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A 'Non-Power' Looks at Separation of Powers

Alan B. Morrison

George Washington University Law School, abmorrison@law.gwu.edu

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ESSAY

A Non-Power Looks at Separation of Powers

ALAN B. MORRISON*

I. INTRODUCTION

Separation of powers has been a growth area of constitutional law in the 1970s and 1980s. As a frequent participant in separation of powers litigation, I am arguably one of the least appropriate persons to assess the results of this litigation. My apparent inappropriateness is due, in part, to the fact that observers may interpret some of my views as “sour grapes” over lost causes and cases. Undaunted by that possibility, however, I have nonetheless attempted to distill some degree of coherence in the separation of powers area and to offer a few suggestions for change.

First, a disclaimer. I have no illusions that I have found the Rosetta stone that will decipher a unified theory of separation of powers and allow the reader to predict the outcome of future separation of powers cases with total, or even significant, accuracy. I do not believe that I can fully explain all of the past cases, and I have not tried to fit every aspect of every case into the approaches described below. The fact that I cannot explain everything, however, does not deter me from trying to explain the major trends.

In Part II of this essay, I describe three basic approaches used to analyze separation of powers cases: (1) does the challenged action transgress specific provisions in the Constitution; (2) does the challenged action constitute an encroachment on the powers of another branch (an encroachment may be either “active” or “passive,” terms that I have created and define below); or (3) does the challenged action substantially impair the ability of one branch to carry out its constitutionally mandated responsibilities? In Part III, I ask whether, in dealing with these three types of challenges, the courts have appropriately responded to three questions that have troubled observers: (1) have the courts tied the hands of Congress too tightly, thereby freezing our

* Mr. Morrison, a Washington attorney, is the director of the Public Citizen Litigation Group. This essay is based on the Phillip A. Hart lecture that he gave at Georgetown University Law Center on April 6, 1989. It has been revised to take into account subsequent separation of powers developments and insights that the author obtained from his colleagues and from conducting a separation of powers workshop at Harvard Law School in January 1990. This essay has benefitted greatly from the insightful comments of Litigation Group attorneys David C. Vladeck and Patti A. Goldman, who worked with the author on many of the cases mentioned in the essay, and from Georgetown Professor of Law Roy A. Schotland, who noted a number of errors in analysis before they reached the final stage.

system of government in the past and failing to take into account the circumstances of twentieth century governance in the United States; (2) have the courts given Congress too much freedom to delegate legislative functions to other branches; and (3) has the proper role of the judicial branch been found, or in some instances has the judiciary been assigned too much that does not involve adjudication and in other instances have some types of cases been improperly removed from the judicial domain? Plainly here my judgments are personal, but because I am not a member of any of the branches of government at least my views remain unaffected by an institutional bias in favor of one branch or another.¹ Finally, in Part IV of this essay, I try to identify the reasons for the recent increase in separation of powers litigation and ask what, if anything, those in power can and should do to try to prevent or encourage such litigation.

Before turning to these questions, however, I want to state my view—one that I believe the Framers shared—of the doctrine of separation of powers. The purpose of making the separation of powers doctrine the bedrock of the Constitution was not to divide our government into three equal teams, like a professional sports league, so that the competition between them would be as equal as possible. Under such an approach, the doctrine of separation of powers would tolerate any alteration in the power structure as long as none of the other players objected to the intrusion into their territory. Thus, if judges wanted to issue advisory opinions, or members of Congress wanted to serve part-time as judges, that would be acceptable as long as the other branches did not object.²

My view is rather different. As I read the history of the doctrine and the purposes behind it, the Framers included separation of powers in the Constitution to protect all of the people, not just those who happen to occupy the three branches of government on a temporary lease from the nation's citizens. In formulating separation of powers doctrine, the Framers were concerned with two separate, but related matters: (1) the need to avoid an excessive concentration of power in one branch, particularly the Congress, because of the resulting threat of tyranny; and (2) the need to assure the people that they were being governed by their elected representatives, principally the members of Congress, to whom they had ceded the great powers of the Constitution. These two concerns, which are too often ignored, should

1. It is perhaps because the Framers of the Constitution did not know for certain whether they would be part of the executive, legislative, or judicial branch of the government that the final document proved to be such a balanced one and that the doctrine of separation of powers, including the checks and balances built into it, works so well.

2. The incompatibility clause might well create an independent barrier in the latter case. U.S. CONST. art. I, § 6, cl. 2.

govern the applicability of separation of powers doctrine in deciding whether a particular action meets the requirements of the Constitution.

II. AVENUES OF CHALLENGE

A. TEXTUAL VIOLATIONS

When passing on constitutional questions, one ought at least to begin with the words and history of the Constitution. Surprisingly, even though almost 200 years have passed since the framing of our Constitution, several recent separation of powers challenges have been resolved in large part by use of the literal language of the Constitution—or at least by use of that language as interpreted in light of the gloss that has been applied to it over time.

One provision that has been used to answer several of these separation of powers questions is the appointments clause, which grants to the President the power to:

nominate, and by and with the Advice and Consent of the Senate . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.³

While at first blush this provision seems to be rather mechanical, it in fact embodies a significant commitment to presidential power, albeit with certain limitations and subject to a senatorial check. It is often forgotten that the appointments clause was at the heart of the dispute underlying *Marbury v. Madison*,⁴ and that the Supreme Court more recently has relied almost entirely on the clause in striking down the composition of the Federal Election Commission in *Buckley v. Valeo*,⁵ and in upholding the appointment of an independent counsel in *Morrison v. Olson*.⁶

The Supreme Court used the text of the Constitution in *United States v. Will*⁷ in determining when certain statutory provisions respecting pay increases of judges became effective and thus ran afoul of the restriction in article III that the compensation of federal judges “shall not be diminished”

3. U.S. CONST. art. II, § 2, cl. 2.

4. 5 U.S. (1 Cranch) 137 (1803).

5. 424 U.S. 1 (1976).

6. 487 U.S. 654 (1988). To a lesser degree in *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court relied on the absence of any constitutional provision for Senate approval of the President's removal of officers appointed by him to overturn a statute requiring such approval. *Id.* at 161.

7. 449 U.S. 200 (1980).

during their term in office.⁸ Federal courts have had occasion, most recently in *Barnes v. Kline*,⁹ to resolve disputes about whether an attempted pocket veto by the President meets the standards of the Constitution by focusing on the nettlesome phrase “unless the Congress by their Adjournment prevent [the] Return”¹⁰ of the bill. The courts have also rejected claims that Congress violated the ascertainment clause¹¹ when it delegated to the President the power to set the salaries of members of Congress, which according to the Constitution shall be “ascertained by Law.”¹² In another recent separation of powers confrontation, the United States Court of Appeals for the District of Columbia (D.C. Circuit) focused on the text and history of the treaty clause and decided that neither Congress as a whole, nor the Senate alone, had the right to insist upon approving our withdrawal from a treaty to which we were a signatory.¹³

In other cases, indeed in most other separation of powers cases, the Court cites provisions of the Constitution in reaching its decisions. In most of these cases, however, no one seriously contends that either the text or its history, as opposed to the general policies emanating from the provisions, provides any real guidance in answering the question before the Court. Even in cases in which the text of the Constitution does provide significant guidance, the Court has also relied on policy considerations to support its analysis.¹⁴

B. ENCROACHMENT

More than 60 years ago, in *Springer v. Government of the Philippine Islands*,¹⁵ the Supreme Court observed that

[i]t 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.¹⁶

Thus, unless there is a specific exception in the Constitution, such as the President's role in enacting laws or the Senate's role in approving appoint-

8. *Id.* at 218.

9. 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom.* *Burke v. Barnes*, 479 U.S. 361 (1987).

10. U.S. CONST. art. I, § 7, cl. 2.

11. *Id.* § 6, cl. 1.

12. *See* *Humphrey v. Baker*, 848 F.2d 811 (D.C. Cir.), *cert. denied*, 109 S. Ct. 491 (1988); *Pressler v. Simon*, 428 F. Supp. 302 (D.D.C. 1976), *aff'd sub nom.* *Pressler v. Blumenthal*, 434 U.S. 1028 (1978).

13. *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.) (en banc), *vacated on justiciability grounds*, 444 U.S. 996 (1979).

14. *See* *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) (referring to Framers' fear concerning legislative aggrandizement).

15. 277 U.S. 189 (1928).

16. *Id.* at 201-02.

ments and treaties, whenever one branch encroaches on another, there is a potential separation of powers problem. The fact of encroachment alone has not, however, been dispositive in all separation of powers cases. Instead, while the Court has been unwilling to allow active encroachment—in which the encroaching branch, typically the Congress, assigns to itself the functions of another branch—the Court has been much more tolerant when the encroachment is passive—when the branch that is encroached upon, typically Congress, with the concurrence of the President, has assigned its own functions to another part of the government.

1. Active Encroachment

Active encroachment occurs when one branch decides to undertake some of the functions of another branch. The leading modern active encroachment case is *Immigration & Naturalization Service v. Chadha*,¹⁷ in which the Supreme Court issued a blanket condemnation of the legislative veto mechanism by which Congress sought to exercise continuing control over a wide variety of decisions of the executive branch, not by passing new legislation, but simply by having one or both houses of Congress exercise a veto over executive actions. Although the Court's opinion discusses the provisions of the Constitution relating to bicameralism and presentment, the real thrust of *Chadha* is that Congress had taken on a role not assigned to it by the Constitution, and hence violated the separation of powers by encroaching upon the role of the executive branch.¹⁸

In *Bowsher v. Synar*,¹⁹ the Supreme Court declared unconstitutional the role of the Comptroller General under the Gramm-Rudman-Hollings Act because Congress could discharge him.²⁰ The underlying difficulty with the statute, and the role of the Comptroller General under it, however, was that the Comptroller General was an agent of Congress and was directed to execute federal laws, a role the Constitution granted to the executive, not the legislative branch. The fact that Congress wrote the law that unconstitutionally added to its own powers made the violation more egregious, and brought forth the specter of Congress trying to unite in the legislative branch the power to both write and execute the laws. It is this coalescence of power in the Office of Comptroller General, rather than any technical distinctions between the power of Congress to remove the Comptroller General and the constitutional power of Congress to remove all officers in the executive and judicial branches, including the President, by impeachment, that is a proper basis for treating the congressional removal power in this case as

17. 462 U.S. 919 (1983).

18. *Id.* at 955-58.

19. 478 U.S. 714 (1986).

20. *Id.* at 720-26.

extraordinary.²¹

President Truman's unsuccessful attempt to take over the steel mills in *Youngstown Sheet & Tube v. Sawyer*,²² exemplifies active encroachment by the President if one accepts the proposition that in acting the President was relying principally on his inherent powers as Commander-in-Chief. One could also read the case, however, as involving only a rather attenuated claim by the President that existing statutes gave him the power to seize the steel mills to maintain the status quo. Perhaps because of the extensive reach of the President's claim, *Youngstown* seems more like an encroachment case than a dispute about statutory powers, although in terms of outcome, the debate is largely academic. As *Youngstown* illustrates, there is no bright line between disputes about statutory powers and claims of encroachment, at least when the President has a plausible argument that Congress has authorized him to undertake the challenged action. Because of the plethora of modern statutes available to the President to justify the exercise of a Presidential power, and to the Court if it wishes to sustain such exercise,²³ there have been almost no recent lawsuits involving presidential encroachment, unless every suit alleging that the President exceeded his powers under a statute is considered to raise encroachment issues.²⁴

2. Passive Encroachment

In contrast to *Chadha*, *Bowsher*, and *Youngstown*, in which the encroaching party decided on its own to undertake new functions, passive encroachment occurs when one branch delegates to another branch functions not normally performed by that branch. Courts and commentators have not

21. Similarly, although *Buckley v. Valeo* involved a textual violation of the appointments clause, Congress compounded the problem by giving itself the right to appoint four of the six Federal Election Commissioners and by giving the House, in addition to the Senate, the right to consent to the appointment of the two chosen by the President. *Buckley v. Valeo*, 424 U.S. 1, 113 (1976).

22. 343 U.S. 579 (1952).

23. See *Dames & Moore v. Regan*, 453 U.S. 654, 669-72 (1981) (Court relied on the "sweeping and unqualified" language of the International Emergency Economic Powers Act to uphold an executive agreement with Iran to arbitrate claims by American citizens against the government of Iran).

24. One area where it may appear that some recent Presidents have attempted aggrandizements of power is impoundment, a practice under which the President directs that less than all the money that Congress has appropriated for a program be spent. In no case has a President relied on his inherent powers to justify an impoundment, but instead has relied either on statutory language or legislative history that purports to give the President the power not to spend. See *Train v. City of New York*, 420 U.S. 35 (1975). The reason for this Presidential reliance on statutes may be that Chief Justice Rehnquist, in his earlier capacity as head of the Office of Legal Counsel in the Department of Justice, gave an opinion that the President had no such inherent authority. *Impoundment of Appropriated Funds by the President: Joint Hearings on S. 373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. of Separation of Powers of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. 394-95 (1973) (statement of William H. Rehnquist, Asst. Att'y Gen., Office of Legal Counsel).

used the term "passive encroachment." In *Buckley v. Valeo*,²⁵ the Court used the phrase "encroachment or aggrandizement," seemingly equating the two.²⁶ While the latter term is more commonly used, it does not lend itself to accompaniment by an adjective like "passive" and does not apply if, for example, Congress were to assign a function of the judicial branch to the executive, a situation in which Congress would not be increasing its own powers.

Passive encroachment usually arises in the context of congressional delegations to the executive. In these instances, the question is whether Congress may constitutionally delegate its power to another branch. In marked contrast to the Supreme Court's early passive encroachment decision setting aside the National Recovery Act in *A.L.A. Schechter Poultry Corp. v. United States*,²⁷ the courts in recent years have been unanimous in their refusal to overturn statutes on the ground of excessive delegation.²⁸ While *Schechter* can be distinguished from the more recent cases because the power was largely assigned to private parties rather than to another branch of government, the change in judicial attitude towards passive encroachment between *Schechter* and the recent decisions is startling.

In *Synar v. United States*,²⁹ for example, the three-judge district court panel opined in dicta that the delegation to the Comptroller General was within the confines of the "intelligible principle" test set forth in *J.W. Hampton & Co. v. United States*.³⁰ The court upheld this delegation even though the Comptroller General was given unreviewable and legislatively-uncontrolled discretion to determine all of the decisive factors that enter into estimating the budget deficit, including such items as the rate of inflation, the amount of the trade deficit, the overall interest rates, and the unemployment rate.³¹

Similarly, in *Mistretta v. United States*,³² the Supreme Court rejected a challenge to a delegation of power to the Sentencing Commission, largely because the delegation was contained within a very detailed statute which answered a number of questions regarding the Commission's discretion.³³

25. 424 U.S. 1 (1976).

26. *Id.* at 12.

27. 295 U.S. 495 (1935).

28. See *Mistretta v. United States*, 109 S. Ct. 647, 655 (1989) ("[Since invalidating two statutes as excessive delegations in 1935,] we have upheld, again without deviation, Congress' ability to delegate power under broad standards.").

29. 626 F. Supp. 1374, 1383, 1387-88 (D.D.C.), *aff'd*, 478 U.S. 714 (1986). The district court in *Synar* also held the Gramm-Rudman-Hollings Act unconstitutional on "active encroachment" grounds. *Id.* at 1403; see *supra* text accompanying notes 19-21.

30. *Synar*, 626 F. Supp. at 1383 (citing *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406, 409 (1928)).

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

32. 109 S. Ct. 647 (1989).

33. *Id.* at 655.

Most of the questions that the statute resolved, however, were on the periphery of the Commission's debates about sentencing policy. Everyone recognized, therefore, that Congress had left to the Commission's discretion most of the major policy choices. Among the issues on which the Commission had virtually complete discretion were the relative seriousness of each crime; the availability of probation; whether fines should be imposed, and, if so, in what amounts; and what factors in aggravation or mitigation, both as to the crime itself and the background of the defendant, could or must be considered in imposing a sentence.³⁴ In these areas the Commission's discretion was only occasionally subject to governing statutes other than the Sentencing Reform Act, principally those setting maximum or minimum sentences.

Even when the statutory language is sparse, the courts have upheld broad delegations of congressional authority. For example, in *Humphrey v. Baker*,³⁵ the D.C. Circuit upheld the Federal Salary Act, which at the time allowed the President to set salaries for senior federal officials at whatever level he "deem[ed] advisable."³⁶ This enabled the President to raise or, with the exception of federal judges, lower those salaries by any amount, and alter the historical relation of salaries among the branches or among officials within each branch as he alone saw fit.

In each of these three cases, the text of the delegation made clear that no judicial review of the delegatee's adherence to the statute was available. Furthermore, even if judicial review had been available, the statutes provided no standards that a court could apply to determine whether there was compliance with the will of Congress.

There is another group of cases that also fits in the passive encroachment category. I refer to cases such as *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*,³⁷ *Thomas v. Union Carbide Agricultural Products Co.*,³⁸ and *Commodity Futures Trading Commission v. Schor*,³⁹ each of which involved the issue of whether Congress has the power to delegate to persons not appointed as federal judges the authority to decide disputes that fall under the jurisdiction of the federal courts. In each of these cases, the parties challenging the statutes argued that they were entitled to present their cases to an article III judge.⁴⁰

The results in this group of cases are difficult to explain and categorize, and, in contrast to the results in the delegation cases, the Court did not al-

34. *Id.* at 656-57.

35. 848 F.2d 211 (D.C. Cir.), *cert. denied*, 109 S. Ct. 491 (1988).

36. Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, § 223, 81 Stat. 613, 642-44 (codified as amended at 2 U.S.C. §§ 351-361 (1988)).

37. 458 U.S. 50 (1982).

38. 473 U.S. 568 (1985).

39. 478 U.S. 833 (1986).

40. *Schor*, 478 U.S. at 838; *Union Carbide*, 473 U.S. at 582; *Northern Pipeline*, 458 U.S. at 62.

ways uphold the statute. In *Northern Pipeline*, the Court, through the combination of a four-Justice plurality opinion written by Justice Brennan and a concurring opinion by Justice Rehnquist and in which Justice O'Connor joined, rebuffed Congress' attempt to expand the functions of bankruptcy judges, who are appointed for a fourteen year term rather than for life, can be removed by means other than impeachment, are subject to salary reduction, and therefore lack the protections of article III.⁴¹ Although bankruptcy judges are part of the judicial branch, the Court still viewed the statute as invading the power of article III judges, albeit without any increase in power to Congress.⁴² However, because Justices Rehnquist and O'Connor agreed only to the extent that the litigation at issue involved a traditional state law claim, and their votes were necessary to achieve a majority, it is unclear how widely the *Northern Pipeline* net will be cast.⁴³

On the other hand, the Court reached the opposite conclusion in a nearly unanimous opinion in *Thomas v. Union Carbide Agricultural Products Co.*⁴⁴ In *Thomas*, the Court sustained a mandatory arbitration program for determining the monetary value of data that the Environmental Protection Agency requires pesticide manufacturers to submit and which it then makes available to other pesticide manufacturers.⁴⁵ The Court seemed unconcerned about the arguable erosion of federal judicial power despite the fact that the arbitrators, unlike the bankruptcy judges in *Northern Pipeline*, were not federal officials and the judicial review of their determinations was even more limited than that which was available under the bankruptcy code.

Justice O'Connor, the author of the *Union Carbide* decision, forcefully expressed her concern about the erosion of federal judicial power in her majority opinion in *Commodity Futures Trading Commission v. Schor*, however.⁴⁶ *Schor* involved a challenge to the validity of a statute that allowed the Commodity Futures Trading Commission (CFTC), an independent agency

41. *Northern Pipeline*, 458 U.S. at 53.

42. *Id.* at 84.

43. Since Congress has greater control over bankruptcy judges than article III judges, it is possible to argue that *Northern Pipeline* is analogous to *Bowsher* in that the Court was concerned in both cases with the potential for improper congressional interference with the decisions of non-article III judges and the Comptroller General. However, given the very different relationship between Congress and the Comptroller General, on the one hand, and Congress and several hundred bankruptcy judges, on the other, it would have been entirely proper to conclude that the potential for congressional interference with decisions of bankruptcy judges was so slight that *Bowsher* could be distinguished, although there might be other bases for doubting whether bankruptcy judges were sufficiently independent to do the job assigned to them in *Northern Pipeline*.

44. 473 U.S. 568 (1985).

45. *Id.* at 571-73, 589. Justice Stevens concurred in the judgment on standing grounds. *Id.* at 602-05 (Stevens, J., concurring in judgment). Justices Brennan, Marshall, and Blackmun also concurred in the judgment but did not join the majority opinion. *Id.* at 594-602 (Brennan, J., with Marshall & Blackmun, JJ., concurring in judgment).

46. 478 U.S. 833, 857 (1986).

within the executive branch, to adjudicate a state common law counterclaim. The objecting party in *Schor* relied on the ruling in *Northern Pipeline* that only article III judges could provide a federal forum for deciding such questions.⁴⁷ The Court, however, upheld the statute and allowed federal, non-article III adjudication of state law claims, at least when the objecting party—the original complainant in the CFTC proceeding—had initiated the adjudicative proceeding and when the counterclaim involved the same basic transaction as the original claim.⁴⁸ The Court did suggest, however, that Congress could not remove all such cases from the purview of the federal judiciary, but did not explain which ones could not be removed or why they were a necessary part of the business of the federal courts.⁴⁹

Another side of the passive encroachment issue is at stake in cases challenging Congress' assignment of functions normally performed by the executive. Thus, in *Morrison v. Olson*,⁵⁰ after first rejecting an appointments clause challenge, the Court turned aside a claim that the judges who appointed the independent counsel were improperly exercising supervisory authority over the independent counsel, a function the opponents said could only be performed by executive branch officials.⁵¹ The Court read the applicable statute narrowly and sustained it, although it first expressed concern about assigning to article III judges the role of supervising the independent counsel.⁵² The Court held that under the statute the judges did not exceed their judicial function, particularly in light of their ancillary powers available through the appointments clause, which allows courts of law to appoint inferior officers, even if the office is part of the executive branch.⁵³

The Supreme Court rejected a similar challenge in *Mistretta v. United States*.⁵⁴ In this case the defendant claimed that Congress' placement of the Sentencing Commission, three of whose seven members were article III judges, in the judicial branch was improper because the Commission performed functions that, if they could be delegated at all, belonged to the executive branch.⁵⁵ The Supreme Court found no encroachment, relying on the historical role of the courts in the sentencing process—although that role had traditionally been on an individual, or retail, rather than a rule-making, or wholesale, basis—and citing the fact that the judges were serving in their

47. *Id.* at 847.

48. *Id.* at 858.

49. *Id.*

50. 487 U.S. 654 (1988).

51. *Id.* at 680-81.

52. *Id.* at 677-78.

53. *Id.* at 673-77.

54. 109 S. Ct. 647 (1989).

55. *Id.* at 660-61.

individual rather than judicial capacities.⁵⁶ In both *Morrison* and *Mistretta*, that Congress had not sought to increase its own powers, but instead assigned new powers to other branches, undoubtedly made it possible for the Court to sustain statutes that clearly would have been set aside if Congress had granted itself or its agents those powers, or if the judiciary had assumed them on its own.

C. UNDUE INTERFERENCE

Even when there has been no textual violation and one branch has not exercised power given by the Constitution to another, separation of powers problems may still exist if a statute “disrupts the proper balance between the coordinate branches.”⁵⁷ As the Court said in *Nixon v. Administrator of General Services*,⁵⁸ in such a case the Court must determine “the extent to which [the statute] prevents the . . . [b]ranch from accomplishing its constitutionally assigned functions,” and then “determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.”⁵⁹ The sole context in which this type of separation of powers challenge has arisen to date is through legislative restrictions on the executive branch, generally on the President. It is also theoretically possible that similar kinds of restrictions could be applied to the judicial branch, for example, by requiring that the weekly conferences of the Supreme Court be open to the press or the public.

Since the determination in each of these cases involves a balancing, it is hardly surprising that the outcomes do not uniformly favor one branch or the other and are not easy to predict. In *Nixon*, the Court was sharply divided over whether the requirement in the Presidential Materials and Recordings Act,⁶⁰ which directed that all papers of former President Richard Nixon be turned over to the National Archives for review and release, subject to certain exemptions, was an undue interference with the power of the President to conduct his office and obtain confidential advice from his staff.⁶¹ The Court upheld the statute, relying on the fact that the Archivist was a professional within the executive branch, that the material at issue related to the performance of official government functions, and that two Presidents (Ford and Carter) had supported the law.⁶² The Court left for future determination the applicability of the statute to specific documents that President

56. *Id.* at 664.

57. *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 443 (1977).

58. 433 U.S. 425 (1977).

59. *Id.*

60. 44 U.S.C. §§ 3315-3324 (1988).

61. *Nixon*, 433 U.S. at 429, 443, 448-49.

62. *Id.* at 441.

Nixon claimed must be kept secret, and which might or might not have been covered by the exemptions from disclosure.⁶³

In *Morrison v. Olson*, the alleged interference was caused by the President's loss of control over the independent counsel, in particular his inability to fire him, except through the Attorney General, and then only for cause.⁶⁴ Chief Justice Rehnquist, writing for the entire Court except Justice Scalia, upheld the law, finding the need for independence and the desire to avoid the appearance of impropriety sufficient to warrant the limited nature of the intrusion.⁶⁵ The Court's opinion noted that the intrusion was only for the short-term life of the particular independent counsel appointment and was limited to one member of the executive branch, who still could be fired for cause.⁶⁶ The result in *Morrison* is consistent with that in *Humphrey's Executor v. United States*,⁶⁷ which rejected President Roosevelt's separation of powers challenge to the provisions limiting his ability to fire commissioners of the Federal Trade Commission (FTC) except for cause. But the method of analysis in *Morrison* is quite different and seems intended to supplant that in *Humphrey's Executor*, which focused primarily on the legislative nature of the FTC as a reason for distinguishing the case from *Myers v. United States*,⁶⁸ in which the Court only eight years earlier had spoken in broad terms about the President's power to fire executive officers appointed by him.⁶⁹

Two other undue interference cases, in which our office was counsel for the party opposing the executive branch, reached the Supreme Court in the 1988 Term on direct appeals from the United States District Court for the District of Columbia, which in both cases had struck down statutes on separation of powers grounds. However, for different reasons, neither case produced a separation of powers ruling. In the first, *American Foreign Service Association v. Garfinkel*,⁷⁰ Congress had passed an appropriations rider to prevent the executive branch from requiring employees with access to classified information to sign certain nondisclosure agreements that Congress believed contained inappropriate provisions that prevented employees from disclosing

63. *Id.* at 444-46.

64. 487 U.S. 654, 663 (1988).

65. *Id.* at 677, 693-97.

66. *Id.* at 672.

67. 295 U.S. 602 (1935).

68. 272 U.S. 52 (1926).

69. *Id.* at 161-64. In *Morrison*, the Supreme Court, correctly in my view, rejected a claim that the case involved a congressional encroachment, based on the theory that every reduction in Presidential powers results in an increase in legislative power, even though Congress does not gain power as it did with the legislative veto. 487 U.S. at 686. More importantly, *Morrison* clarified and simplified the process of analyzing cases in which Congress increases its own powers, and separated them analytically from those in which Congress imposes restrictions on the other branches.

70. 109 S. Ct. 1693 (1989) (per curiam).

either unclassified or improperly classified information which might prove embarrassing to the executive branch.⁷¹ Senior District Judge Gasch held the statute unconstitutional as an invasion of the President's powers as Commander-in-Chief.⁷² Judge Gasch did so without reference to Congress' substantial powers under the Constitution to declare war, to raise and support the armies, and to make rules for the Armed Forces, as well as Congress' power to control government spending, the specific method used in this instance to limit the nondisclosure agreements. In addition, there was no evidence presented regarding how the limitations imposed by the statute would actually interfere with the President's ability to protect properly classified information, and the record was devoid of evidence on many of the other factors that would go into balancing the need for the statute against the level of interference that it might generate.⁷³

On appeal, the Supreme Court did not reach any of the constitutional issues. Instead, its per curiam opinion vacated the decision below and remanded it for further consideration in light of certain intervening events that mooted at least some aspects of the case.⁷⁴ The Court directed the district court on remand to ensure that all aspects of the case were ripe and not moot, to attempt to reconcile the statute with the Constitution, and to adjudicate the constitutional issues only if it first found specific violations of the statute.⁷⁵ While the Court's opinion was not a ruling on the merits, it recognized that the questions presented in *Garfinkel* are far more subtle, and the interests of Congress far more significant, than the district court believed.

In the second case, *Public Citizen v. Department of Justice*,⁷⁶ five Justices construed the Federal Advisory Committee Act (FACA) so as not to apply to the Judicial Selection Committee of the American Bar Association (ABA Committee), thereby avoiding any constitutional question.⁷⁷ The district court had held that the Department of Justice was violating FACA by "utilizing" the ABA Committee to advise it on nominees for federal judgeships, without complying with the statute.⁷⁸ The court also found, however, that the statute, so construed, violated separation of powers and the appointments clause because it interfered, in unspecified ways, with the President's exclusive constitutional power to appoint federal judges, subject only to the

71. *Id.* at 1694-95.

72. 688 F. Supp. 671, 683, 685 (D.D.C. 1988), *vacated and remanded*, 109 S. Ct. 1963 (1989).

73. *Id.* at 683-85.

74. 109 S. Ct. 1693, 1693-98 (1989).

75. *Id.* at 1698. The case is now on remand, with the plaintiff attempting to show that the statute produces a very low level of interference with executive authority and that it substantially advances valid congressional interests, and with the executive taking the opposite position.

76. 109 S. Ct. 2558 (1989).

77. *Id.* at 2572-73.

78. *Washington Legal Found. v. Department of Justice*, 691 F. Supp. 483, 489 (D.D.C. 1988), *aff'd sub nom. Public Citizen v. Department of Justice*, 109 S. Ct. 2558 (1989).

advice and consent of the Senate.⁷⁹

Three Justices rejected the government's statutory argument, but agreed with the district court that, as applied, FACA was unconstitutional.⁸⁰ To reach that result, the Justices asserted that the district court's findings of interference were not challenged by the plaintiffs,⁸¹ despite the fact that the plaintiff's brief devoted nearly eight pages to explaining how minimal any statutory interference was and how most of the claims of interference were dependent on the courts' rejecting the same statutory defenses to the openness requirements of FACA that seemed to be at the heart of the government's interference argument.⁸² While the Court's opinion in *Public Citizen* makes no new separation of powers law, the willingness of three Justices to accept the government's interference argument, with little or nothing to support it, at least suggests some increased rigidity in the separation of powers balancing tests applied in *Nixon* and *Morrison*.⁸³

III. ASSESSING THE OUTCOMES

The discussion in Part II may be of help in analyzing the cases and in thinking through possible approaches to future separation of powers issues, but it does not attempt to assess the performance of the courts in any way. Such an assessment could take the form of analyzing the opinions for their legal craftsmanship, internal consistency, or consistency with one another. That is not, however, the type of assessment I choose to make.

Instead, I wish to offer some normative judgments about the separation of powers decisions of the Supreme Court, including some decisions not to decide a separation of powers question, in an attempt to evaluate whether the results of those cases make sense in light of the underlying purpose of the doctrine: to give the people a responsive, accountable, and nontyrannical government. This assessment will not attempt to explain all of the Court's separation of powers cases, or even all of the cases mentioned above; nor will it attempt to discuss all of the factors that might go into such a comprehensive assessment. Rather, it will focus on the three questions discussed in the

79. *Id.* at 491-93.

80. *Public Citizen*, 109 S. Ct. at 2580 (Kennedy, J., concurring).

81. *Id.* at 2584.

82. Brief for Appellant at 26-33, *Public Citizen v. Department of Justice*, 109 S. Ct. 2558 (1989) (Nos. 88-429, 88-494).

83. Justice Scalia in all probability would also accept that position. He recused himself in *Public Citizen* presumably because, when he was an Assistant Attorney General in 1974, he had rendered an opinion that the statute as applied to the ABA Committee violated separation of powers. A. Scalia, Memorandum Re Constitutionality of the Federal Advisory Committee Act at 5-7 (Dec. 1, 1974) (copy on file at *The Georgetown Law Journal*). He was also the lone dissenter in *Morrison*, suggesting that he would be willing to find interference at a far lower level than most, if not all, of the other Justices. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

introduction that seem to go to the heart of the judgment about the outcomes in these cases.

A. HAS THE SUPREME COURT REFUSED TO ADAPT THE DOCTRINE OF SEPARATION OF POWERS TO THE PROBLEMS OF TWENTIETH CENTURY AMERICAN GOVERNMENT?

When the Court has found either violations of the text of the Constitution or active encroachment, it has struck down the challenged scheme without inquiring into its possible benefits, with the result that the Court is viewed as unduly rigid by some. The two leading candidates for a charge of "failure to adapt to modern American necessities" are *Immigration & Naturalization Service v. Chadha*⁸⁴ and *Bowsher v. Synar*,⁸⁵ in which the Court set aside major decisions of the elected branch about the necessities of proper government. In *Chadha* the Court overturned Congress' use of the legislative veto device to limit administrative discretion, which many observers both in and out of Congress believed had gone out of control.⁸⁶ In *Bowsher* the Court rejected Congress' choice of the person (office) that it considered the most appropriate to be in charge of the deficit reduction and to ensure a balanced result in carrying out its will.⁸⁷ Indeed, President Reagan, whom the Department of Justice supposedly represented in challenging the law in *Bowsher*, was an early and enthusiastic supporter of Congress' effort to balance the budget by using the Gramm-Rudman-Hollings device, and he signed the bill into law with only a modest constitutional reservation.⁸⁸ Moreover, President Reagan also supported the legislative veto as a candidate,⁸⁹ but was persuaded to take a different position once in office, thereby joining his predecessors in office who opposed the veto, while sometimes acquiescing in its inclusion in especially desired legislation.⁹⁰

Some view the opinions in *Chadha* and *Bowsher*, both of which were written by Chief Justice Burger, as taking an unduly rigid or mechanical approach to separation of powers and showing a lack of sympathy for Congress' problems in trying to pass broad statutes and see that they are executed properly. While there is some truth to this allegation, it overlooks

84. 462 U.S. 919 (1983).

85. 478 U.S. 714 (1986).

86. *Chadha*, 462 U.S. at 944-45.

87. *Bowsher*, 478 U.S. at 720.

88. President's Statement on Signing H.R.J. Res. 372 into Law, 21 WEEKLY COMP. PRES. DOC. 1490-91 (Dec. 12, 1985).

89. Lubasch, *Judge is Urged to Dismiss Westway Bid for a Landfill Permit*, N.Y. Times, June 23, 1983, at B4, col. 1; Brown, *Reagan 'Reforms' Would Tighten Congressional Grip on Agencies*, Wash. Post, Oct. 12, 1980, at A4, col. 1.

90. See *Chadha*, 462 U.S. at 942 n.13; see also Kurtz, *President Yields to Congress, Signs College Student Aid Measure*, Wash. Post, Oct. 15, 1982, at A3, col. 4.

several important facts. For example, in the case of the legislative veto, Congress was poised to launch a full-scale invasion of the executive branch by putting a legislative veto provision on every regulation of every federal agency, and on a host of internal agency decisions as well, not to mention a number of legislative vetoes that would be applied directly to Presidential decisions. One need not applaud the judicial craftsmanship of the *Chadha* opinion to agree that Congress had gone too far and that the holding was unavoidable unless the Court was prepared to allow one House, or more realistically one committee or subcommittee of Congress (or even their staffs), to dictate to executive agencies how their programs should be run. Similarly, while the specific encroachment in *Bowsher* was certainly of lesser magnitude than the legislative veto, allowing the Comptroller General to carry out the budget-cutting functions at issue in *Bowsher* could have opened the way to a *Chadha*-like attack on the powers of the executive branch, using the Comptroller General rather than the legislative veto.

One other opinion is open to this challenge of failing to adapt to the changing governmental needs of twentieth-century America: the Court's refusal in *Northern Pipeline* to allow bankruptcy judges to perform adjudicative functions assigned to them by Congress because the assignment violated article III of the Constitution. There is much force to the portion of Justice White's dissenting opinion criticizing Justice Brennan's plurality opinion for drawing the line at three exceptions to the requirement that article III judges must preside over adjudications in a federal forum,⁹¹ without explaining why three is the magic number instead of four or five. On the other hand, Justice White is on far less secure ground in explaining what line he would draw, or why the case before the Court in *Northern Pipeline*, which embodied a traditional state common law question, should fall on the non-article III side of the line.

What saves the result in *Northern Pipeline* from overburdening federal judges is not the opinion itself, but the Court's subsequent ruling in *Schor* that the parties can consent to a non-article III tribunal. To be sure, there is language in Justice O'Connor's opinion in *Schor* suggesting that article III would preclude such an arrangement in some circumstances, but the basic thrust of her opinion is that consent will resolve most of the problems in non-article III adjudications.⁹² Thus, in the bankruptcy context, federal judges have not been overwhelmed after *Northern Pipeline*, largely because the consent mechanism Congress subsequently built into the system⁹³ has allowed most cases to go to bankruptcy judges with the parties consent. It remains to be seen how far "consent" can be implied. For example, if Congress sought to imply consent in a highly coercive situation, *Schor* might no longer gov-

91. 458 U.S. 50, 103-05 (1982) (White, J., dissenting).

92. 478 U.S. 833, 850-51 (1988).

93. 28 U.S.C. § 157(c)(2) (1988).

ern. In at least one such instance, *Union Carbide*,⁹⁴ the Court declined to rest its result on consent grounds, but instead found the adjudication to be within the previously-recognized exception for administrative tribunals.⁹⁵

Despite these examples, however, there seems to be little basis for any charge that the Supreme Court has completely refused to adapt its separation of powers jurisprudence to the realities of twentieth century American government. Although I have other problems with the decisions in *Humphrey v. Baker*, regarding federal pay, in *Synar v. United States*, regarding the Gramm-Rudman-Hollings Act, and in *Mistretta v. United States*, regarding the Sentencing Commission, no one can accuse those courts of being tied to 1789 as they approved mechanisms that are a far cry from anything ever imagined by the Framers. And while I support the Court's decision to uphold the independent counsel statute in *Morrison*, it is hard to imagine that same result 200 years ago, or even earlier this century.

B. HAVE CONGRESSIONAL DELEGATIONS GONE OUT OF CONTROL?

As yet, there has been no official burial for the doctrine of excessive delegation, and the Supreme Court still pays lip service to the "intelligible principle" test for delegations enunciated in *J.W. Hampton Jr. & Co. v. United States*.⁹⁶ But for all intents and purposes the doctrine is a dead letter. Indeed, at this time, it would be almost a violation of rule 11 of the Federal Rules of Civil Procedure for an attorney to make an excessive delegation claim.⁹⁷

The current state of the law can be illustrated by taking examples from both ends of the excessive delegation spectrum: instances in which Congress includes many specific directions in a delegation, and those in which it includes almost none. Delegations falling at both ends of the spectrum have been upheld. For example, under the Gramm-Rudman-Hollings Act, despite numerous statutory directions as to how cuts should be made, Congress placed no controls on the estimation of the anticipated rate of interest, one of the key figures needed to estimate the deficit.⁹⁸ As a result, even if every economist in the country, the Office of Management and Budget, and the Congressional Budget Office all agreed that interest rates would average eight percent, the Comptroller General would have been entirely free under the statute to designate any interest rate, such as two percent or forty percent. Moreover, not only did the statute contain no controls on the Comptroller's

94. 473 U.S. 568 (1988).

95. *Id.* at 593-94.

96. 276 U.S. 394, 409 (1928).

97. Rule 11 of the Federal Rules of Civil Procedure provides for sanctions for the filing of claims that are not "warranted by existing law." FED. R. CIV. P. 11.

98. 2 U.S.C. § 901 (1988).

discretion in estimating interest rates, it also explicitly made the Comptroller's determinations in this area judicially non-reviewable.⁹⁹ Although there are numerous controls in the Gramm-Rudman-Hollings Act on certain decisions, there are no controls on the discretion, now exercised by the Office of Management and Budget, in deciding virtually all of the crucial factors necessary for estimating the deficit.

A similarly broad delegation is present in the statute creating the Sentencing Commission and directing the establishment of mandatory sentencing guidelines.¹⁰⁰ Like the Gramm-Rudman-Hollings Act, the statute contains a plethora of statutory directions, but leaves virtually all of the major policy choices entirely to the discretion of the Sentencing Commission. For example, under the statute, the Commission could decide that all drug traffickers should receive the maximum sentence allowed by law, or that everyone convicted of income tax evasion must serve sixty days in jail and pay the maximum fine allowable, on the theory that drug trafficking can be deterred only by stiff sentences and that tax evasion is an economic crime which can be deterred only by a combination of jail and heavy fines. Similarly, the Commission could abolish probation for everyone, or make probation mandatory for all first time offenders, except in those cases in which minimum mandatory sentences are prescribed by statute. Furthermore, if the Commission were so inclined, it could decide that pornography was an extraordinarily serious federal offense and require judges to impose the maximum sentence allowable by law in every pornography case. At the same time, the Commission could decide that perjury and conspiracies to violate civil rights were trivial offenses and require judges to impose the minimum sentence permitted. Although in fact the Commission has made rather different judgments from these, nothing in the statute would have precluded it from making any of these determinations, or any of a myriad of others that would have radically altered the federal justice system in our country.

The delegation in the Federal Salary Act of 1985¹⁰¹ can be seen as falling at the opposite end of the delegation spectrum. Under this law, the President has the sole authority to determine the salary level for high ranking officials in the executive, legislative, and judicial branches, and his only statutory direction is to prescribe salary levels that he "deems advisable."¹⁰² Thus, the President can raise salaries to any amount he wants, or, with the exception of the salaries of federal judges, which are protected by article III, he can cut salaries to the bone. The only way that Congress can alter the President's personal preference is by passing a new statute, presumably over his veto.

99. *Id.* § 922(h).

100. 18 U.S.C. §§ 3551-3559 (1988); *id.* §§ 991-998.

101. 2 U.S.C. § 358 (1988).

102. *Id.*

Although there is a commission that makes recommendations to the President, the President is not bound by its advice.¹⁰³ In fact, in 1987 President Reagan changed most of the dollar amounts recommended by the commission and also altered the salaries in a way that upset the historical balances among various officials in the different branches.¹⁰⁴ All of this was entirely proper and not subject to judicial review or to any limitation other than that the President not deem those changes which he chose to make "inadvisable."¹⁰⁵

To be sure, Congress did mandate that the Sentencing Commission follow public rulemaking procedures before promulgating its guidelines,¹⁰⁶ which serves the function of ensuring procedural fairness and an opportunity to be heard. Even if the substance of these guidelines is not subject to judicial review, the public input into them is surely an improvement over the absence of any such procedures, the situation which the Court criticized in *Schechter Poultry*, although it does not answer the substantive objections to an overbroad delegation. But no such procedures were available in *Synar*, and those procedures required under the Federal Salary Act are minimal and inapplicable to the only decision that counts—that of the President.

The Court's unwillingness to strike down these delegations is understandable if one views separation of powers doctrine essentially as an effort to ensure that no one branch has encroached upon the territory of another, which in this instance would mean that Congress' prerogatives had not been invaded. Under such a theory, because Congress does not care about protecting its authority, and has voluntarily divested itself of its own powers, the courts should not interfere. If self-protection of the branches is the goal of the doctrine of separation of powers, then it may not matter that Congress has chosen to give away its authority to another branch of government, subject only to recapture if it can pass another statute.

But if one takes into account the interests of the citizens in the separation of powers, the result is rather different. The purpose of separation of powers becomes not simply to protect the interests of the three branches, but also to protect the right of the people to be governed in accordance with the compact that they made through the Framers by approving the Constitution. This compact is intended to ensure that those whom we elect as lawmakers will actually make the fundamental policy choices. When elected officials do not make these fundamental choices, but instead delegate them to the Presi-

103. *Id.*

104. *Humphrey v. Baker*, 665 F. Supp. 23, 25, 29 (D.D.C. 1987), *aff'd*, 848 F.2d 211 (D.C. Cir.), *cert. denied*, 488 U.S. 966 (1988).

105. It might be argued that the delegation should have been upheld because it did not affect the substantive rights of anyone (other than taxpayers or perhaps the legislators who wanted to vote on the raise), but that was not the rationale on which the law was sustained.

106. 28 U.S.C. § 994(x) (1988).

dent, or to appointed subordinates, this basic compact is broken, and the people do not receive the representative, accountable government to which they are entitled. Although one could also argue that congressional abdication of power is harmful to Congress' own interests both in the long and in the short terms, the case for controlling delegations is a strong one on its own, based solely on principles of responsive and accountable government.

In my opinion, the principal reason why courts have been unwilling to find a delegation to be excessive is that they have been comparing one delegation with another in an effort to decide how much delegation is too much. The difficulty in using this approach is that each statute is different, and it is therefore impossible to make meaningful comparisons among the variety of broad delegations that are challenged in court. As a result, if the Supreme Court continues to proceed along its present path, eventually all delegations will be upheld, if for no other reason than if one is struck down, it will be almost impossible not to slide backwards, striking down each subsequent delegation, in precisely the same way that the courts have been moving forward building on prior delegations that have been upheld.

There does seem to me to be one way to revive the nondelegation doctrine without wholly tying the hands of Congress. Nondelegation issues arise almost exclusively in circumstances in which administrative agencies or others are authorized to make rules, or similar across-the-board determinations, such as under the Gramm-Rudman-Hollings Act or the Federal Salary Act. In these circumstances, to assure the people that the legislative direction has been followed by the administrative rulemakers, the Court should hold that any delegation that does not provide the courts with standards sufficient for determining whether the statutory directions were met is per se excessive. Under this approach, if Congress has not given the agency sufficient guidance, and the Court is consequently unable to determine whether the agency in fact followed the law, then the delegation is excessive. Stated another way, a statute should not be struck down simply because Congress has given an agency a wide range of choices, but should be set aside only in those instances in which the court cannot determine whether the agency's decision fell within the bounds of the delegation.¹⁰⁷

Because the purpose of reviving the nondelegation doctrine is to require Congress to make basic policy choices, the doctrine would apply to decisions like those about the proper levels of federal pay and the appropriate ranges of

107. In my view, Chief Justice Rehnquist was in error in his dissenting opinion in the *Cotton Dust Case*, when he suggested that the delegation there had gone too far. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting). That is so not because Congress had specifically envisioned the details of the standard under challenge, but because the framework for a standard covering a hazard such as cotton dust was plainly contemplated and desired by Congress, although its precise contours were equally plainly not included in the statute.

sentences for convicted criminals. There would be no need to apply the non-delegation doctrine, however, in situations in which the choices involve some balancing of policies, but the goal of the law is not to affect substantive rights. The principal impact of this exception to the doctrine would be in the area of procedure, in which the Supreme Court, for example, working through its advisory committees, promulgates binding procedural rules without congressional guidance of the kind that I have suggested is needed for making substantive rules. As long as Congress continues to prohibit the Court from issuing rules that "abridge, enlarge or modify any substantive right,"¹⁰⁸ the promulgation of these procedural rules would present no delegation problems.

Such an approach also would not require that all types of agency decisions be subject to judicial review. It would plainly be proper to insulate from judicial review decisions about whether to bring a law enforcement proceeding, as the Court recognized in *Heckler v. Chaney*.¹⁰⁹ Similarly, an agency authorized to choose among several hundred grant applications, each of which met the minimum standards established by the agency, would not be stopped because a court could not determine whether the agency had chosen the most qualified from among those who met the minimum criteria for grant recipients.

Under this test, the delegations in all three of the statutes described above—the Gramm-Rudman-Hollings Act, the Sentencing Reform Act, and the Federal Salary Act—would not withstand scrutiny. In none of these statutes is there any possibility of judicial review of the key determinations made, and almost anything that could have been done would have been within the statutory framework.

What would such an approach to separation of powers mean? For balancing the budget or setting federal salaries, Congress could simply vote on these issues itself, as it has done in the past. For other issues, like the sentencing guidelines, Congress might have to appoint an advisory committee to do the ground work before Congress would be in a position to vote to approve, disapprove, or modify the committee's recommendations. In other situations, such an approach would require Congress to do more than it has been doing or to delegate fewer decisions to administrative agencies, but neither result would be disastrous, and either would probably make the law-making function substantially better than it is now. Most importantly, this approach would return responsibility and accountability to our elected officials. It would prevent them from ducking the hard choices, as they have done, by either writing detailed but largely insignificant criteria into statutes, or by

108. 28 U.S.C. § 2072 (1988).

109. 470 U.S. 881 (1985).

delegating the decision-making power to the President or other official with permission to do whatever he or she wants. As it now stands our legislators no longer have to make policy; they merely have to decide when to delegate to the other branches the power to do so. It is hard to imagine that the Framers would have created a representative government based on such a principle.

C. HAVE WE FOUND THE RIGHT JUDICIAL NICHE?

The question of whether the judicial role has been properly defined involves two separate inquiries: whether too much of the judicial power has been assigned to others, and whether federal judges have been assigned powers that do not properly belong to the judiciary. The answer to the first question seems, by and large, to be no, and to the second, seems to be yes.¹¹⁰

The *Union Carbide* and *Schor* cases represent the two most recent examples of the Supreme Court's approval of legislative decisions to deny litigants an article III forum. In both cases there is no doubt that the disputes were capable of judicial resolution consistent with the case or controversy requirement of article III; the question, therefore, was whether other forums were also acceptable. In both cases the Court ruled that they were.¹¹¹

Under the "three team approach" to separation of powers, the only inquiry would be whether the courts whose powers were being reduced opposed the laws. After all, if the affected branch does not object, why should a private party be able to oppose the delegation when the other two branches have also agreed? Indeed, in *Union Carbide* and *Schor*, the legislative branch was the source of the reductions in judicial power, and the executive branch supported them, not only at the time that the laws were enacted, but also when they were challenged in court.¹¹²

This view, however, seems too narrow. The federal courts were not created merely for the purpose of employing those chosen by the President and confirmed by the Senate to hold article III offices. Rather, the federal courts were created for the benefit of the parties, to provide a neutral forum for fair and impartial adjudication of certain kinds of controversies. The proper question, therefore, ought to be whether a person with a dispute that is to be resolved in a federal forum is entitled to have that forum be presided over by

110. This article will not discuss whether the courts have improperly expanded or improperly contracted notions of justiciability to bring within their sphere either too much or too little litigation, consistent with the separation of powers aspects of the case or controversy requirement in article III. Instead, this article focuses on whether others have been given judicial-like powers that should remain in the judiciary and on whether the judiciary has been given powers that properly belong to other branches.

111. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 590 (1985).

112. *Schor*, 478 U.S. at 841; *Union Carbide*, 473 U.S. at 590.

a person with the protections of life tenure and a prohibition against salary reduction, which are the hallmarks of article III independence. The answer to that question has little or nothing to do with judicial preferences; in fact, many judges would be pleased to get rid of some types of cases and hand them off to magistrates, bankruptcy judges, or other non-article III adjudicators.

Nonetheless, the answers to the questions presented in *Union Carbide* and *Schor* need not be any different under this approach. It seems clear to me that *Schor* was correctly decided under either approach because the objecting party consented to a non-article III forum by filing a complaint with the CFTC.¹¹³ It is entirely fair and reasonable for Congress to condition the right of Mr. Schor to avail himself of a federal administrative forum upon his willingness to have all matters rising out of the same transaction adjudicated in that forum. The consent theory undercuts much of Justice O'Connor's discussion, which suggests that there are limits on Congress' ability to remove cases from the federal courts¹¹⁴ and assumes that diversity or statutory cases were in federal court before Congress put them there.

Although constructive consent by the affected party seems to me to be a complete answer in *Schor*, it cannot supply the necessary ingredient in *Union Carbide* because the mandatory licensing system at issue in the case was so plainly coercive as to negate any notion of consent.¹¹⁵ It is the mandatory aspect of *Union Carbide*, coupled with the fact that disputes are resolved by arbitrators who are not even federal officials, and whose decisions are virtually immune from judicial review, that makes this decision most troubling to me. The Court's rather mechanical application of the statutory right of action exception to article III jurisdiction and its failure to acknowledge the substantial interest of the objecting litigant in having the dispute resolved by an independent article III judge make the decision problematic. There are some mitigating factors in the case, such as the complexity and fact-bound nature of the issue, which make the result more defensible. However, the Court's reasoning, when viewed in light of its unwillingness to deny an article III forum to the objecting party in *Northern Pipeline*, makes the rationale, if not the result, difficult to accept.

On the question of whether judges have been given powers for which they are constitutionally ill-suited, I conclude that the Court has not reached a proper balance in several respects. Although one could argue that the supervisory role of the special division in the independent counsel statute is improper, the Supreme Court's narrow reading of that law probably makes the minimal additional functions that the judges are required to carry out accept-

113. *Schor*, 478 U.S. at 838, 845.

114. *Id.* at 850-57.

115. *Union Carbide*, 473 U.S. at 573.

able, and certainly makes them of no great moment. Unfortunately, the results in other cases are far less satisfactory.

For me, a much greater problem is presented by the roles taken on by the article III judges on the Sentencing Commission. As the Supreme Court recognized, the job of the Commission is to make difficult policy choices in order to create a fair scheme of sentencing for persons convicted of federal crimes.¹¹⁶ The correct policy choices are not obvious, and in the end many of the choices reflect only the personal preferences of the Commission members. The discretionary nature of these decisions is underscored by the statute's requirement that no more than four members of the Commission can be of the same political party,¹¹⁷ which evidences Congress' recognition that the choices the Commission makes are political in the best sense of the word—they involve value judgments, rather than partisan politics.

It is the political nature of these determinations, however, that makes assigning these functions to article III judges seem entirely inappropriate. Although it is argued that judges were included in the Commission for their expertise, there was no requirement in the statute that the judicial members of the Commission be district judges who are experienced in sentencing, and none of the judges chosen would rank among the members of the federal bench whose sentencing backgrounds made them the most qualified to serve in this role. It seems more likely, however, that Congress included judges on the Commission and placed the Commission in the judicial branch to suggest to the public that the Commission's function was merely to rationalize and systematize the sentencing process, a role in which the judicial experience would be invaluable. While no doubt some of the long process of sentencing reform involved those kinds of decisions, the major and the most contentious part of the process dealt with the policy choices, in which horse-trading between judges and nonjudges on the Commission took place in order to reach a political accommodation that was acceptable to the Commission as a whole.¹¹⁸

116. *Mistretta v. United States*, 109 S. Ct. 647, 657, 665 (1989).

117. 28 U.S.C. § 991(a) (1988).

118. The political aspects of the Commission's work have become even more apparent now that it is trying to decide on appropriate sentences for corporations found guilty of federal crimes. See Strausser, *Corporate Sentences Draw Fire; Big Business Attacks Proposals*, Nat'l Law Journal, Mar. 12, 1990, at 3, col. 1; Etzioni, *Going Soft on Corporate Crime*, Wash. Post, Apr. 1, 1990, at C3, col. 1. It is more than a little ironic that Andrew Frey, one of the attorneys protesting the Commission's proposals, was co-counsel representing the Commission in defending its implementing statute against challenges of excess delegation. Frey and others have now made the similar charge that the Commission is proceeding without statutory guidance and without prior empirical support for the path it is espousing. This charge was made by opponents of the Commission in pointing out that it had markedly increased sentences for individuals in certain areas because it believed that prior sentences were too lenient. Brief for Petitioner at 9, *Mistretta v. United States*, 109 S. Ct. 647 (1989) (Nos. 87-1904, 87-7028).

In my opinion, this is an inappropriate role for article III judges. With life tenure and protections against salary reduction, article III judges are looked upon to protect all of us against the political forces that sometimes oppress minorities and do violence to the Constitution. Bringing judges out of their judicial capacities, and moving them into a policy-making role inevitably undermines the judiciary's limited cache of independence, even if the erosion is only through three of the nearly 700 federal judges.¹¹⁹ It is not an answer to suggest, as the Court did, that the judges participated in the Commission not as members of a court, but as individuals.¹²⁰ A judge with lifetime tenure does not cease being a judge simply by removing his or her robes, or taking on the additional title of Commissioner for a period of time.¹²¹ Although the Court tried to limit its ruling in *Mistretta* to the sentencing area in which courts have long had a major role, it remains to be seen whether this limitation will survive if Congress again reaches into the federal judiciary for "neutral" but experienced individuals to solve difficult political problems.

If viewed from the "three team approach" to separation of powers, Congress' decision to assign added duties to the federal judiciary, principally at the expense of itself, seems of no concern. If Congress is willing to relinquish some of its own powers, the judges are willing to accept them, and the President supports the law, both in the legislative and judicial arenas, who cares? However, if one views separation of powers as protection for the people and not for the branches of government, a different result is reached. If the neutrality of judges is seen as a benefit not only for the judicial branch, but also for the people who come before it, and if the judges' removal from the political process is intended to ensure that neutrality, then there is a loss to the people when Congress assigns federal judges roles that are inconsistent with the role of article III adjudicators.

Perhaps it is not surprising that the Supreme Court found these arguments unpersuasive. It was, after all, article III judges who were determining whether article III judges can continue to be fair and impartial in their judicial role, despite their role in issuing rules governing federal sentences. It is a rare person who can recognize that he or she cannot take on added duties without conflicting with existing ones. How many times, for instance, have individual lawyers said that the rules prohibiting the commingling of funds

119. As of November 4, 1989, there were 743 authorized federal judgeships with 59 vacancies. 1990 JUDICIAL STAFF DIRECTORY 555.

120. *Mistretta*, 109 S. Ct. at 671.

121. When I tried to make a similar point at oral argument in *Mistretta*, Chief Justice Rehnquist suggested that my analysis sounded rather like the aphorism "guns don't kill people, people kill people." My response was perhaps more polite than on point, for it seemed to me then and now that this aphorism is no more viable than the Court's distinction between judges and courts in its opinion. Transcript of Oral Argument at 32-33, *Mistretta v. United States*, 109 S. Ct. 647 (1989) (Nos. 87-1904, 87-7028).

are not made for them, thinking that they are too honest and principled not to return the money when their financial crises pass? It is for this reason that conflict-of-interest rules for lawyers are strict, not because most of us are dishonest, but because too often we cannot see that our independence has been subtly affected by our relations with others. Although this may partially explain the Court's reasoning in *Mistretta*, it does not justify Congress' decision to put judges into this political role, nor the Court's decision to approve it. If we wish to protect the people by maintaining an independent judiciary, we must keep it independent and not allow it to expand its powers beyond those clearly within the ambit of article III.

IV. A FEW FURTHER SUGGESTIONS

Most of the suggestions in Part III are directed to the judiciary and do not seem likely to be adopted in any significant respect. There are two other branches that have a major, in fact the primary, role in the creation of the situations that lead to separation of powers confrontations. Before turning to what the executive and legislative branches might do to address separation of powers issues, it is worth inquiring why there have been so many separation of powers cases in recent years.

Part of the cause of the increase in separation of powers litigation is that the courts have shown an increased willingness to accept arguments based on the doctrine. It is not surprising that litigants have been encouraged to raise appointments clause challenges after *Buckley*, congressional encroachment challenges after *Chadha*, or denial of an article III forum challenges after *Northern Pipeline*. A lawyer who failed to raise these claims might well be guilty of malpractice.

The success of separation of powers challenges may explain why litigants raise these claims, but it does not explain how we got to the place where separation of powers claims have become such a significant part of the legal landscape. Although others may see the origins of the problem in the increased divisiveness between the major political parties, or the increased acrimony between the White House and Capitol Hill, it seems to me that the principal cause is Congress' increasing inability or refusal to make hard choices and reach accommodations in a way that actually resolves difficult problems. The legislative veto was a product of Congress' unwillingness to put meaningful statutory restraints on the agencies—seeking both the glory from passing fine-sounding laws and the power to undo them if they do not turn out the way that Congress intended. The Gramm-Rudman-Hollings Act was a response to Congress' inability to reduce the deficit by refusing to cut popular programs or raise taxes, not to Congress' inability to write budgets, for Congress continued to do that even after the law was passed. The Federal Salary Act was the product of a loss of congressional will and a

desire to make someone else take the political heat for raising the salaries of members of Congress.

To be sure, the weakening of the party system and the loss of power by leaders in Congress have made the process of forging a consensus more difficult. In at least some situations, however, the absence of political backbone does not appear to be the cause of the problem. For example, the *Northern Pipeline* controversy arose largely because of efforts to minimize the expansion of the federal judiciary, while still effectively handling bankruptcy matters. Nonetheless, it is by-and-large the case that separation of powers cases arise because Congress is trying to find a procedural gimmick to avoid hard, substantive choices. It is the presence of these congressional gimmicks more than anything else that has produced the major separation of powers challenges of the last fifteen years.¹²²

Another cause of the increase in separation of powers litigation is the willingness of the executive branch to claim "undue interference" whenever Congress passes a law that arguably touches on one of its constitutional prerogatives. For example, while various Presidents had been unhappy with the role of the Comptroller General, Attorney General Edwin Meese took the opportunity to take the issue to court in *Ameron, Inc. v. United States Army Corps of Engineers*.¹²³ At issue in *Ameron* was the Competition in Contracting Act,¹²⁴ which gave the Comptroller General the power to review bid protests and make recommendations, but not decisions, regarding them.¹²⁵ The statute also put a mandatory ninety-day hold on all contract awards that were subject to bid protests, and gave the Comptroller the power to extend the time if necessary to review the case, or to reduce the time if the claim

122. The Justice Department has shown that it is not above giving into gimmicks, even when the result is an aggrandizement of congressional power. Recently, the executive branch decided that it wanted to be relieved of the burden of running Dulles and National Airports, which serve the Washington, D.C. area, and of raising the money to pay for needed improvements. *Citizens for the Abatement of Aircraft Noise v. Metropolitan D.C. Airports Auth.*, 718 F. Supp. 974, 976 (D.D.C. 1989). The Secretary of Transportation established an advisory commission that proposed creating a new airports authority, to be formed under the laws of Virginia and the District of Columbia, which would receive a long-term lease of the airports from the federal government. *Id.* The House of Representatives insisted that a review board, consisting of nine members of Congress, be given the power to veto all major decisions of the airport authority. *Id.* at 977-78. The Justice Department issued an opinion approving the review board with the result that, as one House Member put it, "We are getting our cake and eating it too." 132 CONG. REC. H11,100 (daily ed. Oct. 15, 1986) (remarks by Rep. Smith). A separation of powers challenge to the review board was rejected by the district court, *Citizens for the Abatement of Aircraft Noise*, 718 F. Supp. at 986, but the D.C. Circuit reversed and held the statute unconstitutional, No. 89-7182 (D.C. Cir. Oct. 26, 1990), even though the Department of Justice intervened in support of the review board.

123. 809 F.2d 979 (3d Cir. 1987), *cert. dismissed*, 488 U.S. 918 (1988).

124. Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified as amended at 31 U.S.C. §§ 3551-3556 (1988)).

125. 31 U.S.C. § 3553 (1988).

could be disposed of more quickly.¹²⁶ Instead of waiting to see whether the Comptroller in fact ever extended the time, or whether Congress would fix the problem in a way satisfactory to both branches, the Attorney General simply directed government agencies not to comply with the statute.¹²⁷ When a bid protester objected to an agency's failure to comply with the Act, the Attorney General raised the full specter of separation of powers, even though the issue was largely, if not entirely, theoretical.¹²⁸ Although there may be constitutional problems in the portion of the Act that allows the Comptroller General to award attorney's fees to a successful bid protester,¹²⁹ I seriously doubt that the doctrine of separation of powers was necessary to deal with the *Ameron* dispute. How little was at stake in *Ameron* is underscored by the fact that once Congress passed a statute which eliminated the Comptroller General's power to extend or shorten the time frame for deciding bid protests, the Solicitor General voluntarily dismissed the certiorari petition that the Supreme Court had granted.¹³⁰

Other separation of powers challenges raised by the Justice Department also seem to be based on a hair-trigger approach to protecting executive prerogatives. In *Public Citizen v. Burke*,¹³¹ the court of appeals summarily rejected the separation of powers argument advanced by the government.¹³² The government argued unsuccessfully that it was unconstitutional for Congress to require former President Nixon to sue to overturn decisions of the Archivist rejecting his claims of executive privilege, instead of accepting them and requiring the requesters of Presidential documents to go to court.¹³³ Similarly, one questions the necessity of the Department of Justice's throwing its full weight against the constitutionality of the independent counsel statute in *Morrison v. Olson*, when others were ready and able to take it on.

Similarly, the government launched immediate full scale separation of powers objections to the statutes at issue in *American Foreign Service Association v. Garfinkel*¹³⁴ and *Public Citizen v. Department of Justice*.¹³⁵ While there may be separation of powers issues with respect to some aspects of

126. *Id.* § 3554(a); *Ameron*, 809 F.2d at 985 n.5.

127. *Ameron*, 809 F.2d at 991 n.8.

128. *See id.* at 987.

129. 31 U.S.C. § 3554(c)(1)(A) (1988).

130. *United States Army Corp. of Eng'r v. Ameron*, 109 S. Ct. 297 (1988) (dismissing writ of certiorari). In fact, the change will likely bring more harm than good to the executive branch, because the Comptroller will no longer be able to shorten, as well as extend, the 90 day review period, which suggests how little the law interfered with the processes of the executive branch.

131. 843 F.2d 1473, 1480 (D.C. Cir. 1988).

132. *Id.* at 1478-80.

133. *Id.* at 1480.

134. 109 S. Ct. 1693 (1989).

135. 109 S. Ct. 2558 (1989).

those laws, it would have been far more consistent with the President's constitutional duty "to take care that the laws shall be faithfully executed"¹³⁶ to have at least attempted to implement the laws in a manner consistent with the statutes, and object on a separation of powers ground only if there was a serious impediment to his ability to carry out his constitutional functions. In several of these cases, Presidential prerogatives have been invoked by middle level Justice Department officials; it would be far preferable if only the President, or perhaps the Attorney General in the President's absence, were permitted to decide to attack a statute on constitutional grounds.

Another reason that Congress becomes embroiled in separation of powers lawsuits is that too often it does not look for separation of powers problems during the legislative process. This charge is most clearly illustrated in the final version of the Sentencing Commission contained in the Sentencing Reform Act.¹³⁷ Although the general proposal for a sentencing commission had been pending for over seven years, the final bill was never subjected to a detailed separation of powers review by either Congress or the executive branch prior to its passage. Some of these problems might be avoided if Congress gave separation of powers issues serious thought during the legislative debates. Perhaps what Congress needs is an independent adviser to provide expert opinions on avoiding constitutional problems. At the least, Congress should ask the executive branch for its views in advance so that they are known and, to the extent possible, taken into account. Although these two steps would not eliminate separation of powers disputes, they might cut down their number or make them more manageable, and make those statutes that do raise separation of powers issues easier to defend.

Sometimes Congress, or at least many of its members, appears not to care about separation of powers issues. This was surely the case in the days preceding the passage of the Gramm-Rudman-Hollings Act when the issue addressed by Congress was politics, with virtually no concern about the constitutional question. This was also true of the legislative veto. Until the Supreme Court said that the veto was unconstitutional, the separation of powers issues were brushed aside by Congress as someone else's concern, even though members of Congress also take an oath to uphold the Constitution. In marked contrast, the constitutional issues in the United States-Canada Free Trade Agreement Implementation Act of 1988 were given careful examination before the law was approved.¹³⁸ That Act also quite sensibly contained a provision for expedited judicial review of the constitutional issues and a careful contingency plan in case any part is declared

136. U.S. CONST. art. II, § 3, cl. 4.

137. 18 U.S.C. §§ 3551-3586 (1988); 28 U.S.C. §§ 991-998 (1988).

138. See H.R. REP. NO. 816, 100th Cong., 2d Sess., pt. 4, at 4-16 (1988).

unconstitutional.¹³⁹

Finally, let me suggest to Congress that even if the nondelegation doctrine is constitutionally moribund, it still embodies a political lesson that Congress should heed. I cite as the prime example the judicial upholding of the Federal Salary Act,¹⁴⁰ followed by the revolt by the American people in January 1989 when Congress sought to use the Act to increase its pay by more than fifty percent.¹⁴¹ While the people were outraged by the amount of the increase, they were equally upset by Congress' unwillingness to stand up and vote for it. Although it was the attempt to avoid a vote rather than the inadequate standards in the law that caused the public outcry, it was the failure of the courts to insist upon a meaningful delegation in the underlying statute that gave Congress the idea that it could get away with the ploy. It is hard to imagine any action that Congress has undertaken in the last half century that caused it more difficulty than its decision to duck the pay issue, a fact that Congress has recognized by amending the statute so that it now specifically requires roll call votes on all future Congressional pay increases. If there were ever a lesson that the Constitution is the minimal requirement, and not necessarily the acceptable level, this surely is it.

Not only do these legislative gimmicks fail in the short run, but in the long run they are destructive of the very power that Congress seeks to maintain in its battles with the executive branch. As the War Powers Resolution¹⁴² and Congress' unwillingness to exercise meaningful oversight over its implementation demonstrate, it is difficult for Congress to recapture power once it has ceded it to the President, either directly or by default. If Congress insists on shedding much of its power in so many areas, it is going to be virtually impossible to reclaim that power. It is only by shunning legislative gimmicks and going back to basic principles of accountability that Congress can hope to recapture its role in the governing process.

One of the problems in achieving reforms in this area is that there is no established constituency looking after separation of powers issues. There are, of course, individuals within the executive and legislative branches who watch out for the institutional interests of their branches, and the judges who hear separation of powers cases can perhaps protect the interests of the judiciary. However, that leaves out the people, some of whom may be seriously affected by a particular separation of powers case, yet have no interest in the issue generally. Perhaps some way can be found to educate the public on the

139. *Id.* at 22-25.

140. *See supra* text accompanying notes 35-38.

141. Morin, *Huge Majority in Poll Opposes 50% Raise for Top Officials*, Wash. Post, Jan. 17, 1989, at A1, col. 1.

142. 50 U.S.C. §§ 1541-1548 (1982).

importance of separation of powers issues so that when they arise they are seen from a broader perspective than "how does this affect me."

V. CONCLUSION

Life is a series of choices. I believe that the Supreme Court has chosen wisely in most, but not all, separation of powers cases. If I had to choose between the present results—problems and all—and a situation in which all of the key rulings came out the opposite way—converting all bad decisions to good and vice versa—I would clearly prefer the status quo. The Court has at least prevented the worst schemes from going forward. Most of what I see as errors—allowing excessive delegations or permitting assignments of duties to branches of the government that are institutionally ill-suited to handle them—involve single statutes and do not apply to a whole range of governmental activities. Furthermore, there is always the hope that the lesson from the congressional pay debate may persuade Congress that decision, not delegation, is the better part of valor. The present balance may not be optimal, but it is a good deal better than it might have been without the Supreme Court's intervention.