be strictly enforced. They thus have little or no substantive bite. In other words, it is rarely, if ever, possible to rely on a Vesting Clause to provide an answer to a separation of powers controversy.*

That the Vesting Clauses are not among the procedural or structural provisions that tend to be strictly enforced should be apparent from the preceding discussion. If they were, then when more specific provisions were found not to have been violated, like the Appointments Clause or the bicameralism and presentment provisions, the next step in the analysis would be to ask whether a Vesting Clause had been violated.[94] And it

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Commissioners for five-year terms. If the Court held that Commissioners are terminable at will, then presumably it would be constitutional to require cause for the SEC to discharge PCAOB members.

94. Some scholars locate a general principle of separation of powers, and other nontextual limitations on governmental power, in Article I's Necessary and Proper Clause, theorizing that a law that violates separation of powers cannot be "*proper*" for "carrying into execution" any federal power. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274 (1993). Lawson's and Granger's argument is based largely on state constitutional separation of

would follow that a Vesting Clause was violated whenever a branch was deprived of complete control over the performance of its assigned constitutional function. Proponents of expansive presidential power, under what has become to be called the unitary executive theory, take this tack.[95] They would argue, for example, that because the independent counsel provisions of the Ethics in Government Act dilute presidential control over the performance of the executive function of prosecution, they are unconstitutional under the Vesting Clause of Article II. Vesting Clause enforcement would require exactly the sort of analysis this essay argues rarely, if ever, occurs. A challenger would claim that Congress has taken a power that belongs to one branch and either unconstitutionally allocated it to a different branch or restricted the proper branch's complete control over its exercise. Regardless of whether it would have been more faithful to the Constitution for the law to have developed that way, it has not, and while the Vesting Clauses have important legal ramifications,[96] they are not enforced strictly, the way other structural provisions of the Constitution are.

The best illustration of this fact of constitutional analysis involves the nondelegation doctrine. The nondelegation doctrine embodies a fundamental separation of powers principle, that Congress may not delegate away its legislative power. In a sense it is a truism, since the Constitution empowers Congress and only Congress to pass laws (subject to the possibility of presidential veto and judicial invalidation). It has long been recognized that delegation of excessive discretion to executive branch officials, even without the authority to actually promulgate laws, implicates the legislative power as a matter of substance if not of form. Even with regard to such a fundamental element of separation of powers, because no particular clause prohibits delegation of discretion (and because the Vesting

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powers provisions that used the word *proper* to refer to matters within the jurisdiction of a particular branch of government. *See id.* at 291–97. They argue that the Framers incorporated this jurisdictional understanding into the Constitution through the use of the word *proper* in the Necessary and Proper Clause. *Id.* at 298–308. Whether they and other scholars who express similar opinions are correct is irrelevant to this Article which attempts only to describe separation of powers as practiced and understood in current law.

95. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) ("The theories of limited congressional power to divest the President of control over the executive department are rooted in the Vesting Clause of Article II, which provides: 'The executive Power shall be vested in *a* President of the United States of America.'" (emphasis added)).

96. The Vesting Clauses do settle important structural matters. For example, we know from Article I that only Congress has the power to pass laws, and we know from Article II that there is only one President of the United States. U.S. CONST. art I, § 1; *id*. art. II, § 1, cl. 1. But under the Court's jurisprudence, the Vesting Clauses do not have much to say about the proper allocation of government power.

Clause of Article I is not understood as such a clause) the standard the Court applies to nondelegation disputes is incredibly forgiving, bordering on a determination that the doctrine is nonjusticiable.[97] To avoid delegation of legislative power, Congress must legislate an "intelligible principle" for agencies to follow when filling in gaps and making policy under the law.[98] If the Vesting Clause of Article I were understood as having separation of powers bite, it would be expected that the nondelegation doctrine would be much less forgiving of executive exercise of discretionary power to promulgate rules and take other action with the force of law.[99]

Because in *PCAOB* the Court began its analysis by quoting Article II's Vesting Clause, and because the Court's opinion asserted that "the executive power included a power to oversee executive officers through removal,"[100] the decision may appear on the surface to contradict the proposition that the Vesting Clauses are not important to separation of powers doctrine. On closer analysis, however, the decision is not substantially different from prior law. Had the analysis stopped here and concluded that *any* limitation on the President's power to remove members of the PCAOB violated separation of powers, we would be characterizing the decision as the opening gambit in the "Roberts Court's separation of powers revolution." What we got instead, however, was a relatively moderate swing toward greater presidential power and an ambiguous tip of the hat to the Vesting Clause of Article II.

The Court's unusually explicit reliance on the Vesting Clause and its characterization of the power to remove as an executive function did create an air of expectancy concerning the next step in the Court's separation of powers jurisprudence. Further, the development under the influence of the Vesting Clause of the apparent per se rule that two levels of for-cause protection are unconstitutional raises the possibility that the Vesting Clause might, in the future, be treated as a specific structural provision prohibiting excessive limitations on presidential control over those aiding in the

97. Justice Scalia stated in *Whitman v. American Trucking Ass'ns*, "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

98. *Whitman*, 531 U.S at 472.

99. The dispute over whether the Constitution absolutely prohibits delegation of legislative power is addressed below, with regard to proposition (6). *See infra* Part III.C.

100. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3152 (2010).

execution of the law. So far, however, indications are that business as usual is the most likely direction for the future.

C. Separation of Powers and the Judicial Branch

The analysis thus far has concerned mainly the Vesting Clauses of Articles I and II. Because the procedures for exercising the judicial power are not highly specified in the text of the Constitution, the Vesting Clause of Article III may be more important than the Vesting Clauses of Articles I and II, and the nature of the judicial power may thus be more relevant to understanding separation of powers than that of the other governmental powers. The structural and procedural aspects of the judicial power that are specified in the Constitution include the maximum jurisdiction of the federal courts,[101] the specification of the Supreme Court's original and appellate jurisdiction,[102] the requirement of trial by jury in criminal matters,[103] the local venue requirement in criminal cases,[104] the evidentiary requirements for treason,[105] and allocation to Congress of the power to establish lower federal courts.[106]

In addition to these matters that are spelled out in the Constitution, the Supreme Court has identified the essential attributes of the judicial power that are reserved to the Article III courts. These include the entry of a final judgment, presiding over jury trials, and imposing criminal punishment. The prohibition on bills of attainder makes judicial power over some aspects of criminal law exclusive,[107] and the restrictions on the suspension of the writ of habeas corpus give the judiciary some power over executive action involving imprisonment.[108] There are also limitations on Congress's power to allocate jurisdiction over core Article III cases to non-Article III tribunals.[109] The lack of specificity in the Constitution concerning the essential attributes of the judicial power means that most controversies over alleged allocation of judicial power to non-Article III tribunals are evaluated under standards similar to the general separation of powers standard that governs executive and legislative branch controversies that do not involve a particular procedural or structural provision.

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101. U.S. CONST. art. III, § 2, cl. 1.
102. *Id*. art. III, § 2, cl. 2.
103. *Id*. art. III, § 2, cl. 3; *see also id*. amend. VI.
104. *Id*. art. III, § 2, cl. 3.
105. *Id*. art. III, § 3, cl. 1.
106. *Id*. art. III, § 1.
107. *Id*. art. I, § 9, cl. 3.
108. *Id*. art. I, § 9, cl. 2.
109. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850–51 (1986); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U. S. 50, 87 (1982).

There is a great deal of federal adjudication outside the Article III courts in institutions as varied as benefits agencies, such as the Social Security Administration; regulatory bodies, such as the National Labor Relations Board; and licensing agencies, such as the Nuclear Regulatory Commission. There are also non-Article III institutions that are explicitly characterized as courts, such as the United States Tax Court. The typical separation of powers controversy concerning Article III involves whether the establishment of a non-Article III federal adjudicatory institution violates Article III because it exercises judicial power that is constitutionally vested in the federal courts. The Vesting Clause is usually invoked, but it has little effect on the actual analysis or resolution of the controversies.

The general rule is that Congress has broad power to create non-Article III adjudicatory institutions to decide categories of cases that have traditionally been viewed as outside the core of Article III jurisdiction. The categories include public rights (rights against the U.S. government), cases arising in territorial courts, and cases arising in military courts. The most important category here is public rights.[110] The theory underlying acceptance of non-Article III adjudication of public rights is that, because the United States could assert complete sovereign immunity or decide such claims in a nonadjudicatory administrative manner, the use of an adjudicatory process does not transform the decisionmaking process into an exercise of the Article III judicial power. This notion is reinforced by the fact that the Supreme Court has long understood claims against the sovereign to be outside the original intent of Article III.[111]

Private rights adjudication in a non-Article III federal tribunal presents a more difficult Article III separation of powers question. In 1979, the Supreme Court invalidated a new system of bankruptcy adjudication because it allowed the non-Article III bankruptcy courts to adjudicate all claims involving the bankrupt estate, including state common law claims between the bankrupt and another private party.[112] Here we have a direct application of the Vesting Clause of Article III: non-Article III federal tribunals cannot exercise the judicial power of the United States.

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110. The reasons behind acceptance of non-Article III territorial courts and courts-martial are idiosyncratic and do not aid in understanding separation of powers doctrine. Non-Article III territorial courts are necessary because when a state is formed in what was previously a territory, the need for federal judges decreases dramatically because most of the work done by the former territory's courts is taken up by the state courts. Courts-martial have long been part of the military structure and would not be considered part of the domain occupied by the Article III courts.

111. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

112. *N. Pipeline*, 458 U.S. at 87.

Until relatively recently, it was unclear whether the Supreme Court would embrace a strict standard condemning all non-Article III adjudication outside the public rights, territorial courts, and courts-martial areas. Early cases placed restrictions on agency adjudication of private rights claims to preserve the Article III courts' dominant role in such adjudication.[113] The closest that a highly restrictive view came to becoming law in recent years was in Justice Brennan's plurality opinion in the case invalidating the bankruptcy courts.[114] Ultimately, the Court adopted a much more forgiving standard, allowing federal adjudication of private rights claims in non-Article III tribunals if the claims were closely related to a federal regulatory scheme and the statute did not allow the non-Article III tribunal to assume the "essential attributes" of Article III courts, such as the power to enter final judgments and the power to preside over jury trials.[115] In language similar to that used in separation of powers controversies concerning the powers of the other branches, the Court stated that the fundamental question concerning the constitutionality of the assignment of adjudicatory power to a non-Article III tribunal is whether it "impermissibly threatens the institutional integrity of the Judicial Branch."[116]

In evaluating the constitutionality of adjudication in non-Article III federal tribunals, it is important to distinguish between the exercise of the judicial power of the United States and the mere use of an adjudicatory procedure. What marks out this distinction is a combination of procedural and structural aspects of the tribunal, most of which are not mentioned in the Constitution and are referred to in the Court's opinions as the "essential attributes of the judicial power."[117] These essential attributes include the power to issue final judgments, the lack of judicial review or review only on a highly deferential standard, the power to issue writs of habeas corpus and preside over jury trials, and jurisdiction over state law claims.[118] If a federal

113. *See* Crowell v. Benson, 285 U.S. 22, 64–65 (1932). In Crowell, the Court held that a federal agency could adjudicate private rights claims as a sort of adjunct to the federal courts, with deferential review of routine facts but de novo review of jurisdictional facts and questions of law.

114. *N. Pipeline*, 458 U.S. at 87.

115. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

116. *Id*.

117. *Id.*

118. *Id.* at 852–53. In *Stern v. Marshall*, No. 10-179, 2011 WL 2472792, at *16 (U.S. June 23, 2011), the Court reaffirmed that the power to enter a final judgment in a state common law claim is an essential attribute of the Article III judicial power. Interestingly, in dicta, the Court expanded the category of "public rights" that may be adjudicated by non-Article III tribunals to include cases between private parties "in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert

institution respects these boundaries sufficiently, the fact that it makes decisions using an adjudicatory process does not take it out of the realm of execution of the law and convert its actions to the exercise of the judicial power of the United States. What is special about this standard is that, because these attributes are not specified in the Constitution, the Vesting Clause, together with a conceptual understanding of the nature of the judicial power, plays a greater role here than in separation of powers controversies concerning the powers of Congress and the President.

III. THE REJECTION OF CONCEPTUAL ANALYSIS

A. No Assignment of Powers

Proposition (4) is the conclusion to this part of the discussion: (4) *As a corollary to proposition (3), in general, separation of powers controversies are rarely, if ever, resolved by determining which branch of government is the proper branch to engage in a particular activity. In other words, separation of powers controversies are not resolved by determining the nature of a government action and then assigning the performance of that action to the branch with the power to engage in that category of action.*

As we have seen, separation of powers controversies are usually resolved by asking two questions: first, whether a specific structural or procedural provision has been violated, and second, if not, whether the particular arrangement being challenged unduly interferes with a branch's ability to perform its assigned function in the government. None of the major separation of powers cases discussed above, except perhaps those concerning judicial power, were decided conceptually by asking whether a branch was exercising a power that properly belonged to another branch. There are powerful practical reasons for this, having mainly to do with the difficulty courts would face if they tried to construct mutually exclusive definitions of the three types of government powers.

Consistent with this analysis, the *Chadha* Court defined the legislative power in a practical way, basically by stating that anything that Congress does that purports to have legal effect outside the Legislative Branch falls within the legislative power.[119] This reflects a fundamental separation of powers understanding that each branch has only the power assigned to it

government agency is deemed essential to a limited regulatory objective within the agency's authority." *Id.* at *18. The Court, in effect, recharacterizes the cases in which it has allowed non-Article III adjudication of claims between private parties as falling within this expanded definition of "public" rights. *Id.* In my view, this is a serious mischaracterization of prior cases. Unfortunately, *Stern* was decided too late in the process of editing this Article to allow for a complete analysis.

119. INS v. Chadha, 462 U.S. 919, 951–52 (1983).

by the Constitution, and that when it exercises governmental power each branch must follow whatever procedural or structural provisions apply to it. Congress must act legislatively. The courts may not go beyond the resolution of cases or controversies. The President may not act beyond the power delegated either by legislation or the Constitution itself. In this regard, one of the more interesting points the Court made in *Morrison v. Olson* is that because the Constitution specifies that courts of law may appoint inferior officers, appointment of officers of the United States is not, constitutionally speaking, an exclusively executive function.[120]

This is not to say that the nature of the power is always irrelevant, although in the vast majority of cases it is. Sometimes conceptual analysis of the nature of a power may be lurking just below the surface of a controversy. Arguably, for example, the Court considers the power to remove officials executing the law as an executive function. Impeachment and conviction by the House and Senate is allowed only because the Constitution specifies it, not because it is a normal legislative function. This helps explain why the Supreme Court denied the Senate a role in removal in *Myers*[121] and why the more recent decision in *PCAOB* placed the power to remove squarely within the executive power constitutionally vested in the President.[122] Even here, however, it is best to say that the President's removal power depends not on the nature of that power but on the potential for any other arrangement to interfere with the performance of his constitutional powers and duties. After all, the Legislative and Judicial Branches have the power to remove their own officials, and even hire them despite the Appointments Clause. Thus, appointment and removal should not be viewed as executive functions per se, except when the officials involved assist the President in executing the law.

The *PCAOB* decision also illustrates that separation of powers decisions do not depend on assignment of a function to a particular branch. In that case, the Court found that the provisions governing removal of PCAOB members contravened the separation of powers.[123] Note, however, that the Court's decision was not that the power to discharge officers of the United States was in its nature an executive function but rather that the removal restrictions unduly impaired the President's ability to carry out his

120. 487 U.S. 654, 695 (1988) ("[T]he power to appoint inferior officers such as independent counsel is not in itself an 'executive' function in the constitutional sense, at least when Congress has exercised its power to vest the appointment of an inferior office in the 'courts of Law.'").

121. Myers v. United States, 272 U.S. 52, 176 (1926).

122. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3152 (2010).

123. *Id.* at 3147.

constitutional obligation to "take Care that the Laws be faithfully executed."[124] Removal can be accomplished legislatively as well. The Court has made it clear that when a legislature abolishes a governmental position and, in effect, removes the incumbent official from office, the legislative body is engaging in a legislative function.[125] Thus, even the separation of powers analysis relevant to removal of officials executing the law is best understood as based on general separation of powers principles rather than the allocation of authority to a particular official or branch of government.

B. Overlapping Powers

(5) *Building on propositions (3) and (4), most government actions can substantively be performed by more than one branch. Each branch must observe the constitutional procedural and structural requirements that apply to it.*

It is a fundamental reality of the U.S. government that more than one branch can create the identical substantive law. To provide a simple example of this, consider the specification of National Ambient Air Quality Standards (NAAQS). Congress has empowered, indeed required, the Environmental Protection Agency (EPA) to establish NAAQS for numerous pollutants.[126] The EPA does this by promulgating regulations pursuant to the procedures established by Congress. There is no doubt that Congress itself could establish the NAAQS via the legislative process of bicameralism and presentment. Assuming proper delegation of authority, Congress and the EPA have concurrent power to establish NAAQS, with the understanding that if Congress acts, its legislative determination supersedes any standard set by the EPA.

We know from *Chadha* that if Congress wants to establish a NAAQS or reject one established by the EPA, it must employ the constitutionally specified legislative process of bicameralism and presentment. *Chadha* also establishes that bicameralism and presentment do not apply to agencies even when they do the exact same thing as Congress might have done itself. This is because agencies are executing the law as established by Congress through bicameralism and presentment.[127] In addition to any substantive

124. The Court referred to both the Vesting Clause and the Take Care Clause, which illustrates how removal disputes test the theory offered here. "We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Id.*

125. Bogan v. Scott-Harris, 523 U.S. 44, 55–56 (1998).

126. Clean Air Act § 109(a), 42 U.S.C. § 7409(a) (2006).

127. *See* INS v. Chadha, 462 U.S. 919, 953 n.16 (1983).

and procedural requirements for agency action established by statute, there are three primary constitutional structural provisions that apply to the EPA. First, unless the EPA claims it is acting under a specific constitutional authorization—as the President does, for example, when recognizing a foreign government—the EPA must be executing the law, which means there must be a sufficiently specified delegation from Congress. To meet the constitutional requirement, the delegation must contain an intelligible principle directing the EPA's actions.[128] If there is no constitutionally valid delegation from Congress, then the EPA would be acting ultra vires in the same way that President Truman's seizure of the steel mills was held unconstitutional in the absence of a statutory delegation of authority in *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*.[129] Second, the officials within the EPA must be appointed as officers of the United States as specified by the Appointments Clause. If the EPA officials are not appointed properly, they cannot exercise authority pursuant to the laws of the United States. Third, the officials must be subject to some measure of presidential control through removal provisions that do not unduly hinder the President's ability to supervise the execution of the laws.

Similarly, Congress and the Executive Branch have overlapping power over the status of aliens like Chadha. If Congress passes a law allowing the Department of Justice or Homeland Security to naturalize or otherwise modify the status of aliens, the exercise of authority under that law would be a classic case of executing the law. However, when Congress passes a

128. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–73 (2001) (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) (discussing the constitutionality of delegation to the Environmental Protection Agency to set National Ambient Air Quality Standards).

129. 343 U.S. 579 (1952). This is the clear implication of the Court's analysis in the *Steel Seizure* case, in which the Court grappled with President Truman's claim of inherent power to seize the steel mills in wartime to avert serious negative consequences to the war effort. The Court's decision appears to stand for the proposition that the President had not only seized the mills, but had also seized the Congress's legislative power, and that this he could not constitutionally do. In my view, it is more accurate to state that President Truman's action was illegal because it was ultra vires. In the Court's view, President Truman had no statutory or constitutional basis for seizing the mills. It is not that the order to seize the mills was an exercise of the legislative power. The President does not have legislative power beyond the veto granted in Article I. It is that lacking a constitutional basis, the only possible source of presidential power would arise from a statute passed by Congress which was also not present. In a sense, the nondelegation doctrine could be understood this way. Vague statutes lacking an intelligible principle simply do not successfully delegate power to the Executive Branch. On this understanding, the problem is not that such statutes improperly delegate legislative power, it is that they do not successfully enable executive action because they are not specific enough. Therefore, action taken purporting to rely on them is ultra vires because it has not been successfully authorized.

bill naturalizing a particular alien or declaring that a particular alien should not be deported, Congress has exercised its legislative power (and therefore must act pursuant to bicameralism and presentment).[130] Further, if, in a justiciable case or controversy, a federal court orders the Executive Branch to modify the status of a particular alien, the court would have exercised the judicial power.

The substantive power of the federal courts also overlaps with that of the other branches. For example, consider a controversy over whether a particular collective bargaining strategy constitutes an unfair labor practice under the National Labor Relations Act.[131] All three branches have the power to make a decision on the subject. The National Labor Relations Board, as part of the Executive Branch, can determine that the conduct is an unfair labor practice.[132] On judicial review, a federal court can make the very same determination. And Congress has the power to legislatively specify whether the practice is unlawful. Each branch is performing its assigned constitutional function and must observe the constitutional requirements for actions that apply to it.

Another example of overlap can be seen in the Commander in Chief power. Perhaps it is in the nature of the power to direct the military that this should belong to the President, but this is a very unsettled area of constitutional law. The Constitution explicitly grants Congress several powers over the military, including the power "[t]o make Rules for the Government and Regulation of the land and naval Forces" and the power to declare war.[133] Further, the appointment of military commanders is subject to the advice and consent of the Senate.[134] Thus, even what appears to be the quintessential executive function is subject to legislative checking and involvement. Over the years, some of the most extravagant claims for exclusive presidential power have involved this power, in

130. *See Chadha*, 462 U.S. at 954–55. This sort of legislation may not be permissible in most states in the United States that have bans on "special legislation" in their constitutions. For example, Article IV, section 13 of the Illinois constitution provides: "The General Assembly shall pass no special or local law when a general law is or can be made applicable." ILL. CONST. art. IV, § 13. Because the federal Constitution has no such provision, Congress is free to legislate with greater particularity than most state legislatures, subject to other limitations such as the prohibition on bills of attainder, which, under certain circumstances, prevents Congress from singling out individuals for unfavorable action. U.S. CONST. art. I, § 9, cl. 3.

131. 29 U.S.C. §§ 141–197 (2006).

132. *Id.* §§ 158, 160.

133. U.S. CONST. art. I, § 8, cl. 11, 14.

134. *Id*. art. II, § 2, cl. 2.

apparent ignorance of the Constitution's dispersion of the power over the military between the Executive and Legislative Branches.[135]

For another simple example, a majority in one house of Congress can prevent a bill from becoming law by voting it down, the President can prevent a bill from taking effect by vetoing it, and the Judiciary can prevent a statute from having legal effect by declaring it unconstitutional and enjoining its enforcement. Of course, there are structural limits on the power of each branch. For example, if a bill was passed in a prior Congress, bicameralism and presentment would be required to repeal it even for constitutional reasons. The President cannot exercise a "veto" over a law that is already in effect,[136] and the Judiciary may act only if presented with a justiciable controversy that implicates the constitutionality of the law.

The existence of overlapping powers is directly related to the general rejection of conceptual analysis in separation of powers law. While there may be small pockets in which conceptual analysis of the nature of a particular governmental power is relevant—such as in deciding on the essential attributes of Article III courts that cannot be exercised outside the Judicial Branch—these pockets are few and far between, because in most cases it simply is not obvious where a power properly belongs. Further, note that this is still a procedural matter, not a substantive limitation on

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135. Consider, for example, Robert Bork's view that Congress lacked the power to legislatively prevent President Nixon from ordering attacks on Cambodian territory during the war in Vietnam. In Bork's view, congressional efforts to prevent attacks on Cambodia interfered with the President's power as Commander in Chief. As Bork stated in 1971:

> I arrive, therefore, at the conclusion that President Nixon had full Constitutional power to order the Cambodian incursion, and that Congress cannot, with Constitutional propriety, undertake to control the details of that incursion. This conclusion in no way detracts from Congress's war powers, for that body retains control of the issue of war or peace. It can end our armed involvement in Southeast Asia and it can forbid entry into new wars to defend governments there. But it ought not try to exercise Executive discretion in the carrying out of a general policy it approves.

Robert H. Bork, *Comments on the Articles on the Legality of the United States Action in Cambodia*, 65 AM. J. INT'L L. 76, 81 (1971). For a contrary view, built on a history of congressional micromanagement of the conduct of wars during the early years of the nation, see Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008).

136. There is substantial controversy over whether the President may refuse to enforce a law that in his or her opinion is unconstitutional. *Compare* Saikrishna Bangalore Prakash, *The Executive's Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1682 (2008) (arguing that the President must disregard unconstitutional statutes to fulfill the obligation to defend the Constitution), *with* Peter L. Strauss, *The President and Choices Not To Enforce*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 107, 123 (advocating that the enforcement of a possibly unconstitutional law should not depend solely on the President's views).

what decisions can be made by a particular branch of government. The fact that only a court has the power to issue a judgment does not tell us anything about the content of the judgment or whether the very same legal standard could have been made by an administrative agency, for example, via rulemaking. The substantive powers overlap even as each branch is governed by unique structural and procedural requirements.

C. The Importance of the Identity of the Actor

Now that it has been established that more than one branch can take the exact same substantive action without violating separation of powers, we can move on to proposition (6): *Building on proposition (5), the identity of the actor performing the action and not the nature of the action itself usually determines what sort of action is being performed. For example, when Congress acts it is legislating, and when an administrative agency acts it is executing the law, even if the action taken is, in substance, identical.*

In the *American Trucking* nondelegation decision, Justices Scalia and Stevens sparred over whether it is more accurate to state that Congress may not delegate any legislative power or to state that the nondelegation doctrine allows Congress to delegate a limited amount of legislative power.[137] In response to Justice Scalia's point that no delegation of legislative power is allowed, Justice Stevens argued that when the EPA establishes NAAQS, it exercises delegated legislative power.[138] Justice Stevens expanded on this argument by claiming that the nature of the government action and not the identity of the actor determines what action is being performed.[139]

Justice Stevens's view that some delegation of legislative power is permissible is inconsistent with the Court's general practice in separation of powers cases, under which decisions often turn on the identity of the actor rather than the action taken. The procedural understandings of legislating and executing the law provide the basis for this conclusion. Continuing with the example of establishing NAAQS, when the EPA acted, it was executing the law, namely the Clean Air Act, which instructed the EPA to establish NAAQS.[140] The EPA's actions meet the definition of actions that

137. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting the Vesting Clause of Article I and finding the text "permits no delegation" of Congress's legislative power); *id.* at 488 (Stevens, J., concurring) ("I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is 'legislative power.'" (citing Mistretta v. United States, 488 U.S. 361, 372 (1989)).

138. *Id.* at 489.

139. *Id.* at 488–89.

140. Clean Air Act § 109(a), 42 U.S.C. § 7409(a) (2006).

can be taken only by officers of the United States, namely the exercise of significant authority pursuant to the law. If Congress had not delegated power to the EPA to establish NAAQS, then chances are that any effort by the EPA to do so would be illegal, not because of the nondelegation doctrine, but because the EPA would be acting without legal authority, i.e. ultra vires. If Congress were to promulgate NAAQS on its own using bicameralism and presentment, it would meet the definition of legislation, since it would affect the rights and duties of people outside Congress. Thus, the same substantive action is execution when done by an agency and legislation when done by Congress.

Although it presents a somewhat more difficult case, even adjudication is subject to this analysis. When the Judiciary establishes a binding legal rule in the course of resolving a case or controversy, it is adjudicating, not legislating. If the legislature is dissatisfied with a nonconstitutional judicial decision, it can override the decision by legislating. An agency can promulgate regulations in reaction to an unfavorable judicial decision, and, under certain circumstances, can force a court to abandon what it considers the best interpretation of a federal statute in favor of a different, but reasonable agency interpretation.[141] Even when a non-Article III judge presides over what looks like an adjudicatory procedure, that official is engaged in the execution of the law unless the non-Article III tribunal purports to have the power to employ the essential attributes of the judicial power.

When a non-Article III decisionmaker employs an adjudicatory process to resolve a claim against the government, that decisionmaker is executing the law, creating the claim, or waiving sovereign immunity as to a claim created elsewhere. The fact that an adjudicatory process is used does not mean that the decisionmaker is exercising the judicial power of the United States. These are the sort of claims that could be resolved in a nonadjudicatory process, and the fact that Congress or an agency decides to use an adjudicatory procedure does not mean that judicial power is involved, just as rulemaking is execution, not legislation. Due process may require an adjudicatory procedure in some cases, but it does not require an Article III decisionmaker.

The separation of powers issues regarding adjudication are more complicated because the Court has liberalized the use of non-Article III decisionmakers to include private rights that would have traditionally been resolved (in the federal system) by Article III judges. It can be argued that

141. *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) (holding that only a judicial precedent which unambiguously forecloses the agency's interpretation displaces a conflicting agency construction).

when a federal agency resolves, for example, a state law breach of contract claim between a commodities broker and a customer, the agency is exercising the judicial power of the United States.[142] More than in any other area, including agency rulemaking under delegation from Congress, agency adjudication of private rights appears to involve the exercise of judicial power outside of the Article III courts.

Despite the apparent assumption of Article III powers by non-Article III tribunals, in allowing agency adjudication of private rights, the Court has applied a forgiving standard similar to the standard that governs separation of powers disputes when no particular structural or procedural provision has been violated. Because the Constitution does not enumerate the structural aspects of the judicial power, the Court's standard for evaluating the permissibility of non-Article III adjudication is not very specific, examining "the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary" to ensure that agency adjudicatory power does not "impermissibly threaten[] the institutional integrity of the Judicial Branch."[143] Under this standard, the Court looks at a range of factors including:

> [T]he extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[144]

Applying this standard, the Court has required a realistic option of Article III adjudication, and has allowed non-Article III adjudication of private rights claims only when they are closely related to federal regulation.[145]

142. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 858 (1986) (upholding such an arrangement).

143. *Id.* at 851.

144. *Id.*

145. *Id.* at 853. In reviewing the adjudication of private rights claims in non-Article III tribunals, the Court has also suggested that it would deny agencies the power to issue final judgments or punish contempt, and that nondeferential judicial review of agency decisions should be available. *Id.*

IV. THE ASSIGNMENT OF POWERS

A. General Principles

(7) *The strongest evidence that a power is assigned to a particular branch is an explicit textual commitment of that action to the branch, not a more general principle of separation of powers. When a power has been assigned to a particular branch, no other branch is allowed to exercise that function unless the Constitution explicitly permits it to.*

This proposition is very similar to proposition (4) but with stress on the commitments the Constitution's text makes to specific branches. The substantive powers of the federal government are shared among the branches. The powers each branch has over substantive areas of the law are overlapping, provided that each branch employs the procedural and structural requirements that apply to it.

Some matters in which the Constitution may assign powers to a particular branch are not textually specified. For example, only a court of law can issue a binding final judgment in a matter within the judicial power of the United States, and only an Article III court can preside over a jury trial. The Supreme Court has characterized these as the essential attributes of the judicial power that are exclusively held by the federal courts.[146] This last observation tests a primary proposition on which this Article is based: that separation of powers disputes are not resolved by inquiring into the nature of the power being exercised and then assigning the power to a branch. The reason for this is that the procedural and structural incidents of the judicial power are under-specified as compared with those that apply to the other branches. The Vesting Clause of Article III may be more important than the other Vesting Clauses in that it is relied upon to assign certain fundamental judicial attributes to the federal courts. In most cases, however, assignment of a power to a particular branch is based on a specific textual provision and not on general principles of separation of powers.

Even the substantive aspect of judicial power is subject to similar sharing, given that Congress can change the law and determine the outcome of legal controversies. Consider what happened to litigation over the effects of logging on the species of bird known as the spotted owl. After environmentalists and logging interests challenged the federal government's logging plans in court, Congress passed a statute essentially approving the government's plan.[147] The statute even mentioned the litigation by case

146. *Id.* at 851.

147. *See* Robertson v. Seattle Audubon Soc., 503 U.S. 429, 433 (1992) (discussing the Northwest Timber Compromise).

name and number.[148] This was challenged as an infringement on the judicial function and the Supreme Court unanimously upheld Congress's action, proclaiming that Congress had changed the law and had not trampled on the Judiciary's power to resolve cases.[149] Had Congress not acted, the federal courts might have made the very same substantive decision, that the logging plans were consistent with the law, or it might have decided differently. As a matter of substance, all three branches had the power to make the exact same decision over the protection of the spotted owl from the effects of logging.

In addition to the practical difficulty of assigning powers to branches, there are positive constitutional reasons for not resolving separation of powers disputes by determining which branch is the one to properly exercise a particular power. A conceptual analysis would weaken the checks and balances aspect of separation of powers law. As the Framers made clear, the idea of separation of powers is not to assign a power to each branch and then give that branch a free hand in exercising that power. Rather, they understood that the whole idea of separation of powers is to condition government action on agreement among multiple centers of power. For this to work, each branch must have a way to check the others. If powers were clearly assigned to branches, checking might still occur though informal bargaining, but such checking is likely to be less robust than when more than one branch has a colorable claim of authority in a substantive area. For example, even if the President has exclusive control over foreign policy and Congress has exclusive control over appropriations, Congress might insist on presidential agreement to a foreign policy strategy before passing an appropriations bill favored by the Executive Branch. However, with multiple colorable claims of authority, much greater competition for control is likely to occur. This is the essence of separation of powers with checks and balances.

B. Textual Commitment

There are functions that can be performed by only one branch of government, usually because the text of the Constitution specifically assigns the function to a particular branch. For example, the President's exclusive control over the recognition of foreign governments is based on the textual commitment of the power to receive foreign ambassadors to the President in Article II, Section Three of the Constitution.[150] Similarly, because of

148. Act of Oct. 23, 1989, Pub. L. No. 101-121, § 318(b)(6)(A), 103 Stat. 701, 745.
149. *Robertson*, 503 U.S. at 438–39.
150. *See* Goldwater v. Carter, 444 U.S. 996 (1979).

textual commitment, only the House of Representatives can vote articles of impeachment[151] and only the Senate can conduct trials in cases of impeachment.[152] Only the President can nominate and appoint principal officers of the United States.[153] Only the two houses of Congress can pass bills and present them to the President[154] and only the President can sign or veto bills presented.[155]

When a power has been assigned to a particular branch, other branches are not allowed to participate in the exercise of the power unless an additional constitutional provision allows it. Note that this element of proposition (7) does not depend on a substantive theory of the nature of the powers that belong to each branch. Rather, assignment is normally due to a specific textual provision rather than based on general separation of powers principles. Exclusivity is implied from a positive grant of power. For example, the specification of the process for making law through bicameralism and presentment strongly implies that only Congress has the power to perform that function. The Appointments Clause vests the power to nominate and appoint officials in the President except that with regard to inferior officers, Congress may legislate to allow department heads and courts of law to make appointments.[156] Participation by any others, such as members of Congress, in the appointment of officials is unconstitutional except when specifically authorized by the Constitution.[157] The Senate would not be allowed to participate in the appointment of officers of the United States were it not for the particular constitutional provision requiring the advice and consent of the Senate for such appointments, and the President would not be allowed to participate in the legislative process absent the presentment requirement spelled out in Article II. This explains why the House is not allowed to participate at all in the appointments process.

It might appear that this analysis depends on a conceptual understanding of separation of powers in the following sense. How do we know that the Senate could not participate in the appointment of officers of the United States without the specific reference in the Appointments Clause to the Senate's power of advice and consent? Is this because appointment is, by nature, an executive function, just as passing legislation is a legislative function in which the President would not be allowed to participate without

151. U.S. CONST. art. I, § 2, cl. 5.
152. *Id.* art. I, § 3, cl. 6.
153. *Id.* art. II, § 2, cl. 2.
154. *Id.* art. I, § 7, cl. 2, 3.
155. *Id.* art. I, § 7, cl. 3.
156. *Id.* art. II, § 2, cl. 2.
157. Buckley v. Valeo, 424 U.S. 1, 143 (1976).

the specific constitutional authorization of the veto? There is some truth to this challenge to my approach, but I do not think it refutes the approach in most cases. For example, even if the Appointments Clause did not exist, efforts by Congress to appoint executive branch officials might be unconstitutional under the general separation of powers standard, not because appointment is an executive function, but because it would prevent the President from accomplishing the constitutional functions of the presidency. In fact, as noted above, the Supreme Court has recognized that because the Appointments Clause invests the courts of law with the potential power to appoint inferior officers, the power to appoint officers of the United States is not exclusively an executive power.[158] The President's power to veto legislation would be more difficult to justify without a specific constitutional authorization, but, as the Framers recognized, the absence of the veto would threaten the presidency.[159]

There is one area of significant uncertainty regarding this proposition, namely, restrictions on appointments such as bipartisanship requirements, qualifications, and other limitations on the President's power to choose freely whom to nominate and appoint. For those who rely on the Vesting Clauses to create a substantive form of separation of powers, this issue is easy—Congress should not be able to restrict the President's choice in appointments matters.[160] To them, only rejection by the Senate should limit the President's choice of who to appoint as an officer of the United States.[161]

Whether Congress has power to limit the President's choice of who to appoint has not been resolved in court. Perhaps this controversy is unlikely to arise in a justiciable form because the President, to receive continued cooperation from Congress, will observe the limitations even if he or she

158. Morrison v. Olson, 487 U.S. 654, 695 (1988).

159. *See* INS v. Chadha, 462 U.S. 919, 946–48 (1983) (discussing two bases for veto: the President's need to protect the presidency from legislative encroachment and the necessity of limiting Congress's propensity to pass ill-considered, faction-dominated legislation).

160. For an argument that all statutory qualifications for federal offices requiring Senate confirmation are unconstitutional, see generally Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745 (2008).

161. For example, after the Katrina disaster, when the federal government's response was marred by Federal Emergency Management Agency's (FEMA's) apparent indifference and incompetence, Congress prescribed strict professional qualifications for the FEMA directorship. President George W. Bush objected to these in a signing statement on the ground that they would prevent him from appointing many qualified people of his choice and promised to "construe [the statute] in a manner consistent with the Appointments Clause of the Constitution." Presidential Statement on Signing the Department of Homeland Security Appropriations Act 2007, 42 WEEKLY COMP. PRES. DOC. 1742, 1742–43 (Oct. 4, 2006).

believes they are unconstitutional.[162] To those who rely on the Vesting Clauses of the Constitution to create a strong form of separation of powers, these restrictions may appear unconstitutional as an interference with the President's appointment power. They can point out that the contrary view implies that Congress may restrict, for example, the President's use of the pardon power,[163] perhaps by substantively restricting it or by requiring certain procedures before a pardon may be issued. If the President's pardon power must remain unrestricted, it is plausible to argue that legal restrictions on the President's choice of nominees are unconstitutional.

This is one of those areas that the text of the Constitution does not definitively resolve. Because of the lack of direct textual resolution, congressional prescription of professional and political qualifications for presidential appointees is likely to be evaluated under the general separation of powers standard of whether the qualifications unduly hamper the President's ability to perform his constitutional functions, mainly to take care that the laws are faithfully executed. As in the vast majority of other situations in which this standard applies, the answer is likely to be no.[164]

The discussion of these seven propositions forms the core of the understanding of separation of powers offered in this essay. In what follows, I discuss two minor propositions that are somewhat peripheral to the theory but still important enough to be worthy of mention.

V. SOME MINOR COROLLARIES OF THE GENERAL UNDERSTANDING

A. Informal Pressure

(8) *Informal pressure on the holder of a power to exercise it in a particular way does not violate separation of powers.*

When the Constitution assigns a function to a particular official or branch of government, only that official may perform the function. However, separation of powers does not prohibit officials in other branches from using their governmental power to exert informal influence over the carrying out of the function. For example, as we know, the President has the constitutional power to appoint officers of the United States and federal judges, and only the Senate has the advice and consent power. A member

162. If the President violates a statutory restriction and, with cooperation from the Senate, makes an appointment contrary to a statutory restriction, perhaps a party subject to regulation by the official involved would be able to argue that regulation is unlawful because the officials were not appointed in accordance with governing law. As far as I know, this has never happened.

163. U.S. CONST. art. II, § 2, cl. 1.

164. *See supra* Part I.B and accompanying notes.

of the House of Representatives may insist that the President appoint his chosen candidate, and might use power over the President's legislative agenda to "convince" the President to comply. A cursory look at the resumes of presidential appointees to agencies would reveal that many were congressional staff members before their appointments. There is also a longstanding tradition of Presidents allowing Senators to virtually choose federal judicial nominees who will sit in their states. As long as the President actually exercises the power to nominate and appoint, external informal involvement in the decisionmaking process presents no separation of powers problem.[165]

There are lesser known manifestations of external influence on the execution of the law. In the appropriations area, congressional committees exert a great deal of influence over how agencies spend funds when they have discretion under appropriations statutes. For example, with regard to military spending, the armed services have at times treated committee reports as if they contain binding legal instructions on how to spend funds.[166] Congressional committees expect agencies to consult them before spending funds differently from what they were requested for.[167] Agencies and the President comply with these practices because they need continued cooperation from members of Congress and congressional committees. members of Congress also sit in on trade negotiations and accompany executive branch officials on trade missions. Again, as long as the actual exercise of executive power is performed only by officers of the United States, the fact that it is done under pressure from members of Congress has no constitutional significance.

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165. For a general look at this, see Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

166. John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 563–65 (2001).

167. The Supreme Court has made it clear that funding requirements contained only in congressional committee reports are not legally binding. *See* Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 646 (2005); Lincoln v. Vigil, 508 U.S. 182, 192 (1993). Late in his presidency, George W. Bush instructed agencies not to treat as binding spending instructions contained in committee reports. Exec. Order 13,457, 3 C.F.R. 175–177 (2009). This Executive Order may be viewed as an example of improper midnight activity, since President Bush waited until the last year of his second term to issue an order that regulated internal executive branch activity. *See generally* Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947 (2003) (finding the phenomenon of "midnight regulation" a fact of life in a term-based political system). Further, Congress continues to include unconstitutional legislative vetoes in appropriations legislation. It is unclear whether agencies informally comply with the veto provisions.

As one court has stated in a case in which a criminal defendant challenged his conviction on the basis that a member of Congress had informally asked the Department of Justice to investigate:

> Legislators routinely express their opinions to executive branch officials about matters for which their departments or agencies are responsible. Defendant's position presumes that executive officials must disregard these views and remain entirely free of their influence in order to maintain the separation of powers, but this is impracticable, unnecessary, and bears no relation to the actual workings of the modern administrative state. Furthermore, the adoption of Defendant's conception of the separation of powers would surely hinder legitimate congressional oversight of executive agencies. This interaction among the branches is simply part of the vigorous engagement that gives rise to the system of checks and balances in our government.[168]

While due process and the Administrative Procedure Act require insulation of decisionmakers from informal pressure in adjudicatory proceedings, it is difficult to imagine a separation of powers violation resulting from informal pressure on executive officials.

B. Underenforcement

(9) *Separation of powers norms may be underenforced judicially. In other words, the constitutional ideal may involve a stricter understanding of separation of powers than what the federal courts are willing to enforce.*

Scholars have long distinguished between actual legal norms and judicial enforcement of the norms.[169] The theory is that full judicial enforcement of some legal norms, such as separation of powers, may be unrealistic or even undesirable. To a legal realist, this may seem paradoxical or even plain wrong. How can there be an unenforced legal norm? Without enforcement, realism teaches that there is no such legal norm. The answer to this objection involves taking an institutional perspective.[170] Norms of judicial restraint and competence may lead judges to uphold laws that they might believe are inconsistent with the best view of what the Constitution requires. A judge might vote to uphold a law that she would have opposed on constitutional grounds as a legislator or President.

Courts might systematically underenforce separation of powers norms for a variety of reasons. The simplest reason is the difficulty of matching

168. United States v. Mardis, 670 F. Supp. 2d 696, 702–03 (W.D. Tenn. 2009) (citations omitted).

169. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

170. *See id.*

function to branch. The nondelegation doctrine provides the clearest example of this. The execution of the law virtually always involves discretion on the part of executive branch officials, and it would be very difficult to construct a legal standard to capture the norm against delegation of legislative power. Perhaps this is why Justice Scalia's opinion for the Court in *Whitman* stated that the courts have not felt "qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[171]

Further, separation of powers controversies often arise in the most politically sensitive and contentious areas, when Congress feels the need to break from tradition. The independent counsel provisions upheld in *Morrison* provide a good example of this. The Watergate scandal spawned several innovations that Congress apparently thought were necessary to restore the public's faith in government. Whether it is fear of a backlash or genuine concern that courts should not meddle in politically sensitive areas unless absolutely necessary, it is not surprising that judges might be restrained when asked to invalidate important legislation for violating a general separation of powers norm.[172]

Underenforcement of separation of powers norms is most likely to exist in areas without clear constitutional rules such as an explicit procedural or structural provision. It might be truer to the Constitution, under whatever theory of constitutional interpretation one holds, to be much stricter with regard to delegation of discretion to the Executive Branch, restrictions on appointment and removal of officers of the United States, and adjudication outside Article III courts. Perhaps it would be truer to the Constitution to prohibit agency rulemaking, agency adjudication, and congressional specification of qualifications for executive office. But except to those with excessive confidence in their ability to extrapolate clear understandings from vagaries of the Vesting Clauses or nonspecific constitutional provisions, these are all areas in which there is no clear answer in the text of the Constitution.

This understanding is consistent with the way separation of powers law has developed. The Court strictly enforces most of the particular procedural and structural separation of powers provisions of the Constitution but is very lenient when the case boils down to whether there has been a violation of general separation of powers norms. A court

171. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989)).

172. *See generally* Kevin M. Stack, *The Story of* Morrison v. Olson*: The Independent Counsel and Independent Agencies in Watergate's Wake*, *in* PRESIDENTIAL POWER STORIES 401 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

concerned with restraint is likely, absent compelling circumstances, to feel more comfortable enforcing the specific requirements of the Appointments Clause and bicameralism and presentment than with invalidating legislation based on a vague, undefined separation of powers understanding. It may be that a "true" understanding of separation of powers would invalidate independent agencies and all restrictions on the President's power to appoint and remove officers of the United States. It may even be that a majority of the Justices of the Supreme Court hold such views, but are unwilling to act on them for reasons of judicial restraint. The *PCAOB* decision may be a nudge in the direction of less discomfort with employing general separation of powers norms, but it remains to be seen whether the Court will move the law toward greater enforcement of general separation of powers norms.

CONCLUSION

Although the Court's recent decision invalidating the provisions governing removal of members of the PCAOB contains hints of a movement toward strict application of separation of powers norms, at the end of the day, the Court preserved the basic structure of separation of powers. Under this basic structure, courts strictly enforce the particular procedural and structural provisions of the Constitution and are lenient when only the general notion of separation of powers is implicated. Key to this understanding is that the Vesting Clauses of the first three Articles of the Constitution are not among the strictly enforced provisions of the Constitution. Under separation of powers in the United States government, the branches have overlapping power in many substantive areas, ensuring a robust system of checks and balances. Separation of powers law looks very little at the substance of government action, demanding usually only that each branch follow the procedural and structural requirements that apply to it. Except in areas clearly governed by a particular procedural or structural constitutional provision, the law of separation of powers allows for a great deal of flexibility concerning the structure and operation of the federal government. Thus, while conceptual analysis of the nature of government power and assignment of each power to a particular branch may be theoretically satisfying, it does not represent the theory or practice of separation of powers in the United States.