Separation of Powers and the Independent Governmental Entity After Mistretta v. United States

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COMMENTS

SEPARATION OF POWERS AND THE INDEPENDENT GOVERNMENTAL ENTITY AFTER MISTRETTA v. UNITED STATES

The United States Constitution provides the framework for the exercise of power by the federal government. Although this document contains no express separation of powers provision, the Constitution defines and allocates the power of the federal government between the legislative, executive, and judicial branches. The Framers of the Constitution divided the exercise of governmental power into three branches to prevent that power from concentrating in one body. Checks are expressly provided in the Constitution creating an overlap of power between the branches. In this way, the power of each branch is limited by giving to a rival branch one facet of another’s unique power. Using these checks, the three branches compete among themselves to keep a relative balance of power. Thus, each branch’s exercise of its type of

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1. The Constitution defines the power of the three main branches of the federal government as legislative, executive, and judicial. U.S. Const. art. I, § 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.” U.S. Const. art. II, § 1, “The executive Power shall be vested in a President of the United States of America.” U.S. Const. art. III, § 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.”

2. “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” The Federalist Papers, No. 47, Madison at 301 (Rossiter ed. 1961).

3. The Federalist Papers, No. 48, Madison at 301 (Rossiter ed. 1961). “But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.” The Federalist Papers, No. 51, Madison at 321-22 (Rossiter ed. 1961).
power is not absolute. 4 Under a literal interpretation of the structure created in the Constitution, violation of the separation of powers doctrine occurs whenever the power of one branch is exercised by another branch without express authority in the Constitution. 5

Congress' use of the independent governmental entity has modified this formal concept of the separation of powers doctrine. An independent entity is created by Congress to exercise governmental power beyond the immediate control of any branch of the government. Examples of independent entities are the independent counsel, which exercises only prosecutorial power, and the independent agency, such as the Federal Trade Commission and Commodity Futures Trading Commission, which exercises the powers of all three branches, i.e., adjudicative, executive, and rulemaking powers.

Because the Constitution does not specifically address independent entities, analysis of the separation of powers issue becomes more complicated when an independent governmental entity exercises the kind of power designated to a particular branch. The independent entity exercises the power of a branch but operates beyond that branch's control. Despite the entity's detachment from the control of a branch, the Court locates it within one of the three branches in order to test whether its exercise of power violates the separation of powers doctrine. 6

The most recent analysis used by the United States Supreme Court to determine whether an independent entity violates the separation of powers doctrine is found in Mistretta v. United States. 7 Practical considerations—such as the invalidation of administrative agencies, which perform most of the work of the government—persuaded the Court to develop an analytical framework that would not confront the fundamental separation of powers problem inherent in the structure of the

4. For example, the President can veto legislation passed by Congress. U.S. Const. art. I, § 7, cl. 2. The Vice President is President of the Senate. U.S. Const. art. I, § 3, cl. 4. Congress can remove the President and Vice President and other executive officers. U.S. Const. art. II, § 4. The President's power to make treaties and appoint certain officers is subject to Senate approval. U.S. Const. art. II, § 2.

5. In Myers v. United States, 272 U.S. 52, 116, 47 S. Ct. 21, 25 (1926), the United States Supreme Court explained that:

[f]rom this division [the Constitution's separation of powers into three branches] on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 Annals of Congress, 497. This rule of construction has been confirmed by this court in Meriwether v. Garrett, 102 U.S. 472, 515, 26 L.Ed 197; Kilbourn v. Thompson, 103 U.S. 168, 190, 26 L.Ed. 377; Mugler v. Kansas, 123 U.S. 623, 662, 8 S. Ct. 273, 31 L.Ed. 205.


7. Id.
agency—combined powers exercised by one body. By combining two approaches that are referred to as formal and functional, the Court has developed an analytical framework for the separation of powers question to accommodate the independent agency that exercises all three kinds of powers. Moreover, the Court has extended the application of this framework to the independent entity that exercises only one kind of power. There are differences between the agency and the one power entity, however, that make the application of the analytical framework to the one power entity a dangerous precedent.

This comment discusses the development of the independent entity and the formal and functional analyses. These two approaches to analyzing separation of powers questions are then illustrated in the next sections by discussing cases using each approach. The discussion then turns to examining similarities between the independent agency and the one power entity. Finally, the comment concludes that Congress and the Court should closely follow the agency model of legislatively created checks on agency power when creating and analyzing the one power entity. This would minimize the unpredictability of analysis of one power entities and give some assurance of protection from abuse of power by using a proven system of checks. The conclusion points out problematic aspects of the one power entity not present in the agency that make abuse of power by the one power entity more of a risk.

Development of the Independent Governmental Entity

Congress delegates power to independent entities for two main reasons: first, Congress wants to insulate a facet of a branch's power from the control of that branch; second, Congress does not have the necessary expertise and time to devote to specialized areas of regulation.

An independent entity that exercises more than one kind of power is typically the agency. Congress delegates power to oversee and monitor

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8. Congress derives its authority to delegate power from U.S. Const. art. I, § 8. Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Prior to 1935, the Supreme Court upheld Congressional delegation of rulemaking power to agencies provided that the legislation giving the agency power explained Congress' policy and legislative intent. The agency followed that criteria when formulating rules. By giving the agency an adequate or "intelligible" standard regarding its purpose, Congress delegated rulemaking not legislative power. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409, 48 S. Ct. 348, 352 (1928). Congress made the policy decisions and the agency filled in the rules using its expertise and experience in that specialized field.

During the Depression, Congress delegated broad power to the President by creating independent agencies within the executive branch to attempt alleviation of the dire national economic situation. The Court has invalidated only two such legislative delegations on the grounds that Congress did not provide an intelligible standard for the agency's exercise
specialized areas requiring expertise, such as securities regulation. Congress allows the agency to exercise rulemaking, executive, and adjudicative power. The agency promulgates complicated regulations, enforces compliance, and adjudicates suspected violations using an informal process dictated by the Administrative Procedure Act. The process is more efficient and economical than having Congress, the President, and courts perform the same function in the process prescribed by the Constitution. Most independent agencies must comply with the Administrative Procedure Act, which provides day-to-day operational procedures and the means and scope of review of agency actions.

Control over these agencies is usually given by Congress to the executive branch. Typically, that branch influences the agency's operation through appointment of the agency officials, threat of removal for good cause, judicial review, and control over its budget. The independent agency is located within the executive branch because it exercises executive power and the executive branch controls appointment and removal.

The agency is independent from the direct control of the executive in order to minimize the separation of powers problem resulting from


10. Id.

11. 5 U.S.C. § 553 (1988) provides the procedure for agency rulemaking. Rules promulgated by the agency have the effect of law. Schwartz, Administrative Law § 4.7 (2d ed. 1984). 5 U.S.C. § 554 (1988) involves administrative adjudication. 5 U.S.C. § 554(d) provides for separation of functions of agency officials who prosecute claims from those officials who decide the claims. This provision is an internal attempt to minimize the separation of powers issue with regard to the combination of functions. Congress and the Administrative Procedure Act have exempted some adjudicatory proceedings from this provision. Id. at §§ 6.22-6.24.

12. 5 U.S.C. §§ 701-706 (1988) provides for judicial review of agency actions. Review is limited to the administrative record. Schwartz, Administrative Law § 10.2 (2d ed. 1984). Review is also limited to the issues raised before the agency and the grounds upon which the agency decided. Id. at §§ 10.3-10.4. Agency finding of fact is given deference, but conclusions of law are reviewable de novo. 5 U.S.C. § 706 (1988).

13. 5 U.S.C. § 551(1) (1988) defines agency as:

   (A) the Congress;
   (B) the courts of the United States;

   "This definition equates the agency with the executive branch; under it, every governmental organ outside of the legislature and the courts is an administrative agency." (citations omitted.) Schwartz, Administrative Law § 1.2 (2d ed. 1984).
its simultaneous exercise of rulemaking and adjudicative power.\textsuperscript{14} Diminished control by the branches reduces the degree to which the entity's exercise of power is attributed to one of the branches. Because Congress does not want another branch to control the agency's exercise of power, Congress delegates power to the autonomous agency.\textsuperscript{15} The agency is within a branch, but remains detached from arbitrary control by the head of the branch. This independence allows the agency to pursue its policies without arbitrary political influence from the branches.

While the independent agency has been a fixture in American government for over 100 years, the one power independent entity has only recently emerged. Congress creates entities, such as the independent counsel,\textsuperscript{16} that are unlike the agency in that they exercise only one kind of power. In this context, the Court is not concerned about a concentration of several types of power in one body. This kind of entity usually operates in a more narrow area than the independent agency, but has broad power within that area. For example, an independent counsel can prosecute only a small group of people—upper level executive branch officers.\textsuperscript{17} Within this narrow jurisdiction, the independent counsel's discretionary power to investigate and prosecute is virtually unlimited.

The branches have few checks on the independent entity's exercise of power. The most potent effect the President has on agencies is appointment of people of like mind upon vacancy of an office. He has an impact on the course of policy to the extent he can predict how his appointees will behave in office and whether they will be receptive to his advice once in office. The executive must appoint with the advice and consent of the Senate in most cases.\textsuperscript{18} In some circumstances, his power to appoint is restricted further.\textsuperscript{19} The removal power of the

\begin{itemize}
\item \textsuperscript{14} Humphrey's Executor v. United States, 295 U.S. 602, 624, 55 S. Ct. 869, 872 (1935).
\item \textsuperscript{15} Humphrey's Executor v. United States, 295 U.S. 602, 55 S. Ct. 869 (1935) (Congress restricted the President's power of removal over a commissioner of the Federal Trade Commission.)
\item \textsuperscript{16} The independent counsel was created by the Ethics in Government Act, 28 U.S.C.A. §§ 591-599 (West Supp. 1989). The Supreme Court upheld its validity on separation of powers grounds in Morrison v. Olson, 108 S. Ct. 2597 (1988).
\item \textsuperscript{17} 28 U.S.C.A. § 591(b) (West Supp. 1989).
\item \textsuperscript{18} U.S. Const. art. II, § 2, cl. 2.
\item \textsuperscript{19} The Ethics Act provided that the Special Division for the United States Court of Appeals for the District of Columbia would name the independent counsel upon application by the Attorney General. 28 U.S.C.A. § 593 (West Supp. 1989). The composition of the Sentencing Commission was dictated by the Sentencing Reform Act. 28 U.S.C.A. § 991 (West Supp. 1989).
\end{itemize}
executive branch usually is limited to good cause.\textsuperscript{20}

Congress also has restricted influence over the independent entity. It passes the legislation creating the entity and the Administrative Procedure Act, which most independent entities must follow. Nevertheless, once the entity is established, Congress can only impeach members\textsuperscript{21} or alter the source legislation.

\textit{The Formal and Functional Analyses}

The United States Supreme Court has applied both a formal and functional analysis to determine whether an independent entity’s exercise of power violates the separation of powers doctrine. The two interpretations have common concerns regarding the allocation of power among the branches.

Both formal and functional approaches are concerned that a branch not be excessively aggrandized or undermined by an independent entity’s exercise of power. Except for the most formal of interpretations, both approaches agree that, in the context of the independent entity, there exists a gray area in which powers of branches can be mingled beyond the strict requirements of separation of powers.\textsuperscript{22} The distinction between the analyses is in the degree to which the powers can be mingled within and beyond this gray area. Whether or not the text of the Constitution addresses a particular structural relationship, the separation of powers doctrine, as perceived by each approach, informs the analysis of the relationship at issue.

Early cases involving the separation of powers doctrine established the rule that the Constitution allocates each branch of the government certain powers that are to be exercised exclusively by that branch.\textsuperscript{23} A formal analysis closely follows the text of the Constitution for instruction regarding the acceptable amount of power overlap between the branches.\textsuperscript{24} There are varying degrees of separation. On the more conservative end

\begin{itemize}
  \item \textsuperscript{21} U.S. Const. art. II, § 4.
  \item \textsuperscript{22} See Justice Scalia’s dissent in Mistretta v. United States, 109 S. Ct. 647, 678 (1989); Humphrey’s Executor v. United States, 295 U.S. 602, 55 S. Ct. 869 (1935), articulated a formal interpretation of separation of powers but allowed a restriction on executive power in context of the independent agency.
  \item \textsuperscript{23} See supra note 5.
  \item \textsuperscript{24} Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 Cornell L. Rev. 488, 489 (1987) describes the formal approach as “grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries)” (citation omitted).
\end{itemize}
of the spectrum, the only acceptable overlap of power among the branches are those checks expressly provided in the Constitution. All power designated to a branch should be exercised or controlled by that branch. This approach uses the constitutional structure as a bright line test to recognize when aggrandizement or encroachment of a branch occurs. The mechanical control of an entity, such as appointment and removal of the entity officials, is often the basis upon which the relationship is evaluated.25 Advocates of a formal analysis view strict adherence to the constitutional structure as a means of preventing erosion of the ability to check power in subsequently created entities.

According to a functional analysis, the entity is valid unless it seriously offends the balance of powers among the branches, regardless of whether there is a provision that on its face violates the tripartite structure.26 For instance, if an agency has a provision giving Congress control over its exercise of executive power, it would be invalid under the formal analysis based on the mingling of legislative and executive power. On the other hand, a functional analysis would hold the structure invalid only if the overall balance of power created by the legislative scheme were skewed in favor of the legislative branch. A functional interpretation looks at the practical effect of the overall structural relationship created by the entity to see whether the control mechanism actually creates an imbalance of power among the branches. In analyzing the practical effect of the structural relationship, a functional approach considers many factors, such as the reason Congress created it and whether it interferes with a branch's ability to carry out its function.

A functional approach tolerates structural relationships that are not in accord with the strict interpretation of separation of powers as long as the created relationships have effective alternative checks. A functional approach is based on the rationale that the structure of the Constitution seeks to check the exercise of governmental power. As long as the independent entities are effectively checked, the relationship created satisfies that concern of the Constitution; thus, there is no need to conform to the tripartite structure to check the entity.

According to a functional approach, the Constitution establishes core functions of the branches. Those are the integral operations that


26. "Functionalism is closely allied with the vision of checks and balances among the branches of government. This vision stresses the complex interaction and tension among the institutions of government. Such interaction presumably requires some blending of the tasks of governance among supposedly distinct branches." (citation omitted). Sargentich, The Contemporary Debate About Legislative-Executive Separation of Powers, 72 Cornell L. Rev. 430, 433 (1987).
the branch must perform, the function that is uniquely characteristic of that branch. The core function of a branch can be exercised by an independent entity, but that exercise of power cannot impair the branch’s ability to perform its core function.27

**Cases Using a Formal Analysis**

The Supreme Court used a formal interpretation of separation of powers in *Myers v. United States*28 to prohibit congressional participation in Presidential removal decisions. In this case, the Court struck down a requirement of the Tenure of Office Act of 1867 that Congress concur in the President’s removal29 of a postal service employee.30 The Act stated that the President could remove a postmaster only with the advice and consent of the Senate.31 Congressional participation in an executive function, such as removal of an executive officer, was an unacceptable impediment to the President’s exercise of executive power. Thus, this interference was a violation of the separation of powers doctrine. The Constitution explicitly allows Congress to concur in appointment of officers and to remove by impeachment. The analysis used by the Court in this case was formal because it did not allow Congress to perform a function not explicitly authorized by the Constitution, i.e., concurrence in removal of appointees.

In subsequent cases in which Congress retained control over independent entities, the Court used a formal separation of powers interpretation.32 In *Immigration and Naturalization Service v. Chadha*,33 the Court held that the one-house legislative veto provision in the Immigration and Naturalization Act34 violated the separation of powers doc-
trine.\textsuperscript{35} Congress promulgated legislation delegating power to the Attorney General to allow a deportable alien to remain in the United States; but, it retained power to veto, by resolution of one house of Congress, action taken under the delegated authority.\textsuperscript{36} The Attorney General decided to allow an illegal alien, Chadha, to remain in the United States. The House of Representatives resolved to veto the action, requiring Chadha to be deported.

The Court respected a check in the Constitution against informal congressional influence and action by striking down the one-house legislative veto provision. The legislative veto violated the constitutionally provided process for congressional action, which is passage by both Houses of Congress and presentment to the President for his signature.\textsuperscript{37} As in \textit{Myers v. United States}, the Chadha Court used a formal approach to determine that, with few exceptions,\textsuperscript{38} Congress may act only through the legislative process.\textsuperscript{39} The analysis was formal because it concentrated on the removal mechanism and the delineation of power between the branches in the strict sense of separation of powers, rather than considering the usefulness of the veto as a check on agency power.\textsuperscript{40} Prescribing a particular process for congressional action acts as a check on the legislative branch because Congress cannot improvise informal ways to circumvent participation by the President and both houses of Congress in lawmaking.\textsuperscript{41}

In \textit{Bowsher v. Synar},\textsuperscript{42} the Supreme Court employed a formal analysis to strike down the removal provision of the Balanced Budget and Emergency Deficit Control Act of 1985.\textsuperscript{43} After reviewing budget projections submitted by the Office of Management and Budget and the Congressional Budget Office, the Comptroller-General recommended budget cuts to the President who was then compelled to sequester the funds. The Court characterized the Comptroller-General’s power in this respect as executive. The removal provision violated the doctrine of separation of powers because Congress retained the power to remove

\begin{itemize}
\item \textsuperscript{35} 462 U.S. at 956, 103 S. Ct. at 2787.
\item \textsuperscript{36} 8 U.S.C.A. § 1254(c)(2) (West 1970); Id. at 923, 103 S. Ct. at 2770.
\item \textsuperscript{37} U.S. Const. art. I, § 7, cl. 2, provides that “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.”
\item \textsuperscript{38} See 462 U.S. at 955 and n.21, 103 S. Ct. at 2786 and n.21.
\item \textsuperscript{39} “Congress’ decision to deport Chadha—no less than Congress’ original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President.” Id. at 954-55, 103 S. Ct. at 2786.
\item \textsuperscript{40} Sargentich, supra note 26, at 470.
\item \textsuperscript{41} 462 U.S. at 951, 103 S. Ct. at 2784.
\item \textsuperscript{42} 478 U.S. 714, 106 S. Ct. 3181 (1986).
\item \textsuperscript{43} 31 U.S.C.A. § 703(e)(1) (West Supp. 1989).
\end{itemize}
the Comptroller-General by joint resolution. As in Myers v. United States, Congressional retention of the means of removal other than by impeachment increased congressional power beyond that granted by the Constitution. Power was improperly concentrated in the legislative branch.

In contrast to the formal analysis of the majority opinion, Justice Stevens' concurrence advocates a functional approach to reach the same result. He argued that concentrating only on the removal provision ignores other aspects of the relationship between the Comptroller and legislative branch, which could compensate for the apparent violation caused by the removal provision. The majority rejected the functional approach and chose to apply a formal analysis in the context of congressional control. Congress cannot delegate power to an entity that it controls. Myers, Chadha, and Bowsher illustrate the Court's strict interpretation of constitutional definition of separation of powers when Congress retains control over an independent entity.

Cases Using a Functional Analysis

The Court developed a functional approach to evaluate the exercise of power by an independent agency exercising three kinds of power. The two most recent separation of powers cases, however, concerned the structure of independent entities that exercised only one kind of power, unlike the typical independent agency. In cases in which Congress did not retain power to control the independent entity, the Court has employed a functional analysis to determine whether the entity's exercise of power violates the separation of powers doctrine. This analysis considers the entity's relationship to branches that exercise the same kind of power. In considering this relationship, the Court retains a partially formal perspective by trying to assimilate, or locate, the entity within one of the three branches.

In Humphrey's Executor v. United States, the Court held that Congress could limit Presidential control over an independent agency

44. U.S. Const. art. I, § 3, cl. 6, provides that "The Senate shall have the sole Power to try all Impeachments." U.S. Const. art. II, § 4, provides that "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."
45. The Bowsher majority stated that the "direct congressional role in the removal of officers charged with the execution of the laws beyond [impeachment] is inconsistent with separation of powers." 478 U.S. at 723, 106 S. Ct. at 3186.
46. Strauss, supra note 24, at 515.
by requiring good cause for removal of a commissioner of the Federal Trade Commission.48 The Court distinguished between an agency official in this case and a "purely executive" official in Myers.49 In contrast to the strict reservation of executive power to executive control in Myers, the Court held that independence of the Commission was more important than the President's interest in unfettered removal power over an agency official. An independent Commission depended on detachment from political control and influence of the Presidency to carry out its duty.50 The analysis was functional because "the character of the office rather than the locus of its appointment determined whether the President was to enjoy unrestricted removal power."51 This decision qualified the sweeping statement of Presidential removal power of Myers, but is also in some respects consistent with a formal interpretation of the separation of powers doctrine. Although Congress could restrict the President's power to remove an agency official, Congress did not participate in the individual removal decisions. Agency officials needed independence from the executive branch, but the Court stated that this restriction of the President's power was not valid when the officials exercised purely executive functions as in the Myers case.52 Humphrey's Executor showed that Congress had more discretion to modify executive power in the context of independent agencies.53 The Court applied a more functional analysis in order to accommodate the agency structure.

In Commodity Futures Trading Commission v. Schor,54 the Supreme Court upheld the ability of an independent agency to adjudicate state law based counterclaims in administrative reparations proceedings.55 The Commodity Futures Trading Commission, an independent agency, had

48. "[A]s to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute." Id. at 632, 55 S. Ct. at 875.
49. "The actual decision in the Myers Case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive..... [T]he necessary reach of the decision goes far enough to include all purely executive officers." Id. at 627-28, 55 S. Ct. at 873-74.
50. Id. at 624, 55 S. Ct. at 872.
51. Tribe, American Constitutional Law § 4-10, at 249 (2d ed. 1988).
52. 295 U.S. at 632, 55 S. Ct. at 875. See also, Wiener v. United States, 357 U.S. 349, 78 S. Ct. 1275 (1958); Tribe, American Constitutional Law § 4-10 at 249 (2d ed. 1988).
53. See Sargentich, supra note 26, at 462. The author states that the analysis in Humphrey's Executor was functional in nature. "Basic ambiguity in the doctrine of Humphrey's Executor complicates this debate. While moving away from Myers' institutional formalism, Humphrey's Executor does not abandon the theory completely." Id. at 463.
55. Id. at 859, 106 S. Ct. 3261.
authority to promulgate regulations in order to implement the Commodity Exchange Act. The Commission also had jurisdiction to adjudicate counterclaims resulting from the same act or transaction as the initial reparations claim, even though the counterclaim was not based on the Act or Commission regulations. Both parties had to agree to Commission adjudication of this counterclaim.

Schor filed a claim against his broker, Conti, grounded in Commission regulations. With the approval of Schor, Conti voluntarily filed a counterclaim in the agency proceeding based in state contract law claiming that Schor owed him money. By deciding the state law issue, the Commission exercised federal judicial power previously reserved only to federal judges who had Article III assurances of life tenure and non-reducible salary.

The Court did not strike down the jurisdiction based on a formal reading of the protection required by Article III for tenure and salary of federal judges. The Court looked beyond the formal requirements of Article III to determine whether that exercise of power by an administrative agency violated the doctrine of separation of powers. The Schor majority stated that Article III served to protect the role of the independent judiciary within the three branch framework and to insure that litigants disputed in a forum free from the influence of the legislative and executive branches. The Court examined the Commission’s adjudicative power in relation to the judicial branch. To determine the constitutionality of the Commission’s jurisdiction, the Court looked to the “degree of judicial control saved to the federal courts ..., the congressional purpose behind the jurisdictional delegation, the demonstrated need for the delegation, and the limited nature of the delegation.”

The majority found that the need for a forum to adjudicate claims efficiently was an important concern prompting Congress to extend the

58. When agencies adjudicate, they do not meet the judicial standards of U.S. Const. art. III. “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. Const. art. III, § 1.
59. “[T]he constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III. This inquiry, in turn, is guided by the principle that ‘practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.’” 478 U.S. 833, 847-48, 106 S. Ct. 3245, 3256 (1986) (quoting Thomas v. Union Carbide Agricultural Prod. Co., 473 U.S. 568, 105 S. Ct. 3325 (1985)) (citations omitted).
60. 478 U.S. at 850-51, 106 S. Ct. at 3256.
61. Id. at 857-58, 106 S. Ct. at 3260.
jurisdiction. Adjudications in this Commission often involved counter-claims based in contract law; denial of agency jurisdiction would compel the parties to litigate the initial claim with the agency and the counter-claim in state or federal court. Rather than encourage an efficient resolution of the dispute, the requirement of two fora would complicate it. On the other hand, litigation of both claims in state or federal court would cause a resolution without benefit of Commission expertise. The intent of Congress was not to withdraw the counterclaims from adjudication by Article III courts, but to encourage efficiency by combining both in an agency action. The administrative adjudication of state law issues ancillary to administrative law based claims did not "impermissibly threatens[s] the institutional integrity of the Judicial Branch."  

The Court refined this functional approach in the context of independent entities that exercise only one kind of power. In Morrison v. Olson, the Court upheld provisions of the Ethics in Government Act that created the independent counsel. The independent counsel exercised the power to investigate and prosecute upper level executive branch officials for federal crimes other than class B and C misdemeanors and infractions. This power was previously exercised exclusively by the executive branch. The Special Division of the United States Court of Appeals for the District of Columbia (Special Division) had the power to name the counsel, define his jurisdiction, and remove him when his job was complete. The counsel could also be removed

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62. Id.
63. Id.
64. 478 U.S. at 851, 106 S.Ct. at 3258.
67. 108 S. Ct. at 2622.
70. Until Morrison, the responsibility to faithfully execute the laws was considered solely that of the executive branch. U.S. Const. art. II. Myers v. United States and Humphrey's Executor v. United States stood for the proposition that the executive branch had power that was characterized as "purely executive" of which the executive had complete discretion to exercise. Prosecutorial discretion was such power. See also United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090 (1974), in which the Court upheld the independence of the special prosecutor, which was the precursor of the independent counsel. The special prosecutor was a designated prosecutor within the Department of Justice. His independence was established by rules issued by the Attorney General.
by congressional impeachment or by the Attorney General for good cause.\textsuperscript{74} Congress had authority to oversee the independent counsel.\textsuperscript{75}

To determine whether the independent counsel provisions violated the separation of powers doctrine, the Court examined whether the power of the Special Division violated Article III and whether the independent counsel's exercise of prosecutorial power impermissibly interfered with the performance of the executive's function. The Court analyzed the degree of control that the Special Division exercised over the counsel and the degree to which the exercise of executive power by the counsel interfered with the executive's ability to perform its core function. The Court defined the executive's core function as making policy and exercising executive power.\textsuperscript{76} The court found that the counsel did interfere with the executive's ability to prosecute.\textsuperscript{77} Using its reasoning in\textit{ Schor}, the court concluded, however, that judicial and legislative branch influence over the independent counsel did not \textit{impermissibly} interfere with the executive's ability to perform its core function.

The independent counsel was created to facilitate investigation and prosecution of those officials who otherwise controlled the exercise of prosecutorial power. Because detachment from the executive was the main purpose for the creation of the independent counsel,\textsuperscript{78} the Special Division's power to name the counsel and oversee its exercise of power was not incongruous.

The\textit{ Morrison} Court examined whether control over the independent counsel was more appropriately exercised by a branch other than the judicial through the Special Division. The Court defined the core function of the judicial branch as the impartial adjudication of claims. The Special Division named the counsel pursuant to the Appointments Clause of the Constitution.\textsuperscript{79} On the face of the Appointments Clause, interbranch appointments, meaning one branch appointing the officers of another, are not prohibited.\textsuperscript{80} Discretion to define the jurisdiction of the counsel is incident to the Special Division's power to appoint;\textsuperscript{81} however, the

\textsuperscript{74} 28 U.S.C.A. § 596(a)(1) (West Supp. 1989) provides that the Attorney General can remove the counsel "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."


\textsuperscript{76} Cf. 108 S. Ct. at 2608-09. (When discussing the broad discretion of the counsel, the Court pointed out that the authority does not include "any authority to formulate policy for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those necessary to operate her office," implying that those are functions integral to the executive.)

\textsuperscript{77} Id. at 2621.

\textsuperscript{78} Id. at 2611 and 2619.

\textsuperscript{79} U.S. Const. art. II, § 2, cl. 2. See supra note 29.

\textsuperscript{80} 108 S. Ct. at 2610.

\textsuperscript{81} Id. at 2612.
jurisdiction must be closely related to the facts set forth in the Attorney General's application for appointment of the counsel. 82

Although the Court expressed doubt as to whether removal power was consistent with the function of federal courts, 83 it upheld the Special Division's exercise of that power. The Court analyzed the removal power of the Special Division from a functional perspective by examining the quality of that power compared to the Attorney General's power of removal. 84 Because the removal power was limited to one particular circumstance—removal of an independent counsel after his job was essentially completed—that power exercised by an arm of the judicial branch was not a threat to the executive branch's performance of its core function. 85 The Special Division's control over the counsel was not more appropriately exercised by another branch considering the necessity for independence and the limited amount of control it exercised.

The Court also examined the relationship between the executive branch and the independent counsel. The Court examined the nature of the counsel's power to conclude that the counsel did not impede the President's ability to perform his core function. The independent counsel is characterized as an inferior officer with limited jurisdiction and tenure. The counsel has no "policy making or significant administrative authority." 86 The counsel's broad discretionary authority was not a violation of constitutional separation of powers because "the President's need to control the exercise of that discretion is [not] so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." 87 The counsel exercised a core function of the executive but it did not violate the separation of powers doctrine as perceived by the majority. The Attorney General's power to remove for good cause gives the President adequate ability to supervise the counsel's exercise of power. Neither the counsel's exercise of limited power 88 nor the Attorney General's restricted removal power impermissibly interfered with the President's ability to perform his core functions. 89

Mistretta v. United States

In Mistretta v. United States, 90 the Court upheld the United States

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82. Id. at 2613 and accompanying n.17.
83. Id. at 2614.
84. Id.
85. Id. at 2614-15.
86. Id. at 2619.
87. Id.
88. Id. at 2622.
89. Id. at 2619.
Sentencing Commission created by the Sentencing Reform Act. John Mistretta was sentenced according to guidelines promulgated by the Sentencing Commission. He appealed the sentence on the grounds that the Sentencing Reform Act violated the delegation and separation of powers doctrine. The case was appealed directly from the district court to the United States Supreme Court.

The Sentencing Reform Act restricts the composition of the Sentencing Commission. The Commission is composed of seven voting members and one non-voting member who promulgate and have the continuing duty to oversee use of the sentencing guidelines. The President appoints the commissioners with the advice and consent of the Senate, and can remove "only for neglect of duty or malfeasance in office or for other good cause shown." The voting members serve a six year term. Three of the voting members must be federal judges chosen from a list provided by the Judicial Conference of the United States. The non-voting member is the Attorney General or his designee, whose term does not expire. Not more than four members of the Commission may be of the same political party.

In the Act, Congress designated that the Commission be within the judicial branch. The Commission must comply with notice and comment procedures for promulgation of its guidelines. Congress then has a 180 day period within which it can amend or eliminate a provision of the guidelines. The trial judge can deviate from the sentencing provisions in the guidelines; however, under those circumstances, he must keep a detailed record of his sentencing decision explaining the reason for the deviation. The guidelines provide a method of determining the sentence for each federal crime. The trial judge evaluates relevant factors pertaining to the individual defendant to increase or decrease the exact length of sentence. Parole is abolished prospectively, but a convict may shorten his sentence by accumulating credit for good behavior during his imprisonment.

93. Id.
94. Id. The Commission is "an independent commission in the judicial branch ....".
97. 18 U.S.C. § 3553(a) and (b) (Supp. V 1987).
99. 18 U.S.C. § 3624(a) and (b) (Supp. V 1987).
Separation of Powers Analysis of Mistretta v. United States

Affirming the district court, the Supreme Court upheld the constitutionality of the Sentencing Commission. According to the Court, the Commission’s exercise of power violated neither the delegation doctrine nor the separation of powers doctrine. The Court held that Congress’ explanation of policy and relevant factors for consideration by the Commission provided an adequate guiding standard for the delegation of power. The Court used a functional analysis derived from both *Morrison* and *Schor* to test whether the Commission violated the separation of powers doctrine.

In the context of the judicial branch, *Morrison* required that control over the independent counsel by that branch not be more appropriately exercised by another branch. *Schor* required that the Commodity Futures Trading Commission’s exercise of state law jurisdiction not impermissibly interfere with the core function of the judicial branch. The *Mistretta* majority combined these two requirements to determine whether the power of the Commission was more appropriately exercised by a branch other than the judicial, and whether the judicial branch was undermined by the location of the Commission within it.

Analysis of the Commission’s exercise of power and its effect upon the judicial branch determined the appropriateness of the location. After initially locating the entity within the judicial branch according to congressional designation, the *Mistretta* Court applied the two step


101. Mistretta claimed that Congress delegated policy-making power to the Commission with inadequate guidance. 109 S. Ct. at 654. The promulgation involved policy-making by the Commission effecting the substantive rights of the defendant. Congress provided factors that the Commission considered in determining the length of sentence. 28 U.S.C.A. § 994 (West Supp. 1989); 109 S. Ct. at 655-57. The majority found that these standards were adequate for delegation purposes. Scalia agreed that the standards provided by Congress were adequate, Id. at 677, but argued that the power exercised by the Commission was of a non-delegable nature. The delegation doctrine did not allow delegation of policymaking power that affected substantive rights of a defendant. Scalia found that such power was legislative not rule-making in nature. Id. at 676.

102. Id. at 660.

103. “Congress’ decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary.” Id. at 661.

104. Id.

105. The Court used a deferential standard of review to determine whether that location was consistent with the Constitution. The Court would invalidate a statutory provision only for the most compelling constitutional reasons. Id. The *Morrison* majority likewise employed a deferential standard for analysis of the legislation creating the independent counsel. 108 S. Ct. 2597, 2614 (1988).
analysis to test this determination. In the first step, the Court held that the power of the Commission would not be more appropriately exercised by another branch. The Court did not examine the appropriateness of other branches exercising the same power. The task of the Court was not to relocate the Commission to the most appropriate branch, but only to test whether the location in the judicial branch was consistent with the separation of powers doctrine. The Court merely tested the validity of the legislation according to a deferential standard of review.\textsuperscript{106}

The Commission's power to promulgate rules determining the length of sentence was not inconsistent with its location in the judicial branch. Although this power is not adjudicative in nature, its product is integrally related to the sentencing function of the trial judge.\textsuperscript{107} The Commission was located within the judicial branch because it performed a rulemaking function concerning issues relevant to the courts.\textsuperscript{108} The Sentencing Commission exercised the same kind of power as federal judges in the sense that, in a similar fashion to the Commission, judges establish their own court procedural rules.\textsuperscript{109}

To show that location of the Commission within the judicial branch did not undermine federal courts, the Court contrasted the Commission to Article III federal courts. The Court found that Congress did not join legislative and judicial power within one branch because the Sentencing Commission is an independent agency rather than a member of the Article III judiciary.\textsuperscript{110} The Commission does not exercise adjudicative power and, because it is an independent agency, its rulemaking power is not vested in a court.\textsuperscript{111} The Court explained that the Commission

\textsuperscript{106} 109 S. Ct. at 661.

\textsuperscript{107} Formerly, the three branches shared responsibility for determining length of sentence. Prior to promulgation of the guidelines, Congress statutorily provided a range of years as the sentence for violation of a particular crime. The trial judge considered many factors regarding the individual defendant to determine the exact length of his sentence. Pursuant to its authority as custodian of the convict, the executive could release a convict prior to the end of his sentence through parole. The responsibility for determining the sentence now rests primarily with the Sentencing Commission.

\textsuperscript{108} "[T]he Sentencing Commission is devoted exclusively to the development of rules to rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch." Mistretta v. United States, 109 S. Ct. 647, 673 (1989).

\textsuperscript{109} The Supreme Court has upheld Congressional delegation of rulemaking power to the judicial branch. Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 61 S. Ct. 422 (1941); Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825). According to these cases, Congress can delegate power to the judiciary to make rules concerning the conduct of court procedure. The dissent argues that these and other examples of judicial rule-making do not effect the substantive rights of the defendant. Procedural rules do not effect the defendant's liberty interest in the same manner that a rule determining length of sentence does.

\textsuperscript{110} 109 S. Ct. at 666.

\textsuperscript{111} Id. at 661.
was characterized as an independent agency because of its structure. The Court emphasized the control Congress exercised over the Commission in contrast with its lack of control over Article III judges. On the other hand, because the courts do not control or influence the Commission, the Commission’s exercise of power does not increase the power of the judicial branch. The judiciary does not exercise a rule-making function incongruous with its core function. Thus, the Court found that the operation of the Commission within the judicial branch does not impermissibly interfere with the judiciary’s core function. Because of the nature of the guidelines and the intimate relationship to the function of the trial judge, it was appropriate for an entity within the judicial branch to promulgate guidelines.

Once the Court was satisfied that the location was appropriate, it examined whether the Commission’s exercise of power undermined the judicial branch. The Commission’s characterization as an independent agency was an important factor in this analysis. The Court held that the judicial branch was not undermined in *Mistretta* because the Commission’s exercise of power did not interfere with the judiciary performing its core function of trying cases in an impartial manner. The promulgation of guidelines is a function independent from adjudication by federal judges.

Because of this independence from the adjudicatory function of the courts, the restrictions on the composition of the Commission do not undermine the judicial branch. The fact that judges serve on the Commission in an administrative capacity does not undermine the impartiality of the judicial branch in the sentencing process or trying of cases. Judges are neither prohibited from extra-judicial service nor required to serve on the Commission. Their status on the Commission does not affect their status as judges. The fact that non-judges serve on the Commission does not undermine the judicial branch because the function of the Commission is not adjudicative in nature.

Control by the President does not undermine the judicial branch. The Attorney General is an ex-officio member and the executive branch has limited control over appointment and removal of the members. The Commission is sufficiently independent from the executive to be protected from political influence. Furthermore, control by the executive cannot

112. “The mere fact that the President within his appointment portfolio has positions that may be attractive to federal judges does not, of itself, corrupt the integrity of the Judiciary. . . . The Act does not, and could not under the Constitution, authorize the President to remove, or in any way diminish the status of Article III judges, as judges. Even if removed from the Commission, a federal judge appointed to the Commission would continue, absent impeachment, to enjoy tenure ‘during good Behavior’ and a full judicial salary.” Id. at 674 (quoting U.S. Const., art. III, § 1).
affect the status of judges on the bench—they are still protected under Article III.

The Exercise of Power by Independent Entities

Because a functional analysis is a fact intensive examination of the system of checks controlling an individual entity made with little regard for the three part delineation of power provided in the Constitution, the approach is necessarily ad hoc to a certain extent. This creates the danger that courts will reach inconsistent and perhaps conflicting results in determining the constitutionality of subsequently created entities. Nevertheless, similarities between the agency and one power entities provide some consistency regarding the limitations on the power of an entity operating outside the tripartite structure. Control over the one power entity is not vested in the branch exercising the same kind of power. This structure is similar to the means by which an agency exercises power. Also, these entities have similar alternative checks, such as limitations analogous to those in the Administrative Procedure Act. One power entities deviate from the agency model in some respects. It is important to understand the reason for, and extent of, deviation in order to see whether the Court is willing to "rubber stamp" any entity created by Congress.

Prior to cases dealing with one power entities, agencies were considered located within the executive branch because of that branch's limited control. The legislation creating the agency usually gives appointment and removal power to the executive branch because the exercise of control is an executive task. Also, the exercise of control corresponded to the agency's exercise of executive power. Location of the one power entity was justified by the Court on the basis of the single kind of power it exercised. Mistretta teaches that location has two separate dimensions, the kind of power exercised by the entity and control over it. The agency located solely by means of kind of power it exercised would be located within three branches. The control dimension combines with the kind of power element to fix location within the executive branch.

Using the Court's functional analysis, each kind of power exercised by the agency can be tested separately in relation to the branch that exercises that corresponding kind of power even though control lies in another branch. The Court has long accepted an agency's exercise of legislative or judicial power while under the control of the executive

113. Justice Scalia argued that there would be no basis to determine location of an entity when "it is acknowledged that an 'independent agency' can be within any of the three Branches, and not merely within the Executive." Id. at 681 (emphasis in original).
branch. In Commodity Futures Trading Commission v. Schor, the majority examined the validity of the exercise of judicial power in reference to the separation of powers doctrine. In Schor, the Commission was located within and controlled by the executive branch. The Court examined the exercise of judicial power by reference only to the judicial branch and the agency's exercise of similar adjudicative power. The Court applied a similar functional analysis to the independent entity in Mistretta to test its exercise of power. Although the Court does not address the issue, the independence of these two kinds of entities allows power to be concentrated in one body without regard to the tripartite scheme.

Some points of consistency emerge in a comparison of the limitations on the agency to those on the one power entity. Congress was careful not to retain power over the entity and thus violate the Chadha and Bowsher formal requirement of congressional action. Neither the independent counsel nor members of the Sentencing Commission are appointed or removed without restriction. The executive is given limited power to determine the composition of the independent entities. Appointment of the most influential members of agencies can be made only with the advice and consent of the Senate. The Special Division, not the executive, had the power to name the independent counsel, and the Sentencing Reform Act limited the executive's power to determine the composition of the Commission. The Sentencing Commission must comply with notice and comment procedures to promulgate rules.

These entities' exercise of power was limited in contrasting ways. The Sentencing Commission's exercise of discretion in determining a range of sentence length was limited by provisions of the Sentencing Reform Act. The Sentencing Commission had to comply with notice and comment procedures before promulgation of rules, and was subject to alteration by Congress within a 180 day period. The independent counsel's exercise of discretion was not reviewable by a court. To compensate for the counsel's unreviewable exercise of power, the Special Division oversaw the operation of the independent counsel. The Sentencing Commission did not have an overseeing commission. Perhaps it was a sufficient compensating check that members of the Sentencing

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115. See supra note 9 and accompanying text for a description of checks on agency power.
Commission\textsuperscript{120} had to discuss and agree upon action, as opposed to the individual independent counsel who made decisions on her own.

In the independent entity context, accountability for exercise of power is a problematic issue. Independence of the agency from the branches is necessary to minimize the separation of powers implications from the combination of powers. Accountability is associated with control. To a certain extent, the executive branch is accountable for the agency's exercise of power. This accountability corresponds to the agency's exercise of executive power. Of course, in the context of the one power entity, concentration of three kinds of powers in one body is not a concern. Nevertheless, independence is necessary because the kind of power exercised is not the power of the controlling branch. The controlling branch cannot be held accountable for the exercise of another branch's kind of power especially when the control is limited. The kind of power branch is equally unaccountable when it lacks control.

Congress has devised a formula for creating a one power independent entity that effectively neutralizes the location branch and controlling branch's influence over the entity. According to the Mistretta analysis, the degree of independence from control affects the manner in which the entity is located. Congress is encouraged to make entities more independent of the branches in order to meet the requirements of the Mistretta test. When control over appointment and removal is diminished to a non-influential level, the location of the entity within the three branch scheme is determined by the kind of power the entity exercises. For example, Congress limited executive control over the Sentencing Commission and designated that it was located within the judicial branch based on similarity of power.\textsuperscript{121} Significant control by a branch that exercises a different kind of power, such as the executive, could create too much interference with the location and render it invalid.

In general, the alternative checks on the independent one power entities should be similar to those of the agency model. Deviation from the agency model should facilitate a compelling purpose that is tailored to the specific reason the entity was created.

\textit{Conclusion}

Approval of one power entities opens up new opportunities for Congress to create efficient extra-branch entities that are inconsistent

\textsuperscript{120} A one power entity's exercise of power similar to that exercised by the judiciary is probably not limited to rulemaking tasks. Congress could create a commission or a limited forum, isolated from Article III courts, which does nothing but adjudicate a narrow range of cases. In that case the alternative checks should be similar to those of an agency adjudicative forum or the Bankruptcy and Claims Courts.

\textsuperscript{121} Mistretta v. United States, 109 S. Ct. 647 (1989).
with a formal separation of powers analysis. Thus far, Congress has used the agency as a model for the one power entity to minimize separation of powers questions. The similarity between the structure of the agency and the one power entity perhaps persuaded the Court to not threaten the agency by striking down the one power entity.

Application of a functional analysis that accommodates the agency should not be extended to the one power entity. Rather than contorting the analytical framework to protect the agency, the Court should recognize the agency structure as an exception to the explicit tripartite scheme that warrants application of a functional analysis. This exception could be justified by the vital role agencies play in our society and the body of administrative law that governs the area. By applying a functional analysis to one power entities, the Court has further eroded its ability to evaluate the effect that an accumulation of entities has on the governmental structure. Because the Court has applied a functional analysis to uphold creation of one power entities, Congress has few restrictions on its ability to create entities.

Inasmuch as the Court has resolved to apply a functional analytical framework to the one power entity, Congress should exercise self-restraint in the creation of these entities. The two cases involving independent entities, *Morrison* and *Mistretta*, point out similarities between the structure of these one power entities and independent agencies. Congress should limit unrestrained creation of one power entities by following the agency model. Deviations from the model should be well justified. By using the external controls imposed upon the agency as a model, the unpredictability of an *ad hoc* analysis can be reduced.

The Court's separation of powers analysis applied to the one power entity illuminates the way the Court may approach the exercise of agency power in the future. Using the functional analysis developed in recent cases, the Court can examine the exercise of power by an agency without confronting the combination of powers issue. The Court would analyze the exercise of one kind of power at a time in relation to the relevant branch. In doing so, it would accept the location stipulated legislatively without considering the effect the location or combination of powers in one body has on the overall balance of power.

The danger of improvised entities created at will by Congress can be reduced by looking to the accepted agency scheme to analyze whether the entity is adequately checked. Using the independent agency model, however, is problematic because the agency's exercise of power raises separation of powers issues. The agency is checked by means other than the checks provided explicitly in the Constitution. Combined powers and independence from branches reduce accountability while increasing the possibility for abuse of power. The Court has developed
an analytical framework that ignores these flaws in the structure of the agency. The Court will not dismantle the agency system of exercising power, but will probably apply a functional analysis, similar to the one developed in the above cases, to accommodate the agency model.

There are dangers inherent in having entities beyond the direct control of any branch. The branches can abuse power, but they are politically accountable for their actions. The diminished control by the branches increases the entity's independence and decreases the political accountability for the entity's exercise of power. The branches are generally not accountable for the actions of the entity because they do not exercise control. This allows "the government," using the entity as a vehicle, to pursue political issues that intimidate Congress without control by or accountability to the branches. The branch with control over appointment and removal is answerable for the entity's exercise of power to a degree commensurate with the amount of control and similarity of power.

Cases using a functional analysis make the delineation between the executive and judicial branch unclear. As a result of Chadha and Bowsher, only the executive and judicial branches can actively influence or control the independent entity. Consequently, Congress has expanded the role of the judicial branch in working with the entities. The function of the judicial branch has been expanded to include performance of administrative duties it had not previously performed. The Sentencing Commission and Special Division were located within the judicial branch for the sole purpose of avoiding control by the executive branch. The Special Division was created to diminish executive control over the independent counsel. Congress' use of commissions within the judicial branch expands the administrative function of the judicial branch.

The Supreme Court is unwilling to threaten the validity of the agency. It has tailored the analytical framework it used in the context of the agency to the independent one power entity. The Morrison and Mistretta decisions, supported by an overwhelming majority of the Court, affirm the application of a functional analysis to the three power

122. In Mistretta, the Court stated that "the Commission ... is not controlled by or accountable to members of the Judicial Branch" because it is an independent agency. Id. at 665. Likewise the executive branch's weak control over appointment and removal does not make it accountable for the Commission's actions.

123. Scalia suggested that Congress may find it desirable to create entities that deal with politically unpopular issues. "How tempting to create an expert Medical Commission ... to dispose of such thorny, 'no-win' political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research." Id. at 680 (Scalia, J., dissenting).
agency. Considering the great number of agencies relied upon and the reality that there is no limit to the number of individual entities Congress can create, Congress is likely to exploit the one power entity.

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