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A SOFTER FORMALISM

Peter L. Strauss*

As our colleagues have often remarked, Professor John Manning's and my views have moved much closer to each other since I wrote the piece he graciously uses as the stalking horse for unmitigated functionalism,¹ and he more recently established himself as the scholarly spokesperson for Scalian textualism and formalism.²

I greatly admire the moderate and exquisitely informed voice of *Separation of Powers as Ordinary Interpretation*,³ which deserves the important influence it will doubtless have. The brief thoughts that follow are to suggest only that (as scholars often enough do) he somewhat exaggerates the characteristics of the schools that he presents as the poles of his persuasive middle ground (functionalism especially); and that, a little strangely, he does not go as far as he might in observing the influence that the details of the Constitution's text respecting government structures might have on the interpretation, especially, of the President's Article II authority.

I. FUNCTIONALISM MUST BE INFORMED BY TEXT; TEXTUALISM, BY FUNCTION

No functionalist scholar — certainly not this one — treats the Necessary and Proper Clause as “giv[ing] Congress virtually limitless room to innovate as long as the overall balance of power is maintained.”⁴ The oversimplified view of functionalism is to present it as indifferent to text, an issue that in my judgment is also present in a certain exaggeration of its relative, purposivism. There is no bright dividing line between an era of purposive/functionalist interpretations and textualist/formalist ones. One of the striking facts about the Supreme Court's decisions in *Bowsher v. Synar*,⁵ his example of majoritarian formalism, and *Commodity Futures Trading Commission v.*

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¹ Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

² See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685 (1999).

³ John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011).

⁴ *Id.* at 1987.

⁵ 478 U.S. 714 (1986).

Schor,⁶ his example of majoritarian functionalism, is that the two opinions were read in Court on July 7, 1986 — the same and final day of the 1985 Term. Four Justices joined both opinions.⁷

One looking carefully at the dates of the opinions he quotes and cites to contrast asserted eras of purposivism and textualism will find that they, too, overlap. With rare exceptions, driven by social imperatives perhaps deserving to be resisted, purposivists apply their skills to and within the boundaries of text. That they find themselves freer of dictionaries, and more attentive to evidence of the concrete social issues catalyzing legislative action, than textualists often are, does not obliterate the constraints of text. One must still determine what the statutory text *could* mean, deploying traditional tools of statutory interpretation, before attending to what it *does* mean.

Neither the formalist majority in *INS v. Chadha*⁸ nor Justice White's functionalist dissent is satisfactory. The majority opinion is circular; only by asserting that Chadha had already acquired a legal right not to be deported could it reason that the House legislative veto altered his rights. But the statute, of course, gave him no fixed right not to be deported until House and Senate, by their inaction, had permitted the legislatively reserved contingency to mature. Justice Powell's lonely concurrence, in my judgment, was more to the point. Just as it would have offended our sense of fairness, and of statutory placement in the Attorney General of the right to suspend deportation, to have the President telephone the Attorney General demanding his action against Chadha in this particular case, it is equally offensive for the House to seek to force that issue in an adjudication. Justice White's purported demonstration that the process for suspending deportation merely echoed the private bill dispensations it had been developed to supplant — as had been the case for private bills, President, House, and Senate must each agree to suspend deportation — failed to take account of the then-quite-recent spread of legislative vetoes to regulatory actions. The President certainly may not "veto" rules promulgated by independent regulatory commissions; and indeed, whether he may command the precise outcomes even of EPA or DOT rulemakings is doubtful.⁹

If, then, one or both houses of Congress claim a veto over regulatory decisions, they have asserted an influence denied the President; however persuasive they might be in the context of reorganizations,

⁶ 478 U.S. 833 (1986).

⁷ See Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

⁸ 462 U.S. 919 (1983).

⁹ See Peter L. Strauss, *Overseer or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

budget adjustments, or even deportations, in the regulatory context Justice White's parallels are not present.¹⁰ And with the legislative veto, if sustained, Congress will have, not irrelevantly if one is concerned with the problems of legislative precision and delegation, given itself permission to legislate mush.¹¹

For *Schor*, too, both formalist and functionalist critiques stumble. In permitting the joinder of administrative action to collect fines with state law counterclaim for damages, the majority was doing only what the Court — Justice Brennan writing in, I suppose, a functionalist vein — had earlier permitted federal district courts; *United Mine Workers v. Gibbs*¹² approved their supplemental (pendant?) jurisdiction over state claims otherwise beyond their jurisdiction to reach, in the interest of party and tribunal convenience. Where the insoluble and unnoticed problem in the case lay was in its easy assumption that Congress could authorize a private individual to invoke the jurisdiction of an administrative agency in an action to collect money damages from another private person for his violation of (regulatory) law. *Crowell v. Benson*,¹³ the last comprehensible Supreme Court opinion to address this kind of problem, rationalized such delegations as either analogous to special masters, within the judiciary, or as occurring in settings in which Congress need provide no resort at all to the courts (cases of “public right”). With its full panoply of regulatory authorities, the CFTC cannot possibly be thought an adjunct to the judicial branch; and today, if not in *Crowell*'s time, it is reasonably clear that due process considerations would not permit Congress to empower the CFTC to amerce and collect fines for private persons (or even for itself) free of judicial supervision. As Justice White remarked in another of the Article III cases, “what limits Art. III places on Congress's ability to create adjudicative institutions designed to carry out federal policy established pursuant to the substantive authority given Congress elsewhere in the Constitution . . . at this point in the history of constitutional law . . . can no longer be answered by looking only to the constitutional text.”¹⁴ His dissent had the concurrence of Chief Justice Burger and Justice Powell, neither of whom were habitual functionalists.

In *Bowsher* as in *Chadha*, in my judgment, one can gain a good deal more by looking to the concurrence than to either “formalist” ma-

¹⁰ See Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789.

¹¹ Cf. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997).

¹² 383 U.S. 715 (1966).

¹³ 285 U.S. 22 (1932).

¹⁴ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 94 (1982) (White, J., dissenting).

jority or “functionalist” dissent. As Justice Stevens argued, the GAO is in reality a *congressional*, not an executive, agency. Without regard to the fact of nominal presidential appointment of its Comptroller, *all* its effective oversight relationships are with the Congress. And it was executing the law, in stark contravention of Article II’s vesting of executive authority in the President. The details of removal authority had little to do with the realities of the case.

A similar issue may be making its way to the Court today, in challenges to the Copyright Royalty Tribunal’s authority to allocate digital copyright fees. It is a subordinate agency of the *Library of Congress* (emphasis supplied), and the formality that the Librarian of Congress is very occasionally nominated by the President with the advice and consent of the Senate seems little more than a figleaf to cover congressional misappropriation of executive function.¹⁵

II. APPLYING PROFESSOR MANNING’S APPROACH TO PRESIDENTIAL AUTHORITY OVER DOMESTIC GOVERNMENT

This short essay turns now to the influence of details. Professor Manning is completely persuasive in the few lines that introduce his discussion of “Reading the Constitution’s Structural Articles”:

In the absence of any meaningful separation of powers baseline, interpreters must take seriously the particular compromises reflected in the adopted text, including the diverse levels of generality at which the document expresses its structural policies. When the Constitution adopts a specific rule about how to implement a given power, interpreters should read that provision as creating a hard and fast limit on congressional authority to adopt a contrary arrangement. In such a case, where the compromise reflects precise decisions about what institution is to exercise a power and the appropriate procedures for its doing so, the interpreter’s job is to protect the balance struck. This conclusion raises questions about important aspects of functionalism.

Conversely, when the Constitution adopts provisions that speak in large, round, indefinite terms, the Court should not read them as if they reflect clear rules.¹⁶

One need not agree with all the details of his analysis — for me, for example, the key to understanding the “Decision of 1789” and *Myers v. United States*¹⁷ is that the former decision was *only* that the Senate would have no voice in removals, and the latter decision was *only* that constitutionally the Senate could have no such voice. All the rest of *Myers* — that is, our former President’s paean to necessary executive

¹⁵ See *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

¹⁶ Manning, *supra* note 3, at 2005.

¹⁷ 272 U.S. 52 (1926).

authority — is surplusage. But Professor Manning’s basic proposition is a commanding one, and the remaining paragraphs of this short commentary will turn to an example that borders on but is strikingly untouched by his discussion, and that bears directly on the issues of presidential authority to which he gives such thoughtful attention.

Here are the important indicators of compromise in the constitutional text that Professor Manning does not take the occasion to discuss. This language, a vivid example of the ways in which the “document that defines the governmental structure [does so] in painstaking detail,”¹⁸ is in italics:

Art. I, § 8, cl. 18: to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers *vested by this Constitution*¹⁹ in the Government of the United States, or *in any Department or Officer thereof*.

Art. II, § 2, cl. 1: The President shall be *Commander in Chief of the Army and Navy* of the United States, and of the Militia of the several States, when called into the actual Service of the United States; *he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices*

Art II, § 3: . . . he shall take Care that the Laws *be* faithfully executed

In contrast to the Vesting Clause, one of those “provisions that speak in large, round, indefinite terms, [that] the Court should not read . . . as if they reflect clear rules,”²⁰ these three clauses, taken together, consistently envision a government in which subordinate officers in the civilian government may themselves be vested with duties, in relation to which the President’s responsibility is that of an overseer, rather than a decisionmaker. Particularly striking — the kind of detail Professor Manning evokes, although it is not one he discusses — is the contrast between the first and second clauses of Article II, Section 2. With respect to the military, the President is “Commander in Chief”; but regarding domestic government, the *only* words about his relationship to it other than the appointments clause, is that he may demand of responsible officials their opinions about *their* duties. The suggestion that duties will be vested in others than the President, inherent in

¹⁸ Manning, *supra* note 3, at 1984.

¹⁹ The Constitution, leaving the creation of the government of the United States to Congress, itself vests no powers either in Congress or in any department or officer. The wording appears to be the somewhat careless residue of an earlier draft that did create a government of several departments given specific duties (the Army, for example) and headed by principal officers responsible for their administration. See Strauss, *supra* note 1, at 599–602. Rather than treat it as surplusage, it seems sensible to take it as a reference to the departments and officers as they are, the product of congressional creation.

²⁰ Manning, *supra* note 3, at 2005.

the Necessary and Proper Clause, is repeated here. The contrast between being commander and being the requester of views, the one clause following immediately upon the other, is striking. And the passive voice of the Take Care Clause, hidden between his (not that important) responsibilities to receive ambassadors and to commission officers, confirms that the President is not the one whose direct action is contemplated. Treating “separation of powers” analysis as an occasion for “ordinary interpretation,” and respecting the meaning of straightforward text as Professor Manning so forcefully counsels us to do, one readily finds here a striking example of “the diverse levels of generality at which the document expresses its structural policies. When the Constitution adopts a specific rule about which institution is to exercise a certain power and in what way, interpreters should read that provision as “creating a hard and fast limit on”²¹ not only congressional power, but also presidential authority to adopt a contrary arrangement.

One setting in which this issue has great importance is regulatory rulemaking. When *Chadha* was decided, serious White House oversight of rulemaking authority was at an early stage of its development. Although President Reagan’s Executive Order 12,291²² predated it by two years, contemporary analyses treated rulemaking as an agency activity, one that might be influenced by “undisclosed Presidential prodding”;²³ and the language of the order itself carefully avoided asserting any right of presidential decision on the merits. Rulemaking records, at the time, were physical records in agency hands; the President’s small Office of Information and Regulatory Affairs could not expect to have ready access to them. The newly created Senior Executive Service, that transformed management levels of the Civil Service, had not yet suffered from its vulnerability to political capture. Today, that vulnerability has been exploited;²⁴ the Executive Order regimes have consistently been strengthened by subsequent Presidents²⁵ and OIRA enlarged; and, of particular importance to the reality of White House possible control, the development of a computerized Federal Data Management Service in conjunction with electronic rulemaking puts rulemaking records on White House as well as agency desks. Under-

²¹ *Id.*

²² 3 C.F.R. 127 (1981).

²³ *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981). Note that about 90% of this opinion’s text concerned itself with excruciatingly detailed review of the agency’s reasoning in light of the agency’s data.

²⁴ David Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008).

²⁵ See, e.g., Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

standing, then, where authority and duties constitutionally lie has much heightened practical importance.

The understanding I suggest is supported by the requirement that principal officers (and any inferior officer Congress does not permit to be appointed by other means) must be appointed with the advice and consent of the Senate. This is no idle requirement. It has a political thrust that reinforces the suggested reading. These appointees will have to be satisfactory to others than the President. Should they be removed from office, whether for cause or at will, the President will have to secure the Senate's approval of their replacement. And, as in the case of William Ruckleshaus supplanting Anne Gorsuch as Ronald Reagan's administrator of the Environmental Protection Agency, the President's practical freedom to appoint whom he wishes and to fire him for any deviation from White House policy preferences may be sharply limited. Surely Mr. Ruckleshaus was aware, from the distance between his views on environmentalism and Ms. Gorsuch's, that his appointment was significantly a product of congressional wishes for environmental administration; and by the same token he could be confident that on the duties entrusted to him by legislation, he had substantial room for decision without fear of presidential dismissal. He was in a political relationship with the Senate, as designed by the Constitution, that would constrain the exercise of removal authority, in practice, by knowledge of its possible political costs and the necessity of finding a Senate-acceptable replacement. The Framers well understood the hazards that would lie in permitting a President alone to make appointments; to them, it was "the most insidious and powerful weapon of eighteenth century despotism."²⁶ Congress is in a position to prevent the appointment of a herd of simple yes-men, in general; as to principal officers, the Constitution directly forbids it to facilitate such appointments, by requiring that its voice, too, must be heard.

Attention to these details, along precisely the lines he so persuasively urges, might have permitted Professor Manning a somewhat less agnostic view of presidential authority than he seems to profess. But then, as he counseled, he was building a framework, not purporting to hang on it every conclusion it might support. And that framework is a persuasive one, indeed.

²⁶ *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (quoting GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 143 (1969)).