Bowsher v. Synar: Separation of Powers, the Removal of Officers, and the Administrative State

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On December 12, 1985, President Ronald Reagan signed into law the Balanced Budget and Emergency Deficit Control Act of 1985, better known as the Gramm-Rudman-Hollings Act. The bill specified annual federal budget deficit ceilings which would progressively decrease to zero by 1991. The Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) were charged with projecting the budget deficit for the upcoming fiscal year and calculating, according to the Act’s provisions, budget reductions needed in each program so that the deficit would not exceed the statutory ceiling. The Comptroller General was to review the Directors’ report, and then to issue his own calculations of the necessary budget reductions to the President. This was the Act’s automatic mechanism which then required the President to sequester funds according to the Comptroller General’s calculations.

Also on December 12, Mike Synar, a Member of the House of Representatives, brought suit in federal district court seeking declaratory judgment and injunctive relief, alleging that the Act was unconstitutional in two respects: first, that the power of the President and other officers under the Act was granted through an unconstitutional delegation of legislative power; second, that the grant of power to the Comptroller General and Director of the CBO, both alleged by the plaintiffs to be legislative officers, violated the principle of separation of powers since the power in question was executive in nature.

The district court ruled in favor of plaintiffs, holding that the delegation of legislative authority was not excessive, but that the exercise of executive power by a legislative officer did violate separation of powers. The court’s invalidation of the Comptroller General’s role

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3. Id. at 1377.
triggered a fallback provision of the Act, included because constitutional problems had been anticipated, whereby the Directors’ report would be submitted to a special joint committee of Congress. Congress would then have the option of acting upon the report through normal legislative channels.

In the case of *Bowsher v. Synar,* the Supreme Court affirmed the ruling of the lower court on the separation of powers question. The Court held that a legislative officer (i.e., one removable by Congress) may not exercise executive power. It based this holding on two premises: first, that Congress may not exercise control over the executive beyond that specifically designated in the Constitution; and second, that the power to remove is the power to control. The first premise is the extension of the Court’s view that many checks and balances, instead of being the guarantors of separation of powers, are actually the antithesis of that structure of government. The second premise is common sense—the power a man fears is not that which appointed him but that which may remove him.

At issue in *Bowsher* was the exercise of executive power by the Comptroller General, who was removable by Congress. The Court therefore examined the nature of the President’s power to remove officers vested with executive authority, in order to determine the constitutionality of Congress’s attempt to usurp this power. The Court’s rationale suggested that this power of removal is inherent in the President’s position as Chief Executive.

The purpose of this Note is to explain the Court’s rationale in *Bowsher,* particularly as it concerned the relationship of separation of powers to checks and balances, and to examine the implications of that rationale. The Note draws two general implications from *Bowsher:* first, that the Congress may not limit the President’s power to remove officers vested with executive authority; and, second, that no single person or agency may exercise more than one of the three primary powers of government (legislative, executive, and judicial).

The scope of this Note includes:

1) An historical development of the theory of separation of powers from its inception to its embodiment in the United States Constitution;
2) A review of the historical debate concerning the specific aspect of separation of powers which most concerned the *Bowsher* Court, that is, the nature of the presidential removal power;

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5. 106 S. Ct. 3181 (1986).
6. The Court did not reach the issue of excessive delegation.
3) A critical analysis of the Bowsher opinion, including an attempt to reveal the perspective the Court crafted in reconciling the removal power debate; and finally,

4) A look at the possible implications of the Bowsher rationale, including its impact on the extent of the removal power, and, more generally, an application of the Court’s analysis to the structure of the present administrative state.

Separation of Powers: Montesquieu to Madison

Although the idea of a tripartite separation of governmental powers had already been developing in theory and in practice for many years, it was first coherently enunciated in 1748 by the French political philosopher Baron de Montesquieu in his great work *De l'Esprit des Loix*. Montesquieu could look back at the history of Western civilization and find a great diversity of political systems: empires, monarchies, aristocracies, republics, and even democracies. Yet, out of these various systems a general pattern arose consisting of consolidation of authority within the governmental structure and aggrandizement of powers to the government itself at the expense of individual liberties. This pattern held true even in popularly based governments.7

The issue for Montesquieu therefore was: how can a government be structured so that it will remain limited, or in his words “moderate,” and not tend to increasingly encroach on the freedoms of its citizens? The answer, said Montesquieu, is to diffuse the power of government:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.8


Democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments; and even in these, it is not always found. It is there only when there is no abuse of power; but constant experience shews us, that everyman invested with power is apt to abuse it, and to carry his authority as far as it will go.

8. Id. at 169.
Montesquieu did not advocate an absolute separation between the legislative, executive, and judicial branches. This is apparent from his use of the contemporary English Constitution as an example of separation of powers. As James Madison observed, the English government was rife with interactions between the three branches. Madison therefore concluded that Montesquieu did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

After the Revolution, the principles of separation of powers were expressly enshrined in the constitutions of most of the American states. In practice, however, no state completely separated the departments of power. Each had various provisions which allowed some interf departmental interactions. Examples of such checks and balances included executive appointment of judges, executive veto of proposed laws, legislative involvement in impeachment proceedings, and even legislative election of the executive.

Madison took note of these various state governments in Federalist No. 47, observing that some mixture of the powers of government was

9. Id. at 169-70.
10. The Federalist No. 47, at 314 (J. Madison) (Modern Library College ed.): On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.
11. Id.
12. Id. at 316. A typical example was the constitution of North Carolina, which provided that "the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other." Id. at 319.
13. Id. at 316-20.
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possible without compromising the needed separation to the point of defeating its effectiveness. He concluded, however, that

[i]t is but too obvious that in some instances the fundamental principle under consideration [i.e. separation of powers] had been violated by too great a mixture, and even an actual consolidation, of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper.¹⁴

Madison made these comments in support of the checks and balances of the proposed United States Constitution. The basic structure of the Constitution itself and of the national government that it envisions is grounded in the principles of separation of powers: Article I, Section 1, "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives;"¹⁵ Article II, Section 1, "The executive power shall be vested in a President of the United States of America;"¹⁶ Article III, Section 1, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."¹⁷ Provisions within the document for interplay between the three branches temper this separation.

The Removal Power: Differing Opinions

The only power to remove officers mentioned in the Constitution is the impeachment power vested in Congress.¹⁸ The issue of the existence of an implied presidential power of removal, and the limitations thereon, has been debated since the origins of the document. Alexander Hamilton wrote in Federalist No. 77 that a presidential removal power could be implied in the appointment power, but "[t]he consent of [the Senate] would be necessary to displace as well as to appoint."¹⁹ This conclusion,

¹⁴. Id. at 320.
¹⁸. U.S. Const. art. II, § 4: "The President, Vice-President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."
¹⁹. The Federalist No. 77, at 497 (A. Hamilton) (Modern Library College ed.). U.S. Const. art. II, § 2 provides that the President shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as
however, was not universally accepted, even at the time it was advanced. The question was open for debate when the First Congress met in 1789. On June 16, 1789, James Madison introduced a bill in the House of Representatives to establish an Executive Department of Foreign Affairs. This bill stated that the head of the Department was "to be removable from office by the President of the United States." Debate erupted concerning whether this language implied that the President did not already have a removal power by virtue of the Constitution. Those who believed in this inherent power supported deletion of the passage. Madison, who had not intended the restrictive view of presidential power, argued for deletion of the language and voted accordingly. The House at first voted against deletion. After a weekend of lobbying, Madison's supporters introduced a new motion which proposed substitution of the phrase, "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy," in place of the disputed phrase. This alternative language clearly suggested recognition of a presidential removal power inherent in the Constitution. After debate, the alternative was adopted by a closely divided House and Senate. The resolution of this dispute was thereafter known as the Decision of 1789, a recognition of the implied presidential power of removal, but hardly a consensus.

Since the Decision of 1789, wide differences of opinion have continued to surface concerning the existence and extent of the removal power. Not surprisingly, Congress has tried to limit the power by asserting that it has a rightful role in removal, the President has generally tried to expand the power by asserting that the restrictions by Congress are unconstitutional, and the Supreme Court has equivocated.

they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The selection of officers by the President with advice and consent of the Senate was apparently accepted at the Constitutional Convention after the alternatives of vesting the appointment power in the President alone or in a select tribunal had been considered and rejected. The Federalist No. 76 (A. Hamilton) (Modern Library College ed.).

20. 1 Annals of Cong. 473 (J. Gales ed. 1789).
22. The House voted on Friday, June 19, 1789. The measure to delete was defeated 34-20. 1 Annals of Cong. 599 (J. Gales ed. 1789).
23. 1 Annals of Cong. 601 (J. Gales ed. 1789).
24. The measure passed the House on Monday, June 22, 1789, only three days after the previous vote. The vote was 30-18 in the House and a tie in the Senate, with Vice-President John Adams casting the tie-breaking vote in favor of the alternative language. Of the eight House members who had been delegates to the Constitutional Convention, six voted for passage. Of the ten Senators who had been delegates, six voted for passage. Burkoff, supra note 21, at 1383.
Congress has asserted varying degrees of power in the appointment and removal of executive officers, ranging from statutory restrictions on presidential power to remove,\textsuperscript{25} to actual appointment or removal by Congress acting alone.\textsuperscript{26} These instances of dabbling in executive control have not always passed constitutional muster when challenged. Perhaps some of the most strident claims to power were advanced during the impeachment proceedings against President Andrew Johnson. The basis for the charges against Johnson was his alleged violation of the Tenure of Office Act of 1867, which provided that "the Secretaries of State . . . [and] of War . . . shall hold their offices respectively for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the advice and consent of the Senate."\textsuperscript{27} Representative John Logan, a Manager of the impeachment cause, concluded, "The Constitution is silent upon the subject of tenure. I hold, therefore, that the whole power is vested in Congress to provide, whenever and however they choose, both for appointment to and removal from office."\textsuperscript{28} This statement prompted one commentator to remark, "Could Representative Logan have been looking at the same Constitution, or the same history, that we have been discussing?"\textsuperscript{29}

Past presidents, having had a very different perspective than that of Representative Logan, have inevitably reached a different conclusion. President Washington lobbied hard for the Decision of 1789, and John Adams cast the deciding vote in its favor in the Senate.\textsuperscript{30} This set the tone for future administrations—that the power of removal of executive officers free of congressional restraint is inherent in the Presidency as is provided by the Constitution. The obvious attraction of this position was that it gave the President virtually complete control over the members of his own branch (which, incidentally, was the major flaw of the position from the standpoint of members of Congress). President Thomas Jefferson, for instance, could not imagine how he could execute his duties effectively without the threat of removing disobedient subordinates.\textsuperscript{31} Jefferson, a Republican, had come to office after twelve years

\textsuperscript{25} See, e.g., Humphrey's Executor v. United States, 295 U.S. 602, 623, 55 S. Ct. 869, 872 (1935), where Congress allowed the President to remove the Federal Trade Commissioner only "for inefficiency, neglect of duty, or malfeasance in office."

\textsuperscript{26} See, e.g., Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612 (1976), where the Supreme Court invalidated Congress's power to appoint members of the Federal Election Commission.

\textsuperscript{27} Act of March 2, 1867, ch. 154, § 1, 14 Stat. 430.

\textsuperscript{28} The Trial of Andrew Johnson, Cong. Globe, 40th Cong., 2d Sess., Supp. at 261 (1868).

\textsuperscript{29} Burkoff, supra note 21, at 1390.

\textsuperscript{30} See supra note 24.

of Federalist rule, and was moved to remark that "Federalists seldom
died and never resigned."32 Many Attorneys General throughout the
1800's reiterated the claim of a presidential removal power.33 Later,
William Howard Taft made perhaps the most extensive claim to presi-
dential power in this area, stating that the President had absolute powers
to fire and hire—the Logan Doctrine in reverse.34

One of the earliest decisions by the Supreme Court concerning the
nature of the removal power was In re Hennen.35 At issue was a district
judge's power to remove a clerk that he had appointed. The power to
appoint had been vested in the judge by Congress pursuant to the
appointment clause of Article II. The Court held that the power to
remove did exist: "In the absence of all constitutional provisions or
statutory regulation, it would seem to be a sound and necessary rule,
to consider the power of removal as incident to the power of appoint-
ment."36 The Court also considered the removal of officers appointed
by the President with advice and consent in the Senate. The majority
recalled the Decision of 1789 and concluded that "the practical con-
struction of the Constitution [was] that this [removal] power was vested
in the President alone."37

Justice John McLean pointed out the inconsistency of In re Hennen
in his dissenting opinion in United States ex rel. Goodrich v. Guthrie38:
"The reasoning is: the President and Senate appoint to office; therefore,
the President may remove from office. Now, the argument would be
legitimate, if the power to remove were inferred to be the same that
appoints.'"39 The logical conclusion, reasoned McLean, is that the Sen-
ate's concurrence would be required for removal.40

The language by the Court in Hennen concerning "the absence of
... statutory regulation" left open the question of whether Congress
could by statute limit the power to remove. This issue was addressed
in United States v. Perkins,41 in which the Court granted back pay to

32. S. Gay, James Madison 139 (1884).
34. W. Taft, Our Chief Magistrate and His Powers 76 (1916).
36. Id. at 259.
37. Id.
38. 58 U.S. (17 How.) 284 (1854).
39. Id. at 306 (McLean, J., dissenting).
40. Justice McLean failed to recognize that a veto over removal has very different
consequences than a veto over appointment. A veto over removal gives the Senate the
implicit power of appointment of an executive officer (the incumbent) over the Chief
Executive's objections. Conversely, no person may hold executive office over the Chief
Executive's objections if the Senate possesses a veto only over appointment.
41. 116 U.S. 483, 6 S. Ct. 449 (1886).
a Navy cadet-engineer who had been appointed by the Secretary of the Navy and removed by him in spite of a statute prohibiting the removal. "[W]hen Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest." The Court inferred this power to restrict removal from Congress's constitutional power to vest appointment.

Perkins controlled the removal power of department heads, but not that of the President. The 1926 case of Myers v. United States involved the removal of a postmaster by the President alone, despite the existence of a statute stating that postmasters "shall be appointed and may be removed by the President and with the advice and consent of the Senate." The Supreme Court, in an opinion written by Chief Justice Taft, ruled that the Senate's role in the removal as provided in the statute was unconstitutional. Taft wrote that, in order for the President effectively to execute his duties, all of his subordinates must be agents of his will and therefore must be under his control. "The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him."

When Congress vests the power of appointment in the head of a department, it "may prescribe incidental regulations controlling and restricting the [appointing officer] in the exercise of the power of removal." But even in that situation, for Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers." Taft further wrote that he believed this rationale extended to the removal of Interstate Commerce Commissioners and other executive officers who might wield quasi-judicial power.

The Court's expansive view of the presidential removal power envisioned in Myers lasted only until Humphrey's Executor v. United States was decided nine years later. Humphrey's Executor involved the removal of a Federal Trade Commissioner by the President without cause, despite a statutory provision that commissioners "may be removed by the President for inefficiency, neglect of duty, or malfeasance

42. Id. at 485, 6 S. Ct. at 450.
43. 272 U.S. 52, 47 S. Ct. 21 (1926).
44. Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80.
45. 272 U.S. at 134, 47 S. Ct. at 31.
46. Id. at 161, 47 S. Ct. at 40.
47. Id.
48. Id. at 135, 47 S. Ct. at 31.
The Supreme Court interpreted this language to bar removal for any reason other than those enumerated in the statute. The Court then addressed the constitutionality of this restrictive provision under Myers, and held that Myers only controlled the removal of “purely executive officers.” A Federal Trade Commissioner is not “purely executive,” since he “occupies no place in the executive department and exercises no part of the executive power vested by the Constitution in the President,” but instead acts only “in the discharge and effectuation of . . . quasi-legislative or quasi-judicial power, or as an [officer of an] agency of the legislative or judicial departments of the government.”

The Court therefore concluded that the President does not possess “illimitable power of removal” of officers who exercise only legislative and/or judicial powers, since this would violate the concept of separation of powers.

The next Supreme Court case specifically concerning the removal power was Wiener v. United States, a 1958 case which involved the issue of whether the President without cause could remove a War Claims Commissioner. The act establishing the Commission, a quasi-judicial body, did not expressly prohibit such removal, but did bar the President from influencing the Commission on a particular claim. The Court therefore concluded that “Congress did not wish to have hang over the Commission the Damocles’ sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing,” and held the removal unlawful under Humphrey’s Executor. This was the last holding by the Supreme Court concerning the removal power until the case of Bowsher v. Synar in 1986.

Bowsher v. Synar: Return to Montesquieu

The issue which the Supreme Court confronted in Bowsher v. Synar was “whether the assignment by Congress to the Comptroller General of the United States of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 [violated] the doctrine of separation of powers.” The Court affirmed the ruling of the lower court by finding that the Act did violate the constitutional separation

51. 295 U.S. at 628, 55 S. Ct. at 874.
52. Id. at 629-30, 55 S. Ct. at 874-75.
54. Id. at 356, 78 S. Ct. at 1279.
55. 106 S. Ct. at 3184.
of powers. This finding was based on two major premises: (1) that no officer of Congress may exercise executive power except as is provided in the Constitution, and (2) that the power to remove an officer is equivalent to the power to control his actions.

In order to derive these two principles, the Court traced the history of the debate over Congress's role in the removal of officers. The opinion first set forth the constitutional and philosophical bases for the general principle of separation of powers, quoting Montesquieu, the Supreme Court decisions of INS v. Chadha and Youngstown Sheet & Tube Co. v. Sawyer, and the Constitution itself. From these sources, the Court concluded that "[t]he Framers provided a vigorous legislative branch and a separate and wholly independent executive branch." The Court acknowledged that such separation inevitably produces "conflicts, confusion, and discordance," but found it necessary to limit the growth of governmental power.

The Court then turned to the involvement of Congress in the removal of executive officers:

The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. . . . [T]he Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. . . . A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.

To support this view, the Court invoked James Madison's comments during the debates over the Decision of 1789, in which Madison argued in favor of the notion that the President did have removal powers implicit in the Constitution, even if Congress did not grant such powers statutorily. The Court concluded that "Madison's position ultimately
prevailed and a congressional role in the removal process was rejected. This ‘Decision of 1789’ provides ‘contemporaneous and weighty evidence’ of the Constitution’s meaning since many of the Members of the first Congress ‘had taken part in framing that instrument.’

The Court then summarized judicial precedent on the issue of the removal power by citing Myers v. United States, Humphrey’s Executor v. United States, and Wiener v. United States. The holding of Myers was quoted to be: “[T]hat for Congress to ‘draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers.” The Court then looked at the Humphrey’s Executor and Wiener opinions as distinguishable from Myers, but, nonetheless, “reaffirming its [Myers’s] holding that congressional participation in the removal of executive officers is unconstitutional.”

The Court finally buttressed its disavowal of the constitutionality of a congressional role in removal by analogizing it to the power of legislative veto, which had been ruled unconstitutional in INS v. Chadha. “Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Con-

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63. 106 S. Ct. at 3187 (quoting Marsh v. Chambers, 463 U.S. 783, 790, 103 S. Ct. 3330, 3335 (1983)). The Court did not note, however, that the persuasiveness of this evidence might be considered somewhat weakened by the lack of true consensus indicated by the debates and votes. The measure in support of Madison’s position failed passage on the first attempt in the House and only passed the Senate after a tie-breaking vote cast by the Vice President. See supra note 24. Furthermore, it might be presumptuous to deduce that the vote stood for anything more than the existence of a constitutional presumption that a presidential removal power exists in the absence of contrary statutory provisions. See Burkoff, supra note 21, at 1381.

64. Id. at 3188 (quoting Myers v. United States, 272 U.S. 52, 161, 47 S. Ct. 21, 40 (1926)).

65. Id. The Court further stated:

Justice Sutherland’s opinion for the Court [in Humphrey’s Executor] also underscored the crucial role of separated powers in our system: “The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.”

Id. (quoting Humphrey’s Executor, 295 U.S. at 629-30, 55 S. Ct. at 874).
Such power is tantamount to a veto over the execution of laws, reasoned the Court, and is therefore impermissible under Chadha.

From the foregoing the Court concluded that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." The Court's historical analysis is notable for its emphasis on the view that the Constitution envisions a government premised on a separation of powers in the strictest sense; the only exceptions to that premise which will be countenanced under this view are those enumerated in or directly implied by the text of the Constitution. This approach is supported by Montesquieu and Madison, both of whom viewed "checks and balances" as interplay between the branches of government, unifying them in purpose and thrust. Such interplay within the government is the obvious antithesis of that separation designed to guarantee the rights of the people against those in power. Why then have any such interplay? Because some coordination of direction is needed to achieve the legitimate ends of government. It was on this basis that Madison concluded that some interactions are needed to temper the disunity inherent in a government of separated powers. Limiting the breaches of separation to those enumerated in the Constitution allows the necessary amount of unity envisioned by the Framers while still maintaining the essence of a tripartite structure. A more liberal interpretation of the permissible checks and balances, letting the powers vest in officers according to

66. 106 S. Ct. at 3189.
67. 106 S. Ct. at 3188. The Court added:
   As the District Court observed, "Once an officer is appointed, it is only the
   authority that can remove him, and not the authority that appointed him, that
   he must fear and, in the performance of his functions, obey." . . . The structure
   of the Constitution does not permit Congress to execute the laws; it follows
   that Congress cannot grant to an officer under its control what it does not
   possess.
   Id. (quoting Synar, 626 F. Supp. at 1401). See also id. at 3189:
   The dangers of congressional usurpation of Executive Branch functions have
   long been recognized. "[T]he debates of the Constitutional Convention, and the
   Federalist Papers, are replete with expressions of fear that the Legislative Branch
   of the National Government will aggrandize itself at the expense of the other
   two branches." Buckley v. Valeo, 424 U.S. 1, 129, 96 S. Ct. 612, 687, 46
   L.Ed.2d 659 (1976). Indeed, we also have observed only recently 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." Chadha, 462 U.S. at 951, 103 S. Ct. at 2784.
68. Justice White considered the majority's opinion to be a "distressingly formalistic
   view of separation of powers." He wrote that Congress has the power to set up independent
   officers and agencies through the "necessary and proper" clause. 106 S. Ct. 3205-06
   (White, J., dissenting).
69. See text accompanying supra notes 8-11.
political expediency, would eventually lead to such unification of the powers of government as to defeat the structure's protection of individual liberties. The exceptions (checks and balances) would swallow the rule (separation of powers).

The very structure of the Constitution also supports the restrictive approach to permissible checks and balances taken by the Court in Bowsher. As a premise, each branch is assigned its respective primary power (legislative, executive, or judicial) at the outset of its respective Article (I, II, or III). This power is thereafter modified by checks, balances, and other limitations. Logic dictates that where no such modifications exist a return to the original premise of separation of powers is in order.

The Court next set about the task of determining whether the Comptroller General is an officer of Congress and whether he is assigned executive powers under the instant Act.

The Court first found that the Comptroller General is an officer of Congress. The “critical factor” in this determination was the statutory provision for the Comptroller's removability; he could be removed by Joint Resolution of Congress on the basis of “(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude.” These circumstances exceed those for which an executive officer may be impeached. The Comptroller was therefore under the control of Congress.

The Court then determined that the power assigned to the Comptroller under the Act was executive in nature:

Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law. Under § 251, the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind
are typically made by officers charged with executing a statute.\textsuperscript{74} Since an officer of Congress may not exercise executive power, the grant of power to the Comptroller General was deemed unconstitutional.

To remedy the problem, attorneys for the government urged that the Court overturn the provisions of the 1921 law which made the Comptroller removable by Congress. The Court rejected this alternative, reasoning that the legislative nature of the Comptroller General was an integral consideration in the assignment of power. "Indeed, striking the removal provisions would lead to a statute that Congress would probably have refused to adopt."\textsuperscript{75} Instead, the Court opted to invoke the fallback provision of the 1985 Act. This provided that, in the event the reporting procedure of section 251 was invalidated, the Directors of OMB and CBO would issue reports directly to Congress. Congress could then take legislative action through the normal constitutional avenues to cut spending.

\textit{Implications}

The immediate consequence of the \textit{Bowsher} decision was to knock out the automatic linchpin of a landmark piece of deficit control legislation—the Gramm-Rudman-Hollings Act. Proving the fallback provision could work, Congress voted to reinstate previous cuts invalidated by \textit{Bowsher}. The allure of Gramm-Rudman-Hollings, though, had always been in the automatic cuts and apparent lack of congressional involvement. Proposed changes are therefore being debated as of this writing aimed at solving the separation of powers problem. One of these proposals would vest the executive power in the Director of OMB, who is removable by the President; another would make the Comptroller General removable by the President.

The significance of the case, though, extends far beyond the confines of deficit reduction. The rationale of the decision calls into question the validity of many of the theories which have been advanced concerning the removal power. These theories can be divided into three general categories: (1) Congress may have a positive role in the removal of executive officers (i.e., some vote by Congress or one branch of it is needed before an officer may be removed);\textsuperscript{76} (2) Congress may have a

\textsuperscript{74} 106 S. Ct. at 3192.

\textsuperscript{75} Id. at 3193. See also Justice Blackmun's dissent, in which he argued that the Court should have invalidated the 1921 removal provision instead of striking down the Comptroller General's role. "[T]he only sensible way to choose between two conjunctively unconstitutional statutory provisions is to determine which provision can be invalidated with the least disruption of congressional objectives." 106 S. Ct. at 3216 (Blackmun, J., dissenting).

\textsuperscript{76} See, e.g., the statutory provision in \textit{Myers}, text accompanying supra note 44; Justice McLean's position, text accompanying supra notes 38-40; Rep. Logan's position, text accompanying supra note 28; and Hamilton's position, text accompanying supra note 19.
negative role in the removal of executive officers (i.e., by imposing statutory restrictions on the reasons for which the President may remove);77 and (3) Congress may have no role in the removal of executive officers except by impeachment.78

The removal mechanism of the Comptroller General under the Act is perhaps the clearest example of a positive congressional role. His removal is initiated and voted upon by Congress; the President is never involved. Such removal of an executive officer is unconstitutional according to Bowsher.

But what about a lesser positive role or even a negative role for Congress? Certainly one of the most attractive theories of removal has been that which implies the power to remove from the power to appoint, and which would therefore allow removal by the President with advice and consent of the Senate if the appointment had been made by that mechanism. The Senate would not initiate removal; only its assent would be required. Indeed, such a theory was advanced by Hamilton. But the Court in Bowsher did not rely on the implication of the power of removal in the power of appointment.79 The Court instead, in reaffirming Myers, found the President’s removal powers a necessary element of control so that he could perform his constitutional executive duties. It implied this power from the structure of the Constitution. The analysis seemed to be: the premise of the Constitution is one of separation of the powers of government; the only textual modification of this separation that bears on removal is the impeachment power; the absence of a modification of the President’s removal powers calls for a return to the premise of separation of powers; since the power to remove is the power to control, the Constitution’s grant of the executive power to the President implies that he, and not the Congress, has the power to remove officers exercising executive power. This analysis would seem to invalidate any congressional role—positive, negative or anything in between—in the removal of executive officers.80 Such a role would constitute an encroachment by one branch into the dominion of another.

77. See, e.g., the statutory provision in Perkins, text accompanying supra notes 41-42.
78. See, e.g., the position of the executive branch, text accompanying supra notes 30-34; and Taft’s opinion in Myers, text accompanying supra notes 43-48.
79. See the criticism of this theory in supra note 40.
80. Justice White pointed out that the Court did not hold “that ‘executive’ powers of the sort granted the Comptroller by the Act may only be exercised by officers removable at will by the President.” 106 S. Ct. at 3206 (White, J., dissenting). See also 106 S. Ct. at 3188 n.4, where the majority dismissed assertions that the “negative” removal restrictions of independent agency directors would be invalidated by the holding. This Note does not assert that the holding in Bowsher invalidates those restrictions, but that the rationale used in achieving that holding leads to the conclusion that such restrictions are unconstitutional.
"The fundamental necessity of maintaining each of the three 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." Such a line of reasoning, if consistently followed, would call for the invalidation of all restrictions on the President's power to remove officers exercising executive power.

Indeed, even *Humphrey's Executor* had reaffirmed the illimitable power of the President to remove "purely executive" officers. But imbedded in the term "purely executive" is the implication that somewhere there exists "partly executive" officers, i.e., officers who exercise executive power along with judicial or legislative power. Such officers with "mixed" powers are in fact prevalent in today's administrative state, as Justice Stevens pointed out in his concurring opinion. For example, the FTC Commissioner who was the subject of dismissal in *Humphrey's Executor* was deemed to possess both quasi-judicial and quasi-legislative authority.

Perhaps the most vexing question arising out of *Bowsher* is: how is it permissible that one such officer or agency can possess more than one of the three primary powers under the Constitution's structure of separated powers (except as is textually provided)? The answer, *Bowsher* seems to say, is: it is not permissible. The Court was very clear in its analysis: the officer is legislative; the power is executive; the combination is unconstitutional. The majority did not attempt to determine the overall nature of the Comptroller General's office after theoretically fusing the new power to his other powers (perhaps making him a quasi-legislative officer with quasi-executive characteristics, "impurely" legislative under *Humphrey's Executor*). Since executive authority may not be exercised by a legislative officer, it follows that legislative authority may not be exercised by an executive officer. Thus, while *Bowsher* did not address the question of delegation per se of legislative authority, it did have

82. 106 S. Ct. at 3191-99 (Stevens, J., concurring).
83. See text accompanying supra note 51.
84. The district court opinion has a lengthy discussion of the delegation doctrine, concluding that there are limits to the amount of authority Congress may delegate, but those limits were not exceeded by the Gramm-Rudman-Hollings Act. See Synar v. United States, 626 F. Supp. 1374, 1382-91 (D.D.C. 1986).

Justice Stevens, joined by Justice Marshall, refused to join the majority's characterization of the power delegated as executive. He instead dubbed it legislative, and argued the delegation should be stricken as excessive. This is noteworthy since no delegation of Congress's legislative authority has been invalidated since 1935. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241 (1935). Stevens stated that:

Even though it is well settled that Congress may delegate legislative power to
much to say about to whom that authority may be delegated. The same
would be true about assignment of judicial power.

The logical end to such reasoning is the categorization of each of
the officers and agencies of the federal government into one of the
three branches, and the categorization of every governmental power as
legislative, executive, or judicial. The Court would then strike down any
assignment of authority inconsistent with the category of the officer
receiving the assignment. This would mean that no single person or
agency could act as, say, both rule-maker and enforcer. A greatly
different government than the one with which we are familiar would
result. Such extreme implications may at first seem far-fetched, but such
categorization was exactly the method by which the Court struck down
the assignment of power in \textit{Bowsher}.

The Federal Trade Commission exemplifies an agency with combined
functions. "[T]he Commission formulates policies, as does the Congress.
It investigates and prosecutes, as does the executive branch. It adjudic-
cates, as does the judiciary."\textsuperscript{85} There is some separation of powers
within the agency, but "prosecutors and judges are still responsible to
the Commission."\textsuperscript{86} In fact, the National Labor Relations Board is the
\textit{only} agency in the federal government which has nearly complete sep-
aration of its General Counsel (who issues complaints) from the rest of
the agency.\textsuperscript{87} The FTC and other agencies like it do not withstand the
strict separation of powers requirements alluded to in \textit{Bowsher}.\textsuperscript{88}

In his concurrence, Justice Stevens disagreed that such a strict ap-
plication of the separation doctrine is feasible. The majority opinion, he
says,

\begin{quote}
rests on the unstated and unsound premise that there is a definite
line that distinguishes executive power from legislative power. . . .
\textquote{G}overnmental power cannot always be readily characterized
with only one of [the] three labels. On the contrary, as our
cases demonstrate, a particular function, like a chameleon, will
\end{quote}

\begin{footnotes}
\footnotetext{85}{S. Breyer & R. Steward, Administrative Law and Regulatory Policy 859 (2d ed.
1985).}
\footnotetext{86}{Id. at 860.}
\footnotetext{87}{Id. at 861.}
\footnotetext{88}{For a thorough discussion of the nature and responsibilities of most of the
independent agencies, see Strauss, The Place of Agencies in Government: Separation of
Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984).}
\end{footnotes}
often take on the aspect of the office to which it is assigned.\textsuperscript{89}

In \textit{Bowsher}, for instance, the Court struck down the power of the Comptroller General because that power was "executive." As a remedy, the same power was given to \textit{Congress} to exercise through its \textit{law-making} ability. The Comptroller, who is legislative, could not issue the order to the President, but the Congress could issue that order. The President has an opportunity to veto Congress's action, but this does not alter the inherently legislative nature of the action. Has the \textit{power} exercised changed from executive to legislative simply because the one who wields it has changed?

This paradox illustrates that the line-drawing in which the majority engaged is no simple task. Yet difficulty is not reason enough for the Court to abandon efforts to maintain the fidelity of the division of powers. To recognize that close calls do exist is a far cry from Justice Stevens's stance which would allow clearly judicial officers to continue to exercise clearly executive powers.\textsuperscript{90} \textit{Bowsher} strongly indicates the majority's intention to make the clear calls \textit{and} the close calls when one branch encroaches into the province of another.

\textbf{Conclusion}

In \textit{Bowsher v. Synar}, the Supreme Court struck down a key provision of perhaps the major budget control act of the 1980's. This alone makes the case noteworthy.

Yet the implications of \textit{Bowsher} in the area of constitutional law might far overshadow the deficit control act itself. The Court ruled that Congress could not grant executive power to any officer which it could remove by method other than impeachment. It based this holding upon the premises that the power to remove is the power to control and that a legislative agent may not hold executive power. Such an analysis calls into question Congress's ability to insulate from the President "independent" officers who wield executive power by limiting his ability to remove them.

Furthermore, the Court's determination to clearly distinguish powers and officers as legislative, executive, or judicial portends trouble for the present administrative structure of government. Officers who exercise a combination of the three primary powers have no place in the Court's view of the Constitution.

\textit{Bowsher} is above all a return to the principles of Montesquieu: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."\textsuperscript{91} Whereas

\textsuperscript{89} 106 S. Ct. at 3200 (Stevens, J., concurring).

\textsuperscript{90} 106 S. Ct. at 3199 n.10 (Stevens, J., concurring).

\textsuperscript{91} See text accompanying supra note 7.
previous courts had given lip service to these principles, the *Bowsher* Court seemed determined to put them into practice.

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