REALISM IN SEPARATION OF POWERS THINKING

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I.

The basic difficulty of defining a judicial role in enforcing structural relationships between the branches of the national government is that the various policies informing those relationships seem quite contradictory: separated powers, yet shared and overlapping powers; independence of branch functions, yet functions that check and balance each other; and, in the duality with which Paul Verkuil begins his essay,[1] promoting efficient specialization, but avoiding the tyranny of too much efficiency. Given these dualities, the courts have three options. They must either adopt simplifying mediating principles, or engage in some form of case-by-case balancing to assess the tradeoffs in particular situations, or abandon the project of trying to enforce separation of powers norms.

The Supreme Court in recent years has often invoked mediating principles based on a textual literalism that is very unsatisfactory. Even taking account of the valuable prophylactic functions that rigid, even simplistic, rules can sometimes perform, the Court's approach in cases like *Bowsher v. Synar*,[2] *INS v. Chadha*,[3] and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[4] does not inspire praise. These opinions suffer the sort of flaw that law cannot survive: they describe a normative and actual universe that we all know to be false. Their rigid categories of branch power simplistically disregard the real complexities of government structure as we know it and as our country has known it for a very long time.

Into this situation, Verkuil has sought to infuse a rather rich mediating principle: courts, in the name of separation of powers val-

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1. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303-05 (1989).

2. 478 U.S. 714 (1986).

3. 462 U.S. 919 (1983).

4. 458 U.S. 50 (1982) (plurality opinion).

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ues, should act to protect against conflicts of interest both within and between the branches. This idea is a useful one, and Verkuil applies it in an illuminating fashion to several of the leading separation of powers issues of our day. The problem with Verkuil's approach, in my judgment, is that it seeks to apply a *unitary* principle to an area of law where there really are *multiple* concerns.

Verkuil's analysis is most convincing in the context of the independent counsel issue, which he seems to acknowledge was the issue for which his theory was "designed."[5] Indeed, the Supreme Court's recent opinion[6] upholding the federal independent counsel legislation[7] not only reflects Verkuil's focus on avoiding conflicts of interest, but is also one of the few recent Supreme Court decisions treating separation of powers in terms of its functional objectives. Verkuil's conflict of interest approach, however, is much less successful as a way of explaining the problems in some of the other current areas of concern.

For example, it is hard to see why in *Bowsher v. Synar*,[8] the Gramm-Rudman-Hollings case, either the Comptroller General or Congress is in a "conflict of interest" situation. Verkuil says that "[t]he combination of law creation and law execution is a conflict of interest,"[9] but surely that is an unusual use of the phrase, pointing to quite different concerns than the core "conflicts" problems that gave rise to, and justify, the independent counsel statute. To conclude that a "conflict" exists in this situation requires the head-on debate about separated-versus-shared powers that Verkuil's approach promised to avoid; "conflict" analysis can no longer function as the promised "tie breaker"[10] among the more traditional dualisms of separation of power analysis. Similarly, it is hard for me to see that the problem posed by the legislative veto[11] really is one of "conflicts of interest," although President Verkuil's actual

5. Verkuil, *supra* note 1, at 326.

6. Morrison v. Olson, 108 S. Ct. 2597 (1988).

7. The Ethics in Government Act, 28 U.S.C. §§ 591-594 (1978), *amended by* The Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 28 U.S.C.A. §§ 591-599 (West Supp. 1988).

8. 478 U.S. 714 (1986).

9. *Id.* at 315.

10. *Id.* at 304-05.

11. INS v. Chadha, 462 U.S. 919 (1983).

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analysis of the various types of legislative veto is full of insight. Finally, the problem of "delegation"[12] does not seem to me a true "conflict of interest" problem either, except perhaps when delegations to private parties are involved. Not surprisingly, at this point in his essay Verkuil invokes an alternative vocabulary and speaks of a "rule of law" version of separation of powers,[13] which in this context seems to require that legal *standards* exist for the executive to apply, and not specifically that conflicts of interest be avoided.

In a sense, then, Verkuil is more faithful to reality than to his principle. He probes a number of very different problem areas and realistically describes significant problems of government structure that they present; but he uses the single label "conflict of interest" to characterize them all. Those problems, and his own underlying concerns, do not seem to me unitary at all.

II.

It is Paul Verkuil's basic commitment to the underlying reality behind separation of powers issues that I want to expand upon and embellish a bit. As I ponder the discussion of separation of powers issues by both scholars and the courts, I find myself wanting more realism. In that vein, let me make four rather loosely connected observations.

A.

First, in the spirit of realism, we should acknowledge that the separation of powers cases that come to the Supreme Court rarely if ever address the truly major separation of powers concerns of our time. For example, these cases barely touch the major issues concerning the proper roles of the President and Congress in foreign affairs decision making. No separation of powers question in recent years has been more important than the one raised by President Reagan's decision to send and keep United States forces within the Persian Gulf; but while Congress debated these separa-

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12. *Id.* at 317-22.
13. *Id.*

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tion of powers matters extensively,[14] the courts have had absolutely no involvement with the issue.

Similarly, the judicial cases do not directly address the serious concerns raised by people like our fellow-conferee Lloyd Cutler, who argues that divisions between the President and Congress, and the constant checking and balancing that this division produces, have yielded extensive paralysis, with issues fundamental to our country remaining unresolved.[15] Nor are the courts addressing, except at the edges, the basic concerns of those who are disturbed by a quite contradictory perception, that we live in an era of dangerously excessive presidential power.

To put the point slightly differently: politics and power relationships, not judicial decisions, most significantly determine the vitality and shape of our system of checks and balances. A strong President with a broad mandate will generally be able to shape the national agenda and forge policy. A strong and politically aroused Congress, particularly with a weak President, will generally be able to work its will. This tends to be the result even when judicial decisions significantly define the terrain. For example, even after the Supreme Court removed the legislative veto from Congress' arsenal,[16] Congress retained ample weapons (oversight hearings, informal pressure on administrators, fast-track legislative procedures, control over appropriations) to check executive branch policy making—*when* Congress has the political will. And as we have seen from the unsteady life of the War Powers Resolution,[17] the relationship and interaction between President and Congress in the foreign policy areas is shaped more by the respective political power of the two branches at a particular time than by any charter of legal rights.

This is certainly not to say that the War Powers Resolution or "law" more generally counts for nothing in this area. Our basic constitutional structure shapes everything; judicial decisions can powerfully shape options; and the existence of laws like the War

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14. *E.g.*, *Senate Blocks Move to Invoke War Powers Resolution*, Wash. Post, June 7, 1988, at A11, col. 1; *Senate Avoids Vote on Keeping Forces in Gulf*, N.Y. Times, June 7, 1988, at A13, col. 1.

15. Cutler, *Now Is the Time for All Good Men . . .*, 30 WM. & MARY L. REV. 387 (1989).

16. INS v. Chadha, 462 U.S. 919 (1983).

17. 50 U.S.C. §§ 1541-1548 (1982).

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Powers Resolution often influences the *politics* of a situation, if nothing else.[18] Nevertheless, I think that we frequently overstate the significance of law and judicial decisions in determining the vitality of our system of separation of powers.

B.

My second point, again in the spirit of realism, is that we should acknowledge more fully that current debates about the powers of the various branches of government are shaped by a broader political and policy context. For example, in recent debates about the proper roles of the President and Congress in the commitment of United States forces abroad, those who advocate a greater congressional role typically favor the more sparing use of force as an instrument of foreign policy, and see broader presidential prerogatives as an invitation to a *disfavored kind of foreign policy.* Similarly, the resurgence of separation of powers challenges to independent agencies has tended to come from those who are opposed to the *substance* of much of the government regulation with which the independent agencies are associated, people who believe that greater presidential control over such agencies will promote favored substantive policies.

This fact does not mean that the structural issues are not serious; "independence" by those who exercise power over us, for example, always raises important concerns about accountability, and rightly so. Moreover, my comments certainly do not mean that we should abandon a search for principled bases for thinking about separation of powers issues. But we should not ignore the fact that positions on structure of powers questions have often been linked to other more substantive goals. Too often, we tend to examine structural issues as if they involved only debates about neutral framework principles that are unconnected to fluctuating substan-

18. For example, the existence of the War Powers Act allows Congress to argue, in the political debate, that the President is violating the law. In a society where the rule of law remains deeply respected, the ability to say that the President is violating the law, and the ability to point to the statute books in support of that claim, has political force—even if the President immediately chooses to answer that the Resolution is unconstitutional, and therefore itself unlawful. At the very least, then, the War Powers Resolution can be seen as an effort by Congress to empower itself in the political conversation by creating a norm that Congress can then call "the law."

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tive policy debates. And thus an air of unreality descends upon our conversations.

C.

Third, both judges and academics should take more realistic account of what is at stake in particular separation of powers cases. Here I align myself with, but go somewhat beyond, those recent scholars, including Paul Verkuil, who have criticized the "formalistic" quality of some recent Supreme Court decisions and urged a more "functional" analysis. My concern is not simply with the mechanical way in which the Court's opinions in cases such as *Bowsher*, *Chadha*, and *Northern Pipeline* are written. In addition, both courts and commentators have too frequently latched on to superficial separation of powers problems and ignored deeper ones, or have invoked separation of powers doctrines as little more than a convenient handle for challenging statutes that are problematic for other reasons.

The Supreme Court's treatment of the Gramm-Rudman-Hollings legislation in *Bowsher*[19] illustrates some of these problems. In *Bowsher* the Court struck down a statute that mandated automatic across-the-board spending reductions each year for a period of five years to reduce the federal budget deficit to various targeted amounts. The Court held the statute invalid because of the role assigned to the Comptroller General, who was responsible for making the calculations necessary to implement the automatic spending reductions. That role violated the doctrine of separation of powers, according to the Court, because the Comptroller General was exercising "executive" functions and yet was potentially removable by Congress. It is unconstitutional, the Court said, for Congress to "reserve for itself the power of removal of an officer charged with the execution of the laws, except by impeachment."[20]

Others have criticized the "formalistic" quality of the Court's analysis.[21] For me, an equally fundamental problem with the opinion is that the Court viewed the central separation of powers issue

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

20. *Id.* at 726.

21. *See, e.g.*, Strauss, Bowsher v. Synar: *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Consistency?*, 72 CORNELL L. REV. 488 (1987); Sun-

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in the case as who should have the authority to remove the Comptroller General. As the debate *outside* the courtrooms clearly acknowledged, Gramm-Rudman-Hollings raised a deeper and more basic issue involving the structure of power in our national government: whether Congress should legislate on such a major matter through a mechanism involving so great an abdication of ongoing deliberative lawmaking by Congress. Automatic across-the-board spending cuts spread out over a period of years apparently reflected Congress' own distrust, and consequent abdication, of its own lawmaking and appropriation powers. Whether Congress may legislate in that way—binding itself with a series of mechanical across-the-board spending cuts rather than making considered value choices on an ongoing basis—was for me the fundamental and important structure-of-national-powers issue that the case raised but that the Court chose not to address.[22] Compared to that structural problem, the Court's altogether hypothetical worry about who might remove the Comptroller General seems like a makeweight.[23]

Of course, good reasons may have existed for the Court to choose the course that it did. For one thing, the structural concern about

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stein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); Verkuil, *Status of Independent Agencies After* Bowsher v. Synar, 1986 DUKE L.J. 779.

22. Justice Stevens' separate concurrence, joined by Justice Marshall, flirted with this issue, concluding that the problem of Gramm-Rudman-Hollings was that Congress had in effect delegated too much lawmaking to the Comptroller General, who was performing tasks properly done by Congress itself. 478 U.S. at 737 (Stevens, J., concurring). But while the problem of Gramm-Rudman-Hollings was indeed that Congress had abdicated responsibility, my point here is not that Congress had given too much lawmaking leeway to the Comptroller General; rather, Congress had created a regime of across-the-board spending cuts to be applied mechanically over a period of years instead of making law by deliberating upon and making critical value choices on an ongoing basis. For a provocative article raising a related kind of objection to Gramm-Rudman-Hollings, see Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986).

23. As Justice White noted in dissent:

> The practical result of the removal provision is not to render the Comptroller unduly dependent upon or subservient to Congress, but to render him one of the most independent officers in the entire federal establishment. . . . [O]f the six Comptrollers who have served since 1921, none has been threatened with, much less subjected to, removal. . . . Realistic consideration of the nature of the Comptroller General's relation to Congress thus reveals that the threat to separation of powers conjured up by the majority is wholly chimerical.

478 U.S. at 773-74 (1986) (White, J., dissenting).

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removal power, hypothetical though it may have been in this case, does have a strong pedigree in modern separation of powers doctrine.[24] To have condemned Gramm-Rudman-Hollings because of what I am calling the deeper structural problem would have required considerably more doctrinal innovation.[25] In addition, even if the Court was troubled by the "deeper" structural problem, many people believed that this form of self-binding legislation was a necessary last resort. By choosing to strike down the statute on a narrow and rather easily correctable ground, the Court did not altogether preclude legislation of this troublesome form. Instead, the door was left open for the Court to uphold automatic spending cut legislation, slightly modified, if Congress took a hard second look and thought that such legislation was really essential. When a court rests decisions on such narrow constitutional grounds, its action can become part of an ongoing interchange between the court and the legislative branch.[26] This may often be a good thing, itself an expression of our system's commitment to institutions that check and balance each other.[27]

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24. *See, e.g.*, Wiener v. United States, 357 U.S. 349 (1958) (removal of War Claims Commissioner by President held invalid); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (removal of FTC Commissioner by President without cause held invalid); Myers v. United States, 272 U.S. 52 (1925) (removal of Postmaster by President held valid).

25. For example, a significant obstacle would have been the cases restricting the nondelegation doctrine. *See generally* Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985).

26. Gramm-Rudman-Hollings contained a "fallback" provision—left intact by *Bowsher* and in effect today—which retains the spending targets and other parts of the Act but requires affirmative congressional action before any spending cuts go into effect. After *Bowsher*, Congress did consider a range of legislation to restore the Act's automatic cuts in a way that would avoid *Bowsher*'s strictures (typically, by authorizing the Office of Management and Budget to implement the automatic cuts); these measures were not adopted, though. The existence of a "fallback" provision which keeps a statute functioning if a part is invalidated typically reduces the pressure for a continuing Court-Congress dialogue—or, to describe the dynamic somewhat differently, the "fallback" reflects Congress' dialogic answer to an imagined judicial action *before* judicial action has actually occurred.

27. A similar potential for Congress-Court dialogue can occur when a court avoids constitutional grounds by construing a statute narrowly—that is, by resting a decision on *statutory grounds.* Such a decisional ground invites Congress to reconsider a controversial policy, leaving open the policy's ultimate constitutionality. The possible uses of statutory construction in separation of powers cases would be a fruitful area for further writing. *See* Gewirtz, *Congress, the Courts, and Executive Policymaking: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46, 65-83 (Summer 1976); Sunstein, *Beyond the Republican Revival*, 98 YALE L.J. 1539 (1988).

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Nevertheless, the Court did not even acknowledge the more fundamental structure-of-government problems with Gramm-Rudman-Hollings, and this avoidance had real costs. First, it contributed to a sense that the Court may have latched on to a makeweight basis for striking down the legislation, one that masked the Court's actual concerns. (A similar question arose concerning some lower court decisions—now reversed—that struck down the controversial new Sentencing Guidelines on the ground that the membership of the Sentencing Commission that developed the guidelines violated separation of powers principles.[28]) Secondly, the Court's opinion in *Bowsher* had the effect of focusing public scrutiny on the unique characteristics of the Comptroller General rather than on the unique abdication of Congressional responsibility that Gramm-Rudman-Hollings represents. In an odd reversal, the Court suggested that the problem with the law was that Congress was *keeping* too much control over the budget cutting process through its potential power to remove the Comptroller General, whereas the real problem was that Congress was *renouncing* too much of its ongoing responsibility. The Court skewed public debate, rather than enriching it.

D.

Finally, "realism" suggests that Court decisions in the separation of powers area should be read narrowly—that is, in light of the particular factual circumstances of the cases. Given the multiplicity of concerns that flourish behind the rubric of separation of powers, some of them clearly in tension with others, judges are unlikely to paint with a very broad brush. This is especially so because the courts, in safeguarding the basic institutional framework set down by the constitutional text, have generally been attentive to the practical necessities of governing and to "the gloss which life has written" upon our governmental structure.[29] Courts, therefore, are likely to evaluate "hard" separation of powers cases with fact

28. The Guidelines were upheld in Mistretta v. United States, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989), handed down after this comment went to press. *See* Jacoby, *Parsing the Sentences*, NEWSWEEK, Sept. 19, 1988, at 82.

29. Youngstown Sheet & Tube Co. v. Sawyer [The Steel Seizure Case], 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

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specificity, both because the facts are what reveal or betray the absence of necessity and because focusing on the facts is a judge's way of negotiating a complex legal terrain where countervailing considerations (and well-established hybrid arrangements) are everywhere.

To be sure, sometimes courts do speak in broad language. Justice Black's majority opinion in *Youngstown Sheet & Tube Co. v. Sawyer [The Steel Seizure Case]*,[30] is a well-known example. Yet today it is almost universally believed that the more narrowly framed concurring opinions in that case capture what it really "stands for." Although several recent Supreme Court cases striking down statutes on separation of powers grounds echo some of Justice Black's sweeping language, each of those cases is probably best read as a decision about the particular provision challenged there, and about very little more. Reading those decisions too broadly led some to speculate that the well-established independent agencies were in serious jeopardy,[31] a reading that seems to have been rejected in the more recent independent counsel decision.[32] And reading the independent counsel decision too broadly may lead others to think the Supreme Court will be broadly receptive to any new hybrid institution that is "functionally" justified.

The Court's opinion in the independent counsel case reflects an attention to the particulars of the statute involved there, and the case should be read with a similar attention to particulars. As Paul Verkuil elaborates,[33] Congress' adoption of the independent counsel legislation rested upon a demonstrated conflict of interest problem when ordinary executive branch prosecutors investigate high-ranking executive branch officials; indeed, Congress was responding to public events that had fundamentally challenged the public's confidence in its government. But rather than create special prosecutors who were altogether independent of the executive, Congress established a much more complex structure.

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30. 343 U.S. 579 (1952).

31. *See* Currie, *The Distribution of Powers After* Bowsher, 1986 SUP. CT. REV. 19; Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41. *But see* Verkuil, *supra* note 21, for a more realistic (and prescient) reading.

32. Morrison v. Olson, 108 S. Ct. 2597 (1988).

33. Verkuil, *supra* note 1, at 326-30.

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Resisting broad separation of powers slogans, the Court emphasized how the specific provisions of the legislation, taken together, respect a cluster of different separation of powers concerns. The statute takes account of any legitimate executive branch prerogatives by preserving a role for the President and Attorney General in the appointment and removal of special prosecutors, and it avoids an excessive role for the other branches of government. Specifically, as the Supreme Court recognized:

- The independent counsel is appointed by a special court, but only if the Attorney General first determines that there are "reasonable grounds to believe that further investigation or prosecution is warranted," and then asks the court to appoint an independent counsel.[34]
- The independent counsel retains a great measure of independence, but the executive branch retains some countercheck by having the power to fire the counsel for "good cause." A further counterbalancing check is built in, however, by providing for judicial review of any decisions to fire.[35]
- The appointing judges are disqualified from sitting in any of the cases that the independent counsel actually brings, thereby protecting the integrity of the judicial branch.[36]
- Congress did not seek to aggrandize its own power, but strictly limited its own role in appointing or removing independent counsels.[37]

Taken together, these provisions give the independent counsel the independence necessary to be a check on executive branch lawlessness, but they also establish a broader interactive structure of checks and balances that promotes a measure of accountability and respects the prerogatives of each branch.

The Court, then, saw this statute as a balanced response to a very real problem of governance. The structure of intersecting roles provided in the legislation suggests that Congress was seeking to foster a system of checks and balances rather than subvert it.

34. 108 S. Ct. at 2603 (quoting 28 U.S.C. § 592(b)(1) (1978), *amended by* 28 U.S.C.A. § 592(b)(2) (West Supp. 1988)).

35. *Id.* at 2604 (citing 28 U.S.C.A. § 596).

36. *Id.* at 2615.

37. *Id.* at 2620-22.

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The Court recognized that Congress had faced up to the constitutional values at stake and, to a striking degree, had taken account of a range of structure-of-powers concerns, balancing and accommodating the multiple values underlying our structure of national government.[38] The Court would have made a grievous error if it had blocked this effort in the name of the Constitution. But the case should be read only as a decision about this particular piece of legislation, with its particular objectives and its distinctively complex structure. Congress' leeway in other contexts—with other purposes in view and with even slight shifts in the accommodations made—will be very much an open question.[39]

The message of realism throughout this Comment rests upon a basic underlying belief. The Constitution embodies and strives for ideals, but it does not create abstractions. It creates living institutions to deal with public affairs in a deliberate, practical, and self-correcting way. It is in that spirit that we find the Constitution's truest and best meaning.

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38. On the pages of a somewhat less scholarly journal, I have argued that Congress in fact deserves the real credit for the independent counsel decision because it carefully considered possible constitutional objections at the time it adopted the law and made careful efforts to minimize them. Gewirtz, *Congress, As Well As Courts, Must Make Constitutional Law*, Hartford Courant, July 24, 1988, at C3.

39. The Court's recent decision upholding the Sentencing Guidelines, Mistretta v. United States, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989), handed down after this comment went to press, once again used a meticulously context-specific approach.

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