SEPARATION OF POWERS: THE THIRD CIRCUIT DIMENSION

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I. INTRODUCTION

This is a subchapter in the never-ending, ever-confusing saga of the separation of powers doctrine. It is a little-noticed but nonetheless significant subchapter written by the United States Court of Appeals for the Third Circuit. It is composed of three recent opinions of that court portraying three differing scenarios of the separation maxim: *Ameron, Inc. v. United States Army Corps of Engineers* (*Ameron I*);[1] *Ameron, Inc. v. United States Army Corps of Engineers* (*Ameron II*);[2] and *United States v. Frank*.[3]

The main chapters of the separation story are penned of course by the Supreme Court. The Court has witnessed an increase in separation of powers cases in recent times. Since 1974, the Court has made at least eleven significant pronouncements on varying aspects of the doctrine.[4] This concentrated proliferation is due in large part to the executive branch's escalating attempts to use the separation doctrine as a justiciable weapon in

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1 787 F.2d 875 (3d Cir.), *aff'd as modified*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 297 (1988).

2 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 297 (1988). *Ameron II* was a decision on rehearing by the same Third Circuit panel that decided *Ameron I*.

3 864 F.2d 992 (3d Cir. 1988). The Third Circuit has also held, without extended discussion, that separation of powers principles do not preclude Congress from acting, in accordance with its vested power to regulate territories of the United States, to authorize the Department of Interior to audit the judicial body known as the Territorial Court of the Virgin Islands. Territorial Court of the V.I. v. Richards, 847 F.2d 108, 112 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 390 (1988).

4 Mistretta v. United States, 109 S. Ct. 647 (1989); Morrison v. Olson, 108 S. Ct. 2597 (1988); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787 (1987); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Bowsher v. Synar, 478 U.S. 714 (1986); Thomas v. Union Carbide Co., 473 U.S. 568 (1985); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Nixon v. Administrator of Gen. Serv., 433 U.S. 425 (1977); Buckley v. Valeo, 424 U.S. 1 (1976); United States v. Nixon, 418 U.S. 683 (1974).

its long-standing and wide-ranging power struggle with the legislative branch. The executive branch has long exhibited what Chief Justice Burger once described as the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power."[5] In the last decade or so, the "hydraulic pressure" within the executive branch has induced it to make more and more court challenges to congressional legislation that in some manner steers executive functions away from officials or agencies under the direct control of the President.

The basic problem facing the Court during this on-going power struggle has been to accommodate "the enormously complex and varied structure of the federal government, as it has grown over the years, to the Constitution's provisions for distributing the power of government among three named heads of authority, each of which in contemplation performs a unique function."[6] The Court's responses to that problem have fluctuated wildly, almost from case to case, and usually accompanied by bitter dissents. Sometimes the Court has treated the separation doctrine as requiring a rigid compartmentalization of the three branches of government. At other times, especially during the most recent past, the Court has viewed the doctrine as dividing the three departments in a flexible and functional manner, and as having the capacity to blend the separate powers so as to create an internal interbranch scheme of oversight, checks and balances.[7]

The three Third Circuit decisions involving the separation doctrine must be viewed against this explosive and controversial backdrop of Supreme Court jurisprudence. We first examine the status of that jurisprudence during the past fifteen years, including the period when the Third Circuit was attempting to divine

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[5] Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

[6] Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 488 (1987).

[7] *See* THE FEDERALIST No. 48, at 332 (J. Madison) (J. Cooke ed. 1961).

> It was shewn in the last paper [The Federalist No. 47] that the political apothegm there examined [the separation doctrine] does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to shew that unless these departments be so far connected and blended as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained.

Id.

and follow the Court's violent doctrinal crosswinds. We then pass judgment on how well the Third Circuit performed its task.

II. FUNCTIONALISM AT THE SUPREME COURT

Striking vacillations in the Court's approach to the separation doctrine occurred during the reign of Chief Justice Burger. The Court alternately swung between a literalist or simplistic approach and a functional or pragmatic approach that balances the conflicting interests of the competing branches. The literalist approach, hewing closely to the constitutional text, is an unruly child of modern theories of interpretivism. It is grounded in the belief that the three great branches of government "should be kept separate in all cases in which they were not expressly blended."[8] On the other hand, the functional version contemplates that Congress "will integrate the dispersed powers into a workable government [and] enjoins upon [the] branches separateness but interdependence, autonomy but reciprocity."[9]

As illustrated by its decisions in *Immigration & Naturalization Service v. Chadha*[10] and *Bowsher v. Synar*,[11] the Burger Court was

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[8] Myers v. United States, 272 U.S. 52, 116 (1923). The *Myers* approach was refined and restated in Springer v. Philippine Islands, 277 U.S. 189 (1928), where the Court declared:

> It may be stated then, 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. The existence . . . of occasional provisions expressly giving to one of the departments powers which fall within the general scope of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.

Id. at 201-02. *See* Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1137 (1988).

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

[10] 462 U.S. 919 (1983). The *Chadha* Court invalidated the one-House veto device on the simplistic notion that Congress can take action that is "essentially legislative in purpose and effect," and that has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," only by literally following the bicameral-presentment procedures prescribed by Article I, section 7 of the Constitution. *Id.* at 952. That so confining the legislative role of Congress to the bicameral-presentment procedures might "impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable" was said by the Court to be one of "those hard choices" made by the Framers "who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *Id.* at 959. *See generally* B. CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE (1988).

[11] 478 U.S. 714 (1986). *Bowsher* held that the Comptroller General is sub-

capable of applying the separation doctrine in its most literal and formal sense. Such decisions were premised on the notion that the constitutional language vesting each of the three basic governmental functions in a separate branch is a reflection of the Framers' respect for Montesquieu's "warning" that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[12] Similarly, as James Madison wrote: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny."[13]

By this reading of history, if we are to avoid tyranny or the loss of liberty, we must confine each branch to the performance of its designated function, with no blending or intermixing of the three functions unless expressly allowed by the Constitution. Legislative functions can be performed only by Congress, acting in a bicameral fashion. Executive functions can be performed only by the "unitary" Executive, or by those executive agents subject to the President's direct control. Judicial functions can be performed only by Article III courts and judges.

But constructing such a strict view of separation on a few out-of-context remarks by Montesquieu and Madison is both intellectually dishonest and historically inaccurate. This construction is also productive of much mischief in accommodating the

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servient to Congress because he is removable only at the initiative of Congress and thus he could not be assigned any powers or functions that were "executive in nature," pursuant to the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act), 99 Stat. 1038 (1985) (codified as amended in scattered sections of 2, 31 & 42 U.S.C.). The Comptroller General's functions under that Act included interpreting the statute and exercising independent judgment as to the expenditure reductions necessary to reduce the national deficit to the targeted amounts. Such functions were viewed "as plainly entailing execution of the law in constitutional terms," and the Comptroller General's decisions were of the kind "typically made by officers charged with executing a statute." *Bowsher*, 478 U.S. at 732-33. Thus the Court concluded that "in effect" Congress "has retained control over the execution of the Act and has intruded into the executive function" contrary to the separation of governmental powers. *Id.* at 734. The *Bowsher* Court also repeated its *Chadha* proclamation that literal application of the separation doctrine is necessary even though it produces inefficient and even unworkable governmental processes, for "[c]onvenience and efficiency are not the primary objectives — or the hallmarks — of democratic government." *Id.* at 736 (quoting Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983)).

[12] *Bowsher*, 478 U.S. at 722. This statement of Montesquieu was also quoted in early writings of James Madison. *See* THE FEDERALIST No. 47, at 325 (J. Madison) (J. Cooke ed. 1961).

[13] THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

separation doctrine—and it is nothing more than a doctrine, a maxim, a theory—to the complexities and necessities of modern government. It is simply wrong to ascribe to those two separation oracles the notion that the functions delegated to each branch are exercisable only by members of that branch, with no functional intermixture allowed. In the same *Federalist Papers* in which the much-quoted "tyranny warnings" of Montesquieu and Madison appear, James Madison is quick to add (in a passage never quoted in such opinions as *Chadha* and *Bowsher*) that Montesquieu "did not mean that these departments ought to have no *partial agency* in, or no *controul* over, the acts of each agency," and that Montesquieu only meant to warn against the exercise of "the *whole* power of one department . . . by the same hands which possess the *whole* power of another department."[14] Madison himself devoted most of his *Federalist Paper No. 47* to a demonstration that in the states with constitutions emphatically proclaiming the separation axiom "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct."[15] Madison then dedicated his *Federalist Paper No. 48* to the proposition that "unless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained."[16]

A fair and a full reading of the *Federalist Papers* confirms that neither Montesquieu nor Madison ever advocated that high walls forever separate the legislative, executive and judicial functions, as distinct from the three separate branches or departments created to execute those functions.[17] Rather, they viewed the sepa-

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[14] *Id.* at 325 (emphasis in original). Justice Brennan, writing for the Court in Nixon v. Administrator of Gen. Serv., 433 U.S. 425 (1977), relied upon this explanation of Montesquieu's vision of the separation doctrine as an affirmation of "the more pragmatic, flexible approach of Madison in the Federalist Papers." *Nixon*, 433 U.S. at 422. Justice Brennan declared further that such approach had earlier been expressly affirmed by the Court. *Id.* at 442 n.5 (citing United States v. Nixon, 418 U.S. 683 (1974)). Chief Justice Burger, writing a dissenting opinion, disputed the significance of the Montesquieun reference to one department exercising the "*whole* power" of another department, stating that this did not purport to be Montesquieu's total treatment of the separation doctrine. *Id.* at 511 n.6 (Burger, J., dissenting). For a discussion of Justice Scalia's position regarding this historical debate, see Mistretta v. United States, 109 S. Ct. 647, 682-83 (1989) (Scalia, J., dissenting).

[15] THE FEDERALIST No. 47, at 327 (J. Madison) (J. Cooke ed. 1961).

[16] *Id.* at 332.

[17] *See* L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 391 (1988).

ration doctrine as a two-part proposition. First, the "whole" of the vested functions of any one branch must not be exercised by another branch, for that indeed breeds tyranny. Conversely, something less than the "whole" of one branch's functions, though not what we like to call its "core" functions, can be dispersed among the other branches to the extent that Congress deems it necessary and proper. The original separation doctrine thus becomes a justification for the modern practice of delegating to one branch or to an independent agency certain functions or "quasi-functions" that normally belong to another branch. This process may blur some of the separateness of the three governmental functions. But it makes possible, without doing violence to the original design of the separation doctrine, the creation of a more efficient governmental structure to achieve those national policies and programs that Congress believes cannot or should not be administered exclusively by the executive branch.

The Burger Court's patent refusal in some of its major separation cases to acknowledge and follow the original concept of separation was undoubtedly one reason that led Justice White, who has consistently dissented in such cases, to accuse the Court of having interposed a "distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives through the means chosen by the Congress and the President in the legislative process established by the Constitution."[18] Justice White has also found the Burger Court guilty of "constitutional myopia" in its separation analysis.[19] Other critics

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Professor Levy adds: "No Court that cared a fig for original intent and had any historical competence would have declared the Gramm-Rudman-Hollings Act unconstitutional on separation-of-powers grounds [as it did in *Bowsher v. Synar*]." *Id.* at 391-92. The Court's subsequent opinion in Mistretta v. United States, 109 S. Ct. 647 (1989), does show much more historical competence, including a more complete reading and awareness of Madison's views as expressed in the Federalist Papers.

[18] Bowsher v. Synar, 478 U.S. 714, 759 (1986) (White, J., dissenting).

[19] Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216, 1217 (1983) (White, J., dissenting). *Process Gas* was one of several summary decisions that applied the *Chadha* precedent to outlaw the use of the one-House veto device with reference to regulations proposed by independent regulatory agencies. Justice White characterized these summary cases as casting "further light on the destructiveness of the *Chadha* holding." *Id.* Justice White has written eloquent and penetrating dissents from the Court's treatment of the separation problems in three recent cases. *See Bowsher*, 478 U.S. at 714, 759 (White, J., dissenting); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 967 (1983) (White, J., dissenting); Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 92 (1982) (White, J., dissenting).

have found the formalistic separation view "vulnerable to a wide range of objections relating to the appropriate characterization of the framers' intent, the problem of interpretative intent, and the question how intent should be treated in unforeseen circumstances."[20]

Moreover, the formalistic view simply does not describe accurately how our modern federal government works, how there must be a constant interplay between the legislative and executive branches. Nor does it permit the kind of interior governmental structure whereby, in Madison's words, the "several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[21] Congressional oversight and internal checks and balances are among the necessities of modern government, and when the Court applies a literalist approach to undermine those necessities either chaos results or the Court's abstractions are ignored or evaded by the political branches. The *Chadha* broadside invalidation of the one-House veto device is a case in point.[22]

Nowhere have the inadequacies of the literalist approach been more apparent than when efforts are made to fit the simplistic separation concept into the labyrinths of the modern administrative agency substructure. As Justice Jackson once noted, the rise of administrative bodies into a veritable fourth branch of government "has been the most significant legal trend of the last century . . . [and] has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-

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[20] Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 493 (1987).

[21] THE FEDERALIST No. 51, at 347-48 (J. Madison) (J. Cooke ed. 1961).

[22] The political branches' need for some kind of a legislative veto procedure has continued unabated following the *Chadha* decision. In the words of one authoritative commentator, *Chadha* simply "painted with too broad a brush and offered a simplistic solution [the enactment of new legislation] that is unacceptable to Congress and the agencies." L. FISHER, CONSTITUTIONAL DIALOGUES 225 (1988). Fisher's study shows that *Chadha* inspired the political branches "to find ingenious and novel methods of achieving basically the same goals: broad delegations of legislative power by Congress to the agencies, checked by congressional controls that do not need enactment of another law." *Id.* Among such post-*Chadha* techniques are informal and nonstatutory legislative vetoes, convoluted uses of the Senate and House rulemaking powers, committee vetoes, and vetoes by way of defeating joint resolutions of approval of administrative action. Fisher notes that from the time of the *Chadha* decision in June of 1983 to the end of the 99th Congress in October of 1986, 102 new legislative vetoes, generally the committee-veto variety, were enacted into law in 24 different statutes. *Id.* Fisher concludes that *Chadha* thus has been "eroded by open defiance and subtle evasion"—a situation for which much of the responsibility "belongs on the doorstep of the Court." *Id.*

dimensional thinking."[23] With the consistent approval of the Supreme Court, Congress has delegated to independent agencies many powers that enable a single agency to perform all three functions — legislative, executive and judicial. A mechanical application of the simplistic separation concept would obviously doom the whole world of independent agencies, for did not Madison say that the accumulation of all three governmental functions in the same hands is "the very definition of tyranny"?[24]

A counter development in the separation story became evident during the Burger era, perhaps inspired by the shallowness and inadequacies of the simplistic version of the doctrine. Without definitively rejecting what it called the archaic or simplistic version, the Court simultaneously began building upon another line of decisions that recognized what was described as "the more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story."[25] In the decision that heralded this pragmatic rebirth, *Nixon v. Administrator of General Serv-*

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[23] Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). See also M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 10 (1967) ("the emergence of terms such as 'quasi-judicial', 'delegated legislation', or 'administrative justice', . . . represent[s] attempts to adapt the older [separation] categories to new problems").

[24] The logic of the extremist separation doctrine leads to the assertion that all independent regulatory agencies violate the doctrine. No court has yet accepted that view. In Ticor Title Ins. Co. v. Federal Trade Comm'n, 625 F.Supp. 747 (D.D.C. 1986), *aff'd*, 814 F.2d 731 (D.C. Cir. 1987), an argument was advanced but not resolved "that the delegation of law enforcement powers to the Federal Trade Commission is unconstitutional because the Commissioners are given the exclusive power to initiate enforcement proceedings, and are not subject to the President's supervisory control." *Ticor*, 625 F. Supp. at 748.

In the *Bowsher* case, the majority opinion declared that its affirmance of the lower court judgment holding the Gramm-Rudman-Hollings Act unconstitutional does not require "casting doubt on the status of 'independent' agencies because no issues involving such agencies are presented here." *Bowsher*, 478 U.S. at 725 n.4. In dissent, Justice White stated that this constituted an "apparent unwillingness" on the Court's part to accept the Solicitor General's argument that executive powers of the sort granted by the Act to the Comptroller "may only be exercised by officers removable at will by the President." *Id.* at 760-61 (White, J., dissenting). Moreover, in the recent *Mistretta* decision, the Court took pains to make clear that it does not intend "to undermine our recognition in previous cases and in over 150 years of practice that rulemaking pursuant to a legislative delegation is not the exclusive prerogative of the Executive." Mistretta v. United States, 109 S. Ct. 647, 662 n.14 (1989).

[25] Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 442 (1977). The Court there stated that this more pragmatic approach had been "expressly affirmed" three years earlier when a unanimous Court held that the separate powers "were not intended to operate with absolute independence" and that it was the judiciary's function to resolve the competing interests of the three branches "in a manner that preserves the essential functions of each branch" while preserving the constitu-

ices,[26] the Court proceeded to articulate a functional balancing test in assessing whether a congressional act unduly disrupts the proper balance between the coordinate branches:

> [T]he proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[27]

Despite its later retreat to doctrinal simplicity in *Chadha* and *Bowsher*, the Burger Court — with largely the same personnel aboard — continued in other cases to refine and hone the Madisonian pragmatic model. The crest of the resurgence of pragmatism came in *Commodity Futures Trading Commission v. Schor*,[28] announced on the same day that Chief Justice Burger blew the trumpets of literalism in *Bowsher v. Synar*.[29] How so many of the Justices on the same

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tional balance of "a workable government." *Id.* (quoting United States v. Nixon, 418 U.S. 683, 707 (1974)).

The Court's reference to Justice Story was to his work entitled COMMENTARIES ON THE CONSTITUTION where he wrote that while separation "is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they [the three great departments] must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree." *Nixon*, 433 U.S. at 442 n.5 (quoting 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 525 (M. Bigelow, 5th ed. 1905)). In the *Nixon* footnote, the Court also quoted from THE FEDERALIST No. 47, where Madison remarked that Montesquieu did not mean that the departments should have no "*partial agency* in, or no *controul* over the acts of each other," and that he meant that the separation doctrine was subverted only "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department." *Nixon*, 433 U.S. at 442 n.5 (quoting THE FEDERALIST No. 47, at 325-26 (J. Cooke ed. 1961) (emphasis in original)).

[26] *Nixon*, 433 U.S. at 442.

[27] *Id.* at 443 (citation omitted).

[28] 478 U.S. 833 (1986). Justice O'Connor's opinion for the Court was joined by Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist, and Stevens. Justices Brennan and Marshall dissented.

Justice O'Connor also wrote the opinion for the Court in Thomas v. Union Carbide Co., 473 U.S. 568 (1985), joined by Chief Justice Burger and Justices White, Powell and Rehnquist; Justices Brennan, Marshall, Blackmun and Stevens concurred separately. *Thomas* involved a statutory scheme whereby private parties could submit certain compensation disputes, growing out of EPA pesticide registration requirements, to binding arbitration by non-judicial officers, with only limited review by Article III judges. In sustaining the constitutionality of the scheme, Justice O'Connor "expressly rejected a formalistic or abstract Article III inquiry" in favor of paying "practical attention to substance rather than doctrinaire reliance on formal [separation] categories." *Id.* at 586-87 (citing Crowell v. Benson, 285 U.S. 22, 53 (1932)).

[29] 478 U.S. 714 (1986). The Chief Justice's opinion was joined by Justices Bren-

day could take both an archaic and a pragmatic approach to the separation doctrine beggars easy explanation.

Justice O'Connor's opinion for the Court in *Schor* brushed aside the contemporaneous *Bowsher* decision in an unconvincing fashion. *Bowsher* was said to involve a question of "the aggrandizement of congressional power at the expense of a coordinate branch," while *Schor* raised a question whether Congress had "impermissibly undermined . . . the role of the Judicial Branch."[30] But in terms of separation analysis, *Bowsher* and *Schor* are irreconcilable.[31] *Bowsher* applied a literalist approach in concluding that the Comptroller General could not, as an agent of Congress, be delegated executive functions, regardless of how relatively insignificant the intrusion upon executive branch functions or how appropriate such intrusion might be to the accomplishment of the political goal of reducing the national deficit. *Schor*, on the other hand, applied a functional approach in concluding that, given the unique aspects and purposes of the congressional plan to delegate a small portion of Article III judicial power to an independent agency to exercise in the course of its administrative proceedings, the resulting dilution of the judicial power of the federal courts posed "no genuine threat" to the institutional integrity of the judicial branch.[32] Had *Schor* followed the literalist path, the delegation to the agency of even a *de minimis* amount of judicial power would have been enough to void the intrusion upon the federal courts' express mandate to exercise such power.

Thus, as the Burger era was fading in 1986, the Court had painted two quite different faces on the separation doctrine. *Bowsher* had divided an amorphous kind of face into three hard edge parts, a different and sharply contrasting color used on each part, painted with thick brush strokes with no overlaps. Using the same basic three-color scheme, *Schor* had painted a realistic kind of face without bright lines of distinction, allowing some of the colors to blend together as long as the mix did not result in one color unduly dominating the others or losing the basic integrity of any of them. As the new Rehnquist era dawned in 1986, the intriguing question was

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nan, Powell, Rehnquist and O'Connor. Justices Stevens and Marshall concurred; Justices White and Blackmun dissented. For an excellent review of *Bowsher* and its implications, see Verkuil, *The Status of Independent Agencies After* Bowsher v. Synar, 1986 DUKE L.J. 779.

[30] *Schor*, 478 U.S. at 856-57.

[31] *See* Strauss, *supra* note 6, at 488-89 (*Bowsher* and *Schor* exemplify "inconsistent reasoning rules").

[32] *Schor*, 487 U.S. at 857.

which face and which color scheme the Rehnquist Court would put upon the separation maxim when it faced its first separation case. Equally intriguing and perhaps more difficult was the task of the lower courts, like the Third Circuit, in trying to fathom the separation signals the Court meant to convey in *Bowsher* and *Schor*. Should the lower courts follow the literalist analysis or the functional analysis?

Somewhat surprisingly, the Rehnquist Court made its choice rather quickly but quite decisively. In 1988, the Court ruled in *Morrison v. Olson*[33] that, consistent with the separation doctrine, Congress can vest in the judicial branch the appointment of a special prosecutor to investigate and prosecute ethical indiscretions by high executive branch officials. In 1989, the Court ruled in *Mistretta v. United States*[34] that, consistent with the separation doctrine, Congress can establish a Sentencing Commission, place it within the judicial branch, authorize it to establish nationwide sentencing guidelines, require designated federal judges to serve on the Commission and to share authority with non-judicial members, and empower the President to appoint the members and remove them for cause only.

What is significant about the *Morrison* and *Mistretta* rulings, apart from their near-unanimity, is their studied refusal to embrace the literalist version of the separation doctrine, so warmly endorsed earlier by the Burger Court in *Chadha* and *Bowsher*. Indeed, both *Morrison* and *Mistretta* consciously reiterate, endorse and apply the functional approach that had been followed in the other line of Burger Court decisions that culminated in *Schor*.

Thus in *Morrison*, Chief Justice Rehnquist — after citing the Madisonian sources of the pragmatic, functional approach —tested the separation implications of the independent counsel provisions of the Ethics in Government Act[35] by asking three functional questions: (1) Does the Act, taken as a whole, involve an attempt by Congress to increase its own powers at the expense of the Executive Branch? (2) Does the Act, taken as a whole, work any judicial usurpation of properly executive functions? (3) Does the Act, taken as a whole, "impermissibly undermine" the powers of the executive branch, or disrupt the proper balance between the coordinate

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[33] 108 S. Ct. 2597 (1988). Chief Justice Rehnquist wrote the opinion for the Court. Justice Scalia dissented, and Justice Kennedy took no part in the decision.

[34] 109 S. Ct. 647 (1989). Justice Blackmun wrote the opinion for the Court. Justice Scalia was the sole dissenter.

[35] 28 U.S.C. §§ 591-599 (Supp. V 1987).

branches by preventing the executive branch from accomplishing its constitutionally assigned functions?[36]

Note that the Court does not ask the simplistic question whether the functions of the independent counsel are essentially executive in nature. Even assuming the functions are executive, the Court balances the congressional policy of having an independent inquiry into the ethics of executive branch officials as against the degree of impact and interference that policy has on the Executive's ability to perform constitutionally assigned functions. And finding that the impact and interference are not very substantial, the Court answered the three questions in the negative and thus validated the Act.

The Court went through the same functional exercise in *Mistretta*. This time the Court was even more eloquent and expansive in its rededication to "Madison's flexible approach to separation of powers" and in its rejection "as archaic complete division of authority between the three Branches."[37] It voiced its adherence to Madison's teaching "that the greatest security against tyranny — the accumulation of excessive authority in a single branch — lies not in a hermetic division between the Branches, but in a carefully crafted system of checked and balanced power within each Branch."[38] The Framers, said the Court, built into the tripartite government "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[39]

Justice Blackmun, writing for the Court, then presented questions to test whether the Sentencing Commission provisions violated the encroachment and aggrandizement concerns that have "animated our separation-of-powers jurisprudence."[40] First, the Court asked whether the placement of the Sentencing Commission within the Judicial Branch constituted an impermissible accumulation or aggrandizement of power within the Judicial Branch. Secondly, the majority questioned whether delegating to the Commission the task of formulating uniform sentencing guidelines, which is significantly political and quasi-legislative in nature, threatened the integrity of the Judicial Branch, or unduly united political and quasi-legislative power with the judicial power of the

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36 *Morrison*, 108 S. Ct. at 2620-22. For a critique of the functional approach utilized in *Morrison*, see Liberman, Morrison v. Olsen: *A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U.L. REV. 313 (1989).

37 *Mistretta*, 109 S. Ct. at 659.

38 *Id.*

39 *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)).

40 *Id.*

courts. Moreover, the Court asked whether the statutory requirement that at least three federal judges serve on the Commission and share their authority with nonjudges undermined the integrity of the Judicial Branch. Finally, the majority queried whether the power of the President to appoint and remove Commission members threatened the independence of the Judicial Branch.[41]

As in *Morrison*, the Court in *Mistretta* gave negative answers to these functional aggrandizement-encroachment questions. The answers were then balanced against the congressional policy of "calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges."[42] And since that policy clearly overbalanced the insignificant aggrandizement and intrusion factors, the Sentencing Commission was held to pass constitutional muster.

Justice Scalia, the lone dissenter in both *Morrison* and *Mistretta*, passionately disassociated himself from the pragmatic approach. That approach, he protested, treated the Constitution "as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court."[43]

Justice Scalia would return to the simplistic separation model whereby the three governmental functions are securely separated at all times, save when the Constitution specifically allows commingling or blending.[44] Justice Scalia would thus achieve what he deems to be the Framers' intent: the executive power is not to be divided or sapped, and no person or agency not within the complete control of the Executive can validly exercise any amount or kind of "executive power."

As of 1989, the simplistic version of the separation doctrine ap-

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41 *See id.* at 661-75.

42 *Id.* at 675.

43 *Id.* at 682 (Scalia, J., dissenting).

44 Justice Scalia gave as examples of constitutionally authorized commingling: (1) the presidential veto over legislation, (2) the Senate's confirmation of executive and judicial officers, (3) the Senate's ratification of treaties, and (4) congressional power to impeach and remove executive and judicial officers. *Id.*

Under Justice Scalia's analysis, since the Constitution vests all legislative power in the Congress, all executive power in the Executive, and all judicial power in the federal courts, and since the Constitution does not expressly permit the delegation of any of these powers to independent agencies or officers outside the branch in which the particular power is vested, the entire structure of independent administrative agencies comes under a constitutional cloud. The whole nondelegation concept is also implicated. *See* Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Carter, *In Upholding Sentencing Commission, Justices Put Separation of Powers on the Ropes*, MANHATTAN LAW. Jan. 31-Feb. 6, 1989, at 13.

pears to be on the wane, finding refuge only in the strident Scalia dissents. Pragmatism seems to reign supreme. It is possible that both *Chadha* and *Bowsher*, insofar as doctrinal analysis is concerned, in effect have been superceded by the pragmatic analysis in *Morrison* and *Mistretta*. In that overall context, we now turn to an examination of the three Third Circuit separation decisions.

III. FUNCTIONALISM AT THE THIRD CIRCUIT

The three Third Circuit decisions were rendered during the 1986-1988 time frame, precisely the period in which the Supreme Court was crowning the pragmatic separation analysis. The simplistic version may have suffered its *coup de grace* on that day in 1986 when *Schor* followed hard on the heels of *Bowsher*. It is within that period of doctrinal flux that we measure the Third Circuit's doctrinal performances.

The two *Ameron* decisions stem from one case, *Ameron II* representing a shift in separation analysis on a panel rehearing of *Ameron I*. The rehearing that produced the shift was motivated by the fact that the Supreme Court's decision in *Bowsher*, rendered nearly three months after *Ameron I*, "was contrary to the reasoning of the panel majority in the first *Ameron* opinion."[45]

The Ameron controversy stemmed from a bitter dispute between the Executive and Legislative Branches about the validity of certain functions of the Comptroller General under the Competition in Contracting Act of 1984.[46] Under that Act, the Comptroller General was authorized to hear protests from disappointed bidders on government contracts and, as an incident to such protests, to issue a stay, either of the award to the successful bidder or of the execution of the contract, pending the Comptroller's recommendation to the contracting agency as to

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[45] *Ameron II*, 809 F.2d 979, 983 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 297 (1988). Judge Garth, the author of the *Ameron I* majority opinion, acknowledged in his concurring opinion in *Ameron II* that "*Bowsher* rejected clearly the analysis of the status of the Comptroller General to which the original majority in *Ameron* adhered." *Ameron II*, 809 F.2d at 999 (Garth, J., concurring).

[46] *See* 41 U.S.C. §§ 251, 253 (Supp. V 1987). The bitterness of the interbranch dispute was dramatically illustrated by a December 17th, 1984 directive by the executive branch's Office of Management and Budget, acting on the advice of the Attorney General, that advised all heads of executive departments and agencies to disregard the stay provisions of the Act that were said to authorize the Comptroller General to exercise executive authority in violation of the separation doctrine. Congressional hearings ensued. *See Constitutionality of GAO's Bid Protest Function: Hearings Before the Subcomm. on Gov't Operations of the House Comm. on Gov't Operations*, 99th Cong. 1st Sess. (1985). *See also* Gressman, *Take Care, Mr. President*, 64 N.C.L. REV. 381 (1986).

the propriety of the award. The executive branch took the adamant position that this stay provision conferred executive functions on the Comptroller General, said to be an agent of Congress, and thus violated the literal separation doctrine.

Circuit Judge Garth, writing the original panel decision in *Ameron I*, rejected a literalist approach to the separation problem, preferring an analysis that focuses "pragmatically on whether the challenged provision actually or potentially interferes with the ability of the affected branch to accomplish its constitutionally assigned functions."[47] But in applying that pragmatic approach, Judge Garth treated the Comptroller as functioning "independently of Congress in exercising his role of reviewing bid protests," Congress never having "exerted control over this process."[48] The Comptroller, he said, "cannot neatly be labelled as totally the creature of one branch or another,"[49] but rather is more like an independent "hybrid agency of the kind described in *Humphrey's Executor*."[50] Thus under Judge Garth's view of the role of the Comptroller — which was later to be repudiated by the Supreme Court in *Bowsher* — the Comptroller "may constitutionally exercise executive functions in reviewing bid protests because he is appointed pursuant to the Appointments Clause and performs executive duties."[51]

Judge Garth's ultimate conclusion was that "the long history of [functional] independence" of the Comptroller supports a judgment that

> the stay provision does not operate to permit intrusion by the legislative branch into executive or judicial decision making. Thus the delicate balance of power among the branches of government has not been endangered or upset . . . [and] the mere existence of the [unexercised] power of Congress to remove the Comptroller General does not render the Comptroller an agent of Congress for the purpose of this case.[52]

In other words, the exercise of executive power by a hybrid independent type of officer, who Judge Garth likened to an independent administrative agency, does not unduly intrude upon the

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47 *Ameron I*, 787 F.2d 875, 881 (3d Cir. 1986) (citing Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 443 (1977), *cert. dismissed*, 109 S. Ct. 297 (1988)).

48 *Ameron I*, 787 F.2d at 885.

49 *Id.*

50 *Id.* at 886 (citing Humphrey's Executor v. United States, 295 U.S. 602 (1935)).

51 *Id.*

52 *Id.* at 887.

functions of the Executive Branch and thus does not violate the pragmatic separation theory.

Circuit Judge Becker disagreed "fundamentally" with Judge Garth's functional analysis of the Comptroller's role. The Supreme Court, said Judge Becker, has never acknowledged that administrative agencies, even the independent regulatory ones, belong to a hybrid constitutional category all their own.[53] Rather, each agency and each officer must be fitted into one of the three constitutional power branches. Judge Becker's analysis of the legislative origins of the Comptroller's office, including the General Accounting Office which he heads, led to the conclusion that the legislative intent was to place and keep the office in the Legislative Branch, exactly the conclusion reached in *Bowsher*.[54]

But instead of ending the matter with a *Bowsher*-type puerility that no one in the Legislative Branch can exercise executive power, Judge Becker slipped into a pragmatic functional mode. The ultimate question, he wrote, "is not merely whether members of one branch do work falling within the description of another. Rather, the question is whether, by that work, the branch to which those members belong infringes so substantially on the other branch that the infringed-on branch cannot carry out its constitutionally assigned functions."[55] On that basis, Judge Becker could not find that the functions conferred on the Comptroller by the Competition in Contracting Act so coalesced powers in the Legislative Branch as to threaten the interests or the functions of the Executive Branch, let alone the interests of the aggrieved contract bidders.[56]

Then came *Ameron II*, spawned by the intervening *Bowsher* ruling that the Comptroller was so subservient to Congress that he could not perform executive duties under the Gramm-Rudman-Hollings Act. Judge Becker became the author of the panel majority opinion in *Ameron II*, with Judge Garth writing a concurring opinion. Judge Becker performed a *tour de force*, much as he did in his *Ameron I* concurrence. He accepted *Bowsher*'s simplistic proposition that the Comptroller is an agent of Congress and then immediately put that proposition into the pragmatic balancing of interests. In so doing, Judge Becker assessed the extent of the Comptroller's non-legislative functions under the Competition in Contracting Act, not under

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53 *Id.* at 892 (Becker, J., concurring).

54 *Id.* at 893 (Becker, J., concurring).

55 *Id.* at 894 (Becker, J., concurring) (citing Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 443 (1977)).

56 *Id.* at 895 (Becker, J., concurring).

the Gramm-Rudman-Hollings Act.[57] Whatever talismatic labels might be placed on the Comptroller's functions under the latter act, the assigned functions under the Competition in Contracting Act were found to be reflective not of a legislative intent to take over execution of this Act but of the legislative power "to investigate potential government misconduct in the execution of the procurement laws, and to influence the executive's execution of the laws through the power of public illumination and persuasion."[58]

Thus *Ameron II* properly put into the separation equation all the Comptroller's functions ascribable to this congressional concern. Whatever non-legislative label might be put on those functions, including the stay provision in question, the functions were weighed by *Ameron II* as against any resulting or potential disruption or interference with the Executive Branch's ability to execute its assigned tasks. Judge Becker concluded that the disruption, if any, was "minimal."[59]

Judge Garth's concurring opinion in *Ameron II* likewise rests on an "empirical exercise in measuring the effect of the intrusion on the coordinate branch" rather than on a "theoretical exercise in questioning whether, in embryo, a dangerous violation of principle lurks beneath an apparently benign legislative mechanism."[60] Relying heavily on the Supreme Court's analysis in *Schor*, he too reached the conclusion that "the very limited power granted to the Comptroller General under [this Act] does not undermine the role of the Executive Branch."[61]

The Third Circuit panel ruling in *United States v. Frank*[62] is the latest and most mature commitment of that court to the pragmatic approach to separation of powers issues. It upheld on separation grounds the validity of the federal sentencing guidelines by the judicial branch agency known as the Sentencing Commission. Exactly the same problem was before the Supreme Court in *Mistretta*, which was issued slightly more than two months after the Third Circuit's

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57 *Ameron II*, 809 F.2d 979, 983-86 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 297 (1988).

58 *Id.* at 993.

59 *Id.* at 987.

60 *Id.* at 1000 (Garth, J., concurring).

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

62 864 F.2d 992 (3rd Cir. 1988). The panel majority opinion was written by Chief Judge Gibbons, joined by Circuit Judge Seitz. Circuit Judge Hutchison filed a dissenting opinion on a non-constitutional point and thus did not reach "the issue of the constitutionality of the federal sentencing guidelines." *Id.* at 1016 (Hutchinson, J., dissenting). *See also* Gibbons, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 SETON HALL L. REV. 435 (1974).

decision in *Frank*.[63] The Court's opinion in *Mistretta* used almost exactly the same doctrinal analysis and reached exactly the same result as was foreshadowed in *Frank*.

Judge Gibbons' opinion in *Frank* attempts to classify the two conflicting lines of Supreme Court precedents by distinguishing between alleged violations of "express textual provisions in the Constitution that deal with separation of powers" and alleged violations of the separation doctrine that are based on "no specific textual provision of the Constitution."[64] In the former category are placed such cases as *Morrison v. Olson*[65] (appointments clause), *Bowsher v. Synar*[66] (appointments clause), *Buckley v. Valeo*[67] (appointments clause), and *Immigration and Naturalization Service v. Chadha*[68] (article I bicameral and presentment clauses). In the non-textual category the *Frank* opinion places such cases as *United States v. Nixon*[69] (claimed presidential immunity not specified in Constitution) and *Nixon v. Administrator of General Services*[70] (non-textual claim that Congress could not provide for taking custody of presidential materials).

The *Frank* opinion then asserts that the functional separation analysis is more appropriate in the second or non-textual type of challenges. "As it has been articulated by the Supreme Court," wrote Judge Gibbons, "the analysis of functional, as opposed to textual, alleged violations of the separation of powers doctrine does not 'contemplate[] complete division of authority between the three branches,' but rather adopts a 'more pragmatic, flexible approach,' associated with Madison (*The Federalist* No. 47), Mr. Justice Story (*Commentaries on the Constitution* § 525), and Mr. Justice Jackson (*Youngstown Sheet & Tube Co. v. Sawyer*)."[71] It may be questioned whether the Court has consciously divided its separation analyses as between textual and non-textual separation challenges; certainly it is difficult to see that division evident in *Morrison*, where the Court ap-

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63 *Frank* is one of the only two federal appellate rulings dealing with the validity of the sentencing guidelines in light of the separation doctrine. For the Ninth Circuit ruling invalidating the guidelines, see Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245 (9th Cir. 1988), *vacated and remanded sub nom.* United States v. Chavez-Sanchez, 109 S. Ct. 859 (1989). In its *Mistretta* opinion, the Court took note of this conflict between the Third and Ninth Circuits. Mistretta v. United States, 109 S. Ct. 647, 654 n.6 (1988).

64 *Frank*, 864 F.2d at 1012-13.

65 108 S. Ct. 2597 (1988).

66 478 U.S. 714 (1986).

67 424 U.S. 1 (1976).

68 462 U.S. 919 (1983).

69 418 U.S. 683 (1974).

70 433 U.S. 425 (1977).

71 *Frank*, 864 F.2d 1013 (citation omitted).

plied a pragmatic analysis in the context of a separation challenge under the appointments clause.[72]

But however we may distinguish between the textual and the non-textual separation challenges, the critical point of the *Frank* decision is its adherence to and application of the pragmatic test in assessing a separation challenge to the constitutionality of the Sentencing Commission's guidelines. The court quite properly put on one scale the interests and the purposes of Congress in establishing the Commission. On the other scale, the court placed the amounts of aggrandizement of power by one branch, and the impairment of power of another branch, that inquiry could uncover. Asking the same questions that the Supreme Court was later to ask in *Mistretta*, the Third Circuit could find no undue aggrandizement of the power of the Judicial Branch, and no unseemly impairment of the powers of the Executive Branch or of the functioning of the judiciary.[73] That being true, the court concluded that the need to promote the objectives of Congress in establishing the Commission to create the sentencing guidelines clearly outweighed the insignificant aggrandizement and impairment factors.

IV. CONCLUSION

We can thus conclude that the Third Circuit has passed its separation of powers test with high honors. It has faithfully adhered to the pragmatic teachings of the Supreme Court, while deftly avoiding some of the Court's simplistic and historically un-

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72 *Cf.* Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978). In assessing the validity of the one-House veto device in light of a separation challenge, the court noted that the constitutional clause vesting legislative authority in Congress

> does not itself, as a textual matter, mechanically direct the manner in which Congress must exercise the legislative power. On that problem, the core purpose of the clause must, of course, be taken into account (as it has in appraising the extent of appropriate delegation), but there are also other pertinent considerations, including the reach of the separation-of-powers doctrine and of the necessary and proper clause, as well as the constitutional sphere of the Executive.

Id. at 1062. Several years later, however, the Supreme Court invalidated the one-House veto in *Chadha*, utilizing a simplistic analysis that contradicts the *Atkins* pragmatic analysis. *Atkins* still stands as the most enlightened judicial statement as to the role of the one-house veto device in our blended tripartite form of government. *See also* Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1 (1984).

73 *Frank*, 864 F.2d at 1013-16. The opinion categorized the argument about the impairment of Executive Branch functions as "much ado about almost nothing." *Id.* at 1014.

sound lectures. It has remained true to the core meaning of the separation doctrine. Chief Justice Vanderbilt of the Supreme Court of New Jersey once wrote that the doctrine

> exists in one form or another in almost every American constitution; and it has nowhere been construed as creating three mutually exclusive watertight compartments. To do so would render government unworkable and the slave of a doctrine that has for its beneficial purpose the prevention of despotism that inevitably results from the concentration of all the powers of government in one person or in one organ of government. . . . While no rule of thumb will cover all the cases, in general it may be said that no deviation from the constitutional provisions incorporating the doctrine of the separation of powers will be tolerated which impairs the essential integrity of one of the great branches of government.[74]

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[74] Massett Bldg. Co. v. Bennett, 4 N.J. 53, 57, 71 A.2d 327, 329 (1950).