Cornell Law Review

Volume 81
Issue 6 *September 1996*

Article 5

Reconsidering FEC v. NRA Political Victory Fund Through a Bolstered Functionalism

Peter S. Guryan

NOTE

RECONSIDERING *FEC V. NRA POLITICAL VICTORY FUND* THROUGH A BOLSTERED FUNCTIONALISM

INTRODUCTION

In *FEC v. NRA Political Victory Fund*,[1] the D.C. Circuit found that the composition of the Federal Election Commission (FEC), an independent agency,[2] violated the constitutional principle of separation of powers because the Secretary of the Senate and the Clerk of the House of Representatives served as ex officio nonvoting members of the Commission. The court of appeals held that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution."[3] The D.C. Circuit's rebuff of Congress represents the most extreme position ever taken by a court against Congress regarding the structural relationship between the legislative branch and the administrative agencies.[4] After initially granting certiorari to determine the constitutionality of these ex officio nonvoting members of the FEC, the Supreme Court dismissed the case on other grounds,[5] thus denying itself an opportunity to repair a damaged doctrine.

---

1 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed*, 115 S. Ct. 537 (1994).

2 *See infra* part I.D for a discussion of independent agencies.

3 *NRA*, 6 F.3d at 827.

4 *Status of the Metropolitan Washington Airports Authority: Hearings on Pending Legislation Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong., 1st Sess. 34 (1995) (statement of Johnny H. Killian, Senior Specialist American Constitutional Law, Congressional Research Service). Mr. Killian appeared before the Senate Subcommittee to address the constitutional questions raised by various proposals to amend the Metropolitan Washington Airports Act of 1986 after both the Supreme Court and the D.C. Circuit found the Act unconstitutional. *See* Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Airport Noise (CAAN), 501 U.S. 252 (1991); Hechinger v. Metropolitan Wash. Airports Auth., 36 F.3d 97 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 934. In *Hechinger*, the D.C. Circuit relied upon the *NRA* decision. Thus, Mr. Killian felt it necessary to comment on *NRA* in discussing the proposed amendments to the Airports Act. For a discussion of *CAAN* and *Hechinger* see *infra* parts II.E.3 and IV.B.2 respectively.

5 *See* FEC v. NRA Political Victory Fund, 115 S. Ct. 537 (1994). In *NRA*, the Supreme Court granted certiorari on the issue of whether the presence of the ex officio nonvoting members on the FEC violated the separation of powers principle. *Id.* After oral argument, however, the Court decided that it could not reach the merits of the case, because the FEC's organic statute did not authorize it to petition for certiorari on its own. *Id.* at 543-44. The Court declared that the Federal Election Campaigu Act (FECA), 2 U.S.C.

This Note reconsiders the relationship between Congress and administrative government through a critique of the *NRA* case. In particular, it examines a "crucial innovation [reflected in the Supreme Court's] post-1980 cases" and relied upon by the D.C. Circuit—the distinction between legislative encroachment and independence.[6] In the past, the Court has permitted Congress to separate the President from the administrative process, thereby diminishing executive powers. But, the Court has consistently refused Congress any expansive role within the administrative state.[7] Use of this judicial construct reflects an inherent judicial bias against the legislative branch and has facilitated the constitutionalization of extreme and unnecessary curtailment of congressional initiative.

Part I of this Note examines the Supreme Court's jurisprudence leading to the development of the distinction between legislative encroachment and independence. It demonstrates how this device has encouraged an extraordinary bias against Congress within separation of powers analysis. Part II examines the D.C. Circuit's decision in *FEC v. NRA Political Victory Fund* by focusing upon Judge Silberman's extremist position. Part III critiques the *NRA* decision and posits that the court's distinction between legislative encroachment and independence is ideologically flawed. It argues that this inadequate judicial construct evolved not from a real fear of Congress, but rather from a reluctance to confront the more difficult task of incorporating the values underlying separation of powers theory—preservation of individual liberty and protection from political tyranny. Part III suggests that courts should adopt a more functional approach bolstered by a consideration of the values underlying separation of powers theory. Finally, this Note concludes that the extremism in the *NRA* decision is inapposite to the traditional separation of powers framework. Moreover, the case should serve as a catalyst for change and should lead toward an approach that is more consistent with the values underlying separation of powers.

---

§ 437d(a)(6), requires the FEC to obtain permission from the Solicitor General to petition for certiorari. *Id.* at 543. Furthermore, the Court found the Solicitor General's attempt to remedy the situation retroactively by granting permission to the FEC on May 26, 1994 insufficient, because too much time had passed. *Id.* Petitions for certiorari must be filed within 90 days of the entry of the judgment below, which, in this case, was October 22, 1993. *Id.* at 541 (citing 28 U.S.C. § 2101(c)).

6 Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 114 (1994).

7 *See* Mistretta v. United States, 488 U.S. 361 (1989) (finding the U.S. Sentencing Commission constitutional); Morrison v. Olson, 487 U.S. 654 (1988) (finding the Independent Counsel provisions of the Ethics in Government Act constitutional); Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating the provisions of the Gramm-Rudman-Hollings Act granting budget cutting authority to the Comptroller General); INS v. Chadha, 462 U.S. 919 (1983) (invalidating the legislative veto).

I
BACKGROUND

A. A Brief Discussion of Separation of Powers

The American separation of powers doctrine represents a deliberate choice made by the framers of the Constitution about the structure of government. The doctrine, which animates what Professor Stephen Carter has termed the Political Constitution,[8] aspires to improve government through a scheme which discourages institutional self-dealing and promotes individual liberty.[9] The doctrine dictates the relationships between institutional actors and ensures that the system satisfies its two fundamental tenets: independence and interdependence.[10] The framers recognized that effective government requires fundamentally independent branches,[11] but that there should also be a working interdependence in which each branch "checks and balances self-interested behavior by the other branches."[12] To some degree, these principles are in conflict. Nevertheless, the American constitutional system is "an amalgam of the separation of powers and checks and balances."[13]

The separation of powers doctrine was introduced and best articulated in the writings of James Madison. In the *Federalist*, Madison explained:

> The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few or many, and whether

---

8 The term, Political Constitution, refers to the structural clauses of the Constitution. For a discussion of this concept, see Stephen L. Carter, *From* Sick Chicken *to* Synar: *The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719, 778-800. According to Carter, the Constitution prescribes a system of balanced and separated powers that the courts ought to enforce. Carter, a formalist, advocates that "[i]n interpreting structural clauses, more than in any other aspect of constitutional adjudication, courts ought to be guided by sources more concrete than moral philosophy or their own intuitions about right and wrong." *Id.* at 780.

9 Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1534 (1991) ("In general, then, separation of powers is aimed at the interconnected goals of preventing tyranny and protecting liberty."). I use the term "institutional self-dealing" because when one branch accumulates too much power, it leads to tyranny.

10 Thomas O. Sargentich, *The Contemporary Debate about Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 434-35 (1987). Sargentich writes:

> It often is taken for granted that the American doctrine of the separation of powers has two main tenets. First, it is thought that the three major "branches" of government should be kept in some fundamental sense separate. Second, this separateness should permit a working interdependence in which each branch, in guarding its own prerogatives, effectively checks and balances self-interested behavior by the other branches.

Id.

11 *Id.*

12 *Id.*

13 M.J.C. VILE, *Separation of Powers*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1659, 1659 (Leonard W. Levy et al. eds., 1986).

> hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. . . . [T]he preservation of liberty requires, that the three great departments of power should be separate and distinct.[14]

Madison recognized the importance of separating the strands of government, but he did not suggest that this separation be absolute.[15] Herein lies the need for interdependence. Madison cautioned against excessive accumulation of power by noting that "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."[16]

Accordingly, government can be both independent and interdependent at the same time, because separation of powers "does not require that the legislative, executive and judiciary departments should be wholly unconnected with each other."[17] Rather, "the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that [no department] ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers."[18] For the most part, Madison assumed that separation of powers is self-executing through internal checks because each department is given "the necessary constitutional means, and personal motives, to resist encroachments of the others."[19]

The Federalist Papers, however, did not envision the government's branches as equally empowered, because its authors were influenced by their experience with a weak executive in state government during the period following the Declaration of Independence. In that period, many state constitutions incorporated a strict division of authority between the branches of government: "Contemporary political observers came increasingly to conclude that these constitutions had unwittingly permitted the emergence of a new species of dangerous concentration of power . . . in the hands of the legislature."[20] According to Professor Cynthia Farina, these state legislatures "not only legislated with what many regarded as irresponsible abandon but also began to engage, under the guise of lawmaking, in executive and judi-

---

14 THE FEDERALIST No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

15 *Id.*

16 *Id.* at 325-26.

17 THE FEDERALIST No. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961).

18 *Id.*

19 THE FEDERALIST No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

20 Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 490 (1989) (citing Thomas Jefferson, NOTES ON THE STATE OF VIRGINIA 120 (W. Peden ed., 1954) and THE FEDERALIST No. 47 (James Madison)).

cial tasks."[21] The legislature's "constitutional powers being at once more extensive and less susceptible of precise limits, it can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."[22]

Although the Constitution embodies the separation of powers doctrine, it fails to articulate a general principle of separated powers.[23] Articles I, II, and III comprise specific textual provisions outlining the structure of government, but they do not contain any broad normative principles.[24] The Supreme Court's application of the doctrine therefore has been anything but exact. Indeed, one commentator has labeled the Court's treatment of the separation of powers doctrine an "incoherent muddle."[25]

In theory, the Constitution prescribes an optimal balance between the competing forces of government.[26] Through separation of powers, it promotes values which will ultimately yield a better, more effective government. Like most constitutional safeguards, however, the separation of powers doctrine also exacts a price in the form of governmental inefficiency.[27] While the doctrine establishes parameters for legislative experimentation and protects against governmental

---

21 *Id.* (footnote omitted) (citing Thomas Jefferson, NOTES ON THE STATE OF VIRGINIA 120 (W. Peden ed., 1954) and 2 PAPERS OF ALEXANDER HAMILTON 400, 404 (H. Syrett & J. Cooke eds., 1961)).

22 THE FEDERALIST No. 48, *supra* note 17, at 334.

23 Brown, *supra* note 9, at 1521.

24 *Id.* at 1521. As Brown explains,

> [f]rom those specifics, the Court must determine the validity of other specific acts not mentioned in the text—as if the eighth amendment did not prohibit cruel and unusual punishment generally, but specifically outlawed thumb screws, decapitation, and the rack, leaving the Court to decide whether the list should include electrocution.

Id. at 1521-22.

25 *Id.* at 1517; *see also* Carter, *supra* note 8, at 721 (arguing that the Court's reasoning in separation of powers cases lacks analytical coherence); Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 127-28 (1988) (noting that the *Morrison* Court, by upholding judicial appointment of independent counsel to investigate alleged wrongdoing in the executive branch, sounded a sudden retreat from traditional separation of powers jurisprudence); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489-96 (1987) (asserting that the court has adopted inconsistent reasoning in separation of powers cases); Paul R. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 312 (asserting that the Court is searching for a "sure guide" to separation of powers cases).

26 *See* Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357, 366 (1990) ("The entire point of a constitution that governs structure is to enable government to function while restraining the ability of government to restructure itself.").

27 *See* INS v. Chadha, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."); *id.* at 958-59 ("it is crystal clear that . . . the Framers ranked other values higher than efficiency").

abuse, by regulating government it inevitably produces an obstacle to reform. Thus, when Congress faces a particular problem, the most effective solution may be unavailable on the grounds that Congress does not have the power to implement it,[28] or because the product of the contemplated initiative is outside the constitutionally prescribed bounds.[29] By design, the sacrifice that separation of powers demands in the short run is justified by its beneficial offerings in the long run: protection from institutional self-dealing and the preservation of political and individual liberty.[30] However, an improperly or excessively policed doctrine compels unnecessary sacrifice and potential harm. Therein lies the danger of the current framework.

B. General Approaches to the Problem

Within the profusion of scholarly commentary addressing the separation of powers doctrine, there exists two distinct schools of thought which punctuate the debate: formalism and functionalism. "Those who espouse the formalist view of separated powers seek judicial legitimacy by insisting upon a firm textual basis in the Constitution for any governmental act."[31] Through bright line rules developed from a literal reading of the constitutional text, formalists insist upon a strict separation of governmental functions "for the sake of doctrinal purity"[32] and determinacy.[33] Such emphasis on the plain meaning of the Constitution inevitably leads to a mechanical application of the doctrine.[34]

Formalists assume that government functions are inherently distinguishable and that any exercise of governmental power must therefore comport with the original framework set forth in Articles I, II,

---

28 *See Chadha*, 462 U.S. 919 (invalidating the legislative veto).

29 *See* Morrison v. Olson, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting) (arguing that the Independent Counsel provision of the Ethics in Government Act is unconstitutional); Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating provisions of the Gramm-Rudman-Hollings Act granting budget cutting authority to the Comptroller General).

30 Brown, *supra* note 9, at 1534.

31 *Id.* at 1523. *See* Carter, *supra* note 25, at 106 (discussing the two strands of separation of powers jurisprudence); Carter, *supra* note 8 (outlining the evolutionary [functionalist] and de-evolutionary [formalist] theories of separation of powers).

32 Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 670 (1990); *but see id.* (arguing that "[t]o insist upon the maintenance of an absolute separation merely for the sake of doctrinal purity could severely hinder the quest for 'a workable government' with no appreciable gain for the cause of liberty or efficiency").

33 *See* Carter, *supra* note 26, at 375-76 (arguing that his formal approach will "lead to relatively determinate answers; that is, different interpreters applying the test in good faith will tend to reach similar results"; but by contrast, a functional approach "almost inevitably must lead to balancing, and hence to indeterminacy").

34 *See* Brown, *supra* note 9, at 1524-25 ("[F]ormalism tends to produce excessively mechanical results.").

and III of the Constitution.[35] For example, Article II, section 1, clause 1 of the Constitution provides, "The executive power shall be vested in a President of the United States."[36] Justice Scalia, a devout formalist, has argued that "this does not mean *some of* the executive power, but *all of* the executive Power."[37] As Scalia's statement demonstrates, the formalistic approach assumes that all governmental power may be characterized as either legislative, executive or judicial. Once characterized, each power may only be exercised by the constitutionally authorized branch.

Formalism encourages judicial activism to thwart legislative initiative in order to preserve the "original understanding."[38] Judicial opinions which incorporate formalism reject any creative government mechanism without explicit constitutional support.[39] As government has grown through legislative delegations of power, Congress has developed unique mechanisms to check those delegations.[40] Such mechanisms have offended the formalists' perception of government and separation of powers, and have spawned more judicial activism.[41] For example, the Supreme Court struck down the legislative veto and rejected the congressional delegation of budget cutting authority to the Comptroller General.[42]

More importantly, under formalist theory, the independent agency presents the most potent threat to the constitutional system.[43] "[T]he creation of independent administrative agencies . . . is considered a violation of the Constitution because such agencies require the exercise of governmental power in ways that involve an overlap of expressly assigned functions, subject to the control of none of the three

---

35 Article I, Section 1 reads: "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ." U.S. CONST. art. I, § 1; Article 2, Section 1 reads: "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1; Article 3, Section 1 reads: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

36 U.S. CONST. art. II, § 1, cl. 1.

37 Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

38 Carter, *supra* note 8, at 754. *See also Morrison*, 487 U.S. at 706 (Scalia, J., dissenting); Carter, *supra* note 25, at 106.

39 *See infra* part I.E.

40 *See infra* part I.E; parts II-III (discussing FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993)); part III.B.2 (discussing Hechinger v. Metropolitan Wash. Airports Auth., 36 F.3d 97 (D.C. Cir. 1994)).

41 *See infra* part I.E.

42 *See* discussions of *Bowsher* and *Chadha infra* part I.E.

43 *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 & n.1 (1994) (arguing that the administrative state is unconstitutional because it is "at variance with the Constitution's original public meaning").

branches."[44] Additionally, formalists argue that independent agencies interfere with the President's responsibility for administering all executive powers.[45] In general, formalism views the administrative state as a constitutionally impermissible threat to presidential power so long as agencies remain beyond presidential oversight.[46]

In contrast to formalism, functionalism is a more permissive doctrine which is concerned with maintaining the proper balance between the coordinate government branches.[47] It rejects formalism as unnecessary: "[O]ur formal, three-branch theory of government . . . cannot describe the government we long have had, is not required by the Constitution, and is not necessary to preserve the very real and desirable benefits of 'separation of powers' that form so fundamental an element of our constitutional scheme."[48] Functionalism suggests that courts "should view separation-of-powers cases in terms of the impact of challenged arrangements on the balance of power among the three named [branches]."[49] The following excerpt portrays the functionalist analytic framework:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[50]

Functionalism suggests that judicial analysis of the constitutionality of independent agencies should be both more flexible and more contextual. The Court can only validate independent agencies through a functional interpretation of separation of powers. As such, independent agencies do not present any constitutional infirmities as long as the balance of power between the three branches is maintained and the branches' core functions are preserved.[51]

---

44 Brown, *supra* note 9, at 1524; *see also* Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 498-99 (1979); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 54-55.

45 *See* Carter, *supra* note 25, at 132.

46 *See id.* (arguing that Justice Scalia, in his *Morrison* dissent, should have found independent agencies unconstitutional).

47 *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (abandoning formalism and adopting an approach focusing on relationships and interconnections).

48 *See* Strauss, *supra* note 25, at 492.

49 *See id.* at 522.

50 Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (citations omitted).

51 *See* Strauss, *supra* note 47.

C. The Current Supreme Court

The Supreme Court's separation of powers jurisprudence is ideologically impure. That is, the Court has failed to endorse any particular ideology, and has pursued a result oriented form of decisionmaking. Critics have described the Court's separation of powers decisions as

> vacillat[ing] over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.[52]

As a result, proponents of both functionalism and formalism can draw upon major Supreme Court decisions to support their positions.[53] This lack of ideological consistency is a function of the failure of most members of the Court to unequivocally commit to any of the predominant interpretive theories.[54] Indeed, the Court has been unconcerned with the fact that, ideologically, it continues to reverse itself.[55] Additionally, the Court's jurisprudence in this area has been especially unfocused, because the Court has utilized both functionalist and formalist language within individual opinions.

The Court's difficulty in devising a coherent methodology can be partially explained by the fact that both functionalism and formalism contain conceptual flaws. For instance, critics argue that functionalism is utterly ad hoc and fails to provide any interpretative structure.[56] Justice Scalia, in *Morrison v. Olson*, commented that adoption of functionalism was "an open invitation to experiment."[57] Formalism, on the other hand, is anachronistic and overly rigid.[58] It is completely dependent upon categorizing government functions.[59]

Although both approaches are flawed, only formalism is inapposite to the validation of the independent administrative structure.[60]

---

52 Strauss, *supra* note 25, at 489.

53 *See* Mistretta v. United States, 488 U.S. 361 (1989) (functionalist); Morrison v Olson, 487 U.S. 654 (1988) (functionalist); Bowsher v. Synar, 478 U.S. 714 (1986) (formalist); INS v. Chadha, 462 U.S. 919 (1983) (formalist).

54 Matthew J. Tanielian, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 971-72 (1995).

55 *See Mistretta*, 488 U.S. 361; *Morrison*, 487 U.S. 654; *Bowsher*, 478 U.S. 714; *Chadha*, 462 U.S. 919; *see also* discussion *infra* parts I.D-E.

56 *See* Carter, *supra* note 25, at 127 (criticizing Court for "letting policy, not history" guide its decision making).

57 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

58 *See* Strauss, *supra* note 25, at 489-96.

59 *See* discussion of *Chadha* and *Bowsher infra* part I.E.1.

60 *See* discussion of formalism *supra* part I.B.

As demonstrated above, independent agencies could not survive scrutiny under a purely formalistic regime.[61] Accordingly, to preserve the independent administrative state, the Court has drawn a distinction between independence and legislative aggrandizement.[62] It has applied a mild functionalism to the former, but a relentless formalism to the latter.[63] Thereby, the Court has acknowledged the propriety and legitimacy of independent agencies without explicitly endorsing them, but at the same time it has rejected congressional efforts to carve out an affirmative role for itself. Although there may be merit in the Court's argument that legislative initiative should be scrutinized more carefully, there is no excuse for failing to adopt a coherent methodology to justify the distinction drawn between independence and aggrandizement and the resulting judicial bias against the legislature. The Court's decision to draw such a distinction can be partially explained by its confusion over the concept of independence. For this reason, one must first consider what the concept of independence means within the context of the separation of powers doctrine.

D. The Concept of Independence under the Separation of Powers Doctrine

Congress has established independent agencies such as the Federal Communications Commission, which "usually consist of five to seven members who are appointed [by the President] on a bipartisan basis and serve for a term usually exceeding that of the President."[64] These agencies possess a varying degree of responsibility which may include investigative powers, rulemaking authority, litigating authority, and adjudicatory power.[65] The agencies' independence stems from their commissioners' statutory protection against being removed at the will of the President.[66] That is, a President could not influence an agency by threatening to remove its commissioner.

1. *The Removal Power:* Humphrey's Executor, Myers *and* Bowsher

Humphrey's Executor v. United States[67] informs the judicial concept of independence in administrative law.[68] In *Humphrey's*, the Supreme

---

61 *See supra* part I.B.

62 *See infra* part I.E.

63 *See infra* part I.E.

64 Paul R. Verkuil, *The Status of Independent Agencies after* Bowsher v. Synar, 1986 DUKE L.J. 779, 781.

65 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 109 (1976) (discussing powers of the Federal Election Commission).

66 Verkuil, *supra* note 64, at 781.

67 295 U.S. 602 (1935).

68 Verkuil, *supra* note 64, at 781.

Court considered whether the Federal Trade Commission Act, which stated that "'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office,'"[69] improperly restricted the constitutional power of the President.[70] According to the Court, the Federal Trade Commission (FTC) acted "in part quasi-legislatively and in part quasi-judicially."[71] The Court concluded that Congress could limit the President's power of removal because "[s]uch a body cannot in any proper sense be characterized as an arm or an eye of the executive."[72] As one commentator observed, "[T]he Court endorsed the independent agency with a vengeance by rebuffing an effort by [President] Roosevelt to remove an uncooperative commissioner of the Federal Trade Commission."[73]

Humphrey's Executor stands in sharp contrast to *Myers v. United States*,[74] a Supreme Court case decided nine years earlier in 1926. In *Myers*, the Court found that Congress could not limit the President's removal power over purely executive officers.[75] *Myers* involved a statute which required the consent of the Senate for the appointment and removal of the Postmaster General. The Court found that for Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers."[76] Despite the apparent conflict between these two cases, *Humphrey's Executor* distinguished *Myers* on the grounds that the latter involved what the Court termed "purely executive powers."[77] As mentioned above, the Court in *Humphrey's Executor* noted that FTC's powers were both quasi-judicial and quasi-legislative. Thus, *Humphrey's Executor* leaves open the possibility that an agency which exercises powers that are not purely executive may be insulated from the president's discretionary removal power. *Humphrey's Executor* may therefore be construed as drawing a

> sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body

---

69 *Humphrey's Executor*, 295 U.S. at 619 (quoting section 1 of the Federal Trade Commission Act).

70 *Id.*

71 *Id.* at 628. In *NRA*, the district court noted that the FEC was an agency patterned after the FTC. FEC v. NRA Political Victory Fund, 778 F. Supp. 62, 66 n.2 (D.D.C. 1991), *rev'd* 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed*, 115 S. Ct. 537 (1994).

72 *Humphrey's Executor*, 295 U.S. at 628.

73 Verkuil, *supra* note 64, at 781.

74 272 U.S. 52 (1926).

75 *Id.* at 161.

76 *Id.*

77 *Humphrey's Executor*, 295 U.S. at 627-28.

> "to exercise its judgment without the leave or hindrance of any other official or any department of the government."[78]

A broad interpretation of *Humphrey's Executor* could lead to the conclusion that independent agencies maintain a constitutional status which is fundamentally different from other government entities. Accordingly, *Humphrey's Executor* may endorse the independent status of agencies.[79] However, the Court has never made any effort to clarify its language in that decision. Moreover, although *Humphrey's Executor* remains good law, it rests in tension with the more recent opinion of *Bowsher v. Synar*.[80]

In *Bowsher*, the Court considered the constitutionality of a provision of the Gramm-Rudman-Hollings Act, that carved out a role for the comptroller general in balancing the budget.[81] In order to balance the budget, "the Act set[ ] a 'maximum deficit amount' for federal spending for each of fiscal years 1986 through 1991."[82] In the event that the federal budget deficit in any fiscal year exceeded this amount, "the Act [compelled] across-the-board cuts in federal spending."[83] Under the statutory scheme, the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) were to estimate the amount of the federal deficit each year for the upcoming year.[84] If the estimate exceeded the target amount, the Directors would independently calculate the amount of reductions for each program necessary to achieve the target.[85] The Directors would then submit these calculations to the Comptroller General who would review them and deliver a report to the President.[86] Finally, the President would "issue a 'sequestration' order mandating the spending reductions specified by the Comptroller General."[87]

---

78 Wiener v. United States, 357 U.S. 349, 353 (1958) (quoting *Humphrey's*, 295 U.S. at 625-26) (holding that the President did not have the power to remove, at least without cause, a member of the War Claims Commission).

79 *See* Carter, *supra* note 26, at 362 ("[J]udicial approval of modern administrative government began in 1935, when the Supreme Court decided in *Humphrey's Executor v. United States* that the Congress may create agencies beyond the direction of either the executive or legislative branches. . . ."); Verkuil, *supra* note 64, at 781-82 ("Since the day it was decided, *Humphrey's Executor* has shaped judicial understanding of the independence concept in administrative law.").

80 478 U.S. 714 (1986).

81 *Id.* at 734.

82 *Id.* at 717.

83 *Id.* at 717-18.

84 *Id.* at 718.

85 *Id.*

86 *Id.*

87 *Id.*

In reviewing this statutory scheme, the Court found the Act unconstitutional.[88] The Court concluded that because Congress retained removal power, the Comptroller General was an agent of Congress and was not independent:[89] "Although the Comptroller General is nominated by the President . . . and confirmed by the Senate, he is removable only at the initiative of Congress."[90] The Comptroller General could be removed either by impeachment or by joint resolution of Congress which had to be grounded on a number of statutorily defined bases.[91] Thus, while the Act made the Comptroller General "one of the most independent officers in the entire federal establishment,"[92] the Court nevertheless found that he was an agent of Congress and therefore could not be assigned executive powers.[93]

For purposes of this section, *Bowsher* is significant because it held that Congress's capacity to remove the Comptroller General made him an agent of Congress. Thus, while *Humphrey's Executor* implied that limited removal power—the ability to exercise removal for cause as opposed to discretionary removal at will—preserves an agency's independence, *Bowsher* suggests that such proposition is incorrect. In this respect, the two opinions are inconsistent with each other. The Supreme Court in *Bowsher* implicitly acknowledged this tension when it defended itself against criticism that the ideology embraced by the Court challenged the constitutional vitality of the independent agencies. The Court declared:

> [N]o issues involving such agencies are presented here. The statutes establishing independent agencies typically specify either that . . . agency members are removable by the President for specified causes . . . . This case involves nothing like these statutes, but rather a statute that provides for direct congressional involvement over the decision to remove the Comptroller General. Appellants have referred us to no independent agency whose members are removable

---

88 *Id.* at 734.

89 *Id.* at 732.

90 *Id.* at 727-28.

91 The Comptroller General "may be removed . . . by impeachment [or] by joint resolution of Congress 'at any time' resting on any one of the following bases: '(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude.'" *Id.* at 728 (quoting 31 U.S.C. §703(e)(1)(B)).

92 Bowsher v. Synar, 478 U.S. 714, 773 (1986) (White, J., dissenting).

93 The Court found that the Comptroller General had exercised executive powers because the Act gave him "the ultimate authority in determining what budget cuts are to be made." *Id.* at 716. According to the Court, "[I]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Id.* at 732. *But see id.* at 751 (Stevens, J., concurring) (finding the majority's characterization of the Comptroller-General-assigned powers unconvincing and explaining that "[u]nder . . . the analysis adopted by the majority today, it would therefore appear that the function at issue is 'executive' if performed by the Comptroller General but 'legislative' if performed by the Congress").

> by the Congress for certain causes short of impeachable offenses . . . .[94]

The Supreme Court's explanation is unpersuasive. If a limited removal power by Congress does not render the Comptroller General independent of Congress, it is difficult to explain why limited removal power by the President rendered the Federal Trade Commission in *Humphrey*'s independent of the President.

Bowsher illuminates the way in which the Supreme Court has dealt with independent agencies. In a case like *Bowsher*, the Court will take a position that ideologically confronts the existence of the independent agencies, but it will inject some unsatisfying language paying homage to the existence of independent agencies to salvage itself. *Bowsher* suggests that an agency cannot be considered independent when Congress has limited removal power, but *Humphrey's Executor* tell us that an agency is independent if the President has a limited removal power. Herein lies the line between legislative encroachment and independence—if Congress is involved, the Court takes an extreme stance; otherwise, the Court is more accommodating.

2. *The Appointment Power:* Buckley v. Valeo

Removal power is not the only constitutionally controversial aspect of independent agencies; the power to appoint Commissioners of independent agencies has also been litigated. In *Buckley v. Valeo*,[95] the Supreme Court concluded that the Appointments Clause of the Constitution requires the President to appoint the members of an independent agency. *Buckley* involved a challenge to the constitutionality of the FEC.[96] At the time of *Buckley*, FEC members were appointed in the following manner: Members of Congress appointed four of the six voting Commissioners, and the President appointed the remaining two.[97] All six had to then be confirmed by a majority of both houses.[98] Moreover, the Secretary of the Senate and Clerk of the House served ex officio on the Commission, but without the right to vote.[99]

In deciding *Buckley*, the Supreme Court relied upon the Appointments Clause which states: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States. . . ."[100] The Supreme Court con-

---

94 *Bowsher*, 478 U.S. at 725 n.4.

95 424 U.S. 1 (1976).

96 *Id.*

97 *Id.* at 126-27; *see* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 310, 88 Stat. 1263, 1280-81 (1974) (amended 1976).

98 *See* § 310, 88 Stat. 1263, 1280-81 (1974).

99 *See Id.*

100 U.S. CONST. art. II, § 2, cl. 2.

cluded that the voting members of the FEC were "Officers of the United States" and therefore could not be appointed by anyone but the President.[101] The Court defined "Officers of the United States" as anyone "exercising significant authority pursuant to the laws of the United States."[102] Accordingly, because the duties of the FEC's members included executive agency functions, Congress could not appoint any of its voting members.[103]

Interestingly, the Supreme Court's review has so far been limited to questions concerning the mechanics of the independent agency structure such as the appointment and removal powers. The Court has never considered the constitutionality of an agency's very existence. In other words, the Supreme Court has not considered the extent to which an entity may be insulated from executive control and simultaneously exercise executive powers. Some courts, including the D.C. Circuit in *NRA*, have relied upon *Morrison v. Olson*[104] to conclude that independent agencies can indeed perform executive functions without running afoul of the Constitution.[105]

3. *Independence:* Morrison v. Olson

In *Morrison v. Olson*, the Supreme Court considered whether the establishment of an Independent Counsel under the Ethics in Government Act was constitutional.[106] The Act bestowed upon an Independent Counsel the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the . . . Attorney General[ ] and . . . the Department of Justice" to investigate the President and other Executive officials who have allegedly been involved in criminal activity.[107] In the wake of Watergate and President Nixon's firing of the special prosecutors assigned to investigate his culpability, Congress thought it necessary to create an Independent Counsel to investigate executive wrongdoing free from presidential control.[108] Under the Act, the Attorney General can remove an Independent Counsel only for "good cause."[109] And, if the

---

101 *Buckley*, 424 U.S. at 126.

102 *Id.*

103 *Id.* at 139-40.

104 487 U.S. 654 (1988).

105 *See, e.g.*, FEC v. NRA Political Victory Fund 6 F.3d 821, 826 (D.C. Cir. 1993) ("Although appellants have standing to assert that the [FEC] . . . acts unconstitutionally because of its independence of the President in its law enforcement activities, there is not much vitality to the claim after *Morrison v. Olson.*"), *cert. dismissed*, 115 S. Ct. 537 (1994).

106 487 U.S. 654 (1988).

107 *Id.* at 662 (citing 28 U.S.C. § 594(a)).

108 KATY J. HARRIGER, INDEPENDENT JUSTICE 47 (1992).

109 *Morrison*, 487 U.S. at 663 (citing 28 U.S.C. § 596 (a)(1)).

Attorney General chooses to remove an Independent Counsel, the Court of Appeals must review that decision.[110]

A majority of the Court found that the Act did not violate the Constitution for two reasons. First, although the functions performed by the Independent Counsel are purely "executive," the restrictions placed upon removal did not impermissibly interfere with the President's exercise of his constitutionally appointed investigative and prosecutorial functions.[111] Because the Independent Counsel possesses limited jurisdiction and tenure, the Court could not see how the President's need to control the Independent Counsel's exercise of discretion was so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will.[112] Moreover, the Court found that the "good cause" removal standard provided the President through the Attorney General with ample authority to assure that the Independent Counsel competently performs his or her statutory responsibilities in a manner that comports with the provisions of the Act.[113] Second, the Court found that the Act did not unduly interfere with the role of the Executive Branch and therefore did not violate the principle of separation of powers.[114] The Court distinguished *Bowsher*, noting that "this case . . . [did] not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."[115]

Like the Independent Counsel, independent agencies are entities separate from the President. Because *Morrison* limited its focus to the status of the Independent Counsel, it did not end the debate over the validity of independent agencies. Nevertheless, the decision serves as another arrow in the quiver of those who believe independent agencies satisfy constitutional muster.[116] And although *Morrison*'s functional approach characterizes the way in which courts have treated independent actors, the Court has been much more sensitive to instances of legislative aggrandizement. This distinction between independence and legislative aggrandizement, and its consequential bias against Congress is analyzed in the next section.

---

110 *Id.* at 663-64 (citing 28 U.S.C. § 596(a)(3)).

111 *Id.* at 692-93.

112 *Id.*

113 *Id.* at 692.

114 *Id.* at 695-96.

115 *Id.* at 694.

116 In *NRA*, Judge Silberman noted that after *Morrison* one could not successfully argue that the FEC, or any other independent agency, acted unconstitutionally because of its independence of the President. FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993), *cert. dismissed*, 115 S. Ct. 537 (1994); *see also supra* note 105.

E. Open Hostility to Congress—Drawing the Distinction between Independence and Aggrandizement

The distinction drawn between independence and aggrandizement evolved from the major separation of powers cases of the 1980's such as *Bowsher, Chadha, Morrison,* and *Mistretta.*[117] Throughout these cases, the Court permitted Congress to establish administrative agencies independent of the President and thereby diminish the breadth of executive power. But, the Court has consistently refused Congress any expansive role within the administrative state.[118] Although the Court has not engaged in any real analysis of the constitutionality of independent agencies, it has excessively policed congressional activity within the administrative realm, thereby constitutionalizing an extreme bias against the legislative branch. The Court first articulated this jurisprudential bias against Congress in two seminal separation of powers cases: *Chadha*[119] and *Bowsher.*[120] In the subsequent cases of *Morrison*[121] and *Mistretta,*[122] the Court distinguished this bias from the concept of independence.

1. *Impermissible Aggrandizement:* Chadha *and* Bowsher

In *INS v. Chadha,*[123] the Court dealt a significant blow to Congressional power through its blanket rejection of the legislative veto. Before *Chadha,* the legislative veto had existed in a wide variety of statutory realms.[124] In the era of modern government, Congress has made broad delegations to the President and to administrative agencies.[125] It developed the legislative veto as a useful mechanism to check these broad delegations of power.[126] For example, the Con-

---

117 *See* Mistretta v. United States, 488 U.S. 361 (1989) (finding the U.S. Sentencing Commission constitutional); Morrison v. Olson, 487 U.S. 654 (1988) (finding the Independent Counsel provision of the Ethics in Government Act constitutional); Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating provisions of the Gramm-Rudman-Hollings Act granting budget cutting authority to the Comptroller General); INS v. Chadha, 462 U.S. 919 (1983) (invalidating the legislative veto).

118 *See supra* note 117.

119 462 U.S. 919 (1983).

120 478 U.S. 714 (1986).

121 487 U.S. 654 (1988).

122 488 U.S. 361 (1989).

123 462 U.S. 919 (1983).

124 *Id.* at 968 (White, J., dissenting) ("The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regnlation of trade, safety, energy, the environment and the economy.").

125 *See generally* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 7-20 (1994) (discussing the magnitude of delegated authority granted to agencies beginning with the New Deal); Robert L. Rabin, *Federal Regulation in Historical Perspective,* 38 STAN. L. REV. 1189 (1986) (examining judicial responses to each successive wave of federal regulatory change).

126 *See* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 160 (9th ed. 1995) ("As agency rulemaking became increasingly important as a

gressional Budget and Impoundment Control Act of 1974 provided that "temporary impoundments [of appropriations by the President] . . . would become effective unless disapproved by one House."[127] Supporters of the Act hailed it as an "indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress's control over lawmaking."[128]

Chadha involved a challenge to the validity of the legislative veto, as provided in the Immigration and Nationality Act. In that case, the Court held that the legislative veto in section 244(c)(2) of the Act violated the separation of powers principle and was therefore unconstitutional.[129] The Act empowered the Attorney General with discretionary authority to suspend the deportation of an otherwise deportable alien by submitting to Congress "a complete and detailed statement of the facts and pertinent provisions of law . . . with the reasons for such suspension."[130] In section 244(c)(2) of the Act, however, Congress retained the power to "veto" the Attorney General's decision by a resolution from either House of Congress.[131] If Congress exercised its veto, the deportation proceedings would continue. If Congress did not act within its next two sessions, the Attorney General would cancel the deportation proceedings.[132]

In the instant case, the INS had ordered Chadha, an alien whose student visa had expired, to show cause why he should not be deported.[133] Chadha conceded that he was deportable but applied for a suspension.[134] After a hearing in front of an Immigration Judge, his deportation was suspended.[135] A year and a half later, the House of Representatives exercised its veto power by passing a resolution re-

---

regulatory form, use of the legislative veto became more frequent . . . ."); James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977). According to Abourezk:

> Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940-49, nineteen statutes; . . . and from 1960-69, forty nine. From the year 1970 through 1975, at least one hundred sixty-three such provisions were included in eighty-nine laws.

Id.

127 *Chadha*, 462 U.S. at 971 (White, J., dissenting).

128 *Id.* at 972-73.

129 *Id.* at 956-59.

130 *Id.* at 924-25.

131 *Id.* at 925.

132 *Id.*

133 *Id.* at 923.

134 *Id.*

135 *Id.* at 924. The INS is administered by the Department of Justice, an entity controlled by the Attorney General.

jecting the suspension order.[136] Chadha challenged this action as violating the separation of powers principle of the Constitution.[137] The Supreme Court responded by invalidating all forms of the legislative veto.[138]

Chadha embodies an extremely formal and mechanical reading of the Constitution. In its decision, the Court concluded that all legislative activity must conform to procedures articulated in the Presentment Clauses[139] as well as the bicameral requirement.[140] The Presentment Clauses provide:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes law, be presented to the President of the United States . . . .[141]
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President . . . and before the Same shall take effect, shall be approved by him, or being disapproved by him, shall be reposed by two thirds of the Senate and House of Representatives . . . .[142]

The bicameral requirement of Article I, sections 1 and 7 dictates that no law can take effect without the concurrence of the prescribed majority of the members of both Houses.[143] Accordingly, the Court found the legislative veto constitutionally inadequate because it did not conform to the presentment and bicameral requirements.[144]

In reaching this conclusion, the Court first demonstrated that the veto was legislative in character and was therefore governed by Article I. The Court found that section 244(c)(2) was "essentially legislative in purpose and in effect" because it "alter[ed] the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch."[145] Thus, the legislative veto satisfied the Court's definition of legislation.[146]

---

136 *Id.* at 927-28.

137 *Id.* at 928.

138 Justice Powell, concurring in the judgment, noted that "[t]he Court's decision . . . apparently will invalidate every use of the legislative veto." *Id.* at 959 (Powell, J., concurring). Donald Elliott too has noted that "only days after *Chadha*, the Court affirmed summarily two decisions declaring legislative vetoes unconstitutional in circumstances arguably distinguishable from *Chadha*." Donald Elliott, INS v. Chadha: *The Administrative Constitution, The Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 127.

139 U.S. CONST. art. I, § 7, cl. 2-3.

140 U.S. CONST. art. I, §§ 1, 7, cl. 2.

141 U.S. CONST. art. I, § 7, cl. 2.

142 U.S. CONST. art. I, § 7, cl. 3.

143 U.S. CONST. art. I, §§ 1, 7.

144 *Chadha*, 462 U.S. 919, 946-59.

145 *Id.* at 952.

146 *Id.*

Further, and with little explanation, the Court assumed that separation of powers mandated that the bicameral requirement and the Presentment Clauses be necessary checks upon all Congressional activity.[147] However, the need for such checks is not as apparent as the majority assumed. Justice White pointed out that "[i]f Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Article I as prohibiting Congress from also reserving a check on legislative power for itself."[148]

The *Chadha* Court's disregard for Justice White's point reflects a judicial bias against legislative initiative. Indeed, there are other institutional actors, such as the Attorney General under the Immigration and Nationality Act, who engage in activity that resembles lawmaking but are not scrutinized in the way that the *Chadha* Court treated Congress.[149] This inconsistency exposes the judicial bias against Congress. In its brief to the Court, Congress questioned this approach by asking why the Attorney General, who is authorized to suspend deportation under the Act, should be "exempt from submitting his proposed changes in the law to the full bicameral process."[150] Certainly, the Act empowers the Attorney General to alter the rights of an alien by suspending deportation. From the Court's reasoning, it would follow that this activity would be subject to Article I procedures.

In response to Congress, the Court concluded that "[t]he bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it. . . . It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity . . . ."[151] Without this language, the *Chadha* opinion would have undermined the legitimacy of administrative rulemaking because when agencies make rules, an activity that resembles lawmaking, these rules are not passed by both houses and then presented to the President.[152] However, if, as the Court's language suggests, the bicameral

147 Indeed, as the Court noted, "[t]here are four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto . . . ." *Id.* at 955 (footnote omitted). These include the House of Representative's impeachment power; the Senate's power to conduct trials following impeachment; the Senate's unreviewable power to approve or to disapprove Presidential appointments; and the Senate's unreviewable power to ratify treaties. *Id.*

148 *Id.* at 986 (White, J., dissenting).

149 *Id.* at 988-89 (White, J., dissenting).

150 *Id.* at 953 n.16.

151 *Id.*

152 An agency, authorized to make rules must conform its rulemaking to the organic statute creating the agency and to the Administrative Procedure Act of 1946 (APA). According to the APA, "[R]ule means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551 (4) (1994). According to Cornelius M. Kerwin, "The rules issued by . . . agencies . . . are law; they carry the same weight as congressional legislation,

process is only necessary for congressional activity, agencies do not need to comply with Article I. *Chadha*, therefore, represents one of the Court's initial attempts to thwart legislative initiative through a formal reading of the text without threatening the administrative state.

Writing for the *Chadha* majority, Justice Burger defended his position with a classic separation of powers defense. Justice Burger wrote: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[153] He made this assertion despite the dissent's claim that "[t]he history of the legislative veto . . . makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches . . . ."[154] Justice Burger's reasoning therefore demonstrates that the Court is unwilling to engage in any real contextual analysis of congressional power.

Bowsher v. Synar[155] is another formalistic opinion which exposes a similar weakness in the Court's reasoning. As discussed above, the *Bowsher* Court found the provision of the Gramm-Rudman-Hollings Act, which bestowed upon the Comptroller General an affirmative role in the budget process, unconstitutional.[156] In *Bowsher*, Justice White argued in dissent that the Court's decision is based on a syllogism: The Act vests the "Comptroller with 'executive power'; such power may not be exercised by Congress or its agents; the Comptroller is an agent of Congress because he is removable by Congress; therefore the Act is invalid."[157]

The Court's formalistic reasoning further illuminates the judiciary's bias against Congress. First, this is demonstrated by the extent to which *Bowsher* clashes with *Humphrey's Executor*.[158] Whereas *Humphrey's Executor* suggests that limited removal means independence, the logic of *Bowsher* contradicts this proposition. Under *Bowsher*, anytime Congress retains removal power, the implicated agency can never be considered independent under the separation of powers doctrine. The Court's analysis of removal power suggests that the Court is free to apply a different and heightened standard to congressional relationships than to others because the "dangers of congressional usurpation

---

presidential executive orders, and judicial decisions. . . . Rulemaking occurs when agencies use the legislative authority granted them by Congress." KERWIN, *supra* note 125, at 4.

153 *Chadha*, 462 U.S. at 951.

154 *Id.* at 974 (White, J., dissenting).

155 Bowsher v. Synar, 478 U.S. 714 (1986).

156 *Id.* at 717-19 (1986); For a detailed discussion of *Bowsher*, see *supra* parts I.D.1, I.E.1.

157 *Id.* at 765 (White, J., dissenting).

158 For a more extensive discussion of the conflict between *Humphrey's Executor* and *Bowsher*, see *supra* part I.D.1.

of Executive Branch functions have long been recognized."[159] The Court continues by suggesting that this decision is supported by debates at the Constitutional Convention and by the Federalist Papers.[160]

Second, the Court's prejudice against Congress is demonstrated in an analogy it makes to *Chadha*:

> To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws, *Chadha* makes clear is constitutionally impermissible.[161]

Thus, "because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers."[162]

Chadha and *Bowsher* suggest that legislative aggrandizement is a threat that should be policed aggressively and with acute sensitivity. The Court operates under the assumption that Congress cannot be effectively restrained by the internal checks of the system. A broad reading of these decisions suggests that Congress cannot exercise any control over executive powers and that anything it does must conform to the legislative process. As noted above, the Court complimented this activist stance with formalistic language. Although the Court limited its opinions to congressional control over administrative agencies, its language can be interpreted as questioning the validity of independent agencies themselves. However, when confronted with truly independent actors in later cases, the Court compromised its prior positions in order to carve out a politically necessary exception. This endeavor is portrayed in *Morrison* and *Mistretta*.

2. *The Supreme Court's Acceptance of Independent Actors:* Morrison *and* Mistretta

In *Morrison v. Olson*,[163] the Supreme Court considered whether the establishment of an Independent Counsel under the Ethics in Government Act was constitutionally permissible. In finding the provision of Independent Counsel constitutional, the Court employed a methodology markedly different from that used in *Bowsher*, *Chadha*,

---

159 *Bowsher*, 478 U.S. at 727.

160 *Id.* ("'The debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.'") (alteration in original) (quoting Buckley v. Valeo, 424 U.S. 1, 129 (1976)).

161 *Id.* at 726-27.

162 *Id.* at 732.

163 487 U.S. 654 (1988).

and other separation of powers cases. In contrast to *Bowsher* and *Chadha*, *Morrison* represents a "stunning setback" to those who thought that the Court had committed itself to formalism in separation of power cases.[164] Moreover, under the facts of *Morrison*, the Court could no longer disregard the existence of independent agencies as it had in prior decisions. The Independent Counsel mirrors the structure of the independent agencies to the extent that, in both cases, the President has limited removal power.[165] If the Court had found the Independent Counsel Provision to be unconstitutional, it would have been difficult to have avoided a more general indictment of independent agencies.[166]

Whereas *Bowsher* and *Chadha* may be characterized as opinions "championing the original understanding,"[167] *Morrison* represents a more pragmatic and functional result. To explain the differences in methodologies, Professor Stephen Carter argued that because the Court's "analytic method" revealed in *Bowsher* "came into conflict with . . . the legitimation and preservation of the independent agencies,"[168] it embraced a more functional methodology to achieve that result. It is clear that the Court recognized its awkward shift. The Court conceded that "it is undeniable that the Act reduces the amount of control or supervision that the . . . President exercises over the investigation and prosecution of a certain class of alleged criminal activity."[169] In order to harmonize its separation of powers jurisprudence, the Court held that "this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. . . . [It] does not pose a 'danger of congressional usurpation of Executive Branch functions."[170]

In reaching this conclusion, the Court ignored the lower court's finding that "if the President's authority is diminished—and we think it utterly impossible to deny that the Act accomplishes at least that result—Congress's political power must necessarily increase vis-à-vis the President."[171] Moreover, the Court did not think it significant that the "Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent

---

164 *See supra* part II.E.2. *Chadha* and *Bowsher* employ a formal interpretation of the separation of powers principle. In contrast, *Morrison* relies upon a functional approach.

165 Carter, *supra* note 26, at 361.

166 Carter, *supra* note 25, at 132 (arguing that Scalia's dissent implicitly finds independent agencies unconstitutional).

167 Carter, *supra* note 25, at 106.

168 *Id.*

169 *Morrison*, 487 U.S. at 695.

170 *Id.* at 694.

171 *In re* Sealed Case, 838 F.2d 476, 507 (D.C. Cir. 1988), *rev'd*, Morrison v. Olson, 487 U.S. 654 (1988).

counsel."[172] The Supreme Court determined that there was a clear distinction between Congress's role in *Bowsher* and its role in relation to the Independent Counsel.[173]

Mistretta v. United States[174] completes this quartet of Supreme Court cases. In *Mistretta*, the Court held that Congress may establish the U.S. Sentencing Commission as an independent agency and may grant it the authority to establish sentencing guidelines binding upon federal judges.[175] The Act established an "independent commission in the judicial branch."[176] As constituted, the Commission has seven voting members, all of whom are appointed by the President. At least three of these members must be federal judges selected from a list of six judges recommended to the President by the Judicial Conference of the United States.[177] Mistretta argued that "Congress in constituting the Commission as it did, effected an unconstitutional accumulation of power within the Judicial Branch while at the same time undermining the Judiciary's independence and integrity."[178] In other words, Mistretta argued that Congress could not constitutionally require Article III judges to exercise legislative authority through the making of sentencing policy. Mistretta further claimed that the Sentencing Commission upset the balance mandated by the principles of separation of powers.[179] Mistretta apparently envisioned a more formal separation of powers.

Despite the enormous delegation of power to an independent agency, there was no suggestion in *Mistretta* that Congress had reserved any power for itself. Thus, the case did not implicate "the particular danger of the Legislative Branch's accreting to itself judicial or executive power,"[180] and the Court adopted a "flexible understanding of separation of powers."[181] Although the Court recognized the danger presented by "the encroachment or aggrandizement of one branch at the expense of the other,"[182] it determined that the Sentencing Commission was located within a constitutionally recognized "'twilight area' in which the activities of the separate Branches merge."[183] For that reason, the Court found it was unnecessary to

172 *Morrison*, 487 U.S. at 694.
173 *Id.*
174 488 U.S. 361 (1988).
175 *Id.* at 412.
176 *Id.* at 368.
177 *Id.*
178 *Id.* at 383.
179 *Id.* at 384.
180 *Id.* at 382.
181 *Id.* at 381.
182 *Id.* at 382.
183 *Id.* at 386.

characterize, as it did in *Bowsher* and *Chadha*, the specific nature of the powers exercised by the Commission.[184]

The Court's justification for its position demonstrates its preference for adhering to the distinction it has drawn. It defended *Mistretta* by showing that although it has "invalidated attempts by Congress to exercise the responsibilities of other Branches," it has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment."[185] In the absence of either aggrandizement or encroachment, the Court does not feel compelled to adopt a formalist approach. Thus, one could infer from *Mistretta* that, although separation of powers is a flexible doctrine, that flexibility does not apply to Congress. Arguably, the interpretive mode employed by the Court has become a substitute for the separation of powers doctrine itself. This became apparent in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*.[186]

3. Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise

The Court has aggressively enforced the analytical framework outlined in the preceding Part. For example, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise* (CAAN), Congress authorized the transfer of operating control of National and Dulles Airports from the Department of Transportation to the Metropolitan Washington Airports Authority (MWAA).[187] It is important to note that the MWAA is not a federal entity and that Congress merely authorized its creation.[188] In addition, the established statutory scheme permitted MWAA's Board of Directors to create a Board of Review composed of nine expert members of Congress, chosen from a list submitted jointly by the Speaker of the House of Representatives and the President pro tempore of the Senate.[189] A member of Congress could satisfy the expertise requirement by having served on one of a number of listed congressional committees.[190] The legislation envisioned that these members of Congress would serve "'in their individual capacities, as representatives of users' of airports."[191]

---

184 *Id.* at 387 n.14.

185 *Id.* at 382.

186 501 U.S. 252 (1991).

187 *Id.* at 255.

188 *Id.* at 258. In 1985, Virginia and the District of Columbia both passed legislation authorizing the establishment of the regional authority. *Id.*

189 *Id.* at 261.

190 *Id.* at 261 n.5.

191 *Id.* at 267 (quoting 49 U.S.C. App. § 2456(f)(1)).

Moreover, the Board of Review was given veto power over decisions made by the Board of Directors.[192]

In a tortured interpretation of separation of powers, the Court found that this arrangement violated separation of powers principles.[193] The Court found that the Board's exercise of federal power implicated the separation of powers doctrine notwithstanding the lack of any threat to the established balance of power among the federal branches.[194] In particular, the Court's finding that federal power was involved is a strained interpretation.[195] The MWAA is a body created by state law; its authority derives from acts passed by Virginia and the District of Columbia.[196] Nonetheless, the majority justified its position on the grounds that control over the airports was originally in federal hands;[197] that the federal government has a strong and continuing interest in the efficient operation of the airports;[198] and that membership on the board is limited to federal officials.[199] The Board of Review would not have existed but for Congress, but that does not mean that Congress's role makes the MWAA a federal entity. As Justice White noted in dissent, "Constitutional text and history leave no question but that Virginia and the District of Columbia could constitutionally agree to pass reciprocal legislation creating a body by which nonfederal officers would appoint Members of Congress functioning in their individual capacities."[200]

In addition, the Court's holding that the Board was a congressional agent is somewhat attenuated. The Court reasoned that because the Act provided that the Board of Review shall consist of members with experience on related congressional committees which are chosen from a list submitted by the President pro tempore of the Senate and the Speaker of the House, it "guarantee[d] Congress effective control over appointments."[201] Once the Court characterized the arrangement in this manner, it could conclude that, under *Bowsher*, the power of removal made the Board of Review a congressional agent.[202] Even if the Court was correct, its logic is thin. The fact that

---

192 *Id.*

193 *Id.* at 276-77.

194 *Id.* ("Congress imposed its will on the regional authority . . . by means . . . that might prove to be innocuous. However, the statutory scheme . . . provides a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role.").

195 In dissent, Justice White noted that this decision was the first time in history that the Court bad employed separation of powers doctrine to invalidate a body created under state law. *Id.* at 278 (White, J., dissenting).

196 *Id.* (White, J., dissenting).

197 *Id.* at 266.

198 *Id.*

199 *Id.* at 267.

200 *Id.* at 283 (White, J., dissenting).

201 *Id.* at 269.

202 *Id.* at 270.

the members of the Board are chosen from a list submitted by Congress does not give Congress extraordinary control over the appointment process. In fact, Congress has often placed notable restrictions on appointments to a wide range of government offices.[203]

Finally, it appears that the Court could not determine whether the power exercised by the *MWAA* was executive or legislative.[204] The Court concluded that "if the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I."[205]

CAAN demonstrates how the Court has constitutionalized an extreme bias towards Congress in matters that involve the structural elements of the Constitution. The Court found that although the scheme in *CAAN* "might prove to be innocuous . . . [it] provides a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role."[206] The Court based its conclusion on the observations of James Madison that the legislature "'can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.'"[207] Thus, *CAAN* indicates that the Court, in its constitutional capacity, has endorsed a judicial paranoia of the legislature. Under the Court's analysis, many innocuous schemes might be interpreted as providing blueprints for unconstitutional activity. Although the Court did not articulate a presumption of invalidity against Congress, its language borders on such. Without reference to Congress's actual influence under the statutory relationship, the Court finds that to dispense with the case, it need not do anything more than invoke James Madison's cautionary observation regarding legislative power. In short, the Court's lack of concern for Congress's *actual* lack of control suggests

---

203 *See e.g.* Mistretta v. United States, 488 U.S. 361, 410 n.31 (1988) (demonstrating that the Court was not bothered by Congress's power to require the President to appoint three federal judges to the Sentencing Commission after considering a list of six judges recommended by the Judicial Conference of the United States); Bowsher v. Synar, 478 U.S. 714, 727 (1986) (demonstrating that the Supreme Court was not troubled by the fact that the Comptroller General was nominated by the President from a list of three individuals recommended by the Speaker of the House and the President pro tempore of the Senate); FEC v. NRA Political Victory Fund, 6 F.3d 821, 823 (D.C. Cir. 1998) (holding the FECA requirement that "no more than 3 members of the Commission . . . may be affiliated with the same political party" constitutional), *cert. dismissed*, 115 S. Ct. 537 (1994).

204 *CAAN*, 501 U.S. at 276. The D.C. Circuit had found that the power exercised by the Board of Review over "key operational decisions is quintessentially executive." *Id.* The Supreme Court found that it did not need to "agree or disagree with this characterization by the Court of Appeals to conclude that the Board of Review's power is constitutionally impermissible." *Id.*

205 *Id.*

206 *Id.* at 277.

207 *Id.* (quoting THE FEDERALIST No. 48, at 334 (James Madison) (Jacob E. Cooke ed., 1961)).

that contextual analysis is unnecessary in cases involving congressional activity. *CAAN* is alarming because it furthers the notion that the Court has a proclivity for invalidating every remotely questionable legislative initiative.

For those justices inclined to use formalistic methodology, *CAAN* was an easy case in the sense that they did not have to worry about the opinion conflicting with the independent agencies as did the *Chadha* and *Bowsher* Courts.[208] *CAAN* presented a unique opportunity to advocate a formalistic assault upon Congress without any cautionary language. Furthermore, it has inspired lower courts such as the D.C. Circuit in the *NRA* case to extend the bias against Congress even further than *CAAN*, *Bowsher*, or *Chadha*. In particular, *NRA* is unique in that it is the first case to apply *CAAN*'s bias to a review of the relationship between Congress and an independent agency. For this reason, the remainder of this Note focuses upon *FEC v. NRA Political Victory Fund*.[209]

II

FEDERAL ELECTION COMMISSION V. NRA POLITICAL VICTORY FUND

A. Introduction

In *FEC v. NRA Political Victory Fund*,[210] the D.C. Circuit found that the composition of the Federal Election Commission (FEC) violated the constitutional principle of separation of powers, because in addition to six voting members appointed by the President, the Secretary of the Senate and the Clerk of the House of Representatives served as ex officio nonvoting members of the Commission.[211] The court of appeals found that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution."[212] For this reason, *NRA* represents the greatest extension of the constitutional bias against Congress to date.

The FEC was established under the Federal Election Campaign Act (FECA)[213] as an independent agency authorized to regulate elections and campaign finance.[214] It was "created in the wake of Watergateout [sic] of a concern about corruption and abuses in campaign

---

208 *See supra* part I.E.1.

209 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed*, 115 S. Ct. 537 (1994).

210 *Id.*

211 *Id.*

212 *Id.* at 827.

213 Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1280-88 (1974) (current version at 2 U.S.C. §§ 431-455 (1994)).

214 *Id.*

finance."[215] Congress removed civil enforcement of the campaign financing statutes from the Department of Justice because it feared that enforcement would otherwise be subject to the partisan influence of the President, and entrusted it to the FEC, an independent, nonpartisan agency.[216] Generally the FEC's powers fall into three categories. First, the Commission exercises powers of an investigative or informative nature.[217] Second, the Commission performs functions such as rulemaking, rendering advisory opinions, and formulating general policy in the area of campaign finance.[218] Third, the Commission is entrusted with exclusive jurisdiction over civil enforcement of FECA.[219] Jurisdiction over criminal prosecution remains with the Department of Justice.[220]

B. *Buckley v. Valeo*

NRA is not the first case to challenge the composition of the FEC. As discussed above, the seminal separation of powers case, *Buckley v. Valeo*,[221] found the FEC unconstitutional and ordered Congress to restructure the Commission.[222] At the time of *Buckley*, members of Congress nominated four of the six voting Commissioners of the FEC, and the President nominated the remaining two.[223] All six nominees then had to be confirmed by a majority of both houses of Congress.[224] The Secretary of the Senate and Clerk of the House served as ex officio members without the right to vote.[225] In *Buckley*, the Court

---

215 *Federal Election Commission Panel Discussion: Problems and Possibilities*, 8 ADMIN. L.J. 223 (1994). In June 1974, the Senate Select Committee on Presidential Campaign Activities, otherwise known as the Watergate Committee, issued its final report which included a recommendation that there should he established an independent nonpartisan Federal Election Commission. S. REP. No. 93-981, 93d Cong., 2d Sess. 564 (1974). The Committee wrote:

> Probably the most significant reform that could emerge from the Watergate scandal is the creation of an independent, nonpartisan agency to supervise the enforcement of the laws relating to the conduct of elections. Such a body—given substantial investigatory and enforcement powers—could not only help ensure that misconduct would be prevented in the future, but that investigations of alleged wrongdoing would be vigorous and conducted with the confidence of the public.

Id. at 564.

216 *See* Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1280-88 (1974).

217 *See* Buckley v. Valeo, 424 U.S. 1, 109 (1976).

218 2 U.S.C. § 437(d) (1994) (outlining the powers of the commission).

219 *See* 2 U.S.C. § 437(g) (1994).

220 *See id.*

221 424 U.S. 1 (1976) (per curiam).

222 *See supra* part I.D.2.

223 *See* Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1281 (1974).

224 *Id.*

225 *Id.*

found that only the President could appoint "Officers of the United States,"[226] which it defined as anyone "exercising significant authority pursuant to laws of the United States."[227] Accordingly, because the duties of the FEC's members included executive agency functions, the Court held that Congress could not appoint any of the Commission's voting members.[228] *Buckley* differs from *NRA* and many other cases discussed in this note in that it relies upon explicit textual provisions of the Constitution. *Buckley's* separation of powers analysis focuses upon the Appointments Clause in Article I.

After being rebuffed in *Buckley*, Congress restructured the FEC so that by the time *NRA* was filed, the Commission was composed of: "[T]he Secretary of the Senate and the Clerk of the House of Representatives . . . ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate."[229] In *NRA*, the NRA successfully argued that despite this reconstitution, the FEC's composition continued to be constitutionally infirm.

C. The *NRA* Case

NRA involved the FEC's 1990 decision to file a civil enforcement suit against the NRA, alleging that the organization violated FECA when it transferred $415,744.72 to the NRA Political Victory Fund.[230] The FEC's decision to bring charges came after a majority of its six voting members found that there was "reason to believe" that the NRA had made illegal campaign contributions.[231] The NRA raised affirmative defenses challenging the constitutional status of the FEC and argued that these constitutional deficiencies barred the Commission from filing this action.[232] The district court, in an opinion authored by Judge Stanley Sporkin, rejected the NRA's affirmative defenses and held that the payment at issue was "an illegal contribution in violation of the FECA."[233]

The NRA, in a summary judgment motion, challenged the FEC's validity on three constitutional grounds. First, it claimed that "the statutory scheme for appointing Commissioners infringes on the presidential appointment power granted in the Constitution because the

---

226 *See* The Appointments Clause, U.S. CONST. art. II, §2, cl. 2.

227 *Buckley*, 424 U.S. at 126.

228 *Id.* at 140.

229 2 U.S.C. § 437c(a)(1) (1994).

230 FEC v. NRA Political Victory Fund, 778 F. Supp. 62, 63 (D.D.C. 1991), *rev'd* 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed* 115 S. Ct. 537 (1994).

231 Brief for FEC at 9, FEC v. NRA Political Victory Fund, 115 S. Ct. 537 (1994) (No. 93-1151).

232 *See NRA*, 778 F. Supp. at 65.

233 *Id.*

President is prevented from appointing more than three Commissioners from the same political party." Second, the NRA argued that "because the Commissioners cannot be controlled or removed by the President, execution of the laws is being entrusted to someone other than the President, who under Article II is to have the sole executive power."[234] This argument, in effect, challenged the constitutionality of independent agencies in general. Finally, and most important, the NRA claimed that there was a violation of the separation of powers doctrine because the Secretary of the Senate and the Clerk of the House sat on the commission as nonvoting ex officio members.[235] The NRA claimed that these members were agents of Congress and that their presence allowed Congress to unconstitutionally influence the exercise of executive powers.[236]

The district court denied the NRA's standing to raise these challenges because "[a]ny attempt to show that defendants' interests have been harmed by the statutory appointment scheme for the FEC would be speculative at best" and "any claim that the presence of non-voting *ex officio* members of the FEC has harmed defendant's interests is equally speculative."[237] According to the district court, only the President's interests were affected and therefore "it is the President and not the NRA who can challenge alleged infringements of presidential powers."[238] Thus, the district court denied the NRA's motion for summary judgment and ordered the organization to pay the assessed penalty.[239]

Judge Sporkin noted in dicta that the FEC's nonvoting members had "no real say in the outcome of any Commission proceedings"[240] and that to declare the FEC unconstitutional because of their presence would be an "excessive remedy."[241] In addition, the district court dismissed the NRA's general attack on the constitutionality of independent agencies by noting that independent agencies such as the FEC have "functioned admirably for decades" and therefore deserve a "presumption of regularity."[242]

On appeal, the D.C. Circuit reversed the district court and declared that the NRA did have standing to raise its affirmative defenses.[243] In its reversal, the circuit court found that the only

234 *Id.* at 65.
235 *Id.*
236 *See id.*
237 *Id.* at 65.
238 *Id.*
239 *Id.* at 66.
240 *Id.*
241 *Id.*
242 *Id.* at 65 n.2.
243 *NRA*, 6 F.3d at 824.

substantial claim raised by the defendants concerned the status of the nonvoting ex officio members.[244] The court did not find the NRA's other arguments persuasive.[245] Writing for the court, Judge Silberman found that the Constitution prohibits Congress from placing its agents "'beyond the legislative sphere' by naming them to membership on an entity with executive powers."[246] Relying upon this constitutional infirmity, the D.C. Circuit found that the FEC did not have authority to bring the enforcement action against the NRA.[247]

Notably, the opinion held only that the FEC could not prosecute the particular claim against the NRA. The court did not order the FEC to reconstitute itself.[248] As a matter of practice, however, absent reconstitution, future FEC enforcement actions brought in the D.C. Circuit would be dismissed based on the stare decisis effect of *NRA*. The FEC could conceivably have avoided this prohibitive effect by bringing an enforcement action in another circuit[249] because Congress was not required, as it was after *Buckley*, to amend the statute.[250] However, four days after the D.C. Circuit's ruling, the Commission voted to reconstitute itself as a six-member agency without ex officio members at least until the Supreme Court had an opportunity to review the D.C. Circuit's position.[251] The reconstituted Commission then proceeded to ratify or reconsider its prior determinations in current investigations and enforcement actions.[252]

What makes this case remarkable is that the ex officio members possessed no statutory authority to exercise FEC powers and no other ability to assert actual control.[253] The Act effectively precluded the ex officio members from controlling the decisionmaking process. That is, because voting is the only mechanism through which the Commis-

---

244 *Id.* at 826.

245 First, the court found that the "challenge to the alleged restriction on the President's appointment power to select more than three commissioners from one party is not justiciable." *Id.* at 824. Second, the court found that "[a]lthough appellants have standing to assert that the Commission acts unconstitutionally because of its . . . law enforcement activities, there is not much vitality to the claim after *Morrison*." *Id.* at 826.

246 *Id.* at 827.

247 *Id.* at 822.

248 In addition, given that FECA contains a severability clause, *see* 2 U.S.C. § 454 (1994) ("If any provision of this Act . . . is held invalid, the validity of the remainder of the Act shall not be affected thereby."), the court did not feel compelled to order Congress to amend the statute. *NRA*, 6 F.3d at 828.

249 *See, e.g.*, FEC v. Williams, No. CV 93-06321-ER (C.D. Cal. Jan. 31, 1995) (Order Re: Cross-Motions for Summary Judgment) (holding that the presence of nonvoting ex officio members of the FEC was not unconstitutional).

250 *NRA*, 6 F.3d at 828.

251 Brief for FEC at 13, FEC v. NRA Political Victory Fund, 115 S. Ct. 537 (1994) (No. 93-1151).

252 *Id.*

253 2 U.S.C. section 437(c) (1994).

sioners administer FEC authority,[254] the Act ensures that the presence of the ex officio members is ineffectual. Additionally, the Act does not permit either of these members to serve as chairmen of the commission.[255] Moreover, the ex officio members could not call or adjourn a meeting and were not counted in determining a quorum.[256] The statute empowered the ex officio members to do nothing more than give advice and express their views to the voting Commissioners during FEC meetings.[257] Notwithstanding its concession that the ex officio members occupied an advisory role at best, the court found that "[a]dvice, however, surely implies influence, and Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role."[258] The court made the following revealing statement:

> [W]e cannot conceive why Congress would wish or expect its officials to serve as *ex officio* members if not to exercise *some* influence. Even if the *ex officio* members were to remain completely silent during all deliberations . . . their mere presence as agents of Congress conveys a tacit message to the other commissioners. The message may well be an entirely appropriate one—but it nevertheless has the potential to influence the other commissioners.[259]

In its decision, the court, "for purposes of constitutional analysis," refused to draw any distinctions between voting and nonvoting members of the FEC.[260] The court recognized that the ex officio members did not have statutory authority to exercise FEC powers, but it found that Congress could exercise a level of influence sufficient to produce a threat of constitutional proportions.[261] Implicit in this holding is the belief that the ex officio members did exercise significant power over the operation of the FEC.[262] Given this implication, it is surprising that Congress was not conspicuously agitated by the decision. Throughout the proceedings, Congress never filed a brief or argued to preserve its relationship with the Commission. One would think

---

254 2 U.S.C. § 437(c)(c) (1994) ("All decisions of the Commission with respect to exercise of its duties and powers under the provisions of the Act shall be made by a majority vote of the [voting] members of the Commission.").

255 2 U.S.C. § 437(c)(a)(5) (1994).

256 Commission Directive No. 10, Rules of Procedure of the Federal Election Commission, 1 FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶¶ 2043-44 (Chicago Commerce Clearing House, 1976).

257 2 U.S.C. § 437(c) (1994).

258 *NRA*, 6 F.3d at 827.

259 *Id.* at 826.

260 The court asked whether "*ex officio* non-voting members enjoy a different status for purposes of constitutional analysis." *Id.* at 826. And, by finding the FEC unconstitutional, the court implicitly concluded that there was no difference. *Id.* at 827.

261 *Id.* at 827.

262 *Id.* (rejecting Commission's argument that Congress intended ex officio membership to play a mere advisory role and noting that advice implies influence).

that if the relationship had provided a powerful means of influence, Congress would have fought protect it. It did not. To some degree, this fact undercuts Judge Silberman's theory because it demonstrates that even Congress did not think that the relationship was influential. In light of the limited role of the ex officio members, this decision is puzzling and warrants further discussion.

III
ANALYSIS

A. Locating *NRA*'s Place in Separation of Powers Jurisprudence

Unlike the appointments clause[263] and removal[264] cases, *NRA* does not purport to rest its separation of powers conclusion on a specific textual provision of the Constitution. Rather, the decision attempts to contribute to the ongoing dialogue by addressing the ideological foundation of the entire separation of powers doctrine. Specifically, the D.C. Circuit considered the extent to which courts should be concerned with legislative efforts to influence nonlegislative entities. Its effort should be discredited, however, as a formalistic assault upon Congress. Without expressly adopting any particular interpretative ideology, the D.C. Circuit has developed an extreme interpretation of what constitutes impermissible legislative aggrandizement. The decision's reliance upon this interpretation is its most troubling feature. The next section addresses this problem.

B. A Formalistic Assault upon Congress—The Meaning of Legislative Aggrandizement Under *NRA*

The *NRA* court analyzed and resolved the issue of the nonvoting members of the FEC in a highly formalistic manner. The decision contains little, if any, contextual analysis. Initially, the court relies on *Bowsher*'s rigid and simplistic proposition that Congress may not exercise executive powers.[265] More importantly, the *NRA* opinion demonstrates how the unsupported fears of legislative aggrandizement reflected in *CAAN* can be expanded to the administrative context. As in *CAAN*, the *NRA* court perceived the FEC's composition as an innocuous arrangement of power that presented a blueprint for legislative

---

263 *See Buckley*, 424 U.S. 1.

264 *See* Morrison v. Olson, 487 U.S. 654 (1989); Bowsher v. Synar, 478 U.S. 714 (1986).

265 *NRA*, 6 F.3d at 826 (citing *Bowsher* to support assertion that "Congress may not appoint the voting members . . . [of] any agency with executive powers"). In addition, the court found that the FEC was influencing executive powers despite the Commission's independent agency status. In the *NRA* opinion, the court of appeals made no effort to determine whether there is a qualitative difference between those powers exercised by the Executive and those exercised by the FEC. *Id.* at 826-27.

tyranny.[266] In defining legislative aggrandizement, the *NRA* court expressed extreme skepticism toward Congress's ability to legitimately participate within the administrative sphere.[267] And although James Madison's suspicion of Congressional power has generally pervaded judicial interpretation of the separation of powers doctrine,[268] the *NRA* case offers a notion of power never before suggested.

Although the principle that Congress may not exercise executive powers has guided formalistic decisions since *Bowsher*, a few courts have actually had to determine what it means to control executive powers.[269] The *NRA* court held that the ability to advise or influence, even minimally, constituted control.[270] This inflexible and unyielding approach significantly discourages legislative initiative in a manner that borders on a constitutional presumption against Congress.[271] However, the court's definition of control does not necessarily follow from *Bowsher*, which left the question open.

1. *Alternative Approaches Taken By The Courts:* Williams, Lear Siegler *and* Ameron

In *FEC v. Williams*,[272] the only other case to consider the constitutionality of the FEC's composition, the Central District of California took an opposite position to that of the D.C.Circuit in *NRA*. The California district court explained that:

---

266 *Id.* at 827 (noting that the Court in *CAAN* invalidated the law because "the statutory scheme challenged . . . provides a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role").

267 *Id.* at 826-27.

268 *See supra* part I.A.; *see also* Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Airport Noise (CAAN), 501 U.S. 252, 277 (1991) (finding the Airports Authority statute unconstitutional after noting James Madison's warning that "power is of an encroaching nature").

269 Besides *NRA*, there are four other cases analyzing this issue: Hechinger v. Metropolitan Wash. Airports Auth., 36 F.3d. 97 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995); Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988), *rev'd on other grounds*, 893 F.2d 205 (9th Cir. 1989); Ameron, Inc. v. United States Army Corps of Eng'rs., 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988); FEC v. Williams, No. CV 93-6321-ER (C.D. Cal. Jan. 31, 1995) (Order Re: Cross-Motions for Summary Judgment).

270 *See NRA*, 6 F.3d at 827. The court does not used the word control, but it relies upon *Bowsher*, 478 U.S. at 732-33, to conclude that Congress cannot exercise executive powers. *Id.*

271 *NRA*, 6 F.3d at 826-27. The court does not actually establish a presumption against Congressional activity. However, the opinion sends a message that the separation of powers doctrine, a constitutional principle, mandates legislative caution in circumstances where Congress has the opportunity to influence administrative activity. In light of this holding, Congress might overreact by closing off avenues of influence. Recently, the effect of *NRA* has been evidenced in congressional deliberations over amendments to the Metropolitan Airports Authority Act. *See* discussion *supra* note 4.

272 FEC v. Williams, No. CV 93-6321-ER (C.D. Cal. Jan. 31, 1995) (Order Re: Cross-Motions for Summary Judgment). In *Williams*, the defendants appealed to the Ninth Circuit, but the case is still pending.

> Although the Court is cognizant of the D.C. Circuit's decision in *FEC v. NRA Political Victory Fund*, . . . [b]ecause the *ex officio* members do not vote, it does not appear Congress sought to usurp an executive function. Thus, the focus of the separation of powers inquiry must shift to whether their presence on the Commission "impermissibly undermines" the executive branch's role. Quite simply, it does not appear that this is the case.[273]

The *Williams* court cast aside formalism and relied upon a functional analysis. This court emphasized the importance of considering the context in which the nonvoting members operated. In *Williams*, the court imposed civil penalties upon the defendant for violating FECA because the defendant had contributed $22,000 to Jack Kemp's 1988 presidential campaign, an amount that exceeded FECA's $1,000 limit.[274] The *Williams* court did not believe that the presence of ex officio members on the FEC rendered the Commission's action constitutionally infirm.[275] To reach this conclusion, the court relied upon the Ninth Circuit's decision in *Lear Siegler, Inc. v. Lehman*,[276] a case which revisited the constitutional status of the Comptroller General after *Bowsher*.

In *Lear Siegler*, the Ninth Circuit found that *Bowsher* and *Chadha* suggest that:

> improper congressional action . . . [is] the exercise of ultimate authority over an executive official, or a final disposition of the rights of persons outside the legislative branch. Put another way, the critical issue is whether Congress or its agent seeks to *control* (not merely to "affect") the execution of its enactments without respect to the Article I legislative process.[277]

Lear Siegler involved the Navy's (a part of the Executive Branch) constitutional challenge to the Competition in Contracting Act of 1984 (CICA).[278] The Act established a system by which the Comptroller General could investigate protests lodged by frustrated bidders claiming agency failure to adhere to competitive procedures in government contract awards.[279] Upon receipt of a protest, the Comptroller investigated the matter and issued a nonbinding recommendation to the agency involved.[280] The Navy's constitutional challenge in *Lear Siegler* focused on a provision of CICA that provided for an automatic stay or suspension of any contract award or its performance once a bid pro-

---

273 *Id.* slip op. at 2 (citations omitted).
274 *Id.* at 3-4.
275 *Id.* at 1-3.
276 *Lear Siegler*, 842 F.2d at 1102.
277 *Id.* at 1108.
278 *Id.* at 1104.
279 *Id.*
280 *Id.*

test was timely lodged with the Comptroller General.[281] No awards could be made and contested contracts could not be performed while the protest was pending.[282]

CICA authorizes the Comptroller General to take up to 90 working days to conduct his investigation, with an extension available "if circumstances require and written reasons are given."[283] The procuring agency may, however, override the stay at any time "upon a written finding that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for the decision of the Comptroller General."[284] In this case, Lear Siegler, which had placed a bid with the Navy to provide fuel tanks, protested the Navy's decision to award the contract to another bidder,[285] and brought an action to compel the Navy to comply with the provisions of CICA.[286]

The Navy challenged the provision of CICA that conditions the duration of the stay upon actions taken by the Comptroller General.[287] In deciding for Lear Siegler, the Ninth Circuit found that although the Comptroller General is an agent of Congress under *Bowsher*, he does not exercise control or ultimate authority over executive action through the stay provisions.[288] Accordingly, the court failed to see any existing constitutional infirmities.[289] The court further justified its holding by noting that because the stay is temporary and the recommendations of the Comptroller General are nonbinding, the stay cannot be used to coerce the procuring agency to make a particular final disposition.[290] "The stay provisions force nothing more than a dialogue between the procuring agency and the legislature."[291]

In addition to finding that the stay provisions of CICA did not control or execute the procurement laws,[292] the court found that the intrusion on the executive branch's exercise of its delegated procurement power was limited, and therefore constitutional, because the stay was short and because CICA expressly authorizes the Executive

---

281 *Id.*

282 *Id.*

283 *Id.* at 1105.

284 *Id.* (citing 31 U.S.C. § 3553(c)(2)(A)).

285 *Id.*

286 *Id.* Prior to this case, the Attorney General had announced that the executive branch would not comply with a district court order—or a possible court of appeals decision—upholding CICA. Ameron, Inc. v. United States Army Corps of Eng'rs, 787 F.2d 875, 889-90 (3d Cir. 1986) (Ameron I).

287 *Lear Siegler*, 842 F.2d at 1108.

288 *Id.* at 1110.

289 *Id.*

290 *Id.*

291 *Id.*

292 *Id.*

Branch to override the stay.[293] This analysis is neither aberrant nor exclusive to the Ninth Circuit. In *Ameron, Inc. v. United States Army Corps of Engineers* (*Ameron II*),[294] a case involving facts virtually identical to *Lear Siegler*, the Third Circuit concluded that CICA did not give the Comptroller General control over the procurement process and therefore was not unconstitutional.[295] The *Ameron* court noted that the Act "encourage[d] the [Legislative and Executive] branches to work together without enabling either branch to bind or compel the other. That is the way a government of divided and separated powers is supposed to work."[296] This additional analysis exhibits the way that functionalistic ideology focuses upon context.

An equally noteworthy aspect of *Lear Siegler* is what the court determined to *not* be the issue at hand. The court noted that the Navy had not challenged the Comptroller General's authority to issue nonbinding recommendations on bid protests.[297] As the court concluded, there is no doubt that Congress can constitutionally act to influence executive officials and others outside the legislative branch through its opinions and through the "illuminating power of investigation."[298]

In contrast to *NRA*, *Lear Siegler* is not excessively wary of legislative initiatives. The analysis in the decision is much more thoughtful and comprehensive, and it embraces a functional ideology similar to that used by the Supreme Court in *Morrison* and *Mistretta*.[299] Following *Lear Siegler*, the *Williams* court found this kind of functional analysis more instructive. *Williams* appreciated the fact that, because the nonvoting members of the FEC have no real influence,[300] they would be unlikely to jeopardize the structural balance between the branches. The *NRA* case, although recognizing this lack of influence, found it to be an irrelevant factor.[301] In *NRA*, Judge Silberman failed to consider the value of the type of analysis suggested by *Lear Siegler* and *Williams*. To date, no court has made any effort to resolve the conflict between the different conceptions of legislative aggrandizement espoused in *NRA* and *Williams*. In the future, the Supreme Court may decide to clarify its position, but it is unclear whether there will ever be a case presented which would enable it to resolve the question of whether ex

293 *Id.* at 1112.

294 809 F.2d 979 (3d Cir. 1986) (case reconsidered in light of Supreme Court's decision in *Bowsher*).

295 *Id.*

296 *Id.* at 998.

297 *Lear Siegler*, 842 F.2d at 1109.

298 *Id.* (quoting *Ameron II*, 809 F.2d at 992).

299 *See supra* part I.E.2.

300 FEC v. Williams, No. CV 93-6321-ER, slip op. at 2 (C.D. Cal. Jan. 31, 1995) (Order Re: Cross-Motions for Summary Judgment).

301 *NRA*, 6 F.3d at 826-27.

officio nonvoting members may constitutionally serve on the FEC.[302] The D.C. Circuit, however, had an opportunity to examine *NRA, Lear Siegler* and *Ameron* in *Hechinger* v. *Metropolitan Washington Airports Authority.*[303]

2. Hechinger v. Metropolitan Washington Airports Authority: *A Recent Consideration of* NRA *and* Lear Siegler/Ameron

In *Hechinger v. Metropolitan Washington Airports Authority,* Judge James L. Buckley, writing for the panel, confronted and navigated through the conflicting opinions of *NRA, Lear Siegler,* and *Ameron.*[304] In *Hechinger,* the court found that an amended version of the Airports Authority statute, whose original provisions were found unconstitu-

---

302 An interesting turn of events has made it more doubtful that the Supreme Court will ever be presented with another case which would enable it to resolve the question of whether a Congressional agent may serve as an ex officio nonvoting member of the FEC. In *NRA,* the Supreme Court expressed an interest in hearing the case, but later dismissed certiorari, and therefore allowed the D.C. Circuit opinion to stand. *See supra* note 5. Because the FEC reconstituted itself after *NRA,* there remained only a limited number of cases where a litigant could challenge the presence of the ex officio members. These cases were those that the FEC had decided to investigate or those which were pending before the D.C. Circuit issued its opinion in *NRA.* Of those cases, *Williams* was the only one being heard by a court outside the D.C. Circuit.

The defendant in *Williams* has appealed to the Ninth Circuit, but the court has not yet rendered an opinion. The court may choose to follow *NRA* and declare the FEC unconstitutional. If that occurred, there would be no split among the circuits. It is unclear whether, without a conflict between circuits, the Supreme Court would feel compelled to grant certiorari. Moreover, if the Ninth Circuit found the FEC unconstitutional, and if the Supreme Court was inclined to agree, it would not, in the absence of a split, need to hear the case.

Additionally, if the Ninth Circuit affirms the result of the district court and concludes that the FEC should be able to seek enforcement, the Ninth Circuit need not address the constitutionality of the Commission. For example, it may choose to follow FEC v. National Republican Senatorial Comm., 877 F. Supp. 15 (D.D.C. 1995). In *NRSC,* the court found that, notwithstanding *NRA,* the FEC could continue its enforcement action because the reconstituted Commission had ratified its prior finding that "there was probable cause to believe a violation had occurred and its subsequent decision to institute this action." *Id.* In other words, the court found that the ratification had resolved any potential constitutional infirmities in the FEC decision to bring a civil enforcement. It is possible that the Ninth Circuit may choose to avoid the thorny constitutional issue and rely upon *NRSC.*

Depending upon what happens in the Ninth Circuit, *Williams* is the next case in which the Supreme Court could address the question of ex officio members of the FEC. But, for the reasons mentioned above, there are doubts as to whether that will occur. In a case which was percolating within the D.C. Circuit at the time of *NRA,* the court of appeals has followed *NRA* and found the presence of the ex officio member on the FEC unconstitutional. *See* FEC v. Legi-Tech, Inc., 75 F.3d 704 (D.C. Cir. 1996). The Supreme Court may decide to hear one of the cases from the D.C. Circuit, but it is more likely that the Court will act only if there is split among circuits. Thus, much depends on whether the Ninth Circuit finds the FEC structure constitutional in *Williams.*

303 36 F.3d 97, *cert. denied,* 115 S. Ct. 934 (1995).

304 *Id.*

tional in *CAAN*, was similarly invalid.[305] Reasoning that the separation of powers doctrine would not be implicated if the Board of Review established by the original Airports Act was deemed powerless,[306] Congress had attempted to salvage the Act by stripping the Board of Review of its veto power over the Board of Directors.[307] In *Hechinger*, the Airports Authority argued that the statute, as revised, relegated the Board of Review to an advisory role—not one that controlled federal power.[308] Nevertheless, the D.C. Circuit court rejected this argument, and found that the Board of Review did, in fact, exercise federal power because the statute granted the Board a range of powers, the cumulative effect of which enabled it to impermissibly interfere with the Board of Directors' performance.[309] First, the court noted that the statute authorized the Board of Review to "request the Authority 'to consider and vote, or to report, on any matter related' to the two airports; and the Authority must do so 'as promptly as feasible.'"[310] Second, under the statute "members of the Board of Review may participate as non-voting members in meetings of the Directors."[311] Third, "the Board of Review ha[d] the discretion to accelerate the implementation of a Directors' decision by promptly approving it or consigning it to the delays and uncertainties of a congressional review."[312]

In declaring the amended statute unconstitutional, the *Hechinger* court found that the provision enabling the Board of Review members to serve as nonvoting directors raised the same concerns "underpinn[ing the] decision in *NRA Political Victory Fund*."[313] The court then noted that Congress must limit the exercise of its influence to the legislative sphere.[314] Although the court identified the problem with having Board of Review members serve as nonvoting directors, the court's position equivocates as to whether the presence of the nonvoting directors, alone, would have been sufficient to find the Act unconstitutional. The court's remarks regarding this issue are limited and do little more than echo the words of *NRA*.[315] It does not appear, however, that the court would have felt completely comfortable with its decision if it had chosen to rely exclusively upon the nonvoting

305 Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Airport Noise (CAAN), 501 U.S. 252 (1991). For a discussion of *CAAN*, see *supra* part I.E.3.

306 *CANN*, 501 U.S. at 269; *see supra* part I.E.3.

307 *Hechinger*, 36 F.3d at 102.

308 *Id.*

309 *Id.* at 104.

310 *Id.* at 102 (citing 49 U.S.C. App. § 2456(f)(6) (Supp. III 1991) (repealed 1994)).

311 *Id.* (citing 49 U.S.C. App. § 2456(f)(7) (Supp. III 1991) (repealed 1994)).

312 *Id.*

313 *Id.*

314 *Id.*

315 *Id.*

members issue.[316] If the court had been fully persuaded by the reasoning employed in *NRA*, the very presence of congressional agents in a nonlegislative context, regardless of their power, would have demanded judicial invalidation of the statute. In its decision, however, the *Hechinger* court was most influenced by the Board of Review's "power to delay and perhaps overturn critical decisions by requiring their referral to Congress."[317] Here, the court found that this fact "tip[ped] the balance" against constitutionality.[318]

In reaching this conclusion, the court did not consider *NRA* but simply rejected the Airports Authority's eIforts to analogize its circumstances to *Ameron* and *Lear Siegler* on the grounds that the authority wielded by the Board of Review under the Act is "significantly greater than that of the Comptroller General under CICA."[319] In contrast to *Lear Siegler*, the Airports Authority Act does not allow the Board of Directors to override the Board of Review's decisions, a safegnard that both *Lear Siegler* and *Ameron* viewed as crucial to concluding that the stay provisions involved in these cases did not vest the Comptroller General with power over persons outside the legislative branch.[320] According to the *Hechinger* court, the power held by the Board of Review was far more than merely "advisory" as the defendants claimed.[321] Whereas taking advantage of avenues of persuasion may be constitutional, the relationship set forth in the Act created a channel through which the Board of Review could illegitimately coerce the Directors of the Airport Authority to follow any recommendation offered.[322]

Hechinger is a strange opinion in that it uses *NRA* and *Lear Siegler/Ameron* to address independent and separate issues. The court's choice is especially confusing in that it follows *NRA's* formalism[323] and *Lear Siegler/Ameron's* functionalism[324] at the same time.[325] It used the *NRA* case to analyze the presence of the nonvoting members, but employed the more functional language in *Lear Siegler* and *Ameron* to identify the infirmities in Congress's ability to impact decisionmak-

316 *See id.*

317 *Id.* at 105.

318 *Id.*

319 *Id.* at 103.

320 *Id.*

321 *Id.* at 105 (citing Hechinger v. Metropolitan Wash. Airports Auth., 845 F. Supp. 902, 907 (D.D.C. 1994)).

322 *Id.*

323 *Id.* at 102.

324 *Id.* at 103-04.

325 Had the *Hechinger* court used *NRA* to analyze the question of the Board of Review's discretion to delay the Director's decision, it would have rejected the device outright. The *NRA* analysis would have made any consideration of context unnecessary. But, the court might have felt that it did not need to use *NRA* because it could refute the Airports Authority's analogies to *Lear Siegler/Ameron.*

ing.[326] While *Hechinger*'s resolution of these two issues draws from markedly different ideological roots, the court makes no effort to explain their differences. Rather, the court mechanically applies the cases without any explanation. Similarly, it is surprising that both *NRA* and *Williams*—albeit two opinions from two different circuits—have resolved the same issue without sharing any ideological common ground. This lack of common ground within the *Hechinger* case and between *NRA* and *Williams* evidences a damaged separation of powers doctrine.

C. The *NRA* Case and the Health of the Separation of Powers Doctrine

In the FEC cases, *NRA* and *Williams*, the dispute between the courts involves more than just facts or matters of degree. The courts differ, not only in their application of the separation of powers doctrine, but also in the methodology they use to reach their conclusions. Taken together, the opinions reflect the tension between functionalism and formalism in their conception of legislative aggrandizement. The analysis which follows demonstrates that both *NRA*'s formalism and *Williams'* functionalism resolve the FEC issue inadequately. However, whereas functionalism may be saved, formalism is an ailing and irremediable doctrine. This section suggests that courts should abandon formalism and adopt a functional analysis bolstered by a consideration of individual liberty. The Note concludes that although *NRA* may have been right in result, it should have reached its conclusions by adopting reasoning more cognizant of the values underlying separation of powers theory.

1. NRA's *Formalism and* Williams's *Functionalism*

NRA and *Williams* manifest their critics' worst fears about ex officio nonvoting members of the FEC. In light of *NRA*'s strict formalism, one might ask whether this opinion will stifle legislative initiative beyond anything intended by the separation of powers doctrine. One commentator has noted that formalism "restricts innovation in sharing power."[327] Certainly, *NRA* is activist in taking a harsh stance against Congress. On the other hand, one might argue that *Williams's* functionalism invites "ad hoc, standardless judgment[s]"[328] which, Justice Scalia has rather sarcastically explained, "has real attraction . . . [because it] is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law."[329]

---

326 *Hechinger*, 36 F.3d at 102-05.
327 Brown, *supra* note 9, at 1526.
328 Morrison v. Olson, 487 U.S. 654, 712 (1988) (Scalia, J., dissenting).
329 *Id.* at 734 (Scalia, J., dissenting).

Nevertheless, *NRA* is more troubling than *Williams*. *NRA* is the first case to apply the extreme bias toward Congress legitimized in *CAAN* to an analysis of the relationship between Congress and independent agencies.[330] Most separation of powers cases do not involve conflict between Congress and state entities, but they often address conflict between Congress and some other branch or independent agency.[331] *CAAN* and *Hechinger* do not assess whether the legislative devices examined in these cases would be constitutional in a conflict between Congress and either the Executive Branch or one of the independent agencies. Perhaps if the Comptroller General in *Lear Siegler* had had the same ability to impact the implementation of decisions made by a procuring agency such as the Board of Review in *Hechinger*, the case would have been different. Because *NRA* impacts upon administrative agencies, a central feature of government, there is cause for concern.

The *NRA* decision is one of the most formal treatments of the relationship between Congress and an independent agency ever written. This kind of formalism is unnecessary. To begin, formalistic analysis should be abandoned because, as Professor Peter Strauss has noted, it "cannot describe the government we long have had, is not required by the Constitution, and is not necessary to preserve the very real and desirable benefits of 'separation of powers' that form so fundamental an element of our constitutional scheme."[332] For instance, the formal theory of separation of powers that prohibits the joining of functions is unworkable because it denies the existence of administrative government. Every part of government created by Congress, the FEC as well as the Department of Justice, exercises all three of the governmental functions—legislative, executive, and adjudicatory.[333] Therefore, it makes no sense to apply formalism to the structural relationships between Congress and administrative agencies if that ideology denies the existence of one of the actors, namely the administrative agency. The *NRA* case is an example of the inadequacy of formalist ideology.

Because of formalism's limitations, Judge Silberman rendered an internally inconsistent opinion. The particular facts of *NRA* force this inconsistency because they involve a challenge to both independence and legislative aggrandizement—the polestars of separation of powers jurisprudence. In addressing the constitutionality of the FEC, Judge Silberman explained that after *Morrison* "there is not much vitality"[334]

---

330 *See* discussion of *CAAN supra* part I.E.3.

331 *See supra* part I.E.

332 Strauss, *supra* note 25, at 492.

333 *Id.* at 493.

334 FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993), *cert. dismissed*, 115 S. Ct. 537 (1994).

to the NRA's argument that because Commissioners cannot be controlled or removed by the President, execution of the laws is being entrusted to someone other than the President who, under Article II, is to have the sole executive power.[335] *Morrison*, which held constitutional the independent counsel, "approved a much greater diminution of presidential authority than presented in this case."[336] As explained previously, *Morrison* relied upon a functional analysis.[337] The major holding of *NRA*, finding the presence of the ex officio nonvoting members unconstitutional, employs a formalistic analysis.

Through *NRA*, it appears that the D.C. Circuit's commitment to the legitimacy of independence, toward which it adopts a functional analysis, is inconsistent with its formal stance against Congress.[338] This inconsistency is further revealed when one considers what would have resulted if the court had applied either a formalistic or functionalist analysis uniformly throughout the opinion. Under a pure formalist analysis, a court would deny the constitutionality of independent agencies, in addition to invalidating the presence of nonvoting members.[339] Under a functional analysis, on the other hand, the court would have validated the status of independent agencies, and, like *Williams*, would have been more flexible regarding the constitutionality of the ex officio members.[340] Such a functional analysis would necessarily consider the powerlessness of the ex officio members as a major factor in reaching its conclusion.

As Professor Strauss has noted:

> [T]he Constitution describes . . . three generalist national institutions (Congress, President, and Supreme Court) which, together with the states, serve as the principal heads of political and legal authority. . . . Each [institution] may be thought of as having a paradigmatic relationship, characterized by that authority-type, with the working government that Congress creates.[341]

Separation of powers thus requires the courts to consider these relationships between the branches in a contextual manner in order preserve the governmental balance. As suggested by *Williams* and *Lear Siegler*, legislative aggrandizement should be measured in terms of the

---

335 *See id.*

336 *Id.*

337 *See supra* parts I.D.3, I.E.3.

338 Interestingly, the author of *NRA*, Judge Silberman, wrote the D.C. Circuit's opinion in *Morrison* in which the court found the Independent Counsel provision unconstitutional. The *Morrison* opinion is extremely formalistic. The Supreme Court later reversed that decision. Morrison v. Olson, 487 U.S. 654 (1988).

339 *See supra* part I.B.

340 *See* FEC v. Williams, No. CV 93-6321-ER, slip. op. at 2 (C.D. Cal. Jan. 31, 1995) (Order Re: Cross-Motions for Summary Judgment); *see also supra* part I.B. (discussing the functional approach to the separation of powers doctrine).

341 *See* Strauss, *supra* note 25, at 492.

full set of relationships among Congress, administrative agencies, the President, the courts, and anyone affected by the legislation.[342]

For these reasons, *Williams* adopts a better approach than *NRA* because of the flexibility inherent in its reasoning. However, this flexibility is also *Williams's* primary weakness; *Williams's* capacity to deal with an actual legislative threat may, in some cases, be apocryphal. In other words, the decision may be too standardless and flexible to offer a sufficient check on congressional activities. This failing does not suggest, however, that the courts should embrace *NRA* for lack of a better choice. *Williams's* functional analysis could be sufficiently bolstered to satisfy its critics by a consideration of certain values underlying separation of powers, such as the preservation of individual liberty and protection from legislative tyranny. As explained in the next section, this approach would differ significantly from that taken by the *NRA* court. A full understanding of this approach becomes more evident in the following critique of the D.C. Circuit opinion.

2. NRA's *Failure to Consider Separation of Powers Values*

The *NRA* court defended its formalist approach as a precautionary measure taken to prevent the validation of a statutory scheme which "provides a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role."[343] However, the court's opinion takes an extremely prejudicial position against Congress without articulating adequate justification. That is, even if a tougher stance against Congress is warranted, *NRA* provides no reason for following its methodology. For Judge Silberman, thwarting legislative initiative has become an end unto itself rather than a means to achieve some greater purpose. The court was persuaded by James Madison's argument that the legislature's constitutional powers being at once more extensive and less susceptible of precise limits, "'can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments,'"[344] and concluded that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution."[345] Following *CAAN* and the cautious words of James Madison, the court made this determination because even innocuous arrangements may provide a "blueprint for extensive expansion of the legislative power

342 *See supra* part III.B.1.

343 FEC v. NRA Political Victory Fund, 6 F.3d 821, 827 (D.C. Cir. 1993) (quoting Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 277 (1991)), *cert. dismissed*, 115 S. Ct. 537 (1994).

344 *Id.* (quoting THE FEDERALIST No. 48, at 334 (James Madison) (Jacob E. Cooke ed., 1961)).

345 *Id.*

beyond its constitutionally-confined role."[346] There may be validity in Madison's perceptions of legislative power, and there may be some utility in invoking judicial distrust of Congress, but that does not mean that the courts should reject all legislative experimentation in every situation that appears innocuous. Rather, judicial decisionmaking should conform to the separation of powers doctrine's "interconnected goals of preventing tyranny and protecting liberty."[347]

3. *Considering Separation of Powers Values and an Ordered Liberty Analysis*

In a recent article, Professor Rebecca Brown has argued that

> the judicial opinions addressing the separation of powers over the past decade tend to place primary emphasis not on the prevention of tyranny or protection of individual liberties, but on the advancement of the institutional interests of the branches themselves, as if that goal were itself a good—a proposition with no historical support.[348]

Similarly, *NRA* focuses primarily on diminishing congressional power without considering whether such extremism is necessary in light of the values inherent in separation of powers theory.

When a court finds that a particular structural arrangement adopted by Congress is unconstitutional, it denies society the beneficial value of that arrangement. Thus, a court must be extremely careful in determining whether the arrangement is valid, because, otherwise, the court may stifle legitimate legislative initiatives. Professor Brown has noted that

> the judges and academics who take up the subject of separated powers almost invariably invoke James Madison: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny," [but this] is more a ritualistic gesture than an effort to supply a meaningful framework for the inquiry at hand.[349]

To effectively police the doctrine of separated powers, a court must acutely recognize the doctrine's external values. Brown, who demonstrates a clear link between ordered liberty and the doctrine of sepa-

---

346 *Id.* (quoting Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 277 (1991)).

347 Brown, *supra* note 9, at 1534.

348 *Id.* at 1518 (footnote omitted).

349 *Id.* at 1515 (footnote omitted) (quoting THE FEDERALIST No. 47, at 313 (James Madison) (Modern Library ed., 1937)). The quotation from Madison, or language expressing the same idea, can be found in nearly every modern judicial opinion on the subject of separated powers. *See e.g.*, Mistretta v. United States, 488 U.S. 361, 380-81 (1989); Bowsher v. Synar, 478 U.S. 714, 721-23 (1986); INS v. Chadha, 462 U.S. 919, 960 (1983).

rated powers,[350] argues that the current jurisprudence should be supplanted by an "ordered-liberty" analysis, which would require courts to examine governmental acts in light of the degree to which they may tend to detract from fairness and accountability in the process of government.[351]

Brown's inquiry "is not limited to opportunities to enforce actual rights of litigants [and] it encompasses a much broader arena, including government actions that do not directly injure any specific individual, but alter the processes of government so as to make such injuries likely."[352] For instance, in cases in which there is no clear property or liberty interest, but which nonetheless involve impairment of processes in some way that threatens the values underlying separated powers, the ordered-liberty analysis "would have the Court ask whether the challenged scheme fosters tendencies toward inaccuracy, lack of accountability, or unfairness."[353]

4. *Incorporating Separation of Powers Values into a Functional Approach*

Professor Brown's critique of current jurisprudence and her suggestion that courts should consider constitutional values are accurate. Her approach is suspect, however, because she ignores purely structural concerns and rejects any consideration of institutional factors. Brown's theory supplants the separation of powers doctrine with an ordered-liberty analysis instead of rehabilitating the doctrine itself. At its core, the separation of powers doctrine remains a structural doctrine: "in the long term, [these] structural protections against abuse of power were [for the Framers] critical to preserving liberty."[354] Nevertheless, Brown's words of caution are well taken. Separation of powers jurisprudence should be criticized for its failure to consider liberty interests; and its guardians, the judiciary, should be encouraged to recoguize purely structural values. But to avoid inconsistency, the judiciary should resolve the tension between formalism and functionalism. The delicate structural relationship between governmental entities cannot be achieved with two conflicting ideologies. Separation of powers jurisprudence and its structural values should be infused with an ordered-liberty analysis as one of its dominant factors. As demonstrated above, functionalism is the better recipient of this infusion.[355] A functional approach dominated by a liberty analysis

---

350 Brown, *supra* note 9, at 1531-40.
351 *Id.* at 1531.
352 *Id.* at 1540.
353 *Id.* at 1561.
354 *Bowsher*, 478 U.S. at 730.
355 *See supra* part III.C.1.

would have been sufficient to decide *NRA* and to destroy any "blueprints" for unconstitutional expansion.

In light of this critique, *NRA* evidences a lazy jurisprudence, which makes the assumption that separation of powers values can be fulfilled by employing a simple mechanism that denies Congress a participatory role in the administrative state. This approach appears to be a proxy for a more contextual one. For example, the approach taken by *NRA* was unnecessary to protect liberty interests. This is evident from a line of cases which have set the standard for determining due process violations from congressional attempts to influence administrative agencies' decisionmaking. Although these cases are not controlling, they offer some guidance.

5. *Guiding Principles:* Pillsbury v. FTC *and* DCP Farms v. Yeutter

Pillsbury v. FTC[356] and *DCP Farms v. Yeutter*[357] distinguish the consequences of congressional interference with quasi-judicial as opposed to nonjudicial proceedings. In *Pillsbury*, the Fifth Circuit found that the mere appearance of bias caused by congressional interference violates the due process rights of parties involved in judicial or quasi-judicial agency proceedings.[358] Conversely, *DCP Farms* acknowledged that in the nonjudicial context "members of Congress are requested to, and do in fact, intrude in varying degrees, in administrative proceedings,"[359] and, consequently, that the "proper standard for evaluating congressional interference with non-judicial decisions of administrative agencies is whether the communication *actually* influenced the agency's decision."[360] More specifically, the court asked "whether 'extraneous factors intruded into the calculus of consideration' of the individual decisionmaker."[361]

In *Pillsbury*, the petitioner sought review of an FTC order which found the petitioner in violation of federal antitrust laws. Pillsbury challenged the order, alleging a violation of its due-process rights on the grounds that Congress had interfered with the FTC's decisional process while the matter was pending.[362] In particular, Pillsbury pointed to a congressional hearing which took place before the FTC

356 354 F.2d 952 (5th Cir. 1966).

357 957 F.2d 1183 (5th Cir. 1992), *cert. denied*, 506 U.S. 953 (1992).

358 *Pillsbury*, 354 F.2d at 964.

359 *DCP Farms*, 957 F.2d at 1188 (emphasis added) (quoting S.E.C. v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 126 (3d Cir. 1981)).

360 *Id.* (citing Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 714 F.2d 163 (D.C. Cir. 1983)).

361 *Id.* (quoting Peter Kiewet Sons' Co. v. U.S. Army Corps of Eng'rs, 714 F.2d 163 (D.C. Cir. 1983) (quoting D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971)).

362 *Pillsbury*, 354 F.2d at 953-55.

rendered a final decision. During the hearing a senator had repeatedly questioned the Commission Chairman and other Commissioners about Pillsbury, and he had criticized the Commissioners for misapplying the antitrust laws in the case.[363] The action arose in the following manner: In June, 1952, the FTC filed a complaint against Pillsbury; in April, 1953, a hearing examiner granted Pillsbury's motion to dismiss because the record lacked necessary evidence; on appeal, the FTC reversed.[364] The Commission proceeded to receive evidence from interested parties over the next several years.[365] When the Chairman of the FTC appeared before Congress in 1955, the FTC had found sufficient evidence to make a prima facie case against Pillsbury for violating section 7 of the Clayton Act and had given the company an opportunity to introduce countervailing evidence.[366] The Chairman appeared before the Senate and met "a barrage of questioning by the members of the committee challenging his view of the requirements of § 7" of the Clayton Act.[367] Congress criticized the Commission's application of section 7 in the *Pillsbury* case.[368] The Senators' questions were so probing that the Chairman of the FTC announced that he would have to disqualify himself from further participation in the *Pillsbury* case.[369] Reviewing the order, the Fifth Circuit concluded that the hearings "constituted an improper intrusion into the adjudicatory processes of the Commission and were of such a damaging character as to have required at least some of the members in addition to the chairman to disqualify themselves."[370] The court was especially concerned with protecting the mental decisional processes of Commissioners and with the petitioner's right to the appearance of impartiality.[371]

DCP Farms raises the question of whether the "'mere appearance of bias or pressure' standard adopted by the *Pillsbury Co. v. FTC* court applies to claims of improper congressional interference with an administrative determination of eligibility for farm subsidies."[372] Here, the USDA's Office of Inspector General released a report documenting abuses of the farm-subsidy program that highlighted DCP Farms' egregious practices.[373] Subsequently, the Deputy Undersecretary of Agriculture for Commodity Programs and others met with a

---

363 *Id.* at 954-55.
364 *Id.* at 955.
365 *Id.*
366 *Id.*
367 *Id.*
368 *Id.* at 956-62 (discussing parts of the transcript of the congressional proceeding).
369 *Id.* at 956.
370 *Id.* at 963.
371 *Id.* at 964.
372 *DCP Farms*, 957 F.2d at 1195 (citation omitted).
373 *Id.* at 1186.

key staff aide on agricultural issues for the chairman of the House Subcommittee on Cotton, Rice, and Sugar.[374] The group specifically discussed DCP Farms.[375] The Chairman later wrote to the Secretary of Agriculture, Clayton Yeutter, expressing concern over the farm-subsidy program and pointing out that "the [DCP Farms] operation violates both the spirit and letter of the law."[376] In his letter, the Chairman indicated that if the USDA did not act, he would introduce legislation to revise the Act.[377] After receiving the letter, the Deputy Administrator of the USDA issued an opinion concluding that DCP Farms was ineligible to receive further subsidy payments. In response, DCP Farms sued for declaratory and injunctive relief, alleging improper congressional interference violated its due process rights.[378] The *DCP Farms* court found *Pillsbury's* "mere appearance of bias" standard inapplicable because the case did not involve the decisionmaking process of any quasi-judicial body.[379] In contrast to *Pillsbury*, *DCP Farms* involved the administration of a congressionally-created program. The court found that the proper standard for evaluating congressional interference with nonjudicial decisions of administrative agencies is "whether the communication *actually* influenced the agency's decision."[380] The court applied a lesser standard because "members of Congress are requested to, and do in fact, intrude in varying degrees, in administrative proceedings."[381]

6. *Applying a Bolstered Functionalism to* NRA

Pillsbury and *DCP Farms* offer guidance for determining whether any liberty interests are involved under the facts presented in *NRA*. Under the *Pillsbury/DCP Farms* dichotomy, to the extent that the FEC did not exercise judicial or quasi-judicial powers, the legitimacy of nonvoting congressional agents on the commission would be examined through the *DCP Farms* standard. The FEC's enforcement power has traditionally been characterized as an executive power.[382] In *NRA*, the NRA never alleged that the ex officio nonvoting members

---

374 *Id.*
375 *Id.*
376 *Id.*
377 *Id.*
378 *Id.* at 1187.
379 *Id.* at 1188.
380 *Id.* (citing Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F.2d 163 (D.C. Cir. 1983) (emphasis added)).
381 *Id.* (citing S.E.C. v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 126 (3d Cir. 1981)).
382

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot be possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and

had exercised any actual influence over the Commission's decision to file a civil enforcement action against the group. Nor did the NRA claim that the Commission was impermissibly prejudiced by the ex officio members. In fact, it is unclear whether the members were even present when the Commissioners decided to bring this enforcement action. Accordingly, if the NRA had made a due process claim, a court evaluating the *NRA* case might conclude that there was no violation under the reasoning of *DCP Farms* because the nonvoting members did not exercise actual influence over the decisionmaking process.[383] Notably, the FEC, unlike many administrative agencies, is not empowered to hold administrative hearings to adjudicate violations of its authorizing act.[384] The FEC is only empowered to bring an enforcement proceeding in district court.[385] If the FEC had been authorized to adjudicate the NRA's alleged violation of FECA, a court might have found that, under *Pillsbury*, the mere presence of congressional agents on the Commission violated due process.

As argued above, if the NRA had alleged a violation of due process, its challenge would most likely have failed under a *Pillsbury/DCP Farms* analysis. However, a separation of powers analysis might be different. In conducting that analysis, *Pillsbury/DCP Farms* offers guidance in identifying the liberty interests implicated. But, a separation of powers analysis, concerned with identifying liberty values, would look beyond the facts of the actual case; it would consider whether the

---

> not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."

Buckley v. Valeo, 424 U.S. 1, 138 (1976) (quoting U.S. CONST. art. II, § 3). *See* Morrison v. Olson, 487 U.S. 654, 691 (1988) ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.").

383 *DCP Farms*, 957 F.2d at 1188.

384 The FEC "may upon affirmative vote of 4 of its members, institute a civil action for relief . . . in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business." 2 U.S.C. § 437g(a)(6)(A) (1994). In contrast, the Federal Trade Commission may conduct an administrative hearing to determine if the Federal Trade Commission Act has been violated. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, OFFICE OF THE FED. REGISTRAR, UNITED STATES GOVERNMENT MANUAL, 605-06 (1994/1995). Similarly, the Occupational Safety and Health Review Commission is empowered to adjudicate enforcement actions initiated under the Occupational Safety and Health Act of 1970. *Id.* at 687.

Elizabeth Hedlund has argued that:

> the FEC should be made into an adjudicatory body, one that, once it decides that has been a violation, can levy a fine. . . .
>
> . . . .
>
> If the Commissioners themselves become the judges, those who decide whether or not there has been a violation, then they can leave to their very capable legal staff the authority to initiate investigations and carry them out.

Federal Election Commission Panel Discussion: Problems and Possibilities, 8 ADMIN. L.J. AM. U. 223,238 (1994) (statement of Elizabeth Hedlund).

385 2 U.S.C. § 437g(a)(6)(A) (1994).

challenged structural relationship fosters tendencies of unfairness or arbitrary abuse of power.[386] If the D.C. Circuit had applied this type of analysis, it could have reached a more reasoned conclusion that the FEC was constitutionally infirm.

As the Supreme Court noted in *Buckley v. Valeo*, the FEC is given "extensive . . . adjudicative powers." The Commission is authorized under section 437f(a) to "render advisory opinions with respect to activities possibly violating the Act."[387] Additionally, the Commission is "charged with the duty . . . to receive and pass upon requests by eligible candidates for campaign money and certify them to the Secretary of the Treasury for the latter's disbursement from the Fund."[388] The degree of adjudicatory power exercised by the FEC is insignificant compared to that performed by the FTC because the FTC can actually adjudicate violations of the Act in question and can compel the defendant to conform to its ruling. However, the adjudicative flavor of the FEC's powers may implicate *Pillsbury*'s warning that the mere appearance of bias caused by congressional interference may violate the due process rights of parties involved in judicial or quasi-judicial agency proceedings.[389] Because courts are more sensitive to intrusions within the adjudicatory context, one might argue that, in this case, the presence of the nonvoting ex officio members fosters tendencies of unfairness or arbitrary abuse, and therefore violates the separation of powers principle.[390] If the *NRA* court had identified this constitutional infirmity, its opinion would have been much stronger.

In addition, even if a court were to find that this arrangement did not violate the separation of powers doctrine and that the FEC could continue its enforcement action against *NRA*, such an opinion would *not* be a blueprint for further expansion of legislative powers. As explained above, administrative agencies like the FTC exercise such significant adjudicatory power that the presence of congressional agents on those entities would definitely violate separation of powers. In its brief, the NRA argued that if the FEC was constitutionally constituted, "Congress. . . could require that one of its agents, nonvoting to be sure, sit in on [the Supreme] Court's deliberations."[391] However, the above analysis suggests that, because of the liberty interests involved, this would be a clear violation of separation of powers.[392]

---

386 *See* Brown, *supra* note 9, at 1561.

387 Buckley v. Valeo, 424 U.S. 1, 110 (1976).

388 *Id.* at 110 n.152.

389 Pillsbury v. FTC, 354 F.2d 952, 964 (5th Cir. 1966).

390 *See* Brown, *supra* note 9, at 1561.

391 Brief for NRA at 70, FEC v. NRA Political Victory Fund, 115 S. Ct. 537 (1994) (No. 93-1151).

392 *Id.*

Instead, the *NRA* court argued that the mere presence of congressional agents on the Commission violated the Constitution because it gave Congress impermissible access to executive powers. But as *DCP Farms* evidences, courts can apply a more contextual analysis to gauge the degree of interference with executive powers. This point was confirmed by James Madison when he wrote that the key to separation of powers for "all sides" was that no branch of the federal government be permitted to have "an overruling influence over the others."[393] This argument suggests that the functional analysis employed in *Williams* would be sufficient in cases in which no liberty interest was involved. As the facts of *NRA* indicate, Congress never obtained "an overruling influence" over the FEC's administrative powers. Therefore, in *NRA*, *Williams* would have offered a more appropriate answer regarding the degree of control exercised by Congress.

A functional analysis bolstered by a liberty analysis of the constitutionality of the FEC will survive attacks that it opens the door to more egregious statutory schemes. Congress would not be free to place its agents as nonvoting members on the boards of all administrative agencies. Because most agencies possess adjudicatory powers, placing congressional agents on those entities would more seriously implicate liberty interests. Therefore, a court would find the placement of congressional agents on these agencies unconstitutional. This approach is preferable to that taken by the courts in *NRA* and *Williams*.

CONCLUSION

The D.C. Circuit's formalistic assault upon Congress in *FEC v. NRA Political Victory Fund* represents the most extreme position ever taken against Congress regarding its structural relationship with administrative agencies. Although Judge Silberman cloaked himself with James Madison's cautionary words regarding the power of the legislature,[394] the extreme bias demonstrated in *NRA* is unsupported by established separation of powers principles. As this Note has argued, the D.C. Circuit's reasoning can be traced to a line of Supreme Court cases which have distinguished between independence and legislative aggrandizement. However, regardless of the value of this device, separation of powers demands a purposeful analysis—one that is concerned with individual liberty and protection from institutional self-dealing. The Court's adoption of this judicial tool should not suggest that legislative initiative be eliminated without a consideration of context or of the purpose of separation of powers. Not every congressional relationship with independent agencies is a "blueprint" for ille-

393 THE FEDERALIST No. 48 (James Madison).

394 *See supra* note 344 and accompanying text.

gitimate legislative expansion. That kind of reasoning would stifle important and innocuous legislative reform. Moreover, courts cannot continue their strict adherence to bias against Congress without abandoning ideological consistency—functionalism and formalism cannot coexist within a coherent separation of powers framework.

The separation of powers doctrine exacts a price by subordinating efficiency in return for protection against tyranny. The Constitution envisions an optimal structural balance and mandates limits to legislative experimentation which sometimes serve as an obstacle to reform. Thus, the Supreme Court should warn against a hyperactive policing of separation of powers because that would compel unnecessary sacrifice and harm. For this reason, the logic of the *NRA* case should be discarded as a dangerous impediment to legislative initiative. This Note has instead offered a more appropriate approach—functional analysis bolstered with a complete consideration of the inherent values of the separation of powers doctrine. This rehabilitated doctrine conforms to the constitutionally authorized balance without thwarting all legislative initiative. If the Supreme Court ever addresses this issue again, it should abandon *NRA*'s formalism and adopt the bolstered functionalism articulated by this Note. And, even if the Court never has another opportunity to hear such a case, the extremism of *NRA* should serve as a wake-up call for those who have cast a blind eye upon the gutting of this sacred constitutional doctrine.

Peter S. Guryan†

† I would like to thank the following people: Prof. Cynthia Farina, for introducing me to separation of powers jurisprudence and for her valuable comments on earlier drafts; Roni Reed, for her editorial work nonpareil; and my parents for their support.