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Separation of Political Powers: Boundaries or Balance

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SEPARATION OF POLITICAL POWERS: BOUNDARIES OR BALANCE?

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One of the most significant structural elements of the United States Constitution divides the political power of the government between two discrete political institutions, the Congress and the President, in order to prevent concentration of the full power of the national government in one place. This governmental structure has posed a continuing dilemma of how to allow for the shared decisionmaking necessary to effective government while maintaining the independence of each political branch. As the United States Congress reaches its two hundredth anniversary, questions concerning the relationship between Congress and the President, for a substantial time thought by legal scholars to be either resolved or uninteresting, have reentered the public discourse between the two political branches and have pressed for judicial answers.

These questions generally appear under the rubric "separation of powers." The term is misleading, however, for it suggests that the Constitution separates the powers each institution exercises rather than the institutions themselves. More aptly, the Constitution mandates a system of shared political powers in which dual institutional consent ordinarily establishes governmental policy. In this way, the Constitution reconciles representative democracy with a remedy for the executive weaknesses that the Continental Congress and the Articles of Confederation had manifested in practice.

After the two political branches reach tentative agreement as to how they will allocate decisionmaking power between themselves, an aggrieved branch or a third party may invite the courts to review the decision. Our constitutional tradition accords the Supreme Court the last word short of formal amendment in deciding

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constitutional issues presented in a "case" or "controversy."[1] The Court may treat the division of political functions between the other two branches as simply one more constitutional issue within its usual competence. On occasion, however, the Court has declined to intervene, leaving the political branches themselves to arrive at acceptable arrangements.[2] The establishment of the institutional arrangements between Congress and the President thus involves the consent of all three branches.

Unfortunately, the Court's recent decisions in this area proceed from an erroneous conception of the constitutional structure, one that divides powers into three neat categories. The opinions do indicate that the powers are not hermetically sealed from one another.[3] But after this nod towards reality, the Court generally goes on to determine whether a particular arrangement falls on one or another side of a separation of powers boundary line. This conception runs three risks: that the Court will prevent the political branches from creating new responses to changing events and problems of government; that the Court will enhance rather than diminish the very consolidation of power within a single branch that the Constitution sought to avoid; and that the Court itself will decide the political matters properly left to the elected branches.

This article offers a competing conception, one that emphasizes decisionmaking shared by Congress and the President.[4] Under this view, the Constitution creates a balance between two vital political institutions that reach decisions in different ways. The resulting combination produces decisions both efficient and responsive. Court intervention is appropriate, then, only to prevent one political branch from upsetting the balance and excluding the other from the decisionmaking process.

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[1] U.S. CONST. art. III, § 2.

[2] *Compare* INS v. Chadha, 462 U.S. 919 (1983) *with* Goldwater v. Carter, 444 U.S. 996 (1979).

[3] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 121 (1976), *quoted with approval in Chadha*, 462 U.S. at 951.

[4] This view is hardly new. Justice Jackson wrote, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952). It wants emphasis, however, in the face of the prevailing Supreme Court trend.

In considering the relationship between Congress and the President, I first examine the constitutional text that shapes the process. The text offers little to support the Court's classification of powers approach. The article then surveys three substantive areas in which one branch presumptively dominates the process: the allocation of funds and revenue raising, in which Congress is said to make the decisions, and the conduct of foreign policy, in which the President assertedly prevails. Contrary to the model of allocation of functions to one or another branch, the two branches share decisionmaking even in these polar cases. The process is often one of presidential leadership accompanied by significant congressional participation. The article contrasts the types of decisionmaking each institution typically employs and relates those methods to observed functional distinctions. It then turns to recent Supreme Court opinions and their apparently divergent model of separation of powers.[5]

I. Separation of Political Powers in the Constitution

The Constitution does not make a direct and explicit declaration that separates the political powers. It does specify the powers of Congress and the President as constitutional entities, implying that each should function in the stated manner without dominance by the other. The belief that the legislative, executive, and judiciary departments ought to be separate and "distinct" unquestionably animated the Framers. As *The Federalist Papers* carefully spelled out, however, the idea does not mean that each department "ought to have no *partial agency* in, or no *controul* over" the acts of the others.[6] Rather, the chief objective is that the *whole* power of one should not rest in the hands of another.

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[5] Because the article explores the dynamics of shared political powers, it bypasses two issues around which much of the separation of powers literature has revolved. Separation of powers concerns affecting the independence or jurisdiction of the judiciary present somewhat different questions and are not directly considered here. The paper thus lays to one side the article III cases from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) to Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Nor does the article focus on questions of how and whether to apply the separation of powers principle to administrative agencies. *See* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984); *cf.* Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1983).

[6] The Federalist No. 47, at 325 (J. Madison) (J. Cooke ed. 1961) (emphasis in original).

Few constitutional provisions deal expressly either with the separation of powers principle or with separation of powers concerns.[7] Almost all the specific articulations of the principle dividing the political power between Congress and the President appear in article I as limitations or attributes of membership in Congress. Section 6, paragraph 2, the incompatibility clause, forbids simultaneous holding of membership in Congress and federal office.[8] A related provision, the ineligibility clause, prohibits a Congressman's appointment to any civil office of the United States created or assigned greater compensation during the time for which he was elected.[9] Both clauses limit the power of the President to corrupt individual members of Congress by giving them executive offices, although the President retains the power to appoint a member to a previously created office when a vacancy occurs, if the member resigns his seat in Congress.[10] By preventing one individual from holding legislative and executive office simultaneously, the incompatibility clause also addresses the concern about concentrating those powers in one set of hands.

Section 6, paragraph 1 establishes a more direct shield for members of Congress. It protects them from civil arrest whenever Congress is in session.[11] It bars questioning "in any other place" regarding any speech or debate in either house.[12] The English ex-

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[7] Several provide for sharing of powers, especially article I, section 7 on enacting legislation and article II, section 2 on making treaties and appointing officers of the United States.

[8] *See* U.S. CONST. art. I, § 6, cl. 2. The clause reads: "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." *Id.*

[9] *See id.* The clause reads: "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time . . . ." *Id.*

[10] In the case of incompatible offices, acceptance of the second office vacates the first. Reservists Committee To Stop the War v. Laird, 323 F. Supp. 833 (D.D.C. 1971), *aff'd mem.*, 495 F.2d 1075 (D.C. Cir.), *rev'd on other grounds sub nom.* 418 U.S. 208 (1974).

[11] *See* Williamson v. United States, 207 U.S. 425 (1908) (the privilege against "arrest" does not apply to an arrest on criminal charges that does not draw in question the legislative acts or motives of the member).

[12] The speech or debate clause has been construed to mean all activity necessary to the process of legislating. *See* Kilbourn v. Thompson, 103 U.S. 168 (1881). The "place" where someone seeks to inquire into a speech or debate generally is

perience of monarchical harassment of the Commons lay behind these provisions. The Constitution sought to preserve for the houses of Congress the independence from the executive power that the British Commons wrested from the King in the seventeenth century.

Section 5 secures to each house a large measure of autonomy in the internal conduct of its own affairs. Each house may determine its own rules of procedure, including, to a large extent, questions of membership. Either house may expel a member, however, only on a two-thirds vote.[13] The Constitution thus prevents the other branches from interfering in the internal workings of either house, although the other branches may sometimes interpret the houses' actions.[14]

The sole provision of article II expressly addressed to separation of powers appears in section 1. Much like the ineligibility clause, that section provides that the President receive a compensation that may not be increased or diminished during his term,[15] thus preventing Congress from coercing the President's official actions. Article II, however, includes no presidential analogue to the article I, section 5 guarantees; no express provisions grant the President a zone of exclusive activity in which to conduct affairs of the executive branch without congressional interference. Although the President may require the principal officer in each executive division to give an opinion in writing on any subject relating to the officer's duties,[16] presidential oversight of officers is not exclusive and Con-

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a courtroom and the proceeding may be a criminal trial, United States v. Johnson, 383 U.S. 169 (1966); a grand jury investigation, Gravel v. United States, 408 U.S. 606 (1972); a civil suit involving the member, Hutchinson v. Proxmire, 443 U.S. 111 (1979); or even a civil suit to which the member is not a party, Miller v. Transamerican Press, Inc., 709 F.2d 524 (9th Cir. 1983).

[13] U.S. CONST. art. I, § 5, cl. 2. The section provides: "Each House may determine the Rules of its Proceedings, punish its members for disorderly Behaviour, and, with the concurrence of two thirds, expel a Member." *Id.*

[14] *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969) (construing the House of Representatives' action as an exclusion, not an explusion); United States v. Smith, 286 U.S. 6 (1932) (determining the relative status of the notification and reconsideration provisions of the Senate rules).

[15] U.S. CONST. art. II, § 1, cl. 7. The section provides that "[t]he President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." *Id.*

[16] U.S. CONST. art. II, § 2, cl. 1.

gress may impose enforceable duties on executive officers.[17] Article II also requires the President to take care that the laws "be faithfully executed," a phrase that the Supreme Court on occasion has extended into a separation of powers shield and is considered more fully below.[18]

This relatively meager collection of privileges and prohibitions hardly supports the solemn edifice of separation of political powers beatified by practice and rhetoric. As earlier suggested, the Constitution sets forth the structure of government itself and the elaboration of powers to support each branch. But that structure raises rather than resolves questions that fall in the large, unarticulated gray area. No one doubts that Congress and the President each have viable roles to play in the constitutional scheme. Differences do arise, however, in assessing the appropriateness of new techniques and patterns of action.

The Supreme Court's recent opinions tend to identify specific functions for each institution and to draw boundary lines around those functions with particularity. Proceeding from the powers enumerated in the Constitution, this approach seeks to limit Congress to the business of legislating,[19] notwithstanding the shared role of Congress and the President in that activity, and to set out the President's role as a supervisory executive officer unfettered by congressionally imposed limits.[20] More rarely, it restrains presidential action beyond the scope of the delegated powers.[21]

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[17] *See, e.g.*, Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838).

[18] *See* Myers v. United States, 272 U.S. 52 (1926); *infra* notes 171-78 and accompanying text.

[19] To do so, of course, courts have had to define "legislative" activity; this prevents Congress from establishing its own institutional role. *See* United States v. Brewster, 408 U.S. 501, 512-13 (1972) (Burger, C.J.) (contacting constituents is political, not legislative, activity); Diggs v. Commissioner, 715 F.2d 245 (6th Cir. 1983) (Congressman may deduct as ordinary and necessary business expenses the costs of attendance at National Black Political Conference but not the costs of attendance at Democratic National Convention). *But see* Common Cause v. Bolger, 574 F. Supp. 672, 677 (D.D.C. 1982), *aff'd*, 461 U.S. 911 (1983) (members of Congress have a "constitutional duty to communicate with and inform" constituents).

[20] *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983); Myers v. United States, 272 U.S. 52 (1926).

[21] The only major separation of powers case the President has lost in modern

I will argue that the emphasis on drawing lines between functions misreads the constitutional structure which, at its most basic level, contemplates that the political branches combine in their operation responsiveness to constituents and effectiveness in administration. I will advocate a second approach that recognizes the Constitution's attempt to effect a balance between the political branches. That balance assures that the special strengths of each branch, derived in part from the fact that they are organized quite differently, can have maximum effect.

The constitutional scheme requires that neither branch subordinate the other, concentrating political power unchecked in one place. So long as each branch can defend itself against subjugation by the other, the specific process by which the branches agree to cooperate to solve the nation's problems should stand even when the solutions stretch rigid definitions of legislative or executive activity. The Constitution states these functions generally, with open-textured, implied powers to allow flexibility in the governmental structure. Only the exclusion of a branch from the decisionmaking process should warrant judicial intervention on separation of powers grounds; otherwise, accommodations by the President and Congress should be respected.

II. Differences in Decisionmaking Models

Congress and the President make political decisions under two separate paradigms of decisionmaking. The differences flow from the structure and organization of each branch. The sharing of powers inserts both methods into the process of governmental choice and allows the process to benefit from the strengths each presents.

Both houses of Congress consist of many members, each independently elected by the voters of a state or district.[22] Each Congressperson and Senator responds to a specific geographically-determined constituency that has the power to retain him or turn him out, regardless of the opinion of leaders within the House or

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times is Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952), also known as the *Steel Seizure Case*. The Supreme Court did affirm the power of the judiciary to review claims of presidential privilege in United States v. Nixon, 418 U.S. 683 (1974).

[22] U.S. Const. amend. XVII. Before adoption of the seventeenth amendment, state legislatures chose the Senators.

Senate or other national political leaders. Each decision taken by a house must marshal a majority of these independently based members. The process of securing a majority on any matter requires that decisionmakers with different priorities and different judgments agree on a single course of action.

A growing literature analyzes the congressional decisionmaking that results, called variously logrolling, market behavior, or partisan mutual adjustment.[23] I describe the decisions as convergent. The determinations the houses tend to reach satisfy many members and dissatisfy few. Compromise and adjustment dominate. The classic advice to new members, ascribed to Sam Rayburn, counsels that "to get along, go along."[24] After either house makes a decision, the bicameral structure of Congress creates further pressure for compromise as the other house must repeat the process among its own members and the separate determinations of the two houses then must be reconciled. The process often produces results that converge toward an average of the differing preferences and dislikes of the members.

This decisionmaking dynamic does not require one to embrace the view that members act only to represent specific interests or that no definition of the public good exists apart from the resolution of those contending interests. Members representing the most altruistic, public-serving views still would have to resolve their differences and bargain over priorities and values. Convergent decisionmaking occurs whether members act out of perceptions of local public interest, national public interest, private constituent interest, or personal enrichment. It applies whether bargaining occurs only within a single subject matter or across issues. Whether the initial positions are high-minded or crass, decisions that embody 535 different opinions, held with different intensities, will tend to reflect central rather than polar positions.

Convergent decisionmaking within each house of Congress takes place in a complex institutional setting that shapes and influences

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[23] *See, e.g.*, J. BUCHANON & G. TULLOCK, THE CALCULUS OF CONSENT (1966); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). *But see* A. MAASS, CONGRESS AND THE COMMON GOOD (1983) (the political process does not simply aggregate narrow group or individual interests; it operates on broader community interests).

[24] C. CLAPP, THE CONGRESSMAN 12 (1963).

the results. The division of the houses into committees affects the bargaining process by increasing the power of committee chairmen and members of committees with jurisdiction over important matters.[25] Party affiliation creates its own set of alliances and influence.[26] Staff members may present issues or regulate the flow of information so as to press toward one set of results or avoid others.[27] The rules and traditions of each house channel decisionmaking.[28] Yet while all of these affect the range of choice for decisionmaking, the organizing principle for reaching an institutional result in the legislature remains the give and take of convergent decisionmaking.

The President, however, takes formal action on his own. His election by the whole nation dilutes the influence of any one group on any specific action. The process of selecting any choice from the range of possibilities does not require him to compromise with any peer. As head of the executive branch, the President can muster, on virtually any subject, a formidable array of technical competence and information in support of his choice.

These conditions distinguish presidential decisionmaking, but they also operate in an institutional framework that bears similarities to convergent decisionmaking. The same range of idealistic, pragmatic or selfish considerations that affects legislators can motivate presidential choice. The same range of constituents that lobbies members of Congress may pluck at the President's sleeve. Powerful staff members may clamor for divergent positions. Others outside government may seek to constrain presidential choice. Bureaucracies that control information, formulate policy responses, and limit access can shape and qualify the kinds of choices the President makes.[29]

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[25] *See* Ehrenhalt, *Media, Power Shifts Dominate O'Neill's House*, 1986 CONG. Q. WEEKLY REP. 2131.

[26] *See generally* D. MAYHEW, PARTY LOYALTY AMONG CONGRESSMEN (1966).

[27] *See* M. MALBIN, UNELECTED REPRESENTATIVES (1980). For two staff members' views, see E. REDMAN, THE DANCE OF LEGISLATION (1973); J. WEATHERFORD, TRIBES ON THE HILL (1981).

[28] *See* SENATE STUDY GROUP REPORT (Apr. 8, 1983); Bach, *The Structure of Choice in the House of Representatives: The Impact of Complex Special Rules*, 18 HARV. J. ON LEGIS. 553 (1981).

[29] *See* G. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (1971). *But see* Krasner, *Are Bureaucracies Important? (Or Allison Wonderland)*, 1972 FOREIGN POL'Y 159.

In the end, however, the quality characterizing formal presidential choice is the President's single, unitary decision. As Abraham Lincoln reportedly once said, in the face of solid Cabinet opposition, "[t]here is one aye and twelve nays, the ayes have it."[30] Presidents certainly compromise, temporize and orchestrate diversity, but the unique quality of a hierarchy with a single head lies in command decisionmaking.

Both kinds of political decisionmaking—convergent and command—contribute to the success of an efficient national government operating on democratic principles.[31] For most of the choices that government makes, no demonstrably right answers exist; a number of answers might provide plausible results. For example, there is no demonstrably "right" amount to appropriate for national defense expenditures. Within a multi-billion dollar range of disagreement, the usual terrain for annual budget battles, nearly any stopping point is plausible, although partisan advocates will have very different and strongly held views as to the optimum point. Similarly, on an individual level, there is no single answer to the question, "what is the right amount of income tax a family of four with a specified income should pay?" The range of choice again is constrained, this time by national revenue needs, comparisons with the tax contributions to be made by others, and predictions about tax effects on future behavior. As the sequence of major tax changes in the last ten years strongly suggests,[32] many

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[30] The story, which may be apochryphal, was quoted on occasion by President John F. Kennedy. PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES 1962, at 390 (1963).

[31] Courts engage in yet a third kind of decisionmaking: judgment. Within the constraints imposed by an existing body of law, judges decide the discrete matters brought to them by attempting to sort out the right and wrong in a case. The complex relationship between judicial decisions and politics has been explored by legal realists and others and lies outside the scope of this paper. *See, e.g.*, Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979) (distinguishing adjudication and bargaining as modes of social adjustment). For an insightful examination of judicial decisionmaking by multi-judge courts, see Kornhauser & Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986).

[32] Over the past ten years, Congress has passed six major pieces of tax legislation: the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520; the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763; the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172; the Tax Equity and Fiscal

different dollar amounts may be plausible.[33]

Nevertheless, Congress does appropriate a specified dollar amount for annual defense and does set rules to establish the income tax liability for any given family. The process of convergent decisionmaking makes these results acceptable. Constituencies that can muster support within the legislature can defend against potentially disastrous governmental decisions, even if they cannot force adoption of the decision they believe optimal. The process creates the sense that all relevant views have been represented and taken into account in reaching the conclusions. Both logic and the significance of an outcome to specific members can play their part.[34]

Some kinds of questions, however, do not lend themselves to the compromises inherent in convergent decisionmaking. The decision to appoint a named individual as Social Security Administrator requires a particular choice, not an averaging. Some candidates will be clearly superior to others under criteria related to job performance. The choice that offends the fewest constituencies may not be best. A decision to recognize a foreign government likewise seems ill-suited to a compromise solution.[35] For these and certain other decisions, averaging of preferences seems likely to produce inferior results. While no procedure can assure the best result in all instances, command decisionmaking seems more likely to produce the right decisions.

The rightness of a command decision, of course, depends on a number of factors, including the choice of the criteria by which to measure it. The best person by the President's standards can be

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Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324; the Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494; and the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. ——.

[33] No general agreement exists on criteria for fairness in altering tax burdens. *See* Feld, *Fairness in Rate Cuts in the Individual Income Tax*, 68 CORNELL L. REV. 429 (1983).

[34] As the legal props for racial segregation demonstrated, the convergent decisionmaking process may produce results that do not satisfy substantial parts of the population if those groups are not adequately represented in the legislature or if the contrary result has great importance for other constituencies. *See* J. ELY, DEMOCRACY AND DISTRUST 135-79 (1980); *cf.* Soifer, *Complacency and Constitutional Law*, 42 OHIO ST. L.J. 383 (1981) (adequate representation in the legislature is hampered by the Supreme Court's weak response to equal protection challenges in vote dilution cases).

[35] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

manifestly wrong by other criteria. For this reason, the Constitution creates opportunities for Congress to review many of the President's decisions. The Senate, for example, may reject a nominee. The Constitution retains command rather than convergent decisionmaking, however, even after the Senate does so: the Senate may not substitute its own nominee; the President must try again.[36]

As these examples demonstrate, both the constitutional allocation of functions and prevailing practice combine both kinds of decisionmaking. Some issues flow through Congress' convergent decisionmaking process. When they do, the President's position enters the decisionmaking process as one of the important determinants. For other issues, like appointments, decisions start with the President. Congress' formal role consists of approval or disapproval of his action. Single rather than joint action tends to be the exception, not the rule.

This outline of constitutional decisionmaking processes suggests the difficulty inherent in policing a separation of discrete functions between President and Congress: both institutions must *join* in major governmental decisions. Each branch understands and accepts, however grudgingly, the importance of the contributions the other makes. In Congress especially, deference to the need for command decisionmaking in foreign and military affairs persuades many members to agree with the President in those areas. For Congress to muster an attack on the executive branch in a way that the President cannot easily avoid through the use of the veto power, a two-thirds majority in each house must agree on the appropriateness and desirability of the approach. In the ordinary course, enough disagreement within Congress over constitutional concerns or short-term advantage will bar a change. The difficulty in achieving agreement at this supermajority level militates against any incursion on essential presidential powers. Indeed, the prevailing

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[36] In the event of an impasse, the President could make an appointment during the Senate's recess. The appointee's commission would then run until the end of the next Senate session. U.S. CONST. art. II, § 2, cl. 3. For a discussion of the implicit limits of this power, see Comment, *Constitutional Restrictions on the President's Power To Make Recess Appointments*, 79 NW. U.L. REV. 191 (1984). *Cf.* 1 Op. Att'y Gen. 826 (1832) (the President may not keep open vacancies until a recess for the purpose of avoiding control by the Senate).

scholarly view sees the President's decisionmaking power enhanced at Congress' expense.[37]

Congress on occasion can muster the effort for institutional change in its favor. It has succeeded in enacting important legislation on the budget[38] and the war powers,[39] the latter over a presidential veto near the end of the Nixon era, in order to restore the constitutional balance in those areas. For the most part, however, Congress finds it difficult to organize around institutional advantage as opposed to specific issues. The legislative veto provides an example. Congress had employed the legislative veto in a variety of forms and contexts until the Supreme Court declared the device invalid in *INS v. Chadha*.[40] Congress' failure to establish an institutional answer to the *Chadha* decision,[41] despite the suggestions by some scholars of the ways it might do so,[42] reflects this difficulty.

III. Constitutional Treatment of Action by Congress and the President

The Constitution binds the two modes of decisionmaking together within the formal processes for congressional action. These processes do not contemplate the actions of individual members or committees of Congress even in their official capacities, notwithstanding that their actions sometimes rise to constitutional significance.[43] The Constitution specifies two modes of formal behavior,

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[37] The titles of two books tell the tale: J. Clark, Congress, the Sapless Branch (1976), and A. Schlesinger, The Imperial Presidency (1973). For a recent exchange as to what should be expected of Congress, compare Mezey, *The Legislature, the Executive and Public Policy: The Futile Quest for Congressional Power*, 13 Cong. & Presidency 1 (1986) with Cooper, *Assessing Legislative Performance: A Reply to the Critics of Congress*, 13 Cong. & Presidency 21 (1986).

[38] *See infra* notes 68-79 and accompanying text.

[39] *See infra* notes 107-16 and accompanying text.

[40] 462 U.S. 919 (1983). Justice White's dissent found the device in nearly 200 statutes. It had been used to limit delegations of broad discretionary authority, to review individual cases, and to resolve constitutional disputes. *Id.* at 967.

[41] *See* Moran, *Of Train Wrecks, Time Bombs, and Skinned Cats: The Congressional Response to the Fall of the Legislative Veto*, 13 J. of Legis. 22 (1986).

[42] *See, e.g.*, Breyer, *The Legislative Veto After* Chadha, 72 Geo. L.J. 785 (1984).

[43] Either house, of course, could authorize specific members or officers to represent and act for it. For example, the Senate Legal Counsel represents the Senate in litigation when authorized to do so. 2 U.S.C. §§ 288b, 288c, 288d

the ordinary and the extraordinary. In the ordinary course of legislation, each house of Congress takes action by majority vote,[44] followed by the President's approval. When a deadlock over legislation occurs, however, the Constitution empowers Congress to break it and override the President's position.[45] The Constitution also grants Congress important powers to remove key personnel and to change the institutions of the federal government under certain conditions.[46] It mandates a two-thirds vote when a house acts in these extraordinary ways.

The extraordinary actions of Congress fall into two general categories: they either substitute for action by another constitutional institution or they remove from office an individual who acts for a constitutional institution. Consider the instances in which the Constitution requires a two-thirds vote.

(1) Veto overrides. When the President vetoes legislation Congress has passed, there can be no *a priori* determination of whether the proposal by Congress or the negative by the President should prevail. Either might be in the country's best interest. Accordingly, the Constitution creates a "tie-breaker" process. Both houses must act by supermajority to override the veto. The special majority in effect substitutes for approval by the President.[47]

(2) Treaty approval. The Constitution declares treaties a part of the supreme law of the land,[48] so that Senate approval of a treaty proposed by the President has the same domestic effect as enactment of a statute. Yet, instead of the three usual participants in fashioning legislation, only the President and the Senate give their

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(1982). Much of the litigation concerning congressional powers and privileges, however, has involved individuals not acting for the House or committees seeking information and operating with substantial independence under a fairly general mandate. *See, e.g.*, Watkins v. United States, 354 U.S. 178 (1957); Benford v. American Broadcasting Co., 502 F. Supp. 1148 (D. Md. 1980), *aff'd without opinion*, 661 F.2d 917 (4th Cir.), *cert. denied*, 454 U.S. 1060 (1981).

[44] A majority is measured by those present and voting, not by the membership of the House. United States v. Ballin, 144 U.S. 1, 9 (1892).

[45] U.S. CONST. art. I, § 7, cl. 3.

[46] *Id.* § 3, cl. 6; *id.* art. V.

[47] The two-thirds is measured by members present and voting. *See* Missouri Pac. Ry. v. Kansas, 248 U.S. 276, 283-85 (1919). At a minumum, a majority of members must be present to constitute a quorum. U.S. CONST. art. I, § 5, cl. 1.

[48] U.S. CONST. art. VI.

assent. The requirement that treaties be ratified by two-thirds of the Senate[49] (rather than by the usual majority) substitutes for the approval by the House of Representatives that is ordinarily required.

(3) Removal of constitutional actors. If abused, the power to remove an individual who acts exclusively for one branch of the government could threaten the proper independence of that institution. Thus, when either house expels one of its own members, or when the Senate conducts an impeachment, directly removing a member of another branch, the Constitution requires a two-thirds vote.[50]

(4) Amendment of the Constitution. When Congress acts to propose a constitutional amendment, thereby creating the potential that government institutions will be recast, the proposal must be passed by two-thirds vote.[51]

The great practical difficulty in obtaining a two-thirds majority in both houses[52] suggests that the supermajority requirement imposes an ample check on arbitrary action. From 1969 to 1984 Congress enacted 5957 measures; the President vetoed 184; and Congress overrode 24 of the vetoes.[53] On the average, there were 1.5 overrides per year, but fully half the overrides came during the brief post-Watergate, Ford presidency.[54] In any event, the override procedure accounted for only .4% of all measures that became law in the fifteen-year period.

As might be expected, each branch behaves strategically in contemplating the formal powers of the other. Congress passes legislation with full awareness of the President's conditional veto and with some calculation as to whether the President likely will exercise it. The President exercises his veto with an eye on the possibilities for override in each house. The result is an interdependence

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[49] *Id.* art. III, § 2, cl. 2. The Constitution expressly provides that the two-thirds is computed based on Senators present. *Id.*

[50] *Id.* art. I, § 5, cl. 2 (expulsion); *id.* § 3, cl. 6 (impeachment).

[51] *Id.* art. V. Again, the two-thirds is of those present. *See* National Prohibition Cases, 253 U.S. 350 (1920).

[52] *See* R. ECKHARDT & C. BLACK, THE TIDES OF POWER: CONVERSATIONS ON THE AMERICAN CONSTITUTION 22-23, 60-62 (1976).

[53] U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT: 1986, at 247, table no. 418 (1985).

[54] *Id.*

in which the convergent processes take account of presidential preferences he can express as command decisions and the command decisions take due regard of the likely outcome of convergent decisionmaking.

The Constitution does empower the President to act independently of Congress in a limited number of areas. Two of these regulate the flow of information: the President may recommend measures to Congress and shall inform it from time to time of the State of the Union;[55] and he may require the written opinion of heads of departments.[56] Other clauses deal with presidential action when Congress or the Senate has not acted or cannot act. The President may convene the houses of Congress when they are not in session, and when they cannot agree on a time to adjourn, he may adjourn them.[57] The Constitution gives the President the power to make appointments to vacancies that occur when the Senate is in recess.[58] In effect, he has "tie-breaker" power in appointment matters if the Senate and the President otherwise fail to agree or Senate agreement cannot be obtained.[59]

The Constitution also grants certain substantive powers to the President in which the Constitution *implies* no direct role for Congress. The President may grant reprieves and pardon offenses, a power not suited to majority vote.[60] He may receive ambassadors.[61] Somewhat more ambiguously, article II says the President "shall be" Commander-in-Chief, without stating what powers attach to this designation.[62] Finally, article II opens by vesting "the executive Power" in the President[63] and closes by requiring him to "take

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[55] U.S. CONST. art. II, § 3.

[56] *Id.* § 2, cl. 1.

[57] *Id.* § 3.

[58] *Id.* § 2, cl. 3.

[59] *See supra* note 36 and accompanying text.

[60] U.S. CONST. art. II, § 2, cl. 1. Perhaps because the pardon power clearly excludes the involvement of other branches, it has sometimes served to exemplify unfettered executive action. *See* Opinion of the Attorney General, at 7-8 (Jan. 16, 1981) (unpublished) (citing the pardon power as a power Congress could not deny the President "by purporting to deny him the minimum obligational authority" to carry it out).

[61] U.S. CONST. art. II, § 3; *see supra* note 35.

[62] U.S. CONST. art. II, § 2, cl. 1. The War Powers Act controversy partly concerned the scope of this power. *See infra* notes 107-16 and accompanying text.

[63] U.S. CONST. art. II, § 1, cl. 1.

care that the Laws be faithfully executed."[64] How much discretion these provisions grant the President to act outside the scope of policy agreed upon between Congress and the President remains unclear. In *Youngstown Sheet & Tube Co. v. Sawyer*,[65] however, the Court rejected the contention that they grant the President inherent power to act in the public interest.[66]

The Constitution thus establishes an intricate balance between Congress and the President, a balance effected by a norm of shared decisionmaking. The Constitution grants Congress the power to overturn the President in matters governed by legislation, by two-thirds vote, and the power to remove the personnel of the executive branch with action by the House and a two-thirds vote of the Senate. And it grants the President a limited set of powers to act alone. For the most part, however, joint effort embracing the different perspectives of each institution is anticipated.

IV. Coordination of Political Functions in Practice

The notion that Congress and the President adhere to a strict separation of functions becomes implausible on examination of specific decisionmaking areas. Some areas, such as expenditure questions, are thought to fall within Congress' special prerogative, while the President is expected to dominate in others such as foreign policy. In both areas, however, the President and Congress have created processes which involve both institutions significantly in shaping the end result. Arriving at the annual budget presumably is the work of Congress, while making a treaty is the work of the President, yet both Congress and the President play important substantive roles in each.

A. The Budget Process

A reading of the Constitution's description of the legislative process suggests that a budget begins with Congress. Yet the formal statutory timetable prescribed for the budget process begins with presidential action.[67] Indeed, the same is true for most tax and

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[64] *Id.* § 3.
[65] 343 U.S. 579 (1952).
[66] *Id.* at 587-88.
[67] *See* 2 U.S.C. § 631 (1982 & Supp. III 1985).

expenditure legislation and for domestic programs generally. Action on money matters or programs rarely begins with congressional initiative; instead, the President shapes the initial proposal and with it the terms of the debate.

Even so, the President's budget proposals do not represent the final word. The houses of Congress can and do modify his starting point. Accordingly, he must take into account the likely legislative reception. And Congress in turn must take into account the President's formal power, his conditional veto, and his informal power of persuasion. Action and potential action by either branch balances the other.

The landmark Congressional Budget and Impoundment Control Act of 1974[68] provides the present framework for budget decisionmaking.[69] From 1921 until the Act's passage, the President, aided by professional staff, prepared a unitary executive branch budget for submission to Congress. Gradually the centralization of function and the President's skilled, professionally-trained staff provided him with enormous advantages in the decisionmaking process. Congress had to rely on the President's formulations for base information as to expenditures, projections as to the economic effects of expenditures, and, most importantly, the balance between expenditure and revenue raising. Not only did Congress lack the professional staff, but its committee structure divided the taxing and spending processes partly to avoid concentration of too much power in a single committee.

A related problem arose out of the Nixon administration's impoundment of appropriated funds on an unprecedented scale. Congress appropriated, but the President frequently failed to spend. Previous Presidents sometimes had failed to spend funds appropriated by Congress for a variety of reasons related to the purpose of the expenditure: the need for the expenditure had vanished; the mandated expenditure was deemed wasteful; or, in a few cases, the President simply disagreed with the desired expenditure.[70] The Nixon

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[68] Pub. L. No. 93-344, 88 Stat. 297.

[69] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, also known as the Gramm-Rudman-Hollings Act, modified some of the budget procedures in order to effect its budget-balancing objectives. The basic changes wrought by the 1974 Act remain in place, however.

[70] *See* Mikva & Hertz, *Impoundment of Funds—The Courts, the Congress, and the President: A Constitutional Triangle*, 69 NW. U.L. REV. 335 (1974).

administration cut back spending for all these reasons but also because it deemed the *general* level of federal expenditure unduly inflationary. Authority for these executive decisions assertedly came from statutory delegations of discretion and from the Constitution's vesting of executive power in the President.[71] But Congress viewed these presidential claims as unwarranted and sought, with the 1974 Act, to reassert its own role.[72]

The Act established internal processes for Congress to relate revenues and expenditures, and it established the Congressional Budget Office as the congressional analogue to the President's Office of Management and Budget.[73] It also regulated presidential impoundment by negating inferences of delegated discretion and by establishing a procedure for dealing with proposed presidential rescissions and deferrals of budget authority.[74] The core of the impoundment

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[71] The Supreme Court's only consideration of impoundment came several years later, in Train v. City of New York, 420 U.S. 35 (1975). The Court there found against the executive on a statutory ground; hence, the constitutional claims have never been decided. *See id.* at 41.

[72] *See* H.R. REP. No. 658, 93d Cong., 1st Sess. 16, 25 (1973).

> Your Committee sees no explicit or inherent authority in the Constitution for the President to impound funds, as he has been doing, even when the goals seem desirable to him. As Associate Justice William H. Rehnquist wrote in 1969, when he was an Assistant Attorney General:
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> "With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that the existence of such a broad power is supported by neither reason nor precedent."
>
> Our system of government rests ultimately on mutual respect among its three branches. A responsible Congress therefore should give thoughtful attention to whatever the President suggests. His judgment that the state of the economy requires controls on spending deserves responsible congressional action. On the other hand, the analyses presented at our hearings raised serious questions about the President's claim to implied impoundment power beyond the Anti-Deficiency Act when faced with conflicting and contradictory statutes.
>
> Whatever the legitimacy of those claims, however, Congress must not permit its own vital and constitutional role in deciding spending priorities to lapse by default. It will surely do so if Congress does not provide a suitable and equitable institutional mechanism to preserve its legitimate prerogatives.

Id. at 26.

[73] Pub. L. No. 93-344, § 201, 88 Stat. at 302.

[74] *Id.* § 1012, 88 Stat. at 333.

procedure, however, included a bicameral legislative veto,[75] and in the aftermath of the apparent invalidation of all legislative vetoes in *INS v. Chadha*,[76] it remains uncertain how much of this impoundment control remains in place.[77]

In any event, the budget procedures of the 1974 Budget Act could not and did not establish exclusive congressional control over the budget process. On the contrary, the Act identified the President as a principal player in budgeting.[78] President Reagan appeared to recognize this in 1981 when he employed the procedures of the 1974 Act to substitute his budgetary priorities for those of the House leadership.[79] Thus, notwithstanding the new organizational features of the 1974 Budget Act, the budget process requires a high level of interaction between the political branches. Balance between the branches rather than a sharp separation of functions marks the process.

B. Tax Legislation: The Origination Clause

The Constitution provides a similar allocation of functions within the legislative branch in its requirement that revenue matters originate in the House. Again, the practice reflects a balance between the institutions.

The Constitution's origination clause provides that all bills for raising revenue shall originate in the House of Representatives; the Senate may then propose amendments or concur.[80] Presumably, the Framers sought to invest the more popularly elected House with the power to initiate and thereby control tax matters. The two

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[75] *Id.* §§ 1012-13, 88 Stat. at 333-35.

[76] 462 U.S. 919, 944-45, 959 (1983); *see supra* notes 40-41 and accompanying text.

[77] A district court has held the legislative veto provision invalid but not severable from the rest of the impoundment procedure set out in the statute. City of New Haven v. United States, 634 F. Supp. 1449 (D.D.C. 1986). Under this holding, the statute neither limits whatever inherent power to impound the President might derive from his exercise of general executive power nor delegates to the President new statutory authority to impound, but the single decision doubtless does not give the final judicial word on the subject.

[78] Pub. L. No. 93-344, §§ 201(d), 301(d), 601(g), 1012, 1013, 88 Stat. 303, 307, 323, 333-34.

[79] For an insider's description, see Baker, *An Introduction to the Politics of Reconciliation*, 20 HARV. J. ON LEGIS. 1 (1983).

[80] U.S. CONST. art. I, § 7, cl. 1.

houses both reach determinations as to tax matters by processes of convergent decisionmaking, but the processes necessarily differ because of the different compositions and size of each House. Passage of a tax bill requires that they jointly reach a result, one that reflects the sharing of revenue-raising power between them.

This is especially true because the origination clause appears to require a nearly impossible distinction between bills that introduce tax proposals and bills that provide amendments to proposals. At what point does an "amendment" by the Senate swallow up the original House proposal and become impermissible new matter? Certainly the power to originate tax legislation loses its force unless the House of Representatives is permitted to set the agenda for tax matters and prevent substitution of wholly new matter. Yet the Senate has on occasion amended revenue legislation by striking all of the content of the bill following the House bill number and substituting its own text. The substitution may be a different sort of tax altogether.

Nevertheless, the courts have held that the amendment process permits this kind of change.[81] The House of Representatives can respond to Senate encroachment on House prerogatives simply by ignoring any Senate action that the House deems an invasion of its origination jurisdiction.[82] The courts wisely have refused to intervene when tax legislation nominally has originated in the House of Representatives.[83]

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[81] *E.g.*, Rainey v. United States, 232 U.S. 310 (1914); Flint v. Stone Tracey Co., 220 U.S. 107 (1911). The nicety with which courts then dealt with such issues is captured by the introductory clause the *Rainey* Court inserted before affirming the lower court's result: "[w]ithout intimating that there is judicial power after an Act of Congress has been duly promulgated to inquire in which House it originated for the purpose of determining its validity . . . ." *Rainey*, 232 U.S. at 517.

[82] The House apparently also has a procedure, the "blue slip," by which the Chairman of the Ways and Means Committee can raise this objection. *See* T. REID, CONGRESSIONAL ODYSSEY 69-75 (1980).

[83] In Hubbard v. Lowe, 226 F. 135 (S.D.N.Y. 1915), the only reported case to void a statute on origination clause grounds, the district court held that the statute, which enforced a regulatory enactment with a tax, constituted a bill for the raising of revenue and that the bill's statement on its face that it originated in the Senate controlled. *Id.* at 139. In fact, the Senate had originated the measure, but the House, by amendment, had added the tax provision. *Id.* at 138.

A threat to the House of Representatives' origination power that is perhaps

A somewhat different question arose concerning the validity of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).[84] The House had passed a minor tax bill the asserted effect of which was to reduce certain taxes by a relatively small amount.[85] The Senate substituted a $99 billion general tax increase.[86] Challengers of the statute claimed that the House bill was not one for the raising of revenue because its effect would have been to reduce revenue; accordingly, the Senate had originated the revenue raising provisions and TEFRA was invalid.

The District of Columbia Circuit dismissed one of the challenges to the Act, filed by several members of Congress, under the circuit court's doctrine of "remedial" or "circumscribed equitable" discretion.[87] The court had developed this doctrine in response to lawsuits by individual members of Congress that raised separation of powers issues.[88] The court had found intervention in such disputes disquieting, but had recognized that traditional objections based on standing and political question doctrine failed to provide a coherent doctrinal basis for judicial inaction.[89] Under the doctrine

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more serious than occasional Senate "originations" derives from the codification of federal tax legislation. With tax legislation "permanent" until altered, the House cannot threaten to withhold tax revenue from the government, only to avoid change in the existing tax structure.

[84] Pub. L. No. 97-248, 96 Stat. 324 (codified as amended in scattered sections of 26 U.S.C.).

[85] *See* H.R. 4961, 97th Cong., 2d Sess. (1981).

[86] *See* S. Rep. No. 494, 97th Cong., 2d Sess. 1 (1982).

[87] Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

[88] The District of Columbia Circuit announced the doctrine in Riegle v. Federal Open Market Committee, 656 F.2d 874 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981). The Supreme Court recently granted certiorari to review the doctrine, but ultimately vacated the grant on mootness grounds. *See* Burke v. Barnes, 106 S. Ct. 1258 (1986), *vacated as moot*, 107 S. Ct. 734 (1987).

[89] The analytical difficulties are discussed in McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981), which *Riegle* cited approvingly. 656 F.2d at 878; *see also* Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976). Judge McGowan's article followed the circuit's unsatisfactory experience in *Goldwater v. Carter*, in which the circuit judges divided over the standing issue as well as the substantive ground, but the Supreme Court, 6-3, simply dismissed the case without opinion. Four Justices concurred on political question grounds, one on ripeness principles, and one without opinion. 617 F.2d 697 (D.C. Cir.) (en banc), *rev'd*, 444 U.S. 996 (1979). The circuit had conferred standing on Senator Edward Kennedy in an earlier pocket veto case, Kennedy v.

of remedial discretion, the court could decline generally to intervene in such disputes but leave open the possibility that it might do so in an appropriate case. As applied with respect to TEFRA, the court said, the doctrine obviated a judicial remedy on the origination clause question.[90] Judge Scalia concurred on standing grounds, believing that standing doctrine barred a judicial determination of the question.[91] The decision in effect remitted to Congress the task of establishing the constitutional bounds set by the origination clause.

In response to the same constitutional challenge in a lawsuit brought by private parties, the Fifth Circuit used yet a third approach. It found plausible both readings of the origination clause phrase "raising of revenue"—dealing with tax matters or increasing the tax yield—and therefore found the issue nonjusticiable as a political question.[92] So long as Congress did not exceed its constitutional power under a permissible interpretation of the language in issue, the court said, the judiciary should not intrude on the determination made by Congress.[93]

All three approaches leave to the House of Representatives and the Senate effective control over the practical meaning of the origination clause. The two houses can work out whatever practical arrangements satisfy them. The value that presumably lies behind the origination clause is its assurance that the more popularly responsive House controls revenue-raising initiatives. Whenever the question raises institutional concerns for the House of Representatives, it can apply the nonjudicial remedy of insisting on its prerogative.

Sampson, 511 F.2d 430 (D.C. Cir. 1974), and had expressed concern about avoiding interference in the legislative process at the behest of legislators unable to obtain a majority in their own house. *See* Reuss v. Balles, 584 F.2d 461, 468 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977).

[90] *Moore*, 733 F.2d at 954-56.

[91] *Id.* at 957 (Scalia, J., concurring).

[92] Texas Ass'n of Concerned Taxpayers, Inc. v. United States, 772 F.2d 163 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 2265 (1986).

[93] *Id.* at 167. Although many earlier decisions had suggested a court monopoly on reading and construing the Constitution, the Fifth Circuit granted Congress a significant interpretive role in constitutional matters. For a vigorous early expression of this view, see Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

C. Foreign Relations

As in no other area, the conventional wisdom elevates the President to nearly absolute power in foreign relations. Justice Sutherland's paean to federal supremacy in *United States v. Curtiss-Wright Export Corp.*[94] has become an anthem of presidential power. Yet in foreign affairs, as in domestic matters, both Congress and the President help to fashion policy. Congress' involvement is textually well-founded. Much in foreign affairs concerns foreign commerce, an area specifically delegated to Congress by article I, section 8. Some foreign policy questions involve the appropriation of funds or the disposition of government property, and the Constitution appears to grant Congress a leading role in such undertakings.[95] Moreover, declarations of war and the raising of armies, tasks intimately related to foreign relations, fall expressly under Congress' powers.[96]

1. Treaty Formation. The process of entering into a treaty with another nation, the most formal instrument of international law, contains elements of both convergent and command decisionmaking. Treaties generally cover many related details whose determination presents the same opportunity for compromise and trade-off as domestic legislation.[97] Agreement often necessitates negotiation among various interested domestic parties as well as negotiation between the United States and the foreign country. But a successful bilateral negotiation with another country requires that a single undisclosed negotiating strategy—a command decision—be followed.

The Constitution places the negotiation with the foreign government in the hands of the President. But it also requires advice and consent by the Senate, which creates the opportunity for a conver-

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[94] 299 U.S. 304, 318-22 (1936). The case involved a congressional delegation to the President of power to embargo arms sales and did not involve solitary decisionmaking by the President.

[95] Article I, section 9 prohibits expenditure of funds except by "Appropriations made by Law," a reference to the lawmaking procedure set out in Article I, section 7. Article IV, section 3 grants Congress power to dispose of property of the United States.

[96] U.S. CONST. art. I, § 8.

[97] A treaty for the prevention of international double taxation, for example, may cover many questions ordinarily addressed in a tax statute.

gent decisionmaking process to resolve the competing domestic interests. Significantly, the Senate's approval power never has been limited to a simple yes or no; the Senate may modify the negotiated treaty as it deems appropriate.[98] The treaty does not become effective unless the modifications are accepted as well.

The Senate's recent ratification of the long-pending Genocide Convention[99] illustrates the range of choice. The Senate Foreign Relations Committee report, which the Senate followed, recommended ratification, but with the adoption of two reservations, five understandings, and one declaration, all of which restrict in varying degrees the operation of the Convention as submitted by the President.[100] As the Committee report notes, the Senate also could have conditioned its consent on actual amendment of the text.[101] The accepted practice thus embodies a highly flexible system whereby differences that emerge from the convergent decisionmaking process

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[98] *See* Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869).

[99] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[100] SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, S. EXEC. DOC. No. 2, 99th Cong., 1st Sess. 17 (1985). As the report explains,

> A reservation is usually defined as a unilateral statement made by a contracting party which purports to exclude or modify the terms of a treaty or the legal effect of certain provisions. Ordinarily, it affects only the party entering it. All that is required of the other parties to the treaty is that they acquiesce in it. Their own treaty obligations among themselves remain unaffected. . . .
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> An understanding is generally defined as a statement which interprets or clarifies the obligation undertaken by a party to a treaty. . . .
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> The practice followed in giving effect to understandings to a multilateral treaty is the same as that for reservations. The state issuing the understanding sees that it is circulated to the other parties. If another party fails to object to it, it is binding in all disputes between the two. If the understanding is rejected, the two parties either do not enter into a treaty relationship or do so absent the provisions to which the understanding applies. . . .
>
> A declaration is generally defined as a formal statement, explanation or clarification made by a party about its opinion or intentions relating to issues raised by the treaty under consideration. Ordinarily, declarations do not touch upon a party's obligations under a treaty. Nonetheless, declarations of a party may be of assistance in interpreting a particular provision of a treaty.

Id. at 16-17.

[101] *Id.* at 17.

can reflect back on and modify the command decisions taken by the President in the negotiation with other countries.

After a treaty becomes effective, it becomes a part of the supreme law of the land. The process to change or repeal the domestic consequences of the treaty may duplicate that for changing the consequences of domestic law created by statute. The President and Congress acting together (or Congress acting by two-thirds majority in the face of presidential opposition) can adapt the internal effects of treaty provisions by subsequent statute.[102] A new agreement of convergent and command decisions is necessary to effect a change.

2. Trade Negotiations. Two other techniques for cooperative political branch action in dealing with foreign countries appear in the Trade Act of 1974.[103] Prior to passage of the Act, the President had to request congressional authority to negotiate reductions in tariffs and non-tariff barriers. A statute could not state the acceptable amount of a reduction without tipping the President's negotiating hand. On the other hand, Congress would not give the President a blank check.

Congress attempted to solve part of the problem by establishing a broad range within which the President might negotiate tariff reductions.[104] And with respect to non-tariff barriers, Congress required subsequent congressional enactment to make the negotiated agreement law, but also provided for a special fast-track procedure to obviate floor delays, amendments, or committee inaction that could delay or defeat enactment.[105] These rules sought to allow the President to engage in multinational negotiations while permitting Congress afterwards to confirm or reject the bargain without significant change.

In practice, the rules were only partly successful. When the 1979 trade packages came to Congress, the horsetrading simply moved back in time, before the bills were formally introduced and the

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[102] *See* The Chinese Exclusion Cases, 130 U.S. 581 (1889); The Head Money Cases, 112 U.S. 580 (1884).

[103] Pub. L. No. 93-618, 88 Stat. 1978. For an overview of the Act, see J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 162-66 (1977).

[104] Trade Act of 1974, *supra* note 103, § 101, 88 Stat. at 1982.

[105] *Id.* § 151, 88 Stat. at 2001.

fast-track procedure was triggered.[106] This required the administration to negotiate with Congress much the same way it had before the Trade Act was enacted. It can still be said, however, that the procedures successfully combined presidential initiative and congressional ratification.

3. Deployment of the Armed Forces. Some friction has developed between the President and Congress in recent years as a result of presidential assertions of exclusive power in foreign affairs. Perhaps the most important of such controversies concerned the scope of the President's power to commit the armed forces to combat without congressional involvement. The importance of the President's power to take action as swift and decisive as circumstances might warrant, a command decision in every sense, was generally conceded. But it allowed the possibility of protracted military combat without the opportunity for direct congressional involvement. The War Powers Act[107] attempted to restore the constitutional balance in decisionmaking by both allowing for presidential action without Congress' assent and providing for a congressional role through prompt notification of Congress, opportunity for subsequent congressional action, and specific deadlines by which unilateral presidential action must terminate unless Congress approves of the action.[108] As in the impoundment portion of the Budget Act,[109] the War Powers Act granted the President power to act without submitting the action to the normal convergent decisonmaking process, while the legislature could still vote the selected action up or down.

Today, however, the War Powers Act exists in constitutional limbo. Presidents have contended that no statute can alter the constitutional dimensions of the President's power as Commander-in-Chief. The *Chadha* case renders the legislative veto mechanism of the Act presumptively invalid.[110] Thus, how much of the Act survives will depend on whether the offending provision alone can be severed from the other operative provisions of the Act.[111]

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[106] *See* A. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE 337-54 (1983).

[107] Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1546a (1976 and Supp. II 1984)).

[108] *Id.* §§ 3-4, 87 Stat. at 555-56.

[109] *See supra* notes 74-75 and accompanying text.

[110] *See supra* notes 40-41 and accompanying text.

[111] *Compare* Buchanan, *In Defense of the War Powers Resolution:* Chadha *Does*

Nonetheless, the President, at the insistence of Congress, generally has conformed with the notification procedures of the Act. To preserve the President's constitutional objections, the notifications recite that they are made "consistent with" the Act rather than under it or in conformity with it.[112] Presidents may stretch the meanings of the words used in the Act to avoid having to report on certain events, but as yet no direct confrontational breach of its terms has occurred.[113]

The Multi-National Force in Lebanon Resolution[114] illustrates the way the Act has changed unilateral to joint decisionmaking. The President had sent Marines to Lebanon as part of a multinational peacekeeping force. The Senate Foreign Relations Committee determined that actual hostilities involving American forces had begun.[115] Under the War Powers Act, congressional authorization was necessary to continue the Marines' presence in Lebanon. An eighteen-month extension was agreed on after negotiations among the House, the Senate and the President.[116] The period was deemed sufficient to allow the President to determine precisely when the Marines should be withdrawn.

4. Executive Agreements. Another area that raises the problem of unilateral presidential action concerns the use of executive agreements to create international obligations. A presidential agreement might cover some of the same ground as a treaty and yet circumvent the requirement of Senate approval. In *Dames & Moore v. Regan*,[117] the Supreme Court upheld an executive agreement ending the Iranian hostage incident even though it was not expressly au-

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Not Apply, 22 HOUS. L. REV. 1153 (1985) *with* Weikert, *Applying* Chadha: *The Fate of the War Powers Resolution*, 24 SANTA CLARA L. REV. 697 (1984) *and* Lungren & Krotoski, *The War Powers Resolution After the* Chadha *Decision*, 17 LOY. L.A.L. REV. 767 (1984).

[112] *See* S. REP. No. 242, 98th Cong., 1st Sess. 2 (1983).

[113] The compliance has been criticized as formal rather than substantial. *See* Glennon, *The War Powers Resolution: Sad Record, Dismal Promise*, 17 LOY. L.A.L. REV. 657 (1984). *But see* Berdes & Huber, *Making the War Powers Resolution Work: The View from the Trench*, 17 LOY. L.A.L. REV. 671 (1984).

[114] Pub. L. No. 98-119, 97 Stat. 805 (1983) (codified at 50 U.S.C. § 1541 (Supp. I 1983)).

[115] S. REP. No. 242, *supra* note 112, at 8.

[116] *Id.* at 7.

[117] 453 U.S. 654 (1981).

thorized by statute.[118] The Court did rely, however, on implicit approval by Congress,[119] leaving open the question of the effect of an executive agreement entered in the face of congressional opposition.

More recently, an executive agreement that seemed to fly in the face of a statutory requirement was held invalid by the District of Columbia Circuit.[120] A majority of the panel thought that a statute levying penalties for the taking of whales should be enforced notwithstanding an executive agreement with Japan.[121] The Supreme Court reversed, holding that the statute in question permitted the President to obtain compliance with the statutory objective through negotiation culminating in an executive agreement.[122] The Court seemed to allow presidential action only because it was not independent of congressional participation, but at the same time recognized that to remove presidential power to negotiate an executive agreement, a statute must be explicit.

A variation on this problem has arisen in connection with treaty terminations. Many treaties provide for termination on notice by one of the parties. The United States has terminated treaties in a number of different ways, including prior authorization by Congress of presidential notice or ratification of such presidential notice. On occasion Presidents have given notice of termination without congressional action. When President Carter sought to terminate the mutual security agreement with the Republic of China, Senator Goldwater and others complained that treaty termination required the same formality as treaty formation and that the President could not terminate a treaty unilaterally.[123] The Supreme Court simply dismissed the lawsuit with prejudice, thereby remitting the problem to the political branches for a nonjudicial remedy.[124]

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[118] *Id.* at 668.

[119] *Id.* at 680.

[120] *See* American Cetacean Soc'y v. Baldridge, 768 F.2d 426 (D.C. Cir. 1985), *rev'd sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860 (1986).

[121] *Id.* at 444.

[122] Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860, 2872 (1986).

[123] Goldwater v. Carter, 481 F. Supp. 949, 950 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

[124] Goldwater v. Carter, 444 U.S. 996, 997 (1979).

V. JUDICIAL DECISIONMAKING

The courts have not dealt consistently with questions concerning the separation of powers between Congress and the President. Often the courts defer to decisions reached through the political process. Sometimes the deference is explicit; on other occasions, the courts have avoided direct intervention by deciding cases on standing principles, political question doctrine, or some other ground.[125] In some cases, however, the courts have proven more interventionist. They have examined political decisions to determine whether they accord with an allocation of functions and powers that the courts find consistent with the Constitution.

Litigation concerning certain of the express separation of powers provisions surveyed earlier demonstrates both forms of judicial response. In one of its most non-interventionist decisions, the Supreme Court disposed of the only incompatibility clause case to find its way there. The lower courts had found a constitutional violation in simultaneous membership in Congress and in the Armed Forces Reserve,[126] but the Supreme Court found that the plaintiff citizens and taxpayers lacked standing to bring the suit.[127] By doing so, the Court effectively ruled out judicial intervention in incompatibility clause cases.[128] The decision did not read the clause out of the Constitution, but it meant that the construction and enforcement of the clause would be left to the political branches, not the courts.

The Court treated its leading ineligibility clause case similarly, dismissing on standing grounds a challenge to the appointment of Justice Hugo Black.[129] Forty-four years later, notwithstanding a spe-

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[125] Another such ground is "remedial discretion." *See supra* notes 87-91 and accompanying text.

[126] *See* Reservists Comm. To Stop the War v. Laird, 323 F. Supp. 833 (D.D.C. 1971), *aff'd mem.*, 495 F.2d 1075 (D.C. Cir. 1972), *rev'd sub nom.* Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208 (1974).

[127] Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 220, 228 (1974).

[128] The standing objection also would bar virtually all lawsuits by public officials as well as private parties. Although standing might exist, for example, in a lawsuit by a member for declaratory judgment as to whether he could accept a reserve commission, the probability of such a suit is exceedingly remote.

[129] *Ex parte* Levitt, 302 U.S. 633 (1937).

cial statute purporting to confer standing for such challenges,[130] the Court summarily affirmed a three-judge district court that had refused to hear a challenge to Judge Abner Mikva's appointment to the District of Columbia Circuit.[131] Once again, the Court left Congress and the President to wrestle with the problems the constitutional provision might raise.[132]

The Supreme Court has taken a more active role in construing—and limiting—the immunities of article I, section 6, clause 1. Over the past fifteen years, the Court has heard several cases involving a claim of immunity under the speech or debate clause.[133] In many

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[130] Act of October 12, 1979, Pub. L. No. 96-86, 93 Stat. 656.

[131] McClure v. Carter, 513 F. Supp. 265 (D. Idaho) (three-judge court), *aff'd mem.*, 454 U.S. 1025 (1981).

[132] *See, e.g., Nomination of William Saxbe to the Office of Attorney General: Hearings on S. 2673 Before the Senate Judiciary Comm.*, 93d Cong., 1st Sess. 13-15 (1973) (opposing views on the application of the ineligibility clause to the nomination of Sen. Saxbe). The Supreme Court never has had to address the prohibition in article II, section 1, paragraph 6 against altering the President's compensation. Former President Nixon's challenge to special treatment of presidential papers and tapes did raise a change-in-emoluments argument in the lower court, but the Supreme Court did not consider this question on appeal. *See* Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321 (D.D.C. 1976), *aff'd*, 433 U.S. 425 (1977).

[133] *See* Hutchinson v. Proxmire, 443 U.S. 111 (1979) (the speech or debate clause does not provide members of Congress absolute immunity for defamatory statements made in press releases); United States v. Helstoski, 442 U.S. 477 (1979) (under the speech or debate clause, evidence of a member's past legislative act may not be introduced in a criminal prosecution); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (the activities of a Senate subcommittee, the individual Senators, and the Chief Counsel are protected by the absolute prohibition of the speech or debate clause against being "questioned in any other Place" and hence are immune from judicial interference); Doe v. McMillan, 412 U.S. 306 (1973) (the Public Printer and the Superintendent of Documents do not share speech or debate clause immunity on dissemination of committee reports); Gravel v. United States, 408 U.S. 606 (1972) (the speech or debate clause does not extend to publication outside Congress); United States v. Brewster, 408 U.S. 501 (1972) (although the speech or debate clause protects members of Congress from inquiry into legislative acts or the motivation for such acts, it does not protect all conduct relating to the legislative process). Considerably fewer speech or debate clause cases came to the Court before 1972. *See* Powell v. McCormack, 395 U.S. 486 (1969) (although the speech or debate clause bars certain actions against Congressmen, it does not bar action against legislative employees charged with unconstitutional activity); United States v. Johnson, 383 U.S. 169 (1966) (the speech or debate clause precludes judicial inquiry into the motivation for a Congressman's speech and prevents such a speech from being made the basis of a

of these cases, the Court either denied or ignored the constitutional claim,[134] even as it created, as a matter of federal common law, a set of comparable immunities for judges and administrators.[135]

The Court's narrow view of speech or debate clause claims perhaps derives from the individual, as opposed to institutional, thrust of the defense. In the ordinary civil case, a specific injured party alleges a wrong done by a member of Congress to which a remedy ordinarily applies. Lack of standing is usually unavailable as an objection. In criminal cases involving the clause, a claim of equal application of the law arises. The speech or debate immunity rests on an institutional concern; its purpose is to protect the houses of Congress from executive branch harassment of individual members. When the focus is on an individual member rather than a house, the courts seem to think more direct judicial intervention warranted. Significant questions as to the institutional character of the immunity, such as whether a house could waive them in specific circumstances, remain unresolved.[136]

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criminal charge of conspiracy to defraud the Government by impeding the due discharge of its functions); Kilbourn v. Thompson, 103 U.S. 168 (1881) (the speech or debate clause exempts Congressmen from liability for any vote in either house, for any report to either house, for any action within either house, and for oral debate).

For an institutional response to the crumbling wall of legislative immunity, see House of Representatives Rule L. *Cf.* Shape of Things To Come, Inc. v. County of Kane, 558 F. Supp. 1192 (N.D. Ill. 1984).

[134] In Davis v. Passman, 442 U.S. 228 (1979), for example, the Court held that a claim of gender discrimination had been stated without considering the speech or debate clause immunity offered as a defense. *See also* the cases cited *supra* note 133.

[135] *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978) (administrators); Stump v. Sparkman, 435 U.S. 349 (1978) (judges); Barr v. Matteo, 360 U.S. 564 (1959) (administrators); *see also* Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981).

[136] This issue arose in United States v. Brewster, 408 U.S. 501 (1972), but did not receive definitive resolution. The prosecution argued that a narrowly drawn statute passed by Congress in the exercise of its power to regulate the conduct of its members could waive the legislative immunity, and had done so. *Id.* at 530 (Brennan, J., dissenting). The majority did not reach the issue, but held that the immunity did not prohibit the prosecution. *Id.* at 529 n.18. Justice Brennan's dissent barred any institutional waiver. *Id.* at 529 (Brennan, J., dissenting).

It is at least anomalous for the Court to decide what constitutes legislative activity in opposition to the contrary claims of members and houses of Congress. Perhaps little harm ultimately devolves on Congress from these holdings, provided

Unlike its treatment of speech or debate clause questions, the Court's interventions in article I, section 5 cases—those involving Congress' authority to regulate its internal affairs—have been limited and marked by deference to political determinations. Four cases make the point.

In *United States v. Ballin*,[137] the respondents challenged a tariff statute that classified worsted goods as woolens, contending that the legislation was invalid because a quorum consisting of a majority of the House had not been present at passage. The journal of the House of Representatives reflected 138 members voting in favor and 189 as not voting. The Speaker announced the names of seventy-four members present and refusing to vote and stated that together with those recorded as voting they constituted a quorum. In so doing, the Speaker acted in accordance with a House rule.[138] The Supreme Court upheld the rule as a reasonable way to determine the presence of a quorum and a majority, and would not allow extrinsic evidence for the purpose of rebutting the journal's statement.[139] The Court thereby deferred to the House's application of rulemaking discretion, even though the rules in this instance bore on a determination of constitutional fact, namely, whether the constitutional requirements for a quorum and majority had been met.

United States v. Smith[140] concerned a presidential appointment to the Federal Power Commission. The Senate initially approved George Otis Smith's appointment and agreed to notify the President. The Senate then adjourned, the Secretary of the Senate notified the President of the confirmation, and the President commissioned

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Congress can alter the judicial determination by statute. Thus, a specific exception to a federal criminal statute for activities of a member in connection with defined legislative activities could eliminate criminal prosecutions. Congress might also confer immunity from defamation lawsuits for comments in press releases relating to legislative business, notwithstanding the holding in Hutchinson v. Proxmire, 443 U.S. 111 (1979). Query, however, as to whether such changes are possbile when a suit is grounded in the Constitution itself. In Davis v. Passman, 442 U.S. 228 (1979), for example, the Court upheld a claim of gender discrimination directly under the Constitution notwithstanding a specific statutory exception to Title VII.

[137] 144 U.S. 1 (1892).

[138] *Id.* at 5.

[139] *Id.* at 9.

[140] 286 U.S. 6 (1932).

Smith. But the Senate rules allowed for a motion for reconsideration to be made within the next two days the Senate was in session, and when the Senate reconvened, it adopted a motion to reconsider and voted to reject Smith as a member of the Commission.[141]

The question, of course, was how to characterize what the Senate had done. Reaffirming the Senate's power to promulgate its own rules of procedure, the Court nonetheless held that the President could rely on the Senate's notification.[142] The Court found that the Senate's notification was intended to permit the President to proceed and empowered him to commission Smith.[143]

As it had in *Ballin*, the Court affirmed Congress' power to make broad rules for its own governance. The Court's intervention simply involved a determination of how those rules operate on others when two rules apparently conflict. The Senate retained control of the confirmation process, for it could alter the result in future cases, if it disagreed with the Supreme Court's view, by taking unambiguous action. *Smith* thus represents traditional judicial construction: the interpretation of a legislative act without limitation of the legislature's power to act in the future.

Perhaps the most intrusive of the four cases discussed here, *Powell v. McCormack*,[144] dealt with the House of Representatives' attempt to exclude Adam Clayton Powell on the basis of allegations that he had, *inter alia*, misappropriated federal funds. In affording Powell relief, the Court rejected the mootness, speech or debate clause, and political question claims urged by the House.[145] The Court characterized the House's action as an exclusion, not an expulsion, largely because the Speaker of the House had ruled it an exclusion during consideration on the floor.[146] The Court found that the House could not add to the qualifications of membership stated in the Constitution. The power to be the judge of elections of members did not imply any power to alter the stated criteria.[147]

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[141] *Id.* at 27-30.
[142] *Id.* at 48-49.
[143] *Id.*
[144] 395 U.S. 486 (1969).
[145] *Id.* at 495-506, 518-49.
[146] *Id.* at 508.
[147] *Id.* at 550.

At least two legislative exclusion cases prior to *Powell* contributed to its result. In 1918 the House had excluded Victor Berger because of his socialist and pacifist views; his writings assertedly gave aid or comfort to the enemies of the United States so as to justify his exclusion.[148] More recently, the Supreme Court had intervened to prevent the Georgia legislature from excluding Julian Bond for his opinions and race.[149] Both cases highlighted the potential damage to democratic processes in a legislative majority's exclusion of members it thought undesirable.

Although *Powell v. McCormack* subjected to judicial review decisions about House membership widely thought to be beyond examination in court, the intervention can be seen as resolving a conflict between two political processes: the electoral process by which Powell's constituents had overwhelmingly chosen him for the seat and the decisionmaking process within the House of Representatives. In this connection, Justice Douglas' insistence in his concurring opinion that the case did not alter the houses' power to expel without judicial review of their motives becomes highly significant.[150] The houses of Congress thus retain unreviewed power to determine their own membership. There must, however, be a two-thirds majority before they can override the operation of another part of the political process.

The fourth case relates the article I, section 5 grants of power to action by states. In *Hartke v. Roudabusch*,[151] the Supreme Court upheld an Indiana procedure for determining the outcome of a disputed election notwithstanding the constitutional grant of power to the Senate to make such a determination.[152] The result seems reasonable since the Senate could act at any time to reestablish its exclusive role. The Senate's failure to act had created an ambiguity and the more reasonable inference was senatorial acquiescence in the state's fact-finding.

As these cases demonstrate, the Court's approach to the explicit separation of powers provisions reflects at least three themes. First,

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[148] *See* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 249-69 (1946).

[149] *See* Bond v. Floyd, 385 U.S. 116 (1966). The Court's rationale rested on first amendment considerations.

[150] *Powell*, 395 U.S. at 558-59.

[151] 405 U.S. 15 (1972).

[152] *Id.* at 24-26.

when the Constitution focuses the institutional concerns on individual members, as in the speech or debate clause cases, the Court weighs the immunity against the harm complained of. In other cases, where the Constitution focuses directly on the institution, the Court is likely to refrain from intervention. Second, the Court reviews congressional action affecting matters internal to the Congress when competing actions are founded on decisions reached in another part of the political process. Finally, when the Court does intervene, its decisions generally allow the political institutions to reach contrary results in the future.

More difficult problems arise when conflicts between Congress and the President derive not from explicit grants of powers but from the structural division of the political power into two components. In these instances, constitutional ambiguity may serve a creative function in allowing the political branches to test new ways to respond to national problems. The Court should intervene only when the threat of concentrated power in one branch arises; that is, to prevent one of the branches from exercising exclusive power that prevents the other branch from participating in decisions.

This has not been the judicial theme, however; the Court recently has followed a more interventionist role. The Court has struck down statutory arrangements because one of the branches, generally the legislature, has exceeded the boundaries of its prescribed powers.[153] The Court has derived these boundaries, which are not explicitly set forth in the Constitution, from the inherent distinction between legislative and executive powers or from the structure of the Constitution. Yet the vigor of the dissenting opinions in these cases[154] underscores the ambiguous nature of the historical and textual materials on which the Court draws. The Court appears to be deliberately ignoring the ambiguity and making its own choices among the possible outcomes.

The most fertile source of dispute that the Supreme Court has undertaken to resolve concerns control over the officers and employees of the government. As discussed earlier, both the President and Congress participate in shaping legislation to implement gov-

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[153] *See, e.g., infra* notes 171-75, 188-203 and accompanying text.

[154] *See, e.g., infra* note 178 and accompanying text.

ernment programs.[155] Few statutes, however, are self-executing or in need only of ministerial action. Much of the business of government must be carried out by individuals exercising discretion to meet new circumstances or to fill in terms unstated in a statutory mandate.[156] Control over these employees, by Congress or the President, may determine how the substantive programs are shaped. If the terms of the statutory arrangement require less than full control over a government employee by the President, should that invalidate the statute?

Here the distinction between separation of powers and sharing of powers has enormous impact. If the question is whether a particular mechanism crosses the line between ideal types, a court may find it easier to strike the mechanism down. The answer instead should derive from the norm of generally shared powers. The statute should stand when it promotes sharing of decisional responsibility, but not when it ousts or limits the President's proper exercise of command decisionmaking.

An early case, *Kendall v. United States* ex rel. *Stokes*,[157] helps to make the point. Private parties sued for compensation for services performed under contract with the Postal Department. When the Postmaster General disallowed certain credits to the account, the parties complained to Congress. As a result, Congress passed legislation signed by the President that directed the Solicitor of the Treasury[158] to determine the proper amount of credit and the Postmaster General to credit that amount.[159] The Solicitor made a finding, but the Postmaster General disagreed and credited the complaining party with a lesser amount. The complaining party then sought mandamus against the Postmaster General to require the full credit. The Court held that the act in question was ministerial and that a writ of mandamus should issue.[160]

The Postmaster General had argued that as a member of the executive branch, he was subject only to the direction of the Pres-

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[155] *See supra* notes 22-42 and accompanying text.

[156] *See* R. Seidman, *Drafting for the Rule of Law*, 12 YALE J. INT'L L. 84 (1987).

[157] 37 U.S. (12 Pet.) 524 (1838).

[158] The Solicitor of the Treasury is the bureaucratic ancestor of the Comptroller General.

[159] *Kendall*, 37 U.S. at 608.

[160] *Id.* at 608-13.

ident in the performance of his duties. The Court acknowledged that certain political duties imposed on executive officers fell under the exclusive direction of the President. Congress, however, could impose on any executive officer any duty it thought proper and not unconstitutional, in which event the duty and responsibility become subject "to the control of the law, and not to the direction of the President."[161] Moreover, the President's article II obligation to take care that the laws be faithfully executed could not mean that the Postmaster General was under the President's exclusive direction and control, for it would vest in the President a "dispensing power" to refuse to enforce legislation.[162] This, in effect, would give the President power, beyond his conditional veto and power to grant pardons, to pick and choose the enforcement of legislation and to paralyze the administration of justice.

Kendall thus treated executive branch employees who carry out ordinary functions—even members of the Cabinet—as if they were subject not just to the President's wishes, but to those of all the decisionmaking institutions of the federal government. Congress, by statute, could constrain a federal employee's discretion, and a federal court could enforce the restraint.[163]

Kendall does not, however, stand for the proposition that a statutory scheme completely excluding the President from the decisionmaking process is acceptable. In *Buckley v. Valeo*,[164] the Court considered an elaborate challenge to a comprehensive scheme to regulate campaign contributions and expenditures in federal elections.[165] The legislation had created an agency, the Federal Election Commission (FEC), to supervise compliance and to enforce the new regime.[166] The legislation further provided for eight election Com-

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[161] *Id.* at 610.

[162] *Id.* at 612-13.

[163] *Kendall* did not involve the more difficult circumstance of an executive branch employee acting in relation to the President's command decisionmaking in such areas as granting pardons, negotiations with foreign powers, or direction of the military forces. It would seem that, in those areas, the proper balance between the President and the other branches would be implicated.

[164] 424 U.S. 1 (1976).

[165] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

[166] Federal Election Campaign Act Amendments of 1974, *supra* note 165, § 310, 88 Stat. at 1280.

missioners: the Clerk of the House of Representatives, chosen by the House; the Secretary of the Senate, chosen by the Senate; and two nominees each from the House, the Senate, and the President.[167] The Court characterized the Commissioners as "officers" of the United States, and held that the appointments clause[168] provided the exclusive method for naming federal officers: presidential nomination or delegation to presidential nominees.[169] The result seems correct. A contrary holding, approving the statutory scheme, would have excluded the President from the selection of most of the Commissioners. The Court's construction of the appointments clause thus preserved shared responsibility.[170]

The wisdom of cases such as *Kendall* and *Buckley*, however, has not always been followed; the Court's treatment of executive officers has been far from consistent. In *Myers v. United States*,[171] the Court substituted a hierarchical view of presidential control. The President had dismissed a postmaster without the senatorial consent required by statute.[172] The Court held that the President, acting alone, had properly dismissed Myers and that no statute could condition the President's power of dismissal on Senate approval.[173] Chief Justice Taft grounded this view of presidential power in the provisions of article II that vest the executive power in the President and require him to see to the faithful execution of the laws.[174] Taft traced the dismissal power question from the first Congress, whose somewhat ambiguous resolution of a proposal

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[167] *Id.*

[168] U.S. CONST. art. II, § 2, cl. 2.

[169] *Buckley*, 424 U.S. at 138-39.

[170] If the Commission's jurisdiction had been limited to supervising election expenditures for House and Senate seats, the scheme conceivably could have been upheld independently under article I, section 5's grant of supervisory power over such elections. Regulation of campaign financing arguably goes to the fairness of an election, and does not create an additional qualification for office of the type prohibited by *Powell v. McCormack*.

[171] 272 U.S. 52 (1926).

[172] *Id.* at 106-07.

[173] *Id.* at 176.

[174] *Id.* at 163-64. For an argument that the constitutional provision requiring the President to see that the laws are faithfully executed was intended to limit the President's power to dispense with legislation he wished to ignore, see Reinstein, *An Early View of Executive Powers and Privileges: Trial of Smith and Ogden*, 2 HASTINGS CONST. L.Q. 309 (1975).

concerning the removal of the Secretary of State was said to be determinative of the matter.[175]

If limited to its historical context, the *Myers* Court's expansive view of presidential power is at least somewhat understandable. The statute in question was modeled on the Tenure of Office Act,[176] which Congress had enacted during Reconstruction (and over a presidential veto) for the avowed purpose of limiting presidential control over subordinates.[177] And as applied to Cabinet-level officers, the statute did present a material intrusion on presidential decisionmaking.

It required a lengthy leap of logic, however, to assert unilateral presidential control over *all* executive branch employees. Congressional involvement in the dismissal of employees who carry out routine duties, employees like the postmaster in *Myers*, simply would not present the cause for concern that control over Cabinet officers would. Indeed, Justice Brandeis' dissent in *Myers* opens with a quotation from Justice Story's *Commentaries* that makes just this point.[178]

Of course, *Myers*' grant of exclusive presidential power covered only the power to dismiss, and the following year the Court affirmed Congress' other supervisory powers over executive branch employees. *McGrain v. Daugherty*[179] involved a challenge to the

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[175] *Myers*, 272 U.S. at 114, 136.

[176] Ch. 154, 14 Stat. 430 (1867).

[177] *See* W. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION, 1865-1867, at 258-60 (1963).

[178] "If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to the correct theory. But, at all events, it will be a consolation to those who love the Union, and honor a devotion to the patriotic discharge of duty, that in regard to inferior officers (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress, by the simple expedient of requiring the consent of the Senate to removals in such cases."

Myers, 272 U.S. at 240 (Brandeis, J., dissenting) (quoting with approval 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1544, at 370 (5th ed. 1891)). Professor Edwin S. Corwin emphasized this point in his contemporaneous critique of *Myers*. *See* Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 374 (1927).

[179] 273 U.S. 135 (1927).

Senate's power to compel testimony in an investigation of alleged failures by the Justice Department to prosecute violations of federal law. The case broadly affirmed the power of each house to investigate for legitimate legislative purposes.[180] The Court opined that administration of the Justice Department "plainly" was a subject on which legislation could be had;[181] Congress also could regulate the powers and duties of the Attorney General and his assistants.[182] Both powers justified oversight of administrators through committee investigation.

Moreover, nine years after *Myers*, the Supreme Court changed course on the dismissal power. Without rejecting *Myers* completely, the Court held in *Humphrey's Executor v. United States*[183] that Congress, by statute, could limit the President's dismissal power at least as to officials in those agencies where the exercise of independent discretion and expertise were desired.[184] The nature of the decisionmaking expected of a particular agency may be significant, not for some special content to fill in the dimensions of the quasi-judicial or quasi-legislative duties referred to in the opinion,[185] but for determining whether the decisions of the agency fell outside the category of presidential command decisions.[186] Some twenty years later, in *Weiner v. United States*,[187] the Supreme Court reaffirmed its decision in *Humphrey's Executor*; Weiner was a member of the War Claims Commission, and as such performed a function to which presidential command decisionmaking had little relevance.

Nonetheless, in its most recent consideration of shared supervision over government decisionmakers, *Bowsher v. Synar*,[188] the Supreme Court returned with a vengeance to the more hierarchical mode of *Myers*. The swing had been presaged in *INS v. Chadha*,[189]

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[180] *Id.* at 175.
[181] *Id.* at 177.
[182] *Id.* at 178.
[183] 295 U.S. 602 (1935).
[184] *Id.* at 631-32; *cf.* Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 CORNELL L. REV. 215 (1936) (Congress may create governmental agencies independent of the President's control through the power of removal, provided the nature of the agency is not purely executive).
[185] *Humphrey's Executor*, 295 U.S. at 624.
[186] *Id.* at 627-29.
[187] 357 U.S. 349 (1958).
[188] 106 S. Ct. 3181 (1986).
[189] 462 U.S. 919 (1983).

where the Supreme Court invalidated the widely used legislative veto, a device that delegated significant decisionmaking power to a federal agency or officer with the proviso that any decision could be revoked if one or both houses of Congress or a specified congressional committee disapproved it within a specific period.

Aside from the instances when inclusion of the legislative veto resolved disputes between the President and Congress over their respective constitutional powers,[190] the Court's invalidation of the veto might have made sense had the Court characterized it as an unconstitutional effort to oust the President from the decisionmaking process, a characterization that might follow to the extent the veto permitted Congress alone to review agency exercises of discretion.[191] But the *Chadha* Court did not employ such a rationale. It reasoned instead from the premise that Congress' powers are limited to legislation in accordance with the legislative process set out in article I, section 7. It emphasized definitional boundaries rather than a concern for institutional balance. Consequently, its decision can be read as invalidating all congressional activity not expressly laid out in the Constitution, without regard to the institutional effect of the activity, such as balancing the decisionmaking power of the President.

This nonfunctional approach also characterized the Court's opinion in *Synar*. The majority opinion there applied ironclad logic to dubious premises to achieve a questionable result. *Synar* concerned the Balanced Budget and Emergency Deficit Control Act of 1985,[192] also known as the Gramm-Rudman-Hollings Act. The Act was passed because the federal budget had run at chronically high deficits for several years and seemed likely to do so into the indefinite future, and the two obvious ways to meet the problem appeared unavailable. Tax increases would not work because the President

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[190] *See supra* notes 40-41 and accompanying text.

[191] Alternatively, the court might have upheld the veto on the ground that the President had ample opportunity for influencing any legislation in its initial formulation. If he believed it desirable to prevent delegation of some decisions to a process that allowed for interim congressional disapproval, he could shape or veto the authorizing bill. But perhaps the increase in the use of the legislative veto in the seventies suggested to the Court an important shift in decisionmaking power away from the President, a result antithetical to the norm of shared powers.

[192] Pub. L. No. 99-177, 99 Stat. 1037 (codified at 2 U.S.C. §§ 901-22 (Supp. III 1985)).

had consistently opposed them and Congress seemed unlikely to muster the two-thirds needed in each house to override his threatened veto. Attempts to cut spending also had reached a standstill because the President would tolerate no reductions in defense spending and most Democrats in Congress opposed eliminating funding for social programs. It was argued that the process of convergent decisionmaking itself, precisely because it required broad agreement, precluded significant long-term reductions in total spending.

With the Gramm-Rudman-Hollings Act, Congress and the President attempted to solve the problem by redefining the budget process. The Act altered internal procedural rules and the calendar for budget considerations.[193] It established declining targets for the deficit and provided complex formulas for automatic spending reduction, by category, in the event that Congress had not otherwise acted by a specified deadline.[194]

Of course, in order to determine how much spending to cut so as to meet a particular year's target, estimates of the effects of revenues and expenditures had to be made, taking into account the direction of general economic conditions as well as the consequences of governmental action. Predictions that were only slightly result-oriented could alter significantly the amounts of spending reduction. The task of apportioning the spending cuts required not only technical expertise in applying the statutory formula, but also judgment as to the economic forecast.

As a result, the Act named three experts capable of making the economic calculations and extrapolations in accordance with state-of-the-art techniques.[195] Two of these experts, the directors of the Congressional Budget Office and the Office of Management and Budget, responded directly to Congress and the President, respectively, and their political biases, if any, could be expected to point in opposite directions. The third, the Comptroller General, would take the figures produced by the first two, and derive his own numbers, which would determine the amount of automatic reduction required to meet the statutory target.[196]

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[193] *Id.* § 300, 99 Stat. at 1040.
[194] *Id.* §§ 201, 251, 99 Stat. at 1039, 1063.
[195] *Id.* § 251, 99 Stat. at 1063.
[196] *Id.* § 251(c)(2), 99 Stat. at 1068.

Representative Mike Synar brought a declaratory judgment action asserting the Act's unconstitutionality chiefly on the ground that Congress had delegated too much of its own power to participate in spending decisions. Spending cuts, under this argument, must proceed through the convergent decisionmaking process to assure that all the affected parties have their usual representative input. The district court held, however, that no undue delegation of congressional power had occurred.[197] Indeed, the court voided the automatic reduction provisions of the Act because they left too *much* control in the hands of an agent of Congress. The Comptroller General was under congressional rather than presidential control, the court said, and thus could not exercise the Act's powers.[198]

The Supreme Court affirmed on this ground. The majority agreed with the district court that the law governing the removal of the Comptroller General left undue control with Congress.[199] The rhetoric of the majority opinion, however, went well beyond this analysis. In a return to *Myers*, which the Court cited with warm approval, the majority rejected an active role for Congress in the supervision of executive officials in favor of exclusive presidential oversight.[200]

The removal provision on which the majority relied seems an odd fulcrum for the Court's result. Impeachment aside, Congress could remove the Comptroller General only by joint resolution, passage by both houses of Congress and presidential assent, or a veto override, the same process by which statutes are enacted.[201] Removal of an officer with the President's agreement hardly seems an invasion of presidential prerogative. The alternative, a two-thirds vote by each House to override a veto, reflected a substantive institutional hurdle that the Constitution expressly allows to sub-

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[197] Synar v. United States, 626 F. Supp. 1374 (D.D.C.) (three-judge court) (per curiam), *aff'd sub nom.* Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[198] *Id.* at 1402-04.

[199] Bowsher v. Synar, 106 S. Ct. at 3192.

[200] "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." 106 S. Ct. at 3187. This conclusory premise seems at odds with the views expressed in *Kendall, McGrain* and *Humphrey's Executor.*

[201] 31 U.S.C. § 703(e)(1) (1982).

stitute for presidential assent.[202] Yet both the district court and the Supreme Court dealt with this concern in a footnote, simply equating the provision for removal by joint resolution to removal by Congress alone.[203]

The Court's remedy in *Synar* also was odd. Despite otherwise following *Myers*, where the Court merely struck the provision allowing for legislative participation in the official's removal, the *Synar* Court did not simply declare the removal provision void: it voided the entire mandatory portion of the Act.[204] The statute presumably could have vested the economic calculation power in an independent agency, such as the Federal Trade Commission, or in a private accounting firm, without violating separation principles, but Congress and the President had agreed on the Comptroller General. The Court apparently felt entitled to make an independent judgment as to the Comptroller's independence.

The Court's decision makes it difficult or impossible to resolve the serious national problem of budget deficits in the way Congress and the President chose—making a major policy determination as to the level of the federal deficit and remitting the details of the process to relatively independent expertise. It unbalances an otherwise balanced decisionmaking process in favor of presidential decisionmaking. And the result is ironic in view of Representative Synar's goal of asserting a larger decisionmaking role for Congress.[205] It creates an all-or-nothing approach to budget decisions under which Congress must either codify the most minute details or hand them over to the President's men to decide.

CONCLUSION

The Supreme Court's insistence that the political branches mechanically conform to idealized notions of their legislative and ex-

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[202] U.S. CONST. art. I, § 7, cl. 2.

[203] *See* Synar v. United States, 626 F. Supp. at 1393 n.21; Bowsher v. Synar, 106 S. Ct. at 3189 n.7.

[204] 106 S. Ct. at 3191, 3194. Justice Blackmun dissented on this ground. *Id.* at 3215 (Blackmun, J., dissenting).

[205] The district court opinion sought to address this point. In its closing paragraphs it suggests that reducing the options for delegation will lead to fewer instances of delegation, a paternalistic justification for judicial intervention. *See* Synar v. United States, 626 F. Supp. at 1403-04.

ecutive functions interferes with the sound operation of the political process. The Court's recent decisions have precluded innovative solutions reached by congressional and presidential agreement, and its attempts to effect a constitutional "balance" are unnecessary when the President shares with Congress the formulation of the institutional responses. Neither precedent nor observed erosion of presidential power justifies the judicial activism. Continued adherence by the Court to a separate powers rather than shared decisionmaking perspective can only hobble the political branches in the performance of their constitutional roles.