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Articles

Understanding Separation of Powers

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I. Introduction

Our Constitution contains explicit directions regarding the organization of the federal government, dividing the responsibilities of government among three separate branches, and enumerating the specific powers each branch is to exercise. This division and enumeration of powers establishes the fundamental terms by which one branch's claim to authority may be deemed valid or invalid, and provides the very basis for deciding whether the exercise of power by an agent of government is permitted or prohibited. Too frequently, however, commentators, both inside and outside of government, discuss the separation of powers found in the Constitution as if it were some kind of broad based "constitutional policy" or political philosophy divorced from the specific provisions in the text of the document.¹ This Article

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1. See, e.g., *The Supreme Court, 1985 Term — Leading Cases*, 100 HARV. L. REV. 100 (1986):

[The Constitution] establishes partially interdependent, separate centers of power in order to prevent any one center from becoming tyrannical by accumulating all judicial, legislative, and executive power. A functional separation of powers analysis that examines a particular arrangement in terms of how it contributes to or detracts from the maintenance of these desirable tensions among the three branches best reflects the separation of powers concept.

Id. at 228 (footnotes omitted); Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. REV. 109, 111 (1984) ("[T]he separation of powers doctrine

seeks to refocus that discussion, to move away from abstractions about separation of powers, and to re-anchor the doctrine to its constitutional moorings.

There is nothing novel or idiosyncratic about the thesis of this Article. Indeed, Supreme Court Justices from virtually every generation of the Court have analyzed the constitutional separation of powers in a similar manner.² Nevertheless, because

[is] a nebulous principle finding no express articulation in the constitutional text.”); Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 331 (1977) (“[T]he constitutional theories of separation of powers and checks and balances . . . have evolved over two hundred years.”); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977):

Separation of powers is not a doctrine in the sense of positive law; it is a political theory concerning the system of allocation of governmental powers. It reflects the consensus of the thirty-nine individuals who signed the Document of 1787 on what was then perceived as the permissible limits of governmental interaction. But use of it as a standard for judging the constitutionality of activities not foreseen is made impossible by the fact that the Framers did not agree on what the doctrine specifically meant. The term was not used in the tripartite division of powers. It is merely an inference drawn from the first three articles of the Constitution.

Id. at 384-85; Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 OR. L. REV. 211, 216 (1973) (“[T]he question remains whether the doctrine [of separation of powers] is still a workable constitutional theory.”); *Ameron, Inc. v. United States Army Corps of Eng’rs*, 787 F.2d 875, 881 (3d Cir. 1986) (“[T]he separation of powers principle . . . is not expressly mentioned in the Constitution but . . . undergirds the Constitutional philosophy . . .”).

2. The Court’s entire history can be measured by the terms of office of nine Justices: William Cushing, 1789-1810; John Marshall, 1801-1835; Roger Brooke Taney, 1836-1864; Samuel Freeman Miller, 1862-1890; Henry Billings Brown, 1891-1906; William Rufus Day, 1903-1922; Louis Dembitz Brandeis, 1916-1939; Hugo Lafayette Black, 1937-1971; and William Joseph Brennan, Jr., 1956-present. CONGRESSIONAL QUARTERLY, INC., CONGRESSIONAL QUARTERLY’S GUIDE TO THE U.S. SUPREME COURT 795-859 (1979). Of these nine, those who have written about the separation of powers have generally espoused the same approach taken in this article. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.) (The “original and [s]upreme will [of the people] organizes the government, and a[ss]igns, to different departments, their re[s]pective powers. . . . The powers of the legi[s]lature are defined, and limited; and that tho[s]e limits may not be mi[s]taken, or forgotten, the con[s]titution is written.”); *Gordon v. United States*, 117 U.S. 697 (1864) (Taney, C.J.):

The Constitution of the United States delegates no judicial power to Congress. Its powers are confined to legislative duties, and restricted within certain prescribed limits. By the second section of Article VI, the laws of Congress are made the supreme law of the land only when they are made in pursuance of the legislative power specified in the Constitution . . .

Id. at 705; *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (Miller, J.):

It is . . . essential to the successful working of this system [of written constitutional law] that the persons intrusted with power in any one of these branches

so many contemporary commentators betray a profound misunderstanding of separation of powers principles, it is important to review the proper approach to separation of powers issues. Nor could such a review be more timely: recent challenges to the constitutionality of the independent counsel law³ reaffirm the continuing significance of separation of powers analysis and highlight the importance of a proper approach to separation of powers issues.

Part II of this Article explains how to "think clearly" about the constitutional requirements for separation of powers. Part III analyzes specific separation of powers conflicts in the context of the principles set forth in Part II. For the sake of simplicity, this Article focuses on separation of powers abuses by the legislative branch.⁴ This includes an examination of the interpretive

shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

Id. at 191; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (Black, J.) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Brennan, J.):

[T]he Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct.

....

As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch.

Id. at 57-58.

3. Former National Security Council staffer, Lt. Col. Oliver North, and former White House aide, Michael Deaver, both under investigation by independent counsel, are contesting the Ethics in Government Act of 1978, 28 U.S.C. §§ 591-598 (1978 & Supp. III 1985), on the grounds that it improperly permits the judiciary to exercise executive functions in selecting independent counsel. *North v. Walsh*, Nos. 87-0457 and 87-0626 (D.D.C. filed March 12, 1987) (dismissed for lack of ripeness); *Deaver v. Seymour*, No. 87-0477 (D.D.C. filed March 11, 1987) (denying preliminary injunction), *aff'd and remanded with instructions to dismiss*, No. 87-5056 (D.C. Cir. filed Mar. 17, 1987) (per curiam).

4. Of course, it is recognized that from time to time the executive and judicial branches are guilty of separation of powers abuses as well. *See, e.g., Youngstown Sheet*, 343 U.S. at 587-88 (presidential seizure of most of the nation's steel mills was not authorized by a constitutional or statutory grant of power to the executive branch and encroached upon legislative authority); *American Cetacean Soc'y v. Baldrige*, 604 F. Supp. 1398 (D.D.C.), *aff'd*, 768 F.2d 426 (D.C. Cir. 1985), *rev'd sub nom.*, *Japan Whaling Ass'n v. American Cetacean Soc'y*, 106 S. Ct. 2860 (1986). In *American Cetacean*, the district court held that the Secretary of Commerce had a nondiscretionary duty, under

tools that should be used in determining whether an act of government comports with prescriptions and proscriptions found in the Constitution for the separate powers of government. This Article concludes in Part IV by affirming the need for a strict interpretation of the text of the Constitution when analyzing separation of powers issues.

II. Thinking Clearly About Separation of Powers

The concept of separated powers as a political doctrine has, of course, existed at least since the middle of the seventeenth century.⁵ Of the various theorists who wrote of the need to divide governmental powers among different institutions, Montesquieu most influenced the Framers.⁶ However, it would be a mistake to assume that Montesquieu's view of separation of powers — or any other particular view, for that matter — was specifically incorporated into the Constitution or intended to dictate our understanding of the constitutional structure of our government.⁷ Whatever theories may have influenced the Framers, only one specific formulation found expression in the Con-

the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, to certify to the President that Japanese nationals were engaged in sperm whaling operations in such a manner as to "diminish the effectiveness" of the zero quota established by the International Convention for the Regulation of Whaling. *Id.* at 1404, 1410-11. The court ordered the Secretary to certify Japan notwithstanding an executive agreement between Japan and the Secretary, whereby the Secretary promised that the United States would not certify Japan under the Amendment if Japan pledged to adhere to certain harvest limits and to cease commercial whaling by 1988. *Id.* at 1404. In reversing the district court, the Supreme Court found that the district court misconstrued the statutory language and legislative history of the Packwood Amendment, which clearly made the Secretary's certification obligations discretionary. *American Cetacean*, 106 S. Ct. at 2868-72.

The Court further commented that although the judiciary may review some issues that affect foreign relations, the political question doctrine prohibits judicial review of other cases "which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Id.* at 2866.

5. W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 9 (Tulane Studies in Political Science No. IX, 1965). Some have even traced the concept of separated powers back to Aristotle. *Id.* at 5.

6. See, e.g., *THE FEDERALIST* No. 47, at 324-28 (J. Madison) (J. Cooke ed. 1961). See also *THE FEDERALIST* No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961) (recognizing the celebrated status of Montesquieu on the issue of separation of powers).

7. See L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 10 (1985); C. PRITCHETT, *CONSTITUTIONAL LAW OF THE FEDERAL SYSTEM* 13 (1984).

stitution. Thus, as a jurisprudential matter, there is neither need nor warrant for reliance on abstract conceptual theories about separation of powers divorced from the actual text of the Constitution.⁸

The United States government is "one of delegated, limited and enumerated powers."⁹ All the powers of the national government are conferred by the Constitution, and those not expressly delegated to it are reserved to the States, or to the people.¹⁰ The Constitution distributes the sum total of national government power among the three branches, stating that "[a]ll legislative Powers . . . shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives";¹¹ that "[t]he executive Power shall be vested in a President of the United States of America";¹² and that "[t]he 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."¹³ Thus, by its own terms, the Constitution makes clear that the executive and judicial branches have no legislative power; that no part of the judicial power is conferred on the legislature or the executive; and that only the executive branch can exercise executive power.¹⁴ Our system of govern-

8. *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("To be sure, the content of the three authorities of government is not to be derived from an abstract analysis. . . . The Constitution is a framework for government.").

9. *United States v. Harris*, 106 U.S. 629, 635 (1882). See generally *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

10. U.S. CONST. amends. IX, X.

11. U.S. CONST. art. I, § 1.

12. *Id.* art. II, § 1.

13. *Id.* art. III, § 1.

14. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."); *United States v. Nixon*, 418 U.S. 683, 704 (1974) ("[T]he 'judicial Power . . . ' vested in the federal courts by Art. III . . . of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . The Founders of

ment, properly viewed, is *not*, as one scholar has described it, "separated institutions *sharing* powers."¹⁶ Rather, it consists of three branches assigned different powers and responsibilities that together comprise the full extent of national governmental power.

The Constitution does not permit a branch of government to expand its own authority by encroaching upon the powers conferred on the other branches; nor does an acquiescence in an unconstitutional exercise of power by another branch establish that power in the other branch.¹⁶ Moreover, beyond those pow-

this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."); *Springer v. Phillipine Islands*, 277 U.S. 189 (1928):

It may be stated . . . as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power.

Id. at 201-02; *Kilbourn v. Thompson*, 103 U.S. 168 (1880):

It is . . . essential to the successful working of this system [of written constitutional law] that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

Id. at 191.

15. R. NEUSTADT, *PRESIDENTIAL POWER* 26 (1980 ed.) (footnote omitted) (emphasis in original).

16. The Supreme Court has been frequently confronted with deciding the constitutionality of one branch's actions when the exercise of power by that branch has been efficient but not authorized by the Constitution. *See, e.g., Chadha*, 462 U.S. at 945-46 (The one-House veto practice, in use for fifty years, was struck down as an unconstitutional violation of art. I of the Constitution, which expressly requires that all bills which pass the two Houses of Congress must be presented to the President.); *Youngstown Sheet*, 343 U.S. at 588-89 (A presidential order to take over and operate steel mills was found to be an impermissible exercise of the lawmaking power because it infringed on Congress' power to pass laws "in both good and bad times." The Court stated that the success of other Presidents in carrying out similar orders did not abrogate Congress' exclusive authority to make laws.); *Fairbank v. United States*, 181 U.S. 283, 289, 311 (1901) (In striking down a stamp duty imposed on bills of lading on exports from the United States, the Court explained that the constitutionally prohibited tax could not be saved on the grounds that previous efforts to impose stamp duties on exports were successful.). *But cf. Ex Parte Grossman*, 267 U.S. 87, 118-19 (1925) (The Court upheld the practice of several United States attorneys general of pardoning criminal contempts of court as a constitutional exercise of the Executive pardon power, even though the judiciary also had power to punish criminal contemnors. The Court found that continued legislative acquiescence to this practice supported a determination of constitutionality.); *United States v. Midwest Oil Co.*, 236 U.S. 458, 473, 483 (1914) (In upholding a presidential order withdrawing specified public lands from private acquisition, notwithstanding a

ers expressly conferred on the various branches (and such powers as are implicit in their delegation, or incidental to their exercise), there are no "inherent" powers of national government.¹⁷ Thus, neither amorphous concepts of sovereignty, nor the mere possession of legislative or executive power, or of governmental power generally, affords a basis for claiming authority to take action not expressly or implicitly authorized by the Constitution.¹⁸

To insist that the separated powers of the three branches are not shared, however, is not to suggest that these powers may not at times be focused on the same subject or that they must operate with absolute independence. For example, the Constitution confers on the President the power to veto bills "which shall have passed the House of Representatives and the Senate," subject to the power of Congress to override that veto by vote of

congressional declaration to the contrary, the Court applied the rule that long-standing acquiescence in a governmental practice gave rise to a presumption of authority. In view of this long-standing executive practice of withdrawal of public lands, the Court sustained the presidential order.).

17. Claims to inherent powers should be distinguished from claims to those implied powers ancillary to an enumerated source of authority in the Constitution. For example, as the necessary and proper clause of article I, section 8, confirms, Congress has not only those powers specifically conferred by the Constitution, but such "incidental or implied powers" necessary to implement the powers given. U.S. CONST. art. I, § 8, cl. 18. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-14 (1819). A claim to inherent powers is a claim to the existence of governmental powers not expressly conferred by the Constitution, but "inherent" in our government, as deduced from the nature of governments generally. C. PYLE & R. PIOUS, *THE PRESIDENT, CONGRESS, AND THE CONSTITUTION* 76-77 (1984). See also SPARKMAN, *Checks and Balances in American Foreign Policy*, 52 IND. L.J. 433, 442-43 (1977); Monaghan, *Presidential War-Making*, 50 B.U.L. REV. 19, 25 (1970) (Special issue). Although claims to inherent powers are typically made on behalf of the executive and legislative branches, claims to federal common law and judicial supervisory authority may also constitute appeals by the judiciary to "inherent" powers. See, e.g., C. PRITCHETT, *supra* note 7, at 284-90 (discussing executive claims to inherent powers); Monaghan, *supra*, at 25 (same). See also *Carlson v. Green*, 446 U.S. 14, 37-40 (1980) (Rehnquist, J., dissenting) (criticizing the majority's holding that, pursuant to federal common law, the court is authorized to award a damages remedy to victims of a constitutional violation by a federal agent, despite the absence of any statute conferring such right). See generally Note, *Supervisory Power in the United States Courts of Appeals*, 63 CORNELL L. REV. 642 (1978) (discussing the supervisory power of the judiciary).

18. See S. BARBER, *ON WHAT THE CONSTITUTION MEANS* 186 (1984) (Such a doctrine of inherent powers "serves only as a license to ignore the constitutional constraints found in the Bill of Rights, the separation of powers, and the idea of authorized national ends.").

two-thirds of each House;¹⁹ it grants the Senate the power of consent over treaties and presidential appointments;²⁰ it gives Congress the power to define the jurisdiction of the judicial branch by virtue of its authority to "ordain and establish . . . inferior [federal] Courts";²¹ and it gives the judiciary, by virtue of its power over cases arising under the Constitution and laws and treaties of the United States, the power to declare legislative and executive acts unconstitutional.²² Such duties may require different branches to study and act upon the same set of circumstances. However, in each of these instances, the powers of each branch remain discrete: the legislature is exercising legislative power, the President is exercising executive power, and the courts are exercising judicial power; none of them is "sharing" its powers with the other branches. Any "sharing" or "blending" of power relates only to the sharing of the sum of all national governmental power and the concurrent exercise of power by more than one branch.

These areas of concurrent but separate responsibility are the checks and balances built into the constitutional structure of government. They preserve the independence of the separate departments and provide each branch with the ability to protect against usurpations of power by the other branches.²³ These checks and balances — i.e., the overlapping application of separate powers to common circumstances — are not inconsistent

19. U.S. CONST. art. I, § 7, cl. 2.

20. *Id.* art. II, § 2, cl. 2.

21. *Id.* art. III, § 1.

22. *Id.* § 2. See also *Kilbourn v. Thompson*, 103 U.S. 168, 197 (1882) (The judiciary may declare a House committee's investigation "beyond [its] legitimate cognizance."); *McCulloch*, 17 U.S. (4 Wheat.) 316:

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Id. at 423.

See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

23. As James Madison wrote: "[T]he 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 FEDERALIST* No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

with the constitutional separation of powers. Indeed, they complement the separation of powers: "Without the power to withstand encroachments by another branch, a department might find its powers drained to the point of extinction."²⁴

Further, adherence to the constitutional requirements for the separation of powers does not disable government from functioning effectively, nor preclude the branches from developing innovative solutions to new and exigent problems, nor mandate government insensitivity to the changing needs of the nation, as some critics have argued.²⁵ The constitutional separation of powers does not preclude such experimentation; it merely requires that each branch operate within the limits of its assigned powers in achieving its goals.²⁶ As Justice Jackson stated: "While the Constitution diffuses power the better to secure liberty, it also contemplates that the practice will integrate the dis-

24. L. FISHER, *supra* note 7, at 14.

25. See, e.g., Bator, *The Constitution and the Art of Practical Government*, 32 Chi. L. Sch. Rec. 8 (1986). Professor Bator — perhaps a bit hyperbolically — describes the insistence on close adherence to the constitutional prescriptions for the separation of powers as a "riot of pedantic separation-of-powers purity." *Id.* at 12. Claiming that the separation of powers provisions in the Constitution should be understood simply "as setting out very general guidelines," Professor Bator would interpret these provisions in light of "a deep notion [of] the necessities of the time," substituting what he calls "constitutional style" for constitutional substance. *Id.*

However, as another scholar has written:

[B]y pretending that the Constitution can be whatever necessity requires, one would erode the Constitution's authority by rendering it too shapeless and malleable to function as a standard for judging events. . . . As "supreme Law," the Constitution expresses a belief that the nation can plan for contingencies and that the plans can be more or less supreme. Not everyone agrees. Some . . . will not believe that general legal prescriptions can cover contingencies [and] will favor government by men and women who have a prudential feel or knack for maneuvering their way through contingencies, having acquired this special competence either from God, nature, education, or practical experience.

S. BARBER, *supra* note 18, at 190-91 (footnote omitted).

26. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976):

Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in [section] 9 of Art. I. No more may it invest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

Id. at 135 (emphasis in original).

See also 3 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE* § 23.38, at 521-22 (1986).

persed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."²⁷

Notwithstanding the constitutional requirements of "separation of powers" which spell out what each branch can and cannot do, certain policy choices are open to the branches of government to do what each determines is best for the government as a whole. For example, it is perfectly legitimate for the executive or legislative branch²⁸ to decide, as a policy matter, to use restraint in the exercise of its powers so as to avoid conflicts or confrontations with the other branches, or to seek increased cooperative decisionmaking with the other branches.²⁹ As long as constitutional powers and functions themselves are not blended, cooperative interaction among the political departments of government does in fact seem desirable. Thus, although participants in separation of powers conflicts may assume that there is always an institutional "duty" to seek to expand the powers of their respective branches, such an assumption should be re-

27. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

28. To some extent, the courts also may avoid separation of powers conflicts through the exercise of restraint in the decision of cases. For example, although courts may not refuse to decide valid cases or controversies, if a case can be decided upon two grounds — one involving a constitutional question, and the other a question of statutory or general law — the courts, to accord due deference to the other branches of government that have spoken on a constitutional issue, ordinarily will refrain from passing on the constitutional question. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("[The courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69 (1947); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

29. Thus, for example, the present Administration has issued a directive to all executive departments and agencies announcing that the assertion of executive privilege in response to congressional requests for information "will be [made] only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." Memorandum for the Heads of Executive Departments and Agencies from Ronald Reagan 1 (Nov. 4, 1982). Recognizing that good faith negotiations between Congress and the executive branch historically have minimized the need for invoking the privilege, and should continue as the primary means for resolving conflicts, the directive goes on to state that "[t]o ensure that every reasonable accommodation is made to the needs of Congress, [the] executive privilege shall not be invoked without specific Presidential authorization." *Id.* The memorandum then lists procedures to "be followed whenever Congressional requests for information raise concerns regarding the confidentiality of information sought." *Id.* at 1-3.

jected. Members of each branch should seek not only to preserve the ability of their branch to exercise the powers and functions granted it by the Constitution, but should also observe and reaffirm the Constitution's limits on the scope of those powers. While this attitude is devoutly hoped for among our public officials, ultimately, the preservation of the constitutional structure of separate powers is dependent not upon such exercise of wisdom by our elected and appointed leadership, but upon the constitutional institutions of checks and balances.

In sum, the Framers chose our structure of government, for all its inefficiencies, the better to secure liberty and to guard against tyranny.³⁰ A clear understanding of the constitutional requirements for separation of powers is necessary to ensure that the purposes sought to be achieved by the division of national governmental power among three branches are protected and preserved.

III. Separation of Powers Conflicts

Separation of powers violations may occur in a variety of ways. Essentially, however, such violations fall into one of two categories: 1) "[o]ne branch may interfere impermissibly with the other's performance of its constitutionally assigned function" by inserting itself into the operation of another branch's duties; or 2) one branch, acting alone, may assume "a function that more properly is entrusted to another."³¹ Whether an act of government is valid or invalid under these criteria is determined by reference to the text of the Constitution, not by resort to generalizations about the balance of governmental power or theoret-

30. See *THE FEDERALIST* No. 9, at 51 (A. Hamilton) (J. Cooke ed. 1961) ("The regular distribution of power into distinct departments — the introduction of legislative balances [sic] and checks — the institution of courts composed of judges, holding their offices during good behaviour . . . are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided."); *THE FEDERALIST* No. 47, at 324 (J. Madison) (J. Cooke ed. 1961) ("The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."). See also *Bowsher v. Synar*, 106 S. Ct. 3181, 3186 (1986) ("The declared purpose of separating and dividing the powers of government . . . was to 'diffus[e] power the better to secure liberty.'") (citation omitted) (alteration in original).

31. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring) (citations omitted).

ical separation of powers principles.

A. Interference by One Branch with Another Branch's Performance of Its Constitutionally Assigned Function

There are several major areas of recurrent conflict between the executive and legislative branches. One of the most frequent conflicts is Congress' intrusion upon the management and prosecutorial responsibilities of the executive through use of its oversight powers. Another recent example of conflict is the unconstitutional use of legislative vetoes to retain continuing control over authority delegated to the executive branch.

1. Congressional Oversight—Interference with Prosecutions

Implicit in the grant of legislative power in article I is the power to acquire information to determine whether to enact new laws; to determine whether existing laws are still necessary or need revision; to determine how the executive branch is enforcing the laws; and to expose corruption, inefficiency, and waste in the administration of the laws.³² The theoretical scope of the power of inquiry is as broad and far reaching as the potential power to enact laws and appropriate funds under the Constitution.³³

This power of inquiry, however, is not unlimited. It must be exercised in aid of legitimate legislative functions,³⁴ and cannot be used to arrogate to Congress functions allocated by the Constitution to the executive or judicial branches.³⁵ Nor can Con-

32. See, e.g., *Watkins v. United States*, 354 U.S. 178, 187 (1957); *McGrain v. Daugherty*, 273 U.S. 135, 173-77 (1927).

33. *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

34. "The subject of any inquiry always must be one 'on which legislation could be had.'" *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) (citation omitted). Furthermore, congressional committees and subcommittees conducting oversight investigations are restricted to the missions delegated to them through authorizing or enabling resolutions. "No witness can be compelled to make disclosures on matters outside that area." *Watkins*, 354 U.S. at 206. See also *Gojack v. United States*, 384 U.S. 702, 714-16 (1966).

35. *Barenblatt*, 360 U.S. at 111-12; *Watkins*, 354 U.S. at 187. See generally *Kilbourn v. Thompson*, 103 U.S. 168 (1881). See also L. FISHER, *supra* note 7:

Were Congress to seek information concerning a pardon, the President could decline on the ground that the matter is solely executive in nature and of no concern

gress' power of inquiry negate the President's constitutional responsibility for managing and controlling affairs committed to the executive branch.³⁶ Thus, for example, it is clear that legislative interference with executive duties — such as open criminal investigations, prosecutions, or other pending litigation — which are derived from the constitutional mandate that the Executive "take Care that the Laws be faithfully executed"³⁷ is beyond the scope of permissible oversight.³⁸

One of many examples of congressional overreaching in this area was the recent attempt by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary to require the Department of Justice to produce documents from its files relating to a newly reopened criminal investigation of alleged false shipbuilding claims filed with the Navy by the Electric Boat Division of General Dynamics. The Subcommittee sought to subpoena sensitive Department documents from its investigative files while the matter was under active investigation before a sitting grand jury.³⁹

to Congress. . . . The President need not disclose to anyone in Congress the details of a treaty being negotiated. He may do so to enlist the support of legislators, but the invitation is voluntary on his part. He does so for political, not constitutional, reasons. Nor is the President under any obligation to share with members of Congress the plans of tactical military operations.

Id. at 205-06 (footnote omitted).

36. Compare *Myers v. United States*, 272 U.S. 52, 161-64 (1926) (The President's power to remove, like his power to appoint, was found to be important to his ability to carry out his constitutional duties and, therefore, was not subject to legislative approval.) with *United States v. Nixon*, 418 U.S. 683, 705 (1974) (Recognizing the interests of both the legislative and judicial branches in fulfilling their constitutional duties, the Court balanced the legislature's power of inquiry against the President's executive privilege and upheld an order for *in camera* review of Presidential documents.).

37. U.S. CONST. art. II, § 3.

38. The Supreme Court, in *Buckley v. Valeo*, 424 U.S. 1, 138-39 (1976), recognized that the prosecution of criminal, civil or administrative violations is quintessentially an executive function.

39. In conjunction with the Subcommittee on International Trade, Finance and Security Economics of the Joint Economic Committee, the Subcommittee on Administrative Practice and Procedure also sought documents relating to closed investigations of alleged false claims against the Navy by Lockheed and Newport News Drydock and Shipbuilding Company, a subsidiary of Tenneco, Inc. The Department agreed to turn over all material regarding these investigations that were not protected against disclosure by Federal Rules of Criminal Procedure 6(e). Letter from Assistant Att'y Gen. Stephen S. Trott to Subcommittee on Admin. Practice and Procedure, Comm. on the Judiciary 1-2 (Oct. 4, 1984) [hereinafter Trott Letter]. The Department also agreed to make available materials in the Electric Boat case "on the same basis" once the investigation in that

Consistent with longstanding executive branch practice, the Department declined to provide such documents on two grounds: 1) many of the documents sought constituted grand jury materials within the meaning of Rule 6(e) of the Federal Rules of Criminal Procedure, which prohibits the Department from disclosing matters occurring before a grand jury; and 2) the "constitutionally mandated separation of the executive and legislative functions" required those files not protected by Rule 6(e) to be held in confidence until the close of the investigation in order to preserve the credibility and integrity of the Department's prosecutorial and investigative operations. Premature release of the material from the investigative file could have damaged the confidence and cooperativeness of witnesses, the integrity of the case development, the independence of prosecutorial decisions, and the strategy of future prosecution.⁴⁰

Without articulating any basis for disagreement with the legal position taken by the Justice Department, the Subcommittee continued to press for release of documents pertaining to the Electric Boat investigation, threatening to "do whatever it must to enforce its subpoena" if its requests were not honored.⁴¹ After several more attempts to reach an accommodation, the Department ultimately agreed to turn over documents from its closed investigative files on Electric Boat, after redacting Rule 6(e) material, despite the belief that those documents were pertinent to

case was closed. *Id.* at 4.

40. The Department consistently refused the disclosure of such statements. Trott Letter of Oct. 4, *supra* note 39, at 3-4. See, e.g., Position of the Executive Department Regarding Investigative Reports, 40 Op. Att'y Gen. 45 (1941):

It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

Id. at 46.

41. Statement of the Subcommittee on Administrative Practice and Procedure accompanying Subpoena of Att'y Gen. (Oct. 5, 1984).

the ongoing investigation. The Subcommittee thereafter did not insist on documents from the Department's open investigative files.

The dispute over the Electric Boat files illustrates how difficult it may sometimes be for members of one branch — even Senators normally sensitive to such issues — to recognize the danger to separation of powers principles involved in the pursuit of certain institutional goals. In this case, congressional efforts to obtain access to information pertinent to ongoing criminal investigations seriously threatened to impinge upon authority vested by the Constitution in the executive branch. Article II of the Constitution places the power to enforce the laws squarely in the executive branch of government. The Executive therefore has the exclusive authority to enforce the laws adopted by Congress, and neither the judicial nor the legislative branches may encroach upon that authority by interfering with the prosecutorial discretion of the executive branch.⁴² The executive branch has an obligation flowing from the due process clause to insure that the fairness of its decisionmaking with respect to its prosecutorial function is not compromised by excessive congressional pressures. As the Supreme Court once stated: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."⁴³

For similar reasons, the executive branch has opposed proposed legislation to amend Rule 6(e) of the Federal Rules of Criminal Procedure to permit congressional access to grand jury materials.⁴⁴ Congressional access to Rule 6(e) materials would not aid the Executive in fair and efficient enforcement of the laws, but would interfere with the Executive's duty to enforce the law. Therefore, the Department of Justice has taken the position that "it would be inconsistent with both the separation of powers and due process clauses for Congress to become a part-

42. *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 456-57 (1869).

43. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810).

44. S. 1562, 99th Cong., 1st Sess. § 5(a) (1985).

ner in an investigation through its access to 6(e) materials.”⁴⁵

2. *Legislative Vetoes*

Until 1983, Congress for six decades often sought to interfere with executive branch responsibilities through use of legislative veto provisions in legislation delegating administrative and other authority to the Executive.⁴⁶ In the legislative veto's most common form, executive branch decisions could be reversed, within a specified time period, by a disapproval resolution of one or both Houses of Congress, or sometimes even a committee. Advocates of legislative vetoes found them to be pragmatic, efficient accommodations between the two branches by which Congress was willing to give broad discretion to the Executive in exchange for retaining the opportunity to review and disapprove the Executive's exercise of that discretion. They argued that in determining the constitutionality of the legislative veto, “[o]ne must consider not only the technical constitutional arguments [that] bear on the legitimacy of the veto, but . . . also . . . the institutional relationships within which the veto operates.”⁴⁷ Judged in this light, advocates contended, such vetoes were consistent with the aims of the separation of powers doctrine because they helped maintain the balance of power between the two political departments of government.⁴⁸

Opponents, on the other hand, argued that the legislative veto violated specific constitutional provisions prescribing the participation of both Houses of Congress in the exercise of the lawmaking power,⁴⁹ requiring presentment of legislation to the President,⁵⁰ and precluding congressional participation in the

45. Letter from Acting Assistant Att'y Gen. Phillip D. Brady to Honorable Strom Thurmond, Chairman of the Senate Committee on the Judiciary 10 (Oct. 22, 1985).

46. See, e.g., *Nixon v. Administrator of General Servs.*, 433 U.S. 425 (1977).

47. Abourezk, *supra* note 1, at 325.

48. See generally Abourezk, *supra* note 1; Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977); Miller & Knapp, *supra* note 1; Schwartz, *Legislative Veto and the Constitution — A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978). See also Bator, *supra* note 25, at 11.

49. U.S. CONST. art. I, §§ 1, 7.

50. *Id.* § 7, cls. 2, 3.

execution of enacted law.⁵¹ The bicameral requirement and the presentment clauses of the Constitution serve an essential constitutional function in preserving the balance of power between the legislative and executive departments. Moreover, once Congress has made its policy judgment by enacting a law, the legislative function comes to an end; the Constitution vests the implementation of that policy in the Executive. Accordingly, opponents argued, legislative vetoes were inconsistent with the scheme for maintaining the separation of powers spelled out in the Constitution.⁵²

Opponents also asserted that by enacting open-ended delegations with legislative vetoes, Congress was shirking its responsibilities: Congress should be dutybound to pass statutes that contain precise delegations limited by clear standards.⁵³ The legislative veto permitted Congress to avoid direct legislative responsibility for crucial policy choices by allowing it to react to perceived agency abuses without imposing a concomitant duty to enact more detailed statutory standards to guide future agency actions.⁵⁴

In 1983, the Supreme Court, in *Immigration and Naturalization Service v. Chadha*,⁵⁵ sided with opponents of the legislative veto and held the device unconstitutional. Concentrating on the procedural requirements of the Constitution, Chief Justice

51. The Constitution declares that the executive power shall be vested in the President, U.S. CONST. art. II, § 1; and grants the Executive exclusive authority to "take Care that the Laws be faithfully executed." *Id.* § 3.

52. See, e.g., Brief for the Immigration and Naturalization Serv. at 26-34, 44-56, *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (Nos. 80-1832, 80-2170, 80-2171); Motion for Leave to File and Brief of American Bar Association as *Amicus Curiae* at 7-15, 21-22, *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (Nos. 80-1832, 80-2170, 80-2171); Brief of Certain Members of the United States House of Representatives, *Amici Curiae* at 10-11, 23, *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (Nos. 80-1832, 80-2170, 80-2171); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1373-74 (1977). For a more thorough discussion of legislative vetoes, see generally Dixon, *The Congressional Veto and the Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423 (1978); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982).

53. See Motion for Leave to File and Brief of American Bar Association as *Amicus Curiae* at 23-26, *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (Nos. 80-1832, 80-2170, 80-2171); Martin, *supra* note 52, at 288-90.

54. See Bruff & Gellhorn, *supra* note 52, at 1427; Martin, *supra* note 52, at 289-90.

55. 462 U.S. 919 (1983).

Burger wrote for the Court that every legislative action requires bicameral congressional action and presentment to the President.⁵⁶ The Court defined "legislative action" broadly to include all actions with the "purpose and effect of altering the legal rights, duties, and relations of persons, including . . . Executive Branch officials . . . outside the Legislative Branch."⁵⁷ The legislative veto not only failed to comport with the procedures which Congress was constitutionally obligated to follow in passing legislation, it impermissibly interfered with the President's role in the lawmaking process by denying him the opportunity to veto legislation.⁵⁸

Notwithstanding *Chadha*, the debate over the legislative veto has continued. The current issue is whether Congress can accomplish the goals of the legislative veto using constitutional means. The most common proposal is for legislation that requires the executive branch to notify Congress of certain actions and thereafter to wait a specified period before implementing those actions in order to allow Congress to pass a joint resolution of approval, or disapproval, which would be presented to the President. One observer has stated that "[t]hese so-called 'report and wait' requirements were recognized by the Supreme Court in *Chadha* as a constitutionally acceptable alternative to the legislative veto."⁵⁹ However, Congress continues to enact "statutory mechanisms . . . to control current, planned, or proposed executive actions" that suffer from the same infirmities as the legislative veto.⁶⁰ For example, Congress has passed a number of appropriations acts after *Chadha* that include provisions empowering the Appropriations Committees of both Houses to approve or disapprove certain expenditures of funds without participation by both Houses of Congress and presentment to

56. *Id.* at 946-51.

57. *Id.* at 952.

58. *Id.* at 951-52.

59. Letter from Att'y Gen. William French Smith to Honorable George Bush, President of the Senate 6 (Nov. 21, 1984) (citing *Chadha*, 103 S. Ct. at 2783) [hereinafter DOJ CICA Letter]. See also *Chadha*, 462 U.S. at 935 n.9. See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-15 (1941) (Congress was authorized to review the Federal Rules of Civil Procedure before they became effective without violating the Constitution.).

60. Kaiser, *Congressional Control of Executive Actions in the Aftermath of the Chadha Decision*, 36 AD. L. REV. 239, 243 (1984).

the President.⁶¹ The President has objected vigorously to the inclusion of such committee veto provisions in appropriations bills and has urged Congress not to include them in the future.⁶²

3. *Congressional Impediments to Executive Branch Management*

Over the years, Congress has placed all types of restrictions in appropriations and other bills that limit the flexibility of the President and his agency heads to manage the government. Perhaps the most egregious example during recent years was the enactment of provisions in the Competition in Contracting Act of 1984 (CICA)⁶³ granting the Comptroller General the authority to lift the stay automatically imposed under CICA when a bid protest is filed,⁶⁴ and purporting to authorize the Comptroller General to make binding awards of attorneys' fees and bid preparation costs to successful bid protesters.⁶⁵

The Department of Justice refused to defend the constitutionality of these provisions because they authorize the Comptroller General, a legislative officer,⁶⁶ to act in an executive capacity by making binding decisions regarding the bid protest process.⁶⁷ As a practical matter, the Comptroller General could effectively suspend any procurement indefinitely simply by de-

61. *Id.* at 240, n.4, 243-44.

62. See Department of Housing and Urban Development — Independent Agencies Appropriation Act, 1985, 20 WEEKLY COMP. PRES. DOC. 1039-40 (July 18, 1984) (objecting to the inclusion of seven such legislative veto devices in the 1985 appropriations bill for the Department of Housing and Urban Development (HUD)). See also *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303, 306 (D.C. Cir. 1982) (declaring appropriations committee veto provision in earlier HUD appropriation bill unconstitutional).

63. The Competition in Contracting Act of 1984 was enacted as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).

64. 31 U.S.C. § 3553(c), (d) (Supp. III 1985).

65. 31 U.S.C. § 3554(c)(1) (Supp. III 1985).

66. The Comptroller General's post and duties and the General Accounting Office that he directs, were established by the Budget and Accounting Act of 1921, §§ 301-302, 31 U.S.C. §§ 701-779 (1982 & Supp. III 1985). The Act gives the Comptroller General the authority to investigate the receipt and disbursement of public funds and to settle and adjust all claims and accounts of the federal government. See *id.* §§ 712, 3526, 3702 (1982). Although the President has the power to appoint the Comptroller General, Congress may remove him for statutorily specified cause. See *id.* § 703(e)(1) (1982). This power of removal makes the Comptroller subservient to Congress and therefore an agent of the legislative branch. See *Bowsher v. Synar*, 106 S. Ct. 3181, 3191 (1986).

67. See DOJ CICA Letter, *supra* note 59, at 5, 9.

laying his decision on a bid protest for an indefinite period. Such authority amounts to a power that, in the words of the Supreme Court, has the "effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch."⁶⁸ In our view, as a constitutional matter, there is little difference between this power and the power of a legislative veto.

The provision permitting the Comptroller General to award costs against a federal agency, including attorneys' fees and bid preparation costs, to a prevailing protester, suffers from a similar constitutional infirmity. This is because by purporting to vest in the Comptroller General the power to award damages against an executive branch agency, Congress has attempted to give its agent the authority to "alter the legal rights, duties, and relations of persons . . . outside the Legislative Branch."⁶⁹ When Congress takes such actions, it must do so by passing a law and submitting it to the President in accordance with the presentment clauses.⁷⁰

It is also eminently arguable that the Comptroller General's authority to overrule the determinations of an executive branch agency and to assess costs and damages against it is judicial in nature, and belongs more properly to the judicial branch.⁷¹ If so, "Congress may no more exercise [such power] than it may exercise executive authority."⁷²

Despite these concerns, the Third Circuit Court of Appeals, in *Ameron, Inc. v. United States Army Corps of Engineers*,⁷³ has upheld the constitutionality of CICA's stay provisions as consistent with the principles of the separation of powers.⁷⁴ It concluded that Congress may legitimately investigate executive

68. *Chadha*, 462 U.S. at 952.

69. *Id.*

70. U.S. CONST. art. I, § 7, cls. 2, 3.

71. See DOJ CICA Letter, *supra* note 59, at 8; See also *Chadha*, 462 U.S. at 964-65 & n.8 (Powell, J., concurring) (wherein a similar argument, that the legislative review of an executive decision was an unconstitutional assumption of judicial duties by the legislature, was addressed).

72. DOJ CICA Letter, *supra* note 59, at 8.

73. 809 F.2d 979 (3d Cir. 1986).

74. *Id.* at 42-43. Because the Comptroller General had declined to order reimbursement of Ameron's costs, and because Ameron made no claim for reimbursement in its complaint, the court concluded that the constitutionality of CICA's fee provision was not ripe for judicial review. *Id.* at 988.

conduct in administering the procurement laws without enacting legislation and could properly delegate such investigative authority to one of its agents. Thus, "[a]bsent a usurpation of executive authority, or an unconstitutional interference with it, the Comptroller [General's] actions pursuant to CICA [in the court's view] represent[ed] a proper exercise of congressional [oversight] authority."⁷⁵

The court found that CICA's stay provisions did not authorize the Comptroller General to usurp executive authority because

[t]he only grant of power to the executive [branch] in CICA [was] the right, under certain circumstances, to override the ninety day stay or any extension thereof which the Comptroller General might impose. CICA [did] not grant. . . authority to the Comptroller General to dictate how the executive [exercised its] authority to override the stay.⁷⁶

The court also found that CICA did not otherwise authorize the Comptroller General to execute the procurement laws for three reasons. First, execution of the procurement laws involved making decisions about the time and price of purchases, and from whom those purchases could be made. Further, the Comptroller General, was authorized to consider only the length of time necessary to resolve a bid protest when deciding whether to extend or shorten the stay. Second, even if the Comptroller General decided that more time was necessary, the executive was not always required to obey the Comptroller General's extension of the stay;⁷⁷ and third, the executive was free to ignore the Comptroller General's recommendation on the merits of the protest.⁷⁸

75. *Id.* at 993.

76. *Id.* at 994.

77. *Id.* at 995. Before a purchase decision has been made the statute permits override of the stay if "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General." 31 U.S.C. § 3553(c)(2)(A) (Supp. III 1985).

78. *Ameron*, 809 F.2d at 995. The court stated that "[i]f agencies choose not to implement the Comptroller General's recommendations, they are bound only to report their reasons." *Id.* at 995 (citing 31 U.S.C. § 3554(e)(1)). The statutory provision, however, states only that "[t]he head of the procuring activity responsible for the solicitation, proposed award, or award of the contract shall report to the Comptroller General, if the Federal agency has not fully implemented those recommendations within 60 days of receipt of the Comptroller General's recommendations under subsection (b) of this sec-

Finally, the court held that CICA did not authorize the Comptroller General to interfere impermissibly with the Executive's performance of its procurement duties. Although it acknowledged that the Comptroller General's authority to lengthen or shorten the stay might affect executive decisionmaking, "a balancing of legislative and executive interests demonstrate[d] that this interference [was] entirely justified," especially in light of the fact that "any potential disruption of the executive function [was] minimal."⁷⁹ More significantly, the court concluded, "CICA effectuate[d], rather than disrupt[ed], the 'proper balance' of power between the executive and legislative branches."⁸⁰

In his concurrence, Judge Garth asserted that a reexamination of the whole statute was unnecessary. He focused only on "the critical and challenged portion of the legislation, rather than the entire enactment itself."⁸¹ Judge Garth determined that whether the stay provision was consistent with the constitutional separation of powers turned on "an assessment of the degree of the alleged intrusion into the authority of the coordinate branch."⁸² Concluding that "the very limited power granted to the Comptroller General under CICA [did] not undermine the role of the Executive Branch," he determined that the stay power "[did] not . . . violate separation-of-powers principles."⁸³

The problem with the majority and concurring opinions in *Ameron* is that neither assesses the validity of CICA's stay authority in light of specific constitutional provisions;⁸⁴ both rely

tion." 31 U.S.C. § 3554(e)(1) (emphasis added). It does not state that the procuring head may ignore the Comptroller General's recommendation.

In any event, before the Comptroller General rules on the protest, the statute prevents the contracting agent from awarding the challenged contract, or from allowing performance of a contract already awarded, except in "urgent and compelling circumstances" significantly affecting the interests of the United States. Only after the Comptroller General rules is the agency freed from this statutory restraint. See *id.* § 3553(c).

79. *Ameron*, 809 F.2d at 997.

80. *Id.* at 998.

81. *Id.* at 1001 (Garth, J., concurring).

82. *Id.* at 1000.

83. *Id.* at 1001.

84. The majority refers once to "[t]he President's duty under the Constitution 'to take care that the laws are faithfully executed,' [which] is accompanied by the grant of 'the executive power.'" *Ameron*, 809 F.2d at 993 (citations omitted).

instead on generalized notions about separation of powers to conclude that the limited intrusion into executive functions occasioned by the stay authority did not unduly upset the balance of power between the executive and legislative branches and was therefore constitutional.

In our view, however, the authority vested in the Comptroller General by virtue of CICA, when analyzed under the actual text of the Constitution, goes beyond the authority that may be constitutionally exercised by an agent of Congress. Because the statute endows the Comptroller General with power to dictate when — and by delaying decision — even *if* a procurement may proceed, it gives him power to “alter legal rights, duties, and relations of persons . . . outside the Legislative Branch.”⁸⁵ As *Chadha* recognizes, the exercise of such power is constitutionally permissible only through bicameral action by Congress and presentment to the President.⁸⁶ The exercise of authority granted to the Comptroller General under the stay provision of CICA fails to comport with these requirements.

In addition, the Constitution confers the executive power on the President,⁸⁷ and imposes on the Executive the responsibility to “take Care that the Laws be faithfully executed.”⁸⁸ As the Supreme Court has stated, “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”⁸⁹ Under CICA, the Comptroller General is empowered to determine whether a particular protest is “frivolous,” whether it “state[s] a valid basis for protest,” or whether “the specific circumstances of the protest”⁹⁰ require staying performance of the government’s contract for longer than the statutory period.⁹¹ Clearly, the Comptroller General is executing the law, because in discharging these responsibilities, he interprets provisions of CICA and must exercise judgment regarding facts

85. *Chadha*, 462 U.S. at 952.

86. See generally *id.* at 946-51 (discussing the presentment clause and the principle of bicameralism as contained in the Constitution and their relationship to one another).

87. U.S. CONST. art. II, § 1, cl. 1.

88. *Id.* § 3.

89. *Bowsher v. Synar*, 106 S. Ct. 3181, 3192 (1986).

90. 31 U.S.C. § 3554(a)(3) (Supp. III 1985).

91. *Id.* § 3554(a)(1).

affecting the implementation of the Act.⁹² As the Justice Department argued in its brief before the Third Circuit, by placing responsibility for execution of the law in the hands of an officer who is an agent of Congress, Congress impermissibly retained control over the execution of the procurement laws and unconstitutionally intruded into the executive function.⁹³

B. One Branch Impermissibly Assumes the Functions of Another Branch

Basic to our constitutional structure of government is the recognition that each branch is supreme "within its own assigned area of constitutional duties."⁹⁴ Accordingly, no branch, consistent with the Constitution, may arrogate to itself or to its officers the powers conferred on the other branches.

1. Congressional Vesting of Article III Power in Non-Article III Judges

In 1978, Congress enacted a comprehensive revision of the bankruptcy laws called the Bankruptcy Reform Act of 1978.⁹⁵ Before the 1978 Act, the district courts served as bankruptcy courts and used "referees" to conduct bankruptcy proceedings.⁹⁶ The referee's final order was appealable to the district court.⁹⁷ The 1978 Act eliminated the referee system and established a United States Bankruptcy Court as an adjunct to each district court.⁹⁸ The judges of this new bankruptcy court were appointed to office for fourteen-year terms by the President, with the advice and consent of the Senate.⁹⁹ They were subject to removal by the "judicial council of the circuit" on account of "incom-

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

93. Brief for Defendants-Appellants at 20-26, *Ameron, Inc. v. United States Army Corps of Eng'rs*, Nos. 85-5226 & 85-5377, slip op. (3d Cir. Dec. 31, 1986). See also *Bowsher*, 106 S. Ct. at 3192.

94. See *United States v. Nixon*, 418 U.S. 683, 705 (1974).

95. Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-151326 (1982 & Supp. III 1985)).

96. See Bankr. R. 102, 11 U.S.C. App. § 101.

97. Bankr. R. 801, 11 U.S.C. App. § 101.

98. 28 U.S.C. § 151 (Supp. III 1985).

99. *Id.* 152(a)(1). See also *id.* § 153 (duties and responsibilities of Bankruptcy Judges).

petenc[y], misconduct, neglect of duty, or physical or mental disability.”¹⁰⁰ In addition, the salaries of the bankruptcy judges were set by statute¹⁰¹ and were subject to adjustment under the Federal Salary Act.¹⁰²

Although the bankruptcy judges were not accorded the protections of article III judges,¹⁰³ the new Bankruptcy Court was granted jurisdiction over all “civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under title 11.”¹⁰⁴ This grant of jurisdiction essentially empowered the new bankruptcy judges to adjudicate constitutional and state-created rights. For this reason, the Supreme Court, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,¹⁰⁵ held the Act unconstitutional as an impermissible incursion into the judicial power.¹⁰⁶

The plurality of the Court in *Marathon* recognized that Congress retained broad power to prescribe the manner in which rights that it creates may be adjudicated — including the assignment to a non-article III officer of some of the functions historically performed by judges.¹⁰⁷ However, it concluded that Congress could not remove from article III authority matters falling within the purview of the judicial power — particularly the adjudication of rights Congress did not create.¹⁰⁸ Because the Act “removed most, if not all, of ‘the essential attributes of the judicial power’” of article III courts over such issues and vested them in article I adjuncts, Congress impermissibly assigned article III power to non-article III officers.¹⁰⁹

Two justices concurred in the judgment. They concluded that the Court need only have decided whether the Bankruptcy

100. *Id.* at § 152(e).

101. *Id.* at § 153.

102. 2 U.S.C. §§ 351-61 (1982 & Supp. III 1985).

103. See U.S.CONST. art. III, § 1: “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.”

104. 28 U.S.C. § 1471(b) (Supp. III 1985).

105. 458 U.S. 50 (1982).

106. *Id.* at 87.

107. *Id.* at 80.

108. *Id.* at 83-84.

109. *Id.* at 87.

Court's exercise of jurisdiction in this case — involving only a state law contract claim — was constitutional. Nevertheless, the concurring justices agreed that to the extent that the Bankruptcy Act of 1978 allowed non-article III judges to adjudicate such a claim, the Act violated article III of the Constitution.¹¹⁰ Thus, both the plurality and concurring opinions agreed that the adjudication of actions, which are traditionally tried by the courts at common law, was at the core of the judicial power and that only article III judges could exercise such power.¹¹¹

2. *Congressional Assumption of Appointment Power*

The appointments clause of the Constitution¹¹² provides in pertinent part that the President shall appoint, with the advice and consent of the Senate, all officers of the United States whose appointments are not otherwise provided for, and that “the Congress may by Law vest the Appointment of such inferior officers, as [it] think[s] proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”¹¹³ In recent years, Congress has attempted to appoint officers of the United States in violation of the clause.¹¹⁴ For example, provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984¹¹⁵ retroactively extended the terms of bankruptcy judges whose terms had expired and thereby unconstitutionally usurped executive appointment authority.

The 1984 Act created a new bankruptcy court system to replace the system established under the Bankruptcy Reform Act of 1978 which had been declared unconstitutional in the *Mara-thon* case, and vested the power to appoint bankruptcy judges to that system in the courts of appeals.¹¹⁶ The 1978 Act had contained a four-and-one-half-year transition period before the bankruptcy court structure under the Act was to take effect. After the Supreme Court declared this new structure unconstitu-

110. *Id.* at 91 (Rehnquist, J., concurring).

111. *Id.* at 69-70 & n.23; *id.* at 89-91.

112. U.S. CONST. art. II, § 2, cl. 2.

113. *Id.*

114. See *Buckley v. Valeo*, 424 U.S. 1, 127 (1976).

115. Pub. L. No. 98-353, 98 Stat. 333 (1984).

116. 28 U.S.C. § 151 (Supp. III 1985). See also *supra* notes 91-96 and accompanying text.

tional in *Marathon*,¹¹⁷ Congress enacted various interim measures to extend the transition period, the last extension expiring on June 27, 1984.¹¹⁸

The 1984 Act, however, was not enacted until July 10, 1984. Therefore, Congress sought to cure the problem of the gap in service by including section 121(e) to extend the term of all bankruptcy judges to the day of enactment of the Act if they were serving when the bankruptcy court emergency authorization provisions expired on June 27, 1984.¹¹⁹ Section 106(a) extended these retroactive appointments so that their terms would expire on the date "four years after the date such bankruptcy judge was last appointed to such office or on October 1, 1986, whichever [was] later."¹²⁰

In refusing to defend sections 106(a) and 121(e) of the Act, the Department of Justice took the position that these provisions violated the appointments clause.¹²¹ The bankruptcy judges' offices and terms had expired on June 27, and the July 10 retroactive reappointment was an improper congressional usurpation of the executive branch's appointment power.¹²²

To date, no court has embraced the Department's constitutional argument.¹²³ The courts' constitutional analysis, however, typically has focused on the reasonableness of the retroactive extensions of the bankruptcy judges' terms in light of the purposes of the appointments clause and the aims of the separation of powers. For example, noting that Congress could constitutionally make changes in the duties of any office it creates, including the length of the term of service, as long as it did not impair the appointment power, the Fifth Circuit held:

Under the limited circumstances of this case, it is clear that the

117. See *supra* notes 98-104 and accompanying text.

118. Pub. L. No. 98-249, 98 Stat. 116 (1984); Pub. L. No. 98-271, 98 Stat. 163 (1984); Pub. L. No. 98-299, 98 Stat. 214 (1984); Pub. L. No. 98-325, 98 Stat. 268 (1984).

119. Pub. L. No. 98-353, § 121(e), 98 Stat. 333, 346 (1984).

120. Pub. L. No. 98-353, § 106(a), 98 Stat. 333, 342 (1984).

121. See Letter from Att'y Gen. William French Smith to Honorable George Bush, President of the Senate 1-2 (Sept. 5, 1984).

122. *Id.* at 4-5.

123. See, e.g., *Koerner v. Colonial Bank*, 800 F.2d 1358, 1362-66 (5th Cir. 1986); *Tom Carter Enters., Inc. v. Lummis*, 44 Bankr. 605, 608 (C.D. Cal. 1984); *In re Benny*, 44 Bankr. 581, 589 (N.D. Cal. 1984), *appeal dismissed*, 791 F.2d 713 (9th Cir. 1986), *aff'd on recertification by district court*, 812 F.2d 1133 (9th Cir. 1987).

action of Congress was a *constitutionally reasonable* change in the term of an existing office.

The gap was minimal. Its occurrence was plainly accidental and the response was both consistent with past action and reasonable.

To the remote extent the Appointments Clause can be said even to be implicated in this scenario, there was no Congressional intent to violate it.

*Congress did not . . . upset the constitutional symmetry among the branches.*¹²⁴

The Northern District of California, held that the 1984 Act was "well within the long established constitutional limits of Congressional power and [did] not violate the letter or spirit of the Appointments Clause or the separation of powers doctrine it embraces."¹²⁵ The court stated:

[T]he need for "a workable government" justifies the retention of interim or transitional bankruptcy judges to preserve the bankruptcy system despite the passage of less than two weeks from the expiration of the 1978 Act until the enactment and effectiveness of the 1984 Act.

To conclude that Congress' retroactive extension of bankruptcy judges' terms constitutes new "appointments" would . . . be to "trivialize the great historic experience on which the Framers based the safeguards" of the Appointments Clause.¹²⁶

Whether the gap in the bankruptcy judges' terms was accidental, and whether Congress sought to further some desirable legislative purpose rather than to usurp the functions of a coordinate branch,¹²⁷ the fact remains that the terms of the transitional bankruptcy judges had in fact lapsed. Once this occurred, their offices terminated and they ceased to be bankruptcy judges. In our opinion, they could not again become bankruptcy judges except by new appointments made pursuant to article II. Technical? Perhaps. But sections 106(a) and 121(e) of the 1984 Amendments circumvented the strictures of article II by making

124. *Koerner*, 800 F.2d at 1367 (emphasis added).

125. *Benny*, 44 Bankr. at 596.

126. *Id.* at 597-98.

127. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.").

bankruptcy judges officers of the United States once more, even though their selection was accomplished by neither of the methods prescribed in the appointments clause, but rather by legislative command. As a result, Congress had assumed for itself functions delegated by the Constitution to the other two branches.¹²⁸

3. *Federal Balanced Budget Act*

Perhaps the most recent example of congressional assumption of executive powers occurred in the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman).¹²⁹ Gramm-Rudman imposes a ceiling on the federal deficit for each fiscal year from 1986 to 1991.¹³⁰ The Act directs the Comptroller General to review reports submitted by the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) and, on the basis of those reports, to calculate and order budget reductions.¹³¹ The Act also directs the Comptroller General to report his conclusions to the President, who is in turn required to issue an initial "sequestration" order mandating the spending reductions specified by the Comptroller General.¹³² Within a certain period, Congress may reduce spending by legislation to obviate, in whole or in part, the need for the sequestration order; but if such reductions are not enacted, the sequestration order becomes effective and the spending reductions included in that order have to be made.¹³³

The Act also contains a fallback provision, to take effect in the event a court may hold the reporting procedures unconstitutional, whereby the directors of OMB and CBO would submit their reports directly to a Joint Committee on Deficit Reduction, composed of the entire membership of the Budget Committees of both Houses. That committee would propose a joint resolu-

128. See *Benny*, 44 Bankr. at 592-98 (The court examines but rejects the argument that Congress exceeded its constitutional powers in violation of the appointments clause when it made its bankruptcy judge appointments retroactive.).

129. 2 U.S.C. §§ 901-922 (Supp. III 1985).

130. See *id.* § 901(a)(3). If in any fiscal year the federal deficit exceeds the ceiling by more than a specified amount, the Act requires across-the-board cuts in federal spending to reach the targeted deficit level. See *id.*

131. See *id.* § 901(b)(1).

132. See *id.* § 902(a)(1).

133. See *id.* § 902(a)(6)-(b)(3).

tion to both Houses of Congress, which, if enacted, would serve as the basis for a presidential sequestration order.¹³⁴

Proponents of the Act's constitutionality argued that despite Congress' power of removal, the Comptroller General was functionally independent of the legislative branch,¹³⁵ that the duties assigned to the Comptroller General, though involving him in the interpretation and application of the law, were appropriate for an independent agent of government to perform,¹³⁶ and that a "technical" separation of powers challenge to the validity of the Act should not be allowed to nullify a legislative experiment which sought to address a difficult national problem.¹³⁷

In *Bowsher v. Synar*,¹³⁸ however, the Supreme Court held the Act's reporting provisions unconstitutional.¹³⁹ It found that the duties assigned to the Comptroller General under the Act required him to exercise judgment concerning facts that affected the application of the Act, and to interpret the provisions of the Act to determine what budgetary calculations were required. These duties "plainly entail[ed] execution of the law in constitutional terms."¹⁴⁰ Thus, "[b]y placing responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect . . . retained control over the execution of the Act and . . . intruded into the executive function."¹⁴¹ In contrast to the arguments advanced by proponents of the Act, the Su-

134. See *id.* § 922(f).

135. See Brief of Appellant United States Senate at 18-25, *Bowsher v. Synar*, 106 S. Ct. 3181 (1986) (Nos. 85-1377, 85-1378, 85-1379); Brief of the Speaker and Bipartisan Leadership Group of the House of Representatives, Intervenor-Appellants at 59-69, *Bowsher* (Nos. 85-1377, 85-1378, 85-1379).

136. See Brief of Appellant United States Senate at 12-13, *Bowsher* (Nos. 85-1377, 85-1378, 85-1379); Brief of the Speaker and Bipartisan Leadership Group of the House of Representatives, Intervenor-Appellants at 13-18, *Bowsher* (Nos. 85-1377, 85-1378, 85-1379).

137. See Brief of the Speaker and Bipartisan Leadership Group of the House of Representatives, Intervenor-Appellants at 18-25, *Bowsher* (Nos. 85-1377, 85-1378, 85-1379).

138. 106 S. Ct. 3181 (1986).

139. *Id.* at 3192.

140. *Id.* The Court reasoned, "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Id.*

141. *Id.*

preme Court's separation of powers analysis in *Bowsher* was squarely rooted in the Constitution:

The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. The President appoints "Officers of the United States" with the "Advice and Consent of the Senate. . . ." Once the appointment has been made and confirmed, however, the 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. An impeachment by the House and trial by the Senate can rest only on "Treason, Bribery or other high Crimes and Misdemeanors." 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.¹⁴²

To cure the separation of powers violation, the Court was urged to invalidate the provisions of the Budget and Accounting Act of 1921 authorizing Congress to remove the Comptroller General instead of nullifying the reporting procedures of Gramm-Rudman.¹⁴³ The Court determined, however, that severance of the removal provisions from the 1921 Act would "recast the Comptroller General as a [member] of the executive branch [and] alter the balance that Congress had in mind in drafting the Budget and Accounting Act of 1921 and the Balanced Budget and Emergency Deficit Control Act, [not to mention] a wide array of other tasks and duties Congress has assigned the Comptroller General in other statutes."¹⁴⁴ The Court therefore concluded that allowing the fallback provisions to come into play would more closely effect congressional intent.¹⁴⁵

IV. Conclusion

This Article has attempted to provide an analytical approach to understanding our Constitution's allocation of the powers of national government and to addressing interbranch conflicts. It presumes that the Constitution is law, the supreme

142. *Id.* at 3187 (citations omitted).

143. *See id.* at 3192-93.

144. *Id.* at 3193.

145. *Id.*

law of the land, and that for the Constitution to be authoritative, it must be considered to provide the rules for deciding when a branch of government can or cannot act. In analyzing separation of powers issues, our government and our Constitution is ill-served by resort to abstract conceptual notions about governmental power; support for any act of government must be derived from the text of the document itself.

Where the text of a particular constitutional provision is ambiguous or vague, resort may be had to other sources indicating the intent of those who drafted, proposed, and ratified its provisions and amendments, including the actual tripartite division of government itself. Of course, the aim of any *extratextual* analysis is only to elucidate the meaning of the actual constitutional text at issue.

These rules of construction are justified by the fact that the Constitution manifests the written will of the sovereign citizens of the United States — “[we] the people” assembled in the conventions and legislatures that ratified the Constitution and its amendments — and as such is supreme, restraining all branches of the government. Indeed, the rationale for judicial review rests on the fact that we have a written Constitution with an ascertainable and permanent meaning that is binding upon all of us, including our judges.¹⁴⁶

While these interpretive rules are the same for all constitutional provisions, the bulk of the original Constitution’s provisions devoted to the structure of the national government, happily, speaks in clear, unambiguous terms and may be easier to interpret than others: “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.”¹⁴⁷ No background inquiry into “purpose” and “intent” is generally necessary, other than to ascertain that the original understanding of the terms used comports with the meaning of these terms today. In fact, as the dissenting opinion in *Immigration and Naturalization Service v. Chadha*¹⁴⁸ illustrates, inquiry into more generalized intent in the face of explicit provisions can

146. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 181 (1803).

147. U.S. CONST. art. I, § 7, cl. 2.

148. 462 U.S. 919, 977-80 (1983) (White, J., dissenting).

be dangerous because such inquiries are more easily manipulated than are straightforward textual arguments.

This is not to suggest that determining the validity of an exercise of power is always easy. Certainly, legitimate differences of opinion over the scope of each branch's authority will continue to exist. However, as this Article suggests, the proper approach to resolving separation of powers disputes must start with an analysis of the Constitution's provisions establishing the structure of government and enumerating its powers. First, it must be determined whether an exercise of government power is authorized by the Constitution. Second, the exercise of power cannot violate any limitations found elsewhere in the Constitution, including such limitations as are implicit in the grant of specific powers to another branch. Stated somewhat differently, no branch may impermissibly interfere with the exercise of powers conferred on another branch or assume for itself powers committed to another branch.