

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Publications

Colorado Law Faculty Scholarship

---

1987

### On the Constitutional Status of the Administrative Agencies

Harold H. Bruff

*University of Colorado Law School*

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Administrative Law Commons](#), [Constitutional Law Commons](#), [Judges Commons](#), [Law and Politics Commons](#), [Legal History Commons](#), [President/Executive Department Commons](#), and the [Supreme Court of the United States Commons](#)

---

#### Citation Information

Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491 (1987), available at <https://scholar.law.colorado.edu/faculty-articles/958>.

#### Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact [rebecca.ciota@colorado.edu](mailto:rebecca.ciota@colorado.edu).

# HEINONLINE

Citation:

Harold H. Bruff, On the Constitutional Status of the Administrative Agencies, 36 Am. U. L. Rev. 491, 518 (1987)

Provided by:

William A. Wise Law Library

Content downloaded/printed from [HeinOnline](#)

Fri Sep 22 17:01:33 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

## [Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

# ON THE CONSTITUTIONAL STATUS OF THE ADMINISTRATIVE AGENCIES

HAROLD H. BRUFF\*

## INTRODUCTION

Our symposium topic, "The Uneasy Constitutional Status of the Administrative Agencies," reflects the fact that the Constitution fails to answer some fundamental questions about the modern administrative state. Ambiguity surrounds the constitutional relationships among the three branches of government, and between the branches and the agencies.<sup>1</sup> The persistence of disquiet and symposia about these issues suggest that the status quo is undesirable and that reduction of ambiguity would enhance the legitimacy of the administrative state.<sup>2</sup> Although our written Constitution, even with its judicial gloss, provides only a skeleton for the organization of government, I argue here that no more detailed anatomy is necessary or desirable at the constitutional level.<sup>3</sup> Instead, statutory and common law strictures suffice to bind administration to law, while allowing for the diversity and evolution that our institutions require.

I begin by discussing the appropriate boundaries of constitutional law. I then review the Supreme Court's separation of powers cases. The holdings of these cases have important consequences for government structure; their implications foretell additional change. For example, recent decisions undermine theoretical support for the special constitutional status of the independent regulatory agencies by shifting power to the executive branch. After speculating about the values that may underlie the Court's approach, I conclude

---

\* Thompson & Knight Centennial Professor of Law, The University of Texas. I thank Glen Robinson and Peter Strauss for their thoughtful comments on an earlier draft.

1. See generally Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (discussing constitutional relationship between agencies and three branches of government); Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979) (considering roles of government branches in relation to federal regulatory agencies).

2. See generally J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978) (detailed analysis of legitimacy issues).

3. My analysis concerns domestic issues. Foreign affairs, although presenting different issues, is unlikely to call for greater constitutional prescription.

that the independent agencies should not enjoy broad constitutional insulation from presidential supervision. I then analyze whether the Reagan administration's efforts to control regulatory policymaking in the agencies could be extended to the independent agencies. My affirmative conclusion rests in part on the role of nonconstitutional controls in protecting the efficacy of oversight by the other two branches.

## I. THE LIMITS OF CONSTITUTIONAL DISCOURSE

The Constitution's framers left the organization of the executive branch of government almost entirely to statutory prescription.<sup>4</sup> Nevertheless, the constitutional text does contain fragments from which the President and Congress can draw support in their contest for custody of the agencies.<sup>5</sup> The President can note that article II vests the "executive Power" in him,<sup>6</sup> charges him to "take Care that the Laws be faithfully executed,"<sup>7</sup> and explicitly empowers him to require the "Opinions in writing" of department heads regarding their duties.<sup>8</sup> Congress can find in article I both its substantive powers to legislate and, in the "necessary and proper" clause, its authorization to pass laws effectuating powers vested in the other branches.<sup>9</sup>

Because we lack specific evidence of what the framers meant by their stirring phrases, and because two centuries have seen vast changes in the nation and its government, modern disputation must infer structural prescriptions from the sparse constitutional text.

---

4. See Strauss, *supra* note 1, at 597-601 (noting meager description in article II of executive branch's organization and powers).

5. See, e.g., U.S. CONST. art. I, § 1 (granting all legislative powers to Congress); *id.* art. I, § 8, cl. 18 (granting Congress power to make laws necessary and proper to carry into effect powers vested by Constitution); *id.* art. II, § 1, cl. 1 (granting President executive power); *id.* art. II, § 2, cl. 1 (granting President power to require written opinions from executive officers regarding their duties); *id.* art. II, § 3 (granting President power to take care that the laws be faithfully executed).

Of course, the courts also oversee the agencies, and sometimes even claim a "partnership" relation. See Robinson, *The Judicial Role, in COMMUNICATIONS FOR TOMORROW: POLICY PERSPECTIVES FOR THE 1980's* 415, 419-20 (G. Robinson ed. 1978) (maintaining that partnership relation implies improper judicial role in agency policymaking). Still, the judicial role is theoretically limited to conforming agency decisions to law, as opposed to the openly political oversight of the other two branches.

6. U.S. CONST. art. II, § 1, cl. 1.

7. *Id.* art. II, § 2, cl. 1.

8. *Id.* art. II, § 3.

9. *Id.* art. I, § 1 (granting legislative powers to Congress); *id.* art. I, § 8, cl. 18 (empowering Congress to pass laws that are necessary and proper to effectuate its own powers and those of the other branches). See generally Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause"*, 36 OHIO ST. L.J. 788 (1975) (stating that Congress may create authority within executive and judicial branches to develop rules that facilitate their duties).

The arguments have become familiar. Supporters of broad presidential power emphasize the need to coordinate a vast federal regulatory apparatus and note the special political claims that flow from the President's national constituency and his responsibility, albeit attenuated, for the performance of the executive establishment.<sup>10</sup> Congressional partisans urge the need to conform administration to substantive and procedural statutory commands, and emphasize the undoubted presence of broad congressional power to arrange the government.<sup>11</sup>

A detached observer would find it hard to pick a clear winner in these arguments. Indeed, beneath the flights of constitutional rhetoric lies confirmation of Madison's expectation that a scheme of separated powers would evince much scuffling for power.<sup>12</sup> In practice, much power is shared because of the hydraulic effect of ambition that Madison built into the system. *The Federalist Papers* provide ample support for the proposition that the framers contemplated considerable blending of power.<sup>13</sup> Yet the framers and analysts since the Constitution's adoption have agreed that there are appropriate limits to the sharing of power.<sup>14</sup> The framers sometimes chose to concentrate responsibility most prominently in their selection of a single executive.<sup>15</sup> Therefore, we cannot escape drawing constitutional lines at some point.

Nevertheless, for several reasons the optimal level of specificity for constitutional rules that organize the government is low. The government is vast and diverse; perforce, even statutes that have

10. See ABA Comm. on Law and the Economy, *Federal Regulation: Roads to Reform*, 99 (1979) (stating that President is elected official most capable of making needed balancing decisions on regulations, while appropriate role of Congress is to review); Bruff, *supra* note 1, at 461-62 (stating that President has national constituency not shared by congressmen and unique responsibility to oversee the execution of many statutes).

11. See 5 SENATE COMM. ON GOVERNMENT OPERATIONS, STUDY ON FEDERAL REGULATION, 95th Cong., 1st Sess. 1-5 (1977) (recommending improved coordination among agencies and greater congressional oversight); Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues that May Be Raised by Executive Order No. 12,291*, 23 ARIZ. L. REV. 1199, 1205-09 (1981) (stating that presidential control over execution of laws is purely matter of legislative authorization).

12. THE FEDERALIST No. 51, at 356 (J. Madison) (B. Wright ed. 1961) (addressing need to protect branches of government from encroachments by each other).

13. THE FEDERALIST No. 47, at 339-42 (J. Madison) (B. Wright ed. 1961) (citing several state constitutions as examples).

14. See Rosenberg, *supra* note 11, at 1206-07 (recognizing need for full presidential control over armed forces and foreign affairs); Fleishman & Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW AND CONTEMP. PROBS. 1, 1-16 (Summer 1976) (noting need for rules to prevent branches from encroaching on prerogatives of others); E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957 9 (4th ed. 1957) (interpreting basic principles of separation of powers doctrine).

15. See C. THACH, THE CREATION OF THE PRESIDENCY, 1775-1789 89 (1923) (noting importance of framers' adoption of executive headed by one person).

government-wide effect are cast in generalities.<sup>16</sup> Moreover, predicting the effects of rules on institutions is hazardous, even in the short run.<sup>17</sup> Also, the obstacles to altering constitutional rules are considerable, even when they are generated by the courts. Not only does constitutional ambiguity serve these needs for flexibility, it also aids the operation of government. Mutual uncertainties about the limits of power foster cooperation between the branches.<sup>18</sup> Where there is clarity, the incentive to compromise disappears. Perhaps these considerations explain why the structural portions of the original Constitution have been left almost intact since their adoption two centuries ago.<sup>19</sup>

Discussion of government organization usually has normative content, whether admitted or not. Yet the mores of constitutional argument discourage normative debate. If constitutional parameters are kept relatively simple and unconstraining, we can shift quickly to nonconstitutional ground where we can more comfortably appraise and debate how the government actually operates and what effects various structural alternatives are likely to have. Perhaps for these reasons, scholars usually approach the constitutional questions cautiously. Recent essays on the separation of powers have articulated a few modest principles closely grounded in the text and structure of the Constitution, and have become very tentative past that point.<sup>20</sup>

Nevertheless, any notion that the administrative state lacks legitimacy because of the absence of textual authorization in the Constitution is belied by the complexity and durability of the nonconstitutional methods that have arisen to assure its account-

---

16. The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-59 (1982), is the most prominent example.

17. See Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 811-15 (1974) (providing illustrative account of unanticipated effects of constitutional jurisprudence on bureaucracies and their clients).

18. For an interesting use of game theory to explore incentives to cooperate when parties bargain under conditions of uncertainty, see R. AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

19. Four amendments have affected presidential elections, succession, and disability. See U.S. CONST. amend. XII (affecting procedures governing presidential elections); *id.* amend. XX, § 3 (providing succession procedures for President); *id.* amend. XXII, § 1 (establishing maximum period one can hold presidential office); *id.* amend. XXV, § 3 (establishing procedures for presidential disability). The seventeenth amendment provided for the direct election of senators. *Id.* amend. XVII, § 1.

20. See, e.g., McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U.L. REV. 443 (1987); Strauss, *supra* note 1; Bruff, *supra* note 1; Rosenberg, *supra* note 11; Shane, *Presidential Regulatory Oversight and Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235 (1981).

ability to the constitutional branches.<sup>21</sup> The basic statutory charter of administrative law, the Administrative Procedure Act (APA), reached its fortieth anniversary without a major change.<sup>22</sup> The formal and informal relationships between the agencies and the constitutional branches confine administrative discretion, although they do not eliminate it.<sup>23</sup> Thus, there is no acute need to extend constitutional separation of powers doctrine to legitimize and control administration.

## II. SEPARATION OF POWERS IN THE SUPREME COURT

In each separation of powers case the Supreme Court must determine whether the Constitution allocates a disputed function to a particular branch or whether the matter should be left to the continuing interplay of power between the branches.<sup>24</sup> Recently, the Court has been willing—sometimes apparently eager—to reach the merits.<sup>25</sup> In cases that involve presidential power, the Court has usually employed a formalist approach that reasons logically from the constitutional text and what is known about the framers' intentions.<sup>26</sup> The major competing approach is a functional one that assesses the needs of each branch for constitutional protection of its "core" functions.<sup>27</sup> Functionalism therefore tends to roam further

21. See Elliot, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 166-70 (summarizing network of legal principles and statutes that manage and control administrative state).

22. 5 U.S.C. §§ 551-59 (1982). See Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 237 (1986) (noting APA's resistance to significant change since its enactment). There have been several amendments on the general subject of open government, but these do not alter the APA's basic prescriptions for rulemaking, adjudication, and judicial review. See generally G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 38-40 (3d ed. 1986) (stating that Freedom of Information Act, Privacy Act, and Sunshine Act amendments did not change basic structure of APA).

23. See Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 246-47 (1984) (stating that administrators have discretion in shaping policy but are subject to complex and distinct set of monitors).

24. For a provocative thesis that courts should regard separation of powers issues as nonjusticiable political questions, see J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980), reviewed by McGowan, *Book Review*, 79 MICH. L. REV. 616, 622 (1981); Monaghan, *Book Review*, 94 HARV. L. REV. 296, 302-03 (1980).

25. See *INS v. Chadha*, 462 U.S. 919 (1983) (providing best example of Court reaching out to decide broad issues on merits); see also *United States v. Nixon*, 418 U.S. 683 (1974) (resolving numerous threshold questions before reaching executive privilege issue).

26. See, e.g., *Bowsher v. Synar*, 106 S. Ct. 3181, 3186-87 (1986) (reasoning that Constitution commands that Congress play no direct role in execution of laws); *INS v. Chadha*, 462 U.S. 919, 951-59 (1983) (holding that congressional vetoes violate article I of Constitution); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (holding that presidential order for seizure of steel company was beyond President's constitutional powers).

27. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (finding absolute presidential immunity from damages); *Nixon v. Administrator of General Servs.*, 433 U.S. 425 (1977) (upholding congressional power to control presidential papers); *United States v. Nixon*, 418 U.S. 683, 705-06 (1974) (implying an executive privilege for presidential communications).

from the constitutional text than does formalism.

For the Court, an important advantage of formalism is its seemingly greater legitimacy. The Court can present a decision as the natural outcome of applying the Constitution to a present day problem. Nevertheless, the Court's decisions are never free of value judgments. For the issue at the heart of any separation of powers controversy is identifying the government branch or officer that has legal responsibility for substantive policymaking, or in short, who decides? Although this question is often presented obliquely, as in the cases on removal of administrators, it dominates the cases even when the Court does not address it explicitly.

Recent decisions have generally promoted a unitary executive branch under presidential direction, as opposed to a more fragmented executive that makes many decisions free of presidential participation. But the Court has not seen fit to explain this important development, or to mark its limits. After reviewing the Court's decisions, I offer some possible reasons for its approach. I believe that the cases contain the seeds of a coherent and workable constitutional theory.

The Court's earliest principal cases involved presidential power to remove executive officers.<sup>28</sup> In *Myers v. United States*,<sup>29</sup> the Court held that Congress could not condition presidential removal of an officer on the Senate's advice and consent.<sup>30</sup> The Court would not allow Congress to expand the Senate's role beyond its explicit authorization to review appointments. The Court's formalist rationale was that no branch should have implied powers to participate in functions constitutionally assigned to another; because removal was an executive function the Senate could not share it.<sup>31</sup> The Court concluded that article II granted the President an illimitable power to remove those executive officials whom he had appointed.<sup>32</sup> The dissents rejoined that Congress has broad power to define the attributes of executive offices; they questioned why removal alone should be divorced from congressional control.<sup>33</sup>

---

28. The Court had already held that executive officers must obey statutory directives. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838). That proposition is no longer in doubt, absent a challenge by the executive to the constitutionality of the statute. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (holding that President's seizure of steel mills was illegal because forbidden by statute).

29. 272 U.S. 52 (1926).

30. *Id.* at 176.

31. *Id.* at 221-22.

32. *Id.* at 161-64. The Court conceded that Congress could condition removal of officers whose appointment was vested in the heads of departments; any other conclusion would have destroyed the civil service.

33. *Id.* at 186 (McReynolds, J., dissenting); *id.* at 245-46 (Brandeis, J., dissenting).

The grand theorizing in the *Myers* opinions obscures the mundane nature of the underlying controversy. The statutory provision in question was part of a longstanding squabble between the branches over control of patronage. That is why the Senate wanted to participate in the President's disposition of a relatively minor office—a postmaster. Nevertheless, the justices wrote lengthy opinions marked by their scholarly depth. Apparently, all regarded the case as an accidental vehicle for an issue of great moment: the distribution of power over the executive branch between President and Congress. The majority opinion, written by Chief Justice Taft, himself a former President, seemed less concerned with the limits of patronage than with the need to prevent Congress from creating a semipermanent bureaucracy at the highest levels, which the President could not displace. *The Federalist Papers*, in a position the Court rejected, had contemplated that very eventuality:

It has been mentioned as one of the advantages to be expected from the cooperation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices.<sup>34</sup>

Thus, two views of the executive branch competed for supremacy. Taft's vision of a unitary executive led his analysis beyond removability. In dictum, he endorsed broad presidential power to supervise inferior officials, but did not explain why the President needed to oversee a postmaster in order to discharge the duties of his own great office.<sup>35</sup> The reason, apparently, was that any erosion of presidential dominance would create the plural executive that the framers had explicitly rejected.<sup>36</sup> Taft captured his view in a syllogism: the President possessed the executive power and the duty to take care that the laws be faithfully executed; he could not exercise those powers without subordinates; therefore, he needed plenary supervisory powers over those subordinates.<sup>37</sup>

The competing view of a more fragmented executive did extract one concession from the majority. In a famous dictum that probably

---

34. THE FEDERALIST No. 77, at 484-85 (A. Hamilton) (B. Wright ed. 1961).

35. *Myers v. United States*, 272 U.S. 52, 135 (1926).

36. The Court argued that the President "may properly supervise and guide" administrators "in order to secure that unitary and uniform executive of the laws which article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Id.*

37. *Id.* at 117.

referred to existing independent agencies, the Court conceded that Congress might be able to vest some statutory functions in inferior officers, free of presidential interference.<sup>38</sup> Still, the Court thought that the President could remove such officers after the fact if displeased by their decisions. This remark foreshadowed the case that would counterbalance *Myers*.

In *Humphrey's Executor v. United States*,<sup>39</sup> the Court sharply limited *Myers* and invented the special constitutional status of the independent regulatory agencies. The Court held that Congress could, in creating the Federal Trade Commission (FTC), restrict the President to specified causes for removal of its commissioners. The Court limited the President's plenary constitutional right of removal to "purely executive officers," without defining that term.<sup>40</sup> The holding in *Humphrey's Executor* corrected one excess of *Myers*: Congress should be able to forbid plenary presidential removal of agency members whose principal duties include adjudication. Statutory protections for adjudicators help to avoid contentions that interference in a particular case has led to a denial of due process.<sup>41</sup>

Like *Myers*, *Humphrey's Executor* is filled with broad theory that has taken on a life of its own, divorced from the historical context in which the case arose.<sup>42</sup> President Roosevelt, no doubt relying on *Myers*, ignored the statutory requirement for cause when he removed Commissioner Humphrey. The Court's unanimous decision condemning this action was issued the same day as its landmark invalidation of the heart of the National Industrial Recovery Act (NIRA).<sup>43</sup> Thus, *Humphrey's Executor* was decided at the apogee of the Court's hostility to the New Deal and to the nearly unconfined executive discretion that marked administration of the NIRA.<sup>44</sup> The Court later accommodated the New Deal, and administrative law developed controls on the executive (for example, through the APA). Yet some broad dicta that the Court issued in the superheated atmosphere of 1935 still form the constitutional basis for the independent agencies.

---

38. *Id.* at 135.

39. 295 U.S. 602 (1935).

40. *Id.* at 631-32.

41. The Constitution itself has not been read to require such protections, perhaps because statutes so frequently supply them. See *Marcello v. Bonds*, 349 U.S. 302, 311-14 (1955) (due process does not require complete insulation of agency adjudicator from executive supervisor).

42. See generally Scalia, *Historical Anomalies in Administrative Law*, Yearbook 1985, 103 (reviewing *Humphrey's Executor* and calling for attention to the historical context of cases).

43. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

44. See G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 22, at 53-60 (reviewing New Deal delegation cases).

The Court in *Humphrey's Executor* characterized agencies such as the FTC as wholly independent of the executive branch, except for the President's constitutional power of appointment.<sup>45</sup> Of course, such expansive dicta were not necessary; nor did the Court point to any textual basis in the Constitution for its startling innovation. Instead, the Court distinguished independent from executive agencies on the basis of a functional difference that does not exist.<sup>46</sup> The performance of "quasi-judicial" and "quasi-legislative" functions, which the Court thought differentiated the independent agencies, also occurs in the executive branch.<sup>47</sup>

In *Humphrey's Executor*, the Court endorsed the original goal that Congress pursued in creating independent agencies. This goal followed the Progressive view that regulation could be a neutral and expert process, above the unseemly strife of politics. Consequently, it seemed appropriate to reduce the political influence of presidential supervision to a minimum (while conveniently ignoring the political nature of congressional oversight). Today, however, the Progressive view seems both an impossible and an undesirable dream.<sup>48</sup> Inescapably, regulation is rife with politics. Political influence fosters administrative accountability and helps to give regulation its (uneasy) legitimacy.<sup>49</sup> Thus, the Court's theory created a special preserve for the independent agencies that now rests on discredited political science.

*Myers* and *Humphrey's Executor* leave the modern era a curious legacy. The two cases, each using sweeping rhetoric, adopted radically different views of the executive. Not surprisingly, they have since become weapons in the continuing struggle between President and Congress for control of the agencies. Each side cites the broad theory of its favored case, torn from the generating context.<sup>50</sup> The

---

45. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935).

46. *Id.* at 631. I am not implying, however, that there are no administrative functions deserving independence from presidential supervision. See *infra* section IV (recognizing that some statutes should be so interpreted).

47. See Bruff, *supra* note 1, at 985 (stating that adjudication and rulemaking are functions performed by both executive branch and independent agencies).

48. See *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C.), *aff'd sub nom.* *Bowsher v. Synar*, 106 S. Ct. 3181 (1986) (suggesting that genuinely independent regulatory agencies cannot exist and would be inconsistent with Constitution); Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1771 (1985) (concluding that impossibility of achieving neutral expertise plus normative reasons favoring accountability justify incorporating independent agencies in executive branch).

49. See generally Bruff, *supra* note 23, at 247 (explaining that political forces influencing agency decisions combine to produce policies having broad public support).

50. The debate over the constitutionality of the Reagan administration's executive oversight program, discussed in § IV *infra*, illustrates this tendency. See generally Symposium, *Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1195 (1981) (summarizing and evaluating the arguments of the branches).

Court has not decisively resolved the conflict. Its modern cases have developed their own broad theories without explicitly confronting the implications of *Myers* and *Humphrey's Executor*. We are left to infer both the present condition of those two precedents and the Court's reasons for its recent decisions.

In *Buckley v. Valeo*,<sup>51</sup> the Court forbade Congress to appoint members of the Federal Election Commission (FEC), notwithstanding the implications of *Humphrey's Executor* that independent agencies are an exclusive congressional preserve. The Court held that the President's power to appoint "Officers of the United States" includes everyone exercising "significant authority" pursuant to statute.<sup>52</sup> Thus the Court treated ordinary administration as "executive" in nature, even when it is placed in an independent agency and is performed by adjudication or rulemaking.<sup>53</sup> The natural implication, not addressed in *Buckley*, is that Congress may not exclude the President from a supervisory role because of his obligation to "take Care that the Laws be faithfully executed."<sup>54</sup>

On the surface, *Buckley* was primarily formalist. The Court began with the text of the appointments clause, added one premise about what officers do (exercise significant duties under public law), and concluded that Congress could not share this power. The analysis was functional in one sense, however, the Court distinguished activities that could only be assigned to executive officers from those that Congress or its agents could perform (such as investigation). But the Court did not explicitly inquire whether a core executive function was threatened. The Court could easily have written a purely functionalist opinion because the President would have little control of administration if Congress could place ordinary regulation in the hands of its own agents. In *Buckley*, then, the choice of analytic approach probably had little effect on the outcome.

Formalism prevailed again in the landmark legislative veto case, *INS v. Chadha*.<sup>55</sup> The Court struck down all forms of the legislative veto as inconsistent with the requirements of article I that all legislation be passed by both houses of Congress and presented to the

---

51. 424 U.S. 1 (1976).

52. *Id.* at 126.

53. *Id.* at 140-41 (finding that although rulemaking aids congressional authority to legislate, it is not sufficiently removed from administration to justify infringement upon presidential power of appointment).

54. See U.S. CONST. art. II, § 3.

55. 424 U.S. 919 (1983). Under the "legislative veto," Congress conditioned delegations of statutory authority by authorizing one or both of its houses to invalidate executive implementation by passing a resolution.

President for his signature or veto.<sup>56</sup> The Court reasoned that a veto resolution, like a statute, "alter[s] the legal rights . . . of persons . . . outside the legislative branch."<sup>57</sup> Because most administrative activity also alters legal rights, the Court essayed a distinction: agency action is not legislative in the constitutional sense because it "cannot reach beyond the limits of the statute that created it."<sup>58</sup> Delegated authority in the executive's hands, then, is executive power in the article II sense, and Congress can overrule it only by statute.<sup>59</sup>

*Chadha*, like *Buckley*, undermined the theoretical basis of *Humphrey's Executor*. The Court adopted a formal definition of the boundary between legislation and execution, and forbade Congress to control the latter through nonstatutory means. The Court would not recognize an exception for the "quasi-legislative" function of rulemaking.<sup>60</sup> Nor would it allow special congressional hegemony over the independent agencies.<sup>61</sup> Thus, the Court appears to have abandoned the functional distinctions that were advanced in *Humphrey's Executor* to justify the special constitutional status of the independent agencies.

The Court's latest decision, *Bowsher v. Synar*,<sup>62</sup> invalidated part of the Gramm-Rudman-Hollings Act (Act).<sup>63</sup> The Act authorized the Comptroller General to estimate budgetary deficits and to certify his figures to the President, who was then to sequester amounts exceeding the Act's targets. Although the President appoints the Comptroller, he is removable only by joint resolution. Accordingly, although the President would participate in removing a Comptroller through his opportunity to sign or veto a joint resolution, Congress can prevent removal by refusing to pass such a resolution. Chief Justice Burger's formalist opinion for the Court reiterated that con-

---

56. See generally Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789 (explaining and criticizing broad sweep of decision).

57. See *INS v. Chadha*, 462 U.S. 919, 952 (1983).

58. *Id.* at 953 n.16.

59. *Id.* at 954-55.

60. *Id.* at 953 n.16.

61. In the wake of *Chadha*, the Court summarily affirmed decisions invalidating the application of legislative vetoes to independent agencies. *Process Gas Consumers Group v. Consumer Energy Council of Am.*, 103 S. Ct. 3556 (1983), *aff'g* *Consumers Union of United States v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (Nos. 82-935 & 82-1044), also *aff'g* *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982) (Nos. 81-2008, 81-2020, 81-2151 & 81-2171), and *denying cert. to* *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982) (Nos. 82-177 & 82-209).

62. 106 S. Ct. 3181 (1986).

63. Balanced Budget and Emergency Deficit Control (Gramm-Rudman-Hollings) Act of 1985 § 251, 2 U.S.C. §§ 901-22, 901 (Supp. III 1985).

gressional control of execution is limited to statute.<sup>64</sup> The Court then equated removability of an officer to control of that officer for constitutional purposes. Hence, the Comptroller was a congressional agent and could not be assigned the executive functions of law interpreting and fact finding that the Act contemplated.<sup>65</sup> The Court distinguished *Humphrey's Executor* on grounds that the President has no power to compel removal of the Comptroller, in contrast to his qualified power to remove members of independent agencies.<sup>66</sup> Nevertheless, the Court's central rationale, that control follows removability for constitutional purposes, implies that the President may supervise all executive officers in some fashion.

Not all of the Court's recent decisions have been both formalist and theoretically inconsistent with agency independence. A decision issued the same day as *Synar* was neither: the Court wrote a functional opinion that explicitly approved the existence of independent agencies, at least for adjudication. In *Commodity Futures Trading Commission v. Schor*,<sup>67</sup> the Court considered whether article III allowed an agency to exercise jurisdiction that could have been granted to the federal courts. The Court upheld the CFTC's power to entertain state law counterclaims in reparation proceedings in which disgruntled customers seek redress for brokers' violations of statutes or regulations. The Court sought guidance from the original purpose of article III's tenure protections—to guarantee independence from political pressure emanating from the executive or Congress. It pleased the Court that Congress had entrusted this function to an independent agency that would be "relatively immune from the 'political winds that sweep Washington.'"<sup>68</sup>

The Court went on to ask whether the agency exercised the range of jurisdiction and powers normally vested only in article III courts, and whether the latter retained the essential attributes of judicial power. Only the CFTC's jurisdiction over counterclaims differed from ordinary agency adjudication; the Court saw no reason to deny agencies all pendent jurisdiction.

The Court distinguished *Synar*:

Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this case is

---

64. *Bowsher v. Synar*, 106 S. Ct. 3181, 3192 (1986) (citing *INS v. Chadha*, 462 U.S. 919, 951-59 (1983)).

65. *Id.* (holding that Congress had intruded into executive function).

66. *Id.* at 3188 n.4.

67. 106 S. Ct. 3245 (1986).

68. *Id.* at 3250.

whether Congress impermissibly undermined, without appreciable expansion of its own powers, the role of the Judicial Branch.<sup>69</sup>

This distinction may help to explain both the analytic technique and the outcome of the cases. The aggrandizement of one branch at the expense of another usually presents a greater threat to separation of powers values than does a possible interference with the prerogatives of a branch.<sup>70</sup> The formalist cases that I reviewed above all presented problems of aggrandizement. The Court's response was to draw bright lines between the functions of the branches, in an apparent effort to prevent future erosion of the separation of powers.

In contrast, interference cases such as *Schor* involve the distribution of functions within the "fourth branch" of the bureaucracy, rather than a direct struggle between the constitutional branches. Hence, the Court assesses the overall relationships between the branches and the agencies to see whether the essential functions of the branches have been preserved.<sup>71</sup> The functional test is far more permissive of diverse government structure than is formalism. It is also especially well suited to cases involving adjudicative power, as a brief review will reveal.

Until recently, one would have thought that the issue in *Schor* had been settled by *Crowell v. Benson*,<sup>72</sup> which upheld the placement of adjudicative authority in an administrative agency. Doubts arose, however, after the controversial decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>73</sup> in which a badly divided Court held that the allocation of certain functions to bankruptcy judges violated article III.<sup>74</sup> Congress had created bankruptcy judges without article III status, but with powers closely resembling those of federal judges. A plurality of four justices signed a formalist opinion that defined some matters as inherently judicial. Bankruptcy matters did not come within the plurality's narrow set of exceptions to mandatory article III jurisdiction. Two concurring justices would have required only that removed state law claims be decided by an article III court. The three dissenters thought that the bankruptcy

---

69. 106 S. Ct. at 3261.

70. See generally Strauss, *Separation of Powers in Court, A Foolish Inconsistency?*, 72 CORNELL L. REV. — (1987) (forthcoming) (favoring a functional analysis that upholds arrangements that do not present dangers of aggrandizement).

71. See generally Strauss, *supra* note 1 (reviewing the relations between the branches and the agencies).

72. 285 U.S. 22 (1932).

73. 458 U.S. 50 (1982).

74. See generally Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197.

scheme satisfied a functional inquiry. They credited the legislative interests in placing decision in an alternative forum (heavy caseloads and a need for specialization). They found no danger that the other branches were aggrandizing themselves at the expense of the courts as long as the subject matter was not of special significance to the political branches.

*Schor* is not the first case to limit *Northern Pipeline*.<sup>75</sup> Formalism is poorly suited to allocating adjudicative functions between courts and agencies. It does not readily accommodate the usual arrangement—primary authority in an agency, subject to the check of limited judicial review. As the *Crowell* Court had understood, forcing the courts to retain potential jurisdiction sacrifices the benefits of more informal administrative processes. Moreover, the effect may be to diminish rather than to enhance judicial power by loading dockets with relatively trivial matters that impede decision of the important ones.

The Court has sometimes used functional analysis in cases involving presidential power. The most prominent example is *United States v. Nixon*<sup>76</sup> in which the Court recognized a constitutional right of executive privilege, based on the President's need for confidential deliberation.<sup>77</sup> (In *Nixon* the privilege was overridden, however, by the need of the judiciary for evidence in a criminal case). Similarly, in *Nixon v. Fitzgerald*<sup>78</sup> the Court recognized an absolute presidential immunity from damages, based on such considerations as the need to encourage the vigorous exercise of the office.<sup>79</sup>

In these cases, the Court may have been drawn to functional analysis by the absence of pertinent constitutional text on which to base a formalist approach.<sup>80</sup> There were also important benefits of flexibility. For both executive privilege and immunity, the Court was defining the power of its own branch regarding the President. Functional analysis allowed the Court to create protection for the executive and to limit it at the same time.<sup>81</sup> Moreover, the Court decided these cases in the absence of statutory guidance. The func-

---

75. See *Thomas v. Union Carbide Agric. Prods. Co.*, 105 S. Ct. 3325, 3334-39 (1985) (upholding mandatory arbitration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(c)(1)(D)(iii)).

76. 418 U.S. 683 (1974).

77. *Id.* at 703.

78. 457 U.S. 731 (1982).

79. *Id.* at 751-53.

80. See also *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 445 (1977) (upholding congressional regulation of presidential papers as not unduly disruptive of executive).

81. The limitation on immunity was the Court's denial, in a companion case to *Fitzgerald*, of absolute immunity for the President's closest aides. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

tional approach avoided disabling Congress from legislating in a way that the Court might later approve.

This view of *Nixon* and *Fitzgerald* suggests that the Court's choice of analytic approach may be result-oriented. Formalism minimizes the sharing of power by the branches; functionalism maximizes it. When the Court perceives aggrandizement, it issues a formalist opinion insisting on the separation of powers. Examples would be *Myers*, *Buckley*, *Chadha*, and *Synar*. When the blending of power presents no such threat, a functional opinion allows it. In addition to the cases involving President Nixon, one could cite *Humphrey's Executor*, in which the Court thought that allowing Congress to share control of the removal of officers would prevent *presidential* aggrandizement.

Hence, constitutional analysis might be improved by a direct focus on the presence or absence of aggrandizement. Assessments of the relative power of the branches, however, are inherently subjective. For example, the New Deal Court's fear of executive arbitrariness seems exaggerated today. Similarly, before *Chadha* there was a spirited debate over the legislative veto: was Congress meddling in executive matters, or imposing a necessary check on a runaway executive? The *Chadha* Court noted the debate in passing<sup>82</sup> and avoided it by employing formalism. Thus, aggrandizement lies in the eye of the beholder.

Both formalism and functionalism have serious problems of scope and predictability. Because formalism employs syllogistic reasoning, there is no obvious terminus to its logic, as *Myers* illustrates. Its predictability is low because the Court's underlying rationale is obscure. Functional analysis, focusing on difficult and subjective fact inquiries, also resists consistent application.<sup>83</sup> The Court needs a

---

82. *INS v. Chadha*, 462 U.S. 919, 945 (1983).

83. For example, in *Synar*, both Justice Stevens' concurrence and Justice White's dissent relied on functional analysis. Justice Stevens characterized the Comptroller as an agent of Congress not because of the removal provision but because many of his statutory powers serve Congress. *Bowsher v. Synar*, 106 S. Ct. 3181, 3198 (1986). Yet he had to concede that even the Comptroller has some powers that are typically executive in nature. *Id.* at n.9. What happens to the argument if Congress increases the Comptroller's executive duties, or reduces his congressional ones? And where do the independent agencies stand? Their functions typically are indistinguishable from those of the executive agencies, yet Congress constantly claims them as "arms of Congress." This form of functional analysis seems plainly unworkable as a general approach to separation of powers issues.

Justice White asked a traditional functional question: whether the Act disrupted the President's capacity to exercise his constitutional functions. He thought not, principally because the President may spend only what Congress appropriates. *Id.* at 3208. Yet this argument ignores the longstanding presence of considerable presidential discretion concerning the spending of amounts appropriated by Congress. See generally L. FISHER, *PRESIDENTIAL SPENDING* (1975) (discussing the history and nature of presidential spending power). The Act

criterion for decision that does not depend on imponderables and that has sufficient legitimacy to be discussed openly in the cases. A theory of political accountability can provide such a criterion, as I next explain.

### III. POLITICAL ACCOUNTABILITY AND SEPARATION OF POWERS DOCTRINE

The Supreme Court's recent separation of powers cases have clarified political responsibility for administration. The Court has consistently rejected schemes that would have given Congress power to share in administrative decisions without full political responsibility for doing so. If *Buckley* had allowed both presidential and congressional appointments to regulatory agencies, neither branch would answer for the agencies' decisions. If *Chadha* had upheld the legislative veto, neither branch would be solely responsible for regulation that did take effect. If *Synar* had upheld the role of the Government Accounting Office (GAO) in the Gramm-Rudman Act, it would be difficult to identify the branch that was determining whether sequestration was needed.

Thus the Court's formalism may rest on a value judgment that accountability for administration should be centered in the executive branch. Such a judgment does not necessarily answer *where* in the executive authority should lie, but it does create an essentially unitary executive with regard to Congress. Imagine the shape of the government if *Buckley*, *Chadha*, and *Synar* had reached opposite results. Congress could appoint some officers and could forbid the President to remove at least some of his appointees without a joint resolution. All officers would act subject to legislative veto. We would truly have "congressional government."<sup>84</sup>

Formalism that is guided by value judgments about accountability has the advantage of avoiding difficult fact issues. In *Synar*, the Court's constitutional equation of removal power with control was not an assertion of fact that could stand scrutiny. No one has tried to remove a Comptroller General. Nor do Presidents readily remove members of the independent agencies. The Court's conclusion can be understood, and justified, only as an assignment of responsibility.

---

shifted much of that discretion to the Comptroller, raising the possibility of disrupting the President's duty to execute the laws.

84. The phrase is from Woodrow Wilson's title for his 1885 book, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS*, which so characterized the hegemony of Congress at that time.

Congressional partisans might respond that under the rejected schemes, both branches would be responsible, with the necessary cooperation between them providing an *increase* in political accountability. I think that the Court has been silently rejecting such a notion, and properly so. Congress was not required to endorse executive policy in a way that carried clear responsibility. The presence of some congressional appointees on a commission would not tie its every action to Congress. Failure to pass a legislative veto resolution, it was often asserted in Congress, would not endorse an executive action, but would only indicate that it was not wholly unacceptable. Under the Gramm-Rudman Act, three differently composed entities were to generate estimates;<sup>85</sup> it would be difficult to place the final product at anyone's door. Still, it could be argued that congressional accountability was increased under these schemes even if it was divided with the executive. Yet any gains for Congress were offset by losses for the executive as the ultimate responsibility for decisions became blurred. Each branch could point to the other as the author of defective policy.

Perhaps hopes for clarity in political accountability are dashed by the practical interdependence that permeates modern government. Surely the Court is aware that Congress retains many avenues of informal influence even when the formal sharing of power is forbidden. Examples abound. Although Congress may not displace the President's appointment power, nominees are screened in advance through the informal practice of senatorial courtesy.<sup>86</sup> Judicial invalidation of the legislative veto does not prevent congressional committees from pressuring agencies in hearings and other informal ways. And notwithstanding *Humphrey's Executor*, the independent agencies are dependent on the executive in a myriad of ways. Nevertheless, a scheme of independent authority that is open to influence is fundamentally different from one with shared responsibility. A branch possessing formal authority is politically accountable for a decision no matter how vigorous outside pressure may be. Such clarity does not exist when the power to decide is shared.

A constitutional separation of powers doctrine that emphasizes clear accountability can be anchored in the framers' goals. *The Fed-*

---

85. The Director of the Office of Management and Budget (OMB) and the Director of the Congressional Budget Office (CBO) were to report jointly to the Comptroller General. 2 U.S.C. § 901(a) (Supp. III 1985). The Comptroller General was to review the OMB and CBO reports and, "with due regard for the data, assumptions, and methodologies used in reaching the conclusions set forth therein," issue a report to the President and Congress. *Id.* § 901(b).

86. Advance approval is necessary because of a Senate custom of refusing to confirm presidential nominations when a senator of the President's party from the nominee's state is opposed.

*eralist Papers* are replete with emphasis on the need to ensure public knowledge of accountability for particular actions.<sup>87</sup> The Constitution incorporates this value most prominently in the choice of a single executive.<sup>88</sup> Moreover, the framers identified an additional advantage in choosing a single executive: increased efficiency due to the energy and dispatch with which a unitary executive could act.<sup>89</sup> Thus, to the extent that authority is allocated clearly, government efficiency increases.<sup>90</sup>

The Court has recently employed an additional kind of formalism, which I will call procedural formality to distinguish it from the Court's formalist style of logical reasoning. A number of recent cases, most prominently *Chadha*, have required Congress to act through full, formal legislative procedures to control the executive.<sup>91</sup> Accountability values may also explain this procedural formality. The political responsibility of members of Congress is mostly individual. True, each may bear some diffuse liability for the performance of the institution as a whole, but the record of individual actions certainly dominates reelection campaigns. Indeed, incumbents often run against Congress. Consequently, Congress is accountable as a branch of government only when it acts as a whole in legislation.

Procedural formality not only conforms congressional power to accountability; it also influences the congressional product. The Constitution's procedural requisites for legislation ameliorate the effects of faction and localized constituencies, and foster policy that advances the public interest.<sup>92</sup> Thus the Madisonian goal of diluting special interest influence is advanced by procedural formality.

The legislative veto was inconsistent with several of these values. First, insofar as the veto mechanism gave the committees effective

---

87. See THE FEDERALIST NO. 70, at 456 (A. Hamilton) (B. Wright ed. 1961) (arguing that with multiple executive, restraints of public opinion "lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall").

88. See generally Martin, *The Legislative Veto and The Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 279 (1982) (Constitutional Convention recognized that accountability depends largely upon public clarity about responsibility for particular actions).

89. *Id.* at 286 (claiming Constitutional Convention chose single executive rather than council because it viewed structure as more conducive to effective governance).

90. These efficiency gains, however, are at the cost of lessened informal cooperation between the branches.

91. *INS v. Chadha*, 462 U.S. 919, 951 (1983) (requiring congressional authority to be exercised only by bicameral passage followed by presentment to President); see also Bruff, *supra* note 23, at 222-26 (reviewing other formalist cases); *Bowsher v. Synar*, 106 S. Ct. 3181, 3189 (1986) (analogizing congressional control of execution through the Comptroller General to legislative veto).

92. See Bruff, *supra* note 23, at 219 (noting that framers conditioned legislation on concurrence of institutions with differing representative bases in response to faction problem).

control over executive action, it conferred power on groups having no separate political responsibility of their own. Second, special interests could more readily dominate in a more confined arena.<sup>93</sup> In addition, this fragmentation of power decreased efficiency by fostering impasse when committees disagreed.

If the Court had employed functional analysis in these cases, it might not have drawn clear lines of accountability. Focusing only on whether a branch is disrupting the core functions of another would result in a much more mixed set of outcomes than does formalism. For example, it is not apparent why the President must appoint all officers if he is to discharge his own duties. Indeed, the function of regulating elections, which was involved in *Buckley*, may be inappropriate for presidential supervision. Nor do all legislative vetoes appear to invade central presidential responsibilities. The one involved in *Chadha* concerned the deportability of individual aliens. Functional analysis might allow the veto in that context but might invalidate one that controlled the President's disposition of the armed forces.<sup>94</sup>

This analysis suggests that formalist pursuit of accountability may sacrifice needed limits to presidential power. Yet rejecting the fragmented executive of *Humphrey's Executor* does not necessarily entail embracing the unitary executive of *Myers*. Limitations to constitutional formalism can be articulated. They flow from the nature of the President's responsibility for administration.

Consider the President's accountability for the actions of his direct subordinates in the Cabinet. Although the President's fortunes may rise or fall with their cumulative actions, the President cannot participate in every policy decision made within his administration. His responsibility, then, is generalized. For this reason, the President's relationship with the agencies is basically one of oversight, and is similar to that of Congress. Therefore, constitutional doctrine needs to preserve only a generalized presidential power of supervision over the agencies, concomitant with his political responsibility for them. I next elaborate this concept.

Presidential accountability flows from several sources. First, it comes from the power to appoint.<sup>95</sup> Even when the President may

---

93. Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1413 (1977) (legislative veto allowed special interest groups to affect policy outside public rulemaking procedures).

94. See Strauss, *supra* note 56 (distinguishing the *Chadha* context from others in which veto addresses vital separation of powers relationships, and suggesting its *greater* appropriateness for the latter).

95. U.S. CONST. art. II, § 2, cl. 2 (authorizing President to appoint ambassadors, Supreme Court justices, and other public officials).

neither remove nor supervise particular officers, such as federal judges, he hears direct criticism when a nomination is made, and suffers the judgments of history for the behavior of his nominees in office. Second, the addition of removal authority<sup>96</sup> dramatically increases presidential responsibility, expanding it from an *ex ante* judgment about qualifications to a continuing appraisal of fitness to remain in office. Obviously, the possession of plenary removal authority maximizes the President's accountability because it closely ties the officer to him. Third, the President's accountability stems from his supervision of the agencies, and the public's subsequent appraisal of the results.<sup>97</sup> Both formal supervisory powers found in statutes (such as budgetary powers) and more informal presidential initiatives are relevant here. This aspect of presidential accountability is not constant; it varies over time and by subject matter. Thus, the Reagan administration's aggressive efforts to supervise policymaking in the agencies increase the President's responsibility for agency decisions.

Constitutional doctrine need not specify the exact nature of the President's fluctuating supervisory powers. It is enough to preserve the three aspects described above, to a degree that depends on the nature of political responsibility in the context. For example, as *Myers* recognized, the President should retain plenary removal power over some officers, such as the Secretary of State. In contrast, because the President's political responsibility for some functions (such as adjudication) is low, his supervisory powers may be restricted accordingly. This last observation suggests a rationale for the Court's usual decision of the cases involving article III functions according to a permissive functional analysis. Absent any need to preserve presidential responsibility for adjudication, Congress is free to allocate it to court or agency within broad limits.

Constitutional doctrine should assume that primary responsibility for particular administrative decisions is where the statutes place it—with the agencies. That assumption will leave the policing of those decisions, and of most aspects of oversight relations with Congress and the executive, to nonconstitutional doctrines. This is not to say, however, that political responsibility ends at the White House gates. If an agency decision is important enough, an officer may be fired for sufficiently displeasing the President. More commonly, however, the structure of our government and the nature of

---

96. See *Myers v. United States*, 272 U.S. 52, 164 (1926) (indicating source of presidential power to remove subordinate executive officials).

97. See *id.* at 117 (indicating source of presidential power to supervise agencies).

modern administrative law ensure agency responsibility. The agencies are overseen by all three constitutional branches and by interest groups. Administrators, far from being insulated, are subject to rewards and punishments from these diverse overseers. Recent administrative law has attempted to open the agencies to these influences and to bind their final decisions to law. Obviously, there are some difficulties in achieving both these goals simultaneously. Two recent Supreme Court cases illustrate the tensions.

In *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>98</sup> the Court allowed the Environmental Protection Agency (EPA) to reverse preexisting policy in favor of an approach that met the efficiency criteria of the Reagan administration.<sup>99</sup> In doing so, the Court endorsed the traditional doctrine that courts should defer to agency interpretations of statutes within the limits of reason and ascertainable legislative intent.<sup>100</sup> The Court may have expanded the doctrine significantly, however, by disapproving broad judicial analysis of implied statutory purpose as a means of confining agency discretion. Instead, the Court limited itself to a search for specific congressional intent on the issue at hand and, failing to find it, left interstitial policy entirely to the agency. Therefore, if Congress wishes to confine executive discretion, it had best do so explicitly.

The *Chevron* Court emphasized that regulation may respond to the policy preferences of the incumbent administration, within statutory limits. This explicit endorsement of the role of politics in regulation is inconsistent with the premise of *Humphrey's Executor* that regulation and politics should not mix. Thus, the modern Court appears to be promoting accountability through administrative law as well as separation of powers doctrine.<sup>101</sup>

*Chevron*, however, is in some tension with the Court's earlier decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*<sup>102</sup> The Court invalidated the National Highway Traffic Safety Administration's (NHTSA) attempt to conform its policy to administration goals by rescinding its passive restraints regulation.<sup>103</sup> One can reconcile these cases on grounds that in *State Farm*, the agency insufficiently explained the factual and policy reasons for its action, whereas in *Chevron* the agency passed that test.

---

98. 467 U.S. 837 (1984). See generally Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986).

99. *Id.* at 865.

100. *Id.* at 866.

101. See Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. LAW, ECON. & ORG. 81, 93-95 (1985) (asserting that *Chevron* promotes accountability).

102. 463 U.S. 29 (1983).

103. *Id.* at 57.

Nevertheless, by endorsing active judicial review of an agency's support for any change in the regulatory status quo, the *State Farm* Court slowed administrative efforts to alter existing regulations.<sup>104</sup>

Under *State Farm*, the courts, using doctrines of judicial review that are essentially a common law gloss on the vague terms of the APA, force agencies to explain policy changes thoroughly.<sup>105</sup> This style of review encourages regulators to respond substantively to the needs of groups that benefit from regulation.<sup>106</sup> For example, much health and safety regulation benefits the general public or a close surrogate. Focusing judicial review on the factual and policy support for an agency's action tends to drive regulation toward serving the public interest.

Thus, both *Chevron* and *State Farm* can be read to promote the accountability of administrative action, although in somewhat different senses of that term. The problem is to reconcile an agency's relationship with the executive and its statutory responsibilities to the public. In *Sierra Club v. Costle*,<sup>107</sup> the court thought it sufficient to require administrators to justify their decisions on the administrative record before them, whatever the content of consultation with the White House.<sup>108</sup> This compromise seems sound. It allows generalized executive oversight, but assigns specific responsibility for administration to the agencies.

Now let us consider the independent agencies. The President's qualified removal power carries formal responsibility for a minimum level of performance by these officers. Yet in practice, both Presidents and Congress have treated these agencies in accordance with the dicta in *Humphrey's Executor* as entities outside the executive branch, whose officers the President does not supervise and is loathe to fire. There are some exceptions to this characterization in which informal presidential pressure has influenced an independent agency's policy or hastened the departure of a member. In general,

---

104. *Id.* at 40-41. See generally Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177 (assessing implications of *State Farm* for administrative law).

105. *State Farm's* approval of active judicial review of the substance of policymaking conflicts with the Court's approach in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), in which the court forbade lower courts to require agencies to follow procedures not imposed by statute. See Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1816-17 (1978) (indicating that Supreme Court's earlier recognition of record requirement not found in APA for informal proceedings conflicts with Court's condemnation of imposition of procedural formalities not required by APA).

106. See Bruff, *supra* note 23, at 210 (examining interest representation theory requiring agencies to explain resolution of policy issues by demonstrating consideration of interested groups' views).

107. 657 F.2d 298 (D.C. Cir. 1981).

108. *Id.* at 404-08.

however, Congress is jealous of its hegemony of these agencies, and Presidents have found it wise to assent.

In both theory and practice, independent agencies report to Congress. Consider the consequences in terms of political responsibility. *All* agencies report to Congress in the sense that they must abide by the statutes that authorize their programs and appropriate their funds. Beyond these statutory functions, however, Congress does not act as a whole. Congressional oversight is performed by authorizing and appropriations committees in both houses, and by individual members of Congress. In short, there is no single elected officer to whom the independent agencies are accountable. In this sense, they truly are the "headless fourth branch" of government.<sup>109</sup>

One can argue that administrative law and the oversight of Congress, the courts, and the interest groups produce enough accountability for the independent agencies, so that their constitutional insulation from the President should remain. It is not sufficient to say, however, that the independent agencies are responsible for following their statutes. Nor is the added influence of executive oversight unnecessary or pernicious. As *Chevron* and *State Farm* illustrate, statutory compliance usually leaves open a broad range of policy choices. The independent agencies encounter uncoordinated and possibly inconsistent oversight from a number of sources, including various committees and members of Congress. Such diverse oversight tends to destabilize agency policymaking.<sup>110</sup> In contrast, executive oversight can be unitary and consistent because of the hierarchical organization of the executive branch. Presidential participation can serve a beneficial role in policy coordination. In any event, the President's political base adds to the various influences on an agency. The outcome is a gain in total accountability, as long as executive oversight does not dictate policy, but rather leaves the final decision with the agency. Thus, if executive oversight can be controlled, I see no reason to exempt the independent agencies from its influence.

Viewed in this light, the special constitutional status of the independent agencies is unjustifiable. The Supreme Court should repudiate the dicta in *Humphrey's Executor* that account for it. That would not, however, identify the limits of permissible presidential

---

109. For the origin of this term, see PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT, 75th Cong., 1st Sess. 40 (1937) (examining role and function of independent agencies within federal government as part of study on reorganization).

110. See Bruff, *supra* note 23, at 231 (indicating that inconsistent signals to agencies from committees reduce stability of administrative policymaking).

supervision of decisions by independent agencies, because those limits are unknown even for executive agencies. For constitutional purposes, it is sufficient to say that the executive branch is unitary in the sense that the President bears generalized responsibility for all of the agencies. The consequence of such a stance would be to prevent Congress from denying the President a supervisory role that is appropriate to the function involved. The details of allocating responsibility for particular decisions between the presidency and the agencies can then be resolved by nonconstitutional doctrine.

#### IV. OVERSIGHT IN ACTION: THE REAGAN ADMINISTRATION'S EXECUTIVE ORDERS AND THE INDEPENDENT REGULATORY COMMISSIONS

Constitutional rudiments do not specify the extent to which the President may oversee policy formation in the agencies, whether the agencies are independent or not. Instead, statutory and informal arrangements dominate everyday life. Because Congress has not yet attempted to define by statute the extent of permissible presidential supervision of the agencies, except insofar as removal restrictions imply limits, it is the informal interplay of power between the branches that dominates. Here, there is ample opportunity for the President to seize the initiative presented by statutory interstices. The President can employ informal methods of supervision, or can create more enduring institutional relationships by the relatively formal method of an executive order.<sup>111</sup> Congress, in turn, is left to respond formally, by statutory authorization or restriction of the President's activities, or informally, by oversight inquiry. The latter method, decentralized congressional oversight, usually constitutes a real political check because at least one house of Congress is usually controlled by the party not holding the White House. Of course, there are efficiency losses in the resulting interplay, but everything costs something.

The Reagan administration has made unparalleled efforts to centralize executive oversight of agency policymaking. Executive Order No. 12,291 commanded executive agencies (but not independent ones) to apply cost-benefit analyses to proposed regulations, and to issue only optimally beneficial final regulations.<sup>112</sup> The Office of

---

111. See Fleishman & Aufses, *supra* note 14, at 1 (assessing value of executive order as policymaking tool).

112. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 note (1982). See generally Shane, *supra* note 20 (assessing facial legality of Executive Order No. 12, 291 and examining premises that led to differing legal conclusions by Department of Justice and Congressional Research Service).

Management and Budget (OMB) was authorized to review both stages of the process. Executive Order No. 12,498 required the same agencies to undergo OMB review of their regulatory agendas at an early stage.<sup>113</sup> Both orders recognize that regulation contains political value judgments as well as technical determinations.<sup>114</sup> Therefore, the orders shift power up the bureaucratic chain, away from technocrats in agency staff components and toward political appointees at the head of the agencies and in OMB.<sup>115</sup>

Presidential oversight tends to be much less visible than most forms of congressional oversight, due to the cloak of executive privilege. Although the Supreme Court recognized a constitutional right of executive privilege in *United States v. Nixon*,<sup>116</sup> the Court did not address the nature of the privilege as it applies to congressional demands for information. *Nixon*, however, gave legitimacy to claims of privilege in all contexts because the privilege rests on privacy needs in the deliberative process that are present regardless of the source of an outside inquiry. Congressional committees seeking information about presidential supervision of the agencies must reckon with the existence of a constitutional privilege of unknown scope. Hence, the committees, striving to discover the content of executive oversight, wrestle with the executive in informal negotiations and, to date, in inconclusive litigation.<sup>117</sup> The committees stress the danger that the White House may secretly pressure the agencies into subverting statutory commands.

A response that minimizes the need for constitutional determinations is to control executive oversight, not to forbid it. The Ameri-

---

113. Exec. Order No. 12,498, 3 C.F.R. 323 (1986), reprinted in 5 U.S.C. § 601 note (1982 & Supp. III 1985). See generally Note, *Presidential Policy Management of Agency Rules Under Reagan Order 12,498*, 38 ADMIN. L. REV. 63 (1986) (discussing enhancement of presidential power by Executive Order No. 12,498 and concluding that this increased authority cannot be maintained under article II of Constitution).

114. See Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1399 (1975) (pointing out that regulatory agencies make political decisions between competing social and economic values).

115. See generally Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986) (examining role of presidential supervision in regulatory process and issues raised by Executive Orders No. 12,291 and No. 12,498); Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1 (1984) (study of OMB review of EPA rules under Executive Order No. 12,291, suggesting establishment of independent regulatory review process).

116. 418 U.S. 683, 705 (1974).

117. See *United States v. American Tel. & Tel. Co.*, 567 F.2d 121, 130 (D.C. Cir. 1977) (Constitution deliberately left allocation of powers between congressional and executive branches unclear in some circumstances to promote negotiation between two branches); *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983) (withholding declaratory judgment concerning executive privilege as defense for withholding documents from Congress).

can Bar Association (ABA) has recommended that Executive Orders No. 12,291 and No. 12,498 be extended to the independent agencies.<sup>118</sup> As a primary control on the process, however, the ABA recommended that OMB-agency policy communications that might otherwise be shielded by executive privilege be made available to Congress. That could check potential abuses, to the extent that policy consultations are written. Consistency of policy with statutory commands would be promoted by exposing reasons for decisions that are not legally permissible. New fact and policy arguments appearing in executive oversight could be channelled into the administrative record.

If the President declines to disclose OMB-agency communications, I think Congress could require it as a condition of oversight. Constitutional executive privilege does not need to be extended from the precincts of the Oval Office throughout the executive branch to allow the President to perform his constitutional duties. If his major oversight relationship with the agencies is a generalized one, such as that embodied in the Reagan executive orders, disclosure should not chill permissible communications. At the same time, disclosure may be necessary to prevent executive oversight from overriding all other influences on the agency and shifting specific policy decisions into the White House.

Exposing the independent agencies to presidential oversight methods that are used for the executive agencies would reflect a parity principle: either both branches should be able to oversee a regulatory function, or neither.<sup>119</sup> Such a principle can recognize that adjudication needs protection from political oversight. Moreover, it allows for identification of particular rulemaking or enforcement functions that should not be subject to normal kinds of political oversight by either branch, such as campaign regulation or monetary policymaking.

These modest alterations in doctrine would replace the broad constitutional insulation from executive oversight that derives from dicta in *Humphrey's Executor* with a much more limited protection from the President. The legality of a particular kind of oversight would depend not on the name of the agency but on the nature of

---

118. See Strauss & Sunstein, *supra* note 115, at 203 (examining ABA recommendation and suggesting that law and policy considerations support extension of executive orders to independent agencies).

119. See Strauss, *supra* note 1, at 668-69 (indicating that parity is not complete because balance can be maintained only by ensuring Congress' right to structure government and President's right to control it).

an affected function and a judgment whether oversight would so impair it as to be inconsistent with the authorizing statute.

Some troubling features of oversight under the current executive orders flow from difficulties in monitoring it through judicial review. Agency action that evades judicial review can be shaped to the needs of special interests more readily than can relatively formal agency decisions of the kind involved in *Chevron* and *State Farm*.<sup>120</sup> Under the executive orders, claims of executive privilege may impede judicial fact finding. Oversight occurs early in the policymaking process when courts are reluctant to intervene.<sup>121</sup> Decisions involve broad questions of priority that the courts avoid.<sup>122</sup> The outcome of oversight is often agency inaction, which courts have long found difficult to control.<sup>123</sup> Thus, it is likely that most aspects of oversight pursuant to the executive orders will prove unreviewable. The impediments to judicial review reinforce the conclusion that executive privilege should not bar all congressional monitoring.

Congress could legislate controls on executive oversight on a government-wide or a program-by-program basis. The constitutional limits of congressional power could remain largely undefined. Now that the Court has guaranteed that the President may appoint executive officers and may remove them under at least some circumstances, powers of supervision could vary substantially without compelling a constitutional conclusion that the President has been denied supervisory authority commensurate with his generalized political accountability.

---

120. In *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), the Court held that judicial review of milk marketing orders at the behest of consumers was impliedly precluded by a statute that was enacted for the principal benefit of milk producers. *Id.* at 351-52. Many statutes, like the one involved in *Community Nutrition*, benefit special interests, but make a bow toward more widespread interests. Precluding ordinary judicial review of their administration only increases existing "capture" problems.

121. Doctrines of finality, ripeness, and exhaustion codify this reluctance. See generally R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 5.7 (1985) (examining timing of judicial review of agency action).

122. In *Allen v. Wright*, 468 U.S. 737 (1984), the Court denied standing to black parents to challenge IRS enforcement policy concerning denial of tax exemptions for discriminatory private schools. *Id.* at 750-52. Although based on standing doctrine, the decision probably owes more to the difficulties of judicial monitoring of levels of enforcement activity.

123. In *Heckler v. Chaney*, 105 S. Ct. 1649 (1985), the Court held that decisions not to take enforcement action are presumptively unreviewable, in part due to the difficulties of reviewing agency priority setting. *Id.* at 1651.

