THE NEW SOVEREIGNTY AND THE OLD CONSTITUTION: THE CHEMICAL WEAPONS CONVENTION AND THE APPOINTMENTS CLAUSE

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A noted scholar on foreign affairs law has declared, "[n]o provision in any treaty has been held unconstitutional by the Supreme Court and few have been seriously challenged there."[1] The Constitution appears to subject treaties and executive agreements to the same limitations that apply to all other actions of the federal government.[2] Further, the first principles of constitutionalism seem to dictate that the federal government cannot evade the Constitution simply because it acts through the process of presidential ratification and senatorial consent, rather than through bicameralism and presentment.[3] Nonetheless, the Supreme Court's record on foreign relations is littered with cases in which the Court arguably stretched the law in order to

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1. Louis Henkin, *Foreign Affairs and the Constitution* 7 (Foundation Press, 1972). Events of the last 25 years have not changed the truth of this observation. See Louis Henkin, *Foreign Affairs and the Constitution* 185 (Oxford U. Press, 2d ed. 1996).

2. See *Reid v. Covert*, 354 U.S. 1 (1957) (Constitution bars court martial of civilian spouses who murdered servicemen-husbands).

3. As Justice Black wrote "no agreement with a foreign nation can confer power on the Congress, or on any other branch of government, which is free from the restraints of the Constitution . . . The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." Id. at 16-17.

find that an international agreement did not violate a structural provision of the Constitution.[4]

Last year's ratification of the Chemical Weapons Convention ("CWC")[5] presents this same tension between the requirements of the structural Constitution and the demands of the nation's international obligations. The Convention bans not only the current use and possession of chemical weapons, but also research, development, and production of such arms in the future. Because of the dual civilian and military uses of several potentially banned chemicals, verification procedures have become the critical issue for the success of the treaty. To enforce the prohibition on chemical weapons now and in the future, the Convention imposes the most intrusive verification procedures yet seen in a multilateral arms control agreement. In particular, the CWC establishes a new international organization that will enjoy the power to conduct snap inspections on almost any military or civilian site within a state party's territory.

Implementation of this treaty scheme will face difficult challenges due to the Constitution's checks on the power of the federal government and its guarantees for the individual rights of the citizenry. Others have identified the constitutional problem raised by the CWC's provisions for warrantless searches of American industrial and business sites.[6] This Essay will focus on a deeper structural issue: whether the Constitution—in particular, the Appointments Clause—permits individuals who are not

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4. See, e.g., *Missouri v. Holland*, 252 U.S. 416 (1920) (migratory bird treaty does not violate state sovereignty and Tenth Amendment); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (executive agreement suspending and transferring American claims against Iran authorized by Congress, even though International Emergency Economic Powers Act failed to provide authority).

5. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993), reprinted in 32 I.L.M. 800 (1993) ("CWC").

6. See Ronald D. Rotunda, *The Chemical Weapons Convention: Political and Constitutional Issues*, 15 Const. Comm. 131 (1998); David G. Gray, Note, *"Then the Dogs Died": The Fourth Amendment and Verification of the Chemical Weapons Convention*, 94 Colum. L. Rev. 567 (1994); David A. Koplow, *The Shadow and Substance of Law: How the United States Constitution Will Affect the Implementation of the Chemical Weapons Convention*, in Benoit Morel and Kyle Olson, eds., *Shadows and Substance: The Chemical Weapons Convention* 155-79 (Westview Press, 1993); Edward A. Tanzman, *Constitutionality of Warrantless On-Site Arms Control Inspections in the United States*, 13 Yale J. Intl. L. 21 (1988); David A. Koplow, *Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States*, 63 N.Y.U. L. Rev. 229 (1988). As with so many of the issues involving foreign affairs and the Constitution, many of these problems were identified long ago by Louis Henkin. Louis Henkin, *Arms Control and Inspection in American Law* 255 (Columbia U. Press, 1958).

officers of the national government to exercise authority under federal law that affects the rights of American citizens.[7]

Long overlooked, the Appointments Clause has received increased scrutiny of late. In several recent opinions, the Supreme Court has found that the Constitution requires that any individual who exercises substantial government authority and discretion must undergo appointment in accordance with the procedures of Article II, Section 2.[8] Although one might read the Appointments Clause, as the Court has noted, "as merely dealing with etiquette or protocol," it is clear that "the drafters had a less frivolous purpose in mind."[9] This purpose was twofold: first, to prevent any single branch from manipulating federal appointments; and second, to ensure that those making appointments would ultimately be accountable to the people of the United States.[10] As this Essay will demonstrate, the Court's current approach to the Appointments Clause comports both with the framers' original understanding of the Clause as a check on national power, and with the Constitution's structural goal of preserving democratic self-government and public accountability.

These understandings of the Appointments Clause—both modern and historical—pose a difficult obstacle to the CWC's verification procedures. If the President and the Senate authorize an international organization to conduct searches on American soil, they will have delegated public authority outside the governmental system established by the Constitution. Vesting such authority in officials who are not officers of the United States risks offending both the fundamental principle of popular sovereignty underlying our Constitution[11] and the Appointment Clause's basic goal of government accountability. The case of the CWC, however, also highlights certain ambigui-

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7. The Appointments Clause declares that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const., Art. II, § 2.

8. See *Ryder v. United States*, 115 S. Ct. 2031 (1995); *Weiss v. United States*, 114 S. Ct. 752 (1994); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991); *Morrison v. Olson*, 487 U.S. 654, 671 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

9. *Buckley*, 424 U.S. at 125.

10. See, e.g., *Weiss*, 114 S. Ct. at 765 (Souter, J., concurring).

11. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987); Gordon S. Wood, *Creation of the American Republic 1776-1787* (U. of North Carolina Press, 1969).

ties in the Court's approach to the Appointments Clause that may suggest ways to conform the treaty to the Constitution.

Following this introduction, this Essay will proceed in three parts. Part I will describe the CWC's verification procedures and its implementing legislation, which is presently before Congress. Part II will examine the Court's case law interpreting the Appointments Clause and the broader constitutional principles of democratic self-government that support it. Part III will discuss ways in which the Clause applies to the CWC, and will examine possible solutions to the CWC's constitutional problems.

I

The CWC seeks to achieve the ambitious goal of eliminating chemical weapons by establishing an intrusive verification mechanism unprecedented for a multilateral treaty. State parties undertake the primary obligation of renouncing the use, development, acquisition, or production of chemical weapons.[12] They also agree to destroy any chemical weapons and production facilities currently within their jurisdiction and control.[13]

Verification is of crucial importance to the success of the CWC because, unlike other arms control agreements, the CWC goes beyond numerical caps on weapon stockpiles or limitations on weapon use in warfare. Instead, the CWC seeks to impose a complete ban on the development, production, and stockpiling of an entire class of weapons. The ease with which chemical weapons can be manufactured and concealed presents a difficult challenge for any verification system. Lethal substances such as mustard gas, for example, can be manufactured in a vat with two common industrial chemicals.[14] Detection of prohibited facili-

12. CWC, Art. I, para. 1 (cited in note 5). A valuable reference work on the Convention with commentary on each provision is Walter Krutzsch and Ralf Trapp, *A Commentary on the Chemical Weapons Convention* (Kluwer Academic Publishers, 1994).

13. CWC, Art. I, para. 2, 4 (cited in note 5). Earlier efforts to regulate chemical weapons had prohibited only their use in warfare, but not their production, storage, and deployment. Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65. Moreover, these earlier chemical weapons agreements had failed to establish any verification mechanisms. Earlier attempts to control chemical weapons may have neglected to implement a verification procedure because during the interwar period "the 'politesse' of relations between nations seemed to require at least the pretense that they, like gentlemen, could of course be trusted to keep their agreements." Henkin, *Arms Control* at 47 (cited in note 6).

14. On the manufacture and use of chemical weapons, see generally Kathleen C. Bailey, *Doomsday Weapons in the Hands of Many: The Arms Control Challenge of the*

ties is also difficult because production sites can be "dual use;" in other words, civilian chemical plants can easily switch to the production of chemical weapons, and vice-versa.[15]

A cheating nation can conceal a chemical weapons facility in an extremely small space. A laboratory no more than 1600 square feet in size can manufacture one hundred tons of chemical weapons in one year.[16] Successfully verifying compliance with the CWC will require monitoring all sites that use and produce civilian chemicals, in addition to the usual military and defense contractor sites that are the subject of other arms control agreements.[17]

Additional challenges are created by the multilateral nature of the treaty. A multilateral agreement with many parties of disparate resources and interests will produce difficult enforcement and verification problems. Smaller nations will not have the ability to verify compliance of the treaty by other nations, and thus they will be forced to rely upon international verification organizations and methods.[18] Because the low cost of chemical weapons make them a "poor man's atomic bomb," the incentive for less advanced nations to cheat so as to achieve strategic parity with more developed countries is probably higher than in a bilateral arrangement between parties of equal strength.

In order to overcome these challenges, the Convention creates a verification mechanism that reaches not just manufacturers of chemical weapons, but also most producers and users of industrial chemicals. According to the congressional Office of Technology Assessment, potentially 10,000 sites in the United States qualify for CWC inspection.[19] Under the so-called challenge procedures of the Convention, potentially any facility or location in the nation—whether involved in the chemical indus-

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90's (U. of Illinois Press, 1991); Hugh D. Crone, *Banning Chemical Weapons: The Technical Background* (Cambridge U. Press, 1992).

15. Address by Vice President George Bush to the Conference on Disarmament: Chemical Weapons Convention, April 18, 1984, quoted in Tanzman, 13 Yale J. Intl. L. 23 (cited in note 6).

16. Bailey, *Doomsday Weapons* at 19-20 (cited in note 14); Gray, 94 Colum. L. Rev. at 575-76 (cited in note 6).

17. See Kathleen C. Bailey, *Problems with the Chemical Weapons Convention*, in Morel and Olson, eds., *Shadows and Substance* at 17-36 (cited in note 6).

18. Kenneth W. Abbott, *"Trust but Verify": The Production of Information in Arms Control Treaties and Other International Agreements*, 26 Cornell Intl. L.J. 1, 57 (1993).

19. U.S. Congress, Office of Technology Assessment, *The Chemical Weapons Convention: Effects on the United States Chemical Industry* 15 (1993) (*"OTA Study"*).

try or not—might be subject to search. According to the treaty, challenge inspections can reach "any facility or location in the territory or in any other place under the jurisdiction" of a state party.[20] Many if not most of these factories, industrial sites, and other locations will not be under the direct control of the United States government, but instead will be in the hands of private commercial enterprises and companies.[21]

The Convention provides for three basic types of verification for sites that produce or store chemical weapons or designated chemicals. First, state parties are required to provide annual, detailed reports on facilities that could produce chemical weapons.[22] Second, sites involved in the chemical industry are subject to on-site inspections.[23] Third, any state party can demand a "challenge" inspection of any location within the jurisdiction of another party.[24] The Convention also creates a new international organization, the Organization for the Prohibition of Chemical Weapons.[25] The Organization's Technical Secretariat will choose the targets for inspection and will conduct the searches.[26] This discussion will focus on the legal issues posed by the on-site and challenge searches, which allow members of the Technical Secretariat to enter and search sites on American soil.

On-site inspections monitor facilities that produce substances that either have been used as, or could help create, chemical weapons. Facilities are classified into four groups based upon the potential dangerousness of the chemical produced; the intrusiveness and regularity of inspections depend on which classification a facility receives. For example, a facility that manufactures a "Schedule 1" substance, which has been used as a chemical weapon in the past, is limited as to the production amount and use of the chemical and is subject to regular on-site searches and monitoring.[27] Schedule 2 and 3 facilities, which receive less intrusive monitoring, produce less lethal chemicals that still might be used to create chemical weapons. If a facility manufactures chemicals that fall within the broader, "Other" category, which includes many organic chemicals that have not been used as chemical weapons in the past, it is subject

20. CWC, Art. IX (cited in note 5).
21. *OTA Study* at 19-32 (cited in note 19).
22. CWC, Art. VI (cited in note 5).
23. Id.
24. CWC, Verification Annex, Part X (cited in note 5).
25. CWC, Art. VIII (cited in note 5).
26. CWC, Art. VIII, Part D (cited in note 5).
27. CWC, Verification Annex, Part VI (cited in note 5).

to random targeting and inspection by the Technical Secretariat. While there may be only a few dozen Schedule 1 facilities in the nation, Congress's Office of Technology Assessment estimates that there are more than 10,000 sites in the United States that fall within the Other category.[28]

While some details of the search procedures are left to future development, the CWC reserves broad inspection rights to the Technical Secretariat inspection teams. Inspection teams must be permitted to enter the state party through a designated point of entry.[29] According to the CWC Verification Annex, the inspection team enjoys "the right to unimpeded access to the inspection site," and the signatory nation has an obligation to grant the team transportation and entrance to the facility to be searched.[30] Inspection teams may interview facility personnel, collect samples, inspect documents and records, take photographs, and bring testing equipment into the facility. Government personnel of the state party may not impede the inspection, although they may observe certain searches.

Of course, on-site inspections and continuous monitoring will only deter treaty violations at known chemical facilities. In cases where a nation is suspected of operating a hidden or undeclared weapons facility, the CWC relies upon challenge inspections to enforce its terms. Each state party has the right to demand an on-site inspection of any location within the jurisdiction of another party. "Without delay," the inspected nation is to provide the search team with unimpeded access to the facility in question and is required to allow a representative of the challenging nation to observe the inspection.[31] The search itself is to be conducted "in the least intrusive manner possible," and its purpose is solely to determine "facts relating to possible non-compliance."[32] The Convention sets no numerical limits on the number of challenge searches that one nation may demand of another.[33]

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28. *OTA Study* at 15 (cited in note 19).

29. CWC, Verification Annex, Part II (cited in note 5). The Secretariat must notify the state concerning the site to be searched and the type of inspection. Id.

30. Id.

31. CWC, Art. IX (cited in note 5).

32. Id.

33. The Convention attempts to provide some procedural safeguards to prevent abuse of challenge inspections. A state may demand a challenge inspection "for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of" the Convention, it must keep the inspection "within the scope" of the Convention, and it must provide information to support its inspection demand. CWC, Art. IX (cited in note 5). The challenging nation must provide its reasons for the

A nation undergoing a challenge search is permitted to take measures to protect "sensitive installations" and to prevent disclosure of "confidential information and data, not related" to the Convention.[34] Furthermore, the Convention contains a provision that a state party's obligation to provide access in response to a challenge is "to take into account any constitutional obligations it may have with regard to proprietary rights or searches and seizures."[35] Apparently, this provision allows a state party to raise a warrant requirement or a potential takings claim as a ground for seeking modification to a challenge inspection.[36] But this is by no means clear, nor is it obvious how the provision would operate. Further, the Convention declares that an inspected state cannot use constitutional obligations "to conceal evasion of its obligations not to engage in activities prohibited under" the Convention.[37]

Implementing legislation proposed in Congress guarantees that CWC officials will have full access to inspection sites, and it places some reasonable limitations on the scope of the searches. Not yet passed by Congress, the legislation authorizes the Technical Secretariat to conduct inspections of U.S. facilities, with American officials along as company. Under the bill it is illegal "for any person to fail or refuse to permit entry or inspection, or to disrupt, delay or otherwise impede an inspection."[38] Federal courts are authorized to restrain violations and to compel compliance with the Convention and its implementing legislation. A search warrant process is established for challenge searches, but not for the on-site inspections of identified facilities (i.e. Sched-

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demand to the Executive Council of the Convention, which can block a challenge request by a three-quarters majority vote. CWC, Verification Annex, Part IX (cited in note 5). The Council, however, can reject the request only if it considers the inspection demand to be "frivolous, abusive, or clearly beyond the scope" of the Convention. CWC, Art. IX (cited in note 5).

34. CWC, Art. IX (cited in note 5).

35. CWC, Verification Annex, Part X (cited in note 5).

36. Gray, 94 Colum. L. Rev. at 590 (cited in note 6).

37. CWC, Verification Annex, Part X (cited in note 5).

38. H.R. 1590, 105th Cong., 1st Sess. § 403 (1997); see also S. 610, 105th Cong., 1st Sess. § 306 (1997). H.R. 1590 parallels the CWC implementing legislation introduced, but not passed, in the 104th Cong. See S. 1732, 104th Cong., 2d Sess. (1996). S. 610, which passed the Senate on May 23, 1997, 143 Cong. Rec. S5080, differs in some significant respects from H.R. 1590. S. 610, for example, requires that the United States seek facility agreements for all schedule 2 and 3 facilities, that the government seek consent before a search, and that the government receive an administrative search warrant before an inspection should the consent not be given. S. 610 also appears to make international inspectors liable for illegal disclosure of confidential information.

ule 1 through Other sites).[39] These latter searches, however, must "be commenced and completed with reasonable promptness and shall be conducted at reasonable times, within reasonable limits, and in a reasonable manner."[40] Inspections may extend to anything within the premises that is "related to" the requirements of the Convention, but the bill protects certain proprietary information and trade secrets from inspection.[41]

Several elements of the verification regime are worth noting at this stage. First, the inspections are conducted by officials of the Technical Secretariat, not by American officials. Members of the Secretariat choose the sites to be inspected, according to standards that they develop. There is no provision for review of a decision to search by any American official, aside from the optional warrant procedure. Members of the Technical Secretariat are not accountable to any American official, they cannot be removed by any American official, and they do not take orders from any American official.

Such independence is the critical component of the CWC's innovative multilateral verification regime. The CWC is a watershed in the development of arms control verification methods because of its attempt to render national governments transparent. Traditional international agreements place obligations upon the national governments of the state parties, which assume the responsibility for enforcing treaty terms upon their citizens. The CWC seeks to sidestep national governments by conducting direct inspections of privately-owned facilities and sites. Searches by the Technical Secretariat are to take place without reliance upon the government of a treaty party; a state party's intervention is required only to assist the inspection teams in enjoying unfettered access to a facility.

These verification procedures are designed to address the problem created by national governments that cannot be trusted

39. Section 406(a) requires that the agency working with the Technical Secretariat seek the consent of the owner or operator of a facility to the inspection. The Section also states that the agency "may seek" a search warrant from an authorized official, who presumably will be a federal judge or magistrate. These proceedings, which are ex parte, require that the agency provide information concerning the basis for selection of the site for inspection, including evidence and reasons provided by a challenging state. Section 406(a)(2) requires the authorized official to issue the warrant upon an affidavit showing that the Convention is in force, that the site is subject to inspection under the Convention, that the procedures of the Convention and of the Act have been complied with, and that the inspection will be conducted in a reasonable manner. H.R. 1590, 105th Cong., 1st Sess § 406(a) - (a)(2).

40. Id. § 401(d).

41. Id. § 401(e)(2).

either to conduct meaningful verification themselves or to obey the treaty's restrictions. The CWC also attempts to build confidence among the signatories by vesting the authority over implementation in a neutral, impartial entity that is not beholden to any single nation or alliance.[42] Such reassurance through verification helps to alleviate the fears of cheating produced by the prisoners' dilemma. Although perhaps desirable from a policy perspective, it is exactly the efforts of this neutral entity to monitor private parties that produces the constitutional difficulties discussed in the remainder of this Essay. Vesting verification in a neutral, impartial international organization may build assurance and trust among treaty partners, but it also creates tensions with fundamental constitutional principles of government accountability.

As will be discussed in the next Section, the Constitution erects limits on the ability of the federal government to transfer or delegate power to entities that are not directly responsible to the American people. Ratification and implementation of the Convention within the American legal system will require an understanding of these principles and the development of mechanisms to respect their requirements.

II

Recent Supreme Court decisions interpreting the Appointments Clause declare that individuals who exercise federal authority must be appointed as federal officers. Efforts to vest verification authority in international organizations whose officials are not appointed by constitutional processes and are not subject to presidential control come into conflict with the Court's developing principles of government accountability. This Section will discuss the Supreme Court's approach to the Appointments Clause, the text and history of the provision, and the Constitution's structural requirement of government accountability.

Much of the academic writing on the Appointments Clause has focused on the balance of power struck by the Constitution when it vested the appointment power in both the President and the Senate.[43] As the Supreme Court recently has recognized,

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42. See generally, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Harvard U. Press, 1995).

43. See, e.g., John C. Yoo, *Criticizing Judges*, 1 Green Bag 2d 253 (1998); John O. McGinnis, Essay, *The President, the Senate, the Constitution, and the Confirmation Proc-*

however, the Clause also serves a much broader function than simply dividing power between the branches. By requiring that all officers of the United States undergo nomination and confirmation, the Constitution renders all officials who exercise federal power answerable to the people's elected representatives, and ultimately to the people themselves. If the people disagree with the manner in which federal officials are enforcing the law, they can pressure the President and the Congress to seek their removal and replacement through the appointments process.

A. THE SUPREME COURT AND THE APPOINTMENTS CLAUSE

Article II, Section 2, Clause 2 of the Constitution regulates the staffing of the federal government and the exercise of certain types of federal authority. According to the Clause, the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, *and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but 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.*[44]

The Appointments Clause is not just an anachronistic, outdated provision of the eighteenth century. It encompasses two objectives: to prevent the manipulation of appointments by any single branch of the national government; and to ensure accountability.[45]

1. Separation of Powers. The Court identified the Appointments Clause's role in maintaining the separation of powers in *Buckley v. Valeo*.[46] In part, *Buckley* raised the question of the constitutionality of the Federal Elections Commission (FEC), which was created to administer and enforce the Federal

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ess: A Reply to Professors Strauss and Sunstein, 71 Tex. L. Rev. 633 (1993); David A. Strauss and Cass R. Sunstein, *The Senate, The Constitution, and the Confirmation Process*, 101 Yale L.J. 1491 (1992); James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. Chi. L. Rev. 337 (1989).

44. U.S. Const., Art. II, § 2, cl 2.

45. See *Weiss v. United States*, 114 S. Ct. 752, 765 (1994) (Souter, J., concurring).

46. 424 U.S. 1 (1976).

Elections Campaign Act Amendments of 1974.[47] Congress composed the FEC of eight members, of which two were to be appointed by the President *pro tempore* of the Senate, two by the Speaker of the House of Representatives, and two by the President. Both the Secretary of the Senate and the Clerk of the House served *ex officio* without any right to vote.[48]

In a *per curiam* opinion, the Court held that this arrangement violated the Appointments Clause. Because Commission members exercised the powers of an officer of the United States, the Court concluded that they had to undergo nomination by the President with the advice and consent of the Senate. Even if the members of the Commission were to be considered "inferior officers," the Court noted, the Constitution still required that their appointment be vested in either the President, the courts, or a department head. According to the Court, the framers of the Constitution had specifically divided the appointment power between the President and Senate in order to prevent the Senate from enjoying the sole authority to appoint executive branch officials. Describing the Constitutional Convention's decision to amend the Clause into its present form, the Court stated "that it was a deliberate change made by the framers with the intent to deny Congress any authority itself to appoint those who were 'Officers of the United States.'"[49]

Relying upon several nineteenth century cases, the Court grouped all officials of the federal government into three basic classes.[50] The first group encompasses principal Officers of the United States, who are nominated by the President with the advice and consent of the Senate. A cabinet secretary would be an example of such an officer. The second category encompasses inferior Officers of the United States, such as postmasters first class and clerks of the federal courts.[51] The *Buckley* Court

47. The composition of the FEC was codified at 2 U.S.C. § 437c(a). After *Buckley* invalidated the FEC's makeup, Congress altered the Commission's membership to include the Secretary of the Senate, and the Clerk of the House of Representatives (or their designees) as ex officio members, and six members appointed by the President with the advice and consent of the Senate with no more than three members from any one political party. 2 U.S.C. § 437c(a)(1) (1988).

48. The presence of the ex officio members was subsequently invalidated as a violation of the separation of powers. *Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993) (Opinion of Silberman, J.), cert. granted, 114 S. Ct. 2703 (1994), cert. dismissed, 115 S. Ct. 537 (1995).

49. *Buckley*, 424 U.S. at 129.

50. *United States v. Germaine*, 99 U.S. 508, 509 (1879) ("The Constitution for purposes of appointment . . . divides all its officers into two classes.").

51. *Buckley*, 424 U.S. at 126 (citing *Myers v. United States*, 272 U.S. 52 (1926) and *Ex Parte Hennen*, 38 U.S. 225 (1839)).

placed all other federal employees in yet a third category, labelling them "lesser functionaries subordinate to officers of the United States."[52] This third category would include the secretaries or law clerks of an officer of the United States.

In *Morrison v. Olson*,[53] the Court provided further guidance concerning the relationships among these different classes of federal officials. Although it admitted that the line between a principal and an inferior officer was unclear, the Court found several factors that indicated that the independent counsel created by the Ethics in Government Act[54] fell into the latter category. The independent counsel was inferior because she was subject to removal by a higher executive branch official, because she performed "only certain, limited duties," because her office was of a limited jurisdiction, and because her office had a limited tenure.[55] Her status as an inferior officer allowed the Court to uphold the Act's placement of appointment authority over the independent counsel in a special federal court.

In *Buckley* and *Morrison*, the Court emphasized the separation of powers aspects of the Appointments Clause. Both cases asked whether Congress could transfer appointment authority of a federal officer from the President and Senate to another branch of government. In *Buckley*, the Court rejected Congress's attempt to arrogate appointment authority to itself, while in *Morrison* the Court upheld placement of the power to select an independent counsel in the federal judiciary. The two cases were different because the *Buckley* Court approached the Appointments Clause as a deliberate limitation upon Congress, due to the framers' fears "that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."[56] According to Chief Justice Rehnquist in *Morrison*, this threat was not present in the Ethics in Government Act, because Congress had transferred the appointment power to the Judiciary, rather than to itself. While concluding that such inter-branch appointments were constitutionally permissible, the Court still found some outer limits on Congress' ability to transfer power out of the executive branch. In particular, the Court found that Congress could not provide for inter-branch appointments of inferior officers if such appoint-

52. *Buckley*, 424 U.S. at 126 n.162.
53. 487 U.S. 654 (1988).
54. 28 U.S.C. § 49 *et seq.*
55. *Morrison*, 487 U.S. at 671-72.
56. *Buckley*, 424 U.S. at 129.

ments either impaired the constitutional functions of another branch, or reflected an incongruity between the function of the officer and the function of the appointing branch.[57]

In two cases decided last Term, the Court re-emphasized the Appointments Clause's role in containing congressional encroachment over official appointments. *Edmond v. United States*[58] involved a challenge to the composition of the Coast Guard criminal appeals court. That court contained two civilian judges who had not received presidential appointment pursuant to Article II, Section 2, Clause 2, but instead were appointed by the Secretary of Transportation.[59] In deciding that the appointments were proper, the Court observed that the Appointments Clause "is among the significant structural safeguards of the constitutional scheme" because it "prevents congressional encroachment upon the Executive and Judicial Branches."[60] The Framers also designed the Clause in this way, Justice Scalia wrote for the Court, because they believed that "the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body."[61]

In *Printz v. United States*,[62] the Court again stressed the Appointments Clause's function in protecting presidential control over the execution of the laws by preventing Congress from transferring such authority to non-federal officers. In invalidating the Brady Act's requirement that state officials conduct federal handgun background checks, the Court observed that this commandeering of state officials would violate not just federalism principles, but also the separation of powers.[63] Allocating such federal responsibilities to state governments, the Court noted, would leave federal law enforcement without "meaningful Presidential control" and would undermine the effectiveness of a unitary executive.[64] "That unity would be shattered," the Court concluded, "and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."[65]

57. *Morrison*, 487 U.S. at 675-76.
58. 117 S. Ct. 1573 (1997).
59. Id. at 1579.
60. Id.
61. Id.
62. 117 S. Ct. 2365 (1997).
63. Id. at 2378.
64. Id.
65. Id.

2. Government Accountability. *Buckley* contained the seeds of a broader understanding of the Appointments Clause that embraces concerns about the general scope of national power and the manner in which that power may be exercised. Before the Clause's appointment process may even begin its work, it first must identify *who* must undergo such appointment. In addressing this question, the Court has declared that those who exercise significant government authority must be appointed pursuant to Article II, Section 2. By requiring appointment of such individuals, the Court has concluded, the Constitution prevents the national government from blurring the lines of responsibility between the people and their agents. As Chief Justice Rehnquist declared for a unanimous Court in *Ryder v. United States*[66]: "The [Appointments] Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'"[67]

Buckley v. Valeo first articulated this link between the Appointments Clause and the overarching structure of the Constitution. It is possible that the *Buckley* Court could have declared that an "Officer of the United States" referred to purely ceremonial titles or only to military and law-enforcement officials, which would have left the appointment process for most federal positions up to Congress. In *Buckley* for example, the government defended the constitutionality of the FEC by arguing that pursuant to its Necessary and Proper Clause powers, Congress could establish offices and could fill them in any manner it chose. In other words, Congress could have designated members of the FEC as non-officers of the United States, thereby avoiding any Appointments Clause difficulties with the Ethics in Government Act.

Buckley rejected that alternative interpretation and established a structural analysis of government positions that linked the Appointments Clause to the legitimate exercise of federal power. Members of the Commission qualified as Officers, the Court found, because they enjoyed substantial power under federal law. "We think [the Clause's] fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must,

66. 115 S. Ct. 2031 (1991).
67. Id. at 2035 (quoting *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991)).

therefore, be appointed in the manner prescribed by §2, cl. 2, of" Article II.[68] If Congress attempts to vest federal authority in someone who is not an officer of the United States, the delegation of authority will be invalid. Non-officers can exercise some authority, but only if those powers are within the legislative branch or do not involve enforcement of federal law.[69]

The Court's Appointments Clause analysis thus proceeds in three steps. First, it asks whether the authority delegated by Congress involves "the administration and enforcement of the public law," where that public law is federal law. If so, then it must determine whether the individual who is given that power "exercises significant authority pursuant to the laws of the United States." If the individual does not exercise significant authority, then that person is a federal employee and not a federal officer. If the first two conditions are met, the Constitution requires compliance with the Appointments Clause. Otherwise, the individual is not an officer of the federal government and his actions pursuant to federal law are invalid.[70]

More recent Supreme Court decisions have further developed *Buckley*'s structural themes. In *Freytag v. Commissioner*,[71] the Court upheld the constitutionality of special trial judges appointed by the chief judge of the Tax Court, an Article I court. In analyzing an Appointments Clause challenge, the Court found that the special trial judges were inferior officers due to their substantial authority to hear certain classes of cases.[72] Because the Tax Court qualified as one of the nation's "Courts of Law" within the meaning of the Clause, however, the appointment of the trial judges by the chief judge satisfied constitutional requirements.[73] In passing on this issue, the Court linked the policies behind the Appointments Clause to the ideal of

68. *Buckley*, 424 U.S. at 126.

69. As the *Buckley* Court declared:

> Congress may undoubtedly under the Necessary and Proper Clause create "offices" in the generic sense and provide such method of appointment to those "offices" as it chooses. But Congress' power under that Clause is inevitably bounded by the express language of Art. II, §2, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be "Officers of the United States." They may, therefore, properly perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not "Officers of the United States."

Id. at 138-39.

70. See *Ryder v. United States*, 115 S. Ct. 2031 (1995).

71. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991).

72. Id. at 881-82.

73. Id. at 888-92.

democratic government. Citing Gordon Wood's book, *The Creation of the American Republic, 1776-1787*, the Court observed that the framers had included the Appointments Clause in the Constitution to prevent the diversion of power to individuals not accountable to the electorate. According to the Court, manipulation of official appointments had been one of the signal grievances against executive power held by the revolutionary generation. "Those who framed our Constitution," the *Freytag* majority declared, "addressed these concerns by carefully husbanding the appointment power to limit its diffusion."[74]

While the framers divided the appointment power between the President and the Senate, they did so in order to guarantee democratic accountability over the process. "The framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people."[75] Thus, the Constitution's only exception to this allocation of the appointment power was granted for inferior officers, the Court observed, and in that case only if Congress transferred the power to the President, the heads of departments, or the courts.[76] The Court made the secondary purpose of the Clause quite clear when it declared that "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic," and therefore "[n]either Congress nor the Executive can agree to waive this structural protection."[77]

In two cases involving military courts-martial, the Justices have reaffirmed the Appointment Clause's purpose in enhancing democratic accountability. In *Weiss v. United States*,[78] the Court answered the question whether military officers had to receive a second appointment in order to serve as military judges. Both the parties and the Court agreed that "because of the authority and responsibilities they possess," military judges "act as 'officers' of the United States," and therefore had to be appointed pursuant to the Appointments Clause.[79] In finding that a second appointment was unnecessary, the Court determined that Congress was not attempting either to arrogate appointment power to itself or to transfer authority outside of the po-

74. Id. at 883.
75. Id. at 884.
76. Id. at 884-85.
77. Id. at 880.
78. 114 S. Ct. 752 (1994).
79. Id. at 757.

litical branches. "[T]here is no ground for suspicion here that Congress was trying to both create an office and also select a particular individual to fill the office. Nor has Congress effected a 'diffusion of the appointment power,' about which this Court expressed concern in *Freytag*."[80]

Concurrences by Justices Souter and Scalia in *Weiss* further revealed the Court's thinking on this second, "anti-diffusion" aspect of the Appointments Clause. According to Justice Souter, two principles lie at the heart of the Appointments Clause. First, the Clause prohibits any single branch from aggrandizing its appointment authority at the expense of another; this is the familiar separation of powers theme at work in *Buckley*. Second, "no Branch may abdicate its Appointments Clause duties" by transferring appointment authority to entities not included in the Clause.[81]

Justice Scalia agreed with Justice Souter's two-tier analysis of the Appointments Clause. "Violation of the Appointments Clause occurs not only when . . . Congress may be aggrandizing *itself* (by effectively appropriating the appointment power over the officer exercising the new duties), but also when Congress, *without* aggrandizing itself, effectively lodges appointment power in any person other than those whom the Constitution specifies."[82] Although Justice Souter has in mind instances when Congress vests appointment power in a lower-level executive branch official, Justice Scalia extends the anti-abdication principle to include any situation in which Congress transfers appointment authority to an entity not listed in the Appointments Clause. In *Edmond*, Justice Scalia further underscored this purpose when, for the Court, he described the Clause as "designed to preserve political accountability relative to important government assignments."[83]

Thus, in these recent cases, the Court has reaffirmed the dual functions of the Appointments Clause first identified in *Buckley v. Valeo*. First, the Clause protects the President's control over the execution of the laws, primarily by serving as a barrier to congressional efforts to interfere with the President's selection and management of his subordinates. Second, the Clause serves an accountability purpose by requiring that any official who exercises "significant authority on behalf of the

80. Id. at 759 (citing *Freytag*, 501 U.S. at 883).
81. *Weiss*, 114 S. Ct. at 766 (Souter, J., concurring).
82. Id. at 770 (Scalia, J., concurring in part and concurring in the judgment).
83. *Edmond v. United States*, 117 S. Ct. 1573, 1581 (1997).

United States" must be appointed an Officer of the United States pursuant to Article II, Section 2. This principle enhances government accountability by clarifying the lines of responsibility within the federal government, and by holding all officials who exercise federal power responsible to the people's elected representatives.

B. THE STRUCTURAL CONSTITUTION AND POPULAR SOVEREIGNTY

To be sure, the Court's elaboration of the purposes of the Appointments Clause has arisen in cases in which the governmental interests involved might not rise to the level of those at stake in the foreign affairs context. The Court's case law on the Appointments Clause, however, deserves to be taken seriously because it reflects the Constitution's safeguards for representative democracy and government accountability. These fundamental principles require that anyone who exercises the power of the government ought to be appointed by, and accountable to, officials who themselves are elected by and responsible to the American people. Requiring that all individuals who exercise federal power are federal officers is fundamental to the Constitution's concept of a national government that is not itself the sovereign, but is only the representative of the people.

1. Background of the Constitution. As the Court has observed, the appointment of government officials was of great concern to the framers. The history of the Appointments Clause, however, is more than just a simple story of popular constraint on executive power. When taken in context, the Appointments Clause can be seen as a reaction against excessive legislative power as well.[84] Further, the Clause represents a mistrust of all governmental power, and indeed embodies the fundamental relationship between the people and government officials as one between a principal and its agents. This Section will examine the history of the Clause, and then identify and elaborate upon its popular sovereignty roots.[85]

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84. *Freytag*, 501 U.S. at 904 n.4 (Scalia, J., concurring in part and concurring in the judgment) ("The Appointments Clause is, intentionally and self-evidently, a limitation on *Congress*.").

85. The legislative history of the Appointments Clause as it relates to the anti-abdication principle has not received extensive scholarly treatment in the law reviews. Two helpful articles are Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 Iowa L. Rev. 1079 (1988), and Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 Syracuse L. Rev. 1037 (1987).

The revolutionary generation bore substantial suspicion of the Crown and its exclusive control over appointments. The eighteenth century English "Whig Science of Politics," as Professor Gordon Wood calls it, laid the seedbed for revolutionary ideology, which feared that those in power would abuse their authority to oppress the people and suppress their liberties.[86] The American revolutionaries rejected the concept that sovereignty resided in the King or the government; rather, sovereignty rested in the people themselves, and the Crown and the executive magistracy existed solely to pursue the public good. One way in which the Crown improperly had projected its power over the colonists was by appointing colonial officials, who were widely viewed as corrupt and oppressive. Recall one of the complaints of the Declaration of Independence against King George III: "He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance."[87]

At the ideological heart of the Revolution was the idea of popular sovereignty. Rejecting the concept that sovereignty was vested in the Crown or in the government, the revolutionaries believed that governments "deriv[ed] their just Powers from the Consent of the Governed," and that when a government abused these powers, "it is the Right of the People to alter or to abolish it, and to institute new Government."[88] Although the true sovereign, according to the political theory of the day, had to possess unlimited, indivisible, and final authority, the people could delegate power to government officials within clearly delineated boundaries. These officials, however, were not the sovereign themselves but were only the agents of the people, who possessed the ultimate power in society.[89] The Massachusetts Constitution of 1780, which served as a model for the Federal Constitution of 1787,[90] codified this understanding: "All power

86. See generally Wood, *Creation* at 3-45 (cited in note 11). In fact, some revolutionary thinkers believed that such abuse of power was inevitable because of the tendency in human nature to seek power over others. See Bernard Bailyn, *Ideological Origins of the American Revolution* 55-93 (Belknap Press, 1967).

87. Declaration of Independence (U.S. 1776).

88. Id. This separation between the sovereignty of the people and the delegated power of the rulers is also expressed in the Ninth and Tenth Amendments of the Constitution, which, as I have argued elsewhere, protect majoritarian rights against an abusive and oppressive central government. John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 Emory L.J. 967, 970-99 (1993). Cf. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127 (1987).

89. See Amar, 96 Yale L.J. at 1429-37 (cited in note 11).

90. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167, 232-34 (1996).

residing originally in the people, and being derived from them, the several magistrates and officers of government vested with authority, whether legislative, executive, or judicial, are the substitutes and agents, and are at all times accountable to them."[91]

The British constitution's allocation of the appointment power offended popular sovereignty in two ways. First, appointments were made by the King, who was not accountable to the people. Of course, this problem would not have been cured by transfer of the appointment power to the Parliament, for the colonists believed that they also did not enjoy any representation in the imperial legislature. Second, colonial officials appointed by the King were not members of the colonial community, but instead were individuals sent from an almost foreign land to rule in America. "There is," wrote John Adams in 1776, "something very unnatural and odious in a Government 1000 Leagues off. An whole Government of our own Choice, managed by Persons whom We love, revere, and can confide in, has charms in it for which Men will fight."[92]

Popular sovereignty demanded that all officials wielding government power be drawn from the people and that they be appointed by those accountable to the people. The colonists' experience with written charters of government already had accustomed them to the idea that government could exercise only limited powers delegated by the sovereign.[93] Like the corporate relationship between principal and agent, then, government officials could act only within the prescribed boundaries of the powers delegated by the people. As Alexander Hamilton wrote in *The Federalist No. 78*: "No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but

91. Mass. Declaration of Rights, Art. V (1780).

92. John Adams to Abigail Adams, May 17, 1776, reprinted in Lyman H. Butterfield, ed., 1 *Adams Family Correspondence* 411 (Belknap Press, 1963), quoted in Wood, *Creation* at 78 (cited in note 11). Although subjects of the British empire, the colonists by 1776 had come to see royal officials as instruments of a foreign government and as the products of the manipulation of politics and society by the distant, corrupt English monarchy. Id. at 78-80. On the colonial dissatisfaction with the powers exercised by royal officials, see Bernard Bailyn, *The Origins of American Politics* 63-91 (Vintage Books, 1970).

93. Bailyn, *Ideological Origins* at 175-98 (cited in note 86).

what they forbid."[94] To make the principal-agent relationship between the people and federal officials even clearer, Hamilton concluded: "the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[95]

Initial efforts to rewrite the state constitutions to incorporate principles of popular sovereignty were unsuccessful. One of the reactions of the revolutionaries upon breaking with the Crown was to relocate the power of appointments, with unfortunate results. As part of a general reaction against executive power,[96] early constitution-writers decided to transfer the appointment power from the executive to the state assemblies. Virginia, for example, in its Constitution of 1776 declared that the two houses of the state legislature would exercise the power to appoint all judges and the Attorney General.[97] Pennsylvania gave the appointment power over all judges and civil and military officers to a twelve-member executive council elected by the people.[98] These structural experiments proved disastrous. As Professor Wood has observed, "[t]he appointing authority which in most [state] constitutions had been granted to the assemblies had become the principal source of division and faction in the states."[99] To cure this "vice of the system," constitution-writers in New York and Massachusetts, who rejected legislative supremacy in favor of a balance with an independent executive, returned the appointment power to the state Governors, with the participation of a council of state.[100] These reforms, particularly the strengthening of the executive at the expense of the

94. Federalist 78 (Hamilton) in Jacob E. Cooke, ed., *The Federalist* 524 (Wesleyan U. Press, 1961).

95. Id at 525. In Federalist No. 39, James Madison also defined a republican form of government to be "a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." *The Federalist* at 251 (cited in note 94). One characteristic of such government, Madison further observed, is "that the persons administering it be appointed, either directly or indirectly, by the people."

96. See, e.g., Yoo, 84 Cal. L. Rev. at 222-28 (cited in note 90) (describing structural changes in executive's ability to make war); Willi Paul Adams, *The First American Constitutions: Republican Ideology and the making of the State Constitutions in the Revolutionary Era* 271 (Rita and Robert Kimber trans., U. of North Carolina Press, 1980).

97. Virginia Constitution (1776), reprinted in Francis N. Thorpe, ed., 7 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3816 (Govt. Print Office, 1909).

98. Pennsylvania Constitution § 19-20 (1776), reprinted in Thorpe, 5 *Federal and State Constitutions* at 3086-87 (cited in note 97).

99. Wood, *Creation* at 407 (cited in note 11).

100. Id. at 433-34.

legislature, had a powerful influence on the delegates to the Philadelphia constitutional convention.[101]

2. The Constitutional Convention and Ratification. In devising a new Constitution, the Philadelphia delegates confronted the task of developing an appointments system that effectuated popular sovereignty without duplicating the failures of the state constitutions. Delegates rejected early proposals, such as the Virginia Plan, that sought to vest the appointment power in the national legislature.[102] James Madison's effort to locate the authority in the Senate met with early support,[103] but in the end a shared arrangement between the President and the Senate (proposed by Alexander Hamilton) prevailed.[104] Nathaniel Gorham of Massachusetts hit upon the "Advice and Consent" language, which ultimately was adopted—along with the idea of presidential nomination accompanied by senatorial confirmation—in the waning days of the Convention.[105]

Delegates approved today's Appointments Clause in order to enhance government accountability. Placing the appointment power in the President alone was thought to risk tyranny, while vesting it solely in the legislature, it was feared, would "give full play to intrigue & cabal."[106] As James Wilson put it, "intrigue, partiality, and concealment were the necessary consequences" of "appointments by numerous bodies."[107] The text of the provision attempts to address these dual concerns not only by placing the power to nominate solely in the hands of the President, but also by allowing an appointment to be completed only with senatorial confirmation. As Governeur Morris declared during the Philadelphia Convention, "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."[108]

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101. Yoo, 84 Cal. L. Rev. at 229-30 (cited in note 90); see also Charles Coleman Thach, *The Creation of the Presidency, 1775-1789* at 34-38 (Johns Hopkins Press, 1922); Federalist 26 (Hamilton) in *The Federalist* at 167 (cited in note 94).

102. Max Farrand, ed., 1 *The Records of the Federal Convention of 1787* at 119-47 (Yale U. Press, 1937). For more detailed descriptions of the history of the Appointments Clause, see Gauch, 56 U. Chi. L. Rev. at 341-58 (cited in note 43); Blumoff, 37 Syracuse L. Rev. at 1061-70 (cited in note 94).

103. Farrand, 1 *Records* at 120 (cited in note 102).

104. Id. at 128.

105. 2 id. at 38, 44, 495, 539.

106. 3 id. at 42. See also 1 id. at 119, 120 (statements of James Wilson and James Madison).

107. 1 id. at 119.

108. 2 id. at 539.

Debate over the Appointments Clause during ratification clarified the framers' intent to create a system that enhanced public accountability over the exercise of federal power. Anti-Federalists criticized the proposed arrangement because it gave the Senate too much executive authority, which they believed would undermine the separation of powers.[109] Alexander Hamilton responded in the *Federalist Papers* by emphasizing that the location of the appointment power in the presidency would promote openness and responsibility in the filling of national offices. Because a nomination would be submitted to the Senate, "the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety; and the public would be at no loss to determine what part had been performed by the different actors."[110] If, for example, a poor nominee was sent forward, then "the blame . . . would fall upon the president singly and absolutely."[111] If, on the other hand, the Senate were to reject a fit candidate, "[t]he censure . . . would lie entirely at the door of the senate."[112] If an unsuitable nominee were to be appointed, then both branches would suffer at the hands of the public. "If an ill appointment should be made the executive for nominating and the senate for approving would participate though in different degrees in the opprobrium and disgrace."[113] Hamilton specifically contrasted the benefits of the Constitution with the secrecy that attended the appointment process in New York state, in which "an unbounded field for cabal and intrigue lies open," and "all idea of responsibility is lost."[114]

To be sure, the Appointments Clause serves a checks-and-balances function by dividing the appointment power between two branches of the national government. This was the focus of *The Federalist No. 76*, which was the companion piece to *The Federalist No. 77*. This purpose, however, should not obscure the provision's equally important goal of constraining the actions of the national government as a whole. As Publius' comments in *No. 77* suggest, the Appointments Clause seeks to

109. See, e.g., The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, *Pennsylvania Packet (Philadelphia)*, Dec. 18, 1787, reprinted in Bernard Bailyn, ed., 1 *The Debate on the Constitution* 546-47 (Library of America, 1993). See also Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 270-75 (Knopf, 1996).

110. Federalist 77 (Hamilton) in *The Federalist* at 517 (cited in note 94).

111. Id.

112. Id.

113. Id.

114. Id. at 518.

make public the process of appointment in order to bring responsibility and accountability to the operations of the federal government. By opening appointments to public scrutiny, the Constitution ensures that those who are to exercise federal power—the agents of the people—will be carefully evaluated, and that any officers who abuse their powers will be held responsible. This meaning becomes even clearer when one considers that the next paper in the series, *Federalist No. 78*, discusses judicial review as an additional method for ensuring that "the intention of the people" is "to be preferred" to "the intention of their agents."[115] Both the Appointments Clause and judicial review work together to ensure that the federal government does not seek to aggrandize its powers or conceal their improper use.

3. Other Constitutional Structures that Promote Government Accountability. Two other structural provisions promote the Appointments Clause's goal of advancing government accountability. First, the Constitution creates a unitary executive branch that demands that all federal officials remain subject to the control of the President, who along with the Vice-President is the only nationally-elected member of the government. Efforts to delegate federal power outside the executive branch may violate not just the Appointments Clause, but also Article II's vesting of the executive power in the President alone.[116] Second, the Constitution nowhere provides for the delegation of public authority outside of the national government. Most of the scholarship and judicial decisions concerning the nondelegation doctrine concern the standards that must accompany the transfer of authority to executive branch agencies. Nondelegation principles, however, may also be offended by the transfer of authority completely outside the government without any standards at all.

American constitutional scholars have been conducting a vigorous debate concerning the nature of the presidency and of the unitary executive.[117] One side advances a "formalist" ap-

115. Federalist 78 (Hamilton) in *The Federalist* at 525 (cited in note 94). For a discussion of the original understanding of the purpose of judicial review as checking federal usurpations of power at the expense of the states, see generally John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311 (1997).

116. *Printz v. United States*, 117 S. Ct. 2365 (1997).

117. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725 (1996); Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994); Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994).

proach that emphasizes that the Constitution creates three branches—executive, legislative, and judicial—which are to exercise independently the three distinct powers—again executive, legislative, and judicial—that lie within their domains. "Functionalists" reject a rigid tripartite structure in favor of a more flexible approach. They provide substantial discretion to the political branches to arrange and share government powers, so long as they do not violate clear textual allocations of power and function to the different branches.[118]

An effort to transfer power outside of the federal government would raise constitutional difficulties under either the formalist or functionalist models. A formalist would argue that the administration of federal law, such as enforcing treaty obligations or conducting criminal investigations, is an executive power that must be exercised by the President or those responsible to him. Any delegation of law enforcement authority to an individual who is not a member of the executive branch and who is not removable by the President, therefore, violates the separation of powers.[119] The Court applied this mode of reasoning to find that the Gramm-Rudman-Hollings deficit reduction law was unconstitutional, because it vested an executive power—the authority to identify required spending reductions—in the Comptroller General, who was found to be controlled by Congress because he was removable by joint resolution.[120] As with the Appointments Clause, the purpose behind centralizing all law enforcement in the President is to render those who exercise government authority accountable to the public, which can hold

118. This division in the scholarly community has mirrored the Supreme Court's inconsistent and sometimes contradictory approach to the separation of powers. For example, in cases such as *INS v. Chadha*, 462 U.S. 919 (1983) and *Bowsher v. Synar*, 478 U.S. 714 (1986), the Court invalidated the legislative veto and the automatic recission device of the Gramm-Rudman-Hollings law because they unconstitutionally vested executive functions outside the executive branch. In cases such as *Morrison v. Olson*, 487 U.S. 654 (1988) and *Mistretta v. United States*, 488 U.S. 361 (1989), however, the Court upheld the constitutionality of the independent counsel and of the Sentencing Guidelines commission in the face of formalist attacks. Although it may be futile to predict these matters, formalism seems to be on the rebound, as demonstrated in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise, Inc.*, 501 U.S. 252 (1991) and *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995).

119. See, e.g., Calabresi and Prakash, 104 Yale L.J. at 593-99 (cited in note 117); see also Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1166 (1992); Lee S. Liberman, Morrison v. Olson: *A Formalist Perspective on Why the Court was Wrong*, 38 Am. U. L. Rev. 313, 353-54 (1989).

120. *Bowsher v. Synar*, 478 U.S. 714 (1986).

the President responsible for his or her actions through the electoral and political process.[121]

A functionalist approach might yield a similar result. In the leading functionalist case, *Morrison v. Olson*,[122] the Court upheld the establishment, within the Justice Department, of an independent counsel who could not be removed by the President except "for good cause." The Court emphasized that the removal restriction was constitutional because it did not "impede the President's ability to perform his constitutional duty" to exercise the executive power and to see that the laws are "faithfully executed."[123] The President continued to enjoy the power to control and supervise the independent counsel, the Court found, because as an executive officer the independent counsel still remained subject to removal. "This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws."[124] Because of this removal authority, even if diluted, the President still "retains ample authority to assure that the counsel is competently performing her statutory responsibilities."[125]

Morrison v. Olson assumes that the separation of powers would not permit the complete insulation of an officer exercising executive authority from presidential removal. Otherwise, the President would be deprived of his ability to control the members of the executive branch and to ensure that the laws are faithfully executed.[126] Furthermore, observing that law enforcement is a core executive function, the *Morrison* Court found that the President's supervision and control over all law enforcement officers had to be maintained in order for the separation of powers to be respected.[127] To be sure, functionalists are willing to accept a dilution of the presidency's removal authority in order to promote other valuable government interests. Even aca-

121. On this point, see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 597 (1984); Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41; Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 Harv. L. Rev. 105 (1988); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1 (1993).

122. 487 U.S. 654 (1988).

123. Id. at 691-92.

124. Id. at 692.

125. Id.

126. Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62, 74-75 (1990).

127. *Morrison*, 487 U.S. at 696.

demic supporters of the functionalist approach, however, likely would object to the complete delegation of authority outside the executive branch, because it would upset the values of balance between the branches, of government accountability, and of government efficiency that they believe the separation of powers promotes.[128]

Indeed, both formalist and functionalist theories would be offended by a transfer of power outside the government because of their shared interest in enhancing accountability in government. Accountability is advanced by the participation (either alone or joint) of the Congress and the President—the two branches that are chosen by the electorate—in the formulation and the implementation of federal policy. Policy is made either by the Congress, which is subject to bicameralism and presentment, or by the President, who is the representative of the national polity—especially in the age of the "plebiscitary presidency."[129] Each branch monitors the other, and, where necessary, checks the other's power through the use of the veto, the purse, or oversight. When the branches conflict with each other, the public remains informed about the government's operations and about whom to hold accountable. These benefits of public lawmaking are lost if authority is vested outside the federal government to individuals who are not responsible to the electorate.

A second constitutional principle that reinforces the Appointments Clause is the non-delegation doctrine. The Supreme Court has held that the Necessary and Proper Clause allows Congress to delegate portions of its enumerated powers to the executive branch.[130] Such delegations often take the form of administrative action or rulemaking in areas in which Congress has provided only general principles. Congress may not delegate such authority, however, unless it has stated an objective, prescribed methods to achieve the objective, and articulated intelligible standards to guide administrative discretion.[131] These requirements attempt to guarantee, at least in a loose sense, that courts will be able to evaluate whether the power is being exercised within the limits of the delegation. Such standards prevent Congress from wholly abdicating its constitutional responsibility

128. Flaherty, 105 Yale L.J. at 1777-87 (cited in note 117).

129. See Theodore J. Lowi, *The Personal President: Power Invested, Promise Unfulfilled* (Cornell U. Press, 1985).

130. *Yakus v. United States*, 321 U.S. 414 (1944).

131. *Mistretta v. United States*, 488 U.S. 361, 371-75 (1988).

to formulate policy and ensure that Congress will remain responsible to the electorate for its policy choices. Although the Court has not invalidated a congressional delegation of authority since the New Deal, the Justices continue to observe that Congress cannot transfer legislative authority without some meaningful standards.[132]

Such concerns are exacerbated when Congress attempts to delegate authority to individuals or entities that lie outside the national government. Congress cannot enforce its standards through the usual legal or political methods when the recipient of the delegated power is not responsible to Congress, the President, or any other federal authority. Neither Congress nor the public has ready means of monitoring the performance of nongovernmental individuals or of measuring their conduct against intelligible standards. Delegation to private parties undermines the public-regarding nature of federal power and risks the capture of government policy by private interests. Fearing this result, the Court in 1935 and 1936 struck down statutes that attempted to give the force of law to regulatory codes and standards promulgated by industry and labor groups.[133] As the Court stated, since "one person may not be entrusted with the power to regulate the business of another, and especially of a competitor,"[134] such delegation "is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."[135]

Like the Appointments Clause, the non-delegation doctrine furthers dual objectives. First, the doctrine ensures that the executive branch will not enjoy complete discretion in the exercise of delegated power. This also prevents Congress from sidestepping the checks on its own lawmaking power by transferring it completely to the President. Second, the non-delegation doctrine enhances accountability in public policymaking by opening up the lawmaking process to public review. By requiring bicameralism and presentment of all laws, the Constitution creates

132. See, e.g., *Mistretta*, 488 U.S. at 371-75.

133. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

134. *Carter*, 298 U.S. at 311.

135. *Schechter Poultry Corp.*, 295 U.S. at 537. Although on only a sporadic basis, the Court has maintained its suspicion of such delegation. In *Larkin v. Grendel's Den*, the Justices invalidated a Massachusetts law that gave a church a veto over liquor licenses for establishments located within 500 feet of the church. 459 U.S. 116 (1982). As one observer has commented, "[t]he judicial hostility to private lawmaking . . . thus represents a persistent theme in American constitutional law." Laurence H. Tribe, *American Constitutional Law* 369 (Foundation Press, 2d ed. 1988).

"institutional inertia" against the initial formulation of policy, which is overcome only by substantial political effort, which itself draws public attention.[136] As Alexander Hamilton wrote in *The Federalist No. 73* in defending the presidential veto: "The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those misteps which proceed from the contagion of some common passion or interest."[137]

Efforts to transfer federal authority to an entity outside the federal government undermine the principles of the unitary executive, of the non-delegation doctrine, and of the public accountability they both seek to promote. If the American people disagree with the manner in which such federal power is exercised, they have no political avenue to influence the individuals who wield that power. This Section has sought to demonstrate that the Appointments Clause requires that individuals who exercise substantial federal authority must undergo appointment pursuant to the Clause. This conclusion is supported both by the Court's decisions interpreting the Clause and by the principles of public accountability and democratic self-government that form the Constitution's structure. Requiring that all who act under color of federal law undergo appointment renders them subject to the control of national officials who ultimately are elected by the people. This ensures that the people will have a voice in the administration of federal law by influencing the selection and removal of their agents.

III

The Constitution's principle of government accountability, and its expression in the Supreme Court's modern reading of the Appointments Clause, create significant difficulties for the implementation of the CWC. Simply put, the CWC requires the vesting of federal power in officials who are not responsible to the American government. The case of the CWC, however, also highlights ambiguities in the Court's interpretation of the Appointments Clause and in the scope of the government accountability principle. This tension between the Appointments Clause and the demands of international multilateral agree-

136. Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 Va. L. Rev. 1, 25-29 (1982).

137. Federalist 73 (Hamilton) in *The Federalist* at 495 (cited in note 94).

ments must be resolved if the nation is to pursue further its efforts to integrate itself into supranational organizations.

A. APPLICATION OF THE APPOINTMENTS CLAUSE TO THE CWC

If the Court were to apply its Appointments Clause test as it has in its recent cases to the CWC, the treaty appears to be constitutionally suspect. First, the CWC grants the power to search American facilities and sites to officials of an international organization who are not appointed pursuant to the Appointments Clause, who are not members of the executive branch, and who are not accountable to the President. Second, the treaty grants the authority to select the locations to be inspected to the Technical Secretariat. Their decisions neither are made by officers of the United States subject to standards established by federal law, nor are they reviewable by an American official appointed by, and accountable to, the President. In other words, the CWC establishes an entity that exercises public authority upon American citizens without the constitutional safeguards designed to preserve government accountability.

To determine whether the CWC inspection teams are subject to the Appointments Clause, we must examine whether they exercise significant federal authority. Upon first glance, it appears that the members of the Technical Secretariat and its inspection teams are exercising some type of federal power. The inspection teams enter the facilities and sites in question and conduct searches. Although American officials may accompany the inspection teams, it is clearly the team members who decide what is to be examined, who walk through a facility and examine its contents, who review documents, who interview facility personnel, and who run tests. Federal law forbids facility operators and private citizens from interfering with the freedom of access of these inspectors; indeed, the targets of the search are required by law to provide their full cooperation. In the domestic context, it is federal law that gives federal law enforcement officials the authority to enter private property to conduct searches.[138] Here, it is also federal law—specifically the CWC and its implementing legislation—that grants a similar authority to the Technical Secretariat's inspection teams. Furthermore, the

138. See, e.g., 18 U.S.C. § 3109 (authorizing "officer" to enter premises if refused entry in order to execute search warrant). It should be noted that § 3109 is limited to entries by officers of the government.

CWC's implementing legislation imposes criminal and civil penalties for violations of the Convention that are discovered by the inspection teams.

In addition to its function as the inspector, the Technical Secretariat also enjoys the authority to choose the locations to be searched. Under the treaty and the implementing legislation, the Technical Secretariat may select any search target without the possibility of review by an American official. Neither the CWC nor the implementing legislation contain any legally-enforceable criteria that can guide or contain the discretion of the Technical Secretariat. The Secretariat need not explain its reasons for demanding a search nor must it evaluate whether some level of probable cause exists to justify an inspection. In fact, some of the searches are to be conducted at random; these searches by their very nature will not be undertaken on the basis of any level of probable cause or articulated suspicion of wrongdoing. No American agency can review or block the Secretariat's decision to search a location within the United States' jurisdiction.

We can see the significance of the authority involved in selecting locations by contrasting the freedom of the Technical Secretariat with the constraints placed upon similar decisions made by domestic law enforcement. Although domestic law enforcement agencies also enjoy the power to conduct searches, this power is subject to three discrete checks. First, the Constitution itself requires that the searches be reasonable, and generally that they be conducted pursuant to a warrant issued upon probable cause, supported by oath or affirmation, and describing with particularity the places, persons, and things to be searched.[139] Second, subject to certain exceptions, the law enforcement agency cannot conduct the search until it receives the warrant from a judicial officer, who has the authority to review the facts and showings of probable cause *de novo* and to refuse to issue a warrant.[140] Third, even if a warrant has been issued and a search conducted, courts may choose to suppress the evidence produced if they find that the search was unconstitutional.[141]

These multiple constraints on the authority of domestic law enforcement to conduct searches reflect the Constitution's con-

139. U.S. Const., Amend IV.
140. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).
141. *Mapp v. Ohio*, 367 U.S. 643 (1961).

cern with the power of the national government in the law enforcement area. Furthermore, the political process imposes an ultimate check upon the ability of law enforcement to conduct searches of private homes and businesses. If the electorate disapproves of the manner in which prosecutors or police are conducting searches, it can remove them (if elected) or the elected representatives who supervise them. The people also can bring these abuses to the attention of Congress, which could hold oversight hearings and use its appropriations power to terminate funding for abusive searches.[142] The Political Safeguards protect not just federalism, but the separation of powers and individual rights as well.[143]

Vesting authority to conduct searches in an international organization may evade this fundamental political check on domestic law enforcement. Members of the Technical Secretariat cannot be held accountable by members of the United States government or by the American electorate. If the Technical Secretariat were to abuse the inspection process, the American public would be unable to exert any control over the officials who are exercising that power. The President has no authority to remove members of the Secretariat, federal law forbids interference with the inspection teams, and Congress cannot use its funding power to curb the Secretariat's activities. This result undermines the basic purposes of the Appointments Clause, as identified by the Supreme Court in *Weiss*: to guarantee that the people have a voice in the appointment of those officials who wield federal powers, and to allow the public to hold its elected representatives accountable for "an ill appointment."[144]

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142. See Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 281-313 (U. Chicago Press, 1980) (describing methods available to Congress to check executive branch).

143. I am not arguing, however, that these political safeguards are exclusive. Instead, as I argue elsewhere, the political process should serve as a primary obstacle to unconstitutional government action, to be supplemented by judicial review. See Yoo, 70 S. Cal. L. Rev. 1311 (cited in note 115).

144. Federalist 77 (Hamilton) in *The Federalist* at 517 (cited in note 94).

In fact, some of the concerns raised by critics of the CWC, such as the theft of trade secrets in violation of the Fifth Amendment or the violation of the rights of privacy secured by the Fourth Amendment, see Rotunda, 15 Const. Comm. at 149-59 (cited in note 6), stem from the failure to observe the principle of government accountability. For example, the Takings Clause guarantees that if the government takes property, it must pay just compensation—a rule that applies to intellectual property as well as to real property. See, e.g., *Dow Chemical v. United States*, 476 U.S. 227, 232 (1986); *Ruckelhaus v. Monsanto*, 467 U.S. 986, 1003-04 (1984). If international inspectors, however, steal confidential business information, aggrieved American parties will be unable to seek a monetary remedy because members of the Technical Secretariat are not considered to be officials of the federal government. Such inspectors would not be liable under either

B. WHO IS SUBJECT TO THE APPOINTMENTS CLAUSE

This analysis is subject to two criticisms of the Court's approach to the Appointments Clause, one focusing on who is an appointee and the other on the nature of significant federal power. First, one might argue that the Court has applied its test only in situations when the individual involved was already an official of the federal government. Under this interpretation, the only question in the Court's cases was whether the official had to undergo appointment pursuant to Article II, Section 2, or whether he or she could exercise federal authority without an appointment of constitutional dimension.[145] Delegations of authority to non-federal actors, therefore, do not implicate the Appointments Clause because these individuals are not already members of the federal government.

This theory, however, makes little sense of the Court's cases concerning the Appointments Clause and the executive power. It would allow Congress and the federal government to escape the requirements of the Clause simply by vesting authority in private individuals, rather than in appointees who are already members of the federal government. Furthermore, it would allow Congress to fragment the authority of the unitary Presidency by transferring power to individuals beyond the control of the executive branch. For example, *Buckley v. Valeo*[146] apparently could have been avoided if Congress only had vested the Federal Election Commission's authority in private individuals, such as members of Common Cause, rather than in officers of Congress. Or, to take another example, *Bowsher v. Sy-*

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the Federal Tort Claims Act, which applies only to employees of the federal government, Federal Torts Claims Act, 28 U.S.C. § 2671 (defining "federal agency" and "employee of the government" for purposes of tort liability), or under state common law, because of their international immunity under the CWC. The exclusionary rule would prove of little use if the plaintiff was never brought up on criminal charges. This result, in fact, may be a good reason to replace the exclusionary rule with a damages action for Fourth Amendment violations in this context. Cf. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev.757, 811-16 (1994). It is even uncertain if evidence provided by non-governmental actors in this context could be suppressed. See, e.g., *United States v. Mount*, 757 F.2d 1315 (D.C. Cir. 1985); Wayne R. LaFave, 1 *Search and Seizure: A Treatise on the Fourth Amendment* §1.8(g) at 213-19 (West, 2d ed. 1987) (discussing if Fourth Amendment applies to searches by foreign police).

145. This was the argument raised by the U.S. Department of Justice's Office of Legal Counsel in response to claims that the CWC presented Appointments Clause problems. Constitutional Implications of the Chemical Weapons Convention: Hearings Before the Subcommittee on the Constitution, Federalism and Property Rights of the Committee on the Judiciary, S. Hrg. 104-859, 104th Cong., 2d Sess., at 81-95 (1996).

146. 424 U.S. 1 (1976).

nar[147] would have been unnecessary if only Congress had thought of vesting the authority to identify automatic spending cuts in the Brookings Institution, rather than in the Comptroller General.[148] Military court-martials would not be subject to constitutional challenges if Congress only had given the authority to conduct court-martials to the American Bar Association, rather than to civilian employees of the federal government. Under the Court's reasoning, vesting such power in private individuals completely outside of the control of the executive branch and of the national government would create even more severe constitutional difficulties than those that actually occurred in these cases.[149]

A critic of the Court's Appointments Clause jurisprudence, however, might respond by pointing to the example of state enforcement of federal law. Almost from the beginning of the Republic, the federal government has turned to the states for assistance in the implementation of federal programs and in the enforcement of federal criminal law.[150] If these state governors and officials are not appointed as officers of the United States,

147. 478 U.S. 714 (1986).

148. See Krent, 85 Nw. U. L. Rev. at 79 (cited in note 126).

149. In defending the constitutionality of the CWC, the Justice Department produced a memo that attempted to narrow the natural interpretation of *Buckley* and its progeny. Hearings on the Constitutional Implications of the Chemical Weapons Convention at 82-94 (cited in note 145). The Clinton administration argued that the Appointments Clause does not apply to an individual unless that person already occupies a position of employment within the federal government. Contrary to *Buckley*, the administration believes that the Appointments Clause analysis ought to be decoupled from the question of what authority is vested in the official. For support, OLC resuscitated three cases: *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15.747); *United States v. Germaine*, 99 U.S. 508 (1879), and *Auffmordt v. Hedden*, 137 U.S. 310 (1890).

These cases provide little support for the administration's interpretation. First, they only discuss the difference between officers of the United States on the one hand, and employees of the United States on the other, rather than the question of whether appointment must accompany the delegation of federal power. Second, none of these cases involved situations in which a federal statute delegated substantial authority and discretion to the official in question. It is quite clear that the individuals in *Germaine* and *Auffmordt* were acting in only a ministerial or advisory capacity, and that they exercised no independent authority or discretion under federal law. In this respect, contrary to the views of the OLC memo, *Germaine* and *Auffmordt* are quite consistent with the reading of *Buckley* advanced by this paper. Indeed, *United States v. Maurice*, which was decided by Chief Justice John Marshall while sitting as a circuit judge, supports the principle articulated by *Buckley*. *Maurice*, 26 F. Cas. at 1214 ("If, then, the agent of fortifications be an officer of the United States, in the sense in which that term is used in the constitution, his office ought to be established by law, and cannot be considered as having been established by the acts empowering the president, generally, to cause fortifications to be constructed.").

150. Krent, 82 Nw. U. L. Rev. at 80-84 (cited in note 126) (surveying various congressional statutes and practices).

and their enforcement of federal law is not unconstitutional, then it must be possible to delegate federal authority outside of both the executive branch and the national government.[151] Some supporters of a functionalist approach to the separation of powers have relied upon this line of reasoning to argue that the President need not have complete authority over the execution of all federal law.[152] If, for example, the President cannot remove state governors or supervise their enforcement of federal law, then the Constitution does not require that the President possess similar power over everyone who exercises federal authority.

It should be noted at the outset that delegating federal authority to state officials does not raise the same accountability concerns involved with the CWC. State officials are still responsible to the people of a state; indeed, because of their closer proximity to the electorate, state officials may be even more responsive to their constituents than federal officials.[153] In the context of joint federal-state programs, delegating authority to state governors actually may buttress the purposes of the Appointments Clause, because it provides the people with two sets of representatives to hold responsible. So long as the federal government is not "commandeering" state officials and is not hiding its own responsibility for certain decisions,[154] state and federal cooperation may have the effect of enhancing democratic self-government, rather than, as in the case of transferring federal power to non-governmental officials, undermining it.

State officials, moreover, may not even implicate the Appointments Clause because they may not be "exercising significant authority pursuant to the laws of the United States."[155] State governors exercise authority pursuant to their own office as state officials rather than pursuant to any federal office. Federal law may not add to their powers in any way; their actions only have the result of achieving federal policy goals, but may not depend on federal law for their legal force. For example,

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151. See, e.g., Memorandum for the General Counsels of the Federal Government from Assistant Attorney General Walter Dellinger, Re: The Constitutional Separation of Powers between the President and Congress (May 7, 1996) (on file with author).

152. See, e.g., Lessig and Sunstein, 94 Colum. L. Rev. 19, 31, 69 (cited in note 117).

153. See, e.g., Yoo, 70 S. Cal. L. Rev. 1311 (cited in note 115); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493-1500 (1987); David L. Shapiro, *Federalism: A Dialogue* 58-106 (Northwestern U. Press, 1995).

154. *Printz v. United States*, 117 S. Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1992).

155. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

when a state law enforcement officer enters a residence to conduct a search for illegal drugs, he must rely upon the powers granted to him by the state for the authority to enter the residence, even if he happens to discover evidence that is later used in a federal prosecution. Otherwise, Congress could grant authority to any individual, even a private citizens, to conduct searches and investigations even though he is not accountable to the President or any other elected official.[156]

C. SIGNIFICANT FEDERAL AUTHORITY

A more difficult problem is presented in determining when an exercise of federal power implicates the Appointments Clause. The Court's case law suggests that every exercise of federal power must be undertaken by a federal official, and when that power is substantial, it must be undertaken by an official who has received appointment pursuant to Article II, Section 2. This approach, however, provides insufficient guidance in the face of the complex nature and forms of federal power that exist today. Extending the Court's approach to the Appointments Clause to harder cases may suggest ways in which the CWC might be implemented consistent with constitutional requirements.

First, every action and decision taken by individuals involved with the federal government need not constitute the exercise of significant federal authority. Members of government advisory commissions or task forces, for example, do not appear to exercise federal authority sufficient to require appointment as Officers of the United States, even though their recommendations might exert a significant influence on federal policy.[157] Ac-

156. This appears to be the reasoning underlying the Court's discussion of the appointment power in *Printz v. United States*, 117 S. Ct. 2365 (1997). In that case, the Court concluded that Congress could not force state executives to enforce federal law because, in part, to do so would place federal law enforcement outside the control of the President. As Justice Scalia wrote for the Court: "The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws." Id. at 2378 (citations and footnote omitted). The Court appeared to believe that state officials might be able to enforce federal law voluntarily, but that Congress could not actually vest authority in state officials to do so because of the threat to executive power. Id. at 2378 n.12. If that is the case, then the authority of state executives must derive from their own office, rather than from any power to exercise federal authority.

157. See, e.g., *Association of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (discussing whether First Lady and health care task force were federal officers or employees subject to the Federal Advisory Committee Act).

tions by federal employees also do not involve substantial exercises of federal power because they are acting under the direction and supervision of an appointed officer; otherwise, by definition, they would require appointment as federal officers. Moreover, not every action by a proprietary government entity, such as Amtrak, necessarily qualifies as the exercise of significant federal authority, although its conduct is governed by the Bill of Rights and its directors are federal appointees.[158]

Second, every exercise of federal power may not demand the involvement of a federal official. Our legal system, for example, sometimes tolerates the activity of private parties who, through their private actions, advance federal interests. For example, when private plaintiffs enforce their rights under federal law in a federal court, the government can be said to have vested some amount of power in private parties. We might even characterize their actions as enforcing the public interest or the public policy of the United States. Nonetheless, we would not think of private plaintiffs as exercising such significant authority under the laws of the United States that they would qualify as Officers of the United States. Instead, we consider the plaintiffs as acting on their own accord as private citizens, even though they exercise the discretion of whether to bring suit and how to conduct the litigation.[159]

This issue also arises when non-federal actors conduct searches and provide evidence that is used in a subsequent federal prosecution. In *Burdeau v. McDowell*, for example, the Court held that the Fourth Amendment restricts only government searches and not searches conducted by private parties.[160] Although a number of exceptions exist to the rule, such as joint searches involving police participation,[161] *Burdeau* permits pri-

158. See, e.g., *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995) (Amtrak subject to the First Amendment). Six of Amtrak's eight directors are appointed by the President, with four of them receiving the advice and consent of the Senate. In concluding that Amtrak should be subject to constitutional restrictions, the Court observed that Amtrak "is not merely in the temporary control of the Government (as a private corporation whose stock comes into federal ownership might be); it is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees." Id. at 398.

159. But cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of racially-restrictive covenants under state common law constitutes state action under the Fourteenth Amendment).

160. 256 U.S. 465 (1921).

161. See, e.g., *United States v. Andrini*, 685 F.2d 1094 (9th Cir. 1982); *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966); LaFave, 1 *Search and Seizure* at §1.8(b) at 178-92 (cited in note 144) (discussing and collecting cases).

vate parties to provide evidence to federal prosecutors (although state officials may not do so free from the constraints of the Fourth Amendment).[162] Thus, searches by common carriers, such as airlines or package services, do not constitute the exercise of government authority, because they are private parties relying upon their common law rights to inspect passengers or goods that they transport.[163] Similarly, searches by public utilities to monitor the condition of equipment do not constitute government action, because the inspections are undertaken pursuant to common law or contractual rights.[164] Finally, courts have held that evidence supplied by foreign police produced by searches on foreign soil do not fall within Fourth Amendment restraints, unless American officials participate in the search.[165]

These cases at the outer edges of federal authority provide examples of the arguable exercise of governmental power that do not appear to rise to the level where they must be carried out by Officers of the United States. For purposes of this paper, the question remains whether the powers and activities of the CWC's Technical Secretariat are more similar to these examples than to those addressed by the Court in *Buckley* and its progeny. Two factors emerge when we attempt to account for these situations within the framework established by the Court's Appointments Clause case law, which may suggest ways to harmonize the CWC's implementation with the Constitution's principle of government accountability. First, we can draw a distinction between situations in which an entity has been given authority, under federal law, to affect the rights of third parties, and those in which it has not.

For example, a federal advisory committee or task force generally neither acts upon the constitutional rights and duties of private parties nor has the power to force private parties to obey their commands. Here, federal law requires private persons to allow the CWC inspection teams onto their property, re-

162. The Court abolished the so-called "silver platter" doctrine in 1960. *Elkins v. United States*, 364 U.S. 206 (1960) (exclusionary rule includes evidence supplied by state search which, if conducted by federal officials, would violate Fourth Amendment).

163. See, e.g., *United States v. Edwards*, 602 F.2d 458 (1st Cir. 1979); *United States v. Pryba*, 502 F.2d 391 (D.C. Cir. 1974). If common carriers are acting pursuant to government orders, however, then they may be considered to be government actors. See, e.g., *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

164. *Perez v. Autoridad de Energia Electrica de Puerto Rico*, 741 F. Supp. 23 (D. Puerto Rico 1990).

165. See, e.g., *United States v. Mitro*, 880 F.2d 1480 (1st Cir. 1989); *United States v. LaChapelle*, 869 F.2d 488 (9th Cir. 1989); *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986); *United States v. Mount*, 757 F.2d 1315 (D.C. Cir. 1985).

quires cooperation with the search, and forbids interference with their movements and activities. In this respect, members of the Technical Secretariat wield power on a par with that enjoyed by federal law enforcement officers. Unlike the example of utilities or common carriers, the inspection teams' authority to search does not derive from any common law or contractual rights that arise because of a service that they provide to facility owners. Instead, the Technical Secretariat enjoys authority that Congress has delegated to it by legislation—in other words, they are acting under color of federal law.[166] Limiting the reach of the Appointments Clause in this way—by applying it only to officials who are vested with discretionary authority to affect the legal rights and duties of private parties—is consistent with the Court's case law and helps explain examples that do not appear to require the involvement of a federal officer.

Congress could pull the CWC away from the reach of the Appointments Clause by abandoning the decision to vest inspection teams with the official authority to conduct searches under color of federal law. Instead, the CWC implementing legislation could attempt to alter the common law rights of property owners such that they could not exercise their power of exclusion upon the inspection teams. While such an action might lie within Congress's powers under the Commerce Clause, the redistribution of property rights on such a broad scale might present substantial Takings Clause problems. Alternatively, Congress could create a cause of action that would allow the Technical Secretariat to sue for the right to enter property because of the harm posed by the suspected presence of chemical weapons. This scheme, however, would deny the speed and secrecy demanded by the CWC verification mechanism. A better approach would require the Secretariat to enter into voluntary agreements with every facility that falls within the CWC inspection categories, in order to gain their consent to a search. Relying upon direct CWC-facility agreements might solve the Appointments Clause problem, because the authority for a search would derive from a contract rather than from federal law. This alternative, however, might present difficulties for the execution of challenge searches, which by their nature might include nonconsenting facilities.

166. Cf. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (finding no state action in decision by school, funded almost exclusively by the state, because of absence of delegated state authority).

Second, we might explain the Appointments Clause's "significant federal authority" prong as extending only to situations involving a core government function. In other words, the Clause could be read to require appointment when a federal official is exercising his or her authority in an area that is considered to be a central government activity, but not when an official is engaged in an activity that falls outside our conception of such functions. Thus, the federal government's supervision of Amtrak may not implicate the Appointments Clause, because operating a railroad may not lie at the core of a government function, but rather constitutes the participation of government in a proprietary activity. To be sure, as the Court has suggested in *Garcia v. San Antonio Metro. Transit Authority*,[167] it is difficult to draw an exact line between "traditional" government functions and propriety functions. Nonetheless, the Court in more recent cases has displayed a willingness to identify areas of government authority at the state level so significant that they must remain free from federal control.[168] *Printz v. United States* might be read, for example, as assuming that law enforcement is such a core government function that the federal government cannot commandeer a state's police force for federal purposes. Delegating the authority to enter and search private property for purposes of discovering violations of the criminal laws may represent a similar intrusion into a core government function.

At a minimum, government functions that only federal officers may perform ought to include areas of authority that the Constitution allocates to the executive branch. Enforcing this principle would address the Court's concern in its Appointments Clause cases about congressional efforts to strip power from the unitary executive, and it would satisfy the Constitution's requirement of government accountability. Thus, the power to engage in military hostilities must rest solely in the federal government's hands, both by virtue of the President's Article II, Section 2 Commander-in-Chief power and by the Article I, Section 10 bar on state war-making.[169] Similarly, the federal government could not delegate the authority to negotiate treaties or to appoint judges to private persons, although certainly the

167. 469 U.S. 528, 543-46 (1985).

168. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *New York v. United States*, 505 U.S. 144 (1992); *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996); *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997); *Printz v. United States*, 117 S. Ct. 2365 (1997); see also Yoo, 70 S. Cal. L. Rev. 1311 (cited in note 115).

169. See Yoo, 84 Cal. L. Rev. at 252-56 (cited in note 90).

President could seek advice on such matters from non-governmental entities or individuals.[170]

These considerations indicate that the CWC implicates the executive branch's control over the government function of law enforcement. As the Court observed in *Morrison v. Olson*, control over federal law enforcement and prosecution is linked to the President's executive power and his obligation to "take Care that the Laws be faithfully executed." Because prosecution and law enforcement have been functions typically and historically undertaken by the executive branch, Congress could impose only a limited good cause restriction on the President's freedom to remove the independent prosecutor.[171] In its state action cases, the Court also has recognized that law enforcement is a government function that cannot be delegated to private individuals free of the restrictions of the Fourteenth Amendment.[172] The Technical Secretariat's statutory authority to enter and search the premises of American facilities in search of breaches of the CWC, for which criminal sanctions would attach, appears to be the functional equivalent of the power of federal officers who have the responsibility to investigate violations of federal law.

A description of the problem suggest a possible cure. If the core government function here centers on law enforcement and prosecution, then the CWC may be harmonized with the Constitution by detaching its searches from the coercive power of the state. First, implementing legislation could place more reliance for the legal authority for a CWC inspection upon the consent of a facility owner, rather than upon a statutory requirement that all owners must permit members of the Technical Secretariat upon their property. Second, the Technical Secretariat still might be permitted to search under color of federal law, but only if any incriminating evidence found could not be used in a prosecution against the facility owner. Such evidence could be

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170. *Association of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993); *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989).

171. *Morrison v. Olson*, 487 U.S. 654, 691 (1988) ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."). But see Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent*, 99 Yale L.J. 1069 (1990).

172. *Marsh v. Alabama*, 326 U.S. 501 (1946); cf. *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953). See also Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 Wash. U. L.Q. 757.

used, of course, to demonstrate a breach of U.S. treaty obligations under the CWC, but allowing the Technical Secretariat to supply evidence, obtained on American soil under color of federal law, to prosecute an American citizen, would represent the performance of a public function allocated solely to the federal government.[173] De-coupling the verification purpose of CWC inspections for international treaty purposes from the purpose of achieving domestic law enforcement and prosecution objectives, therefore, could alleviate the objection to the Convention raised by the Court's Appointments Clause doctrine.

CONCLUSION

This Essay has sought to analyze a potential stumbling block of constitutional proportions to the multilateral verification mechanism of the Chemical Weapons Convention. It has described the Supreme Court's growing jurisprudence in the Appointments Clause area, and it has linked the doctrine to the principles of government accountability that inform the constitutional design. Reconciling the constitutional requirement of government accountability with the demands of multilateral treaty obligations will require the adjustment of either the Court's approach to the Appointments Clause or the implementation of the Convention.

How the problem addressed in this paper is resolved will have a significant impact on the nation's ability to conduct its foreign policy in the future. The CWC's reliance upon an international organization, rather than on state parties, to conduct verification will serve as a model for future multilateral agreements. It is probable that future multilateral arms control agreements will contain similar provisions for intrusive on-site verification by international inspectors.[174] Such verification mechanisms are likely to spread beyond the arms control area to other international regulatory treaties, particularly those con-

173. Cf. *Elkins v. United States*, 364 U.S. 206 (1960) (abolishing "silver platter" doctrine that allowed federal courts to receive evidence from state law enforcement officials obtained in violation of Fourth Amendment standards); *United States v. Mount*, 757 F.2d 1315 (D.C. Cir. 1985) (permitting introduction in federal court of evidence obtained by foreign police on foreign soil pursuant to foreign authorization); LaFave, 1 *Search and Seizure* at §1.8(g) at 213-19 (cited in note 144) (discussing cases).

174. Efforts to renegotiate the Biological Weapons Convention have included calls for such verification mechanisms. Chayes and Chayes, *New Sovereignty* at 179 (cited in note 42).

cerning the environment.[175] As with the CWC, the objective is to ensure compliance not just by national governments, but also by private parties within the state. As Abram and Antonia Chayes have observed, while "[s]uch treaties are formally among states, and the obligations are cast as state obligations . . . [t]he real object of the treaty . . . is not to affect state behavior but to regulate the activities of individuals and private entities."[176] The future also may bring on-site verification mechanisms in the context of international labor standards and of human rights, or any other area in which an international agreement seeks to regulate private activity. As the United States decides whether to further this process, it will need to address how the Constitution will allow it to accept the international commitments of a new multilateral world.

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175. If, for example, nations wish to reduce the emission of a certain substance, an international organization might be created to monitor whether industrial facilities and businesses are violating specified limits on the production and use of that substance. Both the Montreal Protocol on Substances that Deplete the Ozone Layer, which seeks to phase-out the use of CFCs, and the Convention on Long-Range Transboundary Air Pollution, which imposes limits on the emission of sulphur dioxide and nitrogen dioxide, fit within the model of international regulatory agreements that seek to monitor the use of certain substances by domestic industries. See, e.g., David D. Caron, *Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Law*, 14 Hastings Intl. and Comp. L. Rev. 755 (1991) (describing verification regime for Montreal Protocol). One can view the verification procedures of the International Convention for the Regulation of Whaling and the Antarctic Treaty as further steps toward the use of intrusive on-site inspections in the context of international regulatory agreements. On the regulation of whaling, see Patricia Birnie, ed., *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale Watching* (Oceana Publications, 1985). For recent developments, see David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 Am. J. Intl. L. 154 (1995). On Antarctica, see Christopher C. Joyner and Sudhir K. Chopra, eds., *The Antarctic Legal Regime* (Martinus Nijhoff Publishers, 1988).

176. Chayes and Chayes, *New Sovereignty* at 14 (cited in note 42).