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The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission

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Jeffrey H. Bowman††

Congress’s power to establish independent regulatory commissions has seemed clear at least since the Supreme Court decided Humphrey’s Executor v. United States1 in 1935. Recently, however, both the necessity and constitutional legitimacy of commissions that are independent of presidential direction have been subjected to renewed discussion.2 Congress’s attempt to check abuses of executive power by creating “executive” agencies outside of presidential control has been challenged by some commentators as a violation of the separation of powers.3

This Article takes issue with the blanket assertion that independent regulatory commissions are unconstitutional. It contends that the Founding

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The opinions in this Article are those of the authors and should not be attributed to the Federal Election Commission.

2. See, e.g., Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573 (1984) (independent agencies unconstitutional except to insulate decisions from political pressure). The constitutional parameters of Congress’s power to exempt agencies from executive control have generally been tested through assertion of the President’s removal power. While the authors believe that the independence of the FEC from both presidential and congressional control is consistent with Professor Strauss’s thesis, we have used the traditional meaning of “independent agency” as one whose decisions are insulated from direct political pressure by a legislative shield against removal by the President. We do not claim that this is the only shield that defines agency “independence.” See also Note, In Defense of Administrative Autonomy, 96 YALE L.J. 787 (1987); Miller, Independent Agencies, 1986 SUP. CT. REV. 41; Note, Incorporation of Independent Agencies Into the Executive Branch, 94 YALE L.J. 1766 (1985); Tieler, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 B.U.L. REV. 59 (1983); Note, Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional, and Political Tensions in the Special Prosecutor Provisions of the Ethics in Government Act, 49 BROOKLYN L. REV. 113 (1982) [hereinafter Note, Fallen Angels]; Ledewitz, The Uncertain Power of the President to Execute the Laws, 46 TENN. L. REV. 757 (1979); Note, The Proposed Court-Appointed Special Prosecutor: In Quest of a Constitutional Justification, 87 YALE L.J. 1692 (1978); Note, Removing Politics From the Justice Department: Constitutional Problems with Institutional Reform, 50 N.Y.U. L. REV. 366 (1975) [hereinafter Note, Removing Politics].
3. See, e.g., Strauss, supra note 2; Tieler, supra note 2; Ledewitz, supra note 2; Note, Removing Politics, supra note 2.
Fathers made the Constitution flexible enough to meet administrative exigencies and did not intend to leave the enforcement of all laws to the President, and argues further that courts reviewing the allocation of "executive" power should be guided by Congress's power under the necessary and proper clause to insulate sensitive decisions from presidential control.

The example of the Federal Election Commission ("FEC" or "Commission") is used throughout the Article to illustrate this thesis. The FEC, because of its sensitive role in the electoral process, is a particularly apt example of an agency whose executive decisions should remain free from direct presidential or congressional supervision. The FEC is a profitable example because, unlike other administrative agencies, its constitutionality is subject to expedited litigative attack under special provisions of the Federal Election Campaign Act which allow parties to seek the certification of constitutional issues to the Courts of Appeals and the Supreme Court. Political candidates and others claiming injury from FEC review of campaign finance regulation have direct standing to sue the Commission. Indeed, the constitutionality of the FEC has already been litigated before the Supreme Court, most notably in Buckley v. Valeo.

By showing that the FEC is constitutional under the necessary and proper clause, this Article demonstrates that any blanket argument rejecting the constitutionality of all independent agencies is inadequate, and that the necessary and proper clause is an avenue for case-by-case adjudication of the constitutional question. Part I outlines the judicial history of independent agencies. Part II explores Congress's intent in establishing the FEC in the context of the necessary and proper clause. Part III considers the test of the FEC's constitutionality in Buckley v. Valeo, and Congress's subsequent reconstitution of the agency. Offering pragmatic and constitutional arguments, this Part articulates the consistency between Buckley and other litigation on independent agencies. Finally, the Article concludes that the Supreme Court should explicitly embrace the

6. Buckley v. Valeo, 424 U.S. 1, 8 n.4 (1976). See also Bread Political Action Committee v. FEC, 455 U.S. 577, 581 (1982) (only the FEC, a national party committee, or a voter eligible to vote in a presidential election may invoke the expedited procedures); California Medical Ass'n v. FEC, 453 U.S. 182, 189 (1981) ($5000 limit on annual contributions by individuals and unincorporated associations is constitutional).
necessary and proper clause as a criterion for the examination of the constitutionality of other independent agencies.

I. Independent Agencies: Historical Foundations and Recent Cases

Supreme Court approval of independent agencies goes back more than fifty years, to *Humphrey's Executor v. United States.* The oft-told story of *Humphrey's Executor* requires only summary description. President Franklin D. Roosevelt sought to remove Commissioner William E. Humphrey from the Federal Trade Commission (FTC) because he felt that the commissioner's views were inconsistent with his own. The President believed that he should control and direct the Commission's work himself. The Supreme Court disallowed the President's action on two grounds: first, because Congress had specified the causes for removal; and second, because Congress had explicitly created the FTC as an independent regulatory commission. The Court thus acceded to Congress's intent to create a body independent of executive authority. The Court's reasoning emphasized the need for agency autonomy, observing that "it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."

Recently, in *Synar v. United States,* the District Court for the District of Columbia questioned the contemporary validity of *Humphrey's Executor.* The court in *Synar* stated in dictum that it was "difficult to reconcile *Humphrey's Executor*'s 'headless fourth branch' with a constitutional text and tradition establishing three branches of

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8. In August 1933, Roosevelt wrote Humphrey, "I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission." *Id.* at 619.
9. *Id.* at 624.
10. *Id.* at 625-26. The Court recognized Congress's intent to create "a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Id.* (emphasis in original).
11. *Id.* at 629.
government. . . . “14 While the Supreme Court affirmed the lower court’s decision, it stated explicitly that its ruling should not be seen as “casting doubt on the status of ‘independent’ agencies,”16 and rejected the appellants’ claim that affirmance would invalidate the charters and functions of many independent agencies. The Supreme Court thus accepted, virtually in toto, the oral argument of the Solicitor General, who dismissed appellants’ independent agency argument as a “scare” and asserted that his own argument did “not in any way cast doubt on independent agencies.”17

Despite the Court’s assurances to the contrary, Synar has been viewed as a potential threat to the constitutional status of independent agencies

14. 626 F. Supp. at 1398. The court remarked that “Justice Sutherland’s decision in Humphrey’s Executor . . . is stamped with some of the political science preconceptions characteristic of its era and not of the present day—if not stamped as well, as President Roosevelt thought, with hostility towards the architect of the New Deal.” Id. Emphasizing the uncertainty which it thought surrounded the constitutional status of independent agencies, the court remarked that “[i]t is not as obvious today as it seemed in the 1930’s that there can be such things as genuinely ‘independent’ regulatory agencies.” Id.


16. Id. at 3188 n.4.

17. The following excerpts from the text of the exchange between Solicitor General Fried and Justice O’Connor are of interest:


This grant of authority violates the Constitution, first and principally because the grant is to an official removable only on the initiative of Congress . . . [a]nd second, because executive functions importantly affecting the whole of the executive branch and directing the President himself may only be performed by an officer who serves at the pleasure of the President.

I would like to say at the outset that this second argument does not in our view in any way cast doubt on the validity of agencies such as the Federal Reserve Board, the Federal Trade Commission, or any such agencies, and that the notion that the second argument in some sense endangers those agencies or would embark this Court on some constitutional misadventure is simply a scare which we don’t intend to throw into the Court and I don’t think need be thrown there.

O’Connor: Well, Mr. Fried, I’ll confess you scared me with it. (Laughter) So why don’t you explain.

Fried: Well, the principal point, Justice O’Connor, is that the powers which are given to the Comptroller General here are so sweeping they affect every nook and cranny of the Executive Department. They give orders to the President himself. They affect every one of the executive agencies.

And there is no single agency of those that we are perfectly familiar with which has any such sweeping powers. And the argument we make is simply that an officer who can have that pervasive effect on the executive branch must be removable by the President at will.

O’Connor: Well, that strikes me as kind of a novel doctrine you’re espousing. . . . Can’t it be said that the Federal Reserve Board, for example, through its powers, basically affects the financial structure of every agency in government?

Fried: The Federal Reserve Board is a good example, because in fact what the Federal Reserve Board does is to determine, as the bank which it is established to be, the interest rate it will charge to its clients. . . . It’s quite interesting that the statute setting up the Federal Reserve Board specifically said that nothing in it shall in any sense impinge on the powers of the Secretary of the Treasury. Here we have an official who gives orders to the President. I don’t think we have that in respect to the Federal Reserve Board or any of the other agencies which we’re familiar with.

Independent Agencies

and is but one example of a growing controversy over the role of these agencies.\(^8\) On September 13, 1985, Attorney General Edwin Meese III argued that "the framers of the Constitution did not intend Federal agencies to be independent of the President or to be run by bureaucrats who are not politically accountable."\(^9\) He maintained that these agencies belong in the executive branch under presidential control:

"Federal Agencies performing executive functions are themselves properly agents of the executive. They are not "quasi" this or "independent" that. In the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government."\(^20\)

Moreover, in *Ticor Title Insurance Co. v. Federal Trade Commission*,\(^{21}\) a federal district court considered the argument that the delegation of law enforcement powers to the FTC was unconstitutional because the FTC was given the exclusive power to initiate enforcement proceedings and was not subject to the supervisory control of the President. Although the court "reluctantly"\(^{22}\) dismissed the case on ripeness grounds, it did question the reach of *Humphrey's Executor*:

[T]here is no doubt that plaintiffs raise a serious and substantial issue of considerable public importance. The constitutionality of independent federal agencies has never been fully adjudicated; as the Assistant Attorney General for the United States candidly admitted, the issue has been avoided for years.\(^{23}\)

Amid such widespread questioning of independent regulatory commissions,\(^{24}\) it is important to consider the significance of *Buckley v.*
Valeo— a case involving the FEC whose central conclusion is often ignored by proponents of complete presidential control over executive agencies. While the Buckley Court held the appointment procedure of the FEC as then devised unconstitutional, it indicated that Federal Election Commissioners could exercise executive powers if they were appointed by the President and subject to Senate confirmation. In Humphrey’s Executor the Court had upheld Congress’s power to create independent agencies if legitimate functional needs justified such a step. In Buckley, it went on to acknowledge the necessity of such a properly appointed Federal Election Commission. Because of the Commission’s sensitive role in the oversight and possible prosecution of political candidates, including an incumbent President and his opponent, the Court recognized the need to insulate the Commission from the President. Therefore, the Court mandated only that Commissioners be appointed pursuant to article II, section 2 of the Constitution. As a result of Buckley, the FEC has become the model of a properly constituted independent agency.

II. The Creation of the FEC

In creating the FEC, Congress determined that an independent agency was necessary and proper to enforce campaign finance legislation. This Part first briefly examines the scope of the necessary and proper clause of the Constitution, and then outlines the legislative history underlying the creation of the FEC.
A. The Scope of the Necessary and Proper Clause

Congress has the power to make all laws which shall be necessary and proper for carrying into execution its own powers and all other powers vested by the Constitution in the Government of the United States, or any department thereof. Since McCulloch v. Maryland, it has been hornbook law that the "vertical" portion of the clause permits Congress discretion both as to when its own powers will be exercised, and as to how they shall be executed. What is often overlooked is that the second, or "horizontal," portion of the clause allows Congress to determine how all powers vested in the rest of the federal government, including the executive branch, shall be executed. Thus, the Constitution provides that Congress may specify the means and manner by which the powers vested in the federal government or in any department or officer of the federal government may be executed, subject only to the limitation that it cannot contravene an express constitutional provision.

Congress's power under the necessary and proper clause is broad. In the famous language of Chief Justice Marshall in McCulloch v. Maryland:

[The necessary and proper clause] . . . allow[s] to the national legislature that discretion, with respect to the means by which the powers [the Constitution] confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are

31. U.S. CONST. art. I, § 8, cl. 18. For an analysis of the scope of the necessary and proper clause, see Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause," 36 OHIO ST. L.J. 788 (1975). Van Alstyne maintains that the second half of the clause assigns to Congress alone the responsibility to say by law what additional authority, if any, the executive and the courts are to have beyond that core of powers that are literally indispensable, rather than merely appropriate or helpful to the performance of the express duties under Articles II and III of the Constitution.

Id. at 799.

32. 17 U.S. (4 Wheat.) 316 (1819).

33. Under the second portion of the necessary and proper clause, for example, Congress has determined the qualifications for officers of the United States nominated by the President. As Justice Brandeis pointed out:

[A] multitude of laws have been enacted which limit the President's power to make nominations, and which, through the restrictions imposed, may prevent the selection of the person deemed by him best fitted. Such restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the Government. Every President has approved one or more of such acts. Every President has consistently observed them. This is true of those offices to which he makes appointments without the advice and consent of the Senate as well as those for which consent is required.

Myers v. United States, 272 U.S. 52, 265 (Brandeis, J., dissenting).

34. See Buckley, 424 U.S. at 138-39.
appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.\textsuperscript{35}

In finding that the incorporation of the Bank of the United States was a necessary and proper means of executing vested congressional powers,\textsuperscript{36} Chief Justice Marshall emphasized that the clause is not “confined to those single means, without which the end would be entirely unattainable.”\textsuperscript{37} To the contrary, the clause should be seen as an affirmative power of Congress “to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of government.”\textsuperscript{38}

An early judicial recognition of the necessary and proper clause justification for federal election controls came with \textit{Burroughs v. United States}.\textsuperscript{39} In the spirit of Chief Justice Marshall’s opinion in \textit{McCulloch}, the Supreme Court found that Congress had the power to protect elections from interference and held constitutional\textsuperscript{40} the Federal Corrupt Practices Act,\textsuperscript{41} an antecedent to the Federal Election Campaign Act of 1971.\textsuperscript{42} The \textit{Burroughs} Court emphasized the importance of allowing Congress to deal with serious national problems by appropriate means. The Court stated that Congress “undoubtedly . . . possesses every . . . power essential to preserve the departments and institutions of the general government from impairment or destruction.”\textsuperscript{43} The “choice of means” to achieve these ends, according to the Court, “presents a question primarily addressed to the judgment of Congress.”\textsuperscript{44} As the following legislative history of the FEC illustrates, forty years after \textit{Burroughs} Congress judged that an independent agency was necessary and proper to preserve the integrity of government operations and public confidence in the electoral process.

B. The Legislative History of the FEC

In 1971, Congress completed a long debate over revisions of federal campaign finance laws with a major new enactment, the Federal Election

36. \textit{Id.} at 424.
37. \textit{Id.} at 414.
38. \textit{Id.} at 420.
40. \textit{Id.} at 547.
43. 290 U.S. at 545.
44. \textit{Id.} at 547.
Independent Agencies

Campaign Act (FECA). As part of that debate, Congress—facing the fact that campaign finance laws largely had been ignored—considered creating a specialized administrative agency to administer the Act.\textsuperscript{46} It was not until the 1974 amendments to FECA, however, that the FEC was created.\textsuperscript{46}

The debates preceding the 1974 FECA amendments occurred during the Watergate controversy, which raised fundamental questions about the executive branch's responsibility to obey the very laws that it and its officers had sworn faithfully to execute. The Watergate imbroglio, which involved the use of personnel and money belonging to President Nixon's reelection committee, brought to the forefront questions about the President's use of federal agencies under his control against political enemies. Pressure to create an independent agency was intensified by Congress's belief that campaign finance laws could not regulate the activities of the President's own reelection committee unless the execution of those laws was free from his direct control. Widespread congressional mistrust and fear of executive power also generated movement for the radical idea, disapproved in \textit{Buckley},\textsuperscript{47} that Congress should assert the appointment power over members of the agency.

Congress's fear that a President might use an agency within his control to harass or embarrass political opponents appeared justified.\textsuperscript{48} The final report of the Senate Watergate Committee discussed in painstaking detail several "attempts by White House personnel to use Government agencies for their own political ends."\textsuperscript{49}

\begin{itemize}
\item\textsuperscript{45} Though independence was contemplated in the original 1971 legislation, the FEC became an independent agency for the first time under the 1974 FECA amendments. In the Senate version of the 1971 FECA, for example, there was a provision for such a commission but it was deleted by the House-Senate conference committee. See S. 956, 92d Cong., 1st Sess. § 310, 117 \textsc{Cong. Rec.} 3887 (1971); see also Note, \textit{Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971}, 10 \textit{Harv. J. on Legis.} 331, 354 (1973).
\item\textsuperscript{46} See supra note 4.
\item\textsuperscript{47} 424 \textit{U.S.} at 127.
\item\textsuperscript{48} As is frequently true in the passage of major legislation, the motive forces behind the legislation are not found solely in the congressional debates, but also in the contemporaneous events. For example, on October 20, 1973, President Nixon issued a direct order to Watergate Special Prosecutor Archibald Cox to stop seeking crucial White House tape recordings of Oval Office conversations. When Cox refused, the President ordered Attorney General Elliot Richardson to fire Cox. Richardson refused and resigned instead. Richardson's deputy, William D. Ruckelshaus, refused to dismiss Cox; he, too, was fired. Eventually, the third man in line at the Department of Justice, Solicitor General Robert H. Bork, carried out Nixon's order and dismissed Cox. The United States District Court for the District of Columbia later found that Cox's dismissal "in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal." Nader v. Bork, 366 F. Supp. 104, 108 (D.D.C. 1973). The regulation provided that "[t]he Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part." Office of Watergate Special Prosecution Force, 28 \textit{C.F.R.} § 0.37 (1973).
\item\textsuperscript{49} S. \textsc{Rep. No.} 981, 93d Cong., 2d Sess. 130 (1974). For example, the Report found that White House efforts to have the Internal Revenue Service audit "left wing organizations" and attempts to get IRS information for political purposes "all attest to the serious efforts made by the White House
In its final report, the Senate Watergate Committee recommended that "the Congress enact legislation to establish an independent, nonpartisan Federal Election Commission." As the Committee explained:

Probably the most significant reform that could emerge from the Watergate scandal is the creation of an independent nonpartisan agency to supervise the enforcement of the laws relating to the conduct of elections. Such a body—given substantial investigatory and enforcement powers—could not only help insure that misconduct would be prevented in the future, but that investigations of alleged wrongdoing would be vigorous and conducted with the confidence of the public.

In response, Congress in 1974 amended FECA to create the Federal Election Commission.

The 1974 FECA amendments had their origins in two bills. Congress sought to strengthen and centralize administration of the Act in a specialized agency which would take over the responsibilities (largely the receipt of campaign disclosure reports) vested by the 1971 Act in the Clerk of the
House, the Secretary of the Senate, and the Comptroller General. The original Senate bill, 53 introduced by Senator Howard Cannon, would have created a seven-member commission appointed by the President, with Senate confirmation, to seven-year terms. Two of the Commissioners were to be chosen from persons recommended by the President pro tempore of the Senate, upon recommendation of the majority and minority leaders of the Senate; and two were to be chosen from persons recommended by the Speaker of the House of Representatives, upon recommendation of the majority and minority leaders of the House. The remaining three members were to be chosen directly by the President.

The idea for a commission appointed by Congress which would exercise the powers thought necessary for enforcement of the campaign finance laws originated in the House. Wayne Hays, Chairman of the Committee on House Administration, introduced a bill, H.R. 16,090, 54 to establish a seven-member board of supervisory officers. The board was to be composed of the Secretary of the Senate, the Clerk of the House, the Comptroller General, and four “public members”—two appointed by the President of the Senate, upon recommendation of the Senate majority and minority leaders, and two appointed by the Speaker of the House, upon recommendation of the House majority and minority leaders. The four appointees, who would serve on a part-time basis for four years, would not be subject to either presidential review or congressional confirmation.

Although the original Senate proposal of a seven-member Federal Election Commission passed the Senate without amendment by a 53-32 vote, 55 the House version with its board of supervisory officers encountered stiff resistance. In the House report recommending approval of H.R. 16,090 and its enforcement approach, Representative Bill Frenzel filed supplemental views criticizing this scheme for placing “four appointees of Congress and three employees of Congress in charge of administration and enforcement of election law.” 56 Frenzel concluded, “[n]ot only is the fox in charge of the chicken coop, he is living in the farm house and managing the farm.” 57

As an alternative, Frenzel proposed the creation of a six-member Federal Election Commission to be appointed by the President from lists submitted by congressional leaders from the House and Senate in order “to assure the Commission’s independence.” 58 Frenzel also argued that his

57. Id.
58. Id. at 138.
proposal, unlike the Hays proposal, was constitutionally sound because it recognized that “under Article II . . . the President appoints the members of the Commission.”

Once H.R. 16,090 was reported out of committee, the Frenzel proposal for an independent commission rapidly gained support. Its main obstacle was Chairman Hays, who strongly opposed the Senate presidential appointment plan because he preferred an enforcement agency controlled by congressional leaders. In a last minute move to stave off a fierce, uncertain fight over the bill’s enforcement provision, Hays called a meeting of his House Administration Committee to work out a compromise.

The next day, August 8, 1974, Congressman John Brademas introduced a compromise amendment to H.R. 16,090 formulated by the House Administration Committee. Brademas explained that the amendment was meant “to respond to criticism of the language in the committee bill wherein congressional employees were seated on the board.” The amendment provided for a board of supervisory officers composed of four public members—two to be appointed by the Speaker of the House and two by the President of the Senate on a bipartisan basis. The Clerk of the House and the Secretary of the Senate were also to sit on the Board, but in a non-voting capacity.

The compromise amendment was opposed, however, by those concerned that such an independent supervisory board could turn against Congress, especially if the Clerk of the House and the Secretary of the Senate could not vote. Representative Dawson Mathis warned:

We are going to set up a bunch of headhunters down here who are going to spend their full time trying to make a name for themselves persecuting and prosecuting Members of Congress. . . . Members had better watch their heads once the Commission is established.

59. Id. Representative Frenzel believed that it was essential to give “the President this limited discretion mainly because the Presidential appointment is absolutely necessary if the Commission is to be given any authority to enforce campaign laws in the court.” Id. The lack of a presidential appointment was, in Frenzel’s view, a “fatal defect in H.R. 16,090.” Id. Since Hays’s proposed supervisory board would not be presidentially appointed, Frenzel concluded that the board would have “no enforcement powers and cannot be given those powers.” Id.

60. Cong. Q. August 10, 1974, at 2192.
62. Id. at 27,473 (1974) (remarks of Rep. Mathis). Representative Mathis further stated that a Federal Election Commission was unnecessary because the Clerk of the House and the Secretary of the Senate were doing an adequate job and that problems with enforcement rested with the Department of Justice: “There have been over 5,000 violations of the 1971 Act referred to the Department of Justice for prosecution, and I am informed that there have been three which have been followed through on.” Id. Mathis also opposed the compromise because it allowed the White House to appoint two members: “We do not know who is going to be on this Commission; we have no idea. It might have been two years ago the members might have been Ehrlichman, Mitchell, Haldeman and Dean.” Id.
Similarly, Representative Bill Burlison warned that "with this amendment we are setting the stage for making it impossible for an incumbent to get a fair shake before this group." Thus, in addition to congressional worries with respect to executive domination of the Commission, members of the House were also concerned with the regulation of their own activities by a board of supervisory officers.

Even as the House compromise emerged, however, the argument that the agency should be independent prevailed. Speaking in support of the compromise amendment, Representative Dante Fascell expressed the sentiments of the House when he stressed the need for an "independent enforcement Commission," which he characterized as the "heart and crux of campaign reform." Fascell concluded that "the credibility of Congress is at stake" and "unless we make adequate provision for the independent and vigorous enforcement of the limitations we enact, we will remain open to charges of conflict of interest and public distrust will continue." The compromise amendment was adopted by a 391-25 vote.

The final bill, which passed both Houses by wide margins, established a commission broadly empowered to issue rules, require submission of campaign disclosure reports, conduct investigations, subpoena witnesses, issue advisory opinions, and initiate civil actions itself or request the Attorney General to institute civil or criminal actions to enforce the statute. The Commission could also temporarily disqualify any candidate for election to federal office for failing to comply with FECA reporting regulations.

Congress also took steps to assure that the Commission would not become a vehicle for partisan purposes. It sought to protect the Commission's partisan balance, integrity, and independence from possible legislative or executive manipulation. The bill explicitly stated the need for public confidence in the Commission's freedom from outside influence and created an unusual structural conflict within the FEC to safeguard

64. Id. at 27,472 (remarks of Rep. Fascell). Rep. Fascell observed that "the elections commission besides having the primary supervisory and enforcement authority, is given full independent authority to seek enforcement through civil action in court by way of injunction or other appropriate relief without the necessity of submitting the matter to the Attorney General first." Id.
65. Id.
66. Id.
67. Id. at 27,473-74.
68. The Senate passed the bill by a 60-16 margin, 120 Cong. Rec. 34,392 (1974); the House passed the bill by 365-24, id. at 35,148.
71. The bill stated:
Members shall be chosen on the basis of their maturity, experience, integrity, impartiality, and good judgment and shall be chosen from among individuals who at the time of their appoint-
against domination of the Commission by one political party. The conferrees provided that no more than three members of the Commission be members of the same political party. A plurality of at least four votes would be required for the Commission to exercise any of its central powers. Unlike other regulatory agencies which have an odd number of members, one of whom is designated as permanent chairman, the FECA provided for a rotating chairmanship, with a new chairman to be selected by the members each year.

Innovative appointment procedures were intended to guarantee that Congress would not concede complete political control of the new Commission to the executive. Two members of the Commission would be appointed by the President pro tempore of the Senate upon recommendation of the Senate majority and minority leaders; two members by the Speaker of the House upon recommendation of the House majority and minority leaders; and two members by the President. All six members would be subject to confirmation by a majority vote of each House of Congress.

Comments in both Houses indicated that the legislators believed the bill met their goal of establishing an independent body. House comments revealed a consensus that the conference bill provided for a "strong independent commission to enforce provisions of this act." Similarly, the Senate believed that the conference bill had produced, in the words of Senate Minority Leader Hugh Scott, "an independent Federal Election Commission." As summarized by Representative Frenzel, "[t]he establishment of an independent Commission is the key provision in the bill. It will assure

73. Id.
74. 2 U.S.C. § 437c(a)(5) (Supp. V 1975). The section further requires that "the Chairman and Vice-Chairman shall not be affiliated with the same political party." Congress's concern that the Commission, in light of its uniquely sensitive mission, have the greatest degree of flexibility and independence possible, is evidenced by several other specific statutory provisions. For instance, Congress provided that the two most senior positions at the Commission, the staff director and the general counsel, be executive level positions with the incumbents serving at the pleasure of the Commission. 2 U.S.C. § 437c(f)(1) (1982). Congress also provided a special procedure whereby the Commission could make budget submissions directly to Congress as well as to the Office of Management and Budget (OMB). Furthermore, the statute prohibited the Commission from submitting legislative recommendations or testimony or comments on legislation to the OMB prior to the legislation's submission to Congress. 2 U.S.C. § 437d(d)(2) (1982).
75. Comments in both the House and Senate indicated that Congress was pleased that the new Commission would not be presidentially appointed in its entirety. 120 CONG. REC. 35,134 (1974) (remarks of Rep. Sieberling); id. at 35,377 (1974) (remarks of Sen. Clark).
76. Id. at 35,135 (remarks of Rep. Armstrong).
77. Id. at 34,373 (remarks of Sen. Scott).
judicious, expeditious enforcement of the law, while reversing the long history of nonenforcement.\textsuperscript{78}

III. The Constitutional Debate Over Independent Agencies

The constitutional debate surrounding independent regulatory agencies has focused on their accountability within the constitutional scheme, and particularly on their supposed lack of a legitimate locus within the three branches of government. However, the separation of powers should not be rigidly construed; a certain cooperation and blending of powers must occur to insure the balance of powers and the accountability of the three branches of government to each other and to the public at large. The Federal Election Commission is one example of an independent agency that facilitates such a balance.

A. Opposition to Independent Agencies

Congress's judgment that the creation of an independent FEC was necessary and proper to prevent abuses of campaign finance law while shielding the administration of the law from executive or legislative interference and retaliatory removal was not, in itself, sufficient to activate the legislation under the necessary and proper clause. Though the legislators considered such independence essential for the Commission to carry out its duties, any statutory provision that reflects what Congress deems appropriate under the necessary and proper clause must also be consistent with, and not prohibited by, the "letter and spirit of the Constitution."\textsuperscript{79}

Opponents of independent agencies generally make the argument that the separation of powers mandates that each governmental function be labeled "executive," "legislative," or "judicial," and then assigned inflexibly to one of these branches and to no other.\textsuperscript{80} This syllogistic approach contends that any agency exercising enforcement powers is performing executive functions and therefore must fall under the control and direction of the President, since the executive is responsible for executing the laws.\textsuperscript{81} "From a practical point of view the only way in which Congress can make the regulatory commissions independent is by limiting the discretionary power of the President to remove their members from office," Robert Cushman has observed, because "if he can remove them at pleasure, he can control them; if he cannot remove them, he cannot control

\textsuperscript{78} Id. at 35,135 (1974) (remarks of Rep. Frenzel).
\textsuperscript{79} Logan v. United States, 144 U.S. 263, 283 (1892).
\textsuperscript{80} See, e.g., Strauss, supra note 2; Note, Fallen Angels, supra note 2.
\textsuperscript{81} U.S. CONST. art. II, § 1.
Accordingly, opponents of agency independence argue that commissioners must serve at the pleasure of the President because they exercise executive functions and therefore must be controlled by the executive.

Notwithstanding this argument, the FEC is within the "letter and spirit of the Constitution." Congress has the power to make laws "necessary and proper" to carry into effect the powers "vested by this Constitution in the Government of the United States, or in any Department thereof." Thus, Congress may establish an independent commission to ensure that the executive "take[s] care that the laws are faithfully executed."

As the following sections will show, this conclusion is consistent with the Supreme Court's indication in *Buckley v. Valeo* that Federal Election Commissioners, if nominated by the President and subject to Senate confirmation, could constitutionally exercise independent executive powers. In addition, the status and purpose of the FEC conforms with the historical and theoretical underpinnings of separation of powers theory. Finally, there is nothing in the President's removal power—a power nowhere specifically mentioned in the Constitution—which gives the executive authority to remove members of an independent commission.

B. Buckley v. Valeo and the Challenge to the FEC's Constitutionality

Congress included in its final version of FECA an extraordinary jurisdictional provision expediting Supreme Court review when the agency's constitutionality was challenged. This provision was used in *Buckley v. Valeo*, wherein the Supreme Court held, among other things, that the combined congressional-presidential appointment method for Federal Election Commissioners under the 1974 FECA violated the appointments clause of the Constitution. Because the Commissioners were neither nominated by the President nor appointed by the President alone during a congressional recess, but rather appointed by the House and Senate leadership, they could not legally perform executive functions.

The Commission's law enforcement responsibilities were executive functions in the eyes of the Court, dischargeable only by appropriately

82. R. Cushman, The Independent Regulatory Commissions 454 (1941).
83. U.S. Const. art. I, § 8, cl. 18.
84. Id. art. II, § 3.
86. 424 U.S. 1 (1976).
87. U.S. Const. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States").
88. The *Buckley* majority characterized the constitutional questions, as it has frequently done elsewhere in recent terms, as susceptible to resolution by a strict separation of powers analysis which seeks to identify and categorize particular powers as "executive," "legislative," or "judicial." See *Buckley*, 424 U.S. at 118-24. See also INS v. Chadha, 462 U.S. 919 (1983); cf. Strauss, supra note 2, at 616-21, 625-39 (critical analysis of strict separation of powers approach). As Professor Strauss'
appointed "Officers of the United States." The Court indicated that this was particularly true of the Commission's power to bring civil actions against violators. It also concluded that the Commission's rulemaking and advisory opinion powers, together with its authority to determine candidate eligibility for federal funding, gave the Commission substantial additional authority that was executive in nature. The Court declared that the Commission, as constituted, could only continue to exercise informational and certain investigatory responsibilities "which Congress might delegate to one of its own committees," and would have to curtail its executive actions unless the appointment process was appropriately altered.

The Supreme Court thus fully understood the nature and breadth of the Commission's enforcement authority. It is equally clear that analysis suggests, it is not yet clear exactly how the Court intends to ascertain how particular powers are "executive" as opposed to "legislative." The question how to decide whether particular powers, such as rulemaking or subpoena, are legislative or executive thus still lies ahead.

89. 424 U.S. at 125-26.
90. Id. at 138.
91. Id.
92. Id. at 137. Buckley, though not the first incident of this kind, strikingly exemplifies what has become commonplace: the executive, rather than defending the constitutionality of laws it is its duty faithfully to execute, has either refused to defend or, on occasion, actually challenged the constitutionality of congressional enactments signed by the President. In Buckley, the Justice Department's so-called amicus brief on behalf of the Commission consisted of five sections, and while the first four did defend the statute, the beginning of the fifth section argued that it should be declared unconstitutional with respect to the manner of appointment of the Commissioners. Brief for the Government as Amicus Curiae, Buckley v. Valeo, 424 U.S. 1 (1976) (No. 75-436). This approach is certainly wrong. "Execution" of the laws means enforcement and defense; it emphatically does not mean "killing" some laws that the President does not like. Just as it has long been established that federal administrative agencies are without power or expertise to pass upon the constitutionality of legislative action, see, e.g., Oesterich v. Selective Service Bd., 393 U.S. 233, 242 (1968); Speigel, Inc. v. FTC, 540 F.2d 287, 294 (7th Cir. 1976), so the President or the Department of Justice should be considered without power to contest the constitutionality of legislative action—at least as a condition of determining which laws will or will not be faithfully executed and defended. This is particularly so where, as with the 1974 FECA, the statute had been approved by the President. See Miller & Bowman, Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem, 40 Ohio St. L.J. 51 (1979).
93. 424 U.S. at 163-67 and 169-73. Sections 437c, d, and g of the Act were reprinted in the appendix to the Court's opinion in Buckley. These provisions detailed the Commission's general powers along with their administrative and enforcement authority. The Justice Department, in its brief to the District Court in Buckley, expressly approved the FEC's exercise of the powers it had been granted by the statute. The Justice Department argued only that the Act "purports to vest power civilly to enforce the law in the Federal Election Commission, a legislative body. Such an attempted grant of power runs afoul of the separation of powers expressed in the Constitution." The Department noted, "It is clear that this problem may easily be eliminated by Congress, for the only remediation necessary would be amendment of the Act to provide that the President appoint all Commission members." Brief for the Attorney General at 7 n.6. (emphasis supplied), Buckley v. Valeo, 387 F. Supp. 135 (D.D.C. 1975) (No. 75-0001). Similarly, in his brief to the Supreme Court in Buckley, Attorney General Levi wrote:

"[T]he members of the independent regulatory Commissions are "Officers of the United States" within the meaning of Article II, Section 2 of the Constitution. They are appointed by the President and are confirmed by the Senate. In consequence, they can share, much as cabinet officers share, in the power granted by Article II to execute the laws. Members of the [Federal
Congress intended this enforcement authority to be exercised free of the President’s supervisory control. The Court did not question Congress’s entrustment of enforcement authority to the Federal Election Commission. Rather, it held that the Commission could exercise this significant executive responsibility so long as the Commissioners were executive branch appointees under the appointments power and thus “Officers of the United States.”

Reserving questions which might be presented under other provisions of the Constitution, the Court indicated that curing the appointments defect would enable a reconstituted agency to exercise the executive enforcement powers. The Court found no need to discuss the congressional judgment that the agency should be insulated from either executive or legislative branch day-to-day control over its functions. Rather, the Court listed the powers assigned to the agency generally, and specifically indicated those which could be exercised by a reconstituted Commission. In so doing, the Court approved the assignment of these powers to an independent agency.

This Supreme Court imprimatur of constitutionality also appeared in other dicta of the Court. Even though it found the Commission to be unconstitutionally organized, the Court accorded the Commission’s past actions de facto validity: “It is also our view that the Commission’s inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission’s administrative actions and determinations to this date. . . .” The Supreme Court has long recognized a distinction between the unconstitutionality of a governmental body and the use of unconstitutional means to select its members. If the body itself is invalid, its acts are without force or effect; however, if the defect relates only to the manner in which the officeholders are selected, then their acts may be given de facto validity.

Election Commission are not “Officers of the United States” and, in consequence, possess no power under Article II.

94. U.S. CONST. art. II, § 2, cl. 2.

95. 424 U.S. at 137 n.175. The Court was particularly concerned with 2 U.S.C. § 456 (1982), which empowered the Commission to disqualify a federal candidate for failing to file campaign reports.

96. Id. at 142 (emphasis supplied).

Not only did the Supreme Court accept the past acts of the Commission as valid, it also stayed its judgment in *Buckley* for thirty days. The stay explicitly allowed "the present Commission" to complete unfinished business pending at the time of *Buckley* and to "afford Congress an opportunity" to remedy the constitutional defects contained in the Commission's manner of appointment.\(^9\) The Court cited the malapportionment cases, where it had recognized that the doctrine of *de facto* validity could be applied prospectively, since the selection of legislators, rather than the legislature itself, had been constitutionally attacked.\(^10\) Thus, by issuing a stay, the Court gave further indication that it approved of the Commission as an independent institution.

The Court further indicated its approval of the powers exercised by the Commission by suggesting that Congress could "reconstitute the Commission by law."\(^1\) In other words, the Congress could simply provide for the appointment of Commission members by the President alone. This approach would be consistent with the Court's view of the appointments clause and would allow the Commission to employ its enforcement, rulemaking, advisory opinion, and administrative powers. The Court also suggested that Congress could "adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains."\(^2\) Plainly, the Court considered a reconstituted Commission to be a valid enforcement mechanism.

The Court's subsequent willingness to extend the stay further demonstrated its expectation of the Commission's reconstitution, rather than a more general congressional reassessment of the allocation of powers between other agencies and Congress. Senator Howard Cannon and Senate Majority Leader Mike Mansfield had made an unusual written request to the Chief Justice days before the stay was to expire:

**Dear Mr. Chief Justice:**

We are writing to the Court in support of the motion filed today to extend the stay in *Buckley v. Valeo* (nos. 75-436, 75-437) of the portions of the Court's judgment that prevent the Federal Election Commission from exercising certain powers because of the constitutional defect in the appointment of the Commission members.

We wish to inform the Court that the Senate is moving forward expeditiously with legislation to establish the Commission in a constitutional manner, in accord with the Court's decision. . . . It is the

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9. 424 U.S. at 143.
10. Id. (citing Georgia v. United States, 411 U.S. 526 (1973); Fortson v. United States, 385 U.S. 231 (1966); Maryland Comm. v. Tawes, 377 U.S. 656 (1964)).
11. Id. at 143.
12. Id.
The Supreme Court accepted the congressional representation that it was moving toward reconstitution and extended its stay of judgment and the Commission's ability to exercise powers until March 22, 1976. These extraordinary actions facilitating reconstitution further demonstrate the Court's acceptance of the FEC as an independent agency.

The Court's reasoning relied heavily on the specificity of the appointments clause, and the history of its passage at the Constitutional Convention. Noting that earlier drafts at the Convention had given the Senate power to appoint Justices of the Supreme Court and ambassadors, and had given the President power to appoint all other officers of the United States, the Court pointed to the compromise that finally emerged. The power of appointment was shared, so that the President nominated and the Senate confirmed all officers of the United States. The Justices were convinced by their examination of the Convention debate that the Convention had specifically disposed of the question of appointment by making

103. Letter from H. Cannon and M. Mansfield to Chief Justice Burger (Feb. 27, 1976) (on file with the authors). Appellants were quick to oppose the Cannon-Mansfield letter to the Chief Justice and the Commission's motion to support it. Arguing that "Congress has acted in its refusal thus far to pass enabling legislation for the reconstitution of the Federal Election Commission," appellants characterized the request for an extension of the stay in this manner: "[A]ppellees are asking this Court to become a direct participant in the legislative process and to lend its assistance in the passage of the [1976 Amendments to FECA]." Appellants' Opposition to a Further Stay of the Court's Judgment 2, 4, Buckley v. Valeo, 424 U.S. 1 (1976) (No. 75-436). They explicitly protested:

[T]his extraordinary attempt by the Chairman of the Rules Committee and the Majority Leader to pressure this Court into assisting them in passage of legislation which is extremely controversial and of a highly partisan nature demonstrates the high risk this Court faces in entangling itself in the legislative process and the political arena should it grant the private appellees' motion.

Appellants' Memorandum Respecting a Letter From Senators Cannon and Mansfield to the Chief Justice at 2 (Feb. 27, 1976), Buckley v. Valeo, 424 U.S. 1 (1976) (No. 75-436) (on file with the authors).

105. Id. at 128-31.
106. Id. at 131.
the appointments clause refer to “all appointed officials exercising responsibility under the public laws of the Nation.”

The Court stated that the functions Congress had given the Commission included:

- functions relating to the flow of necessary information—receipt, dissemination, and investigation; functions with respect to the Commission’s task of fleshing out the statute—rulemaking and advisory opinions; and functions necessary to insure compliance with the statute and rules—informal procedures, administrative determinations and hearings, and civil suits.

The Court held that, except for the first group of powers, which Congress could itself exercise directly, the “more substantial” powers, especially the power to bring court actions, could be exercised only by officers of the United States: “A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to ‘take care that the laws be faithfully executed.’”

After rejecting the argument that the necessary and proper clause allowed Congress to override the express language of the appointments clause, the Court asserted that litigation has generally been considered executive in nature. The Court held that the Commission’s power to vindicate public rights through litigation violated Article II, section 2, clause 2 of the Constitution, because the employees of the Commission were not duly appointed officers of the United States. The Court concluded that the Commission’s authority to make rules, issue advisory opinions, and determine candidates’ eligibility to receive campaign funds and hold office was of the kind ordinarily held by regulatory agencies under the direction of congressional legislation. It emphasized that the Commission’s executive powers were much broader than those generally exercised by many independent agencies, and cited Humphrey’s Executor for the proposition that “the President may not insist that such functions be

107. Id.
108. Id. at 137.
109. Id. at 138 (quoting U.S. Const. art. II, § 3).
111. 424 U.S. at 140.
112. Id. at 140-41.
delegated to an appointee of his removable at will.” While finally reserving judgment on any explicit power that Congress saw fit to place in a reconstituted FEC, the Court assumed that the powers characterized as executive in nature, including the power to enforce the FECA through suits in the courts of the United States, could be exercised by a reconstituted agency.

Congressional reaction to the Buckley decision, though not swift, showed a willingness to reconstitute the FEC in the manner the Court suggested, even though Congress had lost the political battle to retain control of the agency by excluding the President from the appointment process. The legislative history of the 1976 FECA amendments indicates that Congress intentionally maintained the Commission as an independent monitor of the operation of the Federal Election Campaign Act, with the same mix of powers it had held previously. The executive also reacted favorably to Buckley's resolution: President Ford expressly noted with approval, as he signed the legislation reconstituting the Commission, the need for “a Commission with valid rulemaking and enforcement powers.”

C. Constitutionality and Accountability

Here we address the underlying rationale for the criticism of independent agencies under separation of powers doctrine, namely, their lack of accountability to the legislature or executive, and show why this criticism carries little weight against the FEC. Agency independence does not imply agency unaccountability. A number of formal mechanisms permit Congress, the President, and the courts to exert a large measure of authority over the powers, membership and activities of independent commissions. First, Congress, when it passes legislation, not only creates a commission, it also determines what powers the commission may exercise and the limits on those powers. The annual budget process provides the House and

113. Id. at 141.
114. Id. at 137 n.175.
115. Id. at 137.
120. See Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) (Congress may regulate, but not participate in, executive removal power). Indeed, Congress allows regulated entities to seek not only full administrative and judicial review of agency action, but also legislative curtailment of agency powers.
Senate appropriations committees with an opportunity both to review past agency actions and to chart a course for future policy. This can be achieved by adjusting appropriation levels or by placing conditions on the use of agency funds. Indeed, Congress may even, by passing or repealing a statute, decide to abolish a commission. Moreover, the Senate must confirm the appointment of commissioners to office.

Similarly, the President has significant power over independent agencies. The executive branch, through the Office of Management and Budget, has authority to review and revise independent commission budget requests and legislative recommendations. Through the appointment process, the President selects and nominates commissioners, and in some instances, selects a chairman for the commission. With regard to many agencies, "the Justice Department coordinates, even conducts their litigation."

Finally, the courts provide a check on the powers of independent commissions. It is well established that courts should normally defer to the experience and judgment of the agency to which Congress delegated appropriate authority. But a court may set aside agency action if the agency acted in a manner which was found to be arbitrary, capricious, an abuse of discretion, or contrary to law.

121. See Ribicoff, Congressional Oversight and Regulatory Reform, 28 ADMIN. L. REV. 415, 417-18 (1976) (Congressional oversight defined as "analyzing the administrative implementation of legislation, making sure that the agencies are doing their jobs properly").

122. U.S. CONST. art. II, § 2, cl. 2.


D. Independent Agencies as Checks on Executive Authority

Anyone who argues that the separation of powers requires abdicating complete control of administrative officers to the President must be admitting that there need be no check on presidential authority—a conclusion actually inconsistent with the doctrine of separation of powers. As James Madison argued, the concentration of all governmental powers in the same hands is "the very definition of tyranny." Indeed, as Professor Kenneth Culp Davis has observed, "We have learned that danger of tyranny or injustice lurks in unchecked power, not in blended power." The FEC, by establishing checks and monitors on executive as well as legislative power, actually strengthens the balance of powers which is the objective of separation of powers doctrine. Ordinarily, prosecutions are under the complete control and direction of the President. Congress has concluded, however, that the President and his close associates and political friends, who may be interested parties, should not be allowed to prosecute FECA campaign finance violations. The rationale seems clear. There are probably few political interests as powerful as an administration's interest in securing its own reelection or the election of its congressional allies. In creating an independent commission to administer campaign finance laws, Congress acknowledged the fundamental principle that no man can be the judge of his own case.

The separation of powers doctrine should not be understood as a preoccupation with a mechanistic segregation of governmental functions. Rather, it is a means of securing the accountability of coordinate governmental branches. It contemplates that each branch of government will check the activities of others, while allowing them to cooperate fully. Justice Jackson recognized the dual objectives of the theory in Youngstown Sheet and Tube Co. v. Sawyer, writing:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

129. K. Davis, Administrative Law Treatise 74 (1958). Madison put it another way: "In framing a government which is to be administered by men over men, the great difficulty lies in this; you must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist No. 51, at 356 (J. Madison) (B. Wright ed. 1961).
Similarly, Justice Story believed that even though the Framers accepted a tripartite division of government, they "endeavored to prove that a rigid adherence to it in all cases would be subversive of the efficiency of government, and result in the destruction of public liberties."\(^{131}\)

In allocating the powers of government among the President, Congress, and the judiciary, the Framers did not intend that the three branches remain completely separate. No such requirement appears anywhere in the Constitution. It is true that Montesquieu, whose philosophy greatly influenced the Framers, had stated, "[W]hen the legislative and executive powers are under or in the same person or body . . . there can be no liberty."\(^{132}\) But Madison argued that this maxim "has been totally misconceived and [misapplied]," explaining that Montesquieu did not mean that these departments [of government] ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import . . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.\(^{133}\)

Indeed, as the Supreme Court stated in *Buckley*, it is "clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government.\(^{134}\)

In *Buckley*, the Court explained the assumption of cooperation underlying the separation of powers theory:

The men who met in Philadelphia in the summer of 1787 were practical statesman, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.\(^{135}\)

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133. *Id.* at 336-38 (emphasis in original).
134. 424 U.S. at 121. The Framers also recognized that blending powers, not rigidly separating the major branches, would form an effective government. The Constitution in many places requires explicit cooperation and admixture of functions among the branches. *See, e.g.*, U.S. Const. art. I, § 7, cl. 2 (presidential veto power over legislation); art. 2, § 2, cl. 2 (Senate consent required for appointments); art. III, § 2, cl. 2 (congressional regulatory control over Supreme Court appellate jurisdiction).
135. 424 U.S. at 121.
The *Buckley* opinion echoes the observation of Justice Holmes, who wrote some fifty years earlier that each branch of government "is dependent on the cooperation of the other two, that government may go on."\(^{136}\)

The Supreme Court's recent decisions in *Bowsher v. Synar*\(^ {137}\) and *INS v. Chadha*,\(^ {138}\) however, appear to support a rigid construction of the separation of powers. In both cases the Court struck down congressional action as violative of the doctrine. Each of these cases, though, can be distinguished from the FEC situation in that they involved statutes which allowed legislative activity subsequent to passage of the enabling statute. In *Synar*, the unconstitutional provision gave a congressional employee, the Comptroller General, substantial executive power over the budget.\(^ {139}\) In *Chadha*, the statute at issue gave Congress power to veto the actions of the Attorney General.\(^ {140}\) In neither case did the Court address the constitutionality of an independent agency.\(^ {141}\) Rather, it struck down Congress's attempt to give itself or its own employees executive power.

By contrast, Congress gives itself no opportunity for subsequent executive activity *vis-a-vis* the FEC, since it lacks the power to remove the officers of independent agencies. Once an appointment has been made, the congressional role is finished (except for impeachment).\(^ {142}\) Congress cannot undo the appointment;\(^ {143}\) it can only set standards for removal by the President.

In describing the Framers as "practical statesmen, experienced in politics,"\(^ {144}\) the Supreme Court indicated that in matters involving the separation of powers, a pragmatic, flexible approach should control. Separation of powers questions should be resolved "according to common sense and the inherent necessities of the governmental coordination."\(^ {145}\)

### E. The President's Power of Removal

Although the President has traditionally exercised the power to remove the officials that he has appointed with the advice and consent of the Senate, nothing in the Constitution confers upon him the unrestricted power to do so. Therefore, the removal power cannot act as a constitutional bar

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\(^{139}\) 106 S. Ct. at 3189-92.

\(^{140}\) 462 U.S. at 923.

\(^{141}\) *Synar* explicitly reserved the question, 106 S. Ct. at 3188 n.4.

\(^{142}\) U.S. CONST. art. I, § 2, cl. 5; art. II, § 4.

\(^{143}\) *See Myers v. United States*, 272 U.S. 52, 176 (1926).

\(^{144}\) *Buckley*, 424 U.S. at 121.

\(^{145}\) *Chadha*, 462 U.S. at 962 (Powell, J., concurring in the judgment) (quoting J.W. Hampton *v. United States*, 276 U.S. 394, 406 (1928)).
Independent Agencies

to the independence of agencies such as the FEC. Writing for the Court in 1958, Justice Frankfurter observed that the "[c]ontroversy pertaining to the scope and limits of the President's power of removal fills a thick chapter of our political and judicial history."146 This is due to the Constitution's silence regarding the controversy. Indeed, the only power of removal granted by the Constitution is Congress's impeachment power.147 Limitations on the President's power of removal were first suggested by the Court in Marbury v. Madison,148 when Chief Justice Marshall stated in dictum that the President was powerless to withhold the valid commission of a justice of the peace once an appointment had been made.149 It was not until the 1926 decision of Myers v. United States150—at a time of expansively interpreted presidential powers generally—that the Supreme Court squarely considered the President's removal power per se and found it to be quite broad.

Myers involved an order issued by the Postmaster General, acting at the President's direction, to remove a postmaster. An 1876 statute stated that postmasters "may be removed by the President by and with the advice and consent of the Senate. . . ."151 The Myers Court not only accepted the President's argument that this statutory provision was unconstitutional, but provided him with sweeping powers to remove "executive officers who had been appointed by him. . . ."152 The Court found that Congress could not constitutionally restrain or limit that power. It based its opinion on Congress's 1789 decision to acquiesce in the President's asserted power to remove the Secretaries of State, War, and Treasury.153 The Court found the statutory language Congress used in 1789—"whenever the said principal officer shall be removed from office by the President of the United States"154—to imply an inherent removal power independent of congressional approval.

Myers's applicability to officers of independent agencies was sharply limited only nine years later by Humphrey's Executor v. United States,155 and further by Wiener v. United States.156 In Humphrey's Executor, the

147. See supra note 140 and accompanying text.
148. 5 U.S. (1 Cranch) 137 (1803).
149. Id. at 161.
150. 272 U.S. 52 (1926).
151. Id. at 107 (citing 19 Stat. 80, 81 § 6 (1876) (codified as R.S. § 3830 (1876); superseded by 39 U.S.C. § 1001 (1986)).
152. 272 U.S. at 176.
153. Id. at 111-14 (citing 1 ANNALS OF CONGRESS 370-71, 383, 455, 576, 578-80, 585, and 591 (1789)).
154. Id. at 112. See Act of July 27, 1789, ch. 3, 1 Stat. 28 (1789).
156. 357 U.S. 349 (1958).
Court considered whether a provision of the Federal Trade Commission Act, which stated that “[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office . . .” unconstitutionally restricted or limited the power of the President to remove a commissioner. The Solicitor General claimed that the removal restriction constituted an impermissible interference with the President’s Article II powers, and argued that the limitation was “a substantial interference with the constitutional duty of the President to ‘take care that the laws be faithfully executed.’” He argued that “[f]aithful execution of the laws may require more than freedom from inefficiency, neglect of duty, or malfeasance in office.”

In rejecting the Solicitor General’s arguments, the Humphrey’s Executor Court sharply distinguished between executive officers in the constitutional sense (that is, purely executive officers) and those performing executive functions incidental to “the discharge and effectuation of [their] quasi-legislative or quasi-judicial powers . . .” The Court found that the FTC’s power to institute enforcement proceedings was incidental to its exercise of legislative power, and therefore concluded that the President could not interfere with its management. The existing FTC statute empowered the Commission not only to issue its own administrative complaints, but also to institute judicial proceedings against those who disobeyed cease-and-desist orders. The Court concluded, however, that the law enforcement functions of the Commission did not so encroach upon the President’s Article II authority as to render the Commission unconstitutional.

In agreeing that Congress could prevent presidential removal of FTC Commissioners without cause, the Court emphasized Congress’s intent that commissioners be free from even the possibility of “political domination or control.” The Court found that the statute achieved this objective. Justice White has since stated that under Humphrey’s Executor “[t]he independent agency . . . survived attack [alleging] that its functions

159. Id.
160. 295 U.S. at 628.
161. Id. at 629.
163. Id. at 602.
164. Id. at 625.
Independent Agencies

are so executive in nature that its members must be subject to Presidential control. . . .”

Even more significant for FEC independence is *Wiener v. United States*, in which the Court held that Congress could restrict the President’s removal power if the official’s functions required freedom from executive branch interference. In *Wiener*, President Eisenhower tried to remove a member of the War Claims Commission. The Court safeguarded the independence of the Commission by inferring that the statute, although silent on removal, barred removal at the pleasure of the President. It understood the *Humphrey’s Executor* decision to draw

a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President’s constitutional powers, and those who are members of a body to exercise its judgment without the leave or hindrance of any other official or any department of the government’ . . . as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference.

*Humphrey’s Executor* and *Wiener* show that through statutory protections, both express and implied, Congress can limit the President’s power to remove the officers of certain regulatory commissions. Both cases stress the constitutionally valid independent character of the agencies and emphasize their need to be free from executive interference. Because of its important role in regulating elections in which the President himself may have a stake, the FEC requires such protection.

Conclusion

The constitutional justification for Congress’s power to create independent agencies can be found in Chief Justice Marshall’s comments on the necessary and proper clause in *McCulloch v. Maryland*: “This provision is made in a constitution intended to endure for ages to come, and,

166. 357 U.S. 349 (1957).
167. Id. at 353 (emphasis supplied). With respect to subsequent judicial review, we note that the Seventh Circuit, relying on *Humphrey’s Executor* and *Wiener*, summarily rejected a constitutional challenge to the enforcement powers of the Interstate Commerce Commission. ICC v. Chatworth Cooperative Marketing Ass’n., 347 F.2d 821, 822 (7th Cir.), cert. denied, 382 U.S. 938 (1965) (“[T]he function of initiating a judicial proceeding for the enforcement of a legislative enactment is not the exercise of a prerogative exclusively reserved to the President”).

391
consequently, to be adapted to the various crises of human affairs."\(^{168}\) The Chief Justice explained that Congress, through the necessary and proper clause, was free "to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of government"\(^{169}\) "to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."\(^{170}\) Assistant Attorney General Robert Jackson echoed this view in 1937 when he stated that the Founding Fathers had "set up a living National Government and left the future to fill in much of the detail, according to its own experience, its judgment and its own patriotic purposes."\(^{171}\)

We would argue that the words "necessary and proper" do not mean "required and authorized" but only "reasonable and relevant." It is reasonable and relevant that certain investigations and prosecutions be conducted without presidential involvement or supervision, for even the most high-minded and able may be unduly deferential to higher authority, and nothing is more intimidating to officers of the United States than the authority of the President. The list of officers of the United States protected from removal at the President's will is a long one.\(^{172}\) Congress has found it necessary to create commissions that are free to act as the facts and their own judgment require.

This Article has argued that at least one independent agency, the FEC, is constitutional under the necessary and proper clause. The Article therefore undermines blanket attacks on the constitutionality of independent agencies in general. Courts reviewing the constitutionality of independent agencies must examine how legislation has situated each agency within the constitutional scheme. Judicial deference to Congress's broad and important powers under the necessary and proper clause must be the prerequisite to such an examination.

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\(^{168}\) 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis in original).
\(^{169}\) Id. at 420.
\(^{170}\) Id. at 415-16.