

In Defense of Administrative Agency Autonomy

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Notes

In Defense of Administrative Agency Autonomy

A. Michael Froomkin

Recent Supreme Court decisions suggest that Congress lacks the constitutional authority to insulate any federal agency or high-ranking civil officer from complete presidential control,¹ and that so-called independent²

1. The power to hire, and especially to fire, is the essence of control in federal administration. *See* *Bowsher v. Synar*, 106 S. Ct. 3181, 3189–91 (1986) (General Accounting Office held to be in legislative branch in large part because Congress can remove top officer by joint resolution). When Congress chooses to insulate an agency from presidential control, it frequently does so by protecting its top officer(s) from presidential removal. *See, e.g.,* *Wiener v. United States*, 357 U.S. 349, 356 (1958) (unanimous decision) (congressional purpose in creating independent commission was to protect commissioners from “Damocles’ sword of removal”).

Congress has always chosen to place most executive functions directly under the President’s control. Today the large majority of federal administrators work for agencies whose senior official, typically a Cabinet member, serves at the pleasure of the President. The regulatory and social welfare functions that dominate the domestic aspect of the federal administrative state are almost entirely the result of direct delegation to the President or his subordinates, often through the device of broad and long-lived statutes by which Congress delegates authority for an indefinite period, e.g. over budget-making. *See* Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 169–70 (examples).

Nevertheless, Congress has sought to limit or eliminate the President’s removal power in several areas. The President may remove the seven members of the Federal Reserve Board for “cause.” 12 U.S.C. § 242 (1982). The heads of the Federal Trade Commission (FTC), 15 U.S.C. § 41 (1982), the Occupational Safety and Health Review Commission, 29 U.S.C.A. § 661(b) (West 1985), the Federal Mine Safety and Health Review Commission, 30 U.S.C. § 823(b)(1) (1982), the Federal Energy Regulatory Commission, 42 U.S.C. § 7171(b) (1982), the Interstate Commerce Commission, 49 U.S.C.A. § 10301(c) (West 1986), and the Nuclear Regulatory Commission, 42 U.S.C.A. § 5841(e) (West 1983), may be removed by the President for “inefficiency, neglect of duty, or malfeasance in office” but presumably for no other cause.

More restrictive statutes protect the heads of other “independent” agencies. Commissioners of the Consumer Product Safety Commission “may be removed by the President for neglect of duty or malfeasance in office but for no other cause.” 15 U.S.C. § 2053(a) (1982). A similar standard applies to the Commission on Civil Rights, 42 U.S.C. § 1975(d) (Supp. III 1985). Board members of the National Labor Relations Board (NLRB) are entitled to “notice and hearing” if the President should seek to remove them for either of the two permitted causes, neglect or malfeasance. 29 U.S.C. § 153(a) (1982).

There is no statutory provision for the removal of the heads of the Securities and Exchange Commission, *see* 15 U.S.C.A. § 78d (West Supp. 1986), nor for the Federal Election Commission, *see* 2

federal agencies may therefore be unconstitutional.³ The Justice Department⁴ and many legal scholars⁵ concur. If the courts adopt this view, Con-

U.S.C. § 437c (1982), the Commodity Futures Trading Commission, *see* 7 U.S.C. § 4a(a) (1982), the Energy Research and Development Agency, *see* 42 U.S.C.A. § 5812(a) (West 1983), nor the Federal Communications Commission, *see* 47 U.S.C.A. § 154 (West 1962 & Supp. 1986); *see also* Myers v. United States, 272 U.S. 52, 262 n.30 (1926) (Brandeis, J., dissenting) (citing statutes enacted between 1861 and 1926 that lack removal clauses).

2. Independent agencies are federal implementing, regulatory, and/or adjudicative bodies outside both the legislature and the judiciary, the top officials of which serve for a fixed term during which they are not subject to official direction by the President and may be removed, if at all, only for cause. *See supra* note 1 (statutes governing removal of heads of independent agencies).

It is difficult to compile a definitive list of independent agencies, or at times to determine in which branch of government, if any, they belong. *See, e.g.*, 5 U.S.C. §§ 104, 105 (1982) ("independent establishment" defined as not in executive department, military, Government corporation, or in independent establishment; "Executive agency" defined as "an Executive department, a Government corporation, [or] an independent establishment"); 31 U.S.C. § 102 (1982) ("executive agency" means "a department, agency or instrumentality in the executive branch of the United States Government").

44 U.S.C.A. § 3502(10) (West Supp. 1986) defines 16 named bodies "and any other similar agency designated by statute as a Federal independent regulatory agency or commission" as "independent regulatory agenc[ies]." The list is certainly not exhaustive. *See, e.g.*, 42 U.S.C. § 1975(d) (Supp. III 1985) (Commission on Civil Rights members removable by President only for "neglect of duty or malfeasance in office"). Moreover, independent agencies need not necessarily be "regulatory." For example, the Energy Research and Development Administration is "an independent executive agency," according to 42 U.S.C. § 5811 (1982). *See also*, 12 U.S.C.A. § 2241 (West Supp. 1986) (Farm Credit Administration "shall be an independent agency in the executive"). One authority counts 63 independent agencies. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.8 (2d ed. 1978).

As a matter of practice, the heads of independent agencies are almost uniformly Officers of the United States, appointed by the President with the advice and consent of the Senate. U.S. CONST. art. II, § 2, cl. 2. But Congress can create agencies headed by an "inferior Officer," appointed by the President or by another executive official. *Id.* It is settled law that Congress may forbid the President from removing such an inferior officer. *United States v. Perkins*, 116 U.S. 483 (1886). In theory, the President could be cut out of the appointment process altogether; Congress can vest the power to appoint inferior federal officials in federal judges. U.S. CONST. art. II, § 2, cl. 2; *Ex parte Siebold*, 100 U.S. 371, 379-84, 397-98 (1879) (supervisors of elections appointed by judges); *Hobson v. Hansen*, 265 F. Supp. 902, 911-14 (D.D.C. 1967) (D.C. Board of Education).

3. Several recent Supreme Court separations of powers decisions have noted that there are three, and only three, distinct branches of government; "independent" agencies, therefore, either are in one of the three branches or they are unconstitutional. *See Symposium on Administrative Law, The Uneasy Constitutional Status of Administrative Agencies*, 36 AM. U.L. REV. 276 (forthcoming 1987) (discussing, *inter alia*, *INS v. Chadha*, 462 U.S. 919, 951-52, 953 n.16 (1983); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 118-41 (1976) (per curiam)); *see also* Note, *Incorporation of Executive Agencies into the Executive Branch*, 94 YALE L.J. 1766 (1985). Of course, this is not a new concern. *See, e.g.*, 1 K. DAVIS, *supra* note 2, § 2.7.

4. The Attorney General has stated:

Agencies have no inherent lawmaking powers. They are not creatures of the Constitution. . . .

. . . .

This means we should abandon the idea that there are such things as "quasi-legislative" or "quasi-judicial" functions that can be properly delegated to independent agencies or bodies. . . .

. . . [F]ederal agencies performing executive functions are themselves properly agents of the executive. They are not "quasi" this, or "independent" that.

Address by Attorney General Edwin Meese III, Federal Bar Association, Detroit, Mich. (Sept. 13, 1985). The Justice Department took a similar position in litigation over the constitutionality of the Gramm-Rudman-Hollings Act. *See* Brief for United States at 44-51, *Bowsher v. Synar*, 106 S. Ct. 3181 (1986) (No. 85-1377).

5. The tide of recent academic literature runs against agency autonomy. *See* Ledewitz, *The Uncertain Power of the President To Execute the Laws*, 46 TENN. L. REV. 757, 803-04 (1979) (functions

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gress will lose the most practical⁶ of its few remaining tools for ensuring federal administrative fidelity to legislative intentions. This Note argues, however, that the Constitution permits Congress to create executive agencies with substantial autonomy,⁷ regardless of whether they are called independent.

Because autonomy requires insulation from politically motivated removal,⁸ Section I begins by analyzing the reach of the President's removal power. It then offers a reinterpretation of terms in *Humphrey's Executor v. United States*,⁹ the key modern case holding that Congress may constrain the President's removal power. Distinguishing between *presidential* powers, which belong to the President alone, and more general *executive* powers, which do not, allows Congress to use agency autonomy as a constraint on presidential discretion and gives Congress an option besides acquiescence or impeachment when confronted by presidential disregard of the legislative will.

Agency autonomy does not embrace the rejected concept of a plural ex-

may be vested in agencies independent of executive "policy control" only if President is allowed to remove officials "for cause" including "failure of confidence"); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (forthcoming) (Congress may not forbid presidential removal of policy-making official who refuses order to take legal act within official's jurisdiction); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 625 (1984) (offering several considerations, notably "fairness," that might affect the constitutionality of the independent exercise of executive power, but in context of overriding desire for a "unitary, competent President to serve as check against legislative hegemony"); Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U.L. REV. 59, 103 (1983) (suggesting independent agencies be limited to "non-political" roles); Note, *supra* note 3, at 1766 (distinction between executive and independent agencies "should now be discarded" in favor of full presidential control).

6. The threat of agency autonomy is a more practical tool for checking the executive than are statutes reducing executive discretion or setting penalties for violations. Such statutes would curtail agencies' abilities to react to unforeseen contingencies, and would make complex programs impossible by eliminating discretion to make rules filling out congressional intent. The threat of agency autonomy will color how Presidents and their subordinates use their discretion. See *infra* note 51. To date, Congress' other attempts to shape this discretion have tended to fail. See *infra* note 40. In any case, a statute setting penalties for, say, negligent or willful misconstruction of congressional intent might not be enforced by the administration which chose the interpretation. Attempting to allow other parties a right of action might create standing problems.

Autonomous agencies are a tool, not a panacea; they may, for example, be more subject to capture by special interests than more politically accountable bodies. Congressional power to reduce presidential control does not necessarily translate into congressional control.

7. "Autonomy" in this Note refers to protection from political pressure by the President, most commonly achieved by protecting high officials from dismissal without cause. See *supra* note 1.

8. See *supra* note 1. Even without the power to fire, the President's power to appoint top agency personnel assures a high degree of control of agency activity. See Goodsell & Gayo, *Appointive Control of Federal Regulatory Commissions*, 23 ADMIN. L. REV. 291 (1971) (between 1945 and 1970, enough commissioners on seven major regulatory commissions resigned before completion of statutory term to allow newly-elected Presidents to appoint controlling majorities within average of 21 months). However, agencies enjoy legal and psychological autonomy if Congress shields their chiefs from presidential removal. Greater agency autonomy limits political manipulation by the President without necessarily increasing congressional control. As political control and accountability to the President may be desirable ends, agency autonomy may often be undesirable for policy reasons.

9. 295 U.S. 602 (1935) (unanimous decision).

ecutive, nor does it amount to a fourth branch of government. Section II demonstrates that the degree of autonomy implied by the presidential-executive distinction is consistent with the constitutional text, structural constitutional theory, the intent of the Framers, a long history of legislative practice, and much administrative history as well. Section III outlines how the presidential-executive distinction can work in practice, and applies it to pending allegations that agencies whose top officials do not serve at the pleasure of the President violate the separation of powers when they take executive actions.

I. THE NEW THREAT TO AGENCY AUTONOMY

A. *The Pending Issue*

Emboldened by recent Supreme Court cases suggesting that the President has plenary power over the executive branch, and that congressionally imposed constraints on the removal power may be unconstitutional,¹⁰ private parties are increasingly challenging Congress' power to insulate agencies such as the FTC or the Federal Reserve Board from presidential control.¹¹ Most commonly, a plaintiff claims injuries caused by authority constitutionally assigned to the executive branch but exercised by an officer alleged to be outside it, or a defendant seeks to block an administrative agency's investigation or enforcement action. These arguments share three claims: (1) All high-ranking executive officials are constitutionally removable by the President; (2) Any high-ranking official who is not removable by the President is by definition not in the executive

10. See cases cited *supra* note 3. In *Buckley v. Valeo*, 424 U.S. 1, 138 (1976), the Supreme Court explained why all Federal Election Commissioners needed to be appointed by the President: "[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" See also *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) ("The President's unique status under the constitution distinguishes him from other executive officials.").

11. So far, these claims are failing in the lower courts. See *Ameron, Inc. v. United States Army Corps of Eng'rs*, 787 F.2d 875 (3d Cir.) (Comptroller General may intervene in military procurement to ensure executive compliance with competitive bidding statute), *aff'd on rehearing on other grounds*, No. 85-5226, slip. op. (3d Cir. Dec. 31, 1986); *Hospital Corp. of Am. v. FTC*, No. 85-3185, slip. op. (7th Cir. Dec. 18, 1986) (court will not reach issue because of inadequate briefing); *Ticor Title Ins. Co. v. FTC*, 625 F. Supp. 747 (D.D.C.) (denying separation of powers challenge to FTC's civil enforcement power), *appeal argued*, No. 86-5087 (D.C. Cir. Oct. 20, 1986); *Melcher v. Federal Open Market Comm.*, 644 F. Supp. 510, 517-24 (D.D.C. 1986) (supplemental opinion) (rejecting Senator's challenge to constitutionality of appointment of Federal Open Market Committee by private individuals), *appeal docketed*, No. 86-5692 (D.C. Cir. Dec. 16, 1986); see also *FTC v. Engage-A-Car Servs.*, No. 86-3758 (D.N.J. Dec. 18, 1986) (claim that FTC enforcement power is unconstitutional is "completely devoid of merit"); *American Bd. of Trade, Inc. v. SEC*, No. 86-3166 (S.D.N.Y. order Oct. 27, 1986) (claim dismissed on jurisdictional grounds); *SEC v. Thomas*, No. 86-C-03313G (D.C. Utah minute order Oct. 14, 1986); *FTC v. American Nat'l Cellular, Inc.*, Civ. No. 85-7375 WJR (C.D. Cal. transcript Feb. 26, 1986) (statement that *Humphrey's Executor* controls), *appeal argued* No. 86-5760 (9th Cir. Oct. 2, 1986); *SEC v. Blinder, Robinson & Co.*, No. 80-M1125 (D. Col. July 29, 1986), *appeal docketed* No. 86-2319 (10th Cir. Aug 29, 1986). Cf. *SEC v. Warner*, Civ. Act. No. 86-6742 (D. Fla. argued Dec. 29, 1986).

branch; (3) An agency headed by an official who is not in the executive branch cannot constitutionally exercise any power that is reserved to the executive branch. To date, the Supreme Court has endorsed only the third claim.¹² The Court should go no further.¹³

B. *The Jurisprudential Roots of the Problem*

The Constitution is silent on whether Congress or the President ultimately controls the ordinary removal of high officials,¹⁴ and the Supreme Court has vacillated on the issue. At first the Court allowed Congress freedom to define presidential authority over subordinate parts of the executive branch; later it suggested that the President possessed illimitable removal power; then it reaffirmed congressional authority. Now the Court has, at least in dicta, again approved presidential control.¹⁵

The early Court assumed that departments could have roles shielded from presidential control.¹⁶ In *Kendall v. United States*,¹⁷ it explicitly rejected the “alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper.”¹⁸ Acknowledging that the President’s special constitutional status puts him “beyond the reach of any other department,” the Court explained that it “by no means follows,

12. In *Bowsher*, the Supreme Court construed statutes to find that the Comptroller General is in the legislative branch, and hence cannot exercise budget-cutting powers under the Gramm-Rudman-Hollings Act. The Court reserved judgment on the first two steps of the argument in the text. *Bowsher v. Synar*, 106 S. Ct. 3181, 3188 n.4 (1986).

13. The Court’s approach to Article I courts has tended to parallel its view of independent agencies: First, it applied the flexible approach, *see Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 281–84 (1856) (Treasury may issue writ to collect tax liability); then, a restrictive approach based on a formal view of the relationship between political branches, *see Williams v. United States*, 289 U.S. 553, 565–66 (1933) (Article I Court of Claims cannot partake of Article III judicial power); next, a return to flexibility, *see, e.g., Palmore v. United States*, 411 U.S. 389 (1973) (D.C. Superior Court, established under art. I, § 8, cl. 17, can hear criminal case); *Glidden Co. v. Zdanok*, 370 U.S. 530, 544–52 (1962) (opinion of Harlan, J.) (reversing *Williams*, *supra*, reaffirming congressional power to place jurisdiction over public rights in Article I or Article III court); finally, the threat of renewed formalism, *see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (bankruptcy court may not hear state law counterclaim because it is not art. III court). If this parallelism continues it suggests that a retreat from formalism is due in the agency area. *See Commodity Futures Trading Comm’n v. Schor*, 106 S. Ct. 3245, 3256 (1986) (looking beyond form to substance of agency’s purpose to conclude that agency may hear state law counterclaims despite Article I status).

14. Moreover, the debates at the Constitutional Conventions do not provide much illumination. The delegates “displayed a notable lack of interest in the organization of the executive branch.” L. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 26 (1961).

15. *See supra* note 3. *But see supra* note 13 (retreat from formalism in related area).

16. *See Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838) (Postmaster not subject to presidential direction when executing purely ministerial task); *see also Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824) (Second Bank of United States, majority of whose directors enjoy autonomy from President, is constitutional); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (same).

17. 37 U.S. (12 Pet.) 524 (1838).

18. *Id.* at 610. “[I]n such cases,” the Court noted, “the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.” *Id.*

that every officer in every branch of [a] department is under the exclusive direction of the President.”¹⁹

But in *Myers v. United States*,²⁰ the first modern case to examine the extent to which an agency or its chief officer could be insulated from presidential control, the Supreme Court held that a statute requiring Senate concurrence in presidential removal of a first class postmaster was unconstitutional.²¹ The theory and language of *Myers* were extraordinarily broad, splitting federal power into three rigidly divided branches, with administrative powers reserved largely to the President.²² Yet the holding did no more than strike down the Senate’s attempt to insert itself into the removal mechanism.²³ Properly understood, *Myers* stands only for the proposition that Congress may not add to its constitutionally specified impeachment powers by asserting a veto power over removal of personnel outside the legislative branch.²⁴ The dicta in *Myers* would constrain Congress far more, but the Court said the case presented only the question of whether “the President has the exclusive power of removing executive officers of the United States.”²⁵ To rule that one house of Congress may not require that the President get its assent in order to remove an executive official is not necessarily to rule that Congress cannot constrain the President’s removal power.²⁶

This literal reading of *Myers* explains what otherwise seems to be a rapid about-face in *Humphrey’s Executor v. United States*,²⁷ the corner-

19. *Id.* See also *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 356 (C.C.D.S.C. 1808) (No. 5, 420) (Congress may vest final discretion to act in inferior officer).

20. 272 U.S. 52 (1926). *Myers* was the first case in which the Justice Department challenged the constitutionality of a statute in court. STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, 97TH CONG., 1ST SESS., PRESIDENTIAL CONTROL OF AGENCY RULEMAKING 19-20 (Comm. Print 1981) [hereinafter RULEMAKING].

21. 272 U.S. at 176.

22. *Id.* at 116, 122-23. Chief Justice Taft based his ruling on an expansive reading of the take care clause, U.S. CONST. art. II, § 3.

23. By granting Congress the power to impeach civil officers of the United States, U.S. CONST. art. I, § 3, cl. 6, the Constitution implicitly excludes other direct congressional participation in removals. See *Synar v. United States*, 626 F. Supp. 1374, 1402 n.31 (D.D.C.) (three-judge court) (per curiam), *aff’d on other grounds sub nom.* *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

24. Similarly, the Senate’s role in the confirmation of Officers of the United States is limited to advice and consent. U.S. CONST. art. II, § 2, cl. 2. In *Buckley v. Valeo*, 424 U.S. 1, 137-41 (1976) (per curiam), the Supreme Court struck down the provision of the Federal Election Campaign Act of 1971, 86 Stat. 3 (codified in relevant part at 2 U.S.C. § 437(c) (1976)), by which congressional leaders appointed four members of the independent Federal Election Commission, as infringing on the President’s prerogative of appointment.

25. 272 U.S. at 106.

26. Justice Stevens appears to hold this view. *Bowsher v. Synar*, 106 S. Ct. 3181, 3195-96 (1986) (Stevens, J., concurring in judgment). For a different reading of *Myers*, see Note, *supra* note 3, at 1767-68 (President has illimitable removal power over Officers of the United States).

27. 295 U.S. 602 (1935) (unanimous decision). Judges and commentators have often found it difficult to reconcile the modern trilogy of Supreme Court removal cases (*Myers*, *Humphrey’s Executor*, and *Wiener v. United States*, 357 U.S. 349 (1958)). See, e.g., *Synar v. United States*, 626 F. Supp. 1374, 1396-99, 1402 n.31 (D.D.C.) (three-judge court) (per curiam) (noting, however, that

stone of agency independence today. In *Humphrey's Executor* the Court swept away the dicta in *Myers* by upholding a statute insulating an FTC Commissioner from removal by the President.²⁸ Distinguishing "purely executive" governmental functions in *Myers* that could not be committed to so-called independent agencies, the Court located the FTC's role within another, vague, class of functions that could constitutionally be committed to officials at least partially shielded from presidential removal. The elements that belong to the latter group have been held to include legislative, "quasi-legislative," and "quasi-judicial" powers and functions.²⁹

C. The Presidential-Executive Distinction

Although it achieved the correct result, *Humphrey's Executor* obscured the distinction between *presidential* functions, which the Constitution reserves to the President,³⁰ and *executive* functions, which can be performed by any official in the executive branch.³¹ The "purely executive"

Supreme Court's "signals are not sufficiently clear . . . to justify our disregarding" *Humphrey's Executor*, *aff'd sub nom.* *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

28. The Court based this ruling on its characterization of the FTC's duties as "neither political nor executive." 295 U.S. at 624. Unless the Court unanimously mischaracterized it, the FTC's inclusion among the *not* "purely executive" agencies means that whatever the term may mean in other contexts, in removal jurisprudence "not purely executive" is a very broad class indeed. In 1935 the FTC had responsibilities that most taxonomies would consider "executive," including bringing civil enforcement actions. *See id.* at 619–20 (quoting Federal Trade Commission Act of 1914). Indeed, until 30 years later, when it began issuing rules, the FTC exercised few if any of what are now styled legislative or quasi-legislative functions. *See National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). Under the taxonomy suggested in this Note most of the FTC's functions would be viewed as executive, but not presidential.

29. The issue of what Congress can constitutionally commit to officials at least partially shielded from presidential removal arises on occasion before the Supreme Court in terms of what Congress may delegate to "independent" agencies. Thus far, the permissible categories include vast rulemaking powers, often styled "legislative," *see, e.g.*, 1 K. DAVIS, *supra* note 2, § 2.2; "quasi-legislative" powers, *see, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979) (agencies may make substantive rules, but only to extent specified by Congress); judicial power, *see Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 400 (1940) (Interstate Commerce Commission); and "quasi-judicial" powers, *see Wiener v. United States*, 357 U.S. 349 (1958) (War Claims Commission). But the Court has been less clear about whether and to what extent independent agencies may constitutionally exercise executive powers.

30. Some of these functions, such as the veto power, cannot even be delegated to a fully removable presidential agent. *See infra* notes 138–42 (presidential powers).

31. *See infra* notes 146–63 and accompanying text (examples). Despite the syntactical pairings of the first three articles which "vest" powers, the terms "legislative Powers" and "a Congress"; "executive Power" and "a President"; and "judicial Power" and "one supreme Court" do not establish equivalences. In law they each derive their meaning from the full text of the Constitution. *See, e.g.*, Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction* 65 B.U.L. REV. 205, 221, 251 n.148, 252 n.151 (1985) (distinguishing between "judicial power" and "supreme Court"). Despite the simplistic argument in *Springer v. Government of Philippine Islands*, 277 U.S. 189, 202–03 (1928) (construing Organic Act of Philippines), that the respective branches' roles are self-evident, not everything Congress does conforms to the ideal type of legislation, nor is all that the President does executive, nor even all that courts do judicial. *See, e.g.*, Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (describing judiciary branch's use of seemingly executive powers when managing institutions). However, there are indeed some functions that can properly be conducted by only one branch. *E.g.* military

functions that *Humphrey's Executor* denies to agencies insulated from presidential control are actually presidential functions; the "quasi" functions that the Court has ruled may be performed by officials who, though appointed by the President do not serve at pleasure, are executive but not necessarily presidential. Seen in this light, the so-called "fourth branch of government"³² is simply a particular type of executive agency.³³

Distinguishing between presidential and executive functions provides a restrained ground for the Court's separation of powers jurisprudence.³⁴ It clearly defines each branch's role without questioning the holding of any case, including *Humphrey's Executor*. Locating so-called independent agencies in the non-presidential part of the executive branch resolves puzzling asymmetries as to what Congress can delegate to whom.³⁵ This re-definition also makes it clear that although Congress can protect many, even most, executive tasks from presidential manipulation, it cannot shield everything. Currently, with no clear definition of "purely executive," Congress can theoretically protect any office from being held at the President's pleasure by the admixture of some *not* purely executive functions.³⁶

operations can only be conducted by persons in the executive branch (a category that includes the President).

32. Justice Jackson's line about independent agencies is too often over-abbreviated. He called them a "veritable fourth branch" of government. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (emphasis added).

33. If the Comptroller General is in the legislative branch because Congress reserved itself the power to remove him for cause, *Bowsher v. Synar*, 106 S. Ct. 3181, 3189-91 (1986), then Presidential removal for specified cause suffices for an officer to be in the executive branch. There is no reason to read Article II as requiring more control than does Article I. This alone suffices to place most independent agencies in the executive branch. *See supra* note 1 (independent agencies grouped by removal provisions); *see also infra* text accompanying notes 78-84 (analogy to Article III suggests Congress has great freedom to structure executive branch).

34. Reading the statutes creating independent agencies as having created agencies with autonomy from presidential political direction but still within the executive branch would serve one of the first values of constitutional adjudication, that of resolution of doubtful issues to avoid constitutional questions. *See Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring in judgment).

35. Regarding "independent" agencies as highly autonomous parts of the executive branch has theoretical advantages. The argument that "independent" agencies are outside the executive branch and yet constitutional faces the obvious doctrinal difficulty that the Constitution speaks only of three branches of government. Further, no such classification system can resolve the question of why, in principle, the legislature should be permitted to assign "quasi-" legislative and judicial powers, but not executive powers, to "independent" agencies.

The definitions in the text are consistent with the Court's holdings, if not all the dicta, in recent separation of powers cases. For example, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), correctly identified the congressional attempt to appoint members of an agency with executive powers as an usurpation of the appointment power. *Id.* at 137-41. Only the appointment of Officers of the United States, judges and ambassadors is presidential—other parts of the appointment power are executive and can even be judicial. *See id.* at 125-33; *see also supra* note 2. The definitions are also consistent with the executive privilege cases. Even members of the Court who support expansive executive privilege distinguish Congress' power to control executive departments from its power to control the President. *See Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 513-14, 518 (1977) (Burger, C.J., dissenting).

36. This hypothetical horrible may have provoked the suggestions that *Humphrey's Executor* should be reversed. *See supra* note 5.

Defense of Agency Autonomy

Once the narrow set of presidential functions is understood and identified, Congress should not be permitted to limit the President's control over those functions.³⁷

D. Humphrey's Executor's Legacy

1. *Reduced Congressional Authority in Modern Separation of Powers Jurisprudence*

A misunderstanding of *Myers* and *Humphrey's Executor*, neglecting the difference between presidential and executive powers, would be particularly harmful today because of the direction of recent separation of powers decisions reducing congressional authority relative to increasing presidential power.³⁸ The Court's current approach permits Congress to delegate virtually anything to the executive,³⁹ but restricts Congress' authority to

37. Chief Justice Taft's opinion in *Myers*, based on a historical reading of "the Decision of 1789," by which the first Congress was supposed to have determined that the President has illimitable removal powers, forcefully stated the contrary view that Congress may rarely, if ever, limit the President's removal authority. 272 U.S. at 52-177. As the separate dissents by Justices McReynolds and Brandeis (with which Justice Holmes "emphasize[d] my agreement," *id.* at 177) went to great pains to demonstrate, Taft's reading of the legislative and judicial precedents was at best tendentious. Cf. Van Alstyne, *The Role of Congress in Determining the Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS., Spring 1976, at 102, 115 ("Myers has been an embarrassment to the Supreme Court" because of Taft's reasoning). Perhaps the most striking flaw in Taft's historical survey was his exaggeration of both what was decided in 1789, and also the degree of unanimity the "decision" occasioned then and later. See, e.g., *Myers*, 272 U.S. at 193-94, 208 (McReynolds, J., dissenting). *id.* at 240, 255 n.21 (Brandeis, J., dissenting). Taft simply ignored the considerable number of actions by early Congresses that contradict the supposedly definitive "decision." See *infra* notes 104-10 and accompanying text; see also *Myers*, 272 U.S. at 199-202, 204 (McReynolds, J., dissenting); *id.* at 265-74 (Brandeis, J., dissenting). The dissenting Justices also took issue with Chief Justice Taft's reading of almost every removal case he cited.

The official who was the subject of the "Decision of 1789" was the Secretary of Foreign Affairs, an official who exercised powers that would be presidential under the definitions proposed in this Note. See *infra* Section III.

38. L. FISHER, PRESIDENTIAL SPENDING POWER 247 (1975); Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 786 (1984); see also Polsby, *A Critical Introduction*, LAW & CONTEMP. PROBS., Spring 1976, at 3, 7-8; Strauss, *supra* note 5, at 666-68.

39. See *supra* notes 1, 29. The Supreme Court has upheld creation of sweeping executive rule-making power. E.g., *Yakus v. United States*, 321 U.S. 414 (1944) (broad grant of price-fixing authority); see also *Field v. Clark*, 143 U.S. 649, 683-89 (1892) (cataloguing approvingly statutes that give President wide discretion).

attach strings to its delegations.⁴⁰ The effect has been to strengthen the executive greatly at Congress' expense.⁴¹

2. Congress Is Losing Control of Expenditures

Congress' control over money once it has been appropriated has been attenuated.⁴² A recent case involving Congress' attempt to use the power of the purse, *Ameron, Inc. v. United States Army Corps of Engineers*,⁴³ provides a striking example of the need for congressional power to insulate an agency from presidential faithlessness. Congress passed the 1984 Competition in Contracting Act⁴⁴ (CICA) after years of exhorting and ordering government agencies to avoid sole-source contracting in favor of competitive bidding.⁴⁵ A key element in CICA is a ninety-day automatic freeze on the disbursement of most challenged contracts, pending review by the Comptroller General.⁴⁶ In his signing statement President Reagan declared the administration's belief that CICA was unconstitutional.⁴⁷

40. The Court struck down the legislative veto on the grounds that any action that Congress takes in order to alter "the legal rights, duties, and relations of persons, including . . . Executive Branch officials[,] . . . outside the Legislative Branch" is legislative, and thus requires bicameralism and presentment to President. *INS v. Chadha*, 462 U.S. 919, 952 (1983); see also *Consumers Union of United States, Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam) (striking down two-house legislative veto), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216, *reh'g denied* 463 U.S. 1250 (1983). The Court has held that Congress cannot make appointments to non-legislative agencies. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (Congress may not make appointments to Federal Election Commission because agency has executive functions). Similarly, the effectiveness of legislation contingent on a factual certification by an executive branch official no longer seems a reliable device to control executive discretion. See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 106 S. Ct. 2860 (1986) (denying mandamus to force Secretary of Commerce to issue certification).

41. Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. (forthcoming 1987). A major factor contributing to this trend has been the Supreme Court's willingness to sever Congress' unconstitutional attempts to make contingent delegations, particularly the legislative veto, from statutes creating executive discretion. See, e.g., *Chadha*, 462 U.S. at 1013-16 (Rehnquist, J., dissenting).

42. L. FISHER, *supra* note 38.

43. 787 F.2d 875 (3d Cir.), *aff'd on rehearing on other grounds*, No. 85-5226, slip. op. (3d Cir. Dec. 31, 1986).

44. Pub. L. No. 98-369, 98 Stat. 1199 (codified at 31 U.S.C. §§ 3551-3556 (Supp. II 1984)).

45. See *Ameron*, 787 F.2d at 879 (citing H.R. REP. NO. 1157, 98th Cong., 2d Sess. 12 (1984)). Earlier laws already required maximum feasible competition. Yet, in fiscal year 1983 only \$54 billion of \$168 billion in military procurement was opened to competition. *Id.* The Department of Defense opposed competitive bidding; without an adequate administrative protest system by which disappointed bidders could quickly make their complaints known, corrective action was impossible. CICA sought to create such a system. See H.R. REP. NO. 138, 99th Cong., 1st Sess. 2-5 (1985) [hereinafter CICA REPORT].

46. 31 U.S.C. § 3554 (Supp. II 1984). CICA does not apply when the head of a procuring department certifies in writing that there are "urgent and compelling circumstances which significantly affect interests of the United States [and] will not permit waiting for the decision of the Comptroller General." *Id.* at § 3553(c)(2).

47. Statement on Signing H.R. 4170 into Law, 20 WEEKLY COMP. PRES. DOC. 1037 (July 18, 1984). A major allegation in *Ameron* was that the Comptroller General's authority to alter the length of the stay, 31 U.S.C. § 3554 (Supp. II 1984), usurped the executive function of controlling procurement. *Ameron*, 787 F.2d at 878-79. On rehearing, however, the Third Circuit characterized the in-

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The Office of Management and Budget issued a bulletin instructing agencies to ignore CICA.⁴⁸ The administration's opposition to CICA culminated in a threat by the Attorney General not to comply with any lower federal court ruling upholding CICA.⁴⁹ Only this last ultimatum—not the refusal to enforce a law passed by Congress and signed by the President—stirred a Congressional counter-threat to cut the appropriation for the salaries of top Justice Department officials.⁵⁰

3. Agency Autonomy Seeks To Discourage Presidential Abuses

The CICA episode demonstrates that the power to place—or threaten to place—certain types of administrative decisions beyond a President's political reach is a highly practical tool for Congress to institutionalize executive compliance with congressional intent.⁵¹ Other attempts to control the misuse of discretion delegated to the executive branch are limited by Congress' diffuse and relatively slow decisionmaking.⁵² For example, the disciplinary power of the purse—theoretically Congress' main weapon against presidential abuses—is constrained by the low credibility of a

trusive effect of this power as “de minimis.” *Ameron v. United States Army Corps of Eng'rs*, No. 85-5226, slip. op. at 40 (3d Cir. Dec. 31, 1986).

48. *Ameron*, 787 F.2d at 880 (citing OMB Bulletin No. 85-8 at 2 (Dec. 17, 1984)).

49. *Ameron*, 787 F.2d at 889-90 (Attorney General Meese's statement that District Court is not “court of competent jurisdiction,” and that Third Circuit ruling might be ignored). Ultimately, the administration did acknowledge that it would comply with the District Court order to uphold CICA, and with the Third Circuit's modification of the order. *Id.* at 890.

50. *New York Times*, May 9, 1985, at A28, col. 1 (Meese testimony “major provocation” for vote to cut Justice Department salaries); CICA REPORT, *supra* note 45, at 39-40; *see also id.* at 44-45 (description of other, unpunished, violations by executive branch).

51. Congress' power to *threaten* to insulate a post from the President's political control may increase congressional confidence in presidential implementation and thus promote grants of discretion to the President, which might be desirable. In general, presidential discretion promotes administrative flexibility and the gains incident to centralization, accountability, coordination, and efficiency. *See Note, supra* note 3, at 1773-74 (citing authority). However, wide discretion also increases the President's ability to disregard the legislature's objectives. In order to grant discretion, Congress needs to believe that those entrusted with implementation will faithfully adopt its policy choices. Reserving the threat of insulation increases Congress' chances of having its will obeyed. Admittedly, this is an idealized model. At times compromises required to pass legislation result in a measure that obscures congressional intent. *See, e.g., DeLong, New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 425-27 (1986). Nevertheless, courts somehow manage to discern legislative intent.

52. Congress has devised mechanisms to encourage execution of laws in accordance with legislative intent. *See Franck & Bob, The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT'L L. 912, 921-28, 944-51 (1985) (summarizing types of control used by Congress). Among these mechanisms are the creation of independent sources of information, a vast expansion of the congressional staff system, and increased oversight. *See Tiefer, supra* note 5, at 60-61. However, congressional oversight occurs long after the fact of executive malfeasance. *See, e.g., N.Y. Times*, July 14, 1986, at A3, col. 1 (Congressman and GAO accuse Department of Defense of mischaracterizing large projects as many small projects, including accounting for each shower stall in building as separate “construction project,” to evade statutory spending limits on individual military bases in Honduras).

threat to use it on any project of political significance.⁵³ In any case, Congress should not be forced to cut a desired program, with the risk of compromising vital military procurement or the interests of innocent beneficiaries, because the branches are fighting.⁵⁴

Congress always retains its ultimate weapon of impeachment.⁵⁵ But without any intermediate threats in its arsenal, Congress faces stark choices when confronted with executive misconduct: It can acquiesce in nullification of laws by the executive, it can refuse to fund programs because it distrusts executive implementation, or it can attempt impeachment in circumstances that may not seem to justify such a drastic step.⁵⁶ Agency autonomy gives Congress another option, one which this Note argues is practical and constitutional.

II. CONGRESS' POWER TO LIMIT PRESIDENTIAL REMOVAL

The President's enumerated power to appoint⁵⁷ has been held to connote an inherent or implied power to remove,⁵⁸ as have other clauses of Article II. Careful examination of constitutional theory, administrative history, and judicial precedent, however, demonstrates that this removal power is not absolute, and that Congress may thus constrain it by statute to create a degree of agency autonomy. Such constraints derive part of their legitimacy from Congress' power to create and structure the entire executive branch other than the President and Vice President.

53. See L. FISHER, *supra* note 38, at 262 (practicalities of government require that Congress give President spending discretion). Of course, Congress has informal control mechanisms available. See *supra* note 52.

54. While in the *Ameron* case Congress ultimately did threaten to cut the Justice Department appropriation, it did so only because Justice was seen as challenging the rule of law. At no time did Congress threaten to cut the military budget to emphasize its determination that contracts be awarded competitively, and it is doubtful that such a threat would have been credible.

55. U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 6. It is also true that Congress can block the President's appointments, but this strategy can paralyze government.

56. As long as Congress retains the power of impeachment, it has the power to enforce presidential obedience. But since Congress reserves this power for the most serious offenses, Presidents enjoy great freedom of maneuver if no intermediate sanctions exist. Impeachment remains a great constitutional counterweight, but its very gravity makes it a poor weapon. See Tiefer, *supra* note 5, at 99 n.187. Also, impeachment is a long and messy affair, capable of paralyzing both Congress (especially the Senate, which must interrupt regular business to try impeachments) and the bureau or agency whose chief is on trial.

57. U.S. CONST. art. II, § 2, cl. 2.

58. *Shurtleff v. United States*, 189 U.S. 311, 318 (1903); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). "It is the starting point of all judicial analysis in this area that the President's power to remove, however much it may be restricted, derives from the constitutional grant of his power to appoint . . ." *Synar v. United States*, 626 F. Supp. 1374, 1402 (D.D.C.) (three-judge court) (per curiam) (citation omitted), *aff'd sub nom.* *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

A. *Constitutional Theory*

1. *Textual Argument*

a. *The Constitution Vests Only Limited Powers in the President*

“The executive Power shall be vested in a President of the United States of America.”⁵⁹ Might this vesting of executive power command that the President exercise all of it personally, or perhaps personally control its subdelegation? Both a literal and a structural⁶⁰ analysis suggest not: The executive power of the United States is not uniquely vested in the President alone, just as the President’s functions are not solely executive.⁶¹ Article II clearly anticipates that there will be “Heads of Departments,” and that Congress may, if it chooses, grant them—not the President—the important discretion to appoint inferior officials.⁶² If Heads of Departments were utterly subject to presidential discretion, the provision would be meaningless; the President would in any case be able to regulate the selection, if not the actual appointment, of inferior officials.⁶³ Similarly, the wording of the necessary and proper clause⁶⁴ supports the constitutional validity of the distinction between the President and the executive branch, because it specifically includes departments and officers in a list of potential repositories of federal authority. Further, the power to “make *all* Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers *vested* . . . in any Department or Officer”⁶⁵ gives Congress a textual claim to determine fully the nature of executive offices. Congress can assign a Head of Department any executive power not textually reserved to the President in Article II.⁶⁶

To say that the first sentence of Article II vests executive powers in the

59. U.S. CONST. art. II, § 1, cl. 1.

60. On the structural method of constitutional analysis, see C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); see also Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 112–13 (1984) (balance among branches is a key structural concern).

61. The President’s veto of legislation is an example of a legislative power.

62. “[T]he Congress may by Law vest the Appointment of such inferior Officials, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments” U.S. CONST. art. II, § 2, cl. 2.

63. See *United States v. Perkins*, 116 U.S. 483 (1886) (Congress may insulate cadet engineer, an inferior official, from removal, when appointment of official is vested in Secretary of the Navy, an Officer of the United States); see also RULEMAKING, *supra* note 20, at 31–34 (collecting lower court cases).

64. Congress may “make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18. See Elliott, *supra* note 1, at 142, 175.

65. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

66. See Van Alstyne, *supra* note 37, at 115–17 (necessary and proper clause is more compelling locus of power to structure executive branch than clauses cited by Chief Justice Taft in *Myers*); see also Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 15–16 (1974).

President begs the question of what those powers are.⁶⁷ If it were possible to give content to the President's power without recourse to the text of the constitutional article that purports to define that office, then presumably the first three articles of the Constitution could each have been expressed in a sentence. Those three articles do list the areas in which a branch can go beyond its paradigmatic function,⁶⁸ but their primary purpose remains to define the contours of each branch and of offices within each branch.

b. *Reading the Take Care Clause with the Opinion in Writing Clause*

The constitutional provision that the President "shall take Care that the Laws be faithfully executed"⁶⁹ offers the strongest support for full presidential control over the executive. Yet, the take care clause is not among the major presidential powers of section two, and seems to be at most a modest grant of power.⁷⁰ Among the powers explicitly granted to the President is the power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."⁷¹ A broad reading of the take care clause has the effect of reducing this clause—which appears among the grant of major presidential powers in section two—to surplusage. If the President has so much control over the executive that he can fire at will, why put the power to request written opinions in the Constitution?

The Constitution should not be read to have such redundancy.⁷² A more reasonable interpretation is that the opinion in writing clause exists because it was not assumed, or at the very least not obvious, that the President had absolute power over Heads of Departments.⁷³ The take

67. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640–41 (1952) (Jackson, J., concurring).

68. For example, the legislature has judicial power to try impeachments; the President has legislative power through the veto.

69. U.S. CONST. art. II, § 3.

70. The take care clause is listed among the miscellaneous powers in art. II, § 3. The take care clause's position makes it appear "almost as an afterthought." J. MASHAW & R. MERRILL, *ADMINISTRATIVE PROCESS* 110 (2d ed. 1985).

71. U.S. CONST. art. II, § 2, cl. 1.

72. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

73. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640–41 (1952) (Jackson, J., concurring); see also Ledewitz, *supra* note 5; Tiefer, *supra* note 5. The surviving records of the Constitutional Convention are not very informative about the gestation or purpose of the opinion in writing clause. See 2 *RECORDS OF THE UNITED STATES FEDERAL CONVENTION OF 1787*, at 158, 336–37, 342–43, 367, 495, 541–43, 575, 599, 627 (M. Farrand ed. 1966) (history of clause's adoption). It was debated only once, briefly. See *id.* at 541–42. Passage of the opinion in writing clause was tied to the rejection of a council to advise the President. See *id.* Immediately after the Council of State was defeated by a vote of 8–3, it was agreed, with only New Hampshire dissenting, to "authoriz[e] the President to call for the opinions of the Heads of Departments, in writing." *Id.* at

care clause says only that the President “shall *Take Care* that the laws be faithfully executed,” regardless of who executes them—a duty quite different from the single-handed responsibility for executing all the laws. A literal reading of the take care clause confirms the President’s duty to ensure that officials obey Congress’ instructions; it does not create a presidential power so great that it can be used to frustrate congressional intentions.⁷⁴ The take care clause should not be read to grant the President the power to set the political agenda of agencies, nor to replace agency personnel because they enforce congressional mandates in a manner that conflicts with the President’s political predilections.⁷⁵ Rather, the President’s irreducible constitutional role in overseeing the execution of congressional policies is one of general leadership and persuasion,⁷⁶ initiating personnel reviews, monitoring to see that officials stay within the bounds that Congress has assigned to them, and perhaps initiating dismissal proceedings before an administrative or judicial tribunal.⁷⁷

2. Structural Constitutional Argument

a. Article II’s Parallels to Article III

Article II contains little more information about Congress’ relation to Heads of Departments and inferior officers than Article III contains about

542–43. Both sides in the debate apparently agreed that without either opinion in writing or a Council of State the President could not be assured of adequate information from aides; it was not assumed, therefore, or at least not obvious, that the President had absolute power over Heads of Departments. Curiously, Colonel Mason believed that the rejection of a Council of State *weakened* the President. *Id.* at 639 (reprinting Mason’s contemporaneous “Objections to this Constitution of Government”).

74. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838).

75. “The constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that they execute them faithfully He is not to perform the duty, but to see that the officer assigned by law performs his duty *faithfully*—that is, *honestly*: not with perfect correctness of judgment, but *honestly*.” 1 Op. Att’y Gen. 624, 626 (1823) (Wirt) (emphasis in original).

76. The Presidency carries tremendous persuasive power over even nominally independent agencies. The Constitution gives the President this consultative role. See *Sierra Club v. Costle*, 657 F.2d 298, 404–06 (D.C. Cir. 1981) (President may *discuss* proposed rulemaking with agency after close of public comment period). Professor Strauss suggests that the opinion in writing clause itself should be read as defining a floor level of Presidential involvement in agency affairs. Under this view, the clause empowers the President to preview all agency actions, if only to give him a chance to exercise his powers of persuasion. Strauss, *supra* note 5, at 646–48; see also *Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm’n*, 598 F.2d 759, 775–76 (3d Cir. 1979) (independent agency may allow itself to be persuaded by President).

Congress appears to be aware of the potency of the President’s persuasion. See 12 U.S.C. § 250 (1982) (“No officer or agency of the United States” may require Securities and Exchange Commission, Board of Governors of Federal Reserve System, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, or National Credit Union Administration to seek advance approval for any communication to Congress if such communication includes a statement that it “do[es] not necessarily represent the views of the President”).

77. The argument in the text refers only to the minimum that the Constitution guarantees the President, not to what prudence or good administrative practice suggests that Congress grant him.

Congress' relation to inferior federal courts. Yet, it is rarely disputed that Congress has broad, even unlimited, powers to structure the inferior federal courts.⁷⁸ Congress may even restrict the Supreme Court's appellate jurisdiction,⁷⁹ at least up to a point.⁸⁰ Just as Congress may determine *which* Article III court will hear cases, so too can Congress determine *which* agency will execute its policies.⁸¹ Just as Congress can insulate in-

78. See U.S. CONST. art. III, § 1; *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-50 (1850) (lower court cannot take jurisdiction forbidden by statute); see also *Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962) (opinion of Harlan, J.) (Congress not required to create inferior federal courts); *Lockerty v. Phillips*, 319 U.S. 182, 187-88 (1943) (same); *Federal Power Comm'n v. Pacific Power & Light Co.*, 307 U.S. 156, 159 (1939) (Congress sets jurisdiction of inferior courts). But see Eisenberg, *Congressional Authority To Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974) (lower courts now constitutionally required).

79. U.S. CONST. art. III, § 2, cl. 2; *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868) (Congress may restrict appellate jurisdiction). See generally Amar, *supra* note 31 (proposing "neo-federalist" theory of when this is appropriate).

80. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 144-48 (1871) (distinguishing congressional power to limit Supreme Court's appellate jurisdiction from impermissible attempt to determine outcome of pending litigation); *Glidden*, 370 U.S. at 605 n.11 (Douglas, J., dissenting) ("There is a serious question whether the *McCordle* case [see *supra* note 79] could command a majority view today."); see also Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (limits to congressional power). *Contra* Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965).

81. Denying that Congress has plenary power to structure the executive branch forces one to make odd arguments. See, e.g., Comment, *Abolition of Federal Offices as an Infringement on the President's Power To Remove Federal Executive Officers: A Reassessment of Constitutional Doctrines*, 42 FORDHAM L. REV. 562, 590-93 (1974) (Congress may not abolish agency if purpose is to remove particular official).

One of the greatest virtues of the executive-presidential distinction is that it offers a middle ground for decision in separation of powers cases other than a retreat to nonjusticiability. The stakes in removal cases—control of the federal machinery—too often create a hydraulic pressure toward absolutism. For example, to argue that the President has illimitable removal power, as Chief Justice Taft did in *Myers*, calls into question Congress' ability to create offices with limited terms, and undermines its ability to create terms of more than four years. Yet, it is as odd to say that Congress could not shorten the terms of FTC Commissioners to one year as it would be to suggest that every Article III judge's life tenure prohibits Congress from reducing her court's jurisdiction. See *Glidden*, 370 U.S. at 567-68 (opinion of Harlan, J.) (Congress may narrow jurisdiction of courts, even if this affects pending cases). It might be less odd to limit this claim to sitting Commissioners. *Contra* Comment, *supra*, at 585-94. But if the President has illimitable removal power, then Congress should not be allowed to limit the terms of those yet to be named, for this too usurps the removal power. Yet, this last argument cannot be correct as it is tantamount to arguing that a court can require Congress to fund an office not specified in the Constitution, despite the clear command of the appropriations clause, U.S. CONST. art. I, § 9, cl. 7. See *Glidden*, 370 U.S. at 534 (opinion of Harlan, J.) (Congress may repeal tenure or salary of public officials, but not of art. III judges); *Crenshaw v. United States*, 134 U.S. 99, 107-08 (1890) (same).

Admitting Congress' power to create offices with terms of its choosing, however, opens the equally absolute possibility of major offices—even Cabinet posts—with terms so short that the Senate would have an effective power of removal through its ability to withhold consent from reappointment. The Court's holding in *Bowsher v. Synar*, 106 S. Ct. 3181, 3189-91 (1986) (Congress' statutory reservation of power to remove Comptroller General by passing joint resolution—a statute—made him officer of legislative branch), raises the specter of a similar analysis being applied if the official's term were anything but co-extensive with the President's or the life of the agency, whichever is less. Cf. *United States v. Lovett*, 328 U.S. 303 (1946) (Court avoids deciding claim that bill to cut off salaries of 39 named alleged subversives, unless reappointed by President, encroaches on executive power; holds instead that act was invalid bill of attainder).

Courts have allowed retroactive extensions of terms. See, e.g., *Koerner v. Colonial Bank*, 800 F.2d

ferior federal courts from Supreme Court review,⁸² so too, by analogy,⁸³ can Congress put stringent limits on the President's control of agencies⁸⁴—except, of course, for those functions textually committed to the President.

b. *Limited Foreign Policy Powers Analogized to Domestic Powers*

The President's war and foreign affairs powers extend further than presidential domestic powers. The President is Commander in Chief of the armed forces, not Commander in Chief of the entire government. As Commander in Chief, the President ordinarily has considerably more authority and independence from Congress in the military sphere than in domestic affairs. Similarly, the President ordinarily enjoys broader authority and initiative in foreign affairs.⁸⁵ If Congress can constrain the President's use of his inherent Commander in Chief or foreign affairs powers, it follows that Congress can apply at least as strong constraints to the removal power, an unenumerated, allegedly inherent, domestic power.

One recent analysis of the President's war and foreign affairs powers concluded that the "cases stand quite plainly for the proposition that the President can exercise a purportedly inherent power if Congress has historically acquiesced and *if Congress does not try to stop him*."⁸⁶ Congress has placed restrictions on the President's ability to dismiss a commissioned officer in peacetime;⁸⁷ it should be able to do no less with regard to do-

1358 (5th Cir. 1986) (upholding Bankruptcy Amendments & Federal Judgeship Act of 1984, 98 Stat. 333, 346 Pub. L. No. 98-353, § 121(e), 1984 U.S. CODE CONG. & ADMIN. NEWS (July 10, 1984), which retroactively extended terms of all bankruptcy judges whose commissions had expired June 27); *In re Benny*, 791 F.2d 712 (9th Cir. 1986) (same). Similar issues would arise if Congress passed a prospective increase in an official's term.

82. Amar, *supra* note 31, at 257–58 ("The power to structure the federal judiciary is not trivial; it has real bite. It comprehends the power to create an unreviewable Article III Tax Court—or an Abortion Court." (footnote omitted)).

83. On the virtues of analogies in constitutional interpretation, see C. BLACK, *supra* note 60, at 3–32; Amar, *supra* note 31, at 252 n.151, 253–54 (discussing analogies between art. II and art. III).

84. These limits do not remove the agency from the executive branch. See *supra* note 33.

85. *United States v. Curtiss-Wright Export Corp.* 299 U.S. 304, 315–18 (1936); see also *United States v. Nixon*, 418 U.S. 683, 710 (1974) (rejecting executive privilege claim lacking assertion of "claim of privilege on the ground they are military or diplomatic secrets"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 630–32 (Douglas, J., concurring), 640–41 (Jackson, J., concurring) (1952) (President may not invoke war powers to seize domestic steel mills).

86. Carter, *supra* note 60, at 124 (emphasis in original). Professor Carter cautions that the intent of the Framers was "ambiguous," *id.* at 119, and that the older judicial precedents are "thin," *id.* at 120, but that nevertheless, "[t]he Court has been quite explicit in its avoidance" of defining Congress' power to limit the Commander in Chief power. *Id.* at 120 n.83 (citing cases in which Supreme Court notes congressional inaction); see also *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804) (congressional action, regarding authority of naval forces to seize foreign vessels, occupies field otherwise open to President's discretion); Van Alstyne, *supra* note 37, at 107 (necessary and proper clause assigns Congress authority to determine what powers executive will have beyond those deemed "indispensable").

87. 10 U.S.C. § 1161 (1982) forbids the dismissal of a commissioned officer in peacetime unless the officer is convicted by court-martial, absent without leave for three months, or sentenced to incar-

mestic agency heads. Since the unfettered presidential removal power is at most an "inherent" power,⁸⁸ the comparison to inherent war and foreign affairs powers suggests that Congress may "try to stop" the President from removing Heads of Departments.

3. *The Intent of the Framers*

Separation of powers implements the Framers' chief goal subordinate to the overriding aim of creating a functioning state—that of preventing a recurrence of the tyranny they associated with English rule. Montesquieu, an important influence on the Framers,⁸⁹ emphasized separation of government into starkly divided branches not as an end in itself, but as a means to protect against the tyranny that would result were powers concentrated in one branch or, worse, in one person.⁹⁰ Separation of powers is best understood as the structural realization of Montesquieu's goal of maximum feasible diffusion of power.⁹¹ It should not be understood to require concentration of power in any one branch, and particularly not concentration of power in the executive branch, much less in the President.⁹²

The Framers envisioned Congress as the most powerful of the three branches.⁹³ The Framers saw Congress as the branch that could most safely be entrusted with the greatest power; concentration of power in unelected judges or in a single President too closely resembled the abuses associated with English rule. The Framers expected the President's domestic powers to be far less than the domestic powers of Congress.⁹⁴ Their

ceration by final order of a civilian court. *See also* *Wallace v. United States*, 257 U.S. 541, *reh'g denied* 258 U.S. 216 (1922) (limitations on President's power to remove army officer reduced when President acts with consent of Senate); *cf. McElrath v. United States*, 102 U.S. 426 (1880) (purpose of predecessor statute was to restrict broad wartime dismissal powers in peacetime).

88. *See supra* note 58 and accompanying text.

89. *See* G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 34, 199 n.3 (1969).

90. *See id.* at 151-54, 449-51; H. MERRY, *MONTESQUIEU'S SYSTEM OF NATURAL GOVERNMENT*, 316-19, 352-57 (1970); T. PANGLE, *MONTESQUIEU'S PHILOSOPHY OF LIBERALISM* 130-33 (1973).

91. "Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 106 S. Ct. 3181, 3186 (1986); *cf. THE FEDERALIST* No. 47, at 313-16 (J. Madison) (E. Earle ed. 1937) (quoting Montesquieu); *id.* No. 51, at 337 (J. Madison) (separation of powers will "oblige it [government] to control itself").

92. "When Americans in 1776 spoke of keeping the several parts of the government separate and distinct, they were primarily thinking of insulating the judiciary and particularly the legislature from executive manipulation." G. WOOD, *supra* note 89, at 157.

93. *See THE FEDERALIST* No. 48 (J. Madison) (discussing superiority of legislature); *id.* No. 51, at 338 (J. Madison) (E. Earle ed. 1937) ("In republican government, the legislative authority necessarily predominates"); G. WOOD, *supra* note 89, at 155 (American Revolution "intensified legislative domination of the other parts of the government").

94. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 161, 181 (1978); Zamir, *Administrative Control of Administrative Action*, 57 CALIF. L. REV. 866, 869-71 (1969). The imbalance in favor of

intentions⁹⁵ suggest that Congress retains great latitude to structure the executive branch,⁹⁶ just as it may structure the judicial branch.⁹⁷ Of course, there are limits. The President has certain enumerated powers,⁹⁸ and the Supreme Court has functions that Congress may not erode.⁹⁹ Further, Congress may not delegate power to a legislative rump,¹⁰⁰ or to a legislative agency.¹⁰¹

B. *Historical Allocation of Removal Power*

Early congressional and presidential practices conformed to the view that the Constitution did not grant the President unlimited power to remove Heads of Departments.¹⁰² Presidential authority to supervise, and hence remove,¹⁰³ officials varied with the nature of their function. The first Congresses gave the President the power to direct the Heads of Departments for Foreign Affairs,¹⁰⁴ War,¹⁰⁵ and Navy¹⁰⁶—authority that re-

Congress was consistent with the models provided by all the states at the time the Constitution was drafted. In 1787, no state constitution gave the executive illimitable removal powers. *Myers v. United States*, 272 U.S. 52, 247–48 (1926) (Brandeis, J., dissenting).

95. On problems with modern attempts to find “original understandings” of the Constitution, see Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (Framers did not intend us to be bound by their intent). See generally J. SWIFT, *A Tale of A Tub*, in JONATHAN SWIFT 81 (A. Ross & D. Wooley eds. 1984) (need for empathy with author’s circumstances to understand his work).

96. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 439–46 (1977) (Congress may structure executive’s disposition of presidential papers); *United States v. Nixon*, 418 U.S. 683, 694–96 (1974) (President must use ordinary channels to rescind regulation governing Special Prosecutor in order not to be bound by it); see also THE FEDERALIST NOS. 47, 51 (J. Madison) (legislative role most important in separation of powers); THE FEDERALIST NO. 77 (A. Hamilton) (same).

97. See *supra* notes 78–82 and accompanying text.

98. See *infra* notes 138–42 and accompanying text.

99. See Amar, *supra* note 31, at 239–59 (distinguishing limitable from illimitable jurisdiction of Supreme Court). Nor may Congress expand these functions beyond a certain point. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

100. See *Buckley v. Valeo*, 424 U.S. 1, 118–41 (1976) (per curiam).

101. *Bowsher v. Synar*, 106 S. Ct. 3181, 3186–93 (1986); *INS v. Chadha*, 462 U.S. 919, 952 (1983).

102. See 3 W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 1479–80 (2d ed. 1929); see also R. HARLOW, *THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825*, at 130–34, 140–46, 157–59 (early congressional efforts to structure executive branch); Sofaer, *Practice Under the Framers*, LAW & CONTEMP. PROBS., Spring 1976, at 12, 37 (“No early President suggested that Congress was significantly limited in the control it potentially had over assigned executive powers.”); *supra* note 37 (misunderstanding of “Decision of 1789”). *Contra* L. WHITE, *supra* note 14, at 17–18.

103. Legislators at the time were keenly aware that power to remove implies power to control. See L. FISHER, *THE CONSTITUTION BETWEEN FRIENDS* 52–54 (1978) (citing authorities).

104. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 28–29 (Secretary shall perform duties as enjoined by President).

105. Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 49–50 (Secretary shall perform duties as President shall instruct).

106. Act of April 30, 1798, ch. 35, § 1, 1 Stat. 553, 553 (Secretary’s duty shall be to execute President’s orders).

lated to specifically named presidential functions in Article II.¹⁰⁷ But the two other executive departments—the Post Office¹⁰⁸ and the Treasury¹⁰⁹—were more insulated from presidential direction, with the latter tied particularly closely to Congress.¹¹⁰ Most Attorney Generals agreed with, or acquiesced in, the congressional view for the first seventy-five years of the Republic.¹¹¹

From the beginning, Congress not only restricted the President's authority to fire executive officials, but also narrowed the appointment power from which the removal power primarily derives.¹¹² Congress' undisputed power to create an office includes the corollary power to narrow the group from which the President may select civil officers. Congress has required that certain appointees have particular citizenship¹¹³ or residence in a particular state, territory, or foreign country;¹¹⁴ it has required legal qualifications,¹¹⁵ language proficiency,¹¹⁶ and engineering¹¹⁷ or other professional credentials.¹¹⁸ Further, at times Congress has constrained the President's appointment power by specifying the appointee's age,¹¹⁹ sex,¹²⁰ race,¹²¹ property holdings,¹²² business,¹²³ or drinking habits.¹²⁴

107. For example, the Commander-in-Chief function, U.S. CONST. art. II, § 2, cl. 1, and the receiving of ambassadors, *id.* § 3.

108. Act of May 8, 1794, ch. 23, § 3, 1 Stat. 354, 357 ("Postmaster shall have authority to act . . ."). Compare *id.* with Act of Sept. 22, 1789, ch. 41, § 1, 1 Stat. 70 (temporary establishment of Post Office; Postmaster General "subject to the directions of the President").

109. Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65.

110. The statute nowhere mentions the President, but rather requires the Secretary to make reports to Congress and "generally . . . perform all such services relative to the finances, as he shall be directed to perform." *Id.* ch. 12, § 2, 1 Stat. 65, 66; see also J. MASHAW & R. MERRILL, *supra* note 70, at 155-56 (noting distinction).

111. For example,

If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.

1 Op. Att'y Gen. 624, 625 (1823) (Wirt); accord 13 Op. Att'y Gen. 28 (1869) (Hoar); 6 Op. Att'y Gen. 226 (1853); 4 Op. Att'y Gen. 515, 516 (1846) (Mason); 2 Op. Att'y Gen. 507 (1832) (Taney); cf. RULEMAKING, *supra* note 20, at 32 n.154 (citing other examples drawn from 1823 to 1876). *Contra* Letter from Attorney General Caesar A. Rodney to President Thomas Jefferson (July 15, 1808), reprinted in 10 F. Cas. 357-59 (courts lack jurisdiction to issue mandamus against officer following presidential directive; granting such writs would destroy executive branch); 7 Op. Att'y Gen. 453, 469-70 (1855) (Cushing) (other view would "so divide and transfer the executive power as utterly to subvert the Government").

112. See *supra* note 58.

113. *E.g.* Act of Mar. 1, 1855, ch. 133, § 9, 10 Stat. 619, 623 (requiring U.S. citizenship for all diplomatic officials); see also *Myers v. United States*, 272 U.S. 52, 265 n.35 (1926) (Brandeis, J., dissenting) (collecting statutes).

114. *Myers*, 272 U.S. at 267-68 & nn.37-42, 272 n.54 (Brandeis, J., dissenting).

115. *Id.* at 267 n.43 (Brandeis, J., dissenting).

116. *Id.* at 268 n.43 (Brandeis, J., dissenting).

117. *Id.* at 268-69 n.43 (Brandeis, J., dissenting).

118. *Id.* at 269 n.43 (Brandeis, J., dissenting).

119. *Id.* at 270 n.46 (Brandeis, J., dissenting).

120. *Id.* at 270 n.47 (Brandeis, J., dissenting) (statutes requiring female appointee).

Most of these statutes applied to federal officials below Cabinet rank, although all were “Officers of the United States” and many had no superior officer except, perhaps, the President. Nor are restrictions on the appointment power an historical relic: Since 1947, a person must have been a civilian for ten years to be eligible for appointment as Secretary of Defense or to other top Defense Department posts.¹²⁵ In addition, the President continues to be required to nominate some officials from different parties,¹²⁶ or on a nonpartisan basis.¹²⁷ At times, Congress has limited the President’s choice to lists nominated by state officials, Indian tribes, or private citizens.¹²⁸ The limits of the congressional authority to define or restrict the presidential appointment power have never been tested.¹²⁹

C. *Historical Allocation of Related Powers*

Executive departments shielded from presidential control are a traditional, if relatively infrequently employed, congressional technique to ensure that important national tasks are accomplished when there is reason to fear presidential influence over implementation. Early examples of vesting important government functions in independent corporations, notably the Second Bank of the United States, appear functionally identical to the modern practice of vesting such powers in independent agencies.¹³⁰ The Second Bank of the United States was a federally chartered corporation, but only one-fifth of its stock was owned by the United States. The Bank

121. *Id.* at 271 n.48 (Brandeis, J., dissenting) (statutes requiring Native American appointee).

122. *Id.* at 271 n.49 (Brandeis, J., dissenting).

123. *Id.* at 271 n.53 (Brandeis, J., dissenting).

124. Act of Jan. 16, 1883, ch. 27, § 8, 22 Stat. 403, 406 (requiring temperance).

125. 10 U.S.C. § 133(a) (1982) (Secretary of Defense); *id.* § 134 (Deputy Secretary); *id.* § 135 (Under Secretary); *see also* 42 U.S.C. § 5812(a) (1982) (Administrator of Energy Research and Development shall have been civilian for at least two years).

126. *Myers v. United States*, 272 U.S. 52, 271 n.51 (1926) (Brandeis, J., dissenting). A number of modern statutes include this requirement. *E.g.* 2 U.S.C. § 437c(1) (1982) (Federal Election Commission); 15 U.S.C. § 41 (1982) (Federal Trade Commission); 15 U.S.C.A. § 78d(a) (West Supp. 1986) (Securities and Exchange Commission).

127. *Myers*, 272 U.S. at 271 n.52 (Brandeis, J., dissenting). *Compare* 44 U.S.C.A. § 2103(a) (West Supp. 1986) (Archivist of the United States “shall be appointed without regard to political affiliations and solely on the basis of the professional qualifications required.”) *with* N.Y. Times, Sept. 11, 1986, at A22, col. 1 (two Senators accuse White House staff of questioning candidates for Archivist post about their political beliefs).

128. *Myers*, 272 U.S. at 274 n.56 (Brandeis, J., dissenting).

129. Congress’ power to define the procedures by which lower-level federal employees are selected was affirmed in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding Hatch Act); *see also* *United States v. Perkins*, 116 U.S. 483 (1886) (affirming congressional power to constrain presidential flexibility in appointment of inferior officers). The issue of Congress’ power to define such procedures for higher-level officials is unlikely to arise in court because they require Senate confirmation. Were the President ever to appoint a person in violation of a statute, the Senate presumably would not confirm her.

130. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (upholding constitutionality of Second Bank of the U.S.).

had twenty-five directors, five of whom were appointed by the President from among the stockholders, subject to Senate confirmation.¹³¹ The remaining twenty directors—a comfortable majority—were elected by the other shareholders.¹³² Although the President alone could remove any of the five directors he appointed, he had no power over the other directors.¹³³ While there were bitter divisions about the wisdom of having national banks, the courts resolved the issue of their constitutionality in favor of the banks' legitimacy.¹³⁴

The Bank precedents suggest that Congress could assign the national functions performed by the Federal Reserve Board to a private, or semi-private, federal corporation over whose officers the President might have even less control than he would over a non-presidential executive agency. Any federal function that Congress can put in private hands can *a fortiori* be entrusted to an officer of the United States, either directly or through the fiction of service *ex officio*, regardless of the degree of control permitted the President.¹³⁵

131. Act of Apr. 10, 1816, 3 Stat. 266 § 8.

132. The procedure for weighing votes was complex, and progressive among those wealthy enough to afford the \$100 per share offering price. *Id.* § 11 para. 1.

133. *Id.*

134. Congress' authority to incorporate a bank stems from the necessary and proper clause, U.S. CONST. art I, § 8, cl. 18. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (upholding constitutionality of Second Bank of the U.S.); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (same). Congress also based its authority on the coinage clause, U.S. CONST. art I, § 8, cl. 5. See *Report from the House Ways and Means Committee on the President's Message*, Register of Debates, 1830, App., 104 (Apr. 13, 1830), reprinted in 1 DOCUMENTARY HISTORY OF BANKING AND CURRENCY IN THE UNITED STATES 660, 665 (H. Krooss, ed. 1969). On the Second Bank of the United States, see generally H. CATTERALL, *THE SECOND BANK OF THE UNITED STATES* (1902); B. HAMMOND, *BANKS AND POLITICS IN AMERICA* (1957).

135. Indeed, it could be argued that most functions currently performed by the federal government could be radically "privatized" in this manner. See Note, *Federal Chartering of Corporations: Constitutional Challenges*, 61 GEO. L.J. 123, 128-32 (1972) (discussing federal chartering of various types of corporations to execute various powers); cf. R. NADER, M. GREEN & J. SELIGMAN, *CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS* 71-85, 390-433 (1976) (arguing for federal chartering of large corporations). The major exception applies to *standardless* grants of the police power to private persons. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-42 (1935). However, the existence of de novo review by an administrative agency or a court may legitimate otherwise troubling delegation of regulatory and licensing power to private groups. See Liebmann, *Delegations to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 701-04 (1976) (citing cases and examples). There are a large number of wholly-owned and "mixed-ownership" government corporations. See 31 U.S.C. §§ 9101-9109 (1982) (setting rules for financing and auditing such corporations). At some point, a government corporation becomes legally equivalent to a government agency. See *Morgan v. TVA*, 115 F.2d 990, 994 (6th Cir. 1940) (TVA is executive agency; President may therefore remove Chairman of Board), cert. denied, 312 U.S. 701 (1941); see also *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976) (Federal Home Loan Mortgage Corporation is "agency" for Freedom of Information Act); cf. *Held v. National R.R. Passenger Corp.*, 101 F.R.D. 420 (D.D.C. 1984) (AMTRAK is not government corporation for Age Discrimination in Employment Act); K. DAVIS, *supra* note 2, § 3.12 ("The case law has not crystallized any consistent principle").

The analysis of whether such delegations are constitutional turns in part on whether the statutes reviewed in *McCulloch v. Maryland* and *Osborn v. Bank of the United States*, see *supra* note 134, vested a national function in the corporation, or merely gave a convenient legal status to a series of

III. APPLIED AUTONOMY

A. Determining What Congress May Commit to an Autonomous Agency

Congress acts on strong constitutional foundations when it unambiguously¹³⁶ seeks to insulate one of the many but not unlimited matters committed to the legislature by Article I from the President's political manipulation. Congress is weakest when facing the President's enumerated powers.¹³⁷ The President is the Commander in Chief,¹³⁸ and possesses a complex of foreign affairs powers,¹³⁹ the veto,¹⁴⁰ the pardon power,¹⁴¹ as well as other powers.¹⁴² As one of the President's implied or "inherent" powers, the removal power is more susceptible to congressional modification than are enumerated powers,¹⁴³ but this should not become a congressional license to create executive agencies in order to encroach on presidential powers.¹⁴⁴

Focusing on the political branches' enumerated powers provides a clear-cut and principled way to begin to define precisely which powers Con-

credit transactions that were, in theory, within the private capacities of individuals already. *McCulloch* is vague on this issue, perhaps intentionally so, see Plous & Baker, *McCulloch v. Maryland: Right Principle, Wrong Case*, 9 STAN. L. REV. 710, 721-23, 725 (1957) (issue was argued by counsel for Maryland), but *Osborn* states unequivocally that the Second Bank was a public, not private institution, and hence immune from state taxation. 22 U.S. (9 Wheat.) at 859-60.

136. "The right of removal . . . would exist as inherent in the power of appointment unless taken away in plain and unambiguous language." *Shurtleff v. United States*, 189 U.S. 311, 318 (1903). The only exception in *Myers* to the broad dicta about the President's nearly plenary powers concerns those officials with "duties so peculiarly and specifically committed [by Congress] to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." *Myers v. United States*, 272 U.S. 52, 135 (1926); see also *supra* note 2 (cases on officers appointed by other officers).

137. Weakest, but not powerless; Congress may at times be able to assert a countervailing enumerated power. See *infra* note 138 (congressional power over military affairs).

138. U.S. CONST. art. II, § 2, cl. 1. However, this power is balanced by Congress' authority "To declare War," *id.* art. I, § 8, cl. 11, "To make Rules for the Government and Regulation of the land and naval Forces," *id.* art. I, § 8, cl. 14, and "To provide for calling forth the Militia to execute the Laws . . ." *id.* art. I, § 8, cl. 15. Thus, Congress may structure the manner in which the President exercises authority over the armed forces.

139. The President's enumerated foreign affairs powers are the treaty-making power, U.S. CONST. art. II, § 2, cl. 2; the power to nominate ambassadors, *id.* art. II, § 2, cl. 2; and the power to receive foreign emissaries, *id.* art. II, § 3.

140. U.S. CONST. art. I, § 7, cl. 2.

141. *Id.* art. II, § 2, cl. 1; see also *infra* note 160 (implication of pardon power).

142. U.S. CONST. art. II, §§ 2, 3 & amend. XXV, § 2.

143. See Van Alstyne, *supra* note 37, at 107; see also *supra* text accompanying notes 58-88.

144. The perspective adopted in this Note can be applied to the non-delegation debate: All legislation must fall under a category authorized by Article I; if so, it can create an executive power. All administration is inherently executive and thus must, in all but constitutionally-specified cases, be by a person in that branch. At an extreme point, if Congress fails to set standards for administration, an unconstitutional attempt to give the executive the legislative power will occur. Compare *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) with *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring in judgment) (Congress must make "important choices of social policy") and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-42 (1935) (overturning *standardless* grant of discretion to President).

gress can assign to non-presidential executive agents.¹⁴⁵ Enumeration, for example, allows one to determine that the Federal Reserve Board is constitutional.¹⁴⁶ Ultimate control over the powers it exercises is constitutionally committed to the legislature. Because the Constitution goes to special lengths to vest the control of money and finance solely in the Congress,¹⁴⁷ and especially the House,¹⁴⁸ matters involving the effective use of this power are easily deemed executive rather than presidential.¹⁴⁹

Similar logic applies whenever Congress has good reason to believe that an Article I function is threatened. Thus, it would have been constitutional to create a substantially autonomous executive official to execute the

145. At the very least, considering enumerated powers—most of which are in Article I not Article II—will redress the pro-presidential imbalance fostered by undue emphasis on implications from the relatively vague phrases in Article II.

146. The Federal Reserve Board is the most important of the agencies for which Congress has permitted for-cause removal without specifying what might constitute sufficient cause. *See supra* note 1.

The legal status of the Chairman of the Federal Reserve Board is murky. As a Member of the Board the Chairman holds a 14-year term and can be dismissed for (unspecified) cause. Appointment as Chairman, for which Membership is a prerequisite, requires separate confirmation by the Senate and runs for only four years, with tenure staggered to fall in the middle of a President's term. There is no specific removal procedure for the Chairman, and he is generally thought to be independent of the President. Abolishing the Federal Reserve Board's autonomy would risk politicizing the nation's money supply. *See* M. FRIEDMAN, *A PROGRAM FOR MONETARY STABILITY*, 85-99 (1959) (relying on discretion of authorities is "highly objectionable"); Simons, *Rules Versus Authorities in Monetary Policy*, 44 J. POL. ECON. 1 (1936) (authorities not reliable).

There may, however, be no one with standing to challenge any of the Chairman's actions. *See, e.g.,* Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir.), *cert. denied* 454 U.S. 1082 (1981). The most recent related challenge, though, went to the merits, Melcher v. Federal Open Mkt. Comm., 644 F. Supp. 510 (D.D.C. 1986) (Senator has standing), but still failed. *Id.* at 517-24 (supplemental opinion) (rejecting challenge to constitutionality of monetary body with private citizens holding large minority of Directorships).

147. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." U.S. CONST. art. I, § 9, cl. 7; *see* Hart v. United States, 118 U.S. 62 (1885) (presidential pardon power cannot override appropriations clause); Reeside v. Walker, 52 U.S. (11 How.) 272 (1851) (judicial writ cannot override appropriations clause). Congress has the sole power "To coin Money, [and to] regulate the Value thereof . . ." U.S. CONST. art. I, § 8, cl. 5; *see* Norman v. Baltimore & O.R.R. (Gold Clause Case), 294 U.S. 240, 330 (1934) (broad construction of powers granted to Congress by coinage clause). Further, Congress has the "Power To lay and collect Taxes," U.S. CONST. art. I, § 8, cl. 1, to borrow on the credit of the nation, U.S. CONST. art. I, § 8, cl. 2, and to punish counterfeiting, U.S. CONST. art. I, § 8, cl. 6.

148. U.S. CONST. art. I, § 7, cl. 1 (revenue bills must originate in House).

149. The substantial textual commitment of financial matters to Congress alone is borne out by the statements and practice of the Framers and the first Congresses. The Secretary of the Treasury was placed on a more independent statutory footing than were most other Cabinet-level officers. *See supra* notes 104-110 and accompanying text. The Comptroller of the Treasury, a key financial official, was almost universally agreed to be independent. Even Madison, who usually supported Executive removal power, stated during the Constitutional Convention and again in the first Congress that he believed the Comptroller of the Treasury should not be removable by the Executive. 1 ANNALS OF CONG. 408, 637-38 (J. Gales ed. 1834), *reprinted in* 1 ANNALS OF CONG. 393, 611-12 (J. Gales ed. 1849). The Act of Sept. 2, 1789, ch. 12, § 3, 1 Stat. 66, gave the Comptroller General authority to countersign warrants. Without this signature, no monies could be paid out by the United States Treasury. Theoretically, the Comptroller General retains this executive authority today. *See* F. MOSHER, *THE GAO* 1-32 (1979). *But see* Bowsher v. Synar, 106 S. Ct. 3181 (1986) (Comptroller is legislative branch official and cannot exercise executive budget-cutting power).

budgetary functions that the Gramm-Rudman-Hollings Act¹⁵⁰ assigned to the Comptroller General. The Comptroller's deficit forecasts, which were to trigger a presidential obligation to cut the budget,¹⁵¹ concerned the appropriations power. The Act was unconstitutional because it attached executive power to an officer of the legislative branch,¹⁵² not because it denied them to the President. The 1984 Competition in Contracting Act¹⁵³ may also fall, but again, only because the Comptroller is legislative, not because he is protected from presidential removal.¹⁵⁴ Finally, most other autonomous agencies without the power to bring civil enforcement actions¹⁵⁵ are on as firm ground as the Federal Reserve Board because their functions concern the regulation of commerce, a task committed to Congress.¹⁵⁶

Enumeration identifies many powers as either executive or presidential, but alone it cannot categorize them all. An appropriate supplemental criterion is whether Congress can assign the task in question to private organizations¹⁵⁷—if the President can be cut out of administration entirely, he has no cause to complain if Congress assigns the task to an autonomous agency.¹⁵⁸

An example of an otherwise difficult problem that can be solved this way is whether the FTC may constitutionally bring civil enforcement ac-

150. Public Debt Limit-Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 1037.

151. *Id.* § 251.

152. *Bowsher*, 106 S. Ct. at 3191.

153. Pub. L. No. 98-369, subtit. D, 98 Stat. 1199 (codified at 31 U.S.C. §§ 3551-56 (Supp. II 1984)). See *supra* notes 44-46 and accompanying text (description of Comptroller's role in CICA).

154. In *Ameron v. United States Army Corps of Eng'rs*, No. 85-5226, slip. op. (3d Cir. Dec. 31, 1986), the Third Circuit found CICA to be constitutional because the comptroller's decisions on the merits of bid protests were legislative judgments which the executive can ignore. Although the executive might have to obey when the Comptroller increased the 90-day stay period (in some cases the head of a procuring agency can override a stay with an appropriate certification) the court found that the interference with the executive would be de minimis. *Id.* at 39-43. Following *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3260 (1986), the court held that a de minimis separation of powers violation need not be overturned, particularly when its result is to "effectuate[] . . . the 'proper balance' of power." *Ameron*, slip. op. at 40-41.

If indeed an usurpation of an executive power can be de minimis then perhaps CICA need not be overturned. If, by contrast, the Supreme Court applies a bright-line separation of powers principle, then even a small violation will suffice to invalidate CICA.

155. See *supra* note 1 (partial list of affected agencies); see also *supra* note 2 (reasons why list can only be partial).

156. U.S. CONST. art. I, § 8, cl. 3. For a partial list of agencies potentially affected, see *supra* notes 1-2.

157. See *supra* note 135 and accompanying text.

158. See *Melcher v. Federal Open Mkt. Comm.*, 644 F. Supp. 510, 517-524 (D.D.C. 1986) (H. Greene, J.) (using similar reasoning to uphold constitutionality of Federal Open Market Committee), *appeal docketed*, No. 86-5692 (D.C. Cir. Dec. 16, 1986). For an example of such an argument, see *supra* note 135 and accompanying text. There are, of course, counter-arguments that the greater congressional power need not include the lesser in the separation of powers context. Any such argument, however, should carry a burden of proving that if adopted it would diffuse power among the branches, or otherwise increase individual freedom.

tions.¹⁵⁹ No enumerated power determines whether all enforcement actions must be by an officer answerable to the President.¹⁶⁰ Congress' ability to create private attorneys general to pursue civil enforcement actions¹⁶¹ suggests, however, that civil enforcement power could in theory be radically privatized, just as many traditionally governmental functions could in theory be turned over to federal corporations.¹⁶² If so, then the same *a fortiori* argument legitimates allowing non-presidential executive agencies to initiate civil enforcement actions.¹⁶³

B. *The Limits of Autonomy*

If the take care clause empowers the President, rather than creating a duty,¹⁶⁴ this should be understood to mean that it gives him the power to enforce the standard of governmental performance set by Congress, not to

159. See *supra* notes 3-5, 11 (agencies, including FTC, challenged).

160. The President could argue that the pardon power—which can be exercised before prosecution—implies exclusive presidential responsibility for criminal prosecutions, and perhaps civil prosecutions as well. Prosecutorial discretion, after all, is discretion *not* to prosecute, and thus analogous to a pre-prosecution pardon. In support of this view the President might note that the Supreme Court singled out the prosecutorial function, both civil and criminal, as uniquely deserving of absolute immunity against civil suits arising out of the performance of official duties by executive branch officials. See *Butz v. Economou*, 438 U.S. 478, 515 (1978); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.16 (1982) (“quasi-prosecutorial” function). This immunity suggests that the prosecutorial function is presidential, since only the President enjoys full civil immunity for the performance of official duties. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). But see *id.* at 748 n.27 (leaving open possibility that Congress could create presidential liability by statute). Lower courts have at times suggested that civil and criminal matters are indistinguishable for purposes of prosecutorial discretion. See *Nader v. Saxbe*, 497 F.2d 676, 679-80 & n.19 (D.C. Cir. 1974).

On the other hand, Congress may give other executive officials the power to remit fines and penalties by statute despite the assignment of the pardon power to the President. *The Laura*, 114 U.S. 411 (1885); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 282-83 (1856). And *United States v. Nixon*, 418 U.S. 683 (1974), suggests that the power to *bring* (not *remit*) even criminal prosecutions may be executive rather than presidential. The *United States v. Nixon* Court stated that the executive has exclusive authority and absolute discretion to decide whether to prosecute a case, but it *held* that the President cannot unilaterally countermand a decision on what materials will be subpoenaed by a special prosecutor working pursuant to regulations without first publicly rescinding the regulations according to established procedures. See Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116 (1974). Allowing autonomous agencies to bring civil enforcement actions in no way restricts the presidential pardon power. Furthermore, there is considerable precedent supporting civil enforcement by non-presidential executive agencies. See, e.g., *SEC v. Robert Collier & Co., Inc.*, 76 F.2d 939 (2d Cir. 1935) (L.Hand, J.); accord *SEC v. Sloan*, 535 F.2d 679, 681 (2d Cir. 1976) (per curiam), *cert. denied*, 430 U.S. 996 (1977).

Admittedly, tradition suggests particularly strongly that the criminal prosecution power should be electorally accountable. Perhaps fortunately therefore the FTC's enforcement power is purely civil; criminal prosecutions remain solely in the hands of persons directly accountable to the President.

161. See, e.g., *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (per curiam).

162. See *supra* note 135.

163. See *supra* text accompanying note 135. In any event, the President's pardon power will always remain the ultimate check were an agency to run rampant. There are fewer administrative obstacles to pardons than there are to impeachments.

164. See *supra* note 5 (authors holding this view).

Defense of Agency Autonomy

create the standards themselves.¹⁶⁵ At most, therefore, the take care clause permits the President to suspend or remove department heads for good cause, as defined by Congress, such as engaging in criminal behavior, or exceeding their statutory authority.¹⁶⁶

Congress often states causes for removal, thereby setting standards of faithful execution for the President to enforce. Most independent agency heads may be removed for “inefficiency, neglect of duty, or malfeasance in office” and presumably no other cause.¹⁶⁷ The heads of certain other independent agencies are protected by very restrictive statutes.¹⁶⁸ Board members of the National Labor Relations Board are entitled to “notice and hearing” if the President should seek to remove them for either neglect or malfeasance.¹⁶⁹ The Labor-Management Relations Act demonstrates that Congress can offer a Head of Department substantial autonomy without infringing upon the President’s legitimate supervisory role. This substantial protection should satisfy the congressional concerns behind the crea-

165. It might seem that the President should be free to set the standard in the face of congressional silence. However, *Wiener v. United States*, 357 U.S. 349 (1958) (unanimous decision), suggests that even in the face of such silence the President may still have to allege reasonable cause if there is a clear Congressional intent that the agency be autonomous. *Wiener* held that, in the absence of statutory authorization, the President could not remove a “quasi-judicial” officer without good cause. 357 U.S. at 356. Plaintiff was a member of the War Claims Commission, an executive body the Court found was clearly intended by Congress to be shielded from presidential control. *Id.* (The Commission cannot have been in either the legislative or judicial branches and must, by elimination, have been in the executive. Had the Commission been in the judicial branch the Court would simply have disposed of the case on Article III grounds of life tenure. Instead the Commission’s power appears to have been seen as arising from Article I. *See id.* at 355.) Logically, the holding in *Wiener* should apply to any executive function other than those specifically reserved to the President.

Although *Wiener* is often taken to mean that Congress may protect those officers whose function is not “purely executive,” *see, e.g.*, J. MASHAW & R. MERRILL, *supra* note 70, at 118–19, read narrowly it holds only that Congress may require *cause* for dismissal of a “quasi-judicial” official (an “executive” official under the terminology proposed in this Note), not that the official may be fully insulated from removal. *See* Office of Legal Counsel, Memorandum for Honorable David Stockman (Feb. 12, 1981), Pt. II, *reprinted in* J. MASHAW & R. MERRILL, *supra* note 70, at 153–54. The definition of a “purely executive official” (“presidential” under the terms proposed in this Note) remains unsettled.

166. U.S. CONST. art. II, § 3. The take care clause might also require that the President be allowed to fire officials for negligence. In any case, Congress has usually included inefficiency as one of the causes for presidential removal. *See supra* note 1 (statutes on removal of independent agency officers for “inefficiency, neglect of duty, or malfeasance in office”).

If the Constitution permits Congress to restrict presidential removals to a “for cause” standard, does it also define what that standard is? In other words, does the necessary and proper clause allow Congress to define cause for removal, or does the take care clause require that the President be allowed to suspend or fire for particular offenses? One place to look for minimum standards might be the part of the Constitution that contains standards for removal—the impeachment clause’s requirement of “high crimes and misdemeanors,” the original understanding of which covered a relatively narrow range of subjects. *See* R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 53–102 (1973). Because these standards properly apply to removals by Congress, the best place to look for standards to apply to presidential removals is acts of Congress, which after all make up the very laws whose faithful execution the President is charged to oversee.

167. *See supra* notes 1–2.

168. *See supra* note 1.

169. Labor-Management Relations Act of 1947, 29 U.S.C. § 153(a) (1982).

tion of so-called independent agencies.¹⁷⁰ A notice and hearing requirement allows Congress time to respond both formally and informally to a threatened dismissal, rather than to a presidential *fait accompli*. A notice and hearing requirement also creates due process rights which should allow judicial review of dismissals, for both the fairness of the hearing and perhaps the validity of the underlying allegation.¹⁷¹ Without a hearing, a court might be reluctant to rule that a dismissal was improper, if only for lack of judicially cognizable standards.¹⁷²

IV. CONCLUSION

Distinguishing between executive and presidential agencies reconciles the otherwise competing objectives of allowing Congress to structure the executive, shielding core presidential functions from legislative encroachment, and accommodating the Court's desire for a bright-line separation of powers. The distinction in *Humphrey's Executor* between "purely executive" functions and others, which can be assigned "independent" status, should be abandoned in favor of a taxonomy based on constitutionally committed powers, which preserves the holdings of existing cases and provides a coherent guide for the future.

170. See *supra* notes 44-56 and accompanying text. Political realities being what they are, few Presidents will seek to remove an officer who is entitled to a public hearing unless there is good cause.

171. A notice and hearing requirement would also allow Congress to set the standard of review that courts should apply.

172. Congress has failed to specify removal procedures and thus to set a standard of faithful execution for the heads of several agencies. See *supra* note 1. But see *supra* note 165 (Supreme Court requires that there be some cause for firing of "quasi-judicial" officer).