

## PANEL I

### AGENCY AUTONOMY AND THE UNITARY EXECUTIVE

STEPHEN BREYER\*

As moderator of this distinguished panel, I shall try to set the scene. I shall argue that we must separate two important issues: the first, “separation of powers,” raises issues of constitutional law; and the second, “Presidential control of agency decision making,” raises issues of fair and effective government. In discussing each, I shall raise a few points designed to lead you to conclude that the two sets of issues do not have much to do with each other, that the second set of issues is far more important than the first, and that at the heart of the second set lies the question of governmental “coordination” of both substantive policy and relevant law. Whether I succeed or not, we shall then go on to hear from Judge Silberman, a judicial expert on separation of powers, from Professor Elliot, who, as General Counsel of EPA, can examine the coordination problem from an agency’s point of view, and Mr. Eastland, a former high Justice Department official, familiar with its perspectives, problems and needs.

The classical “separation of powers” question, at its heart, is different from the “coordination” question the government now faces, for two basic reasons. First, the basic functional problem that underlies the doctrine is itself only distantly related to the legal doctrines that have arisen to deal with that problem. To understand that basic problem consider the example of Damien, the attempted assassin of Louis XV. Damien’s sentence was torture, being dragged through the streets tied to four horses and torn to bits. The important point (along with Damien’s last words on the morning of his execution, perhaps the all time classical understatement, “It’s going to be a rough day”), as Michel Foucault argues, is this: the reason for the terrible punishment is that the King himself embodied all law; thus, *any* violation of the law amounted to an attack on the King. A violation that consisted of an actual attack on the King himself, was that much more terrible, and therefore, obviously de-

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serving of the worst possible punishment. Punishment as personal revenge, the law as embodied in an individual, and the refusal to separate the person from the state can produce such arbitrary, unfair behavior that it is hardly surprising that the eighteenth century saw a need to separate firmly the author of the law from its enforcer. This problem, however, calls for a basic, not a perfect, separation between legislature and executive; and it does not necessarily require separation of the judiciary. Indeed, Montesquieu's "three" branches of government consisted of legislative, executive, and foreign affairs.

Second, the American Constitution's separation of branches is more rigid, more extensive, and more thorough than Montesquieu might have thought appropriate. Even so, I do not believe it should act as a serious constraint upon our ability to solve problems of government, nor to achieve necessary coordination among governmental departments. As one examines both past and more recent separation-of-powers cases, it seems as if the courts will grant Congress considerable leeway to create new kinds of institutions to solve particular governmental problems (e.g., the special prosecutor, the sentencing commission). It is not surprising that the Supreme Court has tended to uphold their constitutionality, for typically their creation does not threaten a constitutionally protected human right, nor does it call upon the Court to umpire a dispute between the other branches (for both Congress and the President agreed to the institution-creating legislation). Indeed, the cases, with one exception, suggest that the Court will uphold legislation delegating power to a branch provided: 1) the power is at least arguably related to the basic function of that branch;<sup>1</sup> 2) the specific text of the Constitution does not specifically forbid the delegation;<sup>2</sup> and 3) the delegation of the power to one branch does not unreasonably interfere with the ability of a different branch to carry out its constitutionally mandated duties.<sup>3</sup>

These principles would not seem unduly restrictive. And, if one is prepared to overlook some of the analysis (say, by reading *Humphrey's Executor*<sup>4</sup> as being not about a "headless fourth branch of government," but about "executive branch agencies come in many different shapes and sizes"), and assume that *Mistretta*<sup>5</sup> (the sentencing commission case)

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1. See *Federal Radio Comm'n v. General Elec.*, 281 U.S. 464 (1930).

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

3. *Myers v. United States*, 272 U.S. 52 (1926).

4. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

5. *United States v. Mistretta*, 488 U.S. 361 (1989).

more than *Bowsher*<sup>6</sup> (the Gramm-Rudman case) represents the future, there is not much reason to think the Court either has departed radically from those principles, or will do so.

To understand the basic governmental problem at issue, one should pose the famous question “quis ipsos custodiate?” and examine it in light of the regulatory problems of the 1970’s. Who will control the regulators, particularly if those regulators are “out of control?” And, who will provide proper coordination among programs; who will see that those who enforce individual regulatory programs make decisions that not only are sensible in themselves, but that also make sense when viewed in the context of a total package of related regulatory decisions?

In our tripartite system of government, we have tended to form our answers in terms of “the Congress, the Courts, and the President.” Congress’ immediate answer was the “legislative veto,” which it intended to apply to individual regulatory decisions of which some significant portion of its members disapproved. But *Chadha*,<sup>7</sup> for one thing, has made it difficult to continue down that path. The degree to which the courts are institutionally capable of holding regulators in check—particularly where the issue is unwise policy—is highly debatable, and I shall not engage in that debate here. But what about the President? Why can he not control the policies of the broadly defined “executive” agencies?

That the President might find such control difficult comes as a surprise to Europeans used to cabinet government; yet surprisingly difficult it is. For one thing, most statutes that create regulatory programs delegate the power to write rules, to adjudicate, to create administratively and to enforce those programs, not to the “President,” but rather to the “Administrator,” to the “Secretary,” to the “Board,” and to the “Agency.” The President does not have the legal right to make individual program-related decisions.

For another thing, the President does not necessarily find it easy simply to order a subordinate to make a particular decision on pain of dismissal. To dismiss a subordinate—indeed, for the President to intervene himself in a decision the statute entrusts to another—can impose a considerable political cost, the size of which depends upon the official, the relevant interest groups, the decision, and the circumstances. To understand the problem, simply consider how rarely one sees dismissals; and

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

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

consider as well how rarely the President will personally intervene in a regulatory matter.

Finally, a host of individual laws, sometimes limiting the President's power to dismiss, sometimes simply setting procedural rules for intervention, may inhibit his ability to control—or even to explore some of the considerations underlying—the individual regulatory decision.

Given the need for policy coordination, a need that increases substantially with the growth of regulation, every President since President Ford has tried to increase the power of the White House, or the Office of Management and Budget, to carry out and to oversee significant, detailed regulatory decisions. Thus, we have seen a Council on Wage and Price Stability gradually evolve into an OMB Office of Information and Regulatory Affairs (OIRA). We have seen executive orders (often exempting “independent” agencies) that require presentation of “regulatory agendas” to OMB and insist upon advance OMB review of significant regulatory decisions.

The extent to which this centralizing of regulatory power has worked—has led to better substantive regulatory policy making—by now ought to be the subject of evaluation. On the one hand, OIRA, or any similar OMB group, operates within formidable institutional constraints. Does it have the expertise necessary to determine whether or not a proposed agency rule is desirable? Is its staff of forty—mostly policy analysts—sufficiently large to supervise with understanding a regulatory bureaucracy of tens of thousands? Does it have the necessary authority to convince those agencies to do what it considers right? After all, the legal power to decide likely rests within the agency; and the President himself might not take the personal time needed to overcome high level opposition within the agency or department. Will the agency properly inform OIRA about its important decisions or will it use less visible decisions, unspoken policies, to achieve in practice that which it fears OIRA may disapprove?

On the other hand, OIRA and its predecessors have reported considerable success. If so, to what extent are such successes a function of time-limited political considerations and to what extent a result of the institution itself? To what extent is there agreement that the substantive results reflect “better” substantive policy?

The present institutional arrangement is difficult to evaluate because of 1) the inevitable tendency to confuse substantive results with which one agrees or disagrees with the merits of the structural, or procedural, ar-

rangements that led to those substantive results, and 2) the uncertain extent to which political considerations may influence results at both the "White House" and the individual "agency" levels. Yet, it is difficult for me to see how anyone could still believe that agencies will inevitably reach "correct" regulatory decisions on "technical, non-political" grounds, or for other reasons, deny that considerable coordination from the executive center is desirable. Thus, evaluation—to see whether the present arrangements are sufficient, whether they should be modified—is important. And, luckily for us, Don Elliot may help us in this respect.

Before closing, let me briefly mention one other related matter that I hope we shall have a chance to discuss. It concerns legal matters. To what extent does the Department of Justice have adequate authority to coordinate the legal positions that executive branch entities place before the courts? OIRA, as I have mentioned, consists of a group of policy analysts, not lawyers. They seek to coordinate and to review substantive policy, not legal interpretations. The Department of Justice, in principle, has authority to approve, and thereby to coordinate, legal positions taken by various government departments and agencies in court, but this principle is sometimes denied by statute in practice. The result, doubly surprising to foreign observers, that the government may take conflicting positions in different courts, or that it may become wedded to positions that are sensible when seen from the perspective of a particular agency tied to enforcing a particular regulatory program, but not sensible when seen from the government's center, is particularly problematic in the post-*Chevron*<sup>8</sup> era, when the courts must pay particular attention to the views of an agency about the meaning of the law. Is the degree of coordination insufficient? too constricting? about right?

To reiterate, I have tried to raise three sets of questions: 1) To what extent is the current "separation of powers" doctrine an obstacle to effective government?; 2) How can the President achieve coordinated, effective implementation of programs in the executive branch of government?; and 3) How can the President effectively coordinate legal policy, affecting those programs?

To try to dramatize these issues, one might ask: an authoritarian President or balkanized Agencies? Too much centralized power or teetering on the brink of anarchy?

I hope this introduction will stimulate discussion.

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8. *Chevron, U.S.A. Inc. v. National Resources Defense Counsel, Inc.*, 467 U.S. 837 (1987).

## LAURENCE SILBERMAN\*

Asking me to speak on the doctrine of the unitary executive is very much like asking General George Pickett to speak on the future of the Confederacy after the Battle of Gettysburg. For just as historians love to point to Pickett's Charge as the high water mark of the South's effort to secede, some legal scholars have labeled my opinion, in which my colleague Steve Williams joined and collaborated, as the brief apogee of a constitutional lost cause. As I listen to Steve, it sounds very lost indeed.

Our decision and, even more, Justice Scalia's dissent, issued when the circus arrived in the big tent, are described in much of the literature as extreme examples of a formalist approach to separation of powers jurisprudence. It was not until I was a judge for some time, having lost track of the dominant currents in American law schools, that I realized that formalism was a pejorative. It never occurred to me that "strict adherence to prescribed forms," which is how the dictionary defines formalism, was a bad characteristic for a judge or lawyer.

Certainly such an approach to the first amendment is not similarly denigrated. But labels notwithstanding, I have the impression that views on separation of powers, particularly the concept of the unitary executive, are not uninfluenced by contemporary political trends. Of course, there are exceptions, but many of those who are most hostile to a Presidential claim to exercise all executive power are similarly hostile to the politics of the majority of recent Presidents. Of course, the opposite may also be true, and where you stand may depend on where you sit or have sat. I have often wondered if my own views would have been different had I served, as did several of my colleagues, in the legislative branch, particularly during a period when the President was of another party.

Of one thing, however, I am sure: had the issue presented in *Morrison v. Olson*<sup>9</sup> been presented at a different time in a different context, the prevailing academic reaction also would have been entirely different. Suppose that another kind of independent counsel law—call it the Loyalty in Government Act—had been passed during the Truman Administration by the 80th Congress, perhaps, like the Taft-Hartley Act, over the President's veto. And further suppose the Act had been a product of congressional concern, which as you will recall did exist, that the Tru-

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9. *Morrison v. Olson*, 487 U.S. 654 (1988).

man Administration was insufficiently zealous in rooting out communists or communist sympathizers in senior executive positions. It might well have been said, fairly or unfairly, that the Administration had a conflict of interest in investigating and prosecuting such individuals because of the political embarrassment that exposure would bring. I can easily visualize, as I am sure you can, the senator from Wisconsin, or perhaps from California, introducing such legislation in a fiery floor speech, promising an end to the Administration's coddling of communists. And it takes little further imagination to picture an independent counsel prosecuting an Alger Hiss or Harry Dexter White under such a statute, and the constitutional questions subsequently presented in *Morrison v. Olson*<sup>10</sup> being raised at that earlier time. Is there a single person in this entire room who has any doubt, any doubt at all, where that day's "Tribes" and "Triblets" would have been found in such a controversy? Surely on the side of the unitary executive. I have on occasion very much regretted that we did not experience that exact scenario, because I am convinced the Supreme Court at that time and in that context, would have held the statute unconstitutional. I see Ted Olson watching me very carefully. And I am sorry, Ted, that did not happen.

I do not mean to suggest the Supreme Court's opinion in *Morrison v. Olson* was dictated by political considerations, although the aftermath of Watergate and the difficulties of the Attorney General at the time of the litigation did not help the cause of the unitary executive. No, I think in explaining the Court's opinion, and thereby determining what is left of the doctrine of the unitary executive, one must focus on another factor entirely: the Court's willingness to countenance efforts to split the unitary executive so long as the judiciary remains the final arbiter of intra-executive battles—so long as the judiciary, in a sense, benefits from the damage done to the Presidency.

At the time the *Morrison* case came to court, the Supreme Court had issued a series of opinions through the seventies and the eighties that seemed to bolster the Presidency against direct congressional encroachment: *Buckley*,<sup>11</sup> holding that Congress could not appoint officers of the United States; *Chadha*,<sup>12</sup> determining that Congress could not circumvent the President's constitutional power to shape legislation through the

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10. 487 U.S. 654 (1988).

11. *Buckley v. Valeo*, 424 U.S. 1 (1976).

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

legislative veto; and *Bowsher*,<sup>13</sup> holding that Congress could not maintain theoretical authority to remove officers who perform an executive function. I believe it is not coincidental, however, that the schemes reviewed in these cases shared another characteristic: they did not delegate to the judiciary the application of the check on the executive. In retrospect, that may be the real consideration underlying the Court's ostensibly vigilant protection of the Presidency in those circumstances.

After all, the Court has for a long time looked more favorably upon various devices that fracture the President's authority so long as the federal judiciary remains the coordinator of that split authority; or to put it another way, perhaps an unkind way, so long as the federal judiciary is the ultimate beneficiary of the power of coordination which the President lost. That is not to accuse the Court so much of conscious self-seeking; rather, it is to point out that men and institutions are rarely inclined to question their own wise exercise of power.

Although in *Humphrey's Executor*,<sup>14</sup> the Court justified allowing Congress to place a good-cause restriction on the removal of an FTC commissioner, notwithstanding *Myers*,<sup>15</sup> on grounds—recently discarded in *Morrison*<sup>16</sup>—that the FTC was a quasi-judicial and quasi-legislative body, not a pure executive agency; it should not be forgotten that what constitutes just cause for removal is a question that the Court ultimately controls. Similarly, the Court in *United States v. ICC*<sup>17</sup> permitted a lawsuit between the Justice Department and an independent regulatory agency, notwithstanding a claim of non-justiciability—surely it was in part because the Court stood ready then, as it does now, to resolve disputes between portions of the executive branch that end up in court.

We saw the Court permit litigation between two undeniable parts of the executive branch for the first time, and in my view ominously, in *United States v. Nixon*.<sup>18</sup> The Court recognized the standing of a prosecutor appointed by the Attorney General to sue the President. While *Nixon* surely foreshadowed the demise of the unitary executive, at least the Court advanced a shred of justification in a footnote: the Attorney General, an agent of the President, issued a regulation erecting a barrier

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

14. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

15. *Myers v. United States*, 272 U.S. 52 (1926).

16. 487 U.S. at 890-91.

17. 337 U.S. 426 (1948).

18. 418 U.S. 683 (1973).



to the President's removing the special prosecutor. Of course, the regulation actually represented a congressional slicing of executive power, since it was issued as a condition of the Attorney General's confirmation by the Senate. The Court later in the opinion candidly admitted that the obvious encroachment on the President's authority over the executive branch was necessary because the judiciary needed the evidence to carry out its constitutional function "to do justice in criminal prosecutions."<sup>19</sup> Now, after *Morrison*, there appears to be no principle that protects the President's authority to control his own branch against either overt or covert congressional invasions, so long as Congress is wise enough ostensibly to divert the lost power to the judiciary, rather than to itself. As Justice Scalia put it, the Court's message seems to be: "Trust us. We [the judiciary] will make sure that [the President is] able to accomplish [his] constitutional role."<sup>20</sup>

Of course, the two key aspects of Presidential authority over executive branch personnel are appointment and removal. I regard removal as more important than my colleague here. The majority in *Morrison* thought it not constitutionally incongruous for a court to be given the power to appoint those who prosecute criminal cases before it—notwithstanding our constitutional tradition of separating the prosecutor and judge—because of the judiciary's familiarity with the criminal process.<sup>21</sup> But in a footnote, the Court suggested that the judiciary would have "no special knowledge or expertise" justifying the power to appoint "officials in the Department of Agriculture or the Federal Energy Regulatory Commission."<sup>22</sup> Frankly, I cannot understand why we would be thought more expert in criminal cases than FERC cases. We probably get more of the latter than the former. Still, I suppose the Court wished to caution Congress not to assume that the authority to appoint prosecutors would extend necessarily to authority to appoint officials responsible for litigating civil programs even though, in my view, the incongruity is greater in the criminal field because of a factor which Judge Breyer did not mention—the impact on the individual.

As for restrictions on the President's removal power, it is simply impossible to glean any indication, let alone principle, out of *Morrison* that even suggests the boundaries of statutory limitations on the President's

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19. 418 U.S. at 707.

20. 487 U.S. at 727 (Scalia, J., dissenting).

21. 487 U.S. at 676.

22. *Id.* at 676 n.13.

authority to remove executive branch officials. It can no longer rest, as I thought when I wrote our opinion, on the division between those who exercise policy responsibility and those who do not. I do not think it can be seriously questioned that independent counsel has and uses enormous policy discretion. My guess is that removal restrictions are now more defensible when they relate to officials subject to significant judicial oversight, those whose function is primarily litigation. Perhaps it was not so farfetched when counsel for the House of Representatives argued in *Morrison* that Congress could limit the President's authority over the Solicitor General, so long as the effectuating power to do so was transferred to the judiciary.<sup>23</sup>

In my view, *Public Citizen v. Department of Justice*<sup>24</sup> made clear that one should always look carefully to discover the judiciary's real interest in separation of powers cases. There, three members of the Court, including two from the majority in *Morrison*, explicitly determined that the Advisory Committee Act was unconstitutional as applied to the ABA Judicial Selection Committee because it interfered with the exercise of the President's appointment power. (To avoid the constitutional issue the majority imaginatively interpreted the statute as not applying to the ABA.) *Morrison*'s balancing test was eschewed ostensibly because the President's appointment power over judges is textually explicit, whereas authority over removal of executive branch officers is implied. But that rationale seems inconsistent with the Supreme Court's recognition in *Bowsher* that to control subordinates, the authority to fire is even more important than the authority to hire.<sup>25</sup> Be that as it may, as all the world knows, the ABA's Advisory Committee has become more of a *check* on the President's appointment power than an enhancement. It is a check that is wielded too often behind the scenes by members of the judiciary itself.

It is often said that *Morrison v. Olson*, like *United States v. Nixon*, stands for the proposition that in our democracy no person—even the President—is above the law. But it is the judges who apply—and sometimes, as in the Supreme Court, make—the law. Therefore, when considering how strong the concept of the unitary executive remains in separation-of-powers jurisprudence, one should bear in mind that it has,

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23. *See id.* at 694-95.

24. 109 S. Ct. 2558 (1989).

25. 478 U.S. at 3188-3191.

and probably always will, give way to another notion which I cautioned against in my *Morrison* opinion: judiciary *über alles*.

#### E. DONALD ELLIOTT\*

I normally begin these talks by saying, it is nice to be back in front of a relatively friendly academic audience. I feel a little bit like when I was selected for my track team in high school and the coach said, "You're on the javelin team. Get out and receive." When Judge Silberman advised me at lunch that the recent symposium on the separation of powers at George Washington University<sup>26</sup> basically consisted of a bunch of second-rate articles, including mine, I began to wonder whether or not that was actually correct.

I would like to talk a little bit about the notion of formalism—formalism being a dirty word. I am not against formalism or literalism in constitutional adjudication; I think it has a very important role. What has concerned me is the way in which some of the techniques of literal interpretation that dominate, and properly dominate, our constitutional adjudication have also come to dominate much of our public dialogue about these issues to the extent, I think, of impoverishing some of our ability to think about these issues. I intend today to talk about the unitary executive, but not simply from the standpoint of constitutional law. I would like to pick up on Steve Breyer's point and also consider the wisdom and the policy advantages. The basic notion is that the unitary executive theory is not only a good thing because it is required by the Constitution, but also because you can defend it on the ground that it results in better decisions.

Now, going back to the first point for a minute. Not too long ago when I was at the White House for my briefing for new Presidential appointees, Roger Porter was telling a story about a flight back from St. Louis with the President. He and the President were alone together for a period of time, and they got into a deep discussion. Roger, a very, very bright guy, said he thought it was a very provocative discussion on the question of why it was that the framers of the United States Constitution were so wise; how this group of 400,000 people living on the eastern

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26. See *Symposium—Separation of Powers and the Executive Branch: The Reagan Era in Retrospect*, 57 GEO. WASH. L. REV. 506 (1989).

seaboard produced Madison, Jefferson and all the rest. They came to the view that maybe the framers put before themselves somewhat different questions. They asked questions about what type of government structure would lead to greater results. I have been trying ever since to figure out how to tell Roger Porter and the President that that thought is the last paragraph of a "second-rate" article that I wrote in the *George Washington Law Review*.<sup>27</sup> I finally came upon the notion that the best way is to tell the story at some conference and see if it will work its way back.

In any event, part of my beef with the notion of formalistic jurisprudence is that it impoverishes the thinking of lawyers and judges, and it impoverishes the public debate about how government works and what history teaches us are the characteristic flaws and weaknesses of particular governmental designs. The reason I think this impoverishment of public debate is so important is that the predominant thing about our Constitution on many of these issues of government structure—and this is where I agree with Steve Breyer—is really its lacuna. For most, or many, of the important questions—I think this is the point that Peter Strauss made—regarding issues of governmental structure, we find very little guidance in the words of the Constitution. We are in many ways building institutions in the holes of the great silence of the Constitution.

So let me turn then to the policy question of whether or not an inter-agency review process, a unitary executive subjecting the decisions to the views and opinions of others, can be defended not only on grounds of constitutional theory, but also on more practical grounds of good government and political theory. I think the answer to that question is clearly "Yes." I think that the governmental decisions that emerge as a result of the review process, which takes place within a unitary executive, are much better decisions, much wiser decisions, than they would be if we had the strong theory of agency autonomy. To be more specific, I think the decisions that are reached in the environmental area are sounder, better, wiser, and more balanced decisions, and create better government because the results the EPA might reach if left to its own under a strong autonomy view are hammered out and tempered by the very agency reviews and the unitary executive process within the executive branch. What is important about this, I suppose, is not only that I think that based on my very limited tenure at EPA, but that Bill Riley thinks that

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27. See *supra* note 26.

too. He said so the other day in a meeting, and he thinks as a result of the OMB review process, we probably come to better decisions than we would without it.

I think the explanation, at least in my view, is set out in a very important article by Cutler and Johnson, which was published in the *Yale Law Journal* in 1975, called "Regulation and the Political Process."<sup>28</sup> I recommend it to anyone who is interested in this area. It is a very important article for two reasons: One, I think it gives us a very valuable historical perspective on the difference between today's governmental structure with the OMB process playing such a major role, from what people perceived it to be as recently as fifteen years ago in 1975. In that article, Cutler and Johnson argue strongly that we need to consider whether and how to create a system for continuous political monitoring of all government regulation. They have a specific proposal for how to do that, which would basically give the President authority to break off the various goals of single-mission agencies. Now they made one mistake: they built into their proposal a legislative veto—apologies to my friend, Ted Olson. Other than that, I think the article wears remarkably well.

I think one of the reasons why we need a unitary executive is because almost all agencies have a single-mindedness of purpose about its goals and values. A natural process of self-selection takes place in government. Those people who tend to work for the Environmental Protection Agency tend to be people who think environmental values are very important. They probably, by definition, think environmental values are more important than the population of the United States generally does or they would not have chosen to make that their life's work. So, of course, we believe environmental values probably should trump most other values. At least many people believe that. I cannot say I believe that, but I probably believe they are more important than many other people do.

In the interagency review process, we and every other agency are required to justify our decisions in a process of debate, dialogue, and weighing and balancing against other competing goals and values. The Department of Defense or the Department of Energy comes in and forces us to listen and pay attention to what the consequences of our actions will be for the other important goals and values of our society and our

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28. Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975).

political process. I think it is unfortunate that many of my colleagues who are very much in favor of liberal dialogue and debate—a very popular theme in the Academy these days—do not recognize that the unitary executive theory and the OMB and Justice Department reviewing roles really bring that same need for dialogue among people with competing values. The process is about the harmonization of your values with another person's values through dialogue.

I think the major shortcoming in the process, at least as I have experienced to date, is that it is awfully cumbersome. It is not as speedy as perhaps it might be. I think as this process develops further, it is likely that we will try to make the process not delay things as much as it does now. Right now, you are not only talking about OMB and the Justice Department, and a lot of other individual agencies, but there really can be a very, very long process of interagency review and comment.

The thought I would like to leave with you in closing is that the OMB process, with its reliance on cost-effective analysis, is often misunderstood by my students, particularly in environmental law, because it compares the benefits of a particular program, such as the environmental benefits of something we would like to do, with the cost of doing so. Students, as Frank Easterbrook knows, or Steve Breyer knows, or Steve Carter knows, are very fond of saying, "Well, yeah, but environmental values—it is just money on the other side!" What people often miss is that the money on the other side is a way of measuring all the other things we can do with those resources. Therefore, in some sense, the money, the cost-benefit process, is a way of trading off our environmental values against all the other competing values that society might pursue.

In closing, I would just like to say I think the unitary executive, interagency review, and so on, is really, in an interesting way, a kind of microcosm of the framers' general vision of separation of powers in government. That is to say, those who wish to use the power of government to pursue their particular goals and objectives are required to run a virtual gauntlet of other institutions with competing values. So if something is to be done using the power of the federal government, then it has to pass through a number of checks and be approved from a number of different perspectives. That strikes me, in the long run, not only as being constitutionally required, but as resulting in much better and wiser government decisions.

### TERRY EASTLAND\*

I remember when I came to Washington in 1983 and joined the Justice Department—it was March of '83. Something happened the first week I was here that educated me on the nature of the modern state. Ted Olson, I am sure, remembers this quite well. We were seated around the Attorney General's conference table that morning, reading our newsclips which, by the way, is another way in which the unity of the executive branch is fractured. We all were reading stories about how the President and the Attorney General, Bill Smith, somehow had been censoring the films that were coming in from Canada dealing with acid rain. Of course, I, being new and naive and just up from some place other than Washington, thought, of course, the President was responsible, and in fact he had probably ordered the censorship, and probably through Bill Smith. I was sure Ted Olson had something to do with it. Of course, it turned out Bill Smith was stunned. He did not know about it, neither did Ted Olson, and neither did anyone else. In fact, down in the Criminal Division, a GS-12 was applying a particular statute, the Foreign Agents Registration Act. He had a particular job to do: he would see whether these films from another country comported with current policy, and then he would act accordingly. So much for the theory, I guess, of the unitary executive. You know it is not the President or one of his chief aides that was doing this, but it was just simply the routine nature of business inside the Justice Department.

I point this out only to make the observation that government is very large—larger than ever before. This is, as we shall see, one of the reasons it is difficult to achieve unity in the executive.

I would like to explore this topic less from the narrow focus of agency rulemaking. Instead, I would like to explore the notion of unity from the standpoint of *The Federalist Papers*. The question is, "Why did the framers think unity in the executive branch important or even necessary?" The answer has to do with their particular science of politics.

In the eleven essays on the executive branch, all by Alexander Hamilton, we find unity listed as a so-called "ingredient" of something else, that is to say, of the energy of the executive. The other ingredients are the following: duration of office, by which Hamilton meant the four-year term and re-eligibility, which, as we know, has been eliminated; an ade-

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quate provision for the executive support, which is an adequate salary and competent powers, which are the constitutional powers listed in article II. These ingredients, when brought together in the same mixing bowl, make executive energy.

In a moment I will come back to the particular ingredient of unity. But here, I think it is important to focus on what unity, in combination with these other things, gets you. It gets you energy, which was critical to the framers' understanding of the new constitutional order. In number seventy of the *Federalist Papers*<sup>29</sup> Hamilton wrote that energy in the executive is a leading characteristic of good government. An energetic and independent executive was important for two reasons: one was administrative, the other political. Both of these reasons were rooted in the experience of the 1780s—the administrative in the national experience and the political in the state or colonial experience.

Under the Articles of Confederation, the actual administration of national government had proven extremely difficult. It was widely recognized that there needed to be some independent entity that could carry out tasks, that is to say, execute the laws. It was believed only an energetic body could do this. At the same time, experience in the states had demonstrated something else—that legislatures themselves can threaten the liberty of the people. There needed to be some way to contain what John Marshall called “the wild projects of the moment,” which seemed to emanate routinely from legislative bodies. Again, the executive was needed for this political job. Because the executive, on this understanding, had to act as a force against the legislature, it was made, by definition, to be energetic. I think Hamilton was smack on when he understood the veto power as an ingredient of energy.

Energy was the precious commodity in the framers' political science. Even so, let us note with some care Hamilton's formulation: Energy of the executive is a—“a,” not “the”—leading characteristic of good government.<sup>30</sup> Hamilton does not simply equate good government with an energetic one, and we should be glad that the article he used was “a” and not “the.” Totalitarian governments, after all, can be energetic but they cannot be called “good.”

Again in *Federalist Paper Number 70*, we come upon the connection between power and the people who grant the power. Good government

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29. THE FEDERALIST NO. 70 (A. Hamilton).

30. *Id.*



is government accountable to the people. It has no power other than that granted to it by the people. Energy and a “due responsibility” in the executive, as Hamilton also insisted upon, are together the leading characteristics of good government.<sup>31</sup>

With this much of the framers’ political science sketched, I would like to return to the matter of unity. Should the executive be a unity or a plurality—one person or a council of many? Hamilton explains why the Convention’s choice of unity is superior to the alternative, plurality. I think it is a measure of the successful choice that we have forgotten much of this whole argument. It was about both energy and accountability. Indeed, in discussing the pardon power, it is clear that it is not only speed and vigor that the executive has to have, but also the ability to deliberate. Hamilton in a later paper, not in the *Federalist Papers*, equates energy ultimately with wisdom.

So much for the theory. Today the executive department is obviously much, much bigger than at the founding. I am intrigued to note that Washington reviewed all of the correspondence going out of the executive department. No President could do that today. The President needs aides—lots of them. But the larger the executive department gets, the more likely it is that the executive will be less unitary. This is so, I think, regardless of the growth of congressional staff, the subcommittees, or other external developments. It is so in large part because of human nature. And the less unitary the executive becomes because of expansion, the less energetic the President becomes in the administration of the government.

One good argument for a smaller central government is that it may produce a natural tendency towards unity. A nonofficial, political culture tends to pull the executive office apart. The many interest groups, which collect in Washington and are a part of this culture, strive to hold the executive branch captive. Bill Bennett tells the story of his arrival at the National Endowment for the Humanities (NEH). He was told by a staffer that the “groups” were ready to meet with him. The invitation was refused, but the “groups” went ahead and met. The Washington presence of these “groups” is difficult for most executive appointees to ignore; it is easy to pay attention to what they say. One reason is that appointees tend not to know that much about what they are doing. And precisely because government is so large and there are so many political

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31. *Id.*

appointees, the President is hard-pressed, especially early on in the administration, to provide specific guidance. Consider that Bennett and his colleagues at NEH never received any guidance from the White House as to what their agenda should be. They had no guidance. They had to hope to perform their tasks in the way that the President wanted. In other words, they had to hope that their eyes, arms, ears, and hands would perform as the President wanted.

Finally, I will just note three other things that work against unity. One is the national news media. Second is criminal, unethical or unwise behavior, by political appointees. The third is a special prosecutor culture that encourages specious charges of wrong doing.

How does a President overcome all these forces that work against unity? We can blame Congress. We can blame the media and other forces. But, the Executive himself needs to be energetic if he hopes to preserve his unity and his energy.

#### DISCUSSION

**BREYER:** I am trying to think of an example to make my point about “centralized” v. “bulkanized” decision making. It is hard to think about it in totally abstract terms, which would be useless. It is easier to think about it in terms of particular policy decisions. For example, I do not think it is a good idea to have a “unitary executive” if that means centralized decision making in the White House about whom to prosecute criminally. I would have second thoughts about the President himself deciding who should receive radio and television licenses. Consider all the issues of the day. I personally think there is a need for a centralization of environmental policy, which in my view would bring about a more effective policy, more bang for the buck. And I think regulations of safety and health risks will require greater centralization and coordination. But, to decide proper government structure one must decide irrespective of each individual kind of policy decision; one cannot have a different structure for each different kind of policy. And that kind of more abstract general decision about structure is difficult to make.

My second point is that there are general reasons, politically speaking, for giving more centralized control in many areas of regulatory decision making. One of them is the need to relieve the individual agencies from the political pressures brought by specialized constituencies. Of course,

the President is not immune from political pressures. I remember a story about someone who once worked for a President years ago. The President was sitting in his office and asked his assistant, "Which airline should get the route?" The assistant wrote a little memo saying, "Mr. President, there's Airline A and Airline B. Airline A gave us a lot of money in the campaign." The President was furious. He ran out and said, "Never write a memo like that again! Come in and tell me." I mean, Presidents are not immune from politics.

We do know this, however, the political pressures upon the President are more general in nature. The President alone is a politically responsible official, because he is an elected official. He is paid to consider politics. That fact cuts a bit, generally speaking, in favor of the White House becoming the focus of political pressures. Note, however, that the political and substantive considerations change over time and the desirable focus of pressures and decision making may also change. It is not surprising that the constitutional separation of powers doctrine is liberal enough, by and large, to keep the courts from having a single structure. Indeed, Congress says that under the Constitution civil servants can be treated like judges. Congress can give adjudicatory officials like Humphrey of the FTC and Wiener special protection from dismissal. Congress can even give a special prosecutor special protection. I doubt that Congress could tell the President he cannot fire the Secretary of State, however. Rather the Constitution gives the government leeway—not absolute, but a lot of leeway—in terms of proper structure. That is, in part, because political considerations as well as substance are relevant to "proper" structure, and these considerations change over time.

**SILBERMAN:** Well, first, I should hasten to say that I have not referred to Professor Elliott's article as a second-rate article. Actually, I thought some of the other articles printed along with it suffered by comparison. I did think there was something tenuous about his argument, which, I expect, will stiffen after he spends a few years in the executive branch. I would not be surprised if then he sounded a little bit more like his colleague, Professor Carter. One point Steve Breyer mentioned in his opening talk, and alluded to again, is a very interesting question. He said that Congress does not delegate the interpretation or application of laws to the President, but rather to his subordinates. It is a very interesting proposition, although, I have to confess that I did write an opinion rejecting it. I suggested that the President has the power under a broad

range of circumstances to oversee directly his subordinates' interpretation and application of the laws.

*Wiener*,<sup>32</sup> which is a quasi-judicial situation, is quite different. It is different because it is quasi-judicial, and therefore, not policy making. The same thing is true, as I discussed in the *Morrison* opinion, with respect to limitations on the President's power to discharge civil servants. No theoretical civil servant prior to *Morrison* who is making policy, or who works for an individual somewhere along the line who makes policy, was thought not to be subject to removal by the President.

One other point which I alluded to in my talk, which I come back to and which cannot be said too often: If one only thinks of separation of powers as a management principle for organizing the government, a structure of organizing government, one is more inclined to appreciate Steve Breyer's approach; "Hey, the Court should not get involved. This is just a question of how boxes are organized. Unless it really offends something blatant in the Constitution, let's not take the trouble." That, in my view, totally ignores that separation of powers is designed to protect the American people against too much accretion of government. Even if a President, the Congress, and the judiciary together decide they will obliterate separation-of-power limitations, it is constitutionally objectionable because it impacts on the American citizens. Nowhere is that more clear, in my judgment, than when it involves the unconstitutional prosecution of citizens.

**ELLIOTT:** Because I am no longer in the academic business, I begin to realize that the equivalent of a tour to promote your book, for which you go on talk shows, is to come to conferences to talk about your articles, so that people can encourage other people to read them. So I do not care how this article gets rated, as long as people spell the citation correctly.

In my prepared parts, I tried to resist the temptation to discuss cases with the two judicial members of the panel. That proves to be an irresistible temptation for law professors. But since I was arguing about the over-judicialization and over-literalization of our political dialogue and conference issues, it seems to me that I ought not, in my own words, to fall prey to the tendency for which I myself was criticized. However, now I cannot resist.

I think I disagree with Steve Breyer's prediction that the *Mistretta* sen-

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32. *Wiener v. United States*, 357 U.S. 349 (1948).

tencing commission case<sup>33</sup> necessarily represents the future of our separation-of-powers jurisprudence, as opposed to *Bowsher*.<sup>34</sup> In the literature, people, I think Peter Strauss coined this phrase, are talking about two tendencies: functionalism and formalism in our separation-of-powers jurisprudence. I do not like the terms much. I agree that formalism is not really the right word. One of the problems we always face in legal academics is if we do not use the same words that are already established, if we all invent our own private language, then we do not have any type of cumulative effect.

Anyway, I do not think formalism is politically the right word. In any event, I think these two tendencies, which I think are reflected alternately in the Supreme Court's opinions, are both generated by the same fixation on literalism as the jurisprudential underpinnings for separation-of-powers jurisprudence—which is why I say that separation-of-powers jurisprudence is invisible. Not that the results are wrong, but that we failed to really develop over time a cumulative wisdom in the separation-of-powers or through the judicial process. There I disagree with Judge Silberman. I think that the primary contrast is with something like the first amendment. I think that we have constructed incredible intellectual edifices under the first amendment. They may be right, or they may be wrong, but it is not formalistic. Whatever it is, there is a tremendous body of lore there; I do not see similar creativity in the judicial elaboration of separation-of-powers principles.

With that point, let me just remark very quickly on the point about *Morrison v. Olson*.<sup>35</sup> With all due respect to Ed, I think it is a pretty good opinion, but it is not popular here. One of the reasons I think it is a good opinion is because the Court begins to get beyond particular results, and addresses some of the structural and conceptual issues concerning how the framework of governmental design should be made to work better. My response to Judge Silberman is that in the hypothetical that he put forward about the independent prosecutor in the times of McCarthyism, the substantive policy of prosecuting people for McCarthyite reasons would be wrong, but not necessarily the constitutional structure of creating an independent prosecutor.

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33. *United States v. Mistretta*, 488 U.S. 361 (1989).

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

35. 487 U.S. 654 (1988).

**EASTLAND:** What I would like to do is pick up on one of Elliott's comments regarding the tendency of legalism to impoverish our public debate. I want to take that point in a slightly different direction. I think there is a reason Presidents do not tend to invest their time in agency rulemaking and other related issues. I am not saying this is good or bad, but I want to describe the reason.

The reason is that the President also has political responsibilities. A President has come to be expected, certainly in the age since Woodrow Wilson, to be a rhetorical President. Ronald Reagan performed according to form, according to expectations. During his first year in office, on February 18th, he came out with a large, substantial, ambitious economic recovery program—the national economy having become one of the President's chief responsibilities in recent decades. He went on national television to speak and get legislative votes. We all know the history of that. That was the rhetorical Presidency in action. Notice the bang for the buck you get as the President. You can get a victory, a tangible victory, understood by the voting public.

George Bush, here in the ninth year of the Reagan-Bush Administration is, I think, a very interesting, almost nineteenth-century President. He is not the rhetorical President. He does not give speeches; he hates speeches. He has given two speeches on national television. Neither speech was to push legislation. But he has vetoed ten bills; Reagan vetoed just two in the first year of his Presidency. Some of the bills Bush vetoed were not just policy bills, but they threatened the prerogatives of the President. This President also has, I think, a keen understanding of some of those things I was talking about in regard to unity.

I think that it is interesting to observe that, while we may worry about the degree to which a particular President governs as we might want him, the President that we have now does seem to be tending to the office in a way that is remarkable. He has prevented leaks; we have not had the kind of leaks that you had in the first year of the Reagan Administration. He also does not have ethics problems with his people. This has helped his unity, and it has helped him have energy in the areas in which he wants to have energy.

### QUESTIONS AND ANSWERS

*QUESTION: I would like Professor Silberman to comment on such peculiarities as the fact that the Federal Trade Commission (FTC), allegedly has been given the power to file its own briefs before the Supreme Court without having to receive permission for such filings from the Justice Department. That is just one example of what seems to me, in theory, an unconstitutional creation of power that cannot be checked by the executive.*

**SILBERMAN:** I answer the question without assuming, as your question assumes, that the right is unconstitutional. As you may know, there is a statute giving the FTC authority, which it can easily exercise, to seek *certiorari* without the approval of the Solicitor General. It has done so twice, and twice the Supreme Court has granted *certiorari*. As the burden of my talk should suggest, going back to *United States v. ICC*<sup>36</sup> in which incidentally, to make Terry's point, the government, the Justice Department, argued in the Supreme Court that they could be adverse to the ICC because they wanted the short-term advantage out of it; they wanted to sue as a shipper. In Frankfurter's dissent, he said it was not justiciable, but he makes Terry's point that often the executive branch shoots itself in the foot.

Again, my point, my thesis, was that the Supreme Court looks quite convivially at splitting the executive branch in any kind of litigation forum because—and I do not mean to put this in too harsh a way, human nature being what it is—it enhances the judicial power.

**BREYER:** Well, I think the judiciary has a strong interest in making certain that there is coordination of legal positions within the executive branch. There is a governmental interest in coordinating regulatory rules through a central body which is politically responsible eventually to politically elected officials, such as the President. Legal positions ought to be coordinated as well. If some particular agency is upset about a particular Department of Justice position it asks Congress and sometimes obtains an exemption from the requirement of Justice Department coordination. The result is that a judge may see inconsistent or different executive branch positions taken by the different executive agencies. When the case gets to the Supreme Court, the executive begins to coordinate the views of its separate parts. Well, that is a little irritating for a

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36. 337 U.S. 426 (1948).

lower court which may discover the executive reversing field after it decides a case. So, I think the judiciary has a strong institutional interest in seeing that the executive agencies' legal views are coordinated within the executive itself.

**SILBERMAN:** But that is only if you have a certain view of the judiciary, which Judge Breyer has.

*QUESTION: Judge Silberman, I was delighted to have you raise what I think is the key question here, and that is the effect of a statute which purports to vest authority directly in subordinate officials. I would like to see just how much trouble you are willing to get yourself into.*

**SILBERMAN:** I think I have shown I shall.

*QUESTION: Wait until you hear this one. Let us take, for example, the Tea Importation Act,<sup>37</sup> which tells the Secretary of HHS to promulgate standards for the purity, fitness for consumption, and quality of tea importation. Suppose the President is a tea fancier, and one day happens to be flipping through the C.F.R., comes across the nine pages of regulations on tea standards, and decides they are lousy standards. He writes up his own set, sends them through whatever the appropriate process is and off they go to the Federal Register to be printed. Is that a valid regulation?*

**SILBERMAN:** Well, you know better than to expect that I would answer that question, but I will say this: The one silver lining I found in the majority opinion in *Morrison v. Olson* was Justice Rehnquist's acceptance of the notion, which at several points he explicitly does, that "to take care that the laws are faithfully executed," is both a duty and source of authority of the President.<sup>38</sup> In that series of law review articles from George Washington University that Professor Elliott explained piece-by-piece, there is an article by another person, which suggests, as did my colleague on the Court of Appeals, Judge Ginsberg, that that clause is *not* a grant of authority for the President to ensure any particular interpretation of the laws. I think there is, in the Supreme Court's opinion in *Morrison v. Olson*, the suggestion that there is a Presidential duty. Now how far to go, what he would do, how he would deal with some of the hypotheticals you raised, and which Judge Breyer raised, I am not prepared to say, since we will probably have it before our court next week.

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37. 21 U.S.C. § 43 (1989).

38. 487 U.S. 654, 658 (1988).



**ELLIOTT:** I would like to address that issue as well, but not the particular statutory context you posed. I am not as familiar with the Tea Act as you are. I am speaking in my capacity as a law professor rather than as a general counselor of the EPA. What that means is the staff has not had a chance to brief me on this and tell me I am wrong. We have in many of our environmental statutes an interesting difference in that most of our statutes refer to the Administrator, but some of them refer to the President, and then there is a delegation of power from the President to the Administrator.

My perception is it makes not one iota of difference. In both instances, we are subject to the policy guidance and control of the President, as I believe we should be. I think that the conversation is proceeding on the assumption that it makes a great deal of difference which word is used in the statute. I think that is incorrect, as a matter of law, at least in the environmental area. Granted this issue has never been definitively and squarely resolved by the Supreme Court. At least in *Sierra Club v. Costle*,<sup>39</sup>—this is the coal-fired New Source Performance Standard case in the D.C. Circuit—the argument was pressed quite hard on constitutional grounds by environmental groups. Led by my friend, Bill Buckley, these groups argued that it was constitutionally impermissible for the White House staff to “interfere” with the policy deliberations by the EPA in a statutory context when the statute, the Clean Air Act, confided the discretion in the Administrator, rather than the President. The D.C. Circuit, made very short shrift of that argument.

**SILBERMAN:** That was when Carter was President.

**ELLIOTT:** That is right. So much for formalism.

**EASTLAND:** I have just one comment on that. It seems to me that in this system of separated powers, the President ultimately has to have the authority, whatever the statute may say. I think I agree with what Don Elliott just said—how it is written is less important. I do think, though, that it illustrates a central problem. Every four years in this country, we have an election. The media devotes a tremendous amount of time and attention to it. So do the American people, I guess. The popular psychology assumes that we will have a unitary President because only one President gets elected.

As soon as election day is over, though, we are back in the modern day

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39. 657 F.2d 298 (D.C. Cir. 1981).

administrative state, and then we are back to a de facto plural executive. We are back to a notion of accountability that is different from the original one—accountability to a Washington political culture.

*QUESTION: When you were speaking about the relationship of the courts and the executive branch, I was thinking about the different Presidencies, particularly the one of Abraham Lincoln, which probably to this day continues to be one of the best examples of the need for a strong unitary executive. My question is how do you evaluate the ancient proposition that one reason the separation of powers doctrine is less viable today is that the members of the two nonjudicial branches no longer believe or fully appreciate that they have an independent duty to interpret the Constitution?*

**SILBERMAN:** I am not sure that the right, duty, or authority of members of both the executive and legislative branch to interpret the Constitution for themselves, independently or separately from the judiciary, constitutes a particular reason for tensions over the separation of powers in the last twenty years. I think it comes more from the competition between the executive branch and the Congress. In my talk, I suggested how the judiciary reacts to that.

**BREYER:** Please remember that the special prosecutor case<sup>40</sup> came to the Supreme Court in the context of a law that had been passed by Congress and signed by the President. Now think of the different attitudes that judges may have when a case involves a Bill of Rights protection of fundamental freedom or when the Court is called upon to umpire, under the separation of powers doctrine, a dispute between the other two branches of government. Is either present in the special prosecutor case—a case in which both the President and the Congress have agreed on the law? Is there not something odd about the President attacking the law as unconstitutional? His having done so might give rise to the thought, “If you thought it was unconstitutional, why did you sign it?” It is not that I totally disagree with you, it is just that I have made an addition.

**SILBERMAN:** That is an interesting point, and I gather that the corollary to that, you would have thought, is that *Morrison v. Olson* should have been decided the other way had the independent counsel statute been passed over the President’s veto.

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40. *United States v. Nixon*, 418 U.S. 683 (1973).

**BREYER:** Yes, that is the corollary.

**ELLIOTT:** As the lone representative of the executive branch, defending against judicial hegemony and the principle of judiciary *über alles*, which was referred to earlier, let me at least point out that I think there are very important reasons that the executive branch and probably also Congress, regard themselves as having an independent duty to abide by and make judgments about constitutional principles. That is not, I would suggest, equivalent to defining the law as declared by the Supreme Court. On the other hand, I think it is important that the executive branch continues to raise issues for the courts to decide.

It is also very important that the executive branch thinks about these issues and makes independent judgments about them. I think, at least in the Reagan-Bush Administration, the executive branch was thinking a lot about the constitutional issues. I think that where the process has fallen down, perhaps, is in the Congress. Congress, I think, very seldom thinks about constitutional issues, or at least seldom debates constitutional issues. They frequently defer to the courts and say, "Well, we will find out if this is constitutional." I would say, to put in a good word for formalism, I think one reason that they do that is that we have lost a tremendous amount of predictability in our constitutional law. So many of the cases are very particular and limited to their facts and influenced by political factions. It is very difficult to have an interpretive process and have a true constitutional law in the absence of a jurisprudence that is formalistic enough to have theoretical guidance, to argue about theory. I think separation of power cases are examples of when there is very little consistent, theoretical guidance and predictability in the Supreme Court opinions, as opposed to some superior opinions that emanate from some of the so-called lower courts.

I think we are suffering from an impoverishment of our constitutional law, which generally makes it very difficult for those outside the judiciary to participate in these debates. I certainly think the executive branch is trying very hard to develop some constitutional theory and to think seriously about those issues, and it should be.

**EASTLAND:** I just want to say I am glad that the President's signature did not influence you when you were on the bench. I do not think it should influence any court, but I do think perhaps it might influence a court. There might be some kind of a psychological impact. This throws us back on the fact that the President of the United States, in this case

Ronald Reagan, had two chances to veto the statute. Let us say the President had vetoed the bill in January 1983 instead of signing it. He would have been in a very good position politically to have done so. He did not have the investigations of the known people, with the exception of Labor Secretary Donovan. In 1987, when the statute was re-authorized a second time, the politics had worsened for Reagan.

I think that President Bush's political dynamics are much in his favor at the moment. President Bush might be well positioned simply to say: "I will not sign any independent counsel re-authorization legislation that does not apply the law to members of Congress." I think with the experience of Richard Phelan and the experience now of the Keating Five, the idea of outside counsel will be less attractive—not that I believe it should not be applied to Congress or anyone else. But I do think it would work tactically, perhaps, to get rid of the law.

*QUESTION: Judge Breyer, you suggested the hazards of a unitary executive and named two areas: one, prosecutions, and the other, FCC licenses. You suggested the possibility or the likelihood of political favoritism, and vendettas. But then one begins to think of the independent FCC. It was reported in the first edition of Breyer and Stewart's article that in a twenty-year period, every license issued had been to a licensed applicant who belonged to, and perhaps contributed funds to, the political party of the President in office—that is, with the independent FCC. My question is: Whether there is any theory or empirical evidence to suggest that both of these very legitimate fears—political favoritism and vendettas—are more engendered by splintering or by unification?*

**BREYER:** Institutions are complicated. I will not say the FCC is a model of perfection. I do think that sometimes "bureaucratizing" a process helps provide safeguards of fairness. Such "bureaucratizing"—removing a decision from direct political influence—is appropriate in the criminal justice process. And it is easier to bureaucratize the less central Justice Department than it is to bureaucratize the more central White House. There are other kinds of decisions for which bureaucratizing is less appropriate. Personally, I think awarding television licenses from the White House would not work as well as having the FCC award them. The general point is that there are many different kinds of executive branch decisions; more are criminal prosecutions, handing out television licenses, investigations by the Inspector General, and all sorts of adjudicatory proceedings. There are hosts of different kinds of tasks. Institu-

tions having to deal with such differences must themselves come in different shapes and sizes. There is nothing wrong with saying that one can have an executive branch made up of sub-institutions of different shapes and sizes. If we do not like the particular shape or size of some of those sub-institutions, the appropriate remedy is to call the matter to the public's attention, explain how the particular sub-institution is working or not working, and then ask Congress to change the ground rules. I am wary of "general" institutional solutions for so many different kinds of problems.

**ELLIOTT:** I would like to address that briefly. I thought there were two examples that really worked, not by the anomaly of having the President decide these issues, but rather by smuggling in an inappropriate factor describing the decision that would be equally inappropriate, whether the President or some other institution was involved. I also think the example worked, in part, by the oddity of a President of such limited time getting involved in such small, small issues. So it struck us as counterintuitive, but I really do not think structurally there was anything wrong with it.

Having said that, I will raise one countervailing consideration, which I do not think is compelling. The way we have built the administrative state against making these decisions based on inappropriate factors is, of course, judicial review. To the extent the President makes these decisions personally, on inappropriate factors, we are going to be in a situation of having the Court review these decisions. This makes us a little bit uncomfortable in a constitutional sense.

**SILBERMAN:** When I became Deputy Attorney General in 1974, I found, to my utter astonishment, that every antitrust action brought by the Justice Department, every single one, of any kind, had to be signed by either me or the Attorney General. I could not, for the life of me, understand why.

Tom Kauper was Assistant Attorney General for antitrust at the time, and I asked him why. He said, "Well, it's always been that way." I said, "Well, let's check and find out why." It turned out that it was that way because when Thurman Arnold was Assistant Attorney General, Roosevelt was President. Thurman Arnold had this quaint habit of suing contributors to the Presidential campaign. As a result, the Attorney General had to approve every antitrust complaint. We did change that.

You can not think of a more unitary executive—nor more powerful—than Franklin Delano Roosevelt.

**ELLIOTT:** Just to follow up on that, an interesting question is whether the unitary executive theory would require a political appointee accountable to the President to sign off on every binding act by the executive branch.

**SILBERMAN:** Surely not, no one can bind the EPA.

**ELLIOTT:** The question I am raising is whether or not it is a consequence of the unitary executive theories that people who are not directly accountable to the President serve his pleasure. They act in the name of the executive branch of the United States in a binding way. I do not know the answer to that question. It strikes me as a difficult and troubling one, and perhaps one that you will write an elucidating opinion about.

**EASTLAND:** Well, if we are telling stories from the New Deal era, there is one in which the last Attorney General for Roosevelt fired his head of the Lands Division because he was prosecuting or was about to prosecute someone who was a friend of one of Roosevelt's closest aides. So I guess this kind of coordination of control was not very virtuous.

**SILBERMAN:** I am not sure we are helping our cause.

**EASTLAND:** I think it is in the nature of the Executive to sometimes hide.