

SYMPOSIUM ARTICLES

WILLIAM REHNQUIST, THE SEPARATION OF POWERS, AND THE RIDDLE OF THE SPHINX

Jay S. Bybee* and Tuan N. Samahon**

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INTRODUCTION

William Rehnquist’s tenure on the Supreme Court presents a Sphinx-like riddle for students of the separation of powers: “What animal is that which in

* Circuit Judge, United States Court of Appeals for the Ninth Circuit; Senior Fellow in Constitutional Law, University of Nevada, Las Vegas.

** Associate Professor of Law, University of Nevada, Las Vegas. Professor Samahon is a former law clerk to Judge Bybee.

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the morning goes on four, at noon on two, and in the evening on three feet?"¹ One might well answer: "Rehnquist's separation of powers jurisprudence, as it is a difficult creature to characterize, arguably evolving over time."² In adolescence, it appeared an originalist on all fours,³ in manhood it walked erect, a Byron White functionalist,⁴ and in old age . . . well, perhaps the Sphinx might just devour one after all! Indeed, it is difficult to identify a principle unifying the late Chief Justice's separation of powers cases.

And how does one explain the absence of any separation of powers revolution to accompany federalism's rebirth?⁵ No separation of powers opinion ever announced, "We start with first principles."⁶ Unlike federalism, well-favored and judicially policed by the Federalism Five, the separation of powers has arguably been neglected (salutarily, some might say). But that neglect, salutary or not, has been inconsistent. Rehnquist did police (or attempt to police) the horizontal "parchment barriers" of separation from time to time.⁷ What principle explains Rehnquist's philosophy of the separation of powers?

To explain the pattern of his cases, we resort to Rehnquist's first principles

1. 1 T. T. TIMAYENIS, A HISTORY OF GREECE: FROM THE EARLIEST TIMES TO THE PRESENT 14 (1883).

2. Thus, it has been possible for commentators to describe Rehnquist both as an "advocate of the strict separation of the powers of the federal government," SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 21 (1989), and, like Justice Byron White, as adhering to a "more flexible, less rigid approach to the separation of powers." Theodore B. Olson, *Separation of Powers and the Supreme Court: Implications and Possible Trends*, 6 ADMIN. L.J. AM. U. 261, 276 (1992); see also David C. Vladeck & Alan B. Morrison, *The Roles, Rights, and Responsibilities of the Executive Branch*, in THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 178 (Herman Schwartz ed., 2002) ("[T]he Rehnquist Court will not usually tread on power-sharing arrangements between the branches.").

3. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (joining the majority); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 543 (1981) (dissenting on nondelegation grounds); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 671 (1980) (concurring separately, suggesting nondelegation doctrine ought to apply); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (authoring the separation of powers analysis that struck down the commission); see also *infra* note 104 (discussing proof that Rehnquist was the author of Part IV.B of *Buckley*).

4. See, e.g., *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991) (joining Justice White's dissent); *Mistretta v. United States*, 488 U.S. 361 (1989) (joining the majority); *Morrison v. Olson*, 487 U.S. 654 (1988) (authoring the majority opinion).

5. It is debatable whether or not there was a separation of powers revolution, but the ascendant view favors the conclusion of "no revolution." Compare Steven G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of Clinton v. City of New York*, 99 NW. U. L. REV. 77, 85 (2004) (naming *Clinton v. City of New York* as "the hidden separation of powers blockbuster of the Rehnquist years"), with M. Elizabeth Magill, *The Revolution that Wasn't*, 99 NW. U. L. REV. 47 (2004) (concluding there was no revolution), and Eric R. Claeys, *Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts*, 21 CONST. COMMENT. 405, 407 (2004) (concluding no revolution).

6. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (so announcing for federalism).

7. See THE FEDERALIST NO. 48 (James Madison) (introducing the "parchment barriers" concept); see also cases cited in *supra* note 3 (demonstrating Rehnquist's lack of policing).

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and our own primary research to suggest Rehnquist was consistent at the most fundamental level: From his days as a law clerk to Justice Robert Jackson during *Youngstown* to his service as the head of the Justice Department's Office of Legal Counsel (OLC) through his tenure on the Supreme Court, Rehnquist's separation of powers jurisprudence has been marked by an inductive, common law approach to constitutional adjudication. It is an approach that eschews categorical, a priori bright-line rules but favors precedent and the lessons of history.⁸ When Rehnquist believes the constitutional text speaks clearly, he follows its specific commands.⁹ Absent such clarity, though, he would defer to Congress, "the dominant balancer of public policy in our democratic society," and not the courts.¹⁰ By that same token, Rehnquist enforced the separation of powers by forcing Congress to take responsibility for its duty to make public policy and not impermissibly pass the buck to the executive branch or to the courts.

I. THE ROOTS OF REHNQUIST'S SEPARATION OF POWERS JURISPRUDENCE

In this Part, we briefly assess the importance of *Youngstown*, decided during Rehnquist's clerkship for Justice Jackson, in the development of Rehnquist's views on the separation of powers. Then, we consider how Rehnquist approached the separation of powers during his tenure as Assistant Attorney General in the Office of Legal Counsel in order to evaluate whether his views have remained constant, such that a consistent principle might explain the pattern of his judicial decisions.

A. *Rehnquist as a Law Clerk for Justice Robert Jackson*

Rehnquist's first professional brush with the separation of powers came soon after the start of his legal career as a junior law clerk to Justice Robert Jackson. It was an auspicious start. Rehnquist began his clerkship in February 1952, just months prior to the famous *Youngstown* separation of powers litigation at the Supreme Court. In June 1950, North Korean troops had invaded South Korea, and the U.N. Security Council had authorized the use of force to

8. See, e.g., *Judicial Reform Act: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 91st Cong. 91 (1969) (statement of William H. Rehnquist, Assistant Attorney General, Department of Justice) ("[P]recedent is entitled to a great deal of weight, particularly if you take the view that a page of history is worth a good deal in construing the Constitution.").

9. See R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 20 PEPP. L. REV. 531, 576 (1993) (characterizing such positivist theory as "the Holmesian approach to separation of powers"). Professor Kelso argues that Rehnquist took at least a moderate Holmesian approach to separation of powers. *Id.* at 579.

10. *Id.* at 578.

repel the invaders.¹¹ President Harry Truman had declared a national emergency and ordered American troops into combat in a de facto war.¹² In April 1952, an unresolved labor dispute in the American steel industry risked widespread strikes and the attendant possibility of shortages in the nation's wartime steel supply. Significantly, Truman declined to invoke the Taft-Hartley Act and its procedures for resolving the labor dispute. Instead, Truman issued an executive order authorizing the Secretary of Commerce to seize the privately owned and operated steel mills to assure continued steel production.¹³ He predicated the seizure order on his aggregate power as Commander in Chief of the armed forces and his inherent power as executive.

The steel industry promptly challenged Truman's order in federal district court, seeking a preliminary injunction against the seizure as a violation of the separation of powers—an executive acting *ultra vires*. Judge Pine rejected the government's broad assertion of executive power and granted the steel industry its request for a preliminary injunction.¹⁴ The parties' cross-appeals quickly progressed to the Supreme Court. On May 16, 1952, the Court voted 6-3 in conference to reject Truman's claim of authority to seize the steel mills.¹⁵ As Justice Jackson described the vote to his then-law clerks William Rehnquist and C. George Niebank, Jr., "Well boys, the President got licked."¹⁶

Although Justice Black authored the *Youngstown* majority opinion for the Court,¹⁷ it is Justice Jackson's concurrence that has endured, providing a framework for separation of powers analysis in executive/congressional tugs-of-war. It is to this concurrence we look for any possible abiding influence on the law clerk William Rehnquist.

Jackson laid out three "somewhat over-simplified" groups of potential executive and congressional disputes.¹⁸ In category one, the President acts at the apex of his power when he is acting "pursuant to an express or implied authorization of Congress"—i.e., all the power Congress can delegate to the President plus the power possessed by the President "in his own right."¹⁹ In

11. Complaint of Aggression upon the Republic of Korea, S.C. Res. 83, U.N. Doc. S/RES/1511 (June 27, 1950).

12. Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 19, 1950).

13. Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 10, 1952).

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 577 (D.D.C. 1952).

15. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

16. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 186 (rev. ed. 2001).

17. Rehnquist later opined that the separately concurring Justices, even though they joined Black's opinion, did not fully subscribe to it:

There simply does not seem to have been enough time for the negotiation that often goes on in order to enable those who disagree with minor parts of a proposed Court opinion, but not with the result, to effect some sort of compromise that will enable them to join the principal opinion.

Id. at 187.

18. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

19. *Id.*

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category-two conflicts, the President acts without a congressional grant or denial of power. This category requires the President to rely on his own independent power. It is a shadow land, Jackson's "zone of twilight."²⁰ In category-three conflicts, Congress has expressed or implied its will, but the President acts incompatibly.²¹ Here, the President appears to be at the nadir of his power, Jackson's "lowest ebb" of presidential power, and must rely on his own authority "minus any constitutional powers of Congress over the matter."²²

Jackson's concurrence placed the mill seizure in the least favored camp, category three.²³ Congress had ordained procedures by which the Commander in Chief could resolve labor disputes and effect seizures of the steel mills, such as the Taft-Hartley Act, but the congressionally appointed procedures had to be followed. Truman's order was incompatible with Congress's expressed will, and his power as Commander in Chief did not give him independent authority to seize the mills.

What effect did his participation in this case have on the young William Rehnquist's views of the separation of powers? It has been suggested that *Youngstown* may have "cemented" in the young Rehnquist "a pro-Congress bias in separation of powers cases" that might explain his later votes upholding creative power-sharing and delegating arrangements in *Morrison v. Olson* and *Mistretta*.²⁴ Doubtless, the experience of clerking for Jackson during *Youngstown* left an impression on Rehnquist. He often wrote and spoke about the historic case he witnessed unfold,²⁵ and he later invoked Jackson's concurrence as the author of the Court's opinion in *Dames & Moore*,²⁶ elevating its authority from merely that of a concurrence, even if he, quite arguably, substantially revised Jackson's analysis in the process.²⁷

Yet, there are good reasons to doubt the suggestion that *Youngstown* cemented "a pro-Congress bias" in Rehnquist. First, Jackson's concurrence is best understood as a mode of analysis, not a precedent dictating a pro-Congress outcome whenever invoked. By the concurrence's own terms, the three *Youngstown* categories are "somewhat over-simplified" classes of conflict between the President and Congress. As one progresses from one category to the next, the President shoulders an increasing burden to come forward and defend his claim that Congress, acting pursuant to its enumerated powers, is treading on the President's independent, substantive powers (e.g., the Commander-in-Chief power). To be sure, category three means the President

20. *Id.* at 637.

21. *Id.*

22. *Id.*

23. *Id.* at 640.

24. Calabresi, *supra* note 5, at 83-84.

25. See, e.g., REHNQUIST, *supra* note 16, at 186 (describing the *Youngstown* litigation).

26. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

27. See *infra* note 101 and accompanying text.

carries a heavy burden to prevail against Congress. But it was not for executive power what strict scrutiny was for equal protection jurisprudence: “‘strict’ in theory and fatal in fact.”²⁸ *Youngstown* left an impression on Rehnquist, as it was a landmark separation of powers decision. It did so, however, as a mode of analysis and not an outcome.²⁹

Second, even if one conceived of Jackson’s concurrence as a set of outcomes determined by categorization rather than a mode of analysis, the documentary record casts doubt on the claim that it cemented in Rehnquist a pro-Congress bias. To begin, Jackson’s law clerks had very little hand in drafting his opinions generally and little role in preparing the *Youngstown* concurrence specifically.³⁰ Thus, the *Youngstown* concurrence represented Jackson’s, not Rehnquist’s, work product. In fact, archival materials indicate law clerk Rehnquist suggested alternate *non*-separation of powers grounds on which *Youngstown* might have been resolved. In an apparently unsolicited memorandum to Justice Jackson, William Rehnquist and his co-clerk proposed they undertake additional research for *Youngstown*. Interestingly, all the issues proposed non-separation of powers grounds for resolving the appeal—e.g., by balancing equities on the preliminary injunction, etc.³¹

To be sure, the 1952 clerk memorandum, standing by itself, would be a thin reed to support a claim that Rehnquist had doubts about resolving the separation of powers question in *Youngstown* against the President. It might merely suggest Rehnquist favored the parsimonious adjudication of constitutional cases by resort to avoidance. The memorandum, however, does not stand by itself. In his book *The Supreme Court*, Rehnquist, without mentioning his prior memorandum, expressed doubts about how *Youngstown*

28. Cf. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 & n.36 (1978) (Brennan, J., concurring in part and dissenting in part) (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

29. See *infra* text accompanying notes 96-103.

30. See, e.g., REHNQUIST, *supra* note 16, at 188 (recalling that Jackson showed Rehnquist his *Youngstown* concurrence “in draft form . . . and asked [him] to find citations for some of the propositions it contained, but that was about the extent of our participation”); DVD: Roundtable Discussion with Law Clerks of Justice Robert H. Jackson (Robert H. Jackson Center 2003) (on file with authors) [hereinafter DVD Roundtable Discussion] (noting it was “quite rare” for Jackson to ask a law clerk to do legal research, but law clerks “wound up writing most of the footnotes”); see also William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74 (stating that Justice Jackson “neither needed nor used ghost writers. The great majority of opinions which he wrote were drafted originally by him and submitted to his clerks for their criticism and suggestions”).

31. Memorandum from Cornelius George Niebank, Jr., and William H. Rehnquist to Justice Robert H. Jackson (n.d., prior to May 3, 1952), in THE ROBERT HOUGHWOUT JACKSON PAPERS, Legal File, 1919-1962, n.d., Box 176, Folder 2, Nos. 744-745 (Library of Congress). Likely, Jackson never discussed this memorandum with them, as it was not his practice to confer with his clerks on the grant of certiorari before the Court’s conference. See DVD Roundtable Discussion, *supra* note 30.

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was resolved. Noting that the separation of powers issue was not well settled, but in his view “more or less up for grabs,” he believed *Youngstown* might have been resolved on the balancing of equities and that the law on those issues favored the executive.³² Thus, Chief Justice Rehnquist sheds some light on law-clerk Rehnquist’s thinking: *Youngstown* might have been best resolved on non-separation of powers grounds, and, in any case, an analysis of the separation of powers issue did not clearly favor Congress.³³ That sentiment does not suggest Rehnquist was more favorably disposed toward Congress than the President in the separation of powers, at least not in the context of national security and foreign affairs.

B. *Rehnquist in the Office of Legal Counsel*

Following his clerkship, Rehnquist next encountered the separation of powers with his appointment as Assistant Attorney General for the Office of Legal Counsel (OLC) in the Justice Department.³⁴ During his tenure there, Rehnquist handled several matters implicating core questions of the separation of powers. Before turning to that advice, we consider Rehnquist’s conception of the role OLC played within the executive branch, as that conception itself gives us some insight into Rehnquist’s understanding of the separation of powers.

1. *OLC’s role as an institution*

At the time Rehnquist headed it, OLC was responsible for preparing the Attorney General’s formal opinions, giving legal opinions to executive branch agencies and assisting the Attorney General in advising the President.³⁵ In the discharge of these duties, Rehnquist rejected a “European Ministry of Justice” model for the Justice Department, in which it would act as a disinterested office

32. REHNQUIST, *supra* note 16, at 189.

33. For its time, the Court’s opinion was a departure from its traditional reluctance to reach constitutional issues if a case could be resolved on a nonconstitutional ground. MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* 228 (1994).

34. We skip Rehnquist’s intervening private practice of law in Arizona, because he handled no separation of powers matters during that period, at least not in any reported cases. His work as private counsel principally consisted of state law matters litigated in Arizona state court, but he did handle a few matters in federal court. One of them raised issues of tribal immunity (distantly) analogous to immunities from suit enjoyed by federal officers. *See generally* Davis v. Littell, 398 F.2d 83 (9th Cir. 1968) (arguing that the chief legal officer of a Navajo tribe enjoyed absolute immunity from suit for defamation).

35. 28 C.F.R. § 0.25 (1969). For background on OLC’s opinion-writing function, see Douglas W. Kmiec, *OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993).

within the executive, exercising its own discretion independent of the administration's policy objectives.³⁶ Instead, Rehnquist defended the position that the Justice Department "is but one of several instrumentalities engaged in the process of administering justice."³⁷ That is not to say that Rehnquist countenanced the assertion of any position at all. The Department's position had to be reasonable in the sense that it was arguable, but the Department did not have to adopt the position that "would be most restrictive on its activities."³⁸

As with the Justice Department generally, Rehnquist viewed his own bailiwick in OLC within the tradition of a common law adversary system umpired by the judiciary on a case-by-case basis. For Rehnquist, each branch of the government had a prerogative to determine for itself in the first instance, absent a prior "definitive adjudication," "what a constitutional requirement might mean."³⁹ Thus, the President, for example, could interpret the scope of the Constitution's provision of a Commander-in-Chief power.⁴⁰ But once the federal judiciary—which for Rehnquist was the "definitive expositor of what the Constitution requires"—resolved the matter,⁴¹ that particular issue was off the table to subsequent, inconsistent, executive or congressional reinterpretations on that particular point.⁴² Instead, the Court's precedents, the

36. William H. Rehnquist, *The Old Order Changeth: The Department of Justice Under John Mitchell*, 12 ARIZ. L. REV. 251, 255 (1970) (internal quotations omitted) (remarks before the Honors Convocation of the University of Arizona College of Law).

37. *Id.* Although Rehnquist's convocation remarks speak in terms of the Attorney General's views, it is clear that he shared them. See, e.g., *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92nd Cong. 42 (1971) [hereinafter *Rehnquist Nomination Hearings*] (statement of William H. Rehnquist) (stating in the context of criminal prosecutions "the idea that the Justice Department is basically an advocate for the public is one which I have found myself unable to subscribe to").

38. *Rehnquist Nomination Hearings*, *supra* note 37, at 185.

39. *The Pocket Veto Power: Hearing Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 92nd Cong. 22, 23 (1971) [hereinafter *Pocket Veto Power Hearing*] (statement of William H. Rehnquist, Assistant Attorney General, Department of Justice).

40. That is not to say that Rehnquist believed the different branches could interpret constitutional text any way they liked. See, e.g., *The Independence of Federal Judges: Hearings Before the Subcomm. on Separation of Powers of the S. Comm.*, 91st Cong. 331 (1970) (statement of William H. Rehnquist, Assistant Attorney General, Department of Justice) ("I think that any time you have any language that requires construction, no one would say that the body charged with construing it is entirely free to roam at will. And I don't suppose Congress is any more free [sic] than a court is in construing. But to me the words themselves don't admit any ready definition.").

41. *Pocket Veto Power Hearing*, *supra* note 39, at 25.

42. This view anticipated the Rehnquist Court's later assertion of judicial supremacy in the interpretation of the Constitution. Compare *id.* at 24 ("I would draw back at the notion that the Congress is free to define in some sort of binding way any number of terms in the Constitution, anymore than the Executive is free to define them."), with *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997) (Kennedy, J.) (emphasizing Court's supremacy in interpreting the Fourteenth Amendment).

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lawyer's law, definitively interpreted the constitutional text and thereby assumed greater importance than it.

2. *Rehnquist's watch at OLC*

During his tenure at OLC, Rehnquist advised the Nixon administration on the separation of powers in a variety of contexts. Here, we focus on a small segment of that advice to consider whether Rehnquist's separation of powers jurisprudence is the evolving beast of the Sphinx's riddle or whether Rehnquist has adhered to some basic principles that explain his votes and opinions over time.⁴³ In particular, we consider his OLC opinions on impoundment, the President's power as Commander in Chief, and executive privilege.⁴⁴

a. *Impoundment*

Impoundment occurs when the President exercises discretion to decline to spend money appropriated by Congress for a particular purpose. Relying in part on congressional floor statements, Nixon claimed an inherent "constitutional right to refuse to spend funds which Congress has appropriated."⁴⁵ Nixon's argument would have been roughly as follows: appropriation is an authorization to spend money, but the President, in whom the Constitution vests the executive power, has discretion whether or not actually to spend all of the authorized funds. Thus, the issue raised by impoundment is fundamentally a separation of powers issue: whether the President has constitutional authority to refuse to spend where the congressional appropriation act or legislation requires the expenditure.⁴⁶ Rehnquist's advice on impoundment is particularly renowned, because he rebuffed Nixon's assertion by concluding the President lacked any inherent executive authority to impound, at least in the domestic

43. We acknowledge that Rehnquist's opinions at OLC were informed by prior executive precedents and were likely collaboratively prepared as an advocate and counselor for the President's prerogatives and thus may not represent his views.

44. To obtain the necessary primary materials, Professor Samahon filed three Freedom of Information Act (FOIA) requests with divisions of the Justice Department. At the time of this Article's publication, one FOIA request remained outstanding and another had been denied in part. Thus, our conclusions here are necessarily tentative and subject to revision, pending the Justice Department's response to the requests. The disclosed documents discussed in this Part will be made available through the *Stanford Law Review* website, <http://lawreview.stanford.edu>.

45. Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to the Honorable Edward L. Morgan, Deputy Counsel to the President, Re: Presidential Authority To Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969) [hereinafter *Impoundment Memo*], reprinted in *Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 279-91 (1971).

46. *Id.*

field.⁴⁷

In a legal opinion that silently undertakes a *Youngstown* analysis, Rehnquist explained that, in the area of domestic affairs, the President may not impound appropriations but has a duty to make mandatory expenditures.⁴⁸ He rejected the claim that Article II's Vesting Clause authorized impoundment: "It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them."⁴⁹ This analysis reflects that Rehnquist appreciated that some of the President's power derives from Congress. The President does not have an independent executive power to create national policy "independent from his duty to execute" laws that Congress passes.⁵⁰ Thus, where Congress has spoken clearly by way of its appropriation and the President acts incompatibly with that expressed will in a field where his power is only derivative from Congress,⁵¹ the President's power is at its nadir, a classical Jackson category-three-type conflict.

To be sure, Rehnquist thought a "better argument" might be made for impoundment where Congress had not spoken clearly in the language of the appropriation or left some discretion for the executive. After all, although the Constitution explicitly requires appropriation as a necessary condition to spending, it does not make appropriation a sufficient condition for spending.⁵² But this argument merely relies on Congress delegating some discretion to the President.⁵³ Arguably, it would create a Jackson category two, within the zone of twilight, where the President acts without a congressional denial of power.

But Rehnquist did not categorically deny that the President had a power to impound. His advice concerning impoundment differed in the fields of national security and foreign affairs. Although he does not cite *Youngstown*, here too he

47. This advice contradicts the unflattering claim that Rehnquist simply justified "whatever expansion of executive authority President Nixon desired." DONALD E. BOLES, MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST: THE EARLY YEARS 26 (1987).

48. *Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92nd Cong. 235, 238 (1971) [hereinafter *Impoundment Hearings*] (statement of William H. Rehnquist, Assistant Attorney General, Department of Justice).

49. Impoundment Memo, *supra* note 45. On the other hand, few would question the proposition that the executive has discretion to decline to prosecute, even where Congress has enacted a criminal law and the President is bound to faithfully execute the laws of the United States. See *United States v. Navarro-Vargas*, 408 F.3d 1184, 1205-06 (9th Cir. 2005) (en banc); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

50. Impoundment Memo, *supra* note 45.

51. U.S. CONST. art. II, § 3.

52. *Impoundment Hearings*, *supra* note 48, at 243.

53. Rehnquist opined that the President might also have authority to impound where congressional appropriations created contradictory mandates. Where the President was confronted with "real and imminent conflicting statutory demands," the Take Care Clause might justify his refusal to spend. Impoundment Memo, *supra* note 45.

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appears to apply sub silentio Jackson's mode of analysis. For Rehnquist, unlike domestic policy, national security and foreign affairs are areas where the President has substantive power enumerated, for example, in the clauses making him Commander in Chief and granting him the power to send and receive ambassadors.⁵⁴ That situation differs from the domestic setting because the President would be asserting his own substantive powers enumerated in the Constitution—not merely executing laws passed pursuant to Congress's enumerated powers.⁵⁵

If a conflict were to arise between the President and Congress on an impoundment where Congress mandated national security expenditures, then a *Youngstown* category-three analysis would be in order: Congress has expressed its will by a mandatory appropriations statute, but the President refuses to make the expenditures. In such an instance, the conflict's resolution will depend on the contours and reach of the President's own substantive powers over national security as compared to Congress's competing claim to direct the nation's foreign affairs.⁵⁶

This approach to impoundment has the virtue of forcing Congress, the politically appropriate branch, to take responsibility for its own duties to control spending rather than allow the buck to pass to the President to exercise fiscal restraint. On this account, Congress could authorize impoundment, but it would need to make the policy judgment in its legislation that it granted discretion to the President on a specific appropriation. Otherwise, the President, having failed to veto the appropriation, may not then undermine national policy by virtue of a clause vesting in him the power to execute the laws of the land.

b. *The President's power as Commander in Chief*

Nixon's conduct of the Vietnam War raised several issues requiring Rehnquist and OLC to defend the President's authority to act. When Vietcong forces took up sanctuary in Cambodia, Nixon ordered the secret aerial bombing of these sanctuaries as a part of the war. Rehnquist defended the President's actions as a lawful exercise of Nixon's Commander-in-Chief power. Below we discuss Rehnquist's reasoning as given in his Cambodian sanctuaries memorandum and elsewhere.⁵⁷

Although acknowledging that the boundaries between the President and Congress with respect to the war power are indistinct, Rehnquist noted the

54. See *infra* note 61 and accompanying text.

55. Impoundment Memo, *supra* note 45.

56. *Impoundment Hearings*, *supra* note 48, at 235.

57. Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to the Honorable Charles W. Colson, Special Counsel to the President, Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries (May 22, 1970) [hereinafter Cambodian Sanctuaries Memo].

textual significance that Congress had power to “declare,” not “make” war.⁵⁸ At the Constitutional Convention, Rufus King had proposed the substitution of the word “declare war” for “make war,” to clarify that Congress did not have the ability to actually “conduct” a war.⁵⁹ Rather, that power was vested with the Commander in Chief of the Armed Forces, the President.

The Constitution, however, leaves the scope of the Commander-in-Chief power undefined, and Rehnquist looked to precedent and historical practice to give that term content.⁶⁰ He concluded from the few on point cases that the Commander-in-Chief Clause granted a substantive power to the President—that is, the Clause was “not merely a commission which entitles him to precedence in a reviewing stand,” but implied actual duties and powers to fulfill those duties.⁶¹ In support, Rehnquist invoked Jackson’s *Youngstown* concurrence—not for the proposition that the Commander-in-Chief power has limitations, but to distinguish *Youngstown* and place the Cambodian sanctuaries action on a different footing because it was in a foreign theater of war: “I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, *at least when turned against the outside world for the security of our society.*”⁶² Rehnquist then looked to the history of prior military engagements and their terms, from the conflicts with Barbary pirates off the shores of Tripoli to the Korean War, to determine inductively the scope of the President’s authority by reference to prior action.⁶³ This history of how each of the three branches has interpreted the Constitution provided further direction as to what the President may undertake on his own initiative and what actions require congressional assent.⁶⁴

From these historical precedents, Rehnquist inductively concluded that the principal powers of the Commander in Chief include the ability to commit forces to conflict where they have not previously been engaged; deploy forces globally; and conduct hostilities “once lawfully begun.”⁶⁵ Rehnquist defended

58. *Id.* at 1.

59. *Id.* at 1-2. For a discussion questioning the significance of this change in verbs, see generally Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672 (1972).

60. Cambodian Sanctuaries Memo, *supra* note 57, at 7.

61. *Id.* at 4-5; see also William H. Rehnquist, *The Constitutional Issues—Administration Position*, 45 *N.Y.U. L. REV.* 628, 631 (1970) (remarks before the Association of the Bar on the Cambodian sanctuaries situation).

62. Cambodian Sanctuaries Memo, *supra* note 57, at 6-7 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring)) (emphasis added).

63. *Id.* at 8-13.

64. Rehnquist, *supra* note 61, at 629.

65. *Id.* at 631-32, 635; see also *Congress, the President, and the War Powers: Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the H. Comm. on Foreign Affairs*, 91st Cong. 235 (1970) [hereinafter *War Powers Hearings*] (statement of William H. Rehnquist, Assistant Attorney General, Department of Justice) (agreeing that the power over tactical decisions is a “flow of power under the duties of the

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the Commander in Chief's Cambodian incursions as falling historically within the executive's ken as concerning the tactical conduct of hostilities lawfully begun in the Vietnam War.⁶⁶ These inductively derived fields of historical authority, however, do not cap executive power at a ceiling. Rehnquist's case-by-case common law approach to executive power would allow for further development. Congress could enhance the Commander in Chief's substantive power by delegating *additional* authority to the President. Moreover, it could do so without regard to the traditional constraints of the nondelegation doctrine operative in domestic affairs; the nondelegation doctrine does not apply to the sui generis case of "external affairs,"⁶⁷ perhaps because the President and Congress share responsibility and discretion in this area.

Conversely, Rehnquist acknowledged that the text of the Constitution contemplates that Congress may in some circumstances, such as pursuant to its power to "make rules concerning captures on land and water," limit "the President's power as Commander-in-Chief to a narrower scope than it would have had in the absence of legislation."⁶⁸ But Rehnquist testified that there were limits to Congress's ability to regulate the President's war powers. Although the Constitution by its terms arguably requires a congressional declaration of war, Rehnquist relied on the lawyer's law of the Constitution, precedent and actual practice, which have never interpreted the constitutional text so literally. Instead, he rejected the claim that Congress could constitutionally bind the President with legislation prohibiting the initiation of war without a formal congressional declaration. He cited the President's "*traditional* powers as commander in chief," which might include committing U.S. armed forces to hostilities.⁶⁹ Congress's proposal could have been understood as simply restoring the formal procedure for handling hostilities originally mandated by the Constitution's text. Rehnquist, however, was disinclined to view historical practice as merely accumulated plaque on the teeth of constitutional text. His approach to the separation of powers was a common law approach, not that of a civil judge unbound by stare decisis.

c. Executive privilege

Executive privilege was raised several times during Rehnquist's tenure, including when the Senate sought to obtain from the executive the entirety of the Pentagon Papers, following their partial publication, and other documents relating to national security and foreign relations. As with Rehnquist's advice concerning the scope of the Commander-in-Chief power, his advice concerning

Commander in Chief").

66. Rehnquist, *supra* note 61, at 638.

67. Cambodian Sanctuaries Memo, *supra* note 57, at 18, 20; Rehnquist, *supra* note 61, at 636-37.

68. Cambodian Sanctuaries Memo, *supra* note 57, at 20.

69. *War Powers Hearings*, *supra* note 65, at 232 (emphasis added).

executive privilege displays his common law approach to constitutional adjudication where the constitutional text is underdetermined or silent. In the setting of executive privilege, the Constitution's broad lines mention neither congressional authority to investigate or demand documents nor the executive's concomitant ability to resist.⁷⁰ Instead, the President's authority to withhold documents against compulsory process by the legislative or judicial branches is merely implied by the separation of powers.⁷¹

To trace this implied privilege's contours, Rehnquist did not begin with abstract separation of powers first principles. He did not deduce when the President could withhold documents from Congress or the Courts by reference to a grand theory of what functions are encompassed in the executive and whether the executive is unitary. Instead, he looked to the history of interbranch tugs-of-war concerning privilege and the past practices acceded to by other branches.⁷² From these examples, he inductively arrived at rough groupings of constitutionally supported privilege. Thus, Rehnquist's memoranda on privilege are chiefly historical documentations of prior instances of asserted privilege.⁷³ Based on his survey of prior history, Rehnquist suggested the existence of privilege in the fields of foreign relations, military affairs, pending investigations, and intra-governmental discussions.⁷⁴

Interestingly, Rehnquist's advice on executive privilege suggests that had he participated in the *Nixon Tapes Case*,⁷⁵ he might have provided the ninth vote against Nixon.⁷⁶ Historical precedent did not support the claim that a

70. *U.S. Government Information Policies and Practices—The Pentagon Papers (Part 2): Hearings Before a Subcomm. of the H. Comm. on Government Operations*, 92nd Cong. 359 (1971) [hereinafter *Pentagon Papers Hearings*] (statement of William H. Rehnquist, Assistant Attorney General, Department of Justice).

71. *Id.*

72. *Executive Privilege: The Withholding of Information by the Executive: Hearing Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92nd Cong. 420 (1971) [hereinafter *Executive Privilege Hearing*] (statement of William H. Rehnquist, Assistant Attorney General, Department of Justice).

73. *See, e.g.*, Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to the Honorable John D. Ehrlichman, Assistant to the President for Domestic Affairs, Re: Power of Congressional Committee To Compel Appearance or Testimony of "White House Staff" (Feb. 5, 1971) [hereinafter *White House Staff Memo*]; Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: The President's Executive Privilege To Withhold Foreign Policy and National Security Information (Dec. 8, 1969).

74. *Executive Privilege Hearing*, *supra* note 72, at 422.

75. *United States v. Nixon (Nixon Tapes Case)*, 418 U.S. 683 (1974).

76. Of course, Rehnquist had recused himself. One commentator has suggested that Rehnquist recused himself because of his earlier work at OLC, Keith E. Whittington, *William H. Rehnquist: Nixon's Strict Constructionist, Reagan's Chief Justice*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 19 (Earl M. Maltz ed., 2003), which included advising on executive privilege. Rehnquist clearly had advised and testified publicly on executive privilege issues. That advice, however, was not the cause for recusal.

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President could withhold documents merely because they would “make [him] look bad,”⁷⁷ and “the claim of privilege for documents is not necessarily coextensive” with the President’s absolute personal immunity from subpoena.⁷⁸ In fact, a President could be vulnerable to a subpoena duces tecum, as “furnishing . . . a document to a congressional committee involves little, if any, inconvenience to the Executive Branch or to the President and his advisers.”⁷⁹ To be sure, Rehnquist’s advice was given in the context of interbranch disputes between Congress and the President. How he would have voted in an intra-branch dispute, such as the *Nixon Tapes Case*, is necessarily speculative. But without some kind of theory of a unitary executive or some historical precedent, it seems likely he would have cast his vote against Nixon.

II. REHNQUIST ON THE COURT

In this Part, we consider Rehnquist’s separation of powers cases on the Court. We examine the theme that Rehnquist viewed the separation of powers as a means of reinforcing the legislature’s duty to make policy. In addition, we consider the Rehnquist theme of common law incrementalism, present in his OLC opinions, which reemerges in his treatment of *Youngstown* and disputes between the executive and legislature.

A. Associate Justice Rehnquist

Nixon nominated Rehnquist and Lewis Powell to the Court following a series of administration debacles with judicial nominations. With Rehnquist’s appointment, it appeared that Nixon had found his “strict constructionist.” To assess the early Justice Rehnquist, we consider his nondelegation and federal common law cases, *Dames & Moore v. Regan*, and three cases involving appointment, removal, and bicameralism and presentment.

After all, Rehnquist participated in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), where the Presidential Materials and Recordings Act was challenged on executive privilege and separation of powers grounds. Instead, Rehnquist very likely recused himself in the *Nixon Tapes Case*, 418 U.S. 683, *Kissinger v. Halperin*, 452 U.S. 713 (1981), and *Mitchell v. Forsyth*, 472 U.S. 511 (1985), because John Mitchell, the former Attorney General, was a party in each case “individually, and not simply as an attorney for a client.” Memorandum from William H. Rehnquist to the Conference, Re: No. 79-880 *Kissinger v. Halperin* (May 27, 1981), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 323, Folder 1, No. 79-880 (Library of Congress).

77. *Pentagon Papers Hearings*, *supra* note 70, at 784.

78. White House Staff Memo, *supra* note 73.

79. *Id.*

1. *The nondelegation doctrine and implied causes of action*

Rehnquist attempted to breathe life into the moribund nondelegation doctrine in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*⁸⁰ and *American Textile Manufacturers Institute, Inc. v. Donovan*.⁸¹ In these cases, Rehnquist concurred and dissented, respectively, because the majorities failed to conclude that section 6(b) of the Occupational Safety and Health Act (OSHA) violated the nondelegation doctrine.⁸² Delegations of legislative power from Congress to the executive are permitted to allow the regulation of technical fields, where members of Congress are not experts, provided Congress establishes “the general policy and standards that animate the law, leaving the agency to refine those standards, ‘fill in the blanks,’ or apply the standards to particular cases.”⁸³ Congress must articulate an “intelligible principle” to guide the executive’s discretion in exercising congressionally delegated power.⁸⁴ For Rehnquist, Congress, not the executive branch, is the “governmental body best suited and most obligated to make” difficult policy choices.⁸⁵ It alone must make the tough policy decisions rather than pass the buck to the President. Thus, Rehnquist attempted to use the nondelegation doctrine to hold Congress’s “feet to the fire” by forcing Congress to be conscientious. As a measure of Rehnquist’s commitment to the legislature making the policy decisions, we note that the nondelegation doctrine previously had been invoked successfully only twice to strike down a statute as an unconstitutional delegation of legislative power to the executive.⁸⁶ In fact, unless one considers *Clinton v. City of New York* a nondelegation case,⁸⁷ the nondelegation doctrine has not been successfully invoked to strike down a statute since 1935. This pattern of voting differs from Rehnquist’s later votes on nondelegation.

In a similar vein, Rehnquist demonstrated great reluctance to imply causes of action as a function of the Court’s federal common law power, believing that this power too divested the legislature of its rightful place as policymaker. In

80. 448 U.S. 607 (1980).

81. 452 U.S. 490 (1981).

82. *American Textile*, 452 U.S. at 543; *Industrial Union*, 448 U.S. at 671.

83. *Industrial Union*, 448 U.S. at 675.

84. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 429-30 (1935).

85. *Industrial Union*, 448 U.S. at 672.

86. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining*, 293 U.S. 388.

87. 524 U.S. 417 (1998). Although *Clinton* protested it was merely about presentment and bicameralism, *id.* at 447-48, we join other commentators in concluding that, in fact, the case may reinvigorate the nondelegation doctrine. See Calabresi, *supra* note 5, at 85; Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265 (2001).

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Cannon v. University of Chicago,⁸⁸ *Carlson v. Green*,⁸⁹ and *City of Milwaukee v. Illinois*,⁹⁰ Rehnquist disfavored the implication of private causes of action under statute or the Constitution. Instead, he favored congressional authorization of new causes of action: Congress knows how to authorize private causes of action by statute if it so desires. The Court, under guise of adjudication, should not intrude on this core lawmaking function. Thus, for Rehnquist, the decision to imply a cause of action violates the separation of powers by usurping legislative power.

Both the nondelegation doctrine and the refusal to imply remedies highlight a key theme to Rehnquist's separation of powers jurisprudence: "insist that the constitutionally appropriate political body make those choices and that the Court has a role in ensuring that no institution either shirks its responsibilities or encroaches on the proper sphere of another."⁹¹ Congress must not shirk; the judiciary may not usurp.⁹²

2. *Foreign affairs and national security*

In *Dames & Moore v. Regan*,⁹³ Rehnquist's majority opinion enshrined Jackson's *Youngstown* framework in the majority's analysis of the executive response to the Iranian hostage crisis.⁹⁴ Among the conditions for the release of U.S. hostages, the United States agreed to nullify attachments against Iranian assets in the United States and suspend any claims against Iran, submitting them instead to a U.S.-Iran Claims Tribunal. *Dames and Moore* challenged these executive acts nullifying attachments and suspending claims as not congressionally authorized by the International Emergency Economic Powers Act (IEEPA) or otherwise. Although the Court determined that statute fairly

88. 441 U.S. 677, 718 (1980) (Rehnquist, J., concurring) ("[T]his Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.").

89. 446 U.S. 14, 34 (1980) (Rehnquist, J., dissenting) ("In my view, it is 'an exercise of power that the Constitution does not give us' for this Court to infer a private civil damages remedy from the Eighth Amendment or any other constitutional provision.").

90. 451 U.S. 304, 317 (1981) (Rehnquist, J.) (concluding that Congress had preempted federal common law).

91. Whittington, *supra* note 76, at 21.

92. A legal positivism of sorts may animate Rehnquist's approach. *See, e.g.*, William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976) (revised text of ninth annual Will E. Orgain Lecture, University of Texas School of Law) ("It is the fact of [laws'] enactment that gives them whatever moral claim they have upon us as a society . . . and not any independent virtue they may have in any particular citizen's own scale of values.").

93. 453 U.S. 654 (1981).

94. We are not the first coauthors to observe the irony that Rehnquist was both Jackson's law clerk during *Youngstown* and the author of *Dames & Moore*. *See* Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 745 n.133 (1992).

authorized the nullifying of the attachments, it concluded IEEPA did not authorize the claims suspension. Thus, a *Youngstown* dispute arose over whether the President had authority to act unilaterally.

Rehnquist's opinion tells the reader in no less than four different ways that the Court is undertaking a case-by-case approach to the issue of executive power by declining to articulate any abstract, bright-line rules.⁹⁵ It is the modest approach of common law incrementalism in an area where constitutional text ill defines the borders of congressional and executive power. Although Rehnquist incants Jackson's three *Youngstown* categories⁹⁶ and calls them "analytically useful," he characterizes them as merely points along a "spectrum running from explicit congressional authorization to explicit congressional prohibition."⁹⁷ Thereafter, Rehnquist ceases any further reference to Jackson's categories as if they were defined by bright lines, but speaks only in terms of where along the spectrum of "explicit congressional authorization to explicit congressional prohibition" *this* case falls.⁹⁸ In fact, Rehnquist never says under which of the Jackson categories the President's suspension of the claims actually falls.

Rather than categorize this conflict between the executive and Congress, Rehnquist places the claims suspension along the congressional "authorization-prohibition" spectrum. He interprets IEEPA's failure to authorize claims suspension—in light of prior congressional acquiescence to executive establishment of claims tribunals, IEEPA's other provisions, the Hostage Act, and congressional silence—as implicit congressional authorization for the executive's suspension of claims.⁹⁹ Arguably, this reading collapses Jackson's tripartite classification into a two-tiered inquiry—shifting the Iranian hostage crisis into Jackson category one (the category most favorable to the executive) rather than Jackson category two.¹⁰⁰

Justice Blackmun took exception with this approach. He asked Rehnquist to reconsider the draft opinion's language stating that

the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' measures on independent presidential responsibility. At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the

95. See, e.g., *Dames & Moore*, 453 U.S. at 660 ("We are confined to a resolution of the dispute presented to us."); *id.* at 661 ("We attempt to lay down no general 'guidelines' covering other situations not involved here. . . ."); *id.* ("[T]he decisions of the Court in this area . . . afford little precedential value for subsequent cases."); *id.* at 662 ("deciding only one more episode . . .").

96. *Id.* at 668-69.

97. *Id.* at 669.

98. *Id.*

99. *Id.* at 678.

100. See Koh & Yoo, *supra* note 94, at 745.

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President.¹⁰¹

Blackmun found Rehnquist's position difficult to reconcile with Rehnquist's views of the nondelegation doctrine, where Congress had to articulate an "intelligible principle" in order to delegate legislative power to the executive.¹⁰² Under Rehnquist's approach, Congress had merely to enact legislation in the field to implicitly authorize or invite presidential action. Rehnquist, however, was unmoved. He justified his position by invoking *Curtiss-Wright* and the uniqueness of foreign affairs, an area where the nondelegation doctrine operates somewhat differently than in the purely domestic context¹⁰³—perhaps because the President as Commander in Chief shares a substantive grant of power to act along with Congress.

3. *The appointments, bicameralism, and presentment cases*

We discuss very briefly three other separation of powers cases in which Rehnquist participated as an Associate Justice. First, we consider *Buckley v. Valeo* to illustrate Rehnquist's commitment to constitutional text when it speaks specifically and clearly. In *Buckley*, Rehnquist authored the Appointments Clause analysis that struck down Congress's effort to vest some of the power to appoint to the Federal Election Commission in the Speaker of the House and the President pro tempore of the Senate.¹⁰⁴ The excepting provision of the Appointments Clause allows Congress to vest the appointments of "inferior officers" "in the President alone, in the Courts of Law, or in the Heads of Departments."¹⁰⁵ Under the Appointments Clause, neither the Speaker of the House nor the President pro tempore of the Senate (or any other member of Congress, for that matter) is enumerated as a possible designated recipient of the appointing power. Thus, the plain commands of the Constitution direct a fairly easy resolution of the case.

Second, in *INS v. Chadha*,¹⁰⁶ the Court struck down a legislative veto provision as violating the bicameralism and presentment provisions of the Constitution. Rehnquist dissented. His dissent, however, did not register

101. Letter from Harry A. Blackmun to William H. Rehnquist, Re: No. 80-2078 *Dames and Moore v. Regan* (June 29, 1981), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 336, Folder 8, No. 80-2078 (Library of Congress) (referencing *Dames & Moore*, 453 U.S. at 678-79 (internal quotations omitted)).

102. *Id.*

103. Letter from William H. Rehnquist to Harry A. Blackmun, Re: No. 80-2078 *Dames & Moore v. Regan* (June 29, 1981), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 336, Folder 8, No. 80-2078 (Library of Congress).

104. 424 U.S. 1 (1976). The Blackmun Papers confirm that Rehnquist was the author of Part IV.B of the per curiam opinion. First Draft, *Buckley v. Valeo*, Memorandum from Mr. Justice Rehnquist (Jan. 17, 1976), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 231, Folder 2, No. 75-436 (Library of Congress).

105. U.S. CONST. art. II, § 2.

106. 462 U.S. 919 (1983).

disagreement with bicameralism and presentment, but rather with the severability of the legislative veto provision from the rest of the statutory scheme. Thus, Rehnquist did not appear to disagree with the majority's separation of powers analysis.¹⁰⁷

That is not to say that Rehnquist's dissent about severability was merely about statutory construction and did not harbor separation of powers concerns of another sort. Justice Blackmun's conference notes indicate that Rehnquist was concerned that striking down only the legislative veto without the rest of the legislative package would upset the legislature's appointed role as policymaker.¹⁰⁸ Rehnquist did not feel the executive should benefit by the Court striking down the legislative veto but not the delegations of power to the executive. To Rehnquist, the executive had "unclean hands" in the case by signing the bill.¹⁰⁹ He felt strongly that Congress would not have adopted the legislation delegating power to the executive had it known the legislative veto would not withstand scrutiny.¹¹⁰ To avoid the President receiving large amounts of delegated power without the check of a legislative veto, Rehnquist would interpret the statute to reinforce Congress's role as deliberative policymaker—by striking down the whole statute as unconstitutional. Thus, his *Chadha* dissent is characteristic of Rehnquist for its insistence that Congress make policy, that legislation be considered as a whole, and that the executive take the "bitter with the sweet."¹¹¹

Finally, in *Bowsher v. Synar*,¹¹² Rehnquist voted with the majority to strike down the Gramm-Rudman-Hollings Act's provision vesting the Comptroller General, a legislative officer, with executive power and making him removable only at Congress's initiative. As the Comptroller exercised executive power but was removable by Congress, "Congress in effect [had] retained control over the execution of the Act and has intruded into the executive function."¹¹³ The Justices' correspondence indicates Chief Justice Burger's early circulated draft of the majority opinion, which concerned congressional inability to condition the removal of purely executive officers, also cast doubt on *Humphrey's Executor* and the independent agencies.¹¹⁴ It has been suggested that Rehnquist was complicit in Burger's desire to overrule *Humphrey's Executor* as he did not

107. *Id.* at 1013 (Rehnquist, J., dissenting).

108. *INS v. Chadha* Conference Notes (Feb. 24, 1982), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 352, Folder 9, No. 80-1832 (Library of Congress).

109. *Id.*

110. *Id.*

111. *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974) (Rehnquist, J.).

112. 478 U.S. 714 (1986).

113. *Id.* at 734.

114. See, e.g., Letter from Justice Brennan to Chief Justice Burger, Re: Nos. 85-1377, 85-1378, 85-1379 (n.d.), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 456, Folder 6 (Library of Congress).

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object to Burger's circulated opinion.¹¹⁵ Although Rehnquist would likely question Congress's arrangement under *Myers v. United States*,¹¹⁶ it would be somewhat atypical of Rehnquist to articulate an abstract separation of powers principle that overruled an earlier case needlessly and applied far beyond the facts of the case. It may be a hasty inference that Rehnquist agreed with Burger where other Justices had already raised the draft's possible consequences for *Humphrey's Executor*.

B. Chief Justice Rehnquist

As Chief Justice, Rehnquist authored several separation of powers opinions, including *Raines v. Byrd*,¹¹⁷ *Ryder v. United States*,¹¹⁸ *Dalton v. Specter*,¹¹⁹ *Weiss v. United States*,¹²⁰ and *Walter Nixon v. United States*.¹²¹ These cases largely follow Rehnquist's pattern established as Associate Justice of reinforcing the responsibility of the political branches, employing incrementalism, and following the commands of clear constitutional text. His votes on other cases, however, where he was not the opinion's author, reflect a Chief Justice who was less assertive in pressing the nondelegation doctrine than he was as an Associate Justice.¹²²

Morrison v. Olson,¹²³ however, where Rehnquist did have the pen, stands most prominently among these cases as the biggest mystery in Rehnquist's separation of powers jurisprudence. We focus on it to consider whether it indeed is an outlier or whether it can be reconciled with Rehnquist's approach to the separation of powers.

Morrison pits two former Republican heads of OLC—Rehnquist and Scalia—against one another in a case that recharacterized *Humphrey's Executor* and *Myers* to permit Congress substantially more say in conditioning the removal of executive officers.¹²⁴ Chief Justice Rehnquist assigned the case to himself and authored the majority opinion, which upheld the independent counsel provisions of the Ethics in Government Act against facial separation of

115. See Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 640 (1990).

116. 272 U.S. 52 (1926).

117. 521 U.S. 811 (1997).

118. 515 U.S. 177 (1995).

119. 511 U.S. 462 (1994).

120. 510 U.S. 163 (1994).

121. 506 U.S. 224 (1993).

122. See, e.g., *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001) (declining to find statute in violation of nondelegation doctrine); *Touby v. United States*, 500 U.S. 160 (1991) (same); *Mistretta v. United States*, 488 U.S. 361 (1989) (concluding no excessive delegation).

123. 487 U.S. 654 (1988).

124. Daniel A. Farber, *The Independent Counsel Case: A Tale of Two Conservatives*, in *THE REHNQUIST LEGACY* 222, 233 (Craig Bradley ed., 2006).

power challenges. Scalia dissented alone.

The Act provided for a curious interbranch appointment of an independent counsel by invoking the opt-out “excepting” provision of the Appointments Clause.¹²⁵ Congress vested in a special division of the D.C. Circuit the ability to appoint an independent prosecutor who the Attorney General could not remove, except for “good cause.”¹²⁶ Thus, judicial officers would appoint an executive officer and designate the scope of that officer’s jurisdiction to investigate. Neither the President nor his delegate, the Attorney General, could remove the executive officer, except for “good cause,”¹²⁷ which apparently did not include failure to follow orders of the Attorney General or the President. Congress intended this novel arrangement to solve the inherent conflict of interest presented by the executive branch investigating high-ranking executive officers, such as the President or Attorney General, as had existed during Watergate.

One of the key issues in *Morrison* was whether the independent counsel was an “inferior officer” such that Congress could opt-out of the traditional presidential nomination, senatorial advice, and consent processes. If the independent counsel was not an “inferior officer,” but a “principal officer,” Congress could not vest the appointment in the judiciary. Moreover, whether appointed by the judiciary or not, a second issue was whether the independent counsel, who exercised the core executive function of prosecution, could be insulated from presidential removal at will, such that she could be removed only for “good cause.” Finally, the Court considered whether the Act, taken as a whole, violated the separation of powers.

It is clear from Blackmun’s conference notes that Rehnquist had policy doubts about the Act’s wisdom, but it is equally clear that Rehnquist expressed that he believed the Act to be constitutional.¹²⁸ After all, the “excepting” provision of the Appointments Clause grants Congress discretion in the vesting of inferior officer appointments; it uses the words “as they think proper.”¹²⁹ Nothing in the Constitutional Convention suggested that interbranch appointments were impermissible or, for that matter, contemplated. In the absence of a positive prohibition, Rehnquist was not inclined to strike down the Act’s provision for an “interbranch” appointment. Similarly, Rehnquist approached the construction of the term “inferior officer” as a common law

125. *Morrison*, 487 U.S. at 661.

126. *Id.*

127. *Id.*

128. *Morrison v. Olson* Conference Notes (Apr. 29, 1988), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 507, Folder 8, No. 87-1279 (Library of Congress) (“I have misgivings [concerning the] Act but [it is not] unconstitutional.”). This doubt may explain why Rehnquist avoided reliance on the Act’s purported benefits as support for his separation of powers analysis and confirms scholarly conjecture to that effect. Farber, *supra* note 124, at 237.

129. U.S. CONST. art. II, § 2.

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judge reluctant to articulate a priori bright-line rules, but favorably disposed toward cautious, even if somewhat unpredictable, case-by-case determinations.¹³⁰ This same “common law” approach to constitutional adjudication is apparent in the “impermissible” burden standard Rehnquist articulated in determining whether Congress may condition the removal of executive officers.¹³¹

Morrison, however, is a curious opinion for Rehnquist in an important regard. In a departure from incrementalism, the Court decided the case more broadly than necessary by recharacterizing *Myers* and *Humphrey’s Executor* in the process. *Myers* stood for the proposition that the executive enjoyed general removal powers over executive branch officers.¹³² *Humphrey’s Executor* stood as an exception to the *Myers* proposition: Congress could restrict the President’s removal power when the officer exercised quasi-judicial or quasi-legislative powers, which is to say not purely executive powers.¹³³ *Morrison* “flipped the relationship”: *Myers* was reconceived as merely an exception from the “general principle that Congress may reasonably restrict the President’s removal power.”¹³⁴ The Court could have concluded incrementally that the independent counsel was another exception, like *Humphrey’s Executor*, to the general proposition that the President can remove executive officers at will.¹³⁵ Instead, the Court espoused *Humphrey’s Executor* as the standard. Post-*Morrison*, Congress may generally restrict presidential removal (including removal of officers whose duties are purely executive) provided that Congress expressly supplies the restriction. Why was the decision not more incremental?

In assessing *Morrison*’s position in Rehnquist’s separation of powers jurisprudence, it is helpful to remember that it does not stand in isolation. It has a postlude that, in light of the Justices’ positions espoused in the case, casts doubt on its continued vitality. During *Morrison*, a focal point of contention was whether or not the independent counsel was an “inferior” or principal officer. Scalia’s dissent characterized the independent counsel as a principal officer because she was not “subordinate” to anyone, inferring such a requirement from the meaning of “inferior.” This position espoused the argument advanced by the Solicitor General’s amicus brief, filed by special leave of court on behalf of the defendants: “An officer who exercises prosecutorial power, and who is not subordinate to anyone in the exercise of that power, is not an ‘inferior’ officer.”¹³⁶ Although not clear from the opinion itself, it is clear from Blackmun’s conference notes that both Rehnquist and

130. *Morrison*, 487 U.S. at 671-73.

131. *Id.* at 676.

132. *Myers v. United States*, 272 U.S. 52 (1926).

133. *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

134. Farber, *supra* note 128, at 233.

135. *Id.*

136. Brief for the United States as Amicus Curiae Supporting Appellees at 24, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279).

O'Connor rejected the subordination principle as a bright-line rule.¹³⁷ Instead, *Morrison* employed a balancing test of four factors to conclude that the independent counsel was an "inferior officer."¹³⁸

Enter *Edmond v. United States*.¹³⁹ Justice Scalia, writing for the Court, including Chief Justice Rehnquist, adopts the subordination argument, earlier rejected in the *Morrison* conference, but not disclaimed in the majority opinion. Scalia states his rule in abstract, categorical terms: "Whether one is an 'inferior' officer depends on whether he has a superior."¹⁴⁰ *Edmond* does not purport to overrule *Morrison*. Instead, it characterizes *Morrison* as not purporting to "set forth a definitive test" for what counts as an inferior officer.¹⁴¹

The fact, however, is that *Edmond* may have sub silentio overruled *Morrison* on this point. There is substantial doubt whether under Scalia's subordination formulation for "inferior officer" (a necessary, but not sufficient condition) the independent counsel would still qualify as "inferior."¹⁴² This fact is interesting because Chief Justice Rehnquist, the author of *Morrison*, assigned Scalia the majority opinion in *Edmond*, fully aware of Scalia's earlier views concerning subordination and his own prior rejection of it. Thus, *Edmond* is not a case of Scalia craftily "pick[ing] the Court's pockets" on the separation of powers.¹⁴³ It is the bank president opening the bank's vault wide and inviting Ocean's Eleven to plunder it in broad daylight! It may have been that Rehnquist reconsidered his views in *Morrison*, at least on the subordination point. If that is the case, on that point at least, *Morrison* may represent a dead end in Rehnquist's separation of powers jurisprudence,¹⁴⁴ a constitutional misgiving, and as such it becomes easier to reconcile, through its abandonment, with his other separation of powers cases.

137. *Morrison v. Olson* Conference Notes (Apr. 29, 1988), in THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 507, Folder 8, No. 87-1279 (Library of Congress) (noting under Rehnquist's name "no buy SG's subordination argmt" and under O'Connor's name "reject SG's subordinate proposition").

138. *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988) (Rehnquist, C.J.) (weighing removability, limited duties, limited jurisdiction, and limited tenure to conclude independent counsel was an "inferior officer").

139. 520 U.S. 651 (1997).

140. *Id.* at 662-63.

141. *Id.* at 661-62.

142. Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998).

143. Elsewhere, one of the authors suggested that Scalia "picked the Court's pockets" in *Printz v. United States*, 521 U.S. 898, 922-23 (1997), when as author of the majority opinion Scalia adopted a unitary executive theory rejected in *Morrison v. Olson*. See Jay S. Bybee, Printz, *the Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269, 288 (2001).

144. To be sure, nothing in *Edmond* calls into question *Morrison*'s recharacterization of *Myers* and *Humphrey's Executor*.

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Thus, apart from *Morrison*, which may be explainable in part as a constitutional misgiving, Rehnquist seems to have pursued a generally consistent approach to the separation of powers both as Associate Justice and Chief Justice in the opinions that he authored. He focused on deciding the case before him, such as in *Dames & Moore*, adopting the methodology of common law adjudication and applying it to constitutional decisionmaking. This approach is cautious and incrementalist, generally avoiding the pronouncement of bright-line principles, an approach that permitted the political branches some flexibility in arranging their relations. But where Rehnquist perceived the need, as in *American Textile, Industrial Union*, and *Chadha*, he attempted to reinforce the democratic process by forcing the legislature to make tough policy decisions.

Those opinions Rehnquist did not author, however, may prove more difficult to explain. As previously noted, Chief Justice Rehnquist lacked his earlier vigor and vim as Associate Justice in the enforcement of the nondelegation doctrine. In the next Part, we consider a possible explanation for why Rehnquist's voting behavior may have changed on those opinions that he did not author.

III. ANOTHER ANSWER TO THE RIDDLE: TWO WILLIAM REHNQUISTS?

As an alternate way to explain the Court's constitutional jurisprudence, it has been suggested that there have been two "Rehnquist Courts."¹⁴⁵ We examine the possibility that there may have been not only two Rehnquist Courts, but also two William Rehnquists—Rehnquist the Associate Justice and Rehnquist the Chief Justice.¹⁴⁶ On this account, as the dissenting "Lone Ranger" Associate Justice, Rehnquist took a strong view of the separation of powers.¹⁴⁷ As Chief Justice, with institutional incentives to obtain consensus and vote with the majority, he assumed a less formal approach to the separation of powers.

145. See generally Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003) (describing the second Rehnquist Court as beginning in 1994). Another commentator has suggested there have been *three* Rehnquist Courts. Linda Greenhouse, *Foreword: The Third Rehnquist Court*, in *THE REHNQUIST LEGACY* xiii (Craig Bradley ed., 2006).

146. Of the sixteen Chief Justices confirmed by the Senate (John Rutledge, a recess appointee, was never confirmed), only three have successfully been elevated from Associate Justice to Chief Justice: William Rehnquist, Harlan Stone, and Edward White. Thus, their tenures are natural experiments in how the institutional incentives of becoming Chief Justice may change an Associate Justice's voting behavior.

147. R. Ted Cruz, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 10, 11 (2005) ("[I]n 1986, there is a sharp divide: from that point forward, each Term's volume of collected opinions falls to one to two inches in width. That visual break was not the result of a sudden lack of verbosity. Rather, it was a physical manifestation of Chief Justice Rehnquist's understanding of the very different task assigned a Chief Justice. No longer was his principal role to expound impassioned individual views; instead, it was to lead.").

Rehnquist, as Chief Justice, enjoyed the privilege of assigning the writing of majority opinions to a particular Justice or himself when he voted with the majority. Although his colleagues¹⁴⁸ and empirical evidence¹⁴⁹ confirm that Rehnquist overall used the assignment function equitably and as a neutral tool to promote efficiency, it may be that Rehnquist's *own* voting patterns changed as a result of becoming Chief Justice. There is a potent incentive for a Chief Justice, who enjoys the opinion assignment power, not to waste the opportunity to shape the law by staking out ideologically pure opinions to which a majority will not subscribe. Instead, a Chief Justice may forego perfect consistency for an opportunity to control, either directly or indirectly, the writing of the opinion. Thus, a Chief Justice will speak his mind less frequently by way of concurrence or dissent in exchange for joining a majority and enjoying the privilege of opinion assignment. A prominent former Rehnquist clerk has suggested that the Chief Justice may have used this assignment function to guide outcomes and may have, on occasion, assigned opinions to himself to limit rationales ("damage control").¹⁵⁰ On this account, the Chief Justice's votes as a member of majorities may have, in some circumstances, been strategic.¹⁵¹ The phenomenon of strategic voting should cause legal scholars to reassess whether or not undue weight has been given to one or two outlying opinions, such as *Morrison v. Olson*, as merely reflecting a strategic vote made under constraints rather than an expression of jurisprudential significance.

What evidence supports this claim? First, Rehnquist was typical of prior Chief Justices. Chief Justices typically vote 80% of the time with the majority.¹⁵² Rehnquist was no different. He voted some 81% of the time with the majority during his first five terms as Chief.¹⁵³ Second, and relatedly, Rehnquist's instances of solo dissent and concurrence dropped precipitously

148. Ruth Bader Ginsburg, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 6 (2005) ("[O]f all the bosses I have had as lawyer, law teacher, and judge, Chief Justice William Hubbs Rehnquist was hands down the fairest and most efficient."); Sandra Day O'Connor, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 3, 5 (2005) ("My years spent on a ranch taught me that expert horse riders let the horse know immediately who is in control, but then guide the horse with loose reins and very seldom use the spurs. So it was with our Chief. Efficiency was very important to him, but he guided us with loose reins and used the spurs only rarely to get us up to speed with our work. His best weapon was his assignment of opinions: a Justice behind schedule would simply receive fewer opinions to write.").

149. Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421, 442 (1996); Forrest Maltzman & Paul J. Wahlbeck, *Opinion Assignment on the Rehnquist Court*, 89 JUDICATURE 121 (2005).

150. Cruz, *supra* note 147, at 14-15.

151. *Id.* at 15; see also Linda Greenhouse, *The Last Days of the Rehnquist Court: The Rewards of Patience and Power*, 45 ARIZ. L. REV. 251, 262 (2003) (characterizing Rehnquist as more interested in the outcome than taking credit for it).

152. Harold J. Spaeth, *Chief Justice Rehnquist: "Poster Child" for the Attitudinal Model*, 89 JUDICATURE 108, 114 (2005).

153. *Id.*

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during his Chief Justiceship.¹⁵⁴ Thus, it would be no surprise that Rehnquist would not speak his mind on separation of powers in a concurrence or dissent as he had done in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* and *American Textile Manufacturers Institute, Inc. v. Donovan*. Our own rough count suggests Rehnquist had an even stronger affinity for voting in the majority as Chief Justice on separation of powers cases. In twenty-seven cases in which he participated as Associate Justice, Rehnquist voted with the majority 65% of the time. By comparison, as Chief Justice, Rehnquist voted with the majority almost 90% of the time (thirty-three out of thirty-seven cases). Of course, there is a nonmutually exclusive, alternative explanation: Rehnquist's Chief Justiceship also coincided with a shift in the Court's personnel as Justices Scalia, Kennedy, and Thomas joined the Court, and that change may have made it easier for Rehnquist to join a majority.¹⁵⁵

The institutional incentives of becoming Chief Justice may help explain the evolving beast of Rehnquist's separation of powers jurisprudence. Generally, in those cases he authored, Rehnquist's views on the separation of powers, both as Associate Justice and Chief Justice, were consistent (with the exception of *Morrison*, which we explained may have been later abandoned by Rehnquist himself). However, where Rehnquist did not author the opinion, his votes may not have reflected his first choice. Instead, the institutional incentives of being Chief may have influenced his choice not to concur or dissent as often as when he was Associate Justice, sacrificing some consistency where an outcome was palatable or perhaps simply inevitable.

CONCLUSION

We have suggested that Rehnquist's views on the separation of powers are consistent in one sense: they reflect an inductive case-by-case, common law approach to constitutional adjudication. Rehnquist looked to precedent and historical practice to inform his reading of the constitutional text and, for Rehnquist, precedent and practice are as much the law as the text of the Constitution itself. This pattern is generally consistent in those opinions that Rehnquist authored. Even the notable exception of *Morrison v. Olson* might be explained too, if one considers it a case that Rehnquist later came to regret and allowed Scalia to revisit in part in *Edmond*.

Of course, Rehnquist's separation of powers votes in cases where he did not author the opinion but simply joined might not be as tidily explained as those majority opinions he wrote himself. Rehnquist concurred separately and dissented less often as Chief Justice than as Associate Justice. It may be that

154. *Id.*; see also Nancy Maveety, *The Era of the Choral Court*, 89 JUDICATURE 138, 142 (2005) (noting fewer concurrences).

155. Spaeth, *supra* note 152, at 110.

Rehnquist's role of Chief Justice changed his voting patterns from his early days as a dissenting Associate Justice. Thus, to explain Rehnquist's separation of power opinions and his votes, it might be necessary to resort to both the practical and institutional realities of being the Chief Justice as well as his jurisprudential principles.

Is there a simpler, hidden principle that unifies Rehnquist's separation of powers opinions and votes? As the Sphinx-like Chief might answer: "That's for me to know and you to find out."¹⁵⁶

156. *Quotation of the Day*, N.Y. TIMES, July 9, 2005, at A2 (quoting Chief Justice Rehnquist "to reporters, on rumors that he would retire").