

# THE STATUS OF INDEPENDENT AGENCIES AFTER *BOWSHER v. SYNAR*

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The concept of a multimember, bipartisan, expert tribunal free from direct control by the legislative and executive branches of government was an appealing premise of the New Deal administrative state.<sup>1</sup> The independent agency was thought to embody this concept. The label "independent," while aptly describing the function of these agencies, at the same time raised difficult and so far unresolved constitutional questions about their place in our tripartite system of government.<sup>2</sup>

Over the years, the growth of executive departments and executive branch agencies and the advent of deregulation have diminished the role and stature of independent agencies.<sup>3</sup> But no administration prior to the present one directly attacked the concept of agency independence from the constitutional perspective. The Reagan administration has questioned the constitutional legitimacy of administrators who perform executive functions independent of executive control.<sup>4</sup> Now that the issue has been raised, it is easy to predict a series of judicial challenges to the

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1. See J. LANDIS, *THE ADMINISTRATIVE PROCESS* 15-46 (1938). Much of what might be called traditional administrative law, including the ordering principles contained in the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 701-706 (1982), has been developed to strengthen the independent agency structure. The formal adjudication provisions of the APA, for example, are designed for use by independent agencies. See *id.* §§ 554-557. The hearing examiner (now administrative law judge) was originally associated with the independent agency. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 35-36 n.1 (1950) (explaining terms and conditions of hearing examiners' employment by administrative agencies).

2. Contemporary New Deal critics of independent agencies labeled them a headless fourth branch of government. See *THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT* 39-42 (1937). This characterization has persisted over the years. See, e.g., *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216, 1219 (1983) (White, J., dissenting).

3. Indeed, in addition to reducing the significance of the economic regulatory agencies, deregulation claimed an independent agency as its first victim: The Civil Aeronautics Board, a New Deal favorite, went out of business in 1985. See 49 U.S.C. app. § 1551 (1982); see also Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 *YALE L.J.* 1766 (1985).

4. See Taylor, *A Question of Power, a Powerful Questioner*, *N.Y. Times*, Nov. 6, 1985, at B6, col. 3 (noting Attorney General Meese's comments "that the entire system of independent agencies may be unconstitutional"); see also Fein, *Get Rid of Regulatory Agencies, They Aren't Independent and They're Unconstitutional*, *Wash. Post*, July 27, 1986, at D5, col. 4 (arguing that congressional endowment of independent agencies with executive authority violates separation-of-powers principles).

independent agency.<sup>5</sup>

This kind of litigation will likely be encouraged now that the Supreme Court has declared the Gramm-Rudman-Hollings legislation constitutionally defective because it assigned executive functions to an official—the Comptroller General—who was controlled by the Congress but was independent of the executive.<sup>6</sup> Although *Bowsher v. Synar* did not directly rule on the validity of independent agencies, it sheds important light on that question. Moreover, because Congress must now restructure the Comptroller General's relationship to the Deficit Control Act, the question whether Congress might reconstitute the Comptroller General's position along traditional independent agency lines is of considerable practical importance. For these reasons, no contemporary public law issue is more intriguing than the legitimacy and continued vitality of the independent agency.

Part I of this article explores the historical underpinnings of the debate over the constitutionality of independent agencies, with emphasis on the relationship between the appointment power and the removal power. Part II examines in detail the holding and implications of *Bowsher v. Synar*. Part III discusses the likely future of the independent agency in light of *Bowsher*, and concludes that *Bowsher* need not signal the death of that form of administrative organization. The article then suggests possible ways in which Congress could revise the Comptroller General's role under the Deficit Reduction Act so as to surmount the constitutional hurdles that *Bowsher* erected.

## I. THE INDEPENDENT AGENCY DEBATE

The independent agency has existed for one hundred years, since the formation of the Interstate Commerce Commission as the prototype.<sup>7</sup> But its "independence" did not become a matter of constitutional concern until the 1930's, when the New Deal greatly expanded the number of agencies and commissions. Ironically, President Roosevelt, the great spawner of administrative government, was the victim as well as the beneficiary of the independence concept. More ironically, we now find the repudiator of the New Deal, Ronald Reagan, seeking to vindicate the

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5. See *infra* notes 52-66 and accompanying text.

6. *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

7. Ironically, the ICC began life in 1887 as an executive agency within the Department of the Interior. It became "independent" in 1889. See R. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 60-62, 67 (1941). See generally R. PIERCE, S. SHAPIRO & P. VERKUIJ, *ADMINISTRATIVE LAW AND PROCESS* § 4.4.1a, at 98-100 (1985) (discussing alternative reasons why certain agencies are established as "independent").

same principles of executive control over the agencies that Roosevelt unsuccessfully expounded some fifty years earlier.

Commissions usually consist of five or seven members, who are appointed on a bipartisan basis and serve for a term usually exceeding that of the President.<sup>8</sup> The critical guaranty of independence, however, is the statutory protection that commissioners enjoy against presidential removal; typically, they can be removed only “for cause.”<sup>9</sup> Working from this premise of political independence, Congress, during the Roosevelt administration, gave the “alphabet” agencies broad powers to regulate business activity and behavior. Roosevelt appointed to agency positions aggressive reformers who shared his view of active government such as James Landis and William O. Douglas. The notion that officials appointed by the President but insulated from executive control could commence, hear, and decide (subject to judicial review) cases of major importance to the private sector came to be accepted as a necessary organizational tenet of modern government.<sup>10</sup>

The Supreme Court accepted the structure of independent agencies even as it rejected the major economic initiatives of President Roosevelt’s National Industrial Recovery Act (NIRA). Indeed, in *Humphrey’s Executor v. United States*,<sup>11</sup> the Court endorsed the independent agency with a vengeance by rebuffing an effort by Roosevelt to remove an uncooperative commissioner of the Federal Trade Commission. The President had dismissed Humphrey before Humphrey’s term expired without ascribing the statutorily mandated cause. The President apparently assumed that precedent rendered such statutory restrictions upon his removal authority unconstitutional.<sup>12</sup>

Since the day it was decided, *Humphrey’s Executor* has shaped the judicial understanding of the independence concept in administrative

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8. Terms vary from agency to agency. For example, Nuclear Regulatory Commission members serve five years, *see* 42 U.S.C. § 5841(c) (1982), Federal Communications Commission members serve seven years, *see* 47 U.S.C. § 154(c) (1982), and Federal Reserve Board members serve fourteen years. *See* 12 U.S.C. § 241 (1982). *See also* SENATE COMM. ON GOV’T AFFAIRS, STUDY ON FEDERAL REGULATION VOL. V—REGULATORY ORGANIZATION, S. DOC. NO. 91, 95th Cong., 2d Sess. 35 n.50 (1977) (noting varying terms for members of different federal agencies).

9. The usual formulation is “[a]ny Commissioner may be removed by the President for inefficiency, neglect of duty or malfeasance in office.” 15 U.S.C. § 41 (1982) (authorizing removal of FTC members).

10. *See generally* M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955).

11. 295 U.S. 602 (1935).

12. *Id.* at 616. President Roosevelt believed that his position was vindicated by *Myers v. United States*, 272 U.S. 52, 176 (1926).

law.<sup>13</sup> Some insulation from direct control by the President was thought desirable for those agencies that exercised powers labeled "quasi-judicial" or "quasi-legislative."<sup>14</sup> If a president could remove these officials without giving a reason, he could presumably remove them for politically motivated reasons, thereby jeopardizing the impartial administration of justice. Agency independence, therefore, had due process implications. Furthermore, independence supported the application of expertise to government. If in fact agency commissioners were to apply their expertise to solve problems in a scientific manner, fear of political reprisal would only hinder their ability to perform their jobs effectively. Moreover, the bipartisan-appointment and term-of-years requirements themselves represented congressional recognition that politics had a lesser role to play in the work of independent agencies.

Working against the notions of agency independence were the equally compelling ideas that executive control of administrative agencies was more constitutionally coherent and democratic. Before the New Deal, the Court had recognized in *Myers v. United States*<sup>15</sup> that Congress could not directly participate in the removal of executive officials. In declaring the Tenure in Office Act unconstitutional, the Court emphasized that the executive power resided in the President under article II. The *Myers* opinion (written by Chief Justice Taft, a former president) declared that for Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers."<sup>16</sup>

From the perspective of democratic theory, the President is viewed as more responsive to the people than unelected agency officials, no matter how expert they might be.<sup>17</sup> This view has led recent administrations to focus on achieving greater executive control of administrative policymaking through the Office of Management and Budget (OMB).<sup>18</sup> The

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13. See *Weiner v. United States*, 357 U.S. 349, 356 (1958) (President could not remove commissioner without cause even where commission's enabling statute included no specific removal restriction).

14. *Humphrey's Executor*, 295 U.S. at 629-30. The use of the qualifying "quasi" was necessary to avoid the delegation problem that would have arisen had the agency been viewed as the recipient of "pure" judicial and legislative power.

15. 272 U.S. 52 (1926).

16. *Id.* at 161.

17. See *Pierce, The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 520-24 (1985).

18. Since the Ford administration, presidents have sought to exercise more control over administrative agencies through executive orders. See Exec. Order No. 11,821, 3 C.F.R. 926 (1975), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 8315 (order of President Ford requiring agencies to submit statements analyzing inflationary impact of proposed regulation); Exec. Order

Reagan administration sought to perfect this control through an executive order that requires all executive agencies and encourages all independent agencies to provide OMB with a cost-benefit analysis of all "major" rules before promulgating them.<sup>19</sup> This approach is grounded on article II executive power, but its exercise has been controversial because it involves an assertion of presidential control over agencies that had heretofore enjoyed considerable policymaking freedom.<sup>20</sup>

*Myers* and *Humphrey's Executor* still define the constitutional debate over the validity of independent agencies and the role each branch can play in removing officials. *Myers* struck down an attempt by Congress to participate in the removal of a postmaster<sup>21</sup> and *Humphrey's Executor* let stand a legislative restriction on the President's power to remove an independent agency commissioner.<sup>22</sup> In *Humphrey's Executor*, the Court resolved the apparent tension with *Myers* by drawing an imaginary line between purely executive and quasi-judicial or quasi-legislative officials.<sup>23</sup> The Court, acknowledging that the resolution was not perfect and would probably need to be refined,<sup>24</sup> placed the postmaster on the purely executive side and agency commissioners on the quasi-judi-

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No. 12,044, 3 C.F.R. 152 (1979), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 9680 (order of President Carter requiring agency heads to evaluate proposed regulations for need, simplicity, and effect); Exec. Order No. 12,291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601 app. at 431-34 (1982) (order of President Reagan forbidding agencies from issuing regulations unless OMB has determined that benefits outweigh costs).

19. See Exec. Order No. 12,291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601 app. at 431-34 (1982); Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985), reprinted in 5 U.S.C. § 601 app. at 92-93 (Supp. III 1985). Major rules are defined as those rules likely to result in: "(1) An annual effect on the economy of \$100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets." Exec. Order No. 12,291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601 app. at 432 (1982).

20. See Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064-70 (1986) (criticizing OMB control of rulemaking process as unnecessary and expensive overlay that undermines basic rulemaking principles of fairness and agency expertise). But see DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1082-88 (1986) (arguing that OMB regulatory review encourages policy coordination, greater political accountability, and more balanced regulatory decisions). See generally *Symposium on Presidential Intervention in Administrative Rulemaking*, 56 TUL. L. REV. 811 (1982) (discussing practical administrative, judicial, and executive policy concerns regarding presidential involvement in agency rulemaking process).

21. *Myers*, 272 U.S. at 175-76.

22. *Humphrey's Executor*, 295 U.S. at 631-32.

23. *Id.* at 628.

24. The Court stated in *Humphrey's Executor*:

To the extent that, between the decision of the *Myers* case, which sustains the unrestricted power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a

cial or quasi-legislative side.<sup>25</sup>

The Court correctly acknowledged the imperfection of its analysis. Any distinction based on the label "quasi" is bound to be unsatisfactory. Independent agencies frequently exercise functions similar to those performed by all three branches. The separation-of-powers problem cannot be dismissed by qualifying labels. That the *Humphrey's Executor* approach worked for fifty years says more about congressional and presidential restraint than anything else. Congress did not seek to place removal requirements upon officials who were traditionally executive, and presidents have been able to deal effectively with agency commissioners in spite of the removal restrictions.<sup>26</sup>

Recently, however, both branches have raised removal questions and the courts have been forced to react. The independence of agencies has been subjected to careful scrutiny as a new generation of judges and legal scholars reexamines the place of administrative agencies in the tripartite system of government established by the Constitution.

#### A. *Beyond Quasi Analysis: Exploring Institutional Relationships.*

It has always been puzzling that the Court stated a proposition of agency independence from the three branches of government in *Humphrey's Executor*<sup>27</sup> on the same day that it struck down Roosevelt's NIRA on nondelegation grounds in *A.L.A. Schechter Poultry Corp. v. United States*.<sup>28</sup> It must have occurred to the Court that a grant of legislative and judicial power to an entity independent of those branches would raise the very problem of delegation it was addressing in *Schechter*. But the Court was silent on that point in *Humphrey's Executor*, inexplicably preferring to avoid it through the "quasi" technique.

A partial explanation may be the political one—that in both *Schechter* and *Humphrey's Executor* the unreconstructed Supreme Court was striking a blow against the perceived excesses of the Roosevelt administration. A more enduring answer, however, may lie in the nature of the recipients of the grants of power involved. In the NIRA, Congress gave broad powers directly to the President, thus jeopardizing its institutional relationship with the Executive. In the grant to the independent

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field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

*Id.* at 632.

25. *Id.* at 627-28.

26. It has even been said that some presidents have required resignations by independent commissioners in advance of their appointment. See E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 379-80 n.87 (1957) (referring to President Calvin Coolidge).

27. *Humphrey's Executor*, 295 U.S. at 629.

28. 295 U.S. 495, 549-50 (1935).

agency, however, the beneficiary was a more neutral institution substantially beyond the reach of both the Executive and Congress. Thus, as Professor Strauss has carefully demonstrated,<sup>29</sup> the Court's concern with delegation in *Schechter*, and its lack of concern in *Humphrey's Executor*, can be explained from a checks-and-balances perspective. The grant of legislative power to the President in the NIRA created a significant shift in branch authority, whereas the restriction upon the removal power of the President augured no such outcome. Indeed, such restrictions served to insulate the agencies from both legislative and executive control. From a checks-and-balances perspective, the first action was destructive of interbranch parity and the second was not. Thus, a system of independent agencies that retained judicial, legislative, and even executive power did not jeopardize the relationships among the three branches.<sup>30</sup>

This analysis helps to explain not only the delegation-independence conundrum but also the continued vitality of cases like *Myers*. *Myers* involved the Tenure in Office Act,<sup>31</sup> a statute that granted to Congress the right to participate, by senatorial concurrence, in the removal of an executive official. *Humphrey's Executor* involved restrictions upon the President's removal power through the for-cause limitation but no comparable expansion of the congressional role. The removal question lends itself, under this analysis, to a checks-and-balances resolution. In the *Myers* situation, Congress has sought to aggrandize power at the expense of the President; in the *Humphrey's Executor* situation, it has not.<sup>32</sup> Under this analysis, *Myers* would have been a different case had the only removal restraint involved a for-cause requirement.<sup>33</sup>

A checks-and-balances approach asks the proper constitutional question: Is one branch trying to overreach and seize the powers of the other? Several recent separation-of-powers cases have built upon this distinction. In *United States v. Nixon*,<sup>34</sup> the Court stated that the separa-

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29. See Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 609-16 (1984).

30. See *id.* at 579.

31. 19 Stat. 80 (1876). The Act required senatorial assent to both appointment and removal of executive officials. *Myers*, 272 U.S. at 107. President Harding had ordered the removal of Myers as postmaster before his four-year term expired, without seeking senatorial concurrence. *Id.* at 106-07.

32. Professor Strauss stated the point as follows:

The issue of aggrandizement seems inevitable, however, where Congress asserts the right itself to control the removal question. It has not only limited the President's ordinary political authority by imposing a "for cause" requirement, but also greatly expanded its own political authority by insisting on a voice in that determination.

Strauss, *supra* note 29, at 614.

33. The *Myers* Court itself probably would not have honored the distinction, however, since it suggested that the President could remove after the fact even quasi-judicial officials. See *Myers*, 272 U.S. at 135.

34. 418 U.S. 683 (1974).

tion-of-powers question involved resolving "competing interests in a manner that preserves the essential function of each branch."<sup>35</sup> In *Nixon v. Administrator of General Services*,<sup>36</sup> the Court asked whether the challenged act "disrupt[ed] the proper balance between the coordinate branches."<sup>37</sup> This checks-and-balances approach is of crucial importance in evaluating the constitutional significance of the for-cause removal restriction.

#### B. *Relationship of the Appointment Power to the Removal Power.*

The connection between appointment and removal is obvious and necessary. In *Myers*, the Court said that the appointing authority under the Constitution has sole removal authority.<sup>38</sup> Although the Court avoided analyzing that question in *Humphrey's Executor*, recent cases clarifying the appointment power provide an opportunity to examine the continued relationship between removal restrictions and the appointment power. In *Buckley v. Valeo*,<sup>39</sup> the issue was whether legislative appointment of some members of the Federal Election Commission (FEC) infringed the President's appointment power. The Court used a checks-and-balances approach to determine if the members of the FEC were "Officers of the United States,"<sup>40</sup> officials over whom the President has the sole power of appointment. In finding that the duties of the members included executive agency functions such as rulemaking, the Court concluded that the FEC members could be appointed only by the President.<sup>41</sup> *Buckley* clarified the respective roles of the two branches in the appointment process, but it certainly did not answer all questions about the nature of those officials who fall within the President's control.

Some officials who are members of commissions are still appointed by Congress. For example, members of the newly constituted Civil Rights Commission are appointed by both the President and Congress.<sup>42</sup>

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35. *Id.* at 707.

36. 433 U.S. 425 (1977).

37. *Id.* at 443.

38. *Myers*, 272 U.S. at 122 ("The power of removal is incident to the power of appointment, not the power of advising and consenting to appointment . . .").

39. 424 U.S. 1 (1976) (per curiam).

40. U.S. CONST. art. II, § 2, cl. 2. The President is given sole power to appoint these officers, subject to the advice and consent of the Senate.

41. *Buckley*, 424 U.S. at 140-41.

42. 42 U.S.C.A. § 1975 (West Supp. 1986) (President appoints four members of the eight-member commission; President Pro Tempore of the Senate and Speaker of the House appoint two members each). See generally Verkuil, *Reflections upon Federal and State Control of Administrative Policy Making*, 19 SUFFOLK U.L. REV. 577, 591-92 (1985) (discussing reasons why Commission was reconstituted as independent agency and extent to which its influence in advising President on civil rights matters has been diminished).



Distinguishing *Buckley* in his signing message, President Reagan asserted that the civil rights commissioners did not perform duties of officers of the United States.<sup>43</sup> The courts have yet to rule on this interpretation.<sup>44</sup>

In the most recent case, a member of the Senate challenged the membership of the Open Market Committee of the Federal Reserve Board on the ground that five of the twelve members are not appointed by the President pursuant to article II.<sup>45</sup> The Open Market Committee sets and implements monetary policy by directing the Federal Reserve banks to purchase and sell securities.<sup>46</sup> The government defended this organizational structure against the *Buckley* argument by asserting that Open Market Committee members are "inferior officers," not "Officers of the United States," because they operate under the authority of the Board of Governors of the Federal Reserve System.<sup>47</sup> One can, however, readily construct an argument that the policy decisions of the Open Market Committee are significant enough to qualify its members as "Officers of the United States." That the Executive nevertheless supports agency independence, in apparent contradiction to its own interest, suggests the complexity of the role of the appointment power. The court, indeed, rejected this argument, stating that it would be a "distortion of the language to label as 'inferior officers' members of a body vested with the vast powers of the [Open Market Committee]."<sup>48</sup> The court nevertheless went on to hold that the arrangement was constitutional, relying heavily on a long history of independence on the part of national banking officials and political acceptance of that independence.<sup>49</sup>

This experience suggests that the President and Congress may have reason to agree upon a sharing of the appointment power in certain circumstances, much as they have over the years agreed on the use of for-

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43. See Verkuil, *supra* note 42, at 591 n.63.

44. Alleging that their terms, even in what was admittedly an executive agency, were protected by *Humphrey's Executor*, the holdover members from President Carter's original Civil Rights Commission had earlier brought suit to challenge their dismissal by President Reagan. See *Berry v. Reagau*, 32 Empl. Prac. Dec. (CCH) ¶ 33,898 (D.D.C. Nov. 14, 1983), *dismissed as moot*, 32 Empl. Prac. Dec. (CCH) ¶ 33,925 (D.D.C. Nov. 30, 1983). *Berry* was dismissed as moot because the appointment period expired during litigation. So far, no *Buckley-Synar* suit has been commenced against the new Commission.

45. *Melcher v. Federal Open Mkt. Comm.*, 644 F. Supp. 510 (D.D.C. 1986). Seven of the members are governors of the Federal Reserve Board appointed by the President with senatorial concurrence. 12 U.S.C. § 263(a) (1982). The other five members are selected by the boards of directors of the various Federal Reserve banks on a regional basis. *Id.*

46. See 12 U.S.C. § 263(b) (1982); 12 C.F.R. § 270 (1986).

47. See *Melcher*, 644 F. Supp. at 519.

48. *Id.*

49. *Id.* at 521-23.

cause removal provisions.<sup>50</sup> Although such an agreement does not ensure judicial acceptance, it can lead to an analysis that looks closely at the duties of those purporting to act as "Officers of the United States." The analysis of such an agreement to share the appointment responsibility for agency officials should be conducted in the same checks-and-balances terms as the removal provisions: Does the congressional appointment power deprive the President of control over someone who must exercise significant executive power? If it does, *Buckley* closes the door, even when the President wishes to leave it open.

But the Court in *Buckley* did not seem willing to take the step taken in *Myers*: that of tying the removal power exclusively to the appointment power.<sup>51</sup> Although there was no express "for cause" removal restriction in the Act establishing the FEC, it is doubtful that the President would be permitted to remove FEC commissioners without assigning cause. Thus, while one can conclude after *Buckley* that the removal power is not tied exclusively to the appointment power, the Court did not entirely clarify the limits of congressional removal restrictions.

C. *The Comptroller General as an Executive Policymaker and the Administration's Assault on Independent Agencies.*

The Reagan administration has argued in a variety of settings that congressional restrictions on executive removal of the Comptroller General under the Deficit Reduction Act or on independent agencies in general are unconstitutional. In *Synar v. United States*,<sup>52</sup> a three-judge court accepted the administration's position. The court declared that the provisions of the Balanced Budget and Emergency Deficit Control Act of 1985<sup>53</sup>—popularly known as the Gramm-Rudman-Hollings Act—were unconstitutional because they vested executive powers in the Comptroller General, an official subject to removal only by Congress. The court determined that the Comptroller fell, for removal purposes, between the purely executive official, controlled by *Myers*, and the quasi-judicial or quasi-legislative official, controlled by *Humphrey's Executor*.<sup>54</sup> From this vantage point, the court concluded that because the Comptroller was removable by Congress he could not exercise the executive budget-cut-

50. The independent agencies are the product of legislation signed by the President; this legislation contains removal restrictions in many cases. Of course a president's acquiescence in this manner is not determinative in legal challenges; it was not, for example, determinative in *Bowsher v. Synar*.

51. See *supra* note 16 and accompanying text.

52. 626 F. Supp. 1374 (D.D.C.) (per curiam), *aff'd sub nom.* *Bowsher v. Synar*, 106 S. Ct. 3181 (1986). The three-judge court was convened pursuant to 28 U.S.C. § 2284 (1982).

53. 2 U.S.C.A. §§ 901-922 (West Supp. 1986).

54. *Synar*, 626 F. Supp. at 1400.

ting functions granted under the Act.<sup>55</sup>

The three-judge court felt bound by *Humphrey's Executor*, but, like the administration, it questioned whether the concept of agency independence squared with the President's removal power under article II. The court commented that "[i]t is not as obvious today as it seemed in the 1930's that there can be such things as genuinely 'independent' agencies."<sup>56</sup> The court's skepticism about independent agencies is based on the inherent anomaly of the "fourth branch" idea. In the case of executive officials, the focus of removal power under the Constitution resides with the President. The role of Congress in this regard is expressly limited to removal pursuant to the impeachment clause.<sup>57</sup>

Before the United States Court of Appeals for the Third Circuit, the Department of Justice contemporaneously advanced a similar approach in *Ameron, Inc. v. Corps of Engineers*,<sup>58</sup> a case involving a controversy over the Comptroller General's authority under the Competition in Contracting Act.<sup>59</sup> The government argued that the Comptroller's involvement in the executive process of procurement was unconstitutional due to Congress's power of removal. The Third Circuit expressly disagreed with the three-judge court in *Synar*.<sup>60</sup> On the removal point, it held that there was nothing wrong with independent agencies and found little reason to distinguish the Comptroller General from them.<sup>61</sup> *Ameron* is loyal to *Humphrey's Executor* almost to a fault, however; it seems more intent on uncritically celebrating the fourth branch idea than worrying about how that concept can be made to fit within the Constitution.

Attorney General Meese has frequently questioned whether agencies exercising executive powers may be independent of presidential authority, stating on one occasion that "[f]ederal agencies performing executive functions are themselves properly agents of the executive.

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55. *Id.* at 1403.

56. *Id.* at 1398. The court indicated that the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983), undercut the principles of *Humphrey's Executor*. *Synar*, 626 F. Supp. at 1398.

57. See U.S. CONST. art. I, § 3, cl. 7.

58. 787 F.2d 875, 885 (3d Cir. 1986).

59. 31 U.S.C.A. §§ 3551-3556 (West Supp. 1986). The Comptroller General is called upon under the Act to hear protests from disappointed bidders. *Id.* § 3352. The filing of a protest freezes the award process and gives the Comptroller 90 days to recommend a decision to the agency. *Id.* § 3554. The Department of Justice, on behalf of the Corps of Engineers, argued that due to the Comptroller's impermissible involvement in the executive procurement process, the stay provisions were inoperable. *Ameron*, 787 F.2d at 888.

60. *Ameron*, 787 F.2d at 885. The *Ameron* court also disagreed with the *Synar* court's conclusion that the challenge to the Comptroller's status was ripe. *Id.* at 884.

61. The *Ameron* court stated that the General Accounting Office "is best viewed as a part of a headless 'fourth branch' of government consisting of independent agencies having significant duties in both the legislative and executive branches but residing in neither." *Id.* at 886.

They are not 'quasi' this or 'independent' that. In the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government."<sup>62</sup> Because the administration believes that both direct congressional removal and congressional restraints upon presidential removal are unconstitutional, its argument transcends the specific challenge to the Comptroller General. The administration's argument more broadly challenges the for-cause requirement common to independent agency removal that was honored in *Humphrey's Executor*.

To date, only one court has faced litigants who have advanced the administration's position. In *Ticor Title Insurance Co. v. FTC*,<sup>63</sup> the plaintiff insurance companies asserted that the Commission's commencement of an unfair methods of competition action violated article II by placing the executive power of prosecutorial discretion in an entity independent of the executive branch. The insurance companies asserted that the removal restriction contained in the Federal Trade Commission Act (FTCA)<sup>64</sup> was the basis for independence. Thus, *Ticor* presented the first direct challenge to the power of independent agencies to enforce the law and, of necessity, presented an invitation to reconsider *Humphrey's Executor*.<sup>65</sup> The district court dismissed the case on ripeness grounds,<sup>66</sup> but the issue is certain to arise either in *Ticor* or elsewhere, now that the Attorney General has in effect invited constitutional challenges to the independent agency.

## II. THE IMPLICATIONS OF *BOWSHER V. SYNAR*

The key inquiry is whether the for-cause removal restraint is by itself significant enough to frustrate the power to execute the law that article II clearly entrusts to the Executive. In this setting, the Supreme Court's decision in *Bowsher v. Synar*<sup>67</sup> takes on added significance.

### A. *Bowsher v. Synar*.

In the fifty years since *Humphrey's Executor* was decided, the Supreme Court has had no better opportunity to explore the limits and meaning of agency independence than the challenge to the Balanced

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62. Taylor, *supra* note 4.

63. 625 F. Supp. 747 (D.D.C. 1986), *appeal docketed*, No. 86-5078 (D.C. Cir. Feb. 11, 1986).

64. 15 U.S.C. §§ 41-77 (1982).

65. *Humphrey's Executor* approved the FTC organization which included the same prosecutorial powers mentioned by the plaintiffs in *Ticor*. However, on appeal, the plaintiffs argued that *Humphrey's Executor* did not directly address the prosecutorial issue when it upheld the removal provision. See Brief for Plaintiffs-Appellants at 59-64, *Ticor Title Ins. Co. v. FTC*, No. 86-5078 (D.C. Cir. Feb. 11, 1986).

66. *Ticor*, 625 F. Supp. at 751-52.

67. 106 S. Ct. 3181 (1986).

Budget and Emergency Deficit Control Act in *Bowsher v. Synar*. Under the Act, the role of the Comptroller General was pivotal, with that office being called upon to present to the President binding budget-reduction calculations.<sup>68</sup> The Comptroller General was given discretion to make these calculations after receiving reports from the directors of OMB and the Congressional Budget Office.<sup>69</sup> The Comptroller's tenure, however, was controlled by a provision that permitted congressional removal for specified malfeasances by joint resolution subject to presidential veto.<sup>70</sup>

The issue before the Court was whether such legislative control over an official who was clearly exercising executive, policymaking responsibilities was permissible given the Constitution's scheme of separation of powers. The Court answered in the negative and sought to clarify the concept of agency independence that has been muddled since *Humphrey's Executor*. Although four Justices wrote opinions, Chief Justice Burger's majority opinion and Justice White's dissent together provide the most helpful insights into how the Court might decide a latter-day *Humphrey's Executor* case.<sup>71</sup>

At stake in *Bowsher* was the structural constitutional question, much like the one raised in *INS v. Chadha*,<sup>72</sup> of how many strings Congress can attach when it grants legislative power to an executive official. In *Chadha*, the Court deemed the legislative veto to be too much of a restraint on the executive power to administer legislation involving both

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68. 2 U.S.C.A. § 901(b)(1) (West Supp. 1986).

69. Section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C.A. § 901 (West Supp. 1986), provides for "automatic" reductions through reporting provisions involving the directors of OMB and the Congressional Budget Office, who are independently to estimate the amount of the deficit for the coming year and (if it exceeds the target maximum by more than a specified amount) to calculate the program-by-program budget reductions necessary to reduce the deficit to the maximum allowable. *Id.* § 901(a). These reductions are then reported to the Comptroller General for an independent evaluation which is presented to the President who must issue a "sequestration" order mandating the spending reductions. *Id.* § 901(b).

70. 31 U.S.C. § 703(e)(1)(B) (providing for removal by Congress "at any time" based upon: (i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude). This Act also provides for removal of the Comptroller by impeachment, which, as a remedy stemming directly from the Constitution, need not have been expressed in statutory terms. U.S. CONST. art. I, § 3. A 1980 amendment provides that the President is to nominate the Comptroller General from a list of three individuals recommended by a commission composed of the Speaker of the House, the President Pro Tempore of the Senate, the majority and minority leaders of the House of Representatives and the Senate, and other designated members of Congress. *See id.* § 703(a)(2). The litigants in *Bowsher* did not challenge that "limitation" upon the President's appointment power.

71. Justice Scalia's views can be found in the lower court opinion. *See Synar v. United States*, 626 F. Supp. 1374 (D.D.C.) (per curiam), *aff'd sub nom. Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

72. 462 U.S. 919, 944 (1983). Chief Justice Burger, who wrote both majority opinions, asserted that *Chadha* "supports" the conclusions reached in *Bowsher*. *Bowsher*, 106 S. Ct. at 3189.

executive and independent administrative agencies.<sup>73</sup> In *Bowsher*, the excessive restraint was a joint resolution removal provision that gave Congress potential control over an official—the Comptroller General—who was performing an executive function under the Act. Chief Justice Burger concluded that under the Constitution, Congress could not have it both ways:

To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of laws, *Chadha* makes clear, is constitutionally impermissible.<sup>74</sup>

The Court's bright-line approach to the separation-of-powers problems in *Bowsher* prompted a strong dissent from Justice White, who decried the "distressing formalistic view"<sup>75</sup> reflected in *Bowsher* and *Chadha*. The Court's formulation in *Chadha* led to a rejection of all forms of legislative vetoes that had appeared in some 200 statutory formulations over a fifty-year period. In *Bowsher* the Court rejected a congressional removal technique that had gone unchallenged for more than sixty years. *Bowsher*, like *Chadha*, therefore expressed an unqualified constitutional limitation of congressional power based on separation-of-powers doctrine. This categorical approach might lead observers to believe that a third broad case—against the constitutionality of independent agencies—may also succeed. There are signs in *Bowsher*, however, that indicate the Court will not go that far. *Bowsher*, furthermore, provides important indications of the permissible scope and nature of restrictions placed on the President's power to remove independent agency officials.

#### B. *Bowsher v. Synar*—*Legitimizing the Independent Agency Idea*.

*Bowsher v. Synar* legitimizes the idea of the independent agency. Surprisingly, it is Justice White's dissent that provides the key insights into the place of the independent agency and the role of removal restrictions in our constitutional system of government.

The majority opinion initially observed that the issue at bar did not cast doubt on the status of independent agencies.<sup>76</sup> The Court then quoted approvingly from *Humphrey's Executor*, cited a later removal

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

74. *Bowsher*, 106 S. Ct. at 3189.

75. *Id.* at 3205 (White, J., dissenting).

76. *Id.* at 3188 n.4 ("Appellants therefore are wide of the mark in arguing that an affirmation in this case requires casting doubt on the status of 'independent' agencies because no issues involving such agencies are presented here.").

case, *Weiner v. United States*,<sup>77</sup> and concluded that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."<sup>78</sup> This conclusion does not compel the correlative proposition that Congress may limit the President's authority to remove an executive official, but it surely invites an affirmative response. If there were indeed serious constitutional problems in the Justices' minds about limits on the President's removal authority, they would hardly have based their decision on *Humphrey's Executor*.

Justice White in dissent expanded upon *Humphrey's Executor* in several interesting ways. First, he reiterated that the Court rejected the position urged by the Solicitor General that executive powers of the sort granted to the Comptroller by the Act may be exercised only by officers removable at will by the President.<sup>79</sup> Justice White then argued that the removal power was within the power of Congress under the necessary and proper clause "to vest authority that falls within the Court's definition of executive power in officers who are not subject to removal at will by the President and are therefore not under the President's direct control."<sup>80</sup> For this proposition White cited *Humphrey's Executor* and *Weiner*, in effect crediting these cases with a major role in formulating a legislative-executive checks-and-balances doctrine.

Justice White also examined the qualification in *Humphrey's Executor* that has led to confusion over the reach of that decision and its continued vitality. In *Humphrey's Executor* the Court emphasized the quasi-legislative and quasi-judicial roles that FTC commissioners were meant to play, thereby deemphasizing the "executive" nature of their functions.<sup>81</sup> Justice White found the power of an FTC commissioner to implement, interpret, and apply an act of Congress (the FTCA) to be an executive function equivalent to that performed by the Comptroller General under the Deficit Reduction Act.<sup>82</sup> In drawing this equivalency, White legitimized the FTC executive function, including the exercise of prosecutorial powers, and invited Congress to modify its control over the Comptroller in similar ways.

Both the majority and Justice White recognized the validity of the congressional for-cause removal process and would make it applicable to purely executive officials beyond the category of collegial agency officials

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77. 351 U.S. 349 (1958).

78. *Bowsher*, 106 S. Ct. at 3188.

79. *Id.* at 3206 (White, J., dissenting).

80. *Id.*

81. *Humphrey's Executor*, 295 U.S. at 624.

82. *Bowsher*, 106 S. Ct. at 3207 n.3 (White, J., dissenting).

such as those at the FTC. Although "head-counting" is a precarious proposition at best, it would seem that most, if not all, of the Justices will probably accept this extension of logic, though Justice Scalia may remain a skeptic.<sup>83</sup>

C. *The Reach of the For-cause Requirement over Executive Officials.*

*Bowsher* also suggests limits on the degree to which for-cause requirements may be imposed on executive officials. Nearly everyone accepts the idea that removal of commissioners of independent agencies can be subject to restrictions; removal of other executive officials such as the Comptroller General might be subject to restrictions as well. Additionally, nearly everyone would agree that Congress cannot impose removal restrictions on some executive officials, such as cabinet officers; those officials must serve at the pleasure of the President. *Bowsher* helps to draw a line between these two generally accepted situations.

Justice White's dissent helps determine the class of officials that must serve at the pleasure of the President. Justice White critiqued an observation that Justice Holmes made in *his* dissent in *Myers*.<sup>84</sup> Holmes asserted that executive functions are, in any event, controlled by the substance of the laws passed by Congress. Justice White disagreed:

Justice Holmes perhaps overstated his case, for there are undoubtedly executive functions that, regardless of the enactments of Congress, must be performed by officers subject to removal at will by the President. Whether a particular function falls within this class or within the far larger class that may be relegated to independent officers "will depend upon the character of the office."<sup>85</sup>

Justice White then proposed an approach for defining the class of executive officials the President must be able to remove at will. The touchstone, according to White, is whether a removal restraint "prevents the Executive Branch from accomplishing its constitutionally assigned functions."<sup>86</sup> By this test one could expect the foreign affairs function of the Secretary of State to be sacrosanct, because the President must have the absolute loyalty of cabinet level officers.<sup>87</sup> However, this test would not prevent Congress from putting for-cause removal restrictions on offi-

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83. See *supra* note 56 and accompanying text.

84. *Myers*, 272 U.S. at 177 (Holmes, J., dissenting) ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.").

85. *Bowsher*, 106 S. Ct. at 3207 (White, J., dissenting) (quoting *Humphrey's Executor*, 295 U.S. at 631).

86. *Id.* (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

87. Under the Constitution, the President has the power to appoint all heads of departments and such officers of the United States as Congress shall establish by law. U.S. CONST. art. II, § 2, cl. 2.



cial such as the administrator of the EPA, the head of the FDA, or other similar executive officials because such restraints would not prevent the executive branch from performing its function of supervising those officials. Thus, under Justice White's approach, one first asks whether the function the official performs could be made in any way independent of the Executive. If it could, then the for-cause removal provision has a place; if it could not, then the for-cause removal provision violates article II.

#### D. *The Availability of Judicial Review of For-cause Removals.*

Another debate carried on between the majority and Justice White involved what might be thought an elementary issue—whether judicial review would obtain if the President removed an independent agency official for cause. The question is significant because it may well affect how Congress responds to *Bowsher v. Synar*. The question has never arisen because no president has ever sought to remove an independent agency official pursuant to a statutory for-cause process. *Humphrey's Executor* arose because President Roosevelt specifically refused to initiate for-cause proceedings, preferring instead to remove the FTC commissioner for reasons of what might be labeled incompatibility.<sup>88</sup>

Justice White made two points about the removal of the Comptroller to buttress his conclusion that congressional involvement in removal was insignificant: joint-resolution removal was limited to the stated terms of the statute (inefficiency, neglect of duty, and malfeasance); and posttermination judicial review was available “to ensure that a hearing had in fact been held and that the finding of cause for removal was not arbitrary.”<sup>89</sup>

Surprisingly, though the majority treated Justice White's reasoning with skepticism,<sup>90</sup> it reached the same result on the issue of judicial re-

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88. The President's removal letter to Humphrey merely stated: “Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.” *Humphrey's Executor*, 295 U.S. at 619. Earlier, President Roosevelt had written to Humphrey the following:

You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a “full confidence.”

*Id.* Obviously the President, with the *Myers* precedent in hand, would not have wanted to concede any legislative authority to curtail his removal power. But today it has been suggested that policy incompatibility might be viewed as an aspect of enumerated causes for removal. See Strauss, *supra* note 29, at 615-16.

89. *Bowsher*, 106 S. Ct. at 3211 (White, J., dissenting). Justice White cited *Humphrey's Executor* on the question of the availability of judicial review. *Id.* at 3211 & n.8.

90. *Id.* at 3190-91 & 3190 n.8 (stating that dissent failed to recognize breadth of grounds for removal of Comptroller General and that judicial assessment of risk and political realities cannot be determinative in any event).

view. The majority distinguished *Humphrey's Executor* on the ground that it involved nonstatutory judicial review, not review of presidential removal sought in accordance with the for-cause removal provision.<sup>91</sup> But it is difficult not to conclude that such a proposition should follow *a fortiori*. *Humphrey's Executor* seems to assume that review would be available if a president removed for cause. In addition, the judicial review provisions of the Administrative Procedure Act<sup>92</sup> and the general presumption of judicial review accorded final agency action<sup>93</sup> make it unlikely that judicial review would be unavailable, unless Congress specifically so declared.<sup>94</sup> Thus, although its reason for criticizing Justice White is unclear, the majority would ultimately have to concede that judicial review would obtain if the President removed an agency official for cause.

#### E. *The Definition of "Cause."*

The other questions raised by the majority opinion—whether the for-cause standards are exclusive, and, if they are, what they mean—are also of critical importance. If, as some have argued,<sup>95</sup> "cause" for presidential removal of agency officials might mean nothing more than policy incompatibility, then the statutory removal provision would be far less restrictive, even if it were subjected to judicial review. The majority left open the questions whether the statutory removal terms of "inefficiency," "neglect of duty," or "malfeasance" are exclusive and whether, even if exclusive, they might encompass the broad concept of "maladministration," which the Court noted had specifically been dropped from the impeachment clause.<sup>96</sup>

If "maladministration" includes policy incompatibility, then the President's removal power would be expanded greatly. It would, for example, have justified Roosevelt's removal of Humphrey.<sup>97</sup> Conceptually,

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91. *Id.* at 3190 & n.8.

92. 5 U.S.C. §§ 500, 701-706 (1982).

93. *See* *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) ("[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."). *But see* *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349-51 (1984) ("clear and convincing evidence" test for overcoming presumption of judicial review is not rigid evidentiary test, but only useful reminder that can be overcome by specific language or specific legislative history reliably indicating congressional intent).

94. Which, of course, Congress would not do if it were trying to retain the maximum permissible constitutional control over the President's removal power.

95. *See* *Strauss*, *supra* note 29, at 615-16.

96. *Bowsher*, 106 S. Ct. at 3190 ("[The Constitutional Convention] rejected language that would have permitted impeachment for 'maladministration,' with Madison arguing that '[s]o vague a term will be equivalent to a tenure during pleasure of the Senate.'" (citation omitted)).

97. *See* Letter from Franklin D. Roosevelt to William E. Humphrey, quoted *supra* note 88.

this expansion of definition could make an independent agency official removable at the discretion of the President, which is what Madison feared in connection with the use of the term in the impeachment clause.<sup>98</sup> This concern may lead to a judicial construction against a broad definition of maladministration. Even if it did not, it is unlikely that a president would exercise such broad removal powers frequently since political constraints operate on him as well. He would, after all, have to get the Senate to confirm the individual he appoints to replace the dismissed official.<sup>99</sup>

As a purely legal proposition, *Bowsher* does not indicate whether the traditional statutory removal terms will ensure against presidential removal for other causes. Nor does it indicate how "cause" is to be defined.<sup>100</sup> Obviously the administrative hearing process and subsequent judicial review will play an important role in determining the breadth of statutory removal terms and in defining cause.

### III. THE FUTURE OF AGENCY INDEPENDENCE

Viewed broadly, *Bowsher v. Synar* sends mixed signals concerning the question of executive control over independent agency officials. It withdraws Congress from the removal process, short of the express constitutional remedy of impeachment. This is a dramatic exercise of the doctrine of separation of powers, and it has compelling textual support. If one stops here, it can be said that *Bowsher* strongly favors the executive branch.

When one analyzes all of the opinions, a more balanced and less final picture emerges. First, *Humphrey's Executor* maintains vitality despite the lower court's grudging recognition of its validity.<sup>101</sup> The Supreme Court's active use of *Humphrey's Executor* counsels against automatic acceptance of Attorney General Meese's call for an end to all legislative controls over independent agency removal.<sup>102</sup>

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98. See *supra* note 96.

99. President Reagan's difficulty with restructuring the Civil Rights Commission, traditionally an executive agency, is instructive with respect to the political limits of executive removal even where no "for cause" limitation exists. See Verkuil, *supra* note 42, at 591-92.

100. Indeed one could even argue that the terms "inefficiency" and "neglect of duty," if not "malfeasance," could be construed so as to encompass a general charge of maladministration, in which event even if the terms of removal are deemed to be exclusive they could still be satisfied by a removal by the President on the ground of policy incompatibility. Of course Congress could make the limitations on removal for cause more explicit as well as exclusive.

101. See *Synar v. United States*, 626 F. Supp. 1374, 1398-99 (D.D.C.) (per curiam) (asserting that *Chadha* may have presaged the demise of *Humphrey's Executor* by invalidating "quasi-legislative" activities but noting that Supreme Court's signals were not clear enough to disregard *Humphrey's Executor*), *aff'd sub nom.* *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

102. See Taylor, *supra* note 4.

Second, *Bowsher* suggests that the holding of *Humphrey's Executor* remains relevant not only to the independence of commissions that exercise quasi-judicial and quasi-legislative powers, but also to some purely executive officials, such as the Comptroller General.<sup>103</sup> *Bowsher* does not, however, make clear which executive official positions could be subject to removal restrictions. Here is where legislative and executive attention is likely to be focused.

Although *Bowsher* implies that Congress can place *Humphrey's Executor*-like removal restraints on executive officials such as the Comptroller General, such restraints at some point impinge on constitutional executive branch responsibilities. Removal restrictions on cabinet officials come immediately to mind, but an extension of removal restrictions to an executive official like the Director of OMB is also problematic. In the case of OMB, the President's need for unfettered control is premised on the coordinating role that office plays in the executive branch. Nonetheless, congressional reactions to *Bowsher* might well include expansion of control in these more adventuresome directions. A revival of earlier proposals to legislate explicit executive controls over independent agencies in return for more congressional participation in the process of agency governance is the minimum that might be expected.<sup>104</sup>

#### A. *Determining the Need for Independence from Executive Removal.*

*Bowsher* draws clear constitutional lines for the present, but implies blurred relationships down the road. The relationship between agencies and the President would be much clearer if agency independence could be jettisoned once and for all, as Attorney General Meese has suggested. The difficulty is accepting an administrative system without some partially independent actors. The fourth branch idea may be a constitutional impossibility, but it has an appeal in certain contexts. In order to evaluate the continued need for some independence from presidential removal control, the focus is best placed upon two inherently executive functions: administrative policymaking and prosecution. In both situations the issue is whether the independent agencies, admittedly exercising

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103. See *Bowsher*, 106 S. Ct. at 3188-91. *Humphrey's Executor* dealt with independence of adjudicatory agencies that were created to emulate courts:

The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative.

*Humphrey's Executor*, 295 U.S. at 624. The Comptroller General's duties are far more "political" and "executive" as *Humphrey's Executor* understood those terms, yet *Bowsher* draws no distinction on that basis.

104. See R. PIERCE, S. SHAPIRO & P. VERKUIJ, *supra* note 7, § 9.5.3, at 516-17 (discussing regulatory reform proposals).

executive authority and under executive control for some purposes, can make decisions at least partially free from such control by virtue of the for-cause removal restraints.

1. *Independence and Executive Policymaking.* Administrative agencies make policy through the process of promulgating binding and enforceable rules. Although Congress grants power to the agencies, the exercise of that power is at the core of executive responsibility. The President is elected precisely to implement those policies on which he has campaigned. An independent agency with its own agenda can frustrate this democratic process. It becomes important then for a President to be able to assert policymaking control over independent agencies through the rulemaking process. The last four presidents—Nixon through Reagan—have sought to achieve this policymaking control through an expansion by executive order of the coordinating powers of OMB over the independent agencies.<sup>105</sup> Although debates continue over the degree to which OMB can “manage” the rulemaking process,<sup>106</sup> there is little doubt that as a constitutional matter the executive power to “take care that the laws be faithfully executed”<sup>107</sup> permits much policymaking control. Indeed, although no executive orders have so far directly subjected independent agencies to OMB reporting requirements, the reluctance to do so seems based more on political than legal considerations.<sup>108</sup>

The value that independence serves relates directly to the kind of agency under consideration and the functions it performs. Agencies that make policy may also adjudicate; independence for adjudication is certainly desirable and has due process overtones.<sup>109</sup> Some formal restrictions upon removal of those officials is an appropriate method of legitimizing the adjudicatory function.

In addition, some agencies with pure policymaking functions, such as the Federal Reserve Board and the Federal Election Commission,

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105. See *supra* note 18. For a discussion of the attempts by Nixon, Ford, and Carter to achieve control, see Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 947-49 (1980).

106. See Demuth & Ginsburg, *supra* note 20, at 1083-88.

107. U.S. CONST. art. II, § 3.

108. See Verkuil, *supra* note 105, at 949-52. The House of Delegates of the American Bar Association recently resolved that “[t]he Constitutional principles that justify presidential involvement in rulemaking activities are applicable to both the executive and independent agencies and, thus, the executive orders should be extended to the independent agencies.” *ABA Report to the House of Delegates*, 1986 A.B.A. SEC. ADMIN. L. RES. 100. But the current administration may not feel it needs to extend formal control. After six years in office, President Reagan has had the opportunity to replace or reappoint almost all of the independent agency officials. After six years of OMB supervision, it is doubtful that the administration’s agenda has been misunderstood by those agencies.

109. See R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 7, §§ 9.2-9.2.2, at 484-89.

seem best insulated from total executive control. The commissioners on both agencies, albeit for different reasons, deserve congressional insulation from unexplained and arbitrary executive removal. Congress has recognized this need. In the case of the Federal Reserve Board, Congress fixed the term of the Chairman as well as of the members.<sup>110</sup> In the case of the Federal Election Commission, Congress was initially so concerned that it violated the appointments clause of the Constitution in seeking to retain the power to name some of the commissioners.<sup>111</sup>

Unfettered executive removal of commissioners from either agency presents a potential conflict of interest between the executive branch and the public interest. In the case of the Federal Reserve Board, it is the sense that monetary policy benefits from institutionally established checks and balances; in the case of the Federal Election Commission, it is the fear that partisanship might affect the outcome of future elections. Congress, after being rebuffed in *Buckley* on its appointments effort, remains acutely concerned about whether a President might use removal of FEC commissioners as a means to achieve partisan control of the political process.<sup>112</sup> So long as the congressional limitation upon removal of these independent policymakers does not threaten the Executive's role under the Constitution,<sup>113</sup> there are more reasons to favor than to oppose removal restraints.

2. *Independence and the Prosecutorial Function.* There can hardly be a function more executive in nature than that of commencing prosecution for violations of criminal and civil laws.<sup>114</sup> This function involves highly discretionary decisionmaking; therefore, the context of any legislative impediment should be closely scrutinized and justified. One sufficient context would be that in which executive policymaking presented a conflict of interest. For example, such a conflict would be constitutionally sufficient to justify the legislative creation of a special

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110. The members of the Federal Reserve Board serve 14-year terms. The Chairman's four-year term is protected by a for-cause removal statute. 12 U.S.C. § 241 (1982). Most other independent agencies, such as the FTC, the FCC, the SEC, and the NLRB, have statutory restrictions upon removal of commissioners but do not protect the term of the chairman (as chairman). Thus in these situations the chairman serves at the pleasure of the President.

111. See *Buckley v. Valco*, 424 U.S. 1, 135 (1976).

112. Although *Buckley* did not address the issue directly, the case can be read as sympathetic to imposing for-cause restraints upon the removal of FEC commissioners, which is the technique Congress was forced to employ where its direct power of appointment was rejected. See *Buckley*, 424 U.S. at 135-36.

113. See *Bowsher*, 106 S. Ct. at 3206-07 (White, J., dissenting).

114. See U.S. CONST. art. II, § 1, cl. 3. The President's power faithfully to execute the national law was one of the most noncontroversial propositions considered at the Constitutional Convention. See M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 21-67 (rev. ed. 1937).

prosecutor whose function would be to investigate crimes committed by executive-branch officials who could not be expected to prosecute themselves.<sup>115</sup>

The classic administrative prosecutorial functions traditionally performed by independent agencies like the Federal Trade Commission and the Securities and Exchange Commission present a different situation. The conflict-of-interest argument does not justify independence here because the Attorney General prosecutes similar civil and criminal cases directly.<sup>116</sup> The justification for prosecutorial independence through for-cause removal restrictions must be based on other grounds.

*Humphrey's Executor* is the primary precedent that justifies for-cause removal restrictions over agency prosecutors.<sup>117</sup> Although *Humphrey's Executor* dealt more with what it labeled "quasi-legislative" and "quasi-judicial" functions, it approved an organizational scheme that had a "quasi-prosecutorial" aspect as well. In *Bowsher's* extensive discussion of *Humphrey's Executor*, there was no reference to the precise issue of executive power over the prosecutorial function. Nonetheless, the opinions do provide a framework for evaluating the prosecution-independent agency issue.

The Court might reject a separation-of-powers challenge to the prosecutorial function within the independent administrative agency based on Justice White's analysis of *Humphrey's Executor* in his *Bowsher* dissent. He argued that only a legislative restraint that threatens the core power of the executive branch should be constitutionally suspect.<sup>118</sup> The prosecutorial function of agencies like the FTC presents a minimal threat to the President's power. Agencies exercising their prosecutorial function have the power to commence administrative prosecutions, yet the

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115. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 192 (1978). Under the Ethics in Government Act § 601(a), 28 U.S.C. § 591 (1982), the Attorney General may call for an appointment of an "independent counsel" by the judiciary. The decision not to seek such an appointment, however, has been insulated from judicial review. See *Banzhaf v. Smith*, 737 F.2d 1167, 1169-70 (D.C. Cir. 1984). For a critical discussion of executive discretion in this context, see Note, *The Ethics in Government Act of 1978: Problems with the Attorney General's Discretion and Proposals for Reform*, 1985 DUKE L.J. 497.

116. The Justice Department enforces the same antitrust laws as does the FTC. See T. VAKERICS, ANTITRUST BASICS § 2.01 n.9 (1985).

117. Recent litigation challenges the prosecution function of the FTC on constitutional grounds. Judicial resolution has so far been deferred on ripeness grounds. See *Ticor Title Ins. Co. v. FTC*, 625 F. Supp. 747 (D.D.C.), appeal docketed, No. 86-5078 (D.C. Cir. 1986). Plaintiffs' brief on appeal in *Ticor* places much emphasis on the lower court decision in *Synar* which, as noted above, reluctantly accepted the *Humphrey's Executor* precedent. Brief for Plaintiffs-Appellants at 43. The Supreme Court was far less equivocal on that score, however. See *supra* notes 76-82 and accompanying text.

118. *Bowsher*, 106 S. Ct. at 3207 (White, J., dissenting). This is similar to the approach taken by Professor Strauss. See Strauss, *supra* note 29, at 630-31.

Attorney General represents the agencies in court<sup>119</sup> and has the ultimate power, through the Solicitor General, to decide what position the United States will take before the Supreme Court.<sup>120</sup>

Separating the prosecutorial function from those agencies or eliminating the for-cause removal restraints would undeniably enhance the executive power. But the qualification on that power hardly threatens the executive branch. The power to remove under *Humphrey's Executor* and *Bowsher* still rests exclusively in the President. Exercise of the prosecution function by an independent agency can be supervised through this oversight mechanism, as well as through the appointment process. If requiring the President to exercise the removal power in a studied rather than impetuous way through the for-cause provision is a reasonable restraint, then dividing the prosecution function between independent and cabinet officials does not seem unreasonable.<sup>121</sup> Although the issue may well be analyzed anew in an age of formal adherence to the doctrine of separation of powers, *Humphrey's Executor* encourages the conclusion that independent agencies may constitutionally exercise the prosecutorial function. Nothing in *Bowsher* upsets *Humphrey's Executor* in this regard.

#### B. *Congressional Responses to Bowsher v. Synar.*

The question before Congress is how to revise the Deficit Control Act to preserve some role for the Comptroller General in the deficit calculation process. This task remains a high priority because Congress does not trust the Director of OMB to provide accurate deficit figures or to administer the budget cuts with fairness.<sup>122</sup> Congress would undoubtedly prefer a continuing role for the Comptroller General. To achieve this goal without violating the Constitution, Congress must reach some compromise over the congressional removal restriction that has been the law since 1921. If in fact this removal restriction is trivial, as the dissenting opinions of Justices White and Blackmun in *Bowsher* imply,<sup>123</sup> then Congress should have little difficulty in achieving an acceptable revision

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119. 28 U.S.C. § 516 (1982).

120. Disagreement between the Solicitor General and the agency involved occasionally leads to the anomaly of the United States opposing itself. *See, e.g.,* United States v. ICC, 337 U.S. 426, 431-32 (1949). Generally speaking, however, the Solicitor General, who is part of the Justice Department, formulates the positions of the United States in consultation with the Attorney General.

121. Of course this does not suggest that it makes regulatory sense to have two federal entities enforcing the same antitrust laws. *See* Gellhorn, *Regulatory Reform and the Federal Trade Commission's Antitrust Jurisdiction*, 49 TENN. L. REV. 471, 497-99 (1982).

122. Representative Thomas Foley of Washington, the House Democratic Whip, stated: "There is no question there is a degree of distrust of OMB." N.Y. Times, July 17, 1986, at D2, col. 2.

123. *Bowsher*, 106 S. Ct. at 3208-15, 3218-20.



of the statute. But because this is an issue viewed in branch rivalry terms, strong political forces at work in Congress may make any compromise difficult.<sup>124</sup> Nonetheless, the following four suggestions seem warranted.

First, Congress should recognize that it can constitutionally relax its grip on the Comptroller General through a revision of the removal process with little sacrifice in terms of practical control. The cleanest option open to Congress is to revise the 1921 Act to make the Comptroller General removable for cause by the President.<sup>125</sup> Such a revision would end congressional removal control over the Comptroller but would restrict the President's ability to achieve removal. Indeed, were Congress to make such a revision and were the Court to sustain it, as *Bowsher* indicates the Court would, the decision would expand the applicability of the independence concept to some executive branch officials.

Defining "cause," of course, presents a problem. Congress has several options in defining the for-cause requirement: it could use the for-cause removal formula provided in *Humphrey's Executor* ("inefficiency," "neglect of duty," and "malfeasance"), devise one with greater detail, or transfer the removal standards Congress imposed on itself in the 1921 Act to the new executive removal provision.<sup>126</sup> It is unlikely that adding grounds for removal would bolster congressional control over the executive so as to raise separation-of-powers concerns. The real question would be, as Chief Justice Burger hinted in *Bowsher*,<sup>127</sup> whether the grounds for removal would include "maladministration" and thereby invite a President to remove an executive official because of policy differences.

Congress might be tempted to limit removal of executive officials to enumerated causes other than maladministration. If Congress did so, it might in effect be narrowing the existing "neglect of duty" and "malfeasance" language, which could encompass maladministration as well as the grounds for removal stated in the impeachment clause. In choosing that course, it would tie the President's hands in a manner that would

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124. At least two legislative proposals are now circulating in Congress. One would give the budget-cutting power to a purely executive office, OMB. That option, although suspect politically, would be acceptable constitutionally since the Budget Director is an executive official. Alternatively, the Comptroller General could be reinstated into the process if Congress would cut its removal ties. This appears to be more difficult owing to the fact that the Comptroller performs many purely congressional functions. N.Y. Times, July 17, 1986, at D2, col. 2.

125. *Synar v. United States*, 626 F. Supp. 1374, 1400-02 (D.D.C.) (per curiam), *aff'd sub nom. Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

126. This would add two additional grounds for removal to *Humphrey's Executor's* three: "permanent disability" and "a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1) (1982).

127. *Bowsher*, 106 S. Ct. at 3190.

limit his control over executive policymaking under article II. Congressionally imposed executive removal constraints cannot jeopardize the President's ability to function without violating the separation-of-powers principles articulated in *Bowsher*. The legitimacy of maladministration removal remains an unresolved question.

Second, whatever cause requirement Congress adopts, it also should explicitly provide for a hearing upon removal and for judicial review thereof. Present law implies these elements and there would be no harm in making them explicit. The advantage of such a provision would be to put the executive branch on notice that any contested removal could be achieved only after a clear expression and testing of the President's motives for removal. To some degree this would moderate the executive exercise of maladministration removal.

Third, Congress should retain its participation in the appointment of the Comptroller General. Surprisingly, the appointment provision went unchallenged in *Bowsher*. This provision<sup>128</sup> requires the President to nominate the Comptroller General from a list of three individuals provided by the Speaker of the House of Representatives and the President Pro Tempore of the Senate. This restriction on the President's appointment power might be thought to raise some constitutional questions in light of the clear statements expressed in *Buckley v. Valeo*.<sup>129</sup> But it went unchallenged in *Bowsher*, and the Court might continue to view the provision, like the for-cause removal requirement, as a limited restriction that does not jeopardize the executive function under the Constitution.

Fourth, Congress should provide the Comptroller General a single term of fifteen years. Appointment to terms that exceed the President's is not an unusual restraint; most agency commissioners now are appointed for terms of five or seven years. As a practical matter, a fifteen-year term insulates the Comptroller from political influence. A lengthy term of appointment implies a "good behavior" standard<sup>130</sup> and nothing in *Bowsher* restricts this congressional option.

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128. 31 U.S.C. § 703(a)(2), (3) (1982).

129. In all likelihood the list of three names would be submitted to the President after considerable discussion at which the Vice-President (as President Pro Tempore of the Senate) would be able to express the President's viewpoint. This kind of process may be in fact not much different than that which would obtain for political reasons in sensitive appointment situations even where no such requirement exists.

130. Compare the analogous situation of judicial tenure. The framers of the Constitution thought preservation of judicial independence a policy important enough to support judicial tenure for good behavior. See C. WRIGHT, THE LAW OF FEDERAL COURTS § 11, at 40 & n.2 (4th ed. 1983) (quoting THE FEDERALIST No. 78, at 494-96 (Wright ed. 1961); and *id.* No. 79, at 487).

## IV. CONCLUSION

*Bowsher v. Synar* is a fascinating chapter in the Court's revived foray into separation-of-powers analysis. Like its methodological cousin, *INS v. Chadha*, it formulates a strict view on the limits of congressional authority to participate with the executive branch in policymaking. By restricting Congress to the explicit form of executive official removal contained in the Constitution—the impeachment clause—it deprives Congress of control over the behavior and perhaps the loyalty of officials performing executive functions.

The open questions after *Bowsher* are far reaching: Does it portend the demise of all independent agencies? Does it suggest that *Humphrey's Executor* should be overruled or at least limited to nonexecutive functions? The opinions in *Bowsher* provide guidance on these questions. *Humphrey's Executor*, for all its tortured reasoning and “quasi” analysis, emerges as a central precedent on the degree to which the Constitution will tolerate congressional interference with removal. The Court does not seem concerned with the for-cause removal restraints Congress places on removal of agency officials who exercise executive functions. Thus, independent agencies should be able to continue their existence as constitutional anomalies.

The Comptroller General may also benefit from *Bowsher's* organizational framework. An option Congress might pursue is an “independent” Comptroller with a fifteen-year term. The revised position would have most of the characteristics of the previous one—except that it would not require the Comptroller to exercise executive power in an unconstitutional fashion.

While the logic of the direct challenges to independent agencies in cases such as *Ticor* is tempting to adopt because it breaks cleanly with the past, adherence to this kind of rigid separation-of-powers analysis would eliminate an organizational mechanism that has served both political branches well for many years. Moreover, if the Court rejects a for-cause removal requirement, it would also have to consider rejecting a term-of-years appointment as well as the bipartisan-composition requirement. These restrictions have been working well for fifty years. While no guarantee of future acceptance, past success does indicate that modest constraints upon executive removal are functionally sound. Unless one wants to propose some absolute notion of executive control, these provisions suggest that the independent agency has a useful and continuing life, which is just what the *Bowsher* Court implied when it resuscitated *Humphrey's Executor*.