

CONGRESSIONAL INTERFERENCE WITH THE PRESIDENT'S POWER TO APPOINT

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The decision by President Bill Clinton to invest his wife, Hillary Rodham Clinton with significant political power when he “appointed” her chair of the Presidential Health Care Reform Task Force, raised many questions about whether such action was appropriate. Critics questioned the political wisdom of the president's decision and were quick to point out the significant liabilities that such an undertaking might provide. These political questions continue to absorb many commentators as Mrs. Clinton continues to strongly influence the administration's political direction.

Also raised, and then forgotten, were legal questions. These addressed the issue of whether the “appointment” was properly within the scope of the president's authority, or specifically whether it was forbidden by anti-nepotism laws. Eventually the issue faded as commentators generally accepted the view that the president's powers were not circumscribed and that Mrs. Clinton could be given the tasks that her husband had assigned to her. And yet, based on the plain text of the Federal Anti-Nepotism statute,¹ the question should remain pertinent.

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1. 5 U.S.C. § 3110 (1992). In relevant part, the statute reads:

A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official.

Id. § 3110(b). The statute defines public official to include government “officer[s] (including the President and a Member of Congress).” *Id.* § 3110(a)(2).

The Anti-Nepotism statute — like motherhood and apple pie — appears proper. Yet, in the debate over Mrs. Clinton's "appointment," it has been largely ignored. It is the contention of this Article that the statute is unconstitutional as to the president and that it cannot bind him or her. Although there has been no judicial challenge to the statute, in practice, this limitation on the presidency continues to be thought of as appropriate. But this interference with executive authority is not unique, as other statutes appear to interfere with the president's appointment power.

Must the president be prohibited from appointing a relative to a principal office? Must the solicitor general be "learned in the law?"² Must the commissioners of the statutorily bipartisan Federal Communications Commission, for example, be members of different political parties? Existing statutes require each of the aforementioned questions to be answered in the affirmative. For instance, the Federal Anti-Nepotism statute, Title 5, § 3110 of the *United States Code*, prevents the president from appointing a relative to a principal office.³ Likewise, § 505 of Title 28 mandates that the solicitor general must be "learned in the law."⁴ Finally, Title 47, § 154(5), which is representative of a wide variety of statutes pertaining to the appointment of the commissioners of various governmental commissions, requires that no more than a bare majority of Federal Communications commissioners may be of the same political party.⁵

While cogent arguments can be made to support these laws, each conflicts with the United States Constitution. The United

2. See 28 U.S.C. § 505 (1988).

3. 5 U.S.C. § 3110 (1992).

4. 28 U.S.C. § 505 (1988). This statute, hereinafter referred to as the "Solicitor General statute," requires that the "President shall appoint . . . a Solicitor General, learned in the law."

5. 47 U.S.C. § 154 (1988). The statute reads: "The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission." *Id.* § 154(b)(5).

Another statute containing a similar clause is the Interstate Commerce Commission statute, 49 U.S.C. § 10,301 (1994), which is part of an act to regulate commerce. Section 10,301(b) states that "[n]o more than three members may be appointed from the same political party." Two further examples are the Securities and Exchange Commission statute, 15 U.S.C. § 78(d) (1994), and the Commodity Futures Trading Commission statute, 7 U.S.C. § 4(a) (1994). Each of these statutes contains a clause limiting the possible political composition for the commissions in question.

States Constitution's "Appointments Clause" states that the president has virtually unfettered power to select "principal officers" and certain other federal officers.⁶ The only permissible prenomination interference to the appointment power is contained in the Constitution's "Incompatibility Clause."⁷ The Constitution precludes any other prenomination congressional influence. Yet, each of the aforementioned laws are congressional attempts to influence the president's prenomination appointment power and thus are unconstitutional.

Part one of this Article will examine several of the congressional statutes that challenge the president's appointment power. It will examine the Federal Anti-Nepotism statute and the evils of nepotism in the executive branch that the statute was enacted to prevent. It will also examine the Solicitor General statute and that office's responsibilities. Finally, it examines the Federal Communications Commission statute as representative of other statutes that require partisan selection of appointees.

Part two of this Article will examine the Appointments Clause, the section of the United States Constitution that vests appointment power with the president. Finally, Part three will examine the various challenges to this presidential power based upon the two primary theories of separation of powers jurisprudence.⁸ formal

6. U.S. CONST. art. II, § 2, cl. 2. The characteristics making a position principal, as opposed to inferior, have been the subject of much discourse in legal articles. However, this debate is beyond the scope of this Article. For a more thorough discussion, see Kevin R. Morrissey, *Separation of Powers and the Individual*, 55 BROOK. L. REV. 965 (1989).

7. U.S. CONST. art. I, § 6, cl. 2.

8. All separation of powers analyses are anchored to the goal of protecting liberty. However, each approach reaches this goal differently. These differences will be discussed *infra*.

In addition to the traditional approaches, a new theory of separation of powers jurisprudence has developed. This theory was first seen in Justice Kennedy's concurrence in *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1990). In *Public Citizen*, the Washington Legal Foundation (WLF) brought suit against the Department of Justice after the Standing Committee on Federal Judiciary of the American Bar Association (ABA), a group from which the Department of Justice often seeks advice on possible nominees for judgeship, refused WLF's request for the names of the judges the ABA was considering. *Id.* at 447. The suit was brought under the Federal Advisory Committee Act (FACA), 5 U.S.C. app. § 3(2) (1994), which allows the minutes, records, and reports of advisory committees that are "established or utilized" by the president or an agency to become public record. *Public Citizen*, 491 U.S. at 446-47. The majority never reached the separation of powers question because it determined that evaluations from an ABA committee were not *utilized* by the Department of Justice, under the meaning of the FACA,

ism⁹ and functionalism.¹⁰ It will argue that the statutes studied are

in selecting candidates to fill open positions. *Id.* at 466–67. By arriving at this conclusion, the majority was able to avoid a separation of powers question. *Id.* Therefore, only Justice Kennedy's concurrence reached this constitutional question. *Id.* at 467–89 (Kennedy, J., concurring).

The *Public Citizen* standard is a hybrid of both functionalism and formalism. *Public Citizen* employs an uncompromising formalistic approach in evaluating powers expressly provided by constitutional text because “where the Constitution by explicit text commits [a] power . . . to the exclusive control of the President,” there can be no legislative intrusions. *Id.* at 485. On the other hand, the *Public Citizen* standard uses a functionalist balancing approach for powers implied from constitutional text. *Id.* at 484.

Thus, contrary to the formalistic approach, there are times when the Constitution is inadequate in policing separation of powers disputes. In those circumstances where there is a conflict as to the extent of one branch's powers and the Constitution is silent, the Court must replace the Constitution to resolve the dispute. The functionalist believes it is proper for the Court to resolve these disputes by applying a balancing test, best described in *United States v. Nixon*, 418 U.S. 683 (1974), to establish the proper boundaries between the branches on these ambiguous powers.

The *Public Citizen* standard does not contain any of the problems generally connected to functionalism and formalism. Thus, in taking the best aspects of functionalism and formalism, the *Public Citizen* standard shows deference to explicit balances drawn by the Constitution, implying that the Framers intended the Constitution to evolve with society. With Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy supporting this approach, the *Public Citizen* standard could influence future separation of powers questions.

Since this examination is based upon parts of both functionalism and formalism, it is unnecessary to examine the *Public Citizen* approach separately in this Article. Naturally, if a statute is unconstitutional under formalism and functionalism, then it will be unconstitutional under the *Public Citizen* examination, which combines both.

9. As indicated, it is the goal of each approach to protect personal liberties. The formalist approach maintains this goal by diligently following express constitutional text. Thus, only those explicit interbranch interactions expressly provided by the Constitution are allowable. A formalist approach was used in *INS v. Chadha*, 462 U.S. 919, 944–59 (1983), where the Supreme Court struck down a “legislative veto provision” because it found that such vetoes were “one house vetoes,” which were tantamount to legislating without passage by both houses and presentation to the president as required by the Constitution.

10. Functionalism, on the other hand, suggests “that the rigid separation of the three branches of government is not constitutionally mandated, historically supported, or even necessary to control the abuses of government,” and therefore stresses flexibility. Michael L. Yoder, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173, 179 (1990) (citing *Mistretta v. United States*, 488 U.S. 361, 380 (1989)). To further its goal of protecting liberty, functionalism balances the interests of government's competing branches and the competing constitutional sections against each other. *Id.* at 179–80. Interbranch encroachments not expressly provided in the Constitution may be allowed if justified by the pursuit of protecting liberty or other public policies. *Id.*

A functionalist approach was used in *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977). The Court held that the Presidential Recordings and Materials Preservation Act, 44 U.S.C. §§ 2107–2108 (1982), which directed the administrator of General

unconstitutional under either of these theories.

I. LEGISLATION CHALLENGING THE PRESIDENT'S POWER TO APPOINT

A. The Federal Anti-Nepotism Statute: 5 U.S.C. § 3110

In 1967, to combat the problems associated with nepotism, Congress enacted the Federal Anti-Nepotism statute¹¹ as part of the Federal Postal Act.¹² Nepotism, for our purposes, “refers to the hiring and advancement of un- or underqualified relatives simply by virtue of their relationship with an employee [or] officer.”¹³ In hind-

Services to screen some of President Nixon's presidential materials to separate those that had historical value, was constitutional. *Nixon*, 433 U.S. at 452–53. The Court noted that although the Act did encroach slightly on the executive powers, it did not prevent the president from accomplishing a constitutionally assigned function. *Id.* at 441–46.

11. 5 U.S.C. § 3110; *see supra* note 1.

12. Pub. L. No. 86-682, 74 Stat. 578 (1960) (revised in 39 U.S.C. § 410 (1988)).

Note that the part of this Act pertaining to the Anti-Nepotism statute is very minor in magnitude. In fact, at no point in this Act's legislative history is there any discussion of its need. For example, the senate report, S. REP. NO. 801, 90th Cong., 1st Sess. 2312–13 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2284–85, expands and clarifies the bill's anti-nepotism provision, but does not give any explanation for its relevance or necessity. Further, during the entire hearing process, it appears that the bill was discussed for less than one minute. *See* 113 CONG. REC. 28,658 (1967).

The Postal Act was primarily concerned with adjusting postage rates, the rates of basic compensation for certain federal government officers and employees and the regulation of pandering advertisements. The house report for this bill gives a list of the specific areas to which the Act pertains. H.R. REP. NO. 722, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 2259. Although many believe that the statute was enacted as a reaction to President Kennedy's appointment of his brother, Robert Kennedy, as attorney general, such a notion is more fiction than fact. *See infra* note 20.

Instead, the anti-nepotism provision was included in the Postal Act for two reasons. First, since several parts of the Act were intended to influence government employees, particularly postal workers, the Postal Act was the logical location for a law primarily applicable to these individuals. Second, the Act was primarily intended to apply to “smaller post offices.” 113 CONG. REC. 28,658 (1967).

This provision was sponsored by Representative Neal Smith, a Democrat from Iowa and longtime proponent of a federal anti-nepotism law. *Id.* During a hearing, Representative Smith told Congress that the anti-nepotism amendment should be included in the Postal Act because it was primarily directed at “smaller post offices,” and to a lesser extent Congress, in an effort to eliminate hiring practices not based on merit. *Id.* Smith recently explained to the *Des Moines Register* that the Federal Anti-Nepotism statute is also applicable to Congress because when he “came [to Congress] in the early '60s, there were 50 members who had their wives on the payrolls.” Richard Prince, *Robert Kennedy Law Is Misnamed and Badly Applied*, Gannett News Service, Jan. 29, 1993, at 3.

13. Leonard Bierman & Cynthia D. Fisher, *Anti-Nepotism Rules Applied to*

sight, it is not surprising that the government enacted its own anti-nepotism rules since these rules have existed in a variety of forms¹⁴ for hundreds of years¹⁵ and are still fairly prevalent throughout American society.¹⁶

The Federal Anti-Nepotism statute attempts to eliminate nepotism by explicitly precluding public officials from hiring, employing, or advocating their relatives to positions over which the official has some form of control.¹⁷ It can be surmised that even in light of the dearth of legislative discussion, Congress enacted the anti-nepotism statute to eliminate nepotism within the federal government.¹⁸ Since

Spouses: Business and Legal Viewpoints, 35 LAB. L.J. 634, 634 (1984). Nepotism is derivative of the word nephew and literally means "favoritism benefitting nephews." See Anna Giattina, *Challenging No-Spouse Employment Policies as Marital Status Discrimination: A Balancing Approach*, 33 WAYNE L. REV. 1111, 1111 (1987). However, over time, both immediate blood relatives and relatives by marriage have been covered by anti-nepotism employment policies. *Id.*

14. There are generally four types of anti-nepotism rules. The broadest anti-nepotism rule "completely prohibits the employment of relatives of an employee *anywhere* in the organization." Bierman & Fisher, *supra* note 13, at 634. A less restrictive rule bars the employment of relatives at the same location. *Id.* A more liberal rule "allows employment at the same site but not in the same department or work group." *Id.* The last type of rule, which may be used in conjunction with any of the above rules, "prohibits relatives from holding positions in which one [relative] directly supervises the other or has any formal influence over the pay, promotion, or work situation of the other." *Id.*

Different organizations employ different variations of the rules to suit their individual needs. *Id.* at 635. Some enact policies to prevent married relatives from working in the same office, branch, or department, but allow nonmarried relatives to work together and allow individuals who marry while working together to continue working together as long as their contact with each other is minimal. *Id.* These former policies are generally called anti-nepotism/no-spouse rules. The Federal Anti-Nepotism statute is of the broadest variety, as it prohibits any employment in the branch where a relative exerts influence. See *supra* note 1. For a complete discussion of anti-nepotism rules, see generally Joan G. Wexler, *Husbands and Wives: The Uneasy Case for Anti-Nepotism Rules*, 62 B.U. L. REV. 75 (1982).

15. Initially, anti-nepotism rules developed during the Middle Ages in response to the Roman Catholic Church's policy of clergy appointing relatives, particularly nephews, to high clerical office. Wexler, *supra* note 14, at 75.

16. A study conducted in 1963 of 530 American companies showed that 28% had formal anti-nepotism rules, while 36% had unwritten rules. Bierman & Fisher, *supra* note 13, at 634. A more recent study in 1982 of 45 large corporations concluded that 64% had official policies, and an additional 29% possessed unofficial policies that limited or prohibited the employment of relatives. *Id.*

17. 5 U.S.C. § 3110(a)(2), (b); see *supra* note 1 (quoting the Federal Anti-Nepotism statute in relevant part).

18. The primary justification for anti-nepotism rules is self-explanatory. Individuals should be hired on merit, accomplishments, and skill, rather than on familial relation-

this section is concerned with nepotism occurring in the executive branch, it will only examine the consequences of the president appointing a relative to a position over which he exercises influence.¹⁹

Throughout American history, there have been numerous examples of nepotism in the executive branch. Perhaps the most notable was the appointment of Robert F. Kennedy as attorney general by his brother, President John F. Kennedy. In fact, many incorrectly believe that the Federal Anti-Nepotism statute was enacted in response to this appointment.²⁰ A more recent example,²¹ although debatably not an executive appointment, was Hillary Rodham Clinton's selection as chairperson of President Clinton's Health Care Reform Task Force.²²

ships. Even though broad anti-nepotism regulations — rules that solely evaluate family relationships rather than ability — are not very defensible, courts have been slow to invalidate them because they have reasoned that these rules not only serve the legitimate purpose of preventing the problems associated with nepotism (e.g., the hiring of an incompetent person on the basis of their familial relationship, undue influence, favoritism, etc.), but also because they address additional problems.

For example, in *Cutts v. Fowler*, 692 F.2d 138, 141 (D.C. Cir. 1982), the application of an anti-nepotism rule was upheld because the court believed that, in addition to addressing “the problem of actual favoritism, [anti-nepotism rules] also alleviate the deleterious effect on morale that an apparently prejudiced arrangement can have on other employees.” Furthermore, in dicta, the *Cutts* court stated that organizations should not have the “burden of waiting until a conflict . . . becomes a problem” prior to taking action. *Id.* This dicta appears to legitimize the enactment of preventive anti-nepotism rules.

19. For a complete discussion of nepotism and anti-nepotism rules, see generally Wexler, *supra* note 14.

20. As recently as March 10, 1993, Judge Lamberth perpetuated this fallacy by calling § 3110 “the Kennedy Act.” *Association of Am. Physicians & Surgeons v. Clinton*, 813 F. Supp. 82, 87 n.8 (D.D.C.), *rev'd*, 997 F.2d 898 (D.C. Cir. 1993). However, it is unlikely that this Act was a response to Robert Kennedy's appointment for two reasons. First, the statute was enacted in 1967 and Robert Kennedy's appointment occurred in 1961. Second, in an interview with the *Des Moines Register*, the Act's sponsor, Neal Smith, expressly stated that the Act was not directed against the Kennedys. Prince, *supra* note 12, at 2. Note that if the Federal Anti-Nepotism statute had been enacted prior to this appointment, Robert Kennedy could not have been the attorney general for his brother's administration.

21. The question of whether this appointment was to an executive branch position and therefore, whether Mrs. Clinton is an executive official or employee, has been the subject of litigation. See generally *Association of Am. Physicians & Surgeons*, 813 F. Supp. at 83–90.

22. A recent appointment which raised the issue of nepotism was the appointment of United States District Court Judge John Walker to a seat on the United States Court of Appeals for the Second Circuit. Judge Walker is the first cousin of then President George Bush.

However, even if this appointment was based on nepotism, it probably did not

The concerns arising from the appointment of a relative to an executive position by the president are numerous, regardless of which relative is appointed. Yet these concerns are heightened if the relative is the president's spouse.²³ For example, if the president and his wife worked together, their personal differences could potentially permeate their working relationship and impede their ability to work effectively.²⁴ Moreover, existing problems may be exacerbated if the work site where their personal and professional lives are joined is the White House.²⁵ Furthermore, the president may show favoritism toward his wife.²⁶ Even if there is no actual preferential treatment, other officials and co-workers may believe that favoritism is present and "become resentful and demoralized"²⁷ and, as a consequence, reduce their own performance. Finally, if the spouse does not perform at an acceptable level, the president may have a difficult time reprimanding, let alone firing, her.²⁸ The consequences of firing a spouse or giving the spouse a poor evaluation are more severe than giving a poor evaluation to an "unrelated" official. Even though there are strong rebuttals to these concerns,²⁹ these

fall under § 3110's purview because it involved a judicial appointment and judges are not "executive officials." Further, while no official body has addressed whether the Federal Anti-Nepotism statute is applicable to judicial appointments, and although the president's appointment power may "constitute a modicum of control, it is clear that the President does not supervise the judiciary" as per § 3110. Sanford Hausler, *Dershowitz Errs in Interpreting Law*, NAT'L L.J., Oct. 31, 1989, at 2. Judge Walker's appointment was confirmed on November 30, 1989. He sits today as a very highly regarded jurist. *Today's News Update*, 202 N.Y. L.J. 1 (1989).

23. See generally Wexler, *supra* note 14, for a complete discussion of the concerns associated with appointments when the relative is the president's spouse. While the Authors recognize that either gender may occupy the office of the president, the male pronoun will be employed to refer to the president and the female pronoun to the president's spouse, when gender-neutral language may lead to excessive verbiage or cumbersome wording.

24. *Espinoza v. Thoma*, 580 F.2d 346, 348-49 (8th Cir. 1978).

25. See, e.g., Bierman & Fisher, *supra* note 13, at 635-36.

26. *Id.*

27. *Id.*

28. See *Espinoza*, 580 F.2d at 349. In addition, because of the close relationship between the president and his/her spouse, inadequate performances may be overlooked for several evaluation periods. *Id.*

29. One opponent of anti-nepotism rules points to the fact that these problems can also occur with nonmarried co-workers. Wexler, *supra* note 14, at 96-115. Wexler claims that all people can have problems at home and it is unreasonable to expect single individuals to be better able to handle these problems than married ones. *Id.* She further contends that married couples themselves should decide whether to work together. *Id.* Many of the problems attributed to married couples can also occur when co-workers

problems do exist and they influence the policy choice the president has in making such a selection. The Federal Anti-Nepotism statute takes preventive steps to eliminate nepotism from the executive branch by preempting situations where nepotism may occur.

B. The Solicitor General Statute:
28 U.S.C. § 505

The Solicitor General statute concerns the appointment of the solicitor general,³⁰ the official charged with representing the United States government in lawsuits and appeals in the United States Supreme Court and other lower federal courts.³¹ The solicitor general also acts as a “gatekeeper” who “control[s] a large portion of the litigation that reaches the [Supreme] Court's docket.”³² In recent times, the solicitor general has assumed a position in “the forefront of executive policy making.”³³ Accordingly, the solicitor general has become one of the president's most important allies in pursuing his or her agenda before the court and as such, usually shares the president's political philosophy. As such, there are strong policy reasons against limiting the president's ability to choose this individual.

One of the solicitor general's other responsibilities is to present

are good friends or are dating. *Id.* A rule that attempts to penalize a married couple for having a disagreement, but which does not apply to two unmarried individuals acting in a similar manner, may be discriminatory since these individuals are affected because of their marital status. *See generally id.* Finally, just as these rules may discriminate against married couples vis-a-vis good friends, they also make no allowances for unmarried couples. The term “unmarried couples” encompasses individuals who possess intimate relationships (for example, ones who have made homes together, shared living expenses, and/or had children without the legal bond of marriage). James C. Beattie, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415, 1415 (1991). Further, this term includes homosexuals who live in a family unit, but are legally prevented from marrying their partners because homosexual marriages are not legally recognized in many states. *Id.* at 1415–16.

30. *See* 28 U.S.C. § 505 (1988).

31. REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 11 (1992).

32. *Id.* at 1. These “gatekeeping” powers have a significant impact on the cases the Supreme Court hears and thus, affect the Court's influence. Consider the following statistics from the Supreme Court's 1983 term: The Court granted only 3%, or approximately 116, of the 3878 petitions for writs of certiorari submitted by lawyers. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 4 (1987). On the other hand, the Court granted 79% of those petitions submitted by the solicitor general. *Id.*

33. SALOKAR, *supra* note 31, at 2.

briefs which support or oppose petitions of certiorari.³⁴ The solicitor general is charged with deciding if the United States should intervene in certain cases and, when the government is an interested party to a case, submit amicus curiae briefs to the Supreme Court.³⁵ In addition, when the United States is a party to a case which the Supreme Court selects for meritorious review, the solicitor general has the responsibility of writing, revising, and presenting the government's brief.³⁶

The solicitor general's office was created by Congress through the Judiciary Act of 1870.³⁷ The Act itself proposed to create "a new officer, to be called the solicitor-general of the United States, part of whose duty it shall be to try these cases [those on behalf of the United States] in whatever courts they may arise."³⁸ The United States Code restricts the president to appointing candidates who are "learned in the law."³⁹

C. The Federal Communications Commission: 47 U.S.C. § 154

A January 1934 Interdepartmental Study of Communications, chaired by the secretary of commerce, addressed the need for more centralized regulation of the rapidly expanding wire and radio communication industry, both nationwide and worldwide.⁴⁰ The result

34. *Id.* at 12.

35. *Id.* at 13.

36. *Id.* at 13. For a list of additional duties with which the solicitor general is charged, see *id.* at 12-13.

37. Judiciary Act of 1870, ch. 150, §§ 2, 5, 10, 16 Stat. 162, 162-63. The current statute concerning the solicitor general is located at 28 U.S.C. § 505 (1988).

38. SALOKAR, *supra* note 31, at 10 (quoting CONG. GLOBE, 41st Cong., 2d Sess. 3035 (1870) (statement of Rep. Jenckes)).

39. 28 U.S.C. § 505. In addition, this statute directs the president to appoint a solicitor general to assist the attorney general in performing his or her duties. *Id.*

Although probably not a principal officer (by the position's nature), the circumstances of the nomination by the president and confirmation by the Senate suggest this appointment is governed by the Appointments Clause.

40. SECRETARY OF COMMERCE, 73D CONG., 2D SESS., STUDY OF COMMUNICATIONS BY AN INTERDEPARTMENTAL COMMITTEE (Comm. Print 1934). At the time, communication regulation powers were dispersed among the Interstate Commerce Commission, the Federal Radio Commission, and the postmaster general, as well as other agencies. The FCC was to be devoted to reducing rates, preventing discrimination, controlling exclusive contracts that communications companies made with hotels, railroads and foreign countries, regulating annual depreciation charges, preventing speculative management, preventing the "watering" of stocks, and permitting the extension of service in localities and homes

was the Federal Communications Act of 1934,⁴¹ which created the Federal Communications Commission (FCC), a single regulatory body committed to the federal control of communication mediums such as radio, telephone, and television.⁴² The commission was comprised of seven commissioners,⁴³ but is now comprised of five commissioners.⁴⁴ Even in its original form, however, the Act provided that “[n]ot more than four commissioners shall be members of the same political party.”⁴⁵ The feature of bipartisanship is an appealing one. However, the question of its desirability raises the same policy question: Should the Chief Executive be required to choose nominees on a partisan basis, thereby interfering with his constitutionally granted appointment power?

II. THE APPOINTMENT POWER

The United States Constitution expressly provides the following:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts

not now served. *Id.* at 113.

41. 47 U.S.C. § 154.

42. The purposes of the original Act were stated in § 1 of the Act:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the “Federal Communications Commission,” which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Communications Act of 1934 § 1, ch. 652, 48 Stat. 1064 (1934).

43. *Id.* § 4(a).

44. 47 U.S.C. § 154(a).

45. Communications Act of 1934 § 4(b).

of Law, or in the Heads of Departments.⁴⁶

The Appointments Clause's language is clear. The act of appointing an official requires a combination of two separate powers: the president's power to "nominate" and the senate's power to give or withhold its "Advice and Consent."⁴⁷ This constitutional provision appears to give the president the sole prerogative to choose any individual to fill a principal office, or other office whose appointment is governed by the Appointments Clause, without any prenomination influence by the United States Senate.⁴⁸ A commentator has said, "[T]he appointments clause itself, insofar as it can be said to have plain meaning, is the only positive source for criteria for the determination of the locus and mechanics of the appointment power."⁴⁹ This broad reading of the Appointments Clause is supported by the Clause's grammar;⁵⁰ previous judicial interpretation;⁵¹ the Framers' demonstrated desire to ensure accountability for the holder of the appointment power;⁵² efficiency

46. U.S. CONST. art. II, § 2, cl. 2.

47. *Id.*

48. See John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 638-46 (1993). Professor McGinnis noted that "[a]s a dispassionate reading of the [Constitution's] text . . . shows, the Appointments Clause assigns no prenomination role of a constitutional dimension to the Senate." *Id.* at 635. Professor McGinnis further stated that the president was given the "plenary choice in the appointments process, with that of the Senate, which was given only the power of rejection." *Id.* at 653. Another commentator has noted that "the power to present a candidate for [a principal office] is vested solely in the President." William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 635 (1987).

49. John M. Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 WAYNE L. REV. 1335, 1340 (1976).

50. McGinnis, *supra* note 48, at 638, notes that the Clause's grammar is telling: "[T]he act of nomination is separated from the act of appointment by a comma and a conjunction." McGinnis continued, "Only the latter act [the appointment itself] is qualified by the phrase 'advice and consent,'" thus demonstrating the true location of the nomination power. *Id.* at 638-39.

51. In *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring), it is noted that "[b]y its terms, the [Appointment] Clause divides the appointment power into two separate spheres: the President's power to 'nominate,' and the Senate's power to give or withhold its 'Advice and Consent.'" Justice Kennedy noted that "no role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment." *Id.*

52. This topic was addressed in THE FEDERALIST No. 76, at 455-56 (Alexander Hamilton) (Clinton Rossiter ed., 1961), where Hamilton explained why the president was

cy,⁵³ historical practice;⁵⁴ and historical records.⁵⁵ These factors individually and cumulatively indicate that the senate's⁵⁶ only input into the appointment process should be to give or withhold its consent.⁵⁷

given the sole prerogative in choosing principal officers:

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. [The president] will on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.

Id. Note that the importance of the president's accountability is "[n]ot merely an abstract idea of political theory . . . [it] is a hallmark of [American] democracy — perhaps best put in President Truman's gritty aphorism 'The buck stops here.'" *In re Sealed Case*, 838 F.2d 476, 489 (D.C. Cir.), *rev'd on other grounds sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

53. In order for the executive branch to meet its constitutional obligations, "the Framers envisioned that the Executive Branch would be divided into departments whose officers would be appointed by the President" through the Appointments Clause. *In re Sealed Case*, 838 F.2d at 482. Further, the president's ability to choose these officers is important because the president must depend on these subordinates to assist him in executing the laws. This is true because it would be almost impossible and extremely inefficient for one person to execute all of the laws without assistance. *Buckley v. Valeo*, 424 U.S. 1, 135 (1976). Therefore, it is natural to believe that, as part of his executive power, the president "should [be free to] select those who [are] to act for him under his direction in the execution of the laws." *Id.* at 135–36.

54. McGinnis, *supra* note 48, at 645, notes that the construction of the Appointments Clause, which has been advocated here, "is supported by the practice of the first President and Senate." George Washington, "acutely conscious that his actions would set precedents for future generations," chose William Short to be his first nominee and after nomination, requested the Senate's "advice on the propriety of appointing him." *Id.* at 645 & n.51 (citing 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789–1791, at 8 (Linda G. De Pauw ed., 1974)). Thus, the first president deliberately made his choice and *then* asked the Senate to give its "consent."

55. *The Federalist* provides a historical perspective into the Appointments Clause. See THE FEDERALIST No. 6, at 456–57 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton noted:

In the act of nomination, [the president's] judgment alone would be exercised; and as it would be his sole duty to point out the man who with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment. It will be the office of the president to *nominate*, and, with the advice and consent of the senate to *appoint*. There will, of course, be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose* — they can only ratify or reject the choice of the President.

Id.

56. Note that the House of Representatives plays no role in this process.

57. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 483–84 (1989) (Kennedy, J., concurring). As stated, there is one limitation on the president's appoint-

During the Constitutional Convention, there was much discourse concerning where the appointment power should lie. The Framers all agreed that the ultimate location of the appointment power would play an important part in maintaining the government's structural integrity.⁵⁸ In addition, historical evidence suggests that the Framers considered that the appointment power could be a "powerful weapon" if in the wrong hands.⁵⁹ Thus, the final form of the Appointments Clause reflected these concerns and was written into the Constitution to protect the government's structural integrity by preventing one branch from "aggrandizing its power at the expense of another branch."⁶⁰

As accountability was also important in maintaining the government's structural integrity, the Appointments Clause was worded to bestow accountability on the holder of the appointment power.⁶¹ By placing this power in the hands of a single executive, the Framers envisioned maximization of the accountability factor. Finally, to complete any appointment and to further limit possible misuse, the Framers required the work of two branches. The president's nomination and the Congress' advice and consent are both required to complete any appointment.⁶²

Although there has been controversy concerning recent appoint-

ment power. This limitation is contained in Article I, § 6, Clause 2 of the United States Constitution and is known as the "Incompatibility Clause." *Id.* at 484. This Clause provides in relevant part that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time." U.S. CONST. art. 1, § 6, cl. 2.

58. *Freytag v. Commissioner*, 111 S. Ct. 2631, 2639 (1991). The Court noted that "[t]he structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic." *Id.*

59. In *Freytag*, the Court concluded that historical evidence suggested that the appointment power was a powerful weapon. *Id.* at 2641. The Supreme Court relied upon *The Federalist* and other contemporaneous writings as its "historical evidence." *Id.* These documents suggested the Framers considered the appointment power a "weapon" because "the manipulation of official appointments had long been one of the American revolutionary generations' greatest grievances against executive power." *Id.* To the Framers, this executive was the King of England. *Id.*

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

61. *Freytag*, 111 S. Ct. at 2638. In discussing why the Framers developed the appointment power as they did in the Appointments Clause, the *Freytag* Court stated that the "Framers understood that by limiting the appointment power [i.e., by placing it in one person's hands], they could ensure that those who wielded it were *accountable* to political force and the will of the people." *Id.* at 2641 (emphasis added).

62. U.S. CONST. art. II, § 2, cl. 2.

ments (principally with nominees to the United States Supreme Court) made under the Appointments Clause,⁶³ this controversy has not questioned the president's unilateral power to choose who will be nominated.⁶⁴ Even the Clause's inherent ambiguity as to what a "principal officer" is compared to an "inferior officer" does not cloud the president's unilateral appointment power, as such power has never been questioned.

III. SEPARATION OF POWERS

The "principle of separation of powers has for over 200 years protected the property and liberty of [American] citizens."⁶⁵ In fact, the Framers created a government based on a separation of powers. The justification for such separation stems from various explanations: efficiency;⁶⁶ the protection of liberties;⁶⁷ and the prevention of tyranny.⁶⁸ The Constitution accomplished these goals by separating

63. Recall the confirmation hearings of such recent judicial nominees as Judges Clarence Thomas and Robert Bork.

64. See, e.g., Robert J. Miner, *Advice and Consent in Theory and Practice*, 41 AM. U. L. REV. 1075 (1992); Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213 (1988). Note that even in the course of this controversy, no commentator has disputed the grant of appointment power to the president. For example, Professors David Strauss and Cass Sunstein, calling for a dramatic change in the advice and consent aspect of the Appointments Clause, David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992), have conceded in their reply to Professor John McGinnis' criticism to that earlier article that power to nominate clearly "rests with the President." David A. Strauss & Cass R. Sunstein, *On Truisms and Constitutional Obligations: A Response*, 71 TEX. L. REV. 669, 671 (1993).

65. *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 987 (2d Cir. 1991), cert. denied, 112 S. Ct. 416 (1991). The Court in *Buckley v. Valeo*, 424 U.S. 1, 124 (1976), stated that "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was [expressly] woven into the [Constitution]."

66. See *supra* note 53 and accompanying text.

67. Morrissey, *supra* note 6, at 978-79. In THE FEDERALIST No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961), Madison referred to the separation of powers doctrine as an "essential precaution in favor of liberty." In *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2310 (1991), the Supreme Court stated that "[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed."

68. *Ameron, Inc. v. United States Army Corps of Eng'rs*, 787 F.2d 875, 881 (3d Cir. 1986), cert. dismissed, 488 U.S. 918 (1988). The Framers believed that specialization would enhance efficiency and liberties would be protected "by requiring cooperation of the separate branches before the government can act." *Morrison v. Olson*, 487 U.S. 654, 693 (1988).

the powers and providing defined roles and responsibilities for the legislative, executive, and judicial branches.⁶⁹ The Framers recognized that each branch could be tempted to encroach upon powers delegated to another. Therefore, the Framers developed a Constitution which deliberately reflected these concerns.⁷⁰

Although the American government is divided into three branches, these branches are not hermetically sealed⁷¹ and the underlying structure of the American government consists of “checks and balances.”⁷² The United States Supreme Court primarily uses two techniques to examine separation of powers questions. These techniques, formalism and functionalism, originate from an understanding of the constitutional principle of checks and balances.

A. Formalism

Formalism looks at “checks and balances” by adhering strictly to express constitutional text⁷³ and the established divisions of

69. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). In *Bowsher*, the Court noted that it has often reaffirmed the importance of the Constitution's scheme of separating government power into three coordinate branches. *Id.* at 725. In addition, according to Madison, “[t]he accumulation of all powers legislative, executive and judiciary in the same hands [is] the very definition of tyranny.” THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). Therefore, to avoid this tyranny, all powers were dispersed throughout the government.

70. In *INS v. Chadha*, 462 U.S. 919, 951 (1983), the Supreme Court recognized that “[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power” exists. The Court continued that this pressure must be resisted, even when directed at accomplishing desirable objectives. *Id.*

71. *Ameron*, 787 F.2d at 881. Further, “the Framers did not require — and indeed rejected — the notion that the three Branches must be entirely separate and distinct.” *Mistretta v. United States*, 488 U.S. 361, 380 (1989); see *United States v. Nixon*, 418 U.S. 683, 707 (1974) (noting that chosen governmental structure was not one of absolute separation, but rather one of overlap).

72. Under the “checks and balances” view, the Framers, “[i]n designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches . . . sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.” *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)). Also, in *Buckley v. Valeo*, 424 U.S. 1, 121 (1976), the Court noted that it has consistently recognized that the constitutional framework requires a certain degree of interdependence among the branches to maintain an effective government. For a more complete discussion of checks and balances, see Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1087–91 (1988).

73. In *Chadha*, 462 U.S. at 959, the Court justified its conclusion that a separation of powers violation had occurred by finding that the legislative action in question was

power defined in the arrangement of the three separate branches of government. The formalistic approach assumes the Framers deliberately and particularly separated the three branches of government to prevent one branch from encroaching on another,⁷⁴ and thus, any interpretation should be consistent with this view. The Supreme Court has recently noted that “[w]here a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance has already been struck by the Constitution itself,” and any “tinkering” thereof cannot be tolerated.⁷⁵ Discussing the issue of separation of powers, Justice Kennedy noted that a formalistic approach must be used in evaluating express powers because it would be “improper for [the Supreme] Court to arrogate to itself the power to adjust a balance settled by the explicit terms of the Constitution.”⁷⁶

Formalism is based on the belief that “by maintaining a clear separation of powers among the branches of government, no one branch [can] obtain a level of power that could lead to abuse.”⁷⁷ Formalists do not believe in a strict “hermetic” division of power because they allow for those interbranch interactions expressly provided by the Constitution.⁷⁸ Formalists, therefore, view the government as a system bound by checks and balances, with checks limited only to those expressly allowed by the Constitution itself. To be consistent with this belief, formalists rely on past practice when classifying a power as either executive, legislative, or judicial in separa-

not supported by any constitutional text. *See supra* note 9.

74. According to Chief Justice Warren Burger in *Chadha*, “[t]he Constitution [clearly] sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.” *Chadha*, 462 U.S. at 951.

75. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring).

76. *Id.* Justice Kennedy continued, “[A]s to the particular divisions of power that the Constitution does in fact draw, [the Court is] without authority to alter them, and indeed [the Court is] empowered to act in particular cases to prevent any other Branch from undertaking to alter them.” *Id.* at 487.

77. Yoder, *supra* note 10, at 179.

78. The Constitution contains several interbranch checks. For example, the Appointments Clause allows the head of the executive branch to appoint members to the judicial branch. U.S. CONST. art. II, § 2, cl. 2. Also, the Legislature is empowered to remove executive branch members by impeachment. U.S. CONST. art. 1, § 3. *See generally* Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1 (1989).

tion of powers questions.

Formalism's primary problem is that it is uncompromising as it relies solely on the Constitution for guidance. Thus, its critics contend, formalism fails to "fully recognize that the Constitution intentionally granted some discretion" to each branch so that the government may "respond to the needs of a changing society."⁷⁹ Hence, because the Constitution does not reach many of the questions confronting modern society, a strict approach to the separation of powers is problematic. In other areas, it has been necessary to go beyond the text to reach constitutional issues. In these cases where the Constitution is silent, individual lawmakers and judges are forced to interpret the Constitution, thereby moving beyond the text in the process. Such a common practice makes a strictly formal approach to the separation of powers issue appear less than adequate. Despite this problem, formalism has been used and presents a viable analytic tool for separation of powers questions.

79. Yoder, *supra* note 10, at 179.

B. Functionalism

In contrast to formalism, functionalism stresses flexibility and interaction between the government's three branches.⁸⁰ Recently, functionalism has been embraced by the Supreme Court in dealing with separation of powers questions.⁸¹ Functionalism eschews literal constitutional interpretation in favor of balancing “the extent that [a statute] prevents the [president] from accomplishing constitutionally assigned functions” against whether the intrusion on the president's powers is “justified by an overriding need to promote objectives within the constitutional authority of Congress.”⁸²

In short, the functionalistic test, best set forth in *United States v. Nixon*,⁸³ balances the extent to which one branch's actions disrupt the traditional delegation of power against the public policy that might justify this disruption. Thus, under the *Nixon* test, the functionalistic approach allows a congressional action which might be contrary to the Constitution's direct language if it furthers a necessary public policy and does not dramatically disrupt the constitutional framework.⁸⁴ Courts are empowered to, and freely do, inter

80. *Id.* at 180.

81. For example, in 1989, the Supreme Court used a functionalistic analysis in *Mistretta v. United States*, 488 U.S. 361, 412 (1989), where it upheld a sentencing guideline enacted by the United States Sentencing Commission because it determined that such guidelines were not an improper delegation of legislative authority, and thus, not a violation of the constitutional separation of powers. The Court made this determination because, after applying a balancing test, it determined that creating guidelines to provide a desirable and uniform sentencing structure was an important public policy that outweighed any separation of powers violation. *Id.* at 395–97, 412. In *Mistretta*, all of the justices except Antonin Scalia, who vehemently dissented, supported the application of a functionalistic approach to this question. *Id.* In addition, in 1986, a functionalistic approach was used in *Morrison v. Olson*, 487 U.S. 654 (1988).

82. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). While there are various degrees and classifications for interbranch intrusions, these intrusions are beyond the scope of this Article. For a thorough discussion, see generally Alan B. Morrison, *A Non-Power Looks at Separation of Powers*, 79 GEO. L.J. 281 (1990).

83. *United States v. Nixon*, 418 U.S. 683, 703–07 (1974). This examination is commonly known as the *Nixon* test.

84. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1974). For example, in *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 850–58 (1986), the Supreme Court held that an administrative agency had jurisdiction to decide common law counterclaims arising out of state law claims. The Court made this decision, which conflicted with Article III of the United States Constitution, because it determined that the delegation of a judicial power (to adjudicate common law counterclaims) to an administrative agency (the Commodity Futures Trading Commission) “[did] not impermissibly

pret the meaning of the terms “impermissible disruption” and “furthering public policy.”⁸⁵

This last point is one of functionalism's main problems: “even in circumstances where the text of the Constitution is explicit” in its grant of power, a functionalist strives to balance an infringement against the policies behind it.⁸⁶ The Supreme Court has noted many times that it is improper for any branch to “rewrite [a] particular balance of power” expressly specified within the Constitution, even if it is a “minor adjustment” aimed at a desirable goal.⁸⁷ However, even though functionalism may arrive at results that are counter to the Constitution, courts have not only tolerated its use, but have also embraced it. Therefore, any separation of powers examination should consider functionalism as well.

C. A Formalistic Review of the Appointment Power and the Federal Anti-Nepotism, Solicitor General, and FCC Statutes

As stated, formalism is characterized by a strict adherence to constitutional text and the divisions of power provided within the Constitution's four corners. The constitutional text of the Appointments Clause has given the president virtually absolute power⁸⁸ to

intrude on the province of the judiciary.” *Id.* at 851–52. Since it is ultimately the Court's decision to determine what “dramatically disrupts the Constitutional framework,” a court applying a functionalistic analysis can justify any decision by determining that an act does not “dramatically disrupt the Constitutional framework.” *Nixon*, 433 U.S. at 443. Thus, the approach undertaken for the examination greatly affects the outcome.

85. For example, in *Morrison*, 487 U.S. at 696–97, the Supreme Court determined that the Ethics and Government Act, 28 U.S.C. § 591(a) (Supp. 1989), was constitutional and reversed the court of appeals. The Supreme Court made this determination even though the Act conflicted with the Appointments Clause by vesting the appointment of the Independent Counsel — who, arguably, was an executive officer — in the Special Division and limiting the executive branch's ability to remove this officer. *Id.* at 470–77. *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988), was reversed because the Supreme Court determined that the Act did not “impermissibly undermine the powers of the Executive Branch or disrupt[] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.” *Morrison*, 487 U.S. at 695 (citations omitted). The Supreme Court “bootstrapped” this conclusion by determining the Independent Counsel was not a principal officer, and therefore her appointment was not governed by the Appointments Clause. *Id.* at 696–97.

86. Yoder, *supra* note 10, at 182.

87. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 487 (1988) (Kennedy, J., concurring).

88. Recall that the one limitation to the constitutional limitation to the president's appointment power is the “Incompatibility Clause,” which is contained in the Constitu-

appoint "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States."⁸⁹ However, the Federal Anti-Nepotism statute states that the president "*may not appoint* in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control [the executive branch] any individual who is a relative;"⁹⁰ the Solicitor General statute requires that the solicitor general must be "learned in the law;"⁹¹ and the Federal Communications Commission statute requires that no more than four of the Federal Communications Commissioners may be of the same political party.⁹² Since all three statutes are directly counter to or inconsistent with the Constitution's text, a formalist should strike these statutes down as unconstitutional violations of the separation of powers doctrine. Because explicit constitutional text exists, the statutes are unconstitutional irrespective of the social justifications for requiring the solicitor general to be learned in the law, for preventing nepotism in the Oval office, or for requiring the FCC Commissioners to be a nonpartisan group.

Even though an argument may be made that these positions are not covered by the text of the constitution, and hence not "principal officers," a formalist can look to *Buckley v. Valeo*⁹³ for judicial guidance. In *Buckley*, the Supreme Court was asked to determine whether the Federal Election Campaign Act of 1971, as amended in 1974,⁹⁴ was constitutional.⁹⁵ In part, this Act set requirements for the appointment of Federal Election Commissioners. Some commissioners were to be appointed by the president, while others were not.⁹⁶ When called upon to make their determination about the constitutionality of this legislation, the Supreme Court determined

tion itself.

89. U.S. CONST. art. II, § 2, cl. 2.

90. 5 U.S.C. § 3110(b) (emphasis added). See *supra* note 1 for a more complete quotation of the text.

91. 28 U.S.C. § 505.

92. 47 U.S.C. § 154.

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

94. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended in scattered sections of 2, 18, 47 U.S.C.). Note that the Supreme Court's examination was of the Act before the 1976 amendments.

95. *Buckley*, 424 U.S. at 1.

96. *Id.*

that these commissioners were “principal officers.”⁹⁷ Because the Constitution mandates that only the president can appoint principal officers, this Act was declared unconstitutional.⁹⁸ Although there were strong policy justifications for the Act,⁹⁹ the Supreme Court reached this conclusion because the constitutional text is explicit in its grant to the president alone of the power to nominate principal officials.¹⁰⁰ The Court reasoned that because of the express origin of the appointment power, it should not be disturbed under any circumstances.¹⁰¹

In the three statutes at issue, the appointment power is not being modified as it was in *Buckley*. However, through these statutes, Congress attempted to augment its prenomination role to the president's detriment. In doing so, Congress left the president in a politically difficult position. The fight for presidential power is made to seem like an attempt at promoting cronyism. The Constitution gives the president the power to choose whom he or she will nominate without any congressional influence, while the statutes limit this presidential power. Under the formalistic approach, the examination terminates here, since all three of the statutes are clearly contrary to an explicit constitutional grant of the appointment power.

D. A Functionalistic Review of the Appointment Power and the Federal Anti-Nepotism, Solicitor General, and F.C.C. Statutes

As functionalism stresses flexibility and interaction by the government's three branches, it employs the *Nixon* balancing test to determine whether a statute justifiably or unjustifiably (constitutionally or unconstitutionally) prevents the president from accomplishing a constitutionally assigned function.¹⁰²

97. *Id.*

98. *Id.* at 143.

99. Some of the justifications for this infringement included limiting the actuality and appearance of corruption resulting from large individual financial contributions, equalizing the relative ability of individuals and groups to influence elections, and equalizing the candidates' financial resources. *Id.* at 26, 48, 55.

100. *Id.* at 118.

101. *Id.* at 128.

102. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 484 (1988) (Kennedy, J., concurring).

Since functionalism is concerned with the policy justifications behind any action, the functionalistic *Nixon* test¹⁰³ is applied to both express and implied powers. Functionalism is more effective when evaluating implied powers because it is easier to make inferences about powers that are not supported by explicit text. When dealing with express powers, although some deference is given to explicit constitutional text, a functionalist allows an encroachment by one branch into another branch's domain when legitimate policy reasons justify this action.¹⁰⁴

Under this examination, part one of the *Nixon* test is to determine whether the congressional actions manifested by the Federal Anti-Nepotism, Solicitor General, and F.C.C. statutes prevent the president from accomplishing "a constitutionally assigned function" by examining the magnitude of the infringement upon the appointment power.¹⁰⁵ Although there is specific constitutional text granting the appointment power to the president and there are ample historical records and practice to insulate this position,¹⁰⁶ a functionalist would not automatically protect this power from encroachment.

To a functionalist, the Federal Anti-Nepotism statute, the Solicitor General statute, and the F.C.C. statute may all be insignificant infringements on the president's ability to accomplish a constitutionally assigned function. On initial inspection, each of these statutes appears to only minimally interfere with the president's appointment power. For example, the Federal Anti-Nepotism statute only prevents the president from appointing a relative to an executive branch position and the Solicitor General statute only requires that the individual appointed to fill this office is "learned in the law." The president can still appoint everyone who is not a relative or anyone who is learned in the law. However, in *Gubiensio-Ortiz v. Kanahale*, the Ninth Circuit Court of Appeals, employing a functionalistic examination, noted that one branch's "interference . . . with the operation of another branch need not be immediate and direct in order to be unconstitutional; subtle, indirect or even potential interference may be enough" to meet this thresh-

103. See *supra* note 84 and accompanying text.

104. See *supra* notes 80–87 and accompanying text for a discussion of functionalism.

105. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (citing *United States v. Nixon*, 418 U.S. 683, 711–12 (1974)).

106. See *supra* notes 46–64 and accompanying text for a discussion of the constitutional appointment power of the president.

old.¹⁰⁷ Hence, *any* interference by one branch of government on another may be unconstitutional, and so, it is necessary to employ the second part of the *Nixon* test.

The second part of the *Nixon* test questions whether these disruptions are justified “by an overriding need to promote objectives within [Congress'] constitutional[]” mandate.¹⁰⁸ In each of the statutes, there is no overriding justification for these intrusions. Even though each statute addresses a different area of the government, each can be answered with the same reasoning. For example, even though the evils of nepotism are well recognized,¹⁰⁹ when the appointment is made by the president, sufficient forces exist to control these evils without the use of prior legislative restraint. Political accountability is perhaps the strongest of these forces. As stated, the Framers recognized and relied heavily on accountability in developing the Constitution.¹¹⁰ The president is accountable for his actions, and this accountability forces him to make the best decisions. For example, it would be unwise for the president to appoint an unqualified relative to an executive branch position or to nominate a solicitor general who is not “learned in the law” because of the damaging political fallout that would occur should this person fail. It is in the president's best interest to appoint the best possible person for a position, even if this person is a relative, not learned in the law, or a member of a particular political party. In addition, fear of not being re-elected is another example of this accountability. Since there is no “overriding need” for Congress to act in these areas, there is no justification for these limitations, however trivial, and therefore no reason for Congress to interfere with the president's appointment power.¹¹¹

107. *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1260 (9th Cir.), *cert. granted and judgment vacated*, 488 U.S. 1036 (1988).

108. *Nixon*, 433 U.S. at 443 (citing *United States v. Nixon*, 418 U.S. 683, 711–12 (1974)).

109. *See supra* notes 23–29 and accompanying text.

110. *See supra* notes 61–62 and accompanying text.

111. In *Gubiensio-Ortiz*, 857 F.2d at 1264, in applying the second part of the *Nixon* balancing test to a separation of powers question, the Court noted that even though Congress had “admirable objectives” in enacting the legislation (for example, to secure contributions from experts in the areas of sentencing and judicial administration), it was not necessary because the same ends could have been accomplished by other methods. For instance, rather than call an active judge, Congress could have called a retired judge to fill the position in question. *Id.* Therefore, this congressional action was unconstitutional. *Id.* at 1265.

The president occupies a unique position. As the political leader of the United States, the president lives in a "goldfish-bowl" where all of his actions are "open to public scrutiny."¹¹² Further, whether fair or not, the constant possibility "of being pilloried for any mistake or indiscretion" constantly exists.¹¹³ Thus, much as the Framers envisioned, the president is ultimately "accountable," not only for decisions which he or those under him make, but for almost everything else that occurs in the world during his tenure.¹¹⁴

A series of failures resulting from an actual or perceived decision emanating from his administration may translate into the president not being re-elected. If a government officer makes a mistake, the voters will almost certainly hold the president and his partisans accountable for the officer's actions during ensuing elections.¹¹⁵ If that government officer happens to be the president's spouse or other relative, there will be added accountability in the minds of the public, for nepotism is added to the accountability quotient.

This position is best illustrated by examining the relationship between President Bill Clinton and his wife, Hillary Rodham Clinton. Mrs. Clinton has been extremely active in her husband's government.¹¹⁶ Some believe that Mrs. Clinton was appointed to an official position: Commentators described this "appointment to an official position" as possibly "the riskiest [political] high-wire act of all time,"¹¹⁷ presumably because, if she fails, her failure could conceivably bring down her husband's administration. This view was summarized by Thomas Mann, director of Governmental Studies at the Brookings Institution: if things the First Lady, or any appointed officer for that matter, does fail "people will scream, and the Presi-

112. *Backman v. Bateman*, 263 P.2d 561, 565 (Utah 1953).

113. *Id.*

114. For example, many held President Jimmy Carter personally responsible for the hostage crisis with Iran, the recession of the late seventies, and the dramatic increase of oil prices which came with the rise of O.P.E.C.

115. Mickey Kaus, *TRB from Washington — Thinking of Hillary*, *NEW REPUBLIC*, Feb. 15, 1993, at 6.

116. See *supra* notes 21–22 and accompanying text for a discussion of Hillary Rodham Clinton's selection as chairperson of President Clinton's Health Care Reform Task Force.

117. Naftali Bendavid, *The First Lady and the Law: Old Debate over Spouse's Role Takes a New Twist*, *LEGAL TIMES*, Mar. 15, 1993, at 1, 23. Note that any presidential appointment of a relative, particularly of an immediate family member, will receive such attention.

dent will be held politically accountable.”¹¹⁸ In this particular case, Mann continued, if any of Mrs. Clinton's activities fail, “Hillary will be pilloried, and President Clinton will take a [political] beating. [With the first lady so openly involved] you don't need a legal remedy.”¹¹⁹ This excerpt demonstrates that the desired effect, in this case preventing the president from appointing a relative solely because of familial relationship, is automatically accomplished by fear of political backlash and the possibility of failure leading to not being re-elected. This is all accomplished without Congress unconstitutionally involving itself in the prerogatives of the president. Thus, you not only do not need a legal remedy, you certainly ought not to trample on the constitution in order to provide such a restraint.

Moreover, even if the first part of the *Nixon* test shows that the incursion into the executive branch is minimal, that preventing nepotism in the executive branch is a legitimate policy concern and that the Federal Anti-Nepotism statute does not prevent the president from accomplishing a constitutionally assigned function, there is no need for Congress to involve itself in this issue. This reasoning holds true, although it is not as strong, for the Solicitor General and F.C.C. statutes. Because of the president's accountability, the problems these statutes were enacted to prevent are eliminated by the very nature of the executive's position as envisioned and created by the Framers in the Constitution. Therefore, under a functionalistic examination, Congress is not justified nor allowed to encroach into the executive branch, and thus the Federal Anti-Nepotism, the Solicitor General, and the F.C.C. statutes are unconstitutional.

It is of no defense as well to argue that the president's past practice of observing these statutes cured any infirmity. Indeed, it is precisely because this legislation is seen as “apple pie and motherhood” that the president is practically disabled from asserting his or her constitutionally granted authority. The creation of a justiciable issue would force the president to do something that he might very well not wish to do, such as politicizing a regulatory body in a partisan manner or appointing a relative to an executive position. The policy reasons for adhering to the law might very well be so strong that there is no occasion for presenting the case in a judicial forum.

118. *Id.* at 24 (quoting Thomas Mann, director of Governmental Studies at the Brookings Institution).

119. *Id.*

Indeed, one has to argue that the framework for interpreting constitutional principles cannot be left to the judicial branch. Increasingly, we have seen instances where the president has been put in the politically unenviable position of defending his constitutional prerogatives in the face of congressional action that has interfered with the exercise of his duties. This has clearly been the case in the incursions on the president's war powers. Thus, it is hardly a defense to the issue of constitutionality that the matter has not been brought to a court for adjudication.

IV. CONCLUSION

The Federal Anti-Nepotism statute, the Solicitor General statute, and the Federal Communications Commission statute are unconstitutional infringements into the executive branch under both functionalism and formalism, the different approaches used to examine separation of powers questions. Notwithstanding the exception found within the Constitution's Incompatibility Clause,¹²⁰ the Constitution explicitly states that the president can nominate any individual to be a principal officer or other officer covered by the Appointments Clause. The Federal Anti-Nepotism statute, Solicitor General, and F.C.C. statutes are contrary to this power. Until recently, these issues never arose. However, times have changed and challenges to the constitutionality of one of these statutes, the Federal Anti-nepotism statute, have recently been raised. These questions have raised the issue of other interferences into the president's appointment power. And even if they are not going to be brought before a court for adjudication, they remain as unconstitutional infringements on the Chief Executive.

The discussion of Hillary Rodham Clinton's classification as chairperson of the Health Care Reform Task Force has raised these central issues: whether the Federal Anti-Nepotism statute interferes with express powers delegated to the president and whether this statute is contrary to the Constitution.¹²¹ This Article has deter-

120. U.S. CONST. art. I, § 6, cl. 2.

121. Although this Article specifically addresses President and Mrs. Clinton, it has not determined that Mrs. Clinton was a principal official under the Federal Anti-Nepotism statute in her position. Nonetheless, the fact that this classification is possible forces consideration of the Federal Anti-Nepotism statute's constitutionality with respect to the president of the United States and justifies its re-writing at this time.

mined that under any evaluation, the Federal Anti-Nepotism statute is contrary to the Constitution because it impermissibly interferes with the appointment power. As a result of this statute, President Clinton is precluded from nominating his wife as attorney general, even though she is well-qualified¹²² and may be his choice for the position. President Clinton, and all presidents hereafter, should be free to exercise all of the powers granted to them by the Constitution, including the power to select any individual to be a principal official or other officer whose appointment is covered by the Appointments Clause. Regardless of whether the executive official is a relative, or if the solicitor general is "learned in the law," or whether all of the F.C.C. commissioners are of the same political party, it is solely the president's prerogative to nominate whomever he or she chooses. The only constitutional manner for Congress to interfere with the president's choice is to withhold its consent. Furthermore, not only are the statutes discussed above unconstitutional, they are also unnecessary because there are existing forces to help guide the president towards making the proper decisions.

The president is a unique individual whose office is governed by a unique set of laws. Therefore, it is unnecessary for the general Federal Anti-Nepotism, the Solicitor General, and the F.C.C. statutes, and other similar statutes, to apply to the president. The publicity surrounding the office and the office's political accountability accomplish the same result as these statutes, without violating the Constitution.

122. Hillary Rodham Clinton attended Yale Law School. After law school, Mrs. Clinton became a commercial litigator and trademark-law specialist at the Rose law firm. She became this firm's first woman partner in 1979 and was twice named by the National Law Journal as one of the one hundred most influential lawyers in America. Martin Kasindorf, *Meet Hillary Clinton: She's Raised Hackles and Hopes, but One Thing's Certain: She'll Redefine the Role of the First Lady*, NEWSDAY, Jan. 10, 1993, at 1. From her background and accomplishments, it is clear that Mrs. Clinton is qualified to be attorney general.