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David Schoenbrod
New York Law School, david.schoenbrod@nyls.edu

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David Schoenbrod*

Separation of powers first appears in the United States Constitution in Article I's requirement that the legislative process involve three distinct entities—the House, the Senate, and the President. Each entity controls a separate switch. Each switch must be turned on before new regulations, taxes, or other legislation can take effect, with the exception that supermajorities of the House and the Senate can nonetheless act in the face of a nonacquiescent President.[1] This baroque system was designed to reconcile the desire for political accountability with the need to frustrate the undue influence of special interests.[2] In short, the Article I legislative process was designed to protect the public from the government.

Those who control the House, the Senate, and the White House have decided that a different division of power is convenient for them. The House and the Senate have handed control of their legislative switches to the executive by delegating legislative power.

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* Professor of Law, New York Law School. B.A. 1963, Yale University; B.Phil. 1965, Oxford University; LL.B. 1968, Yale University. I appreciate very helpful observations from Todd Anderson, John Hart Ely, Jethro Lieberman, and Daniel Troy.

1. The exception, of course, is that a two-thirds majority of both houses can override a presidential veto. U.S. CONST. art. I, § 7, cl. 2.

2. *See* Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine,* 36 AM. U.L. REV. 355, 378 (1987) (stating that separation of powers was intended to foster accountability with "safeguards designed to minimize the harm caused by unreasonable pressures").

Although the executive gets to decide, in large measure, whether and how to regulate private conduct, it must pay a political price—accountability for the sole exercise of that power. The House and the Senate, for their part, give up the control on legislation that the Constitution gives them (thereby escaping accountability), but they in turn gain a kind of control over legislation different from that envisioned in the Constitution—the power to scold the executive for how it legislates.

Although this restructuring presents elements of both gain and loss to the President and the houses of Congress, they apparently like the change since, from the days of the New Deal, they have gone in for delegation wholesale. It is remarkable that this different legislative process has become so deeply entrenched in political consciousness that one Senator actually thought he was raising an issue of principle when he objected to a bill that regulated conduct, on the basis that "writing regulations is not our job."[3]

The Reagan administration promised to be different in many ways and, in particular, committed itself to taking separation of powers seriously. But, instead, it invoked separation of powers selectively. Separation of powers has two manifestations. One prohibits power grabs—that is, "encroachment or aggrandizement of one branch at the expense of the other."[4] The other prohibits power give-aways—that is, delegation by one branch of its power to another.[5] The Reagan administration invoked separation of powers to challenge power grabs but not power give-aways.

For example, it attacked statutes that allow legislative veto of executive action (*INS v. Chadha*),[6] grant authority to execute part of the Gramm-Rudman-Hollings budget reduction law to an official controlled by Congress (*Bowsher v. Synar*),[7] and establish "independent prosecutors" to deal with charges against executive branch officials (*Morrison v. Olson*),[8] but it never attacked statutes that delegate legislative power to the executive. To the contrary, it argued in favor of a statute that delegated to a presidentially appointed commission the power to establish rules for criminal sentencing (*Mistretta v. United States*).[9]

The obvious common denominator in this selective use of separation of powers is the protection of executive power, power then wielded by the Reagan administration. Although the executive or

3. 131 CONG. REC. S13,812 (daily ed. Oct. 5, 1984) (remarks of Sen. Symms).

4. Buckley v. Valeo, 424 U.S. 1, 122 (1976).

5. This manifestation has had a troubled history. Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985).

6. 462 U.S. 919 (1983).

7. 478 U.S. 714 (1986).

8. 108 S. Ct. 2597 (1988).

9. 109 S. Ct. 647 (1989). The administration, however, indicated that it would not support the Sentencing Commission if the President was forced to compel a judge to sit as a commissioner. Brief for the United States at 20, United States v. Mistretta, 109 S. Ct. 647 (1989) (No. 87-1904).

Congress protecting its own power is only politics as usual, the Reagan administration purported to make separation of powers a matter of principle, and constitutional principle at that. Indeed, President Reagan[10] and Attorney General Meese[11] themselves led a charge attempting to take the rhetorical high ground on separation of powers.

This Essay asks whether the Reagan administration had a good reason for its selective approach to separation of powers. The purpose of this inquiry is not to assess the scruples of last year's leaders—aren't they always wanting?—but, by learning from the mistakes of the past, to help some future administration that takes separation of powers seriously. To anticipate the conclusion, the Reagan administration's inconsistent approach to separation of powers both hobbled its ability to defend itself and undercut its positive efforts in two important respects.

First, the administration's inconsistent invocation of separation of powers made the doctrine appear as a mere device to shield the executive at the cost of denying the public the benefits that the challenged statutes promised. The generative purpose of separation of powers—to protect the public and its liberties from unwise or overreaching exercises of governmental powers—was thereby forgotten. Whether the Reagan administration tried to be hypocritical and self-serving, it nonetheless succeeded in presenting its case in a dumb way that trivialized the doctrine and diminished its protective utility. That is, the administration's approach ultimately hobbled its ability to defend itself even against blatant grabs of executive power.

Second, the delegation of legislative power is, as I will argue, the regulatory equivalent of deficit spending. While the administration successfully convinced the public that deficit spending allows elected officials to escape accountability for the costs imposed, it utterly failed to communicate that delegation of legislative power has the same effect. Thus, the administration succeeded more in curbing the growth of government spending than in reforming changing regulatory practices, in large part because the administration failed to analogize delegation to deficit spending.

Separation of powers ultimately fared badly during the Reagan administration. The bigger loser was not the administration, but the public, which the separation of powers was meant to protect.

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10. In a speech delivered at the University of Virginia, Mr. Reagan stated that Congress and the President " 'need each other and must work together in common cause, with all deference, but within their separate spheres.' " N.Y. Times, Dec. 17, 1988, at 7, col. 4 (quoting Address by President Ronald Reagan, University of Virginia (Dec. 16, 1988)).

11. Meese, *Perspective on the Authoritativeness of Supreme Court Decision: The Law of the Constitution,* 61 TUL. L. REV. 979 (1987).

This Essay reaches this conclusion by examining in turn three potential justifications for the Reagan administration's selective invocation of separation of powers:

1. Preventing power grabs is more important to separation of powers than preventing power give-aways;
2. Invoking separation of powers against power give-aways would have discredited the administration's entire separation of powers stance in the eyes of the Supreme Court; and
3. Attacking power grabs would eventually set the stage for attacking power give-aways.

I. First Hypothesis: Preventing Power Grabs is More Important to Separation of Powers Than Preventing Power Give-aways

This hypothesis is wrong, although a superficial reading of *Chadha* might lend it some support. The legislative veto of executive action—the power grab challenged in *Chadha*—takes place without presentment to the President, and the one-house legislative veto takes place without participation of the other house within the bicameral legislature. The administration argued not only that the legislative veto violated the Presentment Clauses[12] and the bicameralism requirement,[13] but also that it undercut the purposes that underlay separation of powers. As Chief Justice Burger concluded for the Court:

> [T]he Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.[14]

Although this passage puts protecting the executive in front of protecting the people,[15] the ultimate purpose of protecting the executive—and thereby keeping the branches separate—is to protect the people and their liberties from government power in the service of special interests. The Framers sought to make it more difficult for special interests to co-opt government power by requiring that the exercise of legislative power involve three separated centers of power—the President and the two houses of Congress—each elected by separate constituencies and serving terms of different lengths.[16] Some modern commentators dismiss the Framers' theory,[17] while others, myself included, think there is something to

12. U.S. CONST. art. I, § 7, cl. 2.
13. *Id.* §§ 1, 7.
14. 462 U.S. 919, 951 (1983).
15. As does one of the *Federalist Papers* that the opinion quotes. *Id.* at 947 (quoting THE FEDERALIST No. 73, at 458 (A. Hamilton) (H. Lodge ed. 1888)).
16. Schoenbrod, *supra* note 2, at 372-75.
17. *E.g.*, Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719 (1969) (stating that "delegation without standards . . . has been deemed a necessity from the time

it.[18] However, the important point is that in *Chadha* the Reagan administration embraced the Framers' theory.

Indeed, to the extent that the Reagan administration objected to legislative veto provisions in statutes gladly signed into law by a President, it was objecting to power give-aways—from the President to one or both houses of Congress. However, the administration could not very well object to the President giving his power to the legislature, and at the same time not object to the legislature giving its power to the President, where the Framers' objective was to prevent legislative power from falling into the hands of an isolated decisionmaker. The Framers' strategy of frustrating special interests by putting legislative power into many hands suggests that legislative power in the hands of the President poses a greater threat to freedom than does legislative power in the hands of one or both houses of Congress.[19] So the first hypothesis is wrong, because power give-aways lead directly to the same threat to freedom as do power grabs.

II. Second Hypothesis: Invoking Separation of Powers Against Power Give-aways Would Have Discredited the Administration's Entire Separation of Powers Stance in the Eyes of the Supreme Court

This hypothesis rests on two assumptions. The first is that the administration skewed its separation of powers principles only as needed to contend with judicial realities. The second is that the Supreme Court lacks sympathy for the delegation doctrine. As will be shown, neither assumption is entirely correct.

Some, but by no means all, Reagan administration actions are explicable by judicial proclivities. The administration failed to invoke separation of powers not just when statutes delegated legislative power to the executive, but also when arguing against power grabs probably would have been counterproductive. Although key Reagan administration officials saw independent agencies as invasions

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the United States was founded, as anyone can quickly confirm by examining the statutes enacted by the 1st Congress, which was made up largely of the same men who wrote the Constitution").

18. *See generally* Schoenbrod, *supra* note 2, at 372-75 (arguing that the Framers' design offers efficient safeguards against factions and facilitates public education on legislative matters).

19. Chief Justice Burger tried to distinguish delegation of legislative power from the legislative veto on the theory that the former is subject to judicial review. *See* INS v. Chadha, 462 U.S. 919, 953 n.16 (1983). Justice White, in dissent, counters this argument. *Id.* at 984-89. I have argued elsewhere that judicial review does not rehabilitate delegations of legislative power. *See* Schoenbrod, *supra* note 5, at 1239-43.

of the President's power,[20] the administration never challenged their constitutionality. To the contrary, in *Bowsher v. Synar*[21] the government took pains to distinguish Congress's control over the Comptroller General from its control over independent agencies.[22]

On other occasions, however, the administration failed to resist delegations of legislative power that would not necessarily have gained judicial approval. In its "regulatory reform," when confronted with decisions of past administrations that could be construed as either interpretations of legislated rules or exercises of delegated legislative power, the Reagan administration argued for the latter construction. One example is the administration-appointed Federal Communication Commission's successful argument that the fairness doctrine resulted from policy making rather than statutory interpretations that the Commission had the power to jettison the doctrine without legislative action.[23] Another is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[24] where the administration argued for an interpretation of the Clean Air Act that delegated legislative power to the executive. In accepting the administration's argument, Justice Stevens stated for the Court:

> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[25]

This passage from *Chevron* is at odds with *Chadha*'s contention that the Article I legislative process is the proper way to make legislative policymaking accountable.

It might be said in the administration's defense that if judicial realities mean that it must be stuck with the hot potatoes that Congress has passed to it, it must have some leeway in handling them. However, the administration did not use its power under Article I to avoid being passed hot potatoes. Specifically, President Reagan never vetoed a bill because it delegated legislative power, nor did the Department of Justice's comments in letters to Congress concerning pending legislation object to any bills on delegation

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20. *Are Agencies Constitutional?*, Nat'l. L.J., Oct. 13, 1986, at 23, col. 2 (former Assistant Attorney General Theodore Olson arguing that because FTC commissioners are not removable by the President, the FTC intrudes on executive powers).

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

22. Justice O'Connor expressed concern in the oral argument that the executive's argument, if sustained, would also invalidate administrative agencies.

23. Telecommunications Research & Action Center v. FCC, 801 F.2d 501, 516-17 (D.C.Cir.), *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987); Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

24. 467 U.S. 837 (1984).

25. *Id.* at 865-66.

grounds.[26]

The assumption that the Supreme Court is hostile to the delegation doctrine is also not altogether correct. In 1958, a leading commentator flatly concluded that the delegation doctrine was dead.[27] A look at the cases since decided suggests that this verdict was premature. It is true that the Court has not used the delegation doctrine to strike down a statute since 1935.[28] Indeed, in the years immediately following 1935, it wrote opinions that put a judicial seal of approval on broad delegations.[29] Since 1948,[30] however, the Court had not issued an opinion that gave plenary consideration to a constitutional challenge on delegation grounds—until the decision in *Mistretta v. United States* in 1989.[31] *Mistretta* came down after the Reagan administration had trivialized separation of powers for eight years.

The silence from 1948 to 1989, like that of the dog that did not bark in the night in the Sherlock Holmes tale,[32] was significant, especially when surrounding circumstances are taken into account. While majority opinions since 1948 refrained from extended discussions of delegations of legislative power, dissenting opinions more frequently raised delegation objections.[33] More significantly, delegation concerns were reflected in majority opinions in other forms. The Court had struck down administrative actions concerning regulation of businesses by construing statutes narrowly to avoid potential delegation concerns.[34] It had indicated that it would construe

26. This was the result of a Department of Justice database search using the JURIS System.

27. K. DAVIS, ADMINISTRATIVE LAW TREATISE 75 (1st ed. 1958).

28. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

29. *E.g.*, Fahey v. Mallonee, 332 U.S. 245 (1947) (holding that section 5(d) of the Home Owners' Loan Act of 1933 was constitutional); United States v. Rock Royal Coop., 307 U.S. 533 (1939) (holding that the Agricultural Marketing Agreement Act of 1937 did not delegate legislative power in violation of the Constitution).

30. Lichter v. United States, 334 U.S. 742, 774-78 (1948) (holding that the authority granted under the Renegotiation Act of 1942 for administrative determination of the amount of excessive profits, if any, realized on war contracts was a constitutional delegation of administrative authority).

31. 109 S. Ct. 647 (1989).

32. A. C. DOYLE, *The Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 383, 400 (1952).

33. Schoenbrod, *supra* note 5, at 1234-35.

34. *E.g.*, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) (construing the Occupational Safety and Health Act of 1970 as requiring the Secretary of Labor to find significant risk before promulgating standards, and thus avoiding a construction of the statute as granting open-ended power); National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) (holding that under the Independent Offices Appropriation Act of 1952, fees for agency services are determined in accordance with the "value to the recipient" of the benefit, and not with the "public policy or interest served" by the agency).

statutes even more narrowly when they delegate power over "activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel"[35]—whatever that means (other than travel). Finally, the Court had reflected delegation concerns under other rubrics such as void-for-vagueness[36] and due process.[37] These cases suggest that the Court had concerns about delegations that allow legislators to avoid hard choices by permitting the imposition of controls on conduct absent the safeguards of the Article I legislative process, and about undercutting the accountability of legislative officials.

However, that the Court has not actually struck down a statute as unconstitutional on delegation grounds suggests that it perceives factors that counsel hesitation. It is not hard to imagine what these factors are. First, the Court has adopted no judicially manageable test to distinguish improper delegations of legislative power from valid statutes that define the scope of appropriate exercise of executive or judicial power.[38] Second, the Court does not know whether the nation could cope with modern problems without delegation.[39] Third, given the long-standing dependence upon delegation, the Court may fear a political backlash, as it suffered when President Franklin Roosevelt responded to its 1935 decisions by proposing his Court-packing plan.

The Court's treatment of delegation issues looks like a classic application of Alexander Bickel's "passive virtues."[40] It has avoided the troubling issue by not taking cases that present it or by disposing of cases on narrower grounds.[41] Whenever such tactics were insufficient, it has grounded its decisions on other rubrics—such as void-for-vagueness, due process, or the Presentment Clauses and bicameralism—so as to avoid making precedent that might force it

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35. Kent v. Dulles, 357 U.S. 116, 129 (1958).

36. *E.g.*, Smith v. Goguen, 415 U.S. 566, 575 (1974) (noting that the legislature abdicated its responsibility by allowing policemen, prosecutors, and juries to define a flag-etiquette statute).

37. Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976) (noting that while the President or Congress may choose to exclude all noncitizens from the federal service, the Civil Service Commission has no authority to do so, at least without justification).

38. Schoenbrod, *supra* note 5, at 1229-37; *see* United States v. Mistretta, 109 S. Ct. 647, 675 (1989) (Scalia, J., dissenting).

39. *E.g.*, *Mistretta*, 109 S. Ct. at 680 (Scalia, J., dissenting) (envisioning the creation of an "expert Medicial Commission . . . to dispose of such thorny, 'no-win' political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research"); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring) (stating that delegations of legislative authority to the executive branch have been upheld on the theory that Congress lacks the technical expertise to exercise its authority in certain areas).

40. A. BICKEL, THE LEAST DANGEROUS BRANCH ch. 4 (1962).

41. *E.g.*, *Industrial Union*, 448 U.S. at 646 (stating that a statutory construction that avoids "sweeping delegation of legislative power" should be favored); National Cable Television Ass'n v. United States, 415 U.S. 336, 341 (1974) (avoiding the delegation issue by holding that the Independent Offices Appropriation Act of 1952, which allows the FCC to collect "filing fees," does not bestow the taxing power on a federal agency); Kent v. Dulles, 357 U.S. 116, 129 (1958) (holding that the Act of July 3, 1926 and the Immigration and Nationality Act of 1952 did not delegate legislative authority to the Secretary of State, and thus not reaching the constitutional issue).

to apply the delegation doctrine across the board.[42]

If these generalizations about the attitude of the Court—or more properly, some members of the Court—are correct, then its attitude toward the delegation doctrine is not hostility but caution. If so, an administration that takes separation of powers seriously need not forget about the delegation doctrine if it can develop a strategy that addresses the reasons for the judicial caution.

III. Third Hypothesis: Attacking Power Grabs Would Eventually Set the Stage for Attacking Power Give-aways

If the Reagan administration was serious about separation of powers, including the delegation doctrine, its approach was no more sophisticated than to edge forward—by first attacking the direct invasions of presidential power,[43] then the independent agencies,[44] then the delegations of legislative power. Such an approach is no strategy at all, because it fails to deal with the Supreme Court's reasons for being cautious about delegation.

Moreover, such an approach accentuated the self-serving appearance of the Reagan administration's espousal of separation of powers and put protection of the public in the shade. To fully understand just how damaging this "strategy" was, one must start by contrasting the Reagan administration's "regulatory reform" program with its efforts to reduce the budget deficit.

The 1980 Reagan campaign featured the slogan "get government off peoples' backs," but the new administration fell far short of the dramatic changes it had promised, and the slogan all but disappeared in the 1984 campaign. As an abstract proposition, "regulatory reform" could appeal to anyone forced to contend with ill-conceived regulations, and doubtless that is why the 1980 campaign slogan played so well. But when "regulatory reform" began to take

42. *E.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976) (holding a Civil Service Commission regulation barring noncitizens from federal-service employment unconstitutional on Fifth Amendment due process grounds); Smith v. Goguen, 415 U.S. 566, 575 (1974) (deciding that a Massachusetts flag-misuse statute was unconstitutionally vague and overbroad); Papachristou v. City of Jacksonville, 405 U.S. 156, 168-70 (1972) (declaring a Jacksonville, Florida vagrancy ordinance unconstitutional on void-for-vagueness grounds).

A recent example of such judicial behavior occurred in *Mistretta.* Justice Brennan, who was bothered by a footnote in the opinion wherein the Court "assume[d], without deciding" that Congress could delegate to the Commission the power to promulgate rules to govern the imposition of the death penalty, had the majority include the words "JUSTICE BRENNAN does not join in this footnote," without explaining his test of what makes a delegation improper. *See Mistretta*, 109 S. Ct. at 657 n.11.

43. *E.g.*, INS v. Chadha, 462 U.S. 919 (1983) (addressing the legislative veto).

44. The Reagan administration never actually challenged the constitutionality of independent agencies, although some key officials believed that they invaded the President's power. *See supra* notes 20-22 and accompanying text.

concrete shape during 1981, voters sensed that the Reagan administration was going to allow more lead in gasoline and take other steps perceived as threatening to the public. This transformation shifted the perception of "regulatory reform" from getting rid of restrictions disproportionate to the public's needs to selling the public's police power to the biggest campaign contributors. Such perceptions largely discredited "regulatory reform."

This experience with "regulatory reform" had its parallel in the battles over cutting government spending. As an abstract proposition, it is easy for voters to disapprove of "government spending beyond its means" and to imagine government waste in general. But when an administration proposes any specific set of spending cuts, the focus shifts to the government's upsetting of established expectations. The Reagan adminstration surely found it easier to preach fiscal restraint than to practice it.

But, in the case of deficit spending, the Reagan administration was able to shift the terms of the debate one more time by pointing out a basic weakness in the Article I appropriation process. The administration's point was that legislators could reap political benefits from appropriating the public's money but escape political accountability for the costs, so long as the expenditure was financed through borrowing rather than taxes. The administration used the lack of political accountability for deficit spending to justify its proposals for a balanced-budget amendment and a line-item veto. While neither proposal has succeeded on its own terms, the administration's charge that the legislative process is systematically biased against the public interest changed the terms of the debate and helped to set the stage for the Gramm-Rudman-Hollings budget law. Under it, Congress is not free simply to disapprove the President's proposals to cut the budget, but is, in essence, forced to participate equally in making hard choices.

Delegation is the regulatory analog of deficit spending. With delegation, legislators can take credit for curing problems without having to take the blame for the hard choices essential to their solution. Just as the power to run up a deficit creates a bias in favor of more spending, delegation creates a bias in favor of more regulation.

The irony of the Reagan administration's neglect of its separation of powers principles in the realm of regulatory reform is that consistency in principle might have been rewarded by greater success in policy. For Congress, delegation is like a finesse in bridge. A finesse in cards is a way of converting a losing hand into a winner by getting the other players to take the lead. The Constitution requires Congress to take the lead in legislation, but delegation gives the lead to the executive. With delegation, Congress avoids hard choices by telling the President to make them; Congress is then well positioned to criticize whatever the President does, thereby playing the hero to the entire spectrum of public opinion.[45] The Reagan

45. Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA

administration, eagerly showing off its regulatory reform mandate, was like a naive cowboy, pockets full of pay, who did not know that he was playing with card sharks. Once the professionals on Capitol Hill had cashed in, the delegated power that the Reagan administration initially saw as so vast proved in practice to be much more constrained. This is most dramatically exemplified by the extreme shift within the Reagan Environmental Protection Agency (EPA) before and after the Anne Gorsuch Burford debacles.

The Reagan administration's "regulatory reform" program may well have fared better if it had attacked delegation as a political matter before it tried to use delegated power to deregulate by executive fiat. The administration could have asked Congress to reform regulation by enacting the rules itself, instead of imposing complex rulemaking schemes on the executive and ultimately on the public. If Congress had failed to respond constructively, then the administration would have been freer to act unilaterally. Such a political attack on delegation could be one step leading towards a judicial attack on delegation.

Other steps would also be desirable. The administration could have used its bully pulpit to generate discussion of the concerns that make the Court hesitate about taking on delegation frontally. While there has been much discussion of what is wrong with delegation,[46] there has been very little attention paid to how government would work without it and how the Court would implement the delegation doctrine. Specific topics that deserve attention include how various regulatory objections could be attained without delegation, how a gradual transition to less delegation could be conducted, potential judicially manageable tests of improper delegation, and how the judiciary could ease the transition to less delegation. I am not suggesting that the Court itself must address all these questions before taking on the delegation issue, but the relative dearth of discussion on these topics within government and academe is a reason for the Court to stay its hand. The Attorney General and his lieutenants could encourage such discussions by making speeches and by encouraging institutions like the Administrative Conference to sponsor symposia and position papers. None of this was done.

Whether or not such a strategy would ultimately succeed in quashing, politically or judicially, delegation of legislative power, it would help change the perception of separation of powers from protection of the executive to protection of the people and their freedom. Consider how the lack of such a strategy helped to set the

L. REV. 740, 824 (1983) (stating that with delegation, Congress can "serve[] its own political needs and enhance[] its own power" while "play[ing] hero at home").

46. *See generally* Schoenbrod, *supra* note 5, at 1236 (chronicling sources that call for a renewed and revised delegation doctrine).

stage for the Reagan administration's separation of powers Waterloo in *Morrison v. Olson.*[47]

Morrison, the independent-prosecutor case, had its genesis in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[48] CERCLA provides the framework for dealing with abandoned toxic waste dump sites by delegating to the executive, through the EPA, broad discretion to determine how to cope with these contaminated sites. In enacting the statute, however, Congress declined to take on the politically tough problems: not all the sites could be cleaned up with the resources available, and no site could be made perfectly clean. Rather, Congress told the executive to resolve these tough problems. The administration that took on the implementation of CERCLA would be bound to disappoint public opinion and come under much scrutiny, oversight, and clucking on Capitol Hill.

By most accounts, the Reagan EPA under Anne Gorsuch Burford made a bad situation worse by exercising its delegated authority ineptly and sometimes for narrow, partisan purposes. When congressional committees subpoenaed EPA records, the administration refused to hand them over, claiming executive privilege. Theodore Olson, then Assistant Attorney for the Office of Legal Counsel, played a key role in this battle. Justice Scalia's dissenting opinion summarized what ensued:

> [S]taff counsel of the House Judiciary Committee were commissioned (apparently without the knowledge of many of the Committee's Members) to investigate the Justice Department's role in the controversy. That investigation lasted 2 1/2 years and produced a 3,000-page report issued by the Committee over the vigorous dissent of all but one of its minority-party members. That report, which among other charges questioned the truthfulness of certain statements made by Assistant Attorney General Olson during testimony in front of the Committee during the early stage of its investigation, was sent to the Attorney General along with a formal request that he appoint an independent counsel to investigate Mr. Olson and others.[49]

The independent prosecutor statute at issue in *Morrison* provides that the Attorney General, within ninety days, shall request a special court to appoint such a prosecutor, unless he determines that "there are no reasonable grounds to believe that further investigation or prosecution is warranted."[50] As Justice Scalia put it:

> Congress has effectively compelled a criminal investigation of a high-level appointee of the President in connection with his actions arising out of a bitter power dispute between the President and the Legislative Branch. Mr. Olson may or may not be guilty of a crime; we do not know. [The independent prosecutor dropped the charges against Olson shortly after winning this case

47. 108 S. Ct. 2597 (1988).
48. 42 U.S.C. §§ 9601-9626 (1982).
49. 108 S. Ct. at 2624 (Scalia, J., dissenting) (citation omitted).
50. 28 U.S.C. § 592(b)(1) (1982).

> in the Supreme Court.] But we do know that the investigation of him has been commenced, not necessarily because the President or his authorized subordinates believe it is in the interest of the United States, in the sense that it warrants the diversion of resources from other efforts, and is worth the cost in money and in possible damage to other governmental interests; and not even, leaving aside those normally considered factors, because the President or his authorized subordinates necessarily believe that an investigation is likely to unearth a violation worth prosecuting; but only because the Attorney General cannot affirm, as Congress demands, that there are *no reasonable grounds to believe* that further investigation is warranted. The decisions regarding the scope of that further investigation, its duration, and, finally, whether or not prosecution should ensue, are likewise beyond the control of the President and his subordinates.[51]

Olson objected to the independent prosecutor on separation of powers grounds, and the Department of Justice joined in. One issue in the case was whether an Article III court could appoint an executive branch official. Chief Justice Rehnquist, writing for the Court, disposed of this issue by simply construing the Appointments Clause, which, inter alia, permits courts to appoint minor officials.[52]

The Chief Justice's opinion placed far less emphasis on a broader and more difficult issue: whether the statute as a whole interferes with executive power and is therefore contrary to the principle of separation of powers.[53] The Chief Justice implicitly acknowleged that criminal prosecution is an executive function and that the statute interferes with the executive's conduct of that function, but he dismissed the claim by arguing that the statute neither aggrandizes legislative or judicial power nor unduly undermines executive power.[54] To this, Justice Scalia insisted that invasion of executive power has profound consequences for separation of powers:

> Many countries of the world get along with an Executive that is

51. 108 S. Ct. at 2625 (Scalia, J., dissenting).

52. U.S. CONST. art. II, § 2, cl. 2 ("the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments"); *see* Morrison v. Olson, 108 S. Ct. 2597, 2608-11 (1988) (holding that the independent prosecutor is an "inferior officer" within the meaning of the Appointments Clause).

53. *Morrison*, 108 S. Ct. at 2620-22. There were other issues in the case, as well. In addition to the issues of judicial appointment under Article II and whether the Act, taken as a whole, violates separation of powers, the Court considered whether the Act contravenes Article III by vesting in a court appointment powers exceeding Article III's "case or controversy" requirement, *see id.* at 2611-12, and whether the Act's provision limiting the President's power to remove the independent counsel only for enumerated causes unconstitutionally burdens the President's power of removal, *see id.* at 2616-19.

54. *See id.* at 2620-21.

> much weaker than ours—in fact, entirely dependent upon the continued support of the legislature. Once we depart from the text of the Constitution, just where short of that do we stop?
>
> . . . Before this statute was passed, the President, in taking action disagreeable to the Congress, or an executive officer giving advice to the President or testifying before Congress concerning one of those matters on which the two branches are from time to time at odds, could be assured that his acts and motives would be adjudged—insofar as the decision whether to conduct a criminal investigation and to prosecute is concerned—in the Executive Branch, that is, in a forum attuned to the interests and policies of the Presidency. That was one of the natural advantages the Constitution gave to the Presidency, just as it gave Members of Congress (and their staffs) the advantage of not being prosecutable for anything said or done in their legislative capacities. It is the very object of this legislation to eliminate that assurance of a sympathetic forum.[55]

Justice Scalia further maintained that the statute will weaken the executive branch by making its high officials the subjects of criminal investigations and perhaps even prosecutions.[56] In essence, use of the independent prosecutor is like a mini-version of the vote of no confidence in parliamentary systems. Such legislatively instigated oversight is particularly inimical to the purposes underlying separation of powers where the dispute between the branches has to do with how the executive branch exercises delegated lawmaking power.

The Reagan administration's approach to separation of powers contributed to its defeat in *Morrison* in at least three ways. First, the Reagan administration's failure to attack delegation of legislative power meant that it had to take the blame not just for the ineptitude and corruption within the EPA, but also for CERCLA promising to the public a degree of protection from toxic substances that no administration could have delivered. If the administration had attacked the delegation of legislative power instead of using that power selfishly, the confrontation between Congress and the administration over documents showing misuse of power need never have taken place.

Second, the administration's approach to separation of powers put the emphasis on protecting branches of government, rather than on protecting a way of making laws that safeguards the interests of the people and their freedom. This made it easier for Chief Justice Rehnquist to point out that the statute only encroaches upon a tiny bit of the executive's prosecutorial powers, while not grappling with the reality that the statute can change fundamentally the ways in which the branches interact, and in particular the way in which the executive exercises delegated powers to legislate.

Third, the Reagan administration's reliance on separation of powers to challenge a statute designed to root out corruption within the

55. *Id.* at 2629-30 (Scalia, J., dissenting) (citation omitted).
56. *Id.* at 2630.

executive branch appeared particularly self-serving and hypocritical. Watergate convinced many people that the Department of Justice could not be trusted to prosecute itself. Although there are arguments that Congress's solution to this problem was worse than the problem itself and that even Watergate was solved without an independent prosecutor, these arguments came from a Department of Justice that espoused a version of separation of powers that sounded self-serving and whose head was Attorney General Meese, himself the target of criminal investigation. Indeed, the administration's position appeared so unsavory that President Reagan signed legislation renewing the independent prosecution statute after arguing to the Court of Appeals that such legislation was unconstitutional.

So the administration passed the buck to the Court, asking it to stand up for a principle that the administration had used selectively and ineptly. On this record, it would have been uncomfortable for a justice to decide that Attorney General Meese should have freedom to decide how the cases of Deaver and North and others should be handled. It would have been particularly uncomfortable for a justice appointed by President Reagan, and harder still for Chief Justice Rehnquist, appointed Chief Justice by President Reagan and appointed to the Court by President Nixon after serving as Assistant Attorney General for the Office of Legal Counsel—where he, like Theodore Olson, attempted to use executive privilege to shield a scandal-plagued administration.

The Reagan administration's mistakes, which helped to produce *Morrison* and *Mistretta,* ought not be allowed to prejudice the public's right to a government of separated powers. These cases should be limited to their facts if not overruled. A future administration that takes separation of powers seriously can, with the benefit of hindsight, do better.