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## The Independent Agency After *Bowsher v. Synar*--Alive and Kicking

William H. Hardie, III

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# NOTES

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### I. INTRODUCTION

Because the modern administrative agency combines executive, legislative, and judicial powers, various authorities throughout history have argued that the fundamental structure of the admin-

istrative system is unconstitutional.<sup>1</sup> Recently, the relationship between the separation of powers doctrine and the administrative state has returned to the foreground of both American politics and constitutional law. Attempts by the current executive branch to rein in the policy and rulemaking activities of "independent" federal agencies<sup>2</sup> have resulted in both praise and cries of foul from the legal community and Congress.<sup>3</sup> These attempts at executive branch control have been precipitated by a perceived shift in the United States Supreme Court's position on the separation of powers doctrine. The Court's recent decision striking down certain provisions of the Gramm-Rudman-Hollings Deficit Control Act<sup>4</sup> has greatly increased the belief that the existence of independent agencies is in danger.<sup>5</sup> Moreover, a strong belief now exists that the original functional justifications<sup>6</sup> for the independent status of cer-

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1. See PRESIDENT'S COMMISSION ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES (1937). Early attacks on Congress' establishment of independent regulatory commissions recommended the abolition of the "headless fourth branch" of government and called for the separation of adjudicatory and prosecutory functions possessed by certain agencies.

2. Independent regulatory agencies of the federal government generally are defined as agencies outside the executive departments or those agencies whose head can be discharged by the President only for cause. See K. DAVIS, ADMINISTRATIVE LAW TREATISE ¶ 2.7 (1978). The Paperwork Reduction Act of 1980 lists 17 independent regulatory agencies, the most prominent of which are the Civil Aeronautics Board, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Election Commission, the Federal Reserve Board, and the Securities and Exchange Commission. See 44 U.S.C. § 3502(1) (1982) (defining of independent agency under the Paperwork Reduction Act).

3. Attorney General Edwin Meese has suggested that the entire system of independent agencies may be unconstitutional. According to Mr. Meese: "Federal agencies performing executive functions are themselves properly agents of the executive . . . . In the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government." See Taylor, *A Question of Power, A Powerful Questioner*, N.Y. Times, Nov. 6, 1985, at 19, col. 9 (quoting Meese's September 1985 speech concerning independent agencies). Mr. Meese would include those agencies currently considered independent in the executive branch. In addition, former Federal Trade Commission (FTC) Chairman, and current Office of Management and Budget (OMB) Director James Miller has stated that, with respect to rulemaking, he does not believe there are any "independent" agencies. *Id.*; see also, Letter from Edwin Meese III to Editor, N.Y. Times, reprinted in N.Y. Times, May 13, 1985, at 12. Mr. Miller, President Reagan's appointee to head the FTC (an independent agency) also has referred to the idea of an independent agency as a "myth." See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, LEGISLATIVE VETO OF AGENCY RULES AFTER *INS v. CHADHA* 18 (1983).

4. The Act's popular name "Gramm-Rudman," refers to its two principal draftsmen, Senators Phil Gramm of Texas and Warren B. Rudman of New Hampshire. For purposes of this Note "Gramm-Rudman" is used in substitution for the Act's formal title, Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985).

5. See *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

6. The original justification for agency independence from the executive was an intent

tain agencies have collapsed, taking with them any possible justification for excluding these agencies from the President's control.<sup>7</sup>

This Note will demonstrate that wholesale rejection of the need for the independence of certain administrative agencies is unwarranted. Careful analysis of the most recent cases addressing the independence issue reveals that the constitutional notion of separation of powers can co-exist with the notion of the independent agency. While recent Supreme Court decisions<sup>8</sup> have stressed the need for strict separation of the three named branches and have declared unconstitutional specific attempts to further the scope of the administrative state, they have not precluded the existence of a properly created independent agency.

To preserve the existing administrative structure of government, future decisions on the independent agencies' place in government should focus on a strict separation of powers at the apex of government and on a flexible "checks and balances" model below that apex. By recognizing that independent agencies are not a fourth branch, but are a product of Congress, and that their creation and operation are fully subject to the checks and balances inherent in the Constitution, the Court will enhance the ability of the government to adapt to societal change. Such an interpretation will preserve the agencies' accountability and secure the authority of the separate branches.

This Note examines the future of independent administrative agencies following recent Supreme Court decisions that have focused on the separation of powers and the administrative state.

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on the part of Congress "to create a body of experts who shall gain experience by length of service." *Humphrey's Executor v. United States*, 295 U.S. 602, 625 (1935). Professor Landis states that "[T]he advantages of specialization in the field of regulatory activity seem obvious enough . . . [T]he art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate." J. LANDIS, *THE ADMINISTRATIVE PROCESS* 23-24 (1938). Landis believes that the only way to achieve this expertise is through "long continuance" in office. *Id.* at 23; see *infra* notes 9-24 and accompanying text.

7. See generally Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 *YALE L.J.* 1766 (1985) (arguing that the Supreme Court decision in *INS v. Chadha*, 462 U.S. 919 (1983), and the perceived functional similarity between Executive and independent agencies counsel for incorporation of the independent agencies into the Executive branch). See also Ablard, *American Bar Association Section of Administrative Law Report to the House of Delegates*, A.B.A. SEC. ADMIN. L. (1986) [hereinafter ABA Proposal 100] (arguing that the President's "Opinions in Writing" power of Article II allows Executive Control over independent agencies); ABA COMMISSION ON LAW AND THE ECONOMY, *FEDERAL REGULATION: ROADS TO REFORM 84* (1979) [hereinafter ROADS].

8. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

Section II of this Note discusses the historical justification for the development of the independent status of certain agencies. Section II also reviews early Supreme Court decisions regarding the place of independent agencies in government. Section III identifies and responds to current attacks on the functional justifications for the independent status of certain federal agencies. Section IV discusses the Constitutional issues regarding independent agencies and analyzes recent Supreme Court opinions addressing the place of administrative agencies in government. Section V concludes that although independent agencies have been criticized and their ability to function independently has been questioned, independent agencies should remain in the present governmental structure and should be afforded the political insulation established by Congress.

## II. THE CREATION OF THE ADMINISTRATIVE STATE AND THE INDEPENDENT AGENCY

### A. *Early Federal Regulatory Agencies*

"The rise of the administrative process parallels the development of the United States into a large, complex, and industrialized nation."<sup>9</sup> Burgeoning economic development led Congress to believe that specialized regulation was required in a changing economy.<sup>10</sup> This regulation must encompass notions of flexibility, continuity, and expertise. This belief fostered Congress' decision to delegate economic regulation to subordinate agencies. Congress delegated legislative powers to these agencies, granting them the capability to enact, after consideration of pertinent factual circumstances, specific regulations to further Congress' policy decisions.<sup>11</sup>

The establishment in 1887 of the Interstate Commerce Commission (ICC) marked the beginning of modern administrative regulation. The ICC represented the first governmental regulator that

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9. P. WOLL, *ADMINISTRATIVE LAW* 5 (1983).

10. Many justifications are given for the decision to delegate economic regulation to a subordinate agency rather than to one of the three enumerated branches of government. The belief that regulatory expertise was needed in a narrowly defined area and that courts, from an adjudicatory standpoint, were incapable of developing this expertise was a primary reason for establishing administrative agencies. The requirement of flexibility in regulation has been offered as a premise for the decision to delegate legislative powers to the administrative agency. See generally *id.* at 5-8.

11. *Id.* It has been said that "[t]he early agencies were created because practical men were seeking practical answers to immediate problems." K. DAVIS, *ADMINISTRATIVE LAW* 10 (1951).

was concerned solely with the welfare of a vital national industry.<sup>12</sup> Congress vested the ICC with broad rulemaking, adjudication, and enforcement powers; subsequently, the ICC has become the model for the modern administrative agency.<sup>13</sup> Although a major step in the development of an administrative state, this delegation of authority was not without constitutional foundation. The Supreme Court previously had upheld Congress' ability to transfer both legislative<sup>14</sup> and rulemaking<sup>15</sup> authority to an agency.

The New Deal era represented the next major phase in the development of administrative law. Responding to the collapse of the economy during the Great Depression, President Franklin D. Roosevelt's New Deal drastically expanded the federal government's intervention in economic affairs and laid the foundation for a national welfare state.<sup>16</sup> The creation of agencies to oversee important sectors of the economy was representative of the action taken by the executive branch "to save capitalism from itself."<sup>17</sup> Both the Securities and Exchange Commission<sup>18</sup> and the National Labor Relations Board<sup>19</sup> were created during the New Deal in response to perceived failures in the financial and labor markets. Initial fears concerning Congress' delegations of power caused certain statutes to be held unconstitutional as overly broad delegations of

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12. J. LANDIS, *supra* note 6, at 10. The creation of the ICC was the inevitable result of the Supreme Court's decision to prevent state regulation of the railroads. See *Wabash, St. L. & P. R.R. v. Illinois*, 118 U.S. 557 (1886). The ICC, however, was not the first federal regulatory agency. The creation of administrative agencies began at the very first session of Congress. See REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 8 (1941). These early agencies later would become the Bureau of Customs and the Veterans Administration. See B. SCHWARTZ, ADMINISTRATIVE LAW § 1.10, at 21-22 (2d ed. 1984).

13. See B. SCHWARTZ, *supra* note 12, at 21-22.

14. See *The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813) (upholding Congress' power to transfer its legislative function).

15. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (upholding the power of Congress to delegate to the Supreme Court the ability to regulate judicial practice).

16. See K. DAVIS, *supra* note 11, at 6-7.

17. S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 30 (1985). The decision was made that the legislative process was "ill-suited for handling masses of detail, or for applying . . . the ideas supplied by scientists or other professional advisers. . . . [O]ur legislative bodies [have] developed [a] system of legislating only the main outlines of programs . . . and leaving to administrative agencies the tasks of working out subsidiary policies." K. DAVIS, *supra* note 11, § 3 at 13.

18. The Securities and Exchange Commission was created under authority of the Securities and Exchange Act of 1934, 48 Stat. 881 (1934) (current version at 15 U.S.C. §§ 78a-78jj (1982)).

19. The National Labor Relations Board is an independent agency created by the National Labor Relations Act of 1935, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-168 (1982)).

authority.<sup>20</sup> This judicially created<sup>21</sup> constraint on agency authority has not weathered the test of time and now appears to be "dead, or at least 'moribund.'" <sup>22</sup>

The New Deal era's deferential attitude toward Congress' delegations of authority, however, is not shared by the current Executive. Unlike the New Deal era, in which both the legislative and executive branches were committed to the idea of economic control through the "expert professionalism of administrators,"<sup>23</sup> today the two branches disagree on the propriety of delegating the power to shape the focus and structure of the federal government.<sup>24</sup>

20. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

21. The nondelegation doctrine involved in *Schechter* is wholly judge-made. "[I]nsofar as it is asserted to be a principle of constitutional law [the doctrine] is huilt upon the thinnest of implication, or is the product of the unwritten super-constitution." Duff & Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168, 196 (1929). The fact that the Supreme Court has recognized delegation of authority as a legitimate congressional act indicates that decisions condemning a particular delegation represent policy determinations on the part of the Supreme Court, arguably the inappropriate branch to determine such policy.

22. *Synar v. United States*, 626 F. Supp. 1374, 1384 (D.D.C.), *aff'd sub nom. Bowsher v. Synar*, 106 S. Ct. 3181 (1986). The Supreme Court has invoked the nondelegation doctrine to invalidate a federal statute only three times in history—twice in 1935 (*Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)) and once in 1936 (*Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)). Some commentators have concluded that the nondelegation doctrine "continues to live a fugitive existence at the edge of constitutional jurisprudence." Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 17 (1982). *But see* Goldsmith, *INS v. Chadha and the Nondelegation Doctrine: A Speculation*, 35 SYRACUSE L. REV. 749 (arguing that *INS v. Chadha*, 462 U.S. 919 (1983), has brought new life to the nondelegation doctrine). The Supreme Court's recent decision, *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), however, may signal the end of the doctrine's continued vitality. See *id.* at 3193 & n.10.

23. S. BREYER & R. STEWART, *supra* note 17, at 31. The theory of agency expertise dominated academic notions of administrative law after 1935. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676-81 (1975).

As recently as 1968, both the President and Congress recognized the need to promote the ideas of expert administrators. The United States Postal Service was removed from the Executive branch and given independent status in 1970. The reasons given for the change included the need to remove the appointments and promotions processes from partisan politics and "move to a completely professional postal personnel system." REPORT OF THE PRESIDENT'S COMMISSION ON POSTAL ORGANIZATION: TOWARDS POSTAL EXCELLENCE 58 (1968). However, in a more politically volatile setting, the "for cause" removal requirement which identifies an agency as independent was rejected. See H.R. REP. NO. 197, 98th Cong., 1st Sess. 4, reprinted in 1983 U.S. CODE CONG. & ADMIN. NEWS 1989, 1992-93 (rejecting the "for cause" requirement in the Civil Rights Commission).

24. The most celebrated example of a dispute between the branches of government over administrative law occurred after the *Carter Coal* decision in 1936. Many viewed the Supreme Court's invalidation of the National Recovery Act as a policy decision regarding the New Deal. This political turmoil surrounding the *Carter Coal* decision initiated the Court Packing Plan under which President Roosevelt and his supporters in Congress attempted to reduce the Supreme Court's ability to thwart popular will and economic recov-

### B. *Judicial Acceptance of the Independent Agency*

Congress' most effective method for insulating an agency's rulemaking and policy judgments from executive intrusion is to limit the opportunities the Executive has for removing agency administrators. The administrative heads of federal agencies typically have discretion over the agency's rulemaking and policymaking agenda and, therefore, can influence greatly the agency's impact on society.<sup>25</sup> Thus, decisions that expound on the removal power of the Executive are the logical starting point for comprehending the constitutionality of agency independence because if independent agencies are not protected from unlimited removal by the Executive, the agencies' independence would be a sham.

#### 1. *Myers v. United States*

The Supreme Court's decision in *Myers v. United States*<sup>26</sup> is recognized as the birthplace of contemporary analysis of the Executive's removal power. In *Myers* the Supreme Court invalidated a long-standing statute that required the President to seek the advice and consent of the Senate before removing a Postmaster from office.<sup>27</sup> The majority's extremely formalistic opinion, written by Chief Justice and former President Taft,<sup>28</sup> emphasized the President's need for complete control over the Executive branch.<sup>29</sup> This control, according to the Court, was needed to ensure the uniform and unitary execution of the law. Chief Justice Taft recognized the Senate's express constitutional power to consent to the appointment of a postmaster and to define the qualifications and terms for

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ery by adding pro-executive Justices to the Court.

25. While the administrative head will have significant influence on the activities of the agency, this influence is not unchecked. Congressional amendments to the agency's enabling legislation can sharpen the agency's focus. This amending legislation must, however, survive Presidential approval, which helps to insure that the agencies truly are independent. Because no one branch of government can control these activities, the agencies can conduct their activities relatively free of the influence of partisan politics but still within the limits of the Constitution. One such limit is judicial review. By allowing this process to exist, Congress can regulate the particular industries by delegating authority to expert apolitical heads of departments without sacrificing the goals of separation of powers.

26. 272 U.S. 52 (1926).

27. *Id.* at 135.

28. The Chief Justice stressed a very strict separation of the powers of government theory in his opinion. "[T]he reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended . . . ." *Id.* at 116.

29. *Id.* Chief Justice Taft's experiences as President explain his desire to see a strong Executive branch.



that office.<sup>30</sup> Nevertheless, the Court noted that the President had an implied power of removal, free from congressional limitation, which was based on the need to direct the actions of executive officers. The Chief Justice, however, did acknowledge that the extent of presidential control over a subordinate was determined by the statute creating the subordinate position.<sup>31</sup> Chief Justice Taft also recognized that when quasi-judicial duties of executive officers were involved, the possibility of limiting the President's removal power existed.<sup>32</sup>

The majority's conciliatory concluding statements regarding limitations on the Executive's removal power did not appease the dissenters in *Myers*. Focusing on what he considered a "cautious view of executive power"<sup>33</sup> held by the framers of the Constitution, Justice Brandeis' dissent argued that an unrestricted presidential removal power would create a political spoils system out of the civil service laws by denying individuals in public service protection from removal at the whim of the President.<sup>34</sup> Justice McReynold's dissent stated that, while logic might support the majority's holding that cabinet officers not be protected from unlimited removal, the Court had yet to decide whether commissioners of some independent agencies, such as the Federal Trade Commission (FTC) or the ICC, were protected similarly.<sup>35</sup>

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30. U.S. CONST. art. I, § 8, cl. 18. "Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

31. *Myers*, 272 U.S. at 132.

The Court stated:

But it is contended that executive officers . . . are bound by the statutory law, and are not his servants to do his will, and that his obligation to care for the faithful execution of the laws does not authorize him to treat them as such. The degree of guidance in the discharge of their duties that the President may exercise over executive officers *varies with the character of their service* as prescribed in the law under which they act.

*Id.* (emphasis added).

32. *Id.* at 135. "[T]here may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule . . . the officer . . ." *Id.*; accord *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

33. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 477 (1979).

34. *Myers*, 272 U.S. at 275-78 (Brandeis, J., dissenting).

35. *Id.* at 181-82 (McReynolds, J., dissenting).

## 2. *Humphrey's Executor v. United States*

In *Humphrey's Executor v. United States*<sup>36</sup> the Supreme Court responded to Justice McReynold's questions, holding unconstitutional an attempt by President Franklin Roosevelt to dismiss, without cause, an FTC commissioner. The FTC's enabling statute limited the reasons for dismissal of a commissioner by the President<sup>37</sup> and set the terms of office for commissioners. A unanimous Court failed to emphasize the difference between the instant statute and the statute in *Myers*.<sup>38</sup> Instead, the Court argued that the President's broad removal power over members of the executive branch did not apply to the FTC Commissioner because he was not within the executive branch.<sup>39</sup> Thus, the "headless fourth branch" of government was created.<sup>40</sup>

To justify the conclusion that the FTC Commissioner was not within the executive branch and, therefore, not subject to removal at the will of the President, the Court focused on the congressional intent in creating the FTC. The Court found that Congress intended to create "a body of experts who [should] gain experience by length of service."<sup>41</sup> After careful consideration of the legislative reports in both houses of Congress, the Court determined that Congress' goal was to create a nonpartisan Commission. The Commission was to exercise predominantly quasi-judicial and quasi-legislative functions.<sup>42</sup> Congress' intent was to create "a body which shall be independent of the executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official . . . of the government."<sup>43</sup> The Court plainly stated that, while not all quasi-judicial or quasi-legislative power must be exercised in an independent atmosphere, Congress has the power to insulate those to whom it delegates this power.<sup>44</sup>

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36. 295 U.S. 602 (1935).

37. The prescribed reasons for the President's removal of an FTC Commissioner are "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41 (1982).

38. The statute in *Myers* required advice and consent of the Senate before the Postmaster could be fired; the statute in *Humphrey* required mere cause in the case of an FTC Commissioner.

39. *Humphrey's Executor*, 295 U.S. at 625-26.

40. See Bruff, *supra* note 33, at 479.

41. *Humphrey's Executor*, 295 U.S. at 625.

42. *Id.* at 629.

43. *Id.* at 625 (emphasis in original).

44. "The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted . . ." *Id.* at 629.

Here, in contrast to the situation in *Myers*, Congress created an atmosphere of independence without encroaching on the power of the Executive.<sup>45</sup> The Court reiterated that, like the President, Congress did not have complete control over all aspects of the FTC. The President's power of appointment<sup>46</sup> clearly applied to the FTC.<sup>47</sup> While the Court's formal language paid homage to the separation of powers doctrine,<sup>48</sup> the result exemplified a more flexible approach to the shape and form of government below the apex of power.

### 3. *Wiener v. United States*

The most recent discussion of presidential removal power appeared in *Wiener v. United States*.<sup>49</sup> In *Wiener* the Court voided President Eisenhower's attempt to remove a member of the War Claims Commission. While Congress had established the Commission to serve for a specified number of years,<sup>50</sup> no method for the removal of its members had been specified.

In a unanimous opinion the Court held that Congress' creation of an agency whose determinations were "not subject to review by any other official of the United States" precluded the President's removal of agency members at will.<sup>51</sup> The Court stressed the Commission's obligation to adjudicate claims presented according to the War Claims Act of 1948.<sup>52</sup> Relying on the majority opinion in *Humphrey's Executor*,<sup>53</sup> the Court distinguished between executive officials, removable by virtue of the President's constitutional powers, and those officials who are members of a body created to exercise judgment free from interference from any other govern-

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45. *Id.* at 630.

46. U.S. CONST. art. 2, § 2, cl. 2.

47. See *Humphrey's Executor*, 295 U.S. at 625.

48. According to the Court "[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question." *Id.* at 629. The fact that the Court expanded its analysis beyond the actual text of the Constitution indicates a willingness to allow the government to evolve. As long as the structural norms preventing one branch from usurping power from the others through the system of checks and balances are followed, the intent of the framers will remain safe.

49. 357 U.S. 349 (1957).

50. The Commission was established for a period of three years. *Id.* at 351.

51. *Id.* at 354-55.

52. War Claims Act of 1948, ch. 826, 60 Stat. 1240.

53. 295 U.S. 602 (1935).

ment official.<sup>54</sup> The Court showed little respect for the argument that Congress' failure to provide for removal was an implicit grant of removal power to the President.<sup>55</sup>

Conspicuously absent from the Court's opinion was the obligatory reference to the formal separation of powers doctrine. Although this decision emphasizes the "bright line" drawn between agency officials who are vested with nonexecutive functions and those who are not, the opinion further supports a flexible approach to the form of government permissible under the Constitution. As in *Humphrey's Executor*, the *Wiener* Court demonstrated that Congress, through validly adopted legislation, may create a flexible form of government below the three recognized branches of government without violating the spirit of the Constitution.<sup>56</sup>

In both *Wiener* and *Humphrey's Executor* the Supreme Court recognized the ability of the Constitution to adjust to the contours of society. This attitude was initially outlined in the *Steel Seizure Case*.<sup>57</sup> In Justice Jackson's concurring opinion in *Youngstown*, which has become the starting block for modern separation of powers analysis,<sup>58</sup> the powers of the President were painted as being flexible and fluctuating with the will of Congress.<sup>59</sup> This emphasis on flexibility led Justice Jackson to develop his famous three categories of presidential power, each focusing on the degree of conflict between the executive and legislative branches and the constitutional foundation supporting each.<sup>60</sup> This flexible approach also

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54. *Wiener*, 357 U.S. at 353. The Court stressed "that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.* (quoting *Humphrey's Executor*, 295 U.S. at 629).

55. According to the Court "we are compelled to conclude, that no such [removal] power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it." 357 U.S. at 356.

56. See *supra* note 48.

57. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

58. See Bruff, *supra* note 33, at 472.

59. According to Justice Jackson, the President's powers "fluctuate, depending upon their disjunction or conjunction with those of Congress." 343 U.S. at 635 (Jackson, J., concurring).

60. *Id.* at 635-38. The categories are designed to guide decisionmaking and not to become a fixed state of law. Jackson believed that the President's powers were strongest when he acted pursuant to an express or implied grant of authority from Congress. In this situation the President possessed both executive and legislative power to act. Jackson argued that the President's power was at its weakest when acting in opposition to congressional intent. Actions in this category were valid only when made in reliance on the exclusive Executive power and were to be viewed with caution so as to prevent a tyrannical Executive branch. Jackson's final category, known as the "zone of twilight," existed when Congress had not acted in the area; Jackson believed that the facts of the particular situation would determine the breadth of the President's authority.

was applied to the President's enumerated powers, requiring all constitutional issues to be resolved after consulting the entire text of the Constitution, not merely "isolated clauses or even single Articles torn from context."<sup>61</sup> Justice Jackson also stated that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."<sup>62</sup>

Justice Jackson's interpretation of the checks and balances in the Constitution would allow the legislative branch to shape and focus the administrative portion of the federal government. The Constitution is silent on the subject of government below the "apex" of powers,<sup>63</sup> but this silence should not preclude congressional action shaping the government below the apex. The existence of independent agencies neither violates the structural checks and balances of the Constitution nor upsets the balance of powers.<sup>64</sup> Presidential control over these agencies would be "incompatible with the express . . . will of Congress."<sup>65</sup> Allowing the President to exercise power over the independent agencies would risk upsetting the constitutionally established equilibrium.<sup>66</sup> Only when acts of Congress place this equilibrium at risk should executive control be permitted.

### III. THE FUNCTIONAL JUSTIFICATION: INDEPENDENT AGENCIES TODAY

The Supreme Court's justification for raising an administrative agency to the level of a "fourth branch" of government relies on the intent of Congress to provide for "apolitical" rulemaking

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61. *Id.* at 635.

62. *Id.*

63. See Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). Strauss concludes that while strict separation of powers is necessary only at the apex of the governmental powers, functional needs call for incorporation of the independent agencies into the Executive branch. This Note will demonstrate that experience has not borne out the ability of the Executive to allow "apolitical" decisionmaking to exist in Executive agencies and, therefore, that the independence that Congress intended should be honored. See *infra* notes 79-93 and accompanying text.

64. See *infra* notes 95-100 and accompanying text (discussing the effect independent agency establishment has on the checks and balances in the Constitution).

65. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). This analysis would place the conflict in Justice Jackson's second category—President's action in express derogation of congressional intent. The President's powers are weakest in this category.

66. These characteristics include removal for cause only, and appointment for 12 years so that a term spans longer than any one President's term of office. See also *supra* notes 32-56 and accompanying text.

and adjudication in a forum of its own designation. As evidenced by case law, the President's power to serve as the unitary and accountable Chief Executive requires that Congress vest these agencies with specific characteristics to avoid presidential control.

Recent attacks on the constitutionality of the "independent" status of these agencies have focused on a perceived disappearance of the functional justification critical to continued independence. Specifically, these attacks cite the agencies' failure to attract expert administrators, to remain impartial in their decisionmaking, and to provide adequately for agency accountability.<sup>67</sup>

An agency's ability to attract "experts" is controlled by two factors: (1) the ability of the agency to compete economically in the job market and (2) the atmosphere present within the agency.<sup>68</sup> As most criticisms of the agencies demonstrate, Congress is primarily responsible for allowing agencies to compete economically for the so-called "expert administrator."<sup>69</sup> Congress' decision to create and vest in an agency the power to make the economic decisions necessary to further stated legislative goals necessitates a commitment to fund that agency competitively to attract qualified administrators. Thus, the economic competitiveness of an agency rests squarely with Congress.

In addition to economic competitiveness, an agency's perceived status in government is an important factor in attracting promising expert administrators. That status, however, generally is elevated only during periods of emergency for that particular sector of the national economy. Not coincidentally, this is the same period in which congressional funding typically peaks.<sup>70</sup> This process results in a vicious cycle which, however, may serve to allocate "expert administrators" where they are best suited at a particular point in time. Private industry obviously would have a greater attraction to industry experts during those periods when government regulation is unnecessary and funding is at an ebb.<sup>71</sup>

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67. See generally Note, *supra* note 7, at 1768-71.

68. See W. CARY, *POLITICS AND THE REGULATORY AGENCIES* 87 (1967).

69. See *id.* at 87. Mr. Cary argues that in addition to the financial considerations, the agencies' activities, which focus on growth as opposed to maintenance, are also a very important factor. He maintains that this is somewhat of a vicious cycle because with extra funding the agency will have the opportunity for expanding programs but without the funds, the agencies activities will be restricted to "putting out fires." See also Jaffe, *The Independent Agency—A New Scapegoat*, 65 *YALE L.J.* 1068, 1072 (1956).

70. See W. CARY, *supra* note 68, at 87-88.

71. See S. BREYER & R. STEWART, *supra* note 17, at 172. It is illogical to allocate large sums of additional funding to a sector of the national economy that is operating at an ac-

Certain agencies whose activities focus on problems of social choice, such as the Social Security Administration, have a less legitimate claim to the need for an expert administrator to make policy decisions<sup>72</sup> than agencies such as the FTC, the SEC, or the Federal Reserve Board (FRB), which make legal, economic, and financial decisions. The latter category of decisions requires expert decisionmakers who are immune from the political process. Independence is necessary to ensure that the decisionmaking process achieves uniform application and adherence to congressional policy. Technical decisions involving economic or scientific factors are best left outside the political arena because of the potential for abuse from those with a financial stake in regulation.<sup>73</sup> The potential for abuse is greatest when an industry is able to influence agency activity through extensive lobbying or through the appointment of industry sympathizers to administrative positions. This situation often leads to the regulated industry controlling the regulator or to "capture"<sup>74</sup> of the agency. A buffer to the vagaries of partisan politics is provided to the technical staff and decisionmakers through the independent status of the agency heads.

To blame industry capture of an agency on the administrators again is to focus criticism on the wrong target. Although not totally to blame, Congress, through its advice and consent power over presidential appointments, should be held partially responsible. The Senate's failure to use its advice and consent power has resulted in many "captured" appointees<sup>75</sup> commanding agency positions. Congress' ability to prevent industry "capture" of agencies

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ceptable level without government intervention. It is unlikely, however, that at any given point in time all aspects of the national economy will be operating adequately thereby justifying removal of all government regulation. It is possible that during specific time periods specific agencies will lack the requisite "sexiness" to attract expert administrators. The failure of a particular agency to attract expert administrators, however, is not a persuasive argument for incorporation into the Executive branch of an entire class of decision makers.

72. *Id.* at 128.

73. The necessity of expert decisionmaking was recognized in a judicial context most recently by the United States District Court for the District of Columbia in *Synar v. United States*, 626 F. Supp. 1374, 1389 (D.D.C.), *aff'd sub nom.* *Bowsher v. Synar*, 106 S. Ct. 3181 (1986) ("[W]e note that the economic calculation standards, which might seem vague and confusing to laymen, will have more precise meaning to officials accustomed to making such determinations."). See also *Sunshine Anthracite Coal v. Adkins*, 310 U.S. 381, 398 (1940).

74. See W. CARY, *supra* note 68, at 67. "Irrespective . . . of the absence of undue hospitality, it is the daily machine-gun-like impact on both agency and its staff of industry representation that makes for industry orientation on the part of many honest and capable agency members . . ." SENATE COMM. ON THE JUDICIARY, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, 86th Cong., 2d Sess. 6, 72 (1960) [hereinafter REPORT].

75. REPORT, *supra* note 74, at 67.

by rejecting Executive appointments quite possibly has been expanded by recent Supreme Court interpretations of the advice and consent authority.

The Supreme Court's decision in *Buckley v. Valeo*,<sup>76</sup> upholding the President's exclusive right to control appointments of government officers, also ensures that Congress will not be left out of the appointments process.<sup>77</sup> The Court defined "Officer" as "all persons who . . . hold an office under the government . . . exercising significant authority pursuant to the laws of the United States."<sup>78</sup> This expanded definition gives Congress the ability to expand its advice and consent power.<sup>79</sup> Through the use of this expanded power, the pre-"capture" of a greater number of agency appointees possibly can be avoided.<sup>80</sup> As the diversity of interests in the Senate far exceeds that in the executive branch, this power represents a major step in avoiding politicized decisionmaking. While the agencies may be subject to much criticism, Congress' failure to provide for and protect the agencies adequately is at least an equal problem.

A final attack on the justifications for independent agencies is the lack of coordination and accountability among the agencies.<sup>81</sup> To remedy these problems, most commentators advocate increased participation by the Executive in the regulatory process.<sup>82</sup> The Ex-

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76. 424 U.S. 1 (1975).

77. *Id.* at 143.

78. *Id.* at 126.

79. U.S. CONST. art 2, § 2, cl. 2. All early commentary on the *Buckley* decision focused on the fact that it appeared to close a loophole Congress had for appointing "inferior officers" to agency positions. This Note argues that *Buckley* is simply another recognition by the Supreme Court of the inherent checks and balances of the Constitution. As between the three highest levels of the federal government, a strict separation is necessary and is accomplished by adhering to the provisions of the Constitution in a formalistic manner. Below this apex of authority, as long as the Constitution's terms are followed, however, flexibility should be permitted. The *Buckley* Court determined that Congress was attempting to evade the structure of the document by appointing Officers to the Federal Elections Commission and therefore was quite justified in holding that this was a usurpation of the President's appointment power. See *infra* notes 107-08 and accompanying text; Note, *supra* note 7, at 1777.

80. See W. CARY, *supra* note 68, at 67.

81. See generally ROADS, *supra* note 7, at 84; Bruff, *supra* note 33; Strauss, *supra* note 63; Note, *supra* note 7.

82. Not surprisingly, the degree of intervention into the activities of the independent agencies is a politically sensitive subject. While the President has not attempted to force independent agencies to comply with any of the Executive Orders designed to increase presidential input into the rulemaking procedures of the Executive branch agencies, many commentators support such action. See, e.g., ROADS, *supra* note 7; ABA Proposal 100, *supra* note 7.



ecutive, however, has not clearly demonstrated its ability to increase participation in the functioning of independent agencies and still comply with Congress' intent in creating these agencies—to provide expert decisionmaking in an apolitical atmosphere.<sup>83</sup>

Numerous accounts of executive interference with both executive and independent agency activities have made administrators in these agencies wary of further executive involvement<sup>84</sup> in the activities of independent agencies. An example of this type of interference is found in the saga of the passive restraint system for automobiles. Henry Ford II reportedly made a personal visit to the Nixon White House in 1971 to complain about the effect of federal regulations on the Ford Pinto.<sup>85</sup> As a result of his plea for help, presidential aides John Ehrlichman and Peter Flanigan ordered the National Highway Transportation Safety Administration, the Department of Transportation, and the Secretary of Transportation to delay regulations requiring the passive restraints in favor of cheaper and arguably less effective alternatives.<sup>86</sup> While the idea of coordinated rulemaking is admirable, activities by the executive branch opposing Congress' desires for expert decisionmaking within the executive branch do not bode well for those in the independent agencies.

The experiences of the Environmental Protection Agency

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President Reagan's Executive Order 12,291 establishes a centralized mechanism for presidential management of agency rulemaking activities that gives the President substantial authority to intervene at all stages of the rulemaking process. Under the Order, the Office of Management and Budget (OMB) is authorized to be part of an agency's rule formulation process and apply a cost-benefit analysis to any proposed "major" rules. The effectiveness of the rules is delayed until OMB satisfaction is achieved or an appeal to the President is made. See M. ROSENBERG, OMB AND AGENCY RULEMAKINGS: A DESCRIPTION OF THE REGULATORY REVIEW PROCESS UNDER E.O. 12498 AND 12291, CONGRESSIONAL RESEARCH SERVICE (1985).

83. See *supra* notes 10-12 and accompanying text.

84. While there are documented accounts of direct presidential involvement in agency activity, the majority of Executive involvement has come through OMB. OMB is responsible for overseeing federal spending and agency proposals both for rules and for legislation. "Although it is often called the most powerful agency in the United States Government, the Office of Management and Budget remains somewhat mysterious to Congress and the Public." J. PARIS, THE OFFICE OF MANAGEMENT AND BUDGET: BACKGROUND, RESPONSIBILITIES, RECENT ISSUES, CONGRESSIONAL RESEARCH SERVICE, at i (1978). The OMB was established in the Executive Office of the President pursuant to Reorganization Plan 2 of 1970, 5 U.S.C. § 903 (1982). The Director of OMB is appointed by the President with the advice and consent of the Senate. 31 U.S.C. § 502 (1982).

85. See Bruff, *supra* note 33, at 466 (quoting SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, FEDERAL REGULATION AND REGULATORY REFORM 187-88 (Subcomm. Print 1976)).

86. Bruff, *supra* note 33, at 466.

(EPA), a “quasi-independent”<sup>87</sup> agency, are an excellent example of the lack of deference the executive branch gives Congress’ attempts to achieve reasoned decisionmaking. While Congress arguably intended to insulate the EPA from the vagaries of partisan politics,<sup>88</sup> the EPA’s past experience has demonstrated otherwise. Recent congressional reports have identified incidents of the Executive’s interference, through the Office of Management and Budget (OMB), in asbestos regulations. According to Congress, the OMB exercised its review authority,<sup>89</sup> “in ‘an unlawful abuse of power,’ ” to force the EPA to withdraw asbestos regulations that had been under consideration for more than five years.<sup>90</sup> By forcing the EPA to “capitulat[e] to pressure”<sup>91</sup> the Executive has demonstrated how it intends to treat delegations of scientific rulemaking authority to agencies.

In addition to unreasonably influencing agency rulemaking, the Executive has used the OMB to influence rulemaking through *ex parte* contacts<sup>92</sup> with agency decisionmakers. The effects of *ex parte* contacts are numerous. For example, *ex parte* contacts have been determined to undermine the public participation requirements for rulemaking contained in the Administrative Procedure Act (APA),<sup>93</sup> hamper judicial review, detract from factual decision-making, and undermine accountability in government.<sup>94</sup>

According to some commentators, the problem of accountabil-

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87. The Environmental Protection Agency is seen as “quasi” independent because it was established in the Executive branch as an independent agency pursuant to Reorganization Plan No. 3 of 1970. See UNITED STATES GOVERNMENT MANUAL 1984/85 at 480.

88. See, 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. RES. L. 1, 20 (1984).

89. The review authority is authorized under Executive Order 12,291, 5 U.S.C. § 601 Note (1982), 3 C.F.R. 127 (1982).

90. Peterson, *OMB Illegally Blocked EPA Plan for Asbestos Ban, Report Says*, Wash. Post, Oct. 4, 1985, at A21, cols. 7-13.

91. *Id.*

92. *Ex parte* contacts generally are considered unannounced, private, and off-the-record contacts with agency decision makers by those outside the decisionmaking process. These contacts are prohibited in formal agency rulemakings. See 5 U.S.C. § 557(d) (1982).

A former General Counsel for the EPA has stated that “an attorney who is representing a client on regulatory matters borders on incompetence if he or she does not use OMB to attempt to moderate the regulations.” See Olson, *supra* note 88, at 55-56 (quoting *Role of OMB in Regulation: Hearings of the Oversight and Investigations Subcomm. of the House Comm. on Energy & Commerce*, 97th Cong., 1st Sess. 28 (1981)).

93. 5 U.S.C. § 551 (1982).

94. For an excellent discussion of the impact of OMB’s *ex parte* contacts with the EPA, see Olson, *supra* note 88, at 30-35.

ity and control of the independent agencies has been exaggerated.<sup>95</sup> Described as "stepchildren whose custody is contested by both Congress and the Executive, but without very much affection from either one,"<sup>96</sup> independent agencies are constrained by many factors. The most significant of the systemic factors preventing independent agencies from obtaining too much power are the bicameralism and presentment requirements of the Constitution.<sup>97</sup> Agency authority is derived from statutes, which, to be properly created, must be presented to and approved by the President. Overly broad delegations of power or policy judgments that are contrary to the Executive's own policy can be rejected at this stage of the process.<sup>98</sup>

Yet another check on the independent agencies by both Congress and the Executive is the control of funds vested in the two named branches. By refusing to consider advice from either the Executive or Congress, an independent agency risks presidential veto or a drastic reduction in funding.<sup>99</sup> In addition to threatening an agency's budget, Congress also may amend or repeal the agency's enabling statute. Although concededly broad, these methods of maintaining accountability of the independent agencies are enumerated in the Constitution, are available to the three named branches of government, and do not reduce or infringe upon the authority of any of the three branches.<sup>100</sup>

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95. See W. CARY, *supra* note 68, at 4.

96. *Id.*

97. "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States . . . ." U.S. CONST. art. I, § 7, cl. 2.

98. This was the flaw with the legislative veto, ruled unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). The attempt by Congress to circumvent the requirements of the Constitution could effectively negate the appointments clause power of the President. Because the legislative veto avoids presentment to the President, Congress could thwart regulatory actions taken by an appointee of a hostile President. The use of the legislative veto to control administrative agencies is the factual background for the *Chadha* decision. This reasoning again demonstrates the capabilities of the Constitution to allow for independent agencies. It also points out the fact that once an agency is deemed independent it should be allowed to remain so by both branches of government. This was one of the problems with the Gramm-Rudman statute. By examining to the provisions of the Constitution as a whole, it is impossible to see the possibilities for flexibility while maintaining the balance of powers. However, when one branch attempts to usurp the power of another, a strict view of the checks and balances of the Constitution is needed to safeguard the structure of government.

99. See Strauss, *supra* note 63, at 586.

100. In addition, the appointments power is also a check available to the Executive, but it is one that is tempered by the senatorial advice and consent power. See *infra* text accompanying note 119, where it will be argued that incorporation of the agencies would

Congress already has addressed the need for central administrative procedures throughout the agencies. The General Service Administration (GSA) handles the procurement, office space, and contract needs of all agencies.<sup>101</sup> In addition, the Office of Personnel Management<sup>102</sup> and the Merit Systems Protection Board<sup>103</sup> designate employment and pay scale guidelines for all agencies. Thus, to the extent deemed necessary, Congress has provided for administrative efficiency without subjecting the independent agencies' decisionmaking powers to the vagaries of partisan politics. The notion that Congress, through the independent agencies, has a weapon or a loophole by which it can usurp control of the government from the President is inaccurate. Through the system of appointments,<sup>104</sup> as well as the process by which legislation and appropriations are passed,<sup>105</sup> both Congress and the President have sufficient control over the agencies to make them accountable without upsetting the precarious balance of powers.

#### IV. THE CONTINUED ACCEPTANCE OF THE INDEPENDENT AGENCY UNDER THE CONSTITUTION

##### A. *Buckley v. Valeo*

Recent Supreme Court opinions have been interpreted as representing a shift of the Court away from a flexible approach regarding separation of powers issues toward a formal and unforgiving interpretation of the constitutional position of the three named branches of government. The decision in *Buckley v. Valeo*<sup>106</sup> is considered an example of this shift.

In *Buckley* the Court ruled that a congressional attempt to appoint voting<sup>107</sup> members of the Federal Elections Commission (FEC)<sup>108</sup> was an unconstitutional usurpation of the Executive's ap-

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render Congress subservient to the Executive because incorporation would, from a pragmatic standpoint, prevent Congress from shaping the form of the administrative agencies, a power given to it under the necessary and proper clause.

101. See Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471-544 (1982).

102. See 5 U.S.C. § 1103 (1982) (Office of Personnel Management).

103. See *id.* §§ 1205-1206 (Merit Systems Protection Board).

104. See *supra* note 46.

105. See *supra* note 97.

106. 424 U.S. 1 (1975) (per curiam).

107. Only six of the Commission's members were authorized to vote on rulemaking of adjudicatory matters.

108. 2 U.S.C. § 437(c) (1982).

pointment power.<sup>109</sup> The statute creating the FEC provided that two of the six voting members be appointed by the Speaker of the House, two by the President *pro tempore* of the Senate, and two by the President. The Court found that, as drafted, the statute permitted an unconstitutional appointment of an "officer" of the United States by one other than the Executive.<sup>110</sup>

Central to the Court's opinion and to the continued viability of independent agencies was the establishment of a definition of "officer" under the Constitution.<sup>111</sup> The Court found that the FEC Commissioners exercised nonlegislative rulemaking and adjudicatory powers, which only "officers" could exercise, and held that the President must appoint these "officers." Although the Court apparently retreated from its holding in *Humphrey's Executor*<sup>112</sup> and placed the "independent" status of agencies in question, this is not the case.<sup>113</sup> Congress, by appointing the FEC Commissioners, was attempting to "bootstrap" itself into a position of superiority over the Executive.<sup>114</sup> The *Buckley* Court recognized Congress' attempt to circumvent one of the express checks on its power to shape the government<sup>115</sup> and, therefore, was justified in holding the statute unconstitutional. Although most commentators have focused on the formalistic language of the *Buckley* Court,<sup>116</sup> the Court's requirement of a strict "separation of powers as a vital check against tyranny"<sup>117</sup> is justified in light of the continuous struggle over the tremendous power inherent in the Constitution. The conclusion that the balance of powers is upset by the independent agency does not flow from this decision. The separation of governmental power controls an independent agency and ensures that the agency will not operate unchecked.

Creation of an agency, regardless of its independence, requires

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109. "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States . . . which shall be established by Law . . ." U.S. CONST. art. 2, § 2, cl. 2.

110. *Buckley*, 424 U.S. at 143.

111. See *supra* text accompanying note 78 (giving the *Buckley* Court's definition of "Officer").

112. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). See *supra* notes 36-40 and accompanying text for a discussion of *Humphrey's Executor*.

113. *Contra* Note, *supra* note 7, at 1777.

114. The Court stated that Congress was having it both ways: creating an agency independent from the Executive but not from the Legislative branch. *Buckley*, 424 U.S. at 118.

115. See *supra* note 30.

116. The Court stated that it was the "intent of the Framers that the powers of the three great branches . . . be largely separate from one another." *Buckley*, 424 U.S. at 120.

117. *Id.* at 121

passage of enabling legislation by both houses of Congress and presentment to the President.<sup>118</sup> Thus, the President can veto congressional attempts to create an agency with excessive power or with goals that oppose those of the President. While Congress potentially may override a presidential veto, the President's power of appointment still ensures that the exercise of congressionally delegated powers is within the limits of the general welfare and is carried out by an allied administrator.<sup>119</sup> The advice and consent clause is available to Congress if the President attempts to appoint an individual whose exercise of the agency's power would not comply with congressional intent. Failure of an existing agency or official to perform according to statute or in accordance with a change of congressional will can result in the repeal or modification of the agency's enabling statute. Such a response, however, also is subject to presidential veto.

The *Buckley* decision did no more than return the balance of powers, which Congress had disturbed, to the status quo. The Supreme Court's decision in *Humphrey's Executor* envisioned the struggle among the branches yet had the prudence to allow Congress to shape the government knowing that the balance of powers would not be upset. Maintenance of the balance of powers, the underlying structure of the Constitution, is more deserving of continued support than "isolated clauses or single Articles torn from context."<sup>120</sup>

### B. *INS v. Chadha*

Many commentators have interpreted *INS v. Chadha*,<sup>121</sup> the celebrated legislative veto<sup>122</sup> case, and its companions<sup>123</sup> as bring-

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118. See *supra* note 97.

119. With the introduction of a formal definition of "Officer" under the Constitution, one can argue that Congress now may extend, through statute, its advice and consent power to a larger number of administrative officials. One must also remember that the loophole of creating "inferior" officers to circumvent the appointments power is now closed. Thus the entire system of checks and balances has now been strengthened—but not formalized. See *supra* note 79.

120. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952). This attitude is best labeled interpretistic in that it argues that policy should not be sacrificed for a narrow reading of the text.

121. 462 U.S. 919 (1983).

122. A legislative veto is a device used to prevent agency action from having the force of law. The legislative veto is similar to a Presidential veto, except the device is available to either or both houses, or a committee of Congress without presentment to the President. See Elliott, *The Administrative Constitution, The Constitution, and The Legislative Veto*, 1983 Sup. Ct. Rev. 125, 126 & n.8.

123. Two other cases were decided without opinion by the Supreme Court along with

ing the era of the administrative state to a close.<sup>124</sup> In *Chadha*<sup>125</sup> the Supreme Court held unconstitutional Congress' use of the legislative veto to overturn an executive decision to suspend<sup>126</sup> an alien's deportation under the provisions of the Immigration and Nationality Act.<sup>127</sup>

Chief Justice Burger's "syllogistic" opinion<sup>128</sup> managed to invalidate more laws<sup>129</sup> in one opinion than the Court had invalidated in its entire history and, as a result, reversed fifty years<sup>130</sup> of constitutional law. The Court found that Congress, in exercising the legislative veto,<sup>131</sup> had acted in its "legislative" capacity,<sup>132</sup> yet had failed to conform to the "[e]xplicit and unambiguous provisions of the Constitution"<sup>133</sup> requiring bicameral passage and presentment to the President.<sup>134</sup> While recognizing that the branches are not to be "hermetically" sealed from one another<sup>135</sup> the Court maintained that "[t]he 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."<sup>136</sup> Here, Congress exceeded its legislative power by circumventing the Presi-

*Chadha*, each holding the use of the legislative veto unconstitutional. In *Consumer's Union Inc. v. Federal Trade Commission*, 463 U.S. 1216 (1983), the legislative veto was held unconstitutional when used in connection with FTC rulemaking. Because of the FTC's independent nature, the commentary generally has concluded that the Supreme Court doubts the validity of the agency independence.

124. See *supra* note 3.

125. See Note, *supra* note 7, at 1780; ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *supra* note 3, app. B at 1; Strauss, *supra* note 63.

126. Immigration and Nationality Act, 8 U.S.C. § 1245(a)(1) (Supp. III 1985). Section 144 (a)(1) of the Act provided for suspension of deportation in cases of hardship.

127. *Id.* § 1254(c)(2). Section 244(c)(2) of the Act authorized either house of Congress, by resolution, to reverse the decision of the Attorney General to suspend deportation proceedings.

128. See Elliott, *supra* note 122, at 126.

129. Justice White in his dissent to *Chadha* estimated that the Court invalidated some 200 statutes. 462 U.S. 919, 967 (White, J., dissenting).

130. The first legislative veto was used in 1932. See Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977), cited in *Chadha*, 462 U.S. at 944-45.

131. The Court had to surmount several procedural hurdles to reach the merits of the case, including finding that the INS was an "aggrieved party" for case or controversy needs and finding that an alternative ground for relief, *Chadha's* marriage to a U.S. citizen, need not be considered. See Elliott, *supra* note 129, at 130.

132. *Chadha*, 462 U.S. at 952. The Court reasoned that since the action had the effect of altering legal rights and was not enumerated in one of the express exceptions to article I the actions were "essentially legislative in purpose and effect." *Id.*

133. *Id.* at 945.

134. *Id.* at 957.

135. *Id.* at 951 (citing *Buckley v. Valeo*, 424 U.S. 1, 121 (1975)).

136. *Chadha*, 462 U.S. at 951.

dent's veto power, though arguably in an attempt to improve the function of government through agency accountability. Thus, the Court realized that the most important reason to restrain Congress' ability to structure the form of the administrative agencies is the need to maintain the tensions and interactions among the three branches of government delineated in the Constitution.

The Court's recognition that an agency's action under legislatively delegated authority is subject to both judicial review and legislative amendment or repeal<sup>137</sup> indicates a continued willingness by the Court to allow a flexible form of government as long as constitutional requirements are observed. Although these requirements may "impose burdens of governmental processes that often seem clumsy, inefficient, even unworkable,"<sup>138</sup> the form of government at the apex must conform to the letter of the Constitution despite "the fact that a given law is useful in facilitating functions of government."<sup>139</sup> Adherence to these requirements will ensure that the structure of the Constitution is upheld.

Some have argued that when new issues such as the legislative veto or the Court's judicial powers are *not* at issue,<sup>140</sup> the Court will use a formalistic approach to the problem of separation of powers.<sup>141</sup> This argument is not applicable to the decision in *Chadha*. As in *Buckley v. Valeo*<sup>142</sup> the *Chadha* Court recognized an attempt by a coordinate branch of government to extend its powers beyond those designated by the Constitution. The system of checks and balances that the Court viewed as protection "from the improvident exercise of power"<sup>143</sup> was out of balance when Congress possessed the legislative veto. The legislative veto's presence, like Congress' attempts to make appointments of "Officers" that were at issue in *Buckley*,<sup>144</sup> denies the executive branch its

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137. *Id.* at 953 n.16.

138. *Id.* at 959.

139. *See id.*

140. *See* Braveman, *Chadha: The Supreme Court As Umpire in Separation of Powers Disputes*, 35 SYRACUSE L. REV. 735, 737 (1984). Braveman believes that policy arguments surrounding separation of powers will only be considered when the Court powers are at issue and generally will result in a favorable decision to its own interest.

141. *See* Elliott, *supra* note 122, at 147. Elliott views the process of constitutional jurisprudence as one of "anchoring and adjusting." After the Court issues a formal opinion when first confronted with the issue, a process of adjustment follows that allows the Court to adapt to new situations it faces that involve the same issue.

142. *Buckley v. Valeo*, 424 U.S. 1 (1975) (per curiam); *see supra* notes 112-13 and accompanying text.

143. *Chadha*, 462 U.S. 919 at 957.

144. *See supra* notes 114-20 and accompanying text for a discussion of the appoint-



proper function in the constitutional process. The legislative veto provided Congress with an unfettered ability to nullify executive policy directives in the administrative forum. By circumventing the executive veto, Congress could control not only Executive appointees, but also appointees to agencies that were designed and established to be independent. Independent agencies, whose establishment is a jealously guarded power, should remain, both politically and practically, as independent as the Constitution will allow.<sup>145</sup>

### C. *Bowsher v. Synar*

#### 1. The Supreme Court Opinion

In the celebrated Gramm-Rudman<sup>146</sup> decision, *Bowsher v. Synar*,<sup>147</sup> the Supreme Court denied the constitutionality of specific provisions of the Balanced Budget and Emergency Deficit Control Act (the Act)<sup>148</sup>. These provisions, the Court found, unconstitutionally delegated to the Comptroller General<sup>149</sup> the authority to calculate and report certain budget reduction requirements to the President, who would then be forced to carry them out through sequestration orders.<sup>150</sup> The Court found that this delegation vio-

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ment power and its relevance in the administrative area.

145. See *supra* notes 10-11 (discussing the need to allow for agency independence).

146. See *supra* note 4.

147. 106 S. Ct. 3181 (1986).

148. Pub. L. No. 99-177, 99 Stat. 1037 (1985) [hereinafter the Act or Gramm-Rudman].

149. The Comptroller General's position was created by the Budget and Accounting Act of 1921, Pub.L.No. 99-177, 99 Stat. 1037 (1921). The Comptroller is appointed by the President with the advice and consent of the Senate. 31 U.S.C. § 703(a)(1) (1982).

150. Congress designed the Act to reverse the spiral of growing federal deficits that have been threatening the nation's economy. Federal budget deficits were reported to have increased sevenfold since 1979. See *Balanced Budget and Emergency Deficit Control Act of 1985: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 164 (1985). The detailed provisions of the Act set forth a process by which budget deficit amounts for each of the fiscal years 1986 through 1991 are calculated by the Directors of OMB and the Congressional Budget Office (CBO). The estimates are based on independent economic and revenue projections as developed by each office. The estimates are compared with "maximum deficit amounts" specified in the Act with an accompanying program-by-program budget reduction calculation. Subsequently, the Directors jointly submit these figures to the Comptroller General who is charged with resolving any differences in the budget reduction calculations. The Comptroller presents his report to the President and Congress. Section 252 of the Act requires the President to order the budget reductions through sequestration orders. See H.R. CONF. REP. NO. 433, 99th Cong., 1st Sess. 76, reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 988, 994 [hereinafter CONF. REP.]; see also *Synar v. United States*, 626 F. Supp. 1374, 1377 (D.D.C.), *aff'd sub nom. Bowsher v. Synar*, 106 S. Ct. 3181 (1986). The Act also contained a fallback provision providing that, should

lated the separation of powers doctrine.

The United States District Court for the District of Columbia, when considering the claim<sup>151</sup> that the Act violated the separation of powers doctrine by assigning the reporting responsibilities to the Comptroller General, focused on a section of the Budget and Accounting Act of 1921<sup>152</sup> which provides that the Comptroller General is removable by a joint resolution of Congress<sup>153</sup> for specified cause after notice and hearing.<sup>154</sup> Reaching the merits,<sup>155</sup> the dis-

the primary mechanism be declared invalid, the OMB and CBO would report directly to Congress. Congress then would decide whether to enact a joint resolution meeting the deficit targets in the Act. *See Act, supra* note 153, § 274.

151. Immediately after the President signed the Act into law, Representative Mike Synar and eleven other members of the House invoked the Act's judicial review provision and filed suit to challenge the Act, primarily on grounds of excessive delegation. *Synar*, 626 F. Supp. at 1378. The National Treasury Employees Union instituted an identical action, alleging that its members were injured as a result of the Act's automatic spending reduction provisions. These provisions operated to suspend cost-of-living adjustments otherwise due federal retirees. *Id.* The nominal defendant was the United States. The Comptroller General, the Speaker of the House, and other members of Congress were permitted to intervene for the purpose of defending the Act. *Id.*; *see INS. v. Chadha*, 462 U.S. 919, 940 (1983) (discussing the ability of members of Congress to defend legislation). Standing for members of Congress is based on a "congressional standing" doctrine that recognizes the personal interest of members of Congress in the exercise of their governmental powers. *See Barnes v. Kline*, 759 F.2d 21 (D.C. Cir.), *cert. granted*, 106 S. Ct. 1258 (1985) (vacated as moot in light of *Bowsher*).

After finding that the plaintiffs had standing, the district court dismissed their contention that the Act unconstitutionally delegates the appropriations powers to administrative officials. *Synar*, 626 F. Supp. at 1383. While recognizing the questionable viability of the nondelegation doctrine, *see supra* notes 24-25, the court addressed the contention that the appropriations function is a core function so fundamental to this system of government that it is *per se* nondelegable. The court rejected this argument for several reasons, *see id.* at 1385-87, the most significant being that the appropriations function was indistinguishable from the taxing power, and delegation of the taxing function previously had been upheld. *See J.W. Hampton, Jr. Co. v. United States*, 276 U.S. 394 (1925). In addition, the district court stated that a "core function" test would be without standards and would merely shift the focus of controversy. *See also Yakus v. United States*, 321 U.S. 414, 425-26 (1944) (noting that Congress "is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officials").

152. *See supra* note 149.

153. The joint resolution "requires an affirmative vote by both Houses and submission to the President for approval." 7 L. DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 333 (1977), *quoted in Bowsher v. Synar*, 106 S. Ct. 3181, 3204, (1986) (Stevens, J., concurring); *see also id.* at 3210 (White, J., dissenting) (arguing that because this type of removal is tantamount to new legislation, it comports with both the form and substance of the constitutional requirements for separation of powers).

154. The provision governing the Comptroller General's removal states:

A Comptroller General . . . may be removed at any time by (A) impeachment; or (B) joint resolution of Congress, after notice and on hearing, only for—(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude.

31 U.S.C. § 703(e)(1) (1982).

strict court held that the Act assigned executive functions to the Comptroller General and that "congressional removal power cannot be approved with regard to an officer who actually participates in the execution of the laws."<sup>156</sup> The court, rather than invalidating the removal provision,<sup>157</sup> concluded that "executive powers . . . cannot constitutionally be exercised by an officer removeable by Congress . . . and therefore the automatic deficit reduction process . . . cannot be implemented."<sup>158</sup>

In reaching this conclusion the district court found that the Act granted the Comptroller powers that were neither "purely executive," requiring the President's discretion for removal,<sup>159</sup> nor entirely independent of the executive branch, warranting treatment similar to *Humphrey's Executor*.<sup>160</sup> The court reasoned further that this mixture of Executive and non-Executive powers was impermissible when combined with the Budget and Accounting Act removal provision,<sup>161</sup> which denies the President *direct* involvement in the decision.<sup>162</sup>

Chief Justice Burger's majority opinion<sup>163</sup> in *Bowsher* upheld

155. The defendants attempted to persuade the Court that because Congress had not attempted to exercise the removal power granted to it in the statute, the question was not ripe for adjudication. *Synar*, 626 F. Supp. at 1392. The court determined that this argument was flatly contradicted by the decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (invalidating certain grants of authority under the Bankruptcy Act of 1978 to bankruptcy judges who were not appointed pursuant to Article III of the Constitution).

156. *Synar*, 626 F. Supp. at 1401.

157. Upon determining that the powers granted the Comptroller General under the Act could not be performed by an Officer removable by Congress, the court faced the choice of invalidating either the portion of the Budget and Accounting Act of 1921 which created the Comptroller's position or the portion of the Gramm-Rudman Act which gave the Comptroller the authority to determine the budget reduction amounts. Judicial precedent to aid the court was sparse. See *Northern Pipeline*, 458 U.S. at 50. The Court determined that the legislative history of the Act and the inclusion of the fallback provision indicated Congress' desire to have adjudicated the validity of the Gramm-Rudman Act, and not the Budget and Accounting Act. See *Synar*, 626 F. Supp. at 1394.

158. *Synar*, 626 F. Supp. at 1403.

159. *Humphrey's Executor v. United States*, 295 U.S. 602, 627-28 (1935).

160. According to the *Humphrey's Executor* Court, an independent Officer is one who "occupies no place in the Executive department and who exercises no part of the executive power vested by the Constitution in the President." *Id.* at 628. The Supreme Court in *Humphrey's Executor* upheld Congress' power to restrict the President's ability to remove the FTC Commissioner. See *supra* notes 36-48 and accompanying text.

161. See *supra* note 154. This provision is distinguishable from the provision involved in *Humphrey's Executor* because the FTC Commissioner could be removed only by the President for cause. See *supra* note 37.

162. *Synar*, 626 F. Supp. at 1403.

163. The Chief Justice was joined by Justices Brennan, Powell, Rehnquist and O'Connor. The court's membership has changed since the publication of the *Synar* opinion.

the district court's decision and found that the Act violated the separation of powers doctrine.<sup>164</sup> The Supreme Court rejected as inconsistent with the notion of separation of powers the argument that Congress' role in the removal of the Comptroller General should extend beyond the impeachment powers<sup>165</sup> enumerated in the Constitution.<sup>166</sup> In so holding, the Court found that the Act bestowed executive powers on the Comptroller<sup>167</sup> and, consequently, improperly vested executive powers in an officer removable by Congress.<sup>168</sup> The Court stated very clearly that the instant opinion was to have no effect on the status of "independent" agencies because independent agency administrators are removable by the President for cause while the Comptroller General is removable by joint resolution.<sup>169</sup>

Relying on the Court's earlier decision in *INS v. Chadha*,<sup>170</sup> the *Bowsher* majority reasoned that despite the statutory requirement of a joint resolution with presentment to the President to accomplish removal, the threat of congressional removal rendered the Comptroller General subservient to the legislative branch. The Court found that this potential for removal impermissibly usurped executive branch functions.<sup>171</sup> The Court also rejected the argument that, both practically and politically, the Comptroller General was independent of Congress. According to the Court, Congress created the Comptroller General's position because "it believed that it 'needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations.'"<sup>172</sup>

After determining that the Comptroller General was an agent of Congress, the Court had to define the extent to which the Act

Justice Rehnquist has replaced Chief Justice Burger and Antonin Scalia has joined the Court. Justice Scalia was one of the members of the three-judge district court panel in the *Synar* case. Although the district court opinion was issued per curiam, it is widely believed that Justice Scalia authored the opinion.

164. *Bowsher v. Synar*, 106 S. Ct. 3181, 3194 (1986).

165. See U.S. CONST. art. II, § 4.

166. *Bowsher*, 106 S. Ct. at 3186.

167. See *supra* note 150 (describing function of Comptroller General under the Act).

168. *Bowsher*, 106 S. Ct. at 3192.

169. *Bowsher*, 106 S. Ct. at 3188 n.4.

170. 462 U.S. 919 (1983).

171. *Bowsher*, 106 S. Ct. at 3189. The Court found that the statutory justifications for removal (inefficiency, neglect of duty, or malfeasance) were too broad in their scope and would render the Comptroller General removable "for any number of actual or perceived transgressions of the legislative will." *Id.* at 598.

172. *Id.* at 3191, quoting H. MANSFIELD, *THE COMPTROLLER GENERAL: A STUDY IN THE LAW AND PRACTICE OF FINANCIAL ADMINISTRATION* 65 (1939).

permitted the Comptroller to interfere with executive branch activities. The Court determined that “[i]nterpreting a law enacted by Congress to implement the legislative mandate [represented] the very essence of ‘execution’ of the law.”<sup>173</sup> The Court found that the Act gave the Comptroller General “ultimate authority to determine the budget cuts [and commanded] the President himself to carry out, without slightest variation . . . the directive of the Comptroller General.”<sup>174</sup> The Court, therefore, determined that the Act frustrated the executive branch’s ability to carry out the laws because the Act allowed an agent of Congress to perform executive functions.<sup>175</sup> While the Court recognized Congress’ ability to provide for appropriations through legislation, the Court rejected Congress’ further participation in the process through means other than subsequent legislation.

## 2. Analysis

The *Bowsher* decision illustrates two significant developments in the Court’s attitude toward the independent agency. First, the Court apparently is willing to allow delegation of “executive” powers to officers who are not removable at the President’s will. This willingness is evidenced by the majority’s attempt to distinguish the removal provision challenged here from those present in the enabling statutes of independent agencies.<sup>176</sup> Further evidence of this willingness is the Court’s reliance on its decision in *Chadha* to characterize the Comptroller’s actions under the Act as legislative, and therefore impermissible, because the actions were not performed pursuant to the bicameralism and presentment clause.<sup>177</sup>

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173. *Bowsher*, 106 S. Ct. at 3192.

174. *Id.* The Act provides that:

The [Presidential] order *must provide* for reductions in the manner specified in section 251(a)(3), *must incorporate* the provisions of the [Comptroller General’s] report submitted under section 251(b), and *must be consistent with such report* in all respects. The President *may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages* set forth in the report submitted under section 251(b) in determining the reductions to be specified in the order with respect to programs, projects, and activities, or with respect to budget activities, within an account . . . .”

*Id.*, quoting Act, *supra* note 148, § 252(a)(3) (emphasis added by the Court).

175. 106 S. Ct. at 3192. Like the district court, the Supreme Court found that invalidating the Budget and Accounting Act removal provision was inappropriate and instead chose to rely on the presence of the fallback provision in Gramm-Rudman as evidence of congressional desire to resort to the fallback provision rather than invalidate the removal provision. *Id.* at 3193.

176. *Id.* at 3188 n.4.

177. *Id.* at 3189.

Second, both the Supreme Court and the district court demonstrated the difficulty of classifying the functions of an agency administrator under specific legislation.

Regarding the continued acceptance of the independent form of administrative agencies, both the majority and concurring opinions in *Bowsher* emphasize that the independent agency is still a viable entity in the government structure. The majority addressed Congress' ability to control an independent agency, not Congress' ability to create such an agency. According to the Court, the structure of the Constitution does not allow congressional control over powers previously delegated. As demonstrated above,<sup>178</sup> the independent agency is fully protected from interference by both the President and Congress. As in *Chadha*, the *Bowsher* Court felt that Congress had attempted to assert its authority over a coequal branch of government. Fearing an upset of the balance of powers at the apex of government, the Court struck down the violative provisions of the Act. As Justice Stevens' concurrence points out, the Constitution sets out the prescribed method for lawmaking by Congress; allowing a congressional agent to circumvent these provisions is tantamount to allowing Congress to circumvent the constitutional requirements.<sup>179</sup> However, the independent agencies, when exercising their powers, do not present the same problem. These agencies represent a cooperative effort on the part of Congress and the Executive to adapt and conform government to society's expectations. The independent agency's own authority is subject to the full extent of structural constitutional constraints, and neither branch receives an advantage from the presence of these agencies. The activities of the agencies represent a lawful delegation of legislative power, properly granted pursuant to the necessary and proper clause, and an accompanying congressional policy decision concerning who should exercise that power.<sup>180</sup>

The Court, however, erred in concluding that the Comptroller General is an agent of Congress. As Justice White points out in his

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178. See *supra* text accompanying notes 118-20.

179. *Bowsher*, 106 S. Ct. at 3205. (Stevens, J., concurring).

180. No one should doubt the validity of delegating power to the Executive, for unless that delegation usurps the powers of the judiciary, all branches of government should recognize Congress' ability to delegate its legislative authority. Both Congress and the President are estopped from challenging the legislation because, assuming it was passed lawfully, the full extent of constitutional checks and balances will have been utilized. Any attempt by the Supreme Court to invalidate this type of legislation would represent a policy decision on the part of the Court, which is an impermissible use of its authority. Such is the case with the delegation doctrine.

dissent, the majority simply must have ignored the fact that removal of the Comptroller could not be accomplished without what amounts to new legislation—bicameral approval and presentment to the President.<sup>181</sup> To conclude that the Comptroller is subject to the threats of Congress completely ignores that a joint resolution *requires* presentment to the President for approval or veto. Although a congressional override of a Presidential veto is possible, it is complete folly to believe that the Comptroller is any less independent than the FTC Commissioner, whose removal could be accomplished at the request of only one branch of government—the executive branch.<sup>182</sup> As the Court noted in *Chadha*,<sup>183</sup> removal by joint resolution is congressional “action taken in accordance with [the] ‘single finely wrought and exhaustively considered, procedure established by Art. I . . . [and] should be presumptively viewed as a legitimate exercise of legislative power.’ ”<sup>184</sup>

The Court’s decision, however, is justified to the extent that it reflects a desire to maintain equilibrium at the apex of governmental power. Given the realities of contemporary government, the Court must abandon the notion that the Constitution embodies a neat division of government into three separate branches. The portion of government below the apex was left undefined in the expectation that Congress would exercise appropriate judgment in determining its shape. As long as Congress, through the administrative state, does not upset the balance of power at the apex, its discretion should be accorded a great degree of deference.

181. *Bowsher*, 106 S. Ct. at 3209-10 (White, J., dissenting). According to Justice White:

[R]emoval of the Comptroller under the statute *satisfies the requirements of bicameralism and presentment laid down in Chadha*. The majority’s citation of *Chadha* for the proposition that Congress may only control the acts of officers of the United States “by passing new legislation,” in no sense casts doubt on the legitimacy of the removal provision, for that provision allows Congress to effect removal only through action that constitutes legislation as defined in *Chadha*.

To the extent it has any bearing on the problem before us, *Chadha* would . . . suggest the legitimacy of the statutory provision making the Comptroller removable through joint resolution, for the Court’s opinion in *Chadha* reflects the view that the bicameralism and presentment requirements of Art. I represent the principal assurances that Congress will remain within its legislative role in the constitutionally prescribed scheme of separated powers.

*Id.* at 3210 (citation omitted) (emphasis added).

182. “[T]he President has long possessed a comparable power to remove members of the [FTC], yet it is *universally* accepted that they are independent . . .” *Id.* at 3195 (Stevens, J., concurring) (emphasis added).

183. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

184. *Id.*

The second development arising out of the *Bowsher* decision is the realization by both the district court and the Supreme Court that the ability to classify the functions of an agency "rests on the . . . unsound premise that there is a definite line that distinguishes executive power from legislative power."<sup>185</sup> Further attempts by the Court to define the delegated functions of agencies will result in greater confusion over the place of agencies in government. In analyzing the functions of the Comptroller General under Gramm-Rudman, the Court appeared to indicate that the Comptroller's functions would be "'executive' if performed by the Comptroller General, but 'legislative' if performed by the Congress."<sup>186</sup> The district court previously concluded that the Comptroller General's authority fell somewhere between the executive and legislative categories<sup>187</sup> and admitted that attempts to determine whether executive or nonexecutive powers "predominate" is "neither [a] judicially manageable nor congressionally knowable standard[]." <sup>188</sup> The Supreme Court's inability to classify the activities performed by administrative agencies was first demonstrated in *Humphrey's Executor* when the Court was forced to "retreat to the qualifying 'quasi'" <sup>189</sup> to describe the FTC's functions.<sup>190</sup>

Attempts by the Court to characterize the functions of an agency as legislative, executive, or judicial are no more than disguised delegation doctrine challenges. The Court's ability to characterize the functions performed by an agency is no easier than its ability to determine whether the delegation is too broad.<sup>191</sup> As the Court recognizes the problems inherent in attempting further characterization of agency functions, the Court should give greater deference to congressional delegation decisions. This realization, therefore, should further solidify the independent agencies' place in government.

The United States Court of Appeals for the Third Circuit is the first lower court to address the problem of characterizing func-

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185. *Bowsher*, 106 S. Ct. at 3200 (Stevens, J., concurring).

186. *Id.*

187. *Synar*, 525 F. Supp. at 1401 (the court stated that the Comptroller's authority fell in "no-man's land").

188. *Id.* at 1401.

189. *Federal Trade Comm'n v. Ruberiod Co.*, 343 U.S. 470, 487 (Jackson, J., dissenting) (cited in *Bowsher*, 106 S. Ct. at 3207 n.3 (White, J., dissenting)).

190. See *supra* notes 39-47 and accompanying text.

191. The district court in *Synar* recognized this when it rejected the plaintiff's "core function" challenge to the delegation of powers under Gramm-Rudman to the Comptroller. See *Synar*, 626 F. Supp. at 1385.



tions delegated to an agency that is neither executive nor independent. *Ameron v. United States Army Corps of Engineers*<sup>192</sup> required the Third Circuit to determine whether the Comptroller General was the proper agent to enforce the Competition in Contracting Act<sup>193</sup> (CICA). The CICA empowers the Comptroller to suspend the procurement timetable for federal agencies for an indefinite period when a dispute arises between an agency and a disappointed contractor.<sup>194</sup> After a hearing to determine the merits of the dispute, the Comptroller is required to issue a nonbinding recommendation for resolution of the dispute.<sup>195</sup> In *Ameron* the Corps of Engineers challenged the constitutionality of the CICA, arguing that, given the Supreme Court's determination that the Comptroller is a member of the legislative branch, the Comptroller's suspension of the procurement timetable was an unconstitutional "execution of the laws."<sup>196</sup>

The Third Circuit upheld the constitutionality of the procurement delay by distinguishing the Comptroller's authority under the CICA from its authority under Gramm-Rudman.<sup>197</sup> The court, however, found the characterization of functions under the CICA to be frustrating. The court was forced to determine whether the Comptroller's power under the CICA usurped the President's authority to execute laws<sup>198</sup> and whether the Comptroller actually was executing the laws by controlling the procurement process.<sup>199</sup> The Third Circuit opinion did not analyze the impact the Comptroller's other duties would have, when combined with those under the CICA, on his status under the Constitution.

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192. 809 F.2d 979 (3d Cir. 1986). This opinion was issued after the *Synar* decision was published upon a rehearing by the panel.

193. 31 U.S.C. §§ 3551-3556 (Supp. II 1986).

194. *Id.* §§ 3553-3554. CICA allows the Comptroller to invoke an automatic 90 day suspension that may be modified as required by the facts of the case.

195. *Id.*

196. *Ameron*, 809 F.2d at 982. In addition the Corps of Engineers argued that the Comptroller's activities were an impermissible interference with the executive branch.

197. *Id.* at 997-98. The Third Circuit argued that the CICA did not empower the Comptroller to bind the executive branch as did Gramm-Rudman but instead allowed the Comptroller to make nonbinding recommendations.

198. *See id.* at 993 n.9. The panel had little trouble determining that CICA was a valid exercise of legislative authority in light of Congress' need to watch over the procurement process.

199. *See id.* at 994 n.10. The court found that the Comptroller's actions under CICA were not "executive" in nature, and therefore upheld the law because the Comptroller is restricted to making recommendations. Although a report to Congress is required if those recommendations are not followed, no restraint on the Comptroller's ability to complete the procurement process was available. *Id.* at 994-96.

The policy-oriented and outcome-determinative questions present in an *Ameron*-type analysis dictate that the Supreme Court should refrain from further investigations into the characterization of agency functions. Just as the Court recognized the shortcomings of delegation doctrine challenges to agency action, it also should acknowledge the futility of attempting to neatly characterize agency functions as legislative, executive, or judicial. Moreover, questions persist as to the ability of Congress to label, either expressly or impliedly through legislative history, the functions of an agency in order to preclude substantive judicial review. By recognizing that independent agencies are proper participants in the structuring of government, the Court can avoid the complications involved in classifying actions as either executive, legislative, or judicial.

The Supreme Court may not be able to avoid the question of the independent agencies' constitutionality much longer. The United States Court of Appeals for the Ninth Circuit recently upheld the FTC's ability to enforce the anti-fraud provisions of the Federal Trade Commission Act and thus the Act's constitutionality.<sup>200</sup> In *FTC v. American National Cellular*<sup>201</sup> the Ninth Circuit ruled that the FTC's attempt to enjoin the defendant's actions in obtaining a cellular telephone license did not violate Article II<sup>202</sup> of the Constitution. In upholding the FTC's authority, the court held that enforcement of the Act must be performed by "Officers"<sup>203</sup> of the United States and, relying on *Bowsher*, that the FTC Commissioners were "Officers."<sup>204</sup>

Although this reasoning may have logical appeal, it lacks constitutional support. *Humphrey's Executor* explicitly states that "to the extent that [the FTC] exercises any executive function . . . it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers."<sup>205</sup> In addition, the Ninth Circuit reached

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200. The FTC was seeking preliminary and permanent injunctive relief under § 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) (1982) for alleged false and misleading statements under § 5(c) of the Act against the defendants in connection with cellular telephone licenses.

201. 810 F.2d 1511 (9th Cir. 1987).

202. The defendants alleged that the Act violated article II of the Constitution, specifically §§ 1 and 3. The Constitution states: "The executive power shall be vested in a President of the United States of America . . . [and] shall take care that the Laws be faithfully executed." U.S. CONST. art II, §§ 1, 2.

203. See *supra* text accompanying notes 109-11.

204. *American Nat'l Cellular*, 810 F.2d at 1514.

205. *Humphrey's Executor*, 295 U.S. at 628 (quoted in *American Nat'l Cellular*, 810 F.2d at 1515 (Tang, J., concurring)).

the conclusion that the FTC Commissioners are "Officers" despite the fact that they are not removable at will<sup>206</sup> by the President.<sup>207</sup> While noting these two flaws in the majority opinion, Judge Tang concurred in the result by focusing instead on the ability of Congress to constitutionally delegate authority to administrative agencies.<sup>208</sup> In so doing, Judge Tang recognized the flaw in relying on cases like *Chadha* and *Bowsher*, cases in which the Supreme Court was faced with attempts by Congress to circumvent the express constitutional framework.<sup>209</sup> By emphasizing the authority of Congress to "supervis[e] the various fields over which it enjoys constitutional reign,"<sup>210</sup> Judge Tang recognized the need to defer to Congress' judgment when administering legislative goals.

## V. CONCLUSION

As long as regulation of the economic sector of our society is necessary, the original justifications for the independent agency will remain vital. Congress and the courts are no better suited to regulate the economic sector of society today than they were one hundred years ago. Although independent agencies may suffer minor complications, the responsibility for resolving these problems rests with Congress.

Although not specifically provided for in the Constitution, independent agencies are not prohibited by the language of the document. As has been demonstrated, independent agencies rarely overstep their statutory limits and do not upset the inevitable struggle between the branches of government. As Congress discovered in the companion cases<sup>211</sup> to *Chadha*, the agencies also are independent from their creator.

Independent agencies are constrained sufficiently by the powers granted to each of the three enumerated branches. No other constraints, least of all those outside the Constitution, should be introduced into the system of checks and balances. By subjecting Congress' power to delegate authority to the type of judicial scru-

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206. See *supra* note 37.

207. 810 F.2d at 1514.

208. *Id.* at 1516-17 (Tang, J., concurring).

209. The decision in *Chadha* clearly represents an effort by the Court to reject Congress' attempt to undermine the President's authority by bootstrapping itself into a superior branch of government. The same is not true for *Bowsher*, because, as argued above, the Comptroller General is as independent as an FTC Commissioner and, therefore, does not pose the same threat to the balance of power.

210. 810 F.2d at 1517 (Tang, J., concurring).

211. See *supra* note 123.

tiny found in *Synar* and *Ameron*, the Supreme Court will render Congress subservient to the Executive. The Court should restrain Congress' legislative power only when faced with attempts to circumvent the structure of checks and balances or the express constraints contained in the Constitution. As long as independent agencies are viewed as subject to the same constraints as the three enumerated branches, their existence and Congress' authority to create them should be protected. Viewed in this light, the independent agency is not a "fourth branch," but merely a creature of Congress' constitutional power to shape the government.

WILLIAM H. HARDIE III

