SEPARATION OF POWERS: ASKING A DIFFERENT QUESTION

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What I find most intriguing about Professor Casper's essay[1] is its historical description of the founders' attitude not so much toward *separation of powers*, but toward separation of powers *questions*. In other words, I am more interested in how the founders approached questions and in the sources of their answers than in the substance of those answers. In comparing Professor Casper's description of the late eighteenth-century approach to separation of powers questions with the predominant way of asking separation of powers questions today, I find that the two are quite different. The difference in approach is equivalent to the difference Robin West has noticed between posing a " 'constitutional question' . . . as a normative question about how we should constitute ourselves [and] as an authoritarian question about the content of the Constitution's mandates."[2]

I.

According to Professor Casper, the founding generation approached constitutional separation of powers questions with diffidence, with an appreciation of the theoretical and practical difficulty of such questions, and with an awareness that reasonable minds might differ. Yet they also approached the questions with apparent confidence in their own ability to resolve them satisfactorily. This confidence contrasts rather starkly with the predominant contemporary approach to constitutional questions, and it is this contrast that my comment explores.

As Casper illustrates, the first Congress and administration worked without many guidelines or models from the colonial or

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1. Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989).

2. West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531, 539 (1988).

Confederation periods. They were aware that they were establishing precedents that might last for many years. They were also aware, although Casper did not mention this, that the soundness of those precedents might determine the fate of the new American Republic. The literature of the period is filled with references to the delicacy of the "experiment" and to the importance of impressing European nations with America's significance and ability to prosper both politically and commercially.[3] The founders truly believed that the eyes of the world were upon them, and that the fate of their descendants rested on their efforts.

One might expect that a lack of experience, coupled with an appreciation of the awesome nature of their task, would lead the founding generation to question their ability to achieve success. One might then expect frequent references to some standard authority, such as the Constitution, Montesquieu or other philosophers, or prior state or British practices. Instead, the President and members of Congress sought to use all available sources—including common sense and their own argumentative propositions in addition to the written Constitution and historical practice—to reach adequate, if not always amicable, decisions. Like the Constitutional Convention itself, the new government resorted to frequent committees and to informal discussion prior to solidifying its positions on various issues. Indeed, the first administration changed its positions radically over short periods before its members reached a consensus.

The difference, however, between the Constitutional Convention of 1787 and the political branches between 1789 and 1793, as described by Casper, is that the Convention delegates were writing the Constitution; the new government was interpreting and implementing it. Yet both periods are marked by similar expectations that reason would supplement prior authority. As historian Jack Rakove has noted, the early federal period was marked by a "sense of experimentation, novelty, and creativity—and thus of uncer-

3. *See, e.g.*, THE FEDERALIST No. 11 (A. Hamilton); 1 ANNALS OF CONG. 443 (1789) (Mr. Jackson); *see generally* R. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 24-25 (1984); Adair, *Experience Must Be Our Only Guide: History, Democratic Theory, and the United States Constitution* in THE REINTERPRETATION OF THE AMERICAN REVOLUTION 1763-1789, at 397, 404-07 (J. Greene ed. 1968).

tainty about results and consequences."[4] The founders' approach to establishing the new government is then especially noteworthy because of their failure to rely very much on a recently adopted *authoritative* source to resolve the questions that arose. Although the Constitution certainly did not give much practical guidance on how to implement its rather vague and abstract provisions, one might nevertheless expect the new government to pay at least significant lip-service to the document. As Casper describes it, however, the Constitution was only one source among many upon which the delegates relied while making arguments and resolving disputes—and it was not a particularly important source at that. Confident of their ability to reach the right result, the first Congress and administration placed little reliance on outside authorities. They attempted to create the best possible form of government rather than defer to an earlier and more authoritative determination. As Professor Gwyn notes, practical efficiency was more important than formal doctrine.[5]

II.

Contrast the eighteenth-century approach with the modern approach to separation of powers questions. A significant trend toward narrow, formalist interpretations of the Constitution pervades the modern approach in this area. Instead of relying on their own ability to *interpret* the Constitution, both liberals and conservatives seem to view the language itself as authoritative. Modern courts appeal directly to the literal provisions of the Constitution. They consequently invalidate the devices that the political branches have invented to solve the real-world problems of the "complex system of representative government"[6] that the founders created. This formalism can be characterized as an abdication of responsibility by careless deference to a prior determination.

Three of the most important recent separation of powers cases are particularly illustrative of this tendency: *Northern Pipeline*

4. Rakove, *Comment*, 47 MD. L. REV. 226, 233 (1987) (commenting on Mathias, *Ordered Liberty: The Original Intent of the Constitution*, 47 MD. L. REV. 174 (1987)).

5. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989).

6. Casper, *supra* note 1, at 232.

Construction Co. v. Marathon Pipe Line Co.,[7] which invalidated the establishment of the bankruptcy courts; *INS v. Chadha*,[8] which invalidated the legislative veto; and *Bowsher v. Synar*,[9] which invalidated the Gramm-Rudman-Hollings Act. Although this Comment will not discuss in detail these familiar cases, it will highlight the contrast between these three significant cases and the approach documented in Professor Casper's essay.

A. Northern Pipeline

In 1978, after almost ten years of investigating the intractable problem of the structuring of bankruptcy lawsuits, Congress established special bankruptcy courts. The courts were granted jurisdiction over all suits in which a chapter 11 petitioner was a party. Because the judges in such courts were not given the tenure and salary protections specified for federal judges in article III, the bankruptcy courts were article I or "legislative" courts.

Because the Supreme Court had upheld all legislative courts since the 1940s,[10] one might expect the Court to uphold the bankruptcy courts. Without announcing any particular standard, the Supreme Court in prior cases seemed to balance the congressional need for non-article III resolution of certain issues against the danger to judicial independence. Using that functional analysis, the Court had upheld the assignment of various types of article III jurisdiction to non-article III courts. Legislative courts, some of which are known as administrative agencies, became a useful and practical device for resolving various disputes that federal courts had neither the time nor the expertise to solve. Bankruptcy claims seemed to be exactly suited to resolution by legislative courts; indeed, federal judges had indicated in congressional hearings that they preferred *not* to decide such cases.

In *Northern Pipeline*, however, a liberal plurality of the Court[11] joined a conservative concurrence[12] to invalidate the bankruptcy

7. 458 U.S. 50 (1982) (plurality opinion).
8. 462 U.S. 919 (1983).
9. 478 U.S. 714 (1986).
10. *See, e.g.*, United States v. Raddatz, 447 U.S. 667 (1980); Palmore v. United States, 411 U.S. 398 (1973); Gliddon v. Zdanok, 370 U.S. 530 (1962).
11. Justices Brennan, Marshall, Blackmun, and Stevens formed the plurality.
12. Justices Rehnquist and O'Connor concurred.

courts. The plurality opinion is a striking departure from the earlier practical and flexible decisions about legislative courts. The Justices posited a rigid separation between legislative and judicial powers, and invoked a strict formalistic rule against legislative courts with only three narrow exceptions.[13] The plurality opinion in particular evidences a strong tendency to appeal to authoritative sources such as the constitutional language and earlier, rigid-rule-bound precedent to avoid leaving either Congress or the courts with any discretion or flexibility.

Justice White wrote a stinging dissent.[14] He characterized the plurality opinion as an "eminently sensible"[15] reading of the text of article III in a vacuum, but noted:

> If this simple reading were correct and we were free to disregard 150 years of history, these would be easy cases . . . .
> . . . [However,] [w]hether fortunate or unfortunate, at this point in the history of constitutional law that question can no longer be answered by looking only to the constitutional text. In its attempt to pigeonhole [prior] cases, the plurality does violence to their meaning and creates an artificial structure that itself lacks coherence.[16]

Northern Pipeline signalled the beginning of the Court's move toward a formalistic approach to separation of powers.

B. INS v. Chadha

A year later, in *INS v. Chadha*,[17] the Supreme Court invalidated the legislative veto, which was another convenient solution to a practical problem of interbranch relationships. Six Justices[18] joined the majority opinion. One is immediately struck by its formalism and literalism, and by the Justices' attempt to make the

13. 458 U.S. at 64. The three exceptions to this formalistic rule against legislative courts were the creation of territorial courts, courts-martial, and courts and agencies in which public rights are adjudicated. *See id.* at 64-67.

14. Chief Justice Burger and Justice Powell joined the dissent.

15. 458 U.S. at 93 (White, J., dissenting).

16. *Id.* at 93-94.

17. 462 U.S. 919, 959 (1983).

18. The Justices included Chief Justice Burger and Justice O'Connor, on one side of the political spectrum, Justices Brennan and Marshall, on the other, and Justices Blackmun and Stevens.

decision authoritative by citing as many different constitutional provisions as possible. A marked contrast exists between the *Chadha* approach and the previous constitutional standard for separation of powers between the President and Congress: the flexible analysis of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[19]

Chadha required literal compliance with the bicameralism and presentment clauses of the Constitution, yet ignored the fact that the legislative veto is arguably functionally equivalent to this constitutionally-mandated structure. As in *Northern Pipeline*, Justice White dissented, stressing that the legislative veto is "an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences."[20]

C. Bowsher v. Synar

Three years after *Chadha*, the Court struck down the Gramm-Rudman-Hollings Act in *Bowsher v. Synar*.[21] *Bowsher* is similar to *Chadha* and *Northern Pipeline* in several respects. First, *Bowsher* involved a congressional attempt to solve a virtually insurmountable problem: controlling the deficit despite the political interest of all of the actors in avoiding spending cuts. Second, the constitutionality of the measure was in serious question. Third, a bipartisan majority of the Court invalidated the Act.[22] Finally, the Court's opinion conveyed a strong sense that practical considerations and historical practice are irrelevant; a literal interpretation of the language of the Constitution is all that matters.

The majority in *Bowsher* divided all possible governmental powers and government officers into three categories—legislative, executive, and judicial—and demanded a perfect match between the power and the officer. Each branch was required to be "separate

19. 343 U.S. 579, 635 (1952).

20. 462 U.S. at 972. In contrast to *Northern Pipeline*, White was the only dissenter on the merits.

21. 478 U.S. 714, 736 (1986).

22. The Act was invalidated by a 7-2 vote. Chief Justice Burger and Justices Brennan, Powell, Rehnquist, O'Connor, Stevens, and Marshall formed the majority. Justices White and Blackmun filed separate dissenting opinions.

and wholly independent."[23] Chief Justice Burger's majority opinion explicitly rejected practical protections of separation of powers, requiring instead rigid structural separation.[24] Justice White's dissent aptly characterized the majority's approach as "distressingly formalistic" and labeled the invalidated Gramm-Rudman-Hollings Act as "one of the most novel and far-reaching legislative responses to a national crisis since the New Deal."[25]

D. Summary: The Modern Approach

The three cases discussed above suggest that judges are in search of a formal authority to displace their own discretion and decision-making powers. Unlike the founding generation, many modern judges, of varying political persuasions, seem reluctant (at least in a separation of powers context) to engage in the creative act of judging: the act of reconciling a flawed tradition with an imperfect world so as to improve both and do damage to neither. Instead of crafting new answers to new questions, judges rely on existing answers without asking whether those answers are in fact addressing the right questions.

The results in these cases are not as disturbing as the formalistic approach. Courts might use a non-formalistic approach and still reach the same conclusions. In *Chadha*, for example, the Court might have reasoned that better legislation is more likely in the absence of a legislative veto device. I am not suggesting that the Court has been reaching results that are wrong, or even inconsistent with the framers' intentions. Rather, I am suggesting that it has been reaching results by a decision-making process that is dramatically different from the one the founders used. I am also suggesting that the move toward formalism is inexplicable—with the additional experience and confidence we have gained over the past two hundred years, we should be less formalist than the founding generation.

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23. 478 U.S. at 722.

24. *Id.* at 736.

25. *Id.* at 759 (White, J., dissenting). Justices Stevens and Marshall concurred in the judgment only. They rejected the majority's formalist analysis. *Id.* at 737 (Stevens, J., concurring). They relied instead on the conclusion that the act impermissibly delegated congressional responsibility to formulate national policy. *Id.*

Critics might argue that the contrast between Professor Casper's description of the political branch and my description of the judiciary is an unfair comparison. Although this critique has some merit, I would suggest two responses. First, the political branches (and to a lesser extent the scholars defending and attacking those branches) lately have been making the same formalist arguments. Examples include some of the public and governmental debates over the war powers clauses and the War Powers Resolution, and the intense focus on the advice and consent clause during the Senate's extensive hearings on Judge Bork's nomination.

Second, and more important, the same trend is apparent when the judiciary alone is examined. Dr. Marcus' comments[26] suggest the *ad hoc* nature of early judicial resolution of separation of powers questions. Indeed, early cases reviewing the validity of state and federal statutes exhibit a startling nonchalance about sources of authority.[27] In addition to the written Constitution, early state and Supreme Court cases cite—almost indiscriminately—natural law, inalienable rights, common right and reason, principles of justice, and common sense.[28] These early judges seemed willing to craft their rulings from reason, tradition and morality as well as from the written Constitution. Today's judges, by contrast, are careful to ground their decisions in literalist interpretations of particular clauses of the Constitution, although they tend to be less formalistic in individual rights cases than in the separation of powers cases discussed in this comment.[29]

III.

Some signs indicate that the Court may not be as unremittingly committed to formalism as *Northern Pipeline*, *Chadha*, and *Bow-*

26. Marcus, *Separation of Powers in the Early National Period*, 30 WM. & MARY L. REV. 269 (1989).

27. By "early cases" I refer to those decided during the first decade or so of the nineteenth century. *See* Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1169-76 (1987).

28. For a fuller explanation of this tendency, see *id.*

29. In fact, although the overall shift has been toward a more formalistic reading of the Constitution, the difference between cases involving individual rights and cases involving separation of powers seems to have remained constant over time. In both eras, the individual rights cases perhaps evoked a lesser amount of formalist, authoritarian reasoning.

sher suggest. Individual Justices have dissented from either the results or the analysis in each of these cases. Justice White dissented in all three cases, explicitly criticizing the majority's recourse to formalism.[30] Justice Stevens, joined by Justice Marshall, adopted a more functional approach in his lengthy concurrence in *Bowsher*. These two Justices concluded that the constitutional flaw in the Gramm-Rudman-Hollings Act was that it impermissibly delegated some of Congress' responsibility to formulate national policy.[31] Justice Powell tried to limit the devastating practical effect of *Chadha* by restricting it to cases in which the legislative veto effectively allowed Congress to exercise judicial authority.[32] He also, along with Chief Justice Burger, joined Justice White's dissent in *Northern Pipeline*.

Within the narrow context of legislative courts, the Court appears to have abandoned the strict test of *Northern Pipeline* and silently resurrected the older balancing test. Although the Court has not acknowledged its failure to abide by the *Northern Pipeline* precedent, three recent cases have upheld legislative court schemes that were very similar to the one invalidated in *Northern Pipeline*.[33] *Northern Pipeline* may well have been an "island in the stream," intended to warn Congress against taking advantage of the Court's flexibility by assigning too much power to legislative courts. As such, the case appears to have little precedential value.

Finally, the Court's latest foray into separation of powers questions provides the most hope for change. In *Morrison v. Olson*,[34] the Court reversed the United States Court of Appeals for the District of Columbia and upheld the independent counsel provisions

30. *See supra* text accompanying notes 14-16, 20, 25.

31. 478 U.S. 714, 737 (1986) (Stevens, J., concurring).

32. 462 U.S. 919, 960 (1983) (Powell, J., concurring).

33. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (upholding the jurisdiction of the Commodity Futures Trading Commission over common law counterclaims arising from claims brought pursuant to the Commodity Exchange Act); Thomas v. Arn, 474 U.S. 140 (1985) (upholding a provision of the Federal Magistrates Act that permits a magistrate's report to become unappealable in some circumstances); Thomas v. Union Carbide Agricultural Prod. Co., 473 U.S. 568 (1985) (upholding the arbitration provisions of the Federal Insecticide, Fungicide, and Rodenticide Act that provide for only limited judicial review).

34. 108 S. Ct. 2597 (1988).

of the 1978 Ethics in Government Act.[35] The circuit court's opinion invalidating the Act mirrored the formalism of the earlier separation of powers cases. Citing *Bowsher*, *Chadha*, and *Northern Pipeline*, the court of appeals concluded that neither "convenience and efficiency" nor even "necessity" can justify the slightest departure from the literal constitutional structure.[36]

Chief Justice Rehnquist wrote the nearly unanimous opinion reversing the lower court.[37] A few aspects of the opinion are reminiscent of the formalist decisions. The Chief Justice began with a detailed analysis of the appointments clause and the removal power,[38] turning only later and more briefly to the overarching question of whether the independent counsel provisions interfered with the functioning of any of the branches.[39] He devised a four-part test to determine whether the independent counsel was an "inferior" officer for purposes of the appointments clause.[40] The opinion also focused some attention on whether various authorized activities of the independent counsel were "judicial" or "executive" in nature, although the Chief Justice carefully refrained from drawing any clear demarcation between the two types of authority.

In large part, however, the majority opinion eschewed completely the formalism of recent years. It focused on the purposes of various constitutional provisions, on the practical consequences of various actions, and on the underlying notion of independent and interdependent branches, rather than on the rigid separation of powers. The opinion is indeed striking in its rejection of formalism. The discussion of each issue is permeated with evidence that the majority's central concern was protecting the independent functioning of each branch, rather than adhering to the literal language of minor provisions regardless of the cost to the efficiency and the integrity of the federal system.

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35. 28 U.S.C. §§ 591-596 (1978), *amended by* The Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 28 U.S.C.A. §§ 591-599 (West Supp. 1988).

36. *In re* Sealed Case, 838 F.2d 476, 507 (D.C. Cir. 1988).

37. Justice Kennedy did not participate in the decision and only Justice Scalia dissented.

38. 108 S. Ct. at 2608-20.

39. *Id.* at 2620-22. This progression drew from Justice Scalia—whose analysis of separation of powers was both formalist and ultimately petty—the entirely appropriate remark that "[the majority's emphasis] has it backwards." *Id.* at 2625 (Scalia, J., dissenting).

40. *Id.* at 2608-09.

After concluding that the appointments clause by its terms did not prohibit interbranch appointments, the Chief Justice noted that such appointments might be forbidden when they have "the potential to impair the constitutional functions assigned to one of the branches."[41] He began his discussion of article III by remarking that "[t]he purpose of [prohibiting the assignment of extra-judicial duties to the federal judiciary] is to help ensure the independence of the Judicial Branch and to prevent the judiciary from encroaching into areas reserved for the other branches."[42] In determining that the responsibilities assigned to the independent counsel did not encroach on the executive branch, Rehnquist repeatedly used words and phrases indicating flexibility and attention to practical effect. He said that the termination power of section 596(b)(2) was not a "significant judicial encroachment" on, nor posed a "sufficient threat of judicial intrusion" into executive matters.[43] Furthermore, the Chief Justice said that the Special Division, empowered to appoint independent counsel, was "sufficiently isolated" from the independent counsel to avoid tainting the independence of the judiciary.[44]

The majority opinion exhibited a similar avoidance of rigid rules in its discussion of the Act's limits on executive removal of independent counsel.[45] Although no constitutional provisions directly govern the removal of executive officers by means other than impeachment, a long line of precedent limits Congress' ability to control such removals. Justice Scalia accused the majority of "gutting" one such precedent,[46] *Humphrey's Executor v. United States*,[47] but the opinion clearly did at least as much damage to the even more seminal *Myers v. United States*.[48] Both cases established clearly defined rules for removal of executive officers. *Myers* held that the President could remove executive officers at will;

41. *Id.* at 2611.

42. *Id.* at 2612.

43. *Id.* at 2614-15.

44. *Id.* at 2615.

45. *Id.* at 2616-20. The independent counsel may be removed only upon a showing of "'good cause.'" *Id.* at 2616.

46. *Id.* at 2637 (Scalia, J., dissenting).

47. 295 U.S. 602 (1935).

48. 272 U.S. 52 (1926).

Humphrey's Executor qualified that holding by allowing some limitations on the removal of "quasi-legislative" or "quasi-judicial" executive officers.

The *Morrison* decision replaced both of these rules with a flexible standard: Congress may limit presidential removal power unless it is "essential to the President's proper execution of his Article II powers" that the officer be removable at will.[49] Chief Justice Rehnquist's application of this new standard illustrated its flexibility. His discussion was replete with words and phrases that are soft around the edges: the " 'good cause' " provision does not "unduly trammel[]" nor "impermissibly burden[]" executive authority;[50] the need to control the independent counsel's discretion is not "so central to the functioning of the Executive Branch" as to require removal at will;[51] the Attorney General retains "ample authority" to control the independent counsel.[52] The Chief Justice concluded: "We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws."[53]

The most striking portion of the opinion was its discussion of general separation of powers principles. The Court framed the question as "whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch."[54] It began by observing that "we have never held that the Constitution requires that the three Branches of Government 'operate with absolute independence.' "[55] True to this observation, the rest of the discussion focused on whether the Act constituted a legislative or judicial "usurpation" of executive

49. 108 S. Ct. at 2619. In the process, the majority engaged in a little revisionist history in its interpretation of *Myers*. It read *Myers* as limiting *congressional* involvement in the removal process, rather than as protecting presidential prerogatives. *Id.* at 2618. Because the termination of an independent counsel, however limited the President may be, does not involve Congress, the majority found *Humphrey's Executor* more analogous than *Myers*. *See id.* at 2619.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 2620.

54. *Id.*

55. *Id.* (quoting United States v. Nixon, 418 U.S. 683, 707 (1974)).

functions such that it " 'disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.' "[56] It is difficult to imagine a less formalist or more functional analysis of the questions raised by the independent counsel provisions.

IV.

It is tempting to predict that *Morrison* signals the end of the Court's formalist era in separation of powers. Several factors counsel caution, however. First, Justice Scalia's clamorous demand for strict separation reminds us that at least one member of the Court will continue to press for formalist analysis. Second, Justice Kennedy's views on this issue are still completely unknown. Third, although the flavor of the opinion is anti-formalist, its emphasis is more on the formalities of highly technical clauses than on the general doctrine of separation of powers.

Most importantly, however, the *Morrison* case raised questions that do not easily lend themselves to a formalist analysis. The rigid demarcation in function among the branches is found more in the structure than in the language of the Constitution, and literalism thus tends to be unavailing in these circumstances. Furthermore, the strict rules about removal of executive officers derive from judicial precedent rather than from the Constitution. Moreover, a number of constitutional provisions affirmatively support the independent counsel scheme. These include the provisions that Congress may vest the appointment of inferior officers in the courts[57] and may enforce not only its own enumerated powers, but also those of the other branches of the federal government.[58] It is easy

56. *Id.* at 2621 (quoting Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977)).

57. U.S. CONST. art. II, § 2.

58. *Id.* art. I, § 8. Ironically, Justice Scalia, who attempted to insist on a literal interpretation of the Constitution, ignored this portion of the necessary and proper clause. He asserted that the ordinary presumption of constitutionality of statutes did not apply in interbranch disputes, because the branches are co-equal. 108 S. Ct. at 2626 (Scalia, J., dissenting). Under the necessary and proper clause, however, Congress has the power to enact all laws necessary and proper for the execution of *executive* powers (as well as congressional and judicial powers). The independent counsel act, therefore, like any other statute, is presumptively constitutional under the broad interpretation of the necessary and proper clause that has been the law since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

to make an argument that a law that promotes investigation and prosecution of wrongdoing in the executive department is a legitimate exercise of the power to enforce the executive's constitutional responsibilities.[59]

Nevertheless, the Court's opinion in *Morrison* provides an interesting and refreshing contrast to the clause-bound rigidity of recent cases. Professor Casper's essay shows that the majority's approach to separation of powers is closer to the approach of the framers than is the approach of Justice Scalia, who repeatedly purports to rely on original intent. I tend to be suspicious of reliance on the framers' views and practices, because I do not find such intent dispositive of contemporary constitutional questions. To the extent, however, that Casper's historical analysis illuminates contemporary separation of powers doctrine, I would suggest that the framers' way of approaching the questions is as important as their way of answering them.

59. Just as this comment went to press, the Supreme Court upheld the Sentencing Guidelines promulgated by the United States Sentencing Commission. Mistretta v. United States, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989). Justice Blackmun, writing for all the Justices except Justice Scalia, took a decidedly functionalist approach; Justice Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), was prominently cited. 57 U.S.L.W. at 4107. This result suggests, perhaps, that *Morrison v. Olson* might indeed portend a new trend in separation of powers.