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SIGTARP and the Executive-Legislative Clash: Confronting a Bowsher Issue with an Eye Toward Preserving the Separation of Powers During Future Crisis Legislation

Aaron R. Sims

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SIGTARP and the Executive-Legislative Clash: Confronting a *Bowsher* Issue with an Eye Toward Preserving the Separation of Powers During Future Crisis Legislation[†]

Aaron R. Sims*

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The precise jurisdictions and fields of operation for Congress and the President will always elude us.

—Louis Fisher, *Constitutional Conflicts Between Congress and the President*¹

I. Introduction

The murky demarcations between congressional and presidential authority instigate many heavyweight bouts over the bounds of legislative and executive power.² The struggle for dominance between Congress and the President has produced yet another herculean clash.³ The issue confronted by this Note is whether Congress violates the separation of powers doctrine⁴ by retaining virtually all control, except for the removal

1. LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 291 (5th ed., rev. 2007).

2. *See id.* at 12 ("[T]he imbalance between President and Congress is chronic and permanent."); *see also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1128–29 (2000) ("[W]e cannot seem to solve the problem of separation of powers. We are not even close. We do not agree on what the principle requires, what its objectives are, or how it does or could accomplish its objectives.").

3. *See* MILLER CTR. OF PUBLIC AFFAIRS, UNIV. OF VA., *THE SEPARATION OF POWERS: THE ROLES OF INDEPENDENT COUNSELS, INSPECTORS GENERAL, EXECUTIVE PRIVILEGE AND EXECUTIVE ORDERS* 1 (1998), *available at* http://web1.millercenter.org/commissions/comm_1998.pdf ("Many gray areas remain . . . where the delineation of powers is not so clear and where, in fact, the branches of government, usually the legislative and executive, grapple from time to time for dominance."). For an examination of the history behind the struggle for power between Congress and the President, *see generally* FISHER, *supra* note 1.

4. *See* M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 14 (Liberty Fund, Inc., 2d ed. 1998) (1967) (defining succinctly the "pure doctrine" of the separation of powers). Vile defines the separation of powers doctrine as follows:

It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the

power, over the Special Inspector General for the Troubled Asset Relief Program (SIGTARP),⁵ a government watchdog commissioned to supervise the Treasury Department's execution of Congress's monumental economic bailout program,⁶ and by requiring Treasury, an executive branch agency, to implement recommendations from SIGTARP that are either necessary or appropriate.

Congress's passage of the Emergency Economic Stabilization Act of 2008 (EESA)⁷ created an unprecedented⁸ \$700 billion governmental bailout scheme—the Troubled Asset Relief Program (TARP).⁹ Congress designated SIGTARP the overseer of this bailout program, allocating to SIGTARP the authority to recommend to Treasury certain actions with respect to Treasury's management of TARP funds.¹⁰ In an amendment to EESA, Congress mandated that the executive branch must either act on these

executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.

Id.; see also 1 THE FOUNDERS' CONSTITUTION 313 (Philip B. Kurland & Ralph Lerner eds., Liberty Fund, Inc. 1987) ("[S]eparation [of powers] entails a clear discrimination of powers, an independence whereby each power conducts its deliberations free of external influence, and a dependence whereby the actions of each are subject to scrutiny and control by the others."); *infra* Part V.A (surveying the Founders' intent behind the separation of powers principle).

5. See *infra* notes 40–52 and accompanying text (offering an overview of SIGTARP).

6. See Steven M. Davidoff & David Zaring, *Regulation by Deal: Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 465 (2009) (stating that the federal government's decision to enact the Emergency Economic Stabilization Act of 2008 "mark[ed] the largest government economic intervention in history").

7. See Emergency Economic Stabilization Act of 2008, 12 U.S.C. § 5211 (2006) [hereinafter EESA] (establishing TARP).

8. See Davidoff & Zaring, *supra* note 6, at 465 ("[T]he government decided, in the course of less than a month, to create through congressional action an unprecedented \$700 billion asset purchase program."); see also 155 CONG. REC. H3,848 (daily ed. Mar. 25, 2009) (statement of Rep. Dennis Moore) (referring to EESA and stating that "[w]e stand on the precipice of the largest infusion of government funds over the shortest period of time in our Nation's history" (internal quotation marks omitted)).

9. See EESA § 5211 (establishing TARP).

10. See *infra* notes 45–52 and accompanying text (discussing SIGTARP's statutory authority to supervise Treasury's execution of TARP and to make recommendations to Treasury with respect to TARP).

recommendations or, in the event that the executive declines to act, explain to Congress that no action is necessary or appropriate.¹¹ The issue presented by this provision is whether Congress usurps the executive's prerogative to control the execution of the laws, and thereby violates the separation of powers tenet, by obliging Treasury to follow necessary or appropriate recommendations from SIGTARP, over whom Congress has retained significant control.¹² Analysis of this issue requires an understanding of the economic context in which EESA and its amendment were adopted.¹³

The crisis that led to Congress's enactment of EESA has been called the worst economic calamity since the Great Depression.¹⁴ This "Great Recession,"¹⁵ as one economist calls it, has triggered the failure of major businesses,¹⁶ a \$14 trillion decline in consumer wealth,¹⁷ the largest job-loss

11. See Special Inspector General for the Troubled Asset Relief Program Act of 2009, Pub. L. No. 111-15, sec. 4(2)(f), § 121, 123 Stat. 1603, 1604 (codified at 12 U.S.C. § 5231(f)) [hereinafter SIGTARP Act] (requiring that the Treasury Secretary must "certify" to Congress that no action is necessary or appropriate when the Secretary elects not to heed SIGTARP's recommendations).

12. See *Bowsher v. Synar*, 478 U.S. 714, 727 (1986) ("The dangers of congressional usurpation of Executive Branch functions have long been recognized.").

13. See generally Davidoff & Zaring, *supra* note 6. Davidoff and Zaring "evaluate the government's response to the crisis through a blow-by-blow, or historical, account." *Id.* at 470.

14. See *Three Top Economists Agree 2009 Worst Financial Crisis Since Great Depression; Risks Increase if Right Steps Are Not Taken*, REUTERS, Feb. 27, 2009, <http://www.reuters.com/article/pressRelease/idUS193520+27-Feb-2009+BW20090227> (last visited Feb. 16, 2011) [hereinafter *Three Top Economists*] ("Nouriel Roubini, professor of economics and international business at New York University, Kenneth Rogoff, professor of economics and public policy at Harvard University, and Nariman Behravesh, chief economist and executive vice president for HIS Global Insight, all agreed that this is the worst financial crisis since the Great Depression.") (on file with the Washington and Lee Law Review). Rogoff described the current financial crisis as "a once in a 50-year event." *Id.*; see also Press Release, Barack Obama, President of the United States, Remarks by the President on 21st Century Financial Regulatory Reform (June 17, 2009), http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-on-Regulatory-Reform/ (last visited Feb. 16, 2011) (referring to the current market catastrophe as "a historic economic crisis") (on file with the Washington and Lee Law Review).

15. See *Three Top Economists*, *supra* note 14 (observing that Behravesh dubbed the crisis the "Great Recession").

16. See Carrick Mollenkamp et al., *Lehman Files for Bankruptcy, Merrill Sold, AIG Seeks Cash*, WALL ST. J., Sept. 16, 2008, <http://online.wsj.com/article/SB122145492097035549.html> (observing that the "American financial system was shaken to its core" by the failure of prominent U.S. businesses such as Lehman Brothers Holdings Inc., Merrill Lynch & Co., Bear Stearns Cos., Federal National Mortgage Association (Fannie Mae), and Federal Home Loan Mortgage Corporation (Freddie Mac)) (on file with the Washington and Lee Law Review).

17. See MARTIN NEIL BAILY & DOUGLAS J. ELLIOTT, INITIATIVE ON BUS. & PUB.

episode since the World War II era,¹⁸ and historic collapses in the banking, credit, and housing markets.¹⁹ The federal government responded to this market catastrophe by forcing the sale of prominent businesses and by seizing the reins of other renowned companies that had buckled under the pressure of this economic landslide.²⁰ After this unprecedented

POLICY AT BROOKINGS, THE US FINANCIAL AND ECONOMIC CRISIS: WHERE DOES IT STAND AND WHERE DO WE GO FROM HERE? 7 (2009), available at http://www.brookings.edu/~media/Files/rc/papers/2009/0615_economic_crisis_baily_elliott/0615_economic_crisis_baily_elliott.pdf ("Households lost \$13 trillion of wealth from the peak through the end of 2008 . . . [and lost] another \$1.33 trillion . . . in the first quarter of 2009 . . .").

18. See Timothy R. Homan, *Job Losses in U.S. Slow as Unemployment Climbs to 26-Year High*, BLOOMBERG, Sept. 5, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVmZJLQoKv2g> (last visited Feb. 16, 2011) ("The latest numbers brought total jobs lost since the recession began in December 2007 to 6.9 million, the biggest decline in any post-World War II economic slump.") (on file with the Washington and Lee Law Review). The 9.7% unemployment rate, as of July 2009, is the highest in twenty-six years. *Id.*

19. See BAILY & ELLIOTT, *supra* note 17, at 5–7 ("Declines in the real economy exacerbated the problems of financial institutions, which then created a credit crunch hurting the real economy [T]here was a decline [in home-construction] of over 38 percent in the first quarter of 2009 at an annual rate.").

20. See Lawrence A. Cunningham & David Zaring, *The Three or Four Approaches to Financial Regulation: A Cautionary Analysis Against Exuberance in Crisis Response*, 78 GEO. WASH. L. REV. 39, 56–72 (2009) (examining the federal government's extraordinary "on-the-fly" response to the 2008 market crisis); Steven Pearse, Note, *Accounting for the Lack of Accountability: The Great Depression Meets the Great Recession*, 37 HASTINGS CONST. L.Q. 409, 421 (2010) ("To prevent a complete collapse of all of these financial institutions and avoid a total breakdown of the American economy, the Executive Branch took quick and decisive action to bail these companies out of their self-inflicted financial crisis." (footnote omitted)); see also Davidoff & Zaring, *supra* note 6, at 466 ("As the crisis developed, the government forced the sales of one of the five largest investment banks, the largest thrift in the country, and a number of consumer banks." (footnote omitted)). "[The government] permitted an even larger investment bank and another of the country's largest thrifts to fail." *Id.* "The government also took over the country's largest insurer and nationalized . . . two government-sponsored enterprises that mortally suffered from the popping of the housing bubble." *Id.*

According to Davidoff and Zaring, the "first hints of public trouble in the credit markets began to emerge from the subprime mortgage market in April 2007." *Id.* at 471. The federal government's unprecedented involvement as a facilitator of private deals began with the downfall of Bear Stearns in May 2008. See *id.* at 473–77 (detailing the series of events that preceded Bear's collapse); Charles K. Whitehead, *Reframing Financial Regulation* 22–23 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 09-026, 2009), <http://ssrn.com/abstract=1447424> (last visited Feb. 16, 2011) (same) (on file with the Washington and Lee Law Review). Immediately before Bear would have been forced to declare bankruptcy, the government pressured JPMorgan into acquiring Bear Stearns and squeezed J.C. Flowers, another of Bear's suitors, out of the deal. See Davidoff & Zaring, *supra* note 6, at 479–80 ("Treasury pushed JPMorgan to offer as low a price as possible for

governmental involvement failed to stave off further financial devastation, the government abandoned its previous plan and adopted a new strategy—massive "emergency legislation."²¹ And out of this emergency legislation was born EESA and, with it, a dramatic expansion of governmental power.²²

As the smoke clears from this display of government action, it becomes evident that EESA was enacted with "all the hallmarks of emergency."²³ When government reacts hurriedly to a monumental crisis,²⁴

Bear The chastened investment bank took the deal." (footnotes omitted)).

In July 2008, the Office of Thrift Supervision seized IndyMac Bank, resulting in the second-largest bank failure in U.S. history. *Id.* at 485. Congress then passed the Housing and Economic Recovery Act of 2008 (HERA), 12 U.S.C. § 4501, providing "\$300 billion in aid to subprime housing buyers." *Id.* at 484–85. After nationalizing Fannie Mae and Freddie Mac in September 2008, *id.* at 486, the government watched as Lehman Brothers filed for bankruptcy and as Merrill Lynch was acquired by Bank of America. *Id.* at 493–94. The Federal Reserve then nationalized American International Group (AIG), committing \$182.5 billion to the bailout scheme. *Id.* at 499; *see* Whitehead, *supra*, at 23, 30–36 (recounting AIG's financial downfall and the federal government's subsequent takeover of the company). The FDIC then seized the assets of Washington Mutual and sold them to JPMorgan without informing the leadership of Washington Mutual. Davidoff & Zaring, *supra* note 6, at 508. Wachovia was the next target of the FDIC, which facilitated the sale of the company to Wells Fargo. *Id.* at 509. The final "pre-EESA episode of government as dealmaker" transpired in October 2008, when the government facilitated the rescue of Morgan Stanley. *Id.* at 511–12.

21. *See* Davidoff & Zaring, *supra* note 6, at 464–65 ("When the real estate bubble popped, with catastrophic implications for the financial institutions that facilitated property purchases, the credit market, and, eventually, all of the participants in the worldwide financial system, the federal government reacted slowly, and then uncertainly, and finally on an emergency and massive basis."); *id.* at 512–13 ("Clearly, the government's ad hoc strategy was failing and a greater response was needed The result was a turn away from the deal-to-deal approach and toward Congress.").

22. *See id.* at 523 ("The bailout statute represented a dramatic expansion of the government powers to enter the financial markets, but it also represented a massive grant of flexibility to the Treasury Department, accompanied by hundreds of billions of authorized dollars. That the authorization was unprecedented is perhaps obvious.").

23. *See id.* at 513 ("The text of the first draft of the bailout bill submitted to Congress came from the Treasury Department on September 20, [2008,] with all the hallmarks of emergency; there has never been a shorter draft statute that would have committed such a large amount of money."). The initial draft of EESA "did not provide for judicial review of anything [the Treasury] Department did." *Id.* at 515. Congress rejected this initial draft on September 29. *Id.* at 518. However, in the wake of EESA's initial defeat, the stock market continued to fold. *Id.* Spurred by the increasingly fierce economic crisis, Congress altered and expanded the bill and "quickly passed the amended statute on October 4." *Id.* The bailout bill "had grown from 3 pages in length to 451 pages in length in less than two weeks." *Id.*

24. *See id.* at 475 ("The government's actions [during this economic crisis] were reactive rather than proactive.").

a fair inquiry is whether its action is faithful to constitutional norms, or whether some vital principle falls by the wayside and is sacrificed to apparent necessity.²⁵

Here, the forgotten principle is the separation of powers doctrine.²⁶ Because the Founding Fathers viewed the separation of powers as the keystone of sound government,²⁷ this principle has been upheld even when both the executive and the legislative branches have ignored it in the name of expediency.²⁸ This Note analyzes whether the separation of powers

25. See TOM CAMPBELL, SEPARATION OF POWERS IN PRACTICE 24 (2004) ("The legislature tends to be nondeliberative."). "The major disadvantage of the legislative branch is that, despite the oath requirement of the U.S. Constitution, . . . legislators have strong incentives to ignore constitutional requirements that are not popular." *Id.* "The legislature's ability to shift quickly can lead to inconsistency and uncertainty . . ." *Id.*

26. See *supra* note 4 (defining the separation of powers principle); *infra* Part V.A (discussing the underpinnings of the separation of powers and explaining the critical importance of preserving this principle).

27. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 119 (1976) (recognizing "the importance of the doctrine of separation of powers which is at the heart of our Constitution"); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) ("The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question."); THE FEDERALIST NO. 47, at 336 (James Madison) (Benjamin Fletcher Wright ed., Belknap Press of Harvard University Press 1961) ("No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than [the separation of powers principle]. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny."); see also ANDREW M. ALLISON ET AL., THE REAL THOMAS JEFFERSON 622 (2d ed., rev. 1983) (quoting Thomas Jefferson as stating that the "first principle of a good government is, certainly, a distribution of its powers into executive, judiciary, and legislative, and a subdivision of the latter into two or three branches" (quoting 4 THE WRITINGS OF THOMAS JEFFERSON 454 (Paul Leicester Ford ed., 1898))).

28. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."). In *Chadha*, the Court invalidated a statute's one-House congressional veto provision as violative of the separation of powers principle. *Id.* at 959. The one-House legislative veto contravened both the constitutional requirement that all legislative action must traverse both Houses of Congress (the bicameralism principle) and the constitutional requirement that all legislation must be presented to the President before becoming law (the Presentment Clauses). *Id.* at 945–59. Both the executive and the legislative branches acquiesced to this legislative veto for efficiency and expediency reasons. See Louis Fisher, *Micromanagement by Congress: Reality and Mythology*, in THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH 147 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (observing that the legislative veto arose as a mutually beneficial pact between the executive and legislative branches, "a simple quid pro quo that allowed the executive branch to make law without any legislative action but gave Congress the right to recapture control without having to pass another public law"). In *Chadha*, the Court noted

principle has survived the government's rush to address the economic downturn.²⁹

However, the implications of this Note reach beyond EESA, its amendment, and SIGTARP. Experts portend more uncertainty in the market, the possibility of future crises,³⁰ and the likelihood of more emergency legislation.³¹ Just as Congress resorted to "novel efforts" by enacting EESA and its amendment,³² future problems may produce

that, from 1932 until the Court's 1983 decision in *Chadha*, 295 similar congressional veto procedures had been enacted by statutes. *Chadha*, 462 U.S. at 944. However, the Court found that neither the frequency of nor the convenience offered by these congressional veto provisions justified undercutting the separation of powers principle. *Id.* at 944-45. The Court stated:

Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes

Justice White undertakes to make a case for the proposition that the one-House veto is a useful "political invention," and we need not challenge that assertion But policy arguments supporting even useful "political inventions" are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

Id. (citations omitted).

29. See Pearse, *supra* note 20, at 411 (contending that, although the federal government's massive bailout program granted "quick relief" to the American people, the "Constitution has seemingly been undermined" in the process).

30. See BAILY & ELLIOTT, *supra* note 17, at 2-3 ("We fear that the . . . reactions of the financial markets and . . . analysts carry too much . . . optimism without recognizing enough of the uncertainty [T]here is still [much] uncertainty about when the recession will end, when growth will recover or whether the financial sector is firmly on the road to recovery."). "Uncertainty about Congressional authorization of additional funds could create panic in the markets and exacerbate a future stage of crisis." *Id.* at 23.

31. See Davidoff & Zaring, *supra* note 6, at 532 (outlining the pattern of governmental response to crises). Davidoff and Zaring state:

Government responses to crises have their own pattern The response often begins with the scramble of governments to keep up with fast-paced and deleterious market events, leading to an initial, ad hoc phase in government action, where emergencies are responded to with emergency-style rules and emergency-style process. In sufficiently serious crises, the next phase may be a legislative one—beginning with outraged congressional hearings and then new legislative authority Finally, there is reform; either reform forgone in favor of blue-ribbon commissions and minor regulatory reorganization, or reform embraced by new legislation and a restructuring of the financial regulatory system.

Id. (footnotes omitted).

32. See *id.* at 466 (discussing the government's "novel efforts during [this] financial crisis").

additional legislative experimentation.³³ If the separation of powers principle is diluted in the current economic emergency,³⁴ its future utility is questionable.³⁵ Hence, because this Note contemplates the likelihood of more bold moves by Congress in response to future emergencies, this Note not only proposes a solution to the SIGTARP separation of powers issue, but also recommends a time-honored principle for repelling separation of powers attacks that may plague future crisis legislation.

With that backdrop in mind, Part II of this Note sets forth the relevant facts underlying the separation of powers issue raised by EESA, its amendment, and SIGTARP. Part III surveys Supreme Court precedent on the portion of the separation of powers principle relevant to this Note and applies this precedent to the issue presented by SIGTARP, arguing that the separation of powers has been transgressed.

Part IV proposes a workable solution to the SIGTARP separation of powers predicament in the form of an amendment to the problematic statute. In addition to proffering a solution to SIGTARP's separation of powers problem, this Note submits a standard for resolving similar separation of powers issues that may arise as a result of America's uncertain future. As America weathers the current economic storm, it enters uncharted territory—even experts are uncertain about what lies

33. See *id.* at 470 (finding that the "gathering crisis pushed the government" to abandon its initial approach and to adopt more drastic measures in an attempt to rectify the economy).

34. See *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (striking down as violative of the separation of powers principle a statute through which Congress retained removal power over a congressional officer who exercised executive power). Confronted by "fiscal and economic problems of unprecedented magnitude," Congress enacted the statute at issue in *Bowsher* for the purpose of eliminating the federal budget deficit. *Id.* at 717, 736. However, the Court found that the economic crisis did not justify violating the separation of powers doctrine. *Id.* at 736. The Court stated:

No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government"

Id. (quoting *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983)).

35. See Jeff Zeleny, *Obama Weighs Quick Undoing of Bush Policy*, N.Y. TIMES, Nov. 10, 2008, at A19 (reporting that Rahm Emanuel, President Obama's current chief of staff, stated in an interview: "Rule one: Never allow a crisis to go to waste They are opportunities to do big things"). Crises are often utilized as breeding grounds for long-awaited changes. See Davidoff & Zaring, *supra* note 6, at 484 ("[T]he government used the crisis to push for some long-cherished reform of the financial regulatory system.").

ahead. However, as mentioned above, more crises and, thus, more bold, sweeping legislative responses, are likely. To ensure that the separation of powers withstands these governmental responses to future emergencies, the often shifting Supreme Court precedent must not serve as the lone defense against the deterioration of the separation of powers. Instead, the American people must arise and reclaim their station as the guardians of the republic. Part V petitions for the resurgence of this principle, explaining that the Founders intended for the people to fulfill this critical role. Accordingly, America must turn to the people to safeguard the separation of powers during the uncertain times ahead.

II. The Relevant Facts Underlying the Separation of Powers Issue Presented by SIGTARP

Congress enacted EESA in an attempt to resurrect the economy.³⁶ The centerpiece of EESA is TARP, which authorizes the Treasury Secretary to purchase "troubled assets" such as residential and commercial mortgages, related securities, and other difficult-to-sell resources.³⁷ Although Congress allocated only \$700 billion for the purchase of troubled assets through TARP,³⁸ the total amount of federal funds expended in connection with TARP could exceed \$23 trillion.³⁹

36. See EESA, Pub. L. No. 110-343, pmb1., 122 Stat. 3765, 3765 (2008) ("An Act [t]o provide authority for the Federal Government to purchase and insure certain types of troubled assets for the purposes of providing stability to and preventing disruption in the economy and financial system and protecting taxpayers . . .").

37. See EESA, 12 U.S.C. § 5211(a)(1) (2006) ("The Secretary is authorized to establish . . . TARP . . . to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms . . . as are determined by the Secretary, and in accordance with this chapter and the policies and procedures developed and published by the Secretary."); *id.* § 5202(9)(A)–(B) (defining "troubled assets" as "residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages . . . [and] any other financial instrument that the Secretary . . . determines the purchase of which is necessary to promote financial market stability . . ."); see also Gary Lawson, *Burying the Constitution Under a TARP* 4–5 (Boston Univ. Sch. of Law, Working Paper No. 09-31, 2010), <http://ssrn.com/abstract=1436462> (last visited Feb. 16, 2011) (offering a brief overview of EESA and TARP) (on file with the Washington and Lee Law Review); *id.* at 6 (noting that, through EESA, Congress effectively "empower[ed] the national government to become a gargantuan mortgage broker").

38. OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS 5 (Oct. 21, 2009) [hereinafter SIGTARP QUARTERLY REPORT], available at http://www.sig tarp.gov/reports/congress/2009/October 2009_Quarterly_Report_to_Congress.pdf.

39. In a statement before the House Committee on Oversight and Government Reform

A. Overview of TARP and SIGTARP

To ensure accountability for the use of TARP funds, Congress established, through EESA, the Office of the Special Inspector General for the Troubled Asset Relief Program.⁴⁰ SIGTARP is appointed by the President and confirmed by the Senate and is removable from office by the President.⁴¹ Neil M. Barofsky⁴² was confirmed by the Senate to the position of SIGTARP on December 8, 2008, and was sworn into office on December 15, 2008.⁴³ SIGTARP enjoys a \$65 million operating budget.⁴⁴

SIGTARP's mission is to "advance economic stability by promoting the efficiency and effectiveness of TARP management, through transparency, through coordinated oversight, and through robust

on July 21, 2009, SIGTARP explained that, since the conception of TARP, the Treasury Department has "created 12 separate programs involving Government and private funds of up to almost \$3 trillion." Neil Barofsky, Special Inspector Gen., Troubled Asset Relief Program, Statement Before the House Committee on Oversight and Government Reform 2 (July 21, 2009), *available at* http://www.sig tarp.gov/reports/testimony/2009/Testimony_Before_the_House_Committee_on_Oversight_and_Government_Reform.pdf. However, SIGTARP acknowledged that, "[a]s massive and as important as TARP is on its own, it is just one part of a much broader Federal Government effort to stabilize and support the financial system." *Id.* SIGTARP acknowledged that the "total potential Federal Government support could reach up to \$23.7 trillion." *Id.*

40. EESA § 5231; *see also* James C. Dugan & Scott S. Rose, *TARP Enforcement: Latest Developments and Insights*, THE METROPOLITAN CORPORATE COUNSEL, June 30, 2009, <http://www.metrocorp counsel.com/current.php?artType=view&EntryNo=9881> (last visited Feb. 16, 2011) ("Recognizing that such a large pool of funds is subject to potential misuse, abuse, and fraud, Congress established [SIGTARP] as the chief enforcement body overseeing TARP.") (on file with the Washington and Lee Law Review).

41. EESA § 5231(b)(1), (4); *see also* Inspector General Act of 1978, 5 U.S.C. App. § 3(b) [hereinafter IG Act] ("An Inspector General may be removed from office by the President. . . . [T]he President shall communicate . . . the reasons for any such removal . . . to both Houses of Congress.").

42. Prior to his appointment as SIGTARP, Barofsky served as a federal prosecutor in the Southern District of New York for more than eight years. About Us—The Special Inspector General, http://www.sig tarp.gov/about_ig.shtml (last visited Feb. 16, 2011) (on file with the Washington and Lee Law Review). During his tenure as a prosecutor, Barofsky was a Senior Trial Counsel who chaired the Mortgage Fraud Group. *Id.* In addition to prosecuting white collar crimes with the Securities and Commodities Fraud Unit, Barofsky spearheaded the drug investigation of the Revolutionary Armed Forces of Colombia, which has been dubbed "the largest narcotics indictment filed in U.S. history." *Id.* Barofsky graduated magna cum laude from New York University School of Law. *Id.*

43. *Id.* EESA provides that SIGTARP's limited existence is coterminous with the existence of TARP. EESA, 12 U.S.C. § 5231(k).

44. Public-Private Investment Program Improvement and Oversight Act of 2009, 12 U.S.C. § 5231a(c)(1) (increasing SIGTARP's operating budget from \$50 million to \$65 million).

enforcement against those, whether inside or outside of government, who waste, steal or abuse TARP funds."⁴⁵ SIGTARP's primary duties⁴⁶ include auditing Treasury's management of TARP,⁴⁷ making recommendations to Treasury with respect to TARP funds and activities,⁴⁸ investigating allegations of fraud or abuse with respect to TARP funds,⁴⁹ preparing

45. SIGTARP QUARTERLY REPORT, *supra* note 38, at title page.

46. In addition to the duties specifically enumerated in EESA, Congress endowed SIGTARP with the "duties and responsibilities of inspectors general" under the IG Act. EESA § 5231(c)(3). It is not clear whether this provision of authority in EESA endows SIGTARP with every duty and responsibility that is delineated in the IG Act or whether the EESA provision is limited to § 4 of the IG Act, entitled "Duties and Responsibilities." VANESSA K. BURROWS, CONGRESSIONAL RESEARCH SERV., THE SPECIAL INSPECTOR GENERAL (SIG) FOR THE TROUBLED ASSET RELIEF PROGRAM (TARP) 4 (2009), available at www.fas.org/sgp/crs/misc/R40099.pdf.

Section 4(a)(1) of the IG Act, which grants auditing authority, is likely not applicable to SIGTARP because EESA contains language that grants SIGTARP's specific auditing authority. Compare IG Act § 4(a)(1) (delineating that it is the duty of each IG "to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment"), with EESA § 5231(c)(1) ("It shall be the duty of [SIGTARP] to conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets by the Secretary of the Treasury under any program established by the Secretary . . . , and the management by the Secretary of any program established under [EESA] . . ."). See also BURROWS, *supra*, at 4 ("Depending on how [EESA] is interpreted, it is possible that [SIGTARP's] responsibilities will not encompass § 4(a)(1) of the IG Act . . ."). "Since the provisions creating [SIGTARP] contain specific language with regard to conducting, supervising, and coordinating audits and investigations, and this specific language does not mention 'policy direction,' this provision of the IG Act would not seem to be included in the duties mentioned in [§ 5231(c)(3) of EESA]." *Id.*

However, resolving the confusion regarding the specific extent of SIGTARP's duties is not the purpose of this Note.

47. See EESA § 5231(c)(1) ("It shall be the duty of [SIGTARP] to conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets by the Secretary of the Treasury under [any TARP] . . . , and the management by the Secretary of [any TARP] . . ."). SIGTARP is to execute these audits and investigations partly by collecting and summarizing certain information, including information relating to the troubled assets purchased by the Secretary through TARP, the reasons for these purchases, the institutions from which the assets were purchased, the individuals hired to manage these TARP assets, and the total amount of troubled assets procured by Treasury through TARP. *Id.* § 5231(c)(1)(A)–(G).

48. See IG Act, 5 U.S.C. App. § 4(a)(2)–(3) (providing that an IG possesses the duty to "review . . . legislation and regulations relating to . . . such establishment and to make [related] recommendations . . . [and] to recommend policies for . . . [the] activities [of] such establishment" in order to promote economy and efficiency and in order to prevent and to detect fraud or abuse).

49. See *id.* § 4(a)(3) (providing that an IG possesses the power to "conduct, supervise, or coordinate . . . activities carried out or financed by such establishment for the purpose of . . . preventing and detecting fraud and abuse in . . . its programs and operations").

quarterly reports for Congress on the TARP activities of both SIGTARP and Treasury,⁵⁰ and keeping Congress "fully and currently informed" on SIGTARP's activities.⁵¹

In the exercise of these statutory duties, SIGTARP enjoys the authority conferred upon all other inspectors general (IG), including the power to access all TARP-related records available to Treasury, conduct investigations, request information and assistance from any federal or state governmental agency, subpoena information and data, and have direct access to the Treasury Secretary.⁵²

B. The Clash Between SIGTARP and Treasury Regarding Treasury's Supervisory Authority over SIGTARP

Congress has created IGs in many executive and legislative agencies⁵³ and has also created three special IGs: the Special Inspector General for Iraq Reconstruction (SIGIR), the Special Inspector General for Afghanistan

50. SIGTARP Act, Pub. L. No. 111-15, sec. 5(1), § 121.

51. See IG Act § 4(a)(5) (providing that an IG has the responsibility to "keep . . . Congress fully and currently informed . . . concerning fraud and other serious problems, abuses, and deficiencies . . . , to recommend corrective action . . . , and to report on the progress made in implementing such corrective action").

52. EESA, 12 U.S.C. § 5231(d)(1); see also IG Act § 6(a)–(c) (detailing the authority of IGs to execute their statutory duties).

53. See FREDERICK M. KAISER, CONGRESSIONAL RESEARCH SERV., STATUTORY OFFICES OF INSPECTOR GENERAL: PAST AND PRESENT 1 (2008), available at <http://www.fas.org/sgp/crs/misc/98-379.pdf> ("Established by public law as permanent, nonpartisan independent offices, [statutory offices of inspector general] now exist in more than 60 establishments and entities, including all departments and largest agencies . . ."). The four principal responsibilities of IGs are

- (1) conducting and supervising audits and investigations relating to the programs and operations of the agency;
- (2) providing leadership and coordination and recommending policies to promote the economy, efficiency, and effectiveness of these;
- (3) preventing and detecting waste, fraud, and abuse in these; and
- (4) keeping the agency head and Congress fully and currently informed about problems, deficiencies, and recommended corrective action.

Id. at 1–2. Congress created IGs in an effort to spearhead a movement toward more accountability and ethics in government. See Margaret J. Gates & Marjorie Fine Knowles, *The Inspector General Act in the Federal Government: A New Approach to Accountability*, 36 ALA. L. REV. 473, 473 (1985) ("The creation of statutory, independent inspectors general in the executive branch of the federal government represents a significant new approach to the problem of government accountability."); see also Kathleen Clark, *Toward More Ethical Government: An Inspector General for the White House*, 49 MERCER L. REV. 553, 556–60 (1998) (discussing how IGs promote an ethical environment in government).

Reconstruction (SIGAR), and SIGTARP.⁵⁴ The corresponding organic statutes explicitly require these IGs and SIGIR and SIGAR to report to their respective agency heads and to keep these agency heads fully and currently informed.⁵⁵ The statutes also mandate that the IGs and SIGIR and SIGAR are to be supervised by their respective agency heads.⁵⁶

In contrast to these requirements, EESA does not explicitly require SIGTARP to report to or to be supervised by an agency head, prompting confusion with respect to the scope of SIGTARP's authority and freedom.⁵⁷

54. BURROWS, *supra* note 46, at 1. Congress created SIGIR to provide for "independent . . . audits and investigations relating to the programs and operations" of the reconstruction of Iraq and to provide for "an independent . . . means of keeping [the Secretaries of State and Defense] fully and currently informed about problems and deficiencies relating to the administration of such programs and operations." *See* Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 3001, 117 Stat. 1209, 1234-38 (establishing SIGIR). Congress created SIGAR to provide for "independent . . . audits and investigations relating to the programs and operations funded . . . for the reconstruction of Afghanistan" and to provide for "an independent . . . means of keeping the [Secretaries of State and Defense] fully and currently informed about problems and deficiencies relating to the administration of such programs and operations." *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1229, 122 Stat. 3, 378-85 (establishing SIGAR).

55. BURROWS, *supra* note 46, at 3; *see also* KAISER, *supra* note 53, at 2 (providing that IGs' reporting obligations require them to keep their respective agency heads fully and currently informed).

56. BURROWS, *supra* note 46, at 3; *see* Gates & Knowles, *supra* note 53, at 489 ("The IG . . . for each agency [is] . . . supervised by the head of the agency."); KAISER, *supra* note 53, at 2 ("IGs serve under the 'general supervision' of the agency head" (quoting IG Act § 3(a))).

57. *See* BURROWS, *supra* note 46, at 3 ("Unlike IGs in other agencies, who shall 'report to and be under the general supervision' of the agency head, [SIGTARP] will not be required to report to, or be supervised by, the head of any agency, including the Secretary of the Treasury." (quoting IG Act § 3(a))). "[U]nder one interpretation of [SIGTARP's] duties and responsibilities, . . . [SIGTARP] will report only to Congress and not the agency head. This reporting arrangement would be unique among statutory IGs." *Id.* (footnotes omitted).

EESA provides that SIGTARP "shall . . . have the duties and responsibilities" of IGs pursuant to the IG Act. EESA § 5231(c)(3). However, it is not clear from this generalized language whether the IG Act's requirements that reference interaction with agency heads are applicable to SIGTARP. *See* BURROWS, *supra* note 46, at 4 (noting the confusion surrounding the issue whether SIGTARP is responsible for all of the IG duties outlined in the IG Act, "even those that reference interaction with the head of an establishment or those that reference responsibilities not specifically delineated in EESA").

For example, one of the "duties and responsibilities" outlined by the IG Act provides that an IG must "keep the head of such establishment and the Congress fully and currently informed." IG Act, 5 U.S.C. App. § 4(a)(5). In addition, while EESA requires that SIGTARP submit reports only to Congress, EESA § 121(f)(1), the IG Act requires that IGs submit reports both to Congress and to their respective agency heads. IG Act § 5. The

EESA makes no explicit reference to an agency head to whom SIGTARP is accountable and, while EESA specifically requires that SIGTARP submit reports to Congress, EESA does not explicitly require that SIGTARP submit reports to an agency head.⁵⁸ This arrangement distinguishes SIGTARP from all other IGs.⁵⁹

In fact, even if EESA is interpreted as requiring SIGTARP to report to or to be supervised by an agency head, it is not clear from EESA's language whether the Treasury Secretary is SIGTARP's agency head or whether SIGTARP is even part of the Treasury Department.⁶⁰ This uncertainty with

inconsistencies between EESA and the IG Act spawn confusion with respect to whether SIGTARP must also submit reports to an agency head. *See* BURROWS, *supra* note 46, at 5 ("[I]t is not clear as to whether [SIGTARP] would need to submit the reports in § 5 of the IG Act in addition to the reports required in EESA or whether [SIGTARP] would only be responsible for the required reports set forth in EESA."); *id.* at 6 (observing that the "specificity of the language of [EESA's] report provision could be interpreted to imply that the 'duties and responsibilities' provision in [EESA] § 121(c)(3) would not extend to the reporting requirements [of] § 5 of the IG Act," which requires IGs to submit reports to agency heads).

In addition, there is no explicit provision in EESA that the Treasury Secretary may comment on the reports that SIGTARP prepares for Congress. *See id.* ("There is no explicit requirement in EESA that the Treasury Secretary (or anyone else) be allowed to comment on reports that [SIGTARP] submits to Congress SIGAR and SIGIR have such requirements enabling the Secretaries of State and Defense to submit comments to the appropriate congressional committees"); *see also* Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243, 249 (1999) (observing that, although the IG Act requires agency heads to transmit IGs' reports to Congress unchanged, the IG Act also permits agency heads to "send comments regarding the report directly to Congress").

Hence, "[d]ue to the ambiguous nature of the statutory language in EESA, the scope of the powers and authorities of [SIGTARP] is not clear." BURROWS, *supra* note 46, at 2.

58. *See generally* EESA; *see also id.* § 121(f)(1) (requiring that SIGTARP submit quarterly reports only to Congress); BURROWS, *supra* note 46, at 5 ("EESA requires [SIGTARP] to report to Congress only, and not to an establishment head . . .").

59. *See id.* at 3 (finding that SIGTARP's reporting arrangement, as delineated by EESA, is "unique among statutory IGs").

60. *See generally* EESA; *see also* Dugan & Rose, *supra* note 40 ("[I]t is unclear what degree of control, if any, Treasury holds over SIGTARP."). However, "[i]f EESA is interpreted to include [certain] reporting requirements . . . of the IG Act, then [SIGTARP] could be required to submit certain reports to the establishment head, which would appear to be the Secretary of the Treasury, as TARP itself has not been designated an establishment." BURROWS, *supra* note 46, at 5; *see also* SIGTARP QUARTERLY REPORT, *supra* note 38, at 27 (stating SIGTARP's position that SIGTARP "is an independent entity within Treasury"). Furthermore, because SIGTARP is removable by the President, EESA § 121(a)(4), and because the power to remove is tantamount to the power to control, it seems clear, at least, that SIGTARP is part of the executive branch. *See* *Bowsher v. Synar*, 478 U.S. 714, 720 (1986) ("Under the separation of powers established by the Framers of the Constitution, . . . Congress may not retain the power of removal over an officer performing executive

respect to SIGTARP's autonomy generated thick tension between Treasury and SIGTARP as Treasury asserted supervisory authority over SIGTARP in April 2009 while SIGTARP stressed its independence from Treasury.⁶¹ This deadlock resulted in Treasury requesting from the Justice Department's Office of Legal Counsel (OLC) a legal opinion on the extent of SIGTARP's independence from Treasury.⁶² However, before OLC responded, Treasury withdrew its request for an opinion.⁶³ SIGTARP

functions. The congressional removal power created a 'here-and-now subservience' of the Comptroller General to Congress." (citations omitted)).

61. See Dugan & Rose, *supra* note 40 ("Treasury recently has asserted that, under SIGTARP's governing statutory authority, SIGTARP is subject to Treasury's oversight and control SIGTARP contends that Congress's intent, as reflected in EESA, is clearly that SIGTARP be completely independent of Treasury."); see also Matt Jaffe, *Treasury Dispute with Bailout Watchdog Stems from AIG Bonus Audit; Now Congressman Calls for Investigation*, ABC NEWS, June 19, 2009, <http://blogs.abcnews.com/politicalpunch/2009/06/treasury-dispute-with-bailout-watchdog-stems-from-aig-bonus-audit-now-congressman-calls-for-investigation.html> (last visited Feb. 16, 2011) ("The Treasury Department's ongoing dispute with bailout watchdog Neil Barofsky stems from the Obama administration's refusal in April to hand over documents relating to AIG's executive compensation structure") (on file with the Washington and Lee Law Review). In a letter by Congressman Jeb Hensarling to Congressional Oversight Panel chair Elizabeth Warren, Hensarling penned, "It is my understanding that this disagreement has evolved into a debate between the Administration and SIGTARP as to whether SIGTARP is subject to the control and supervision of the Administration." Letter from Jeb Hensarling, Deputy Republican Whip, U.S. Cong., to Elizabeth Warren, Chair, Cong. Oversight Panel (June 19, 2009), available at http://abcnews.go.com/images/Politics/Congressman_Hensarling_Requests_Hearings_on_SIGTARP.pdf (on file with the Washington and Lee Law Review).

62. See SIGTARP QUARTERLY REPORT, *supra* note 38, at 27 ("On April 15, 2009, Treasury asked . . . OLC for an opinion on [certain] issues pertaining to SIGTARP"); see also Evan Perez & Deborah Solomon, *Treasury Retreats from Standoff with TARP Watchdog*, WALL ST. J., Sept. 3, 2009, <http://online.wsj.com/article/SB125193355469281319.html> ("In April, after butting heads with Mr. Barofsky, Treasury officials asked [OLC] for a ruling to clarify that Mr. Barofsky's office falls under the Treasury secretary's supervision."). Treasury sought OLC's legal opinion on the following issues: (1) "whether SIGTARP is located within Treasury" and (2) "whether [SIGTARP is] subject to the Secretary of the Treasury's . . . general supervision." SIGTARP QUARTERLY REPORT, *supra* note 38, at 27. In response to Treasury's request, "SIGTARP made clear its position that the language and legislative history of section 121 of EESA unambiguously provides that SIGTARP is an independent entity within Treasury [and] that [SIGTARP] is not subject to the Treasury Secretary's supervision." *Id.*; see generally Letter from Neil M. Barofsky, Special Inspector Gen. for the Troubled Asset Relief Program, to Bernard Knight, Jr., Acting General Counsel, U.S. Treasury Dep't (Apr. 7, 2009), available at http://a.abcnews.go.com/images/Politics/SIGTARP_position_within_Treasury.pdf.

63. See SIGTARP QUARTERLY REPORT, *supra* note 38, at 27 ("On August 7, 2009, Treasury withdrew its request for an OLC opinion."). "The Treasury Department declined to explain the reason for the withdrawal of its request to the Justice Department." Perez & Solomon, *supra* note 62.

interpreted this withdrawal as "Treasury's acknowledgement that SIGTARP is an independent entity within Treasury, and that [SIGTARP] is not subject to the supervision of the Treasury Secretary."⁶⁴ As congressman Jeb Hensarling asserted: "Any threat or appearance of a threat to SIGTARP's independence will undermine and corrupt its important mission."⁶⁵

C. Treasury's Certification Requirement

Although vague language in EESA creates serious supervisory issues with respect to SIGTARP, EESA's clear language poses legal questions as well. In an amendment to EESA, Congress mandated that the Treasury Secretary "shall . . . (1) take action to address deficiencies identified by a report or investigation of [SIGTARP] or other auditor engaged by the TARP; or (2) certify to appropriate committees of Congress that no action is necessary or appropriate."⁶⁶ This "certification" provision of EESA initiates separation of powers concerns that are only exacerbated by the uncertainty surrounding SIGTARP's independence from Treasury.⁶⁷

In the following pages, this Note endeavors to resolve this issue pursuant to Supreme Court precedent.

64. SIGTARP QUARTERLY REPORT, *supra* note 38, at 27.

65. Letter from Jeb Hensarling to Elizabeth Warren, *supra* note 61, at 1. In a letter to Treasury Secretary Timothy Geithner, Senator Charles Grassley stated that SIGTARP was "created by Congress as a means to combat waste, fraud, and abuse and to be [an] independent watchdog[] ensuring" that the Treasury Department is held accountable for its actions. Letter from Charles E. Grassley, Senator, U.S. Congress, to Timothy F. Geithner, Secretary, U.S. Dep't of Treasury 1 (June 17, 2009), *available at* http://abcnews.go.com/images/Politics/Letter_to_Treasury090618.pdf. Furthermore, Treasury's contention that SIGTARP is subject to Treasury supervision could contravene congressional intent as evidenced in EESA. *See* Dugan & Rose, *supra* note 40 (observing that Treasury's "claim seems contrary to Congress's intent to charge SIGTARP with responsibility for aggressively guarding the TARP program from fraud and abuse. In particular, a lack of independence from Treasury could tarnish the perception that SIGTARP has the ability to do its job effectively"); *see also supra* notes 55–59 and accompanying text (noting that the explicit statutory references to agency heads' supervisory authority over IGs and SIGIR and SIGAR are lacking in EESA with respect to SIGTARP).

66. SIGTARP Act, Pub. L. No. 111-15, sec. 4(2)(f), § 121.

67. *See* Perez & Solomon, *supra* note 62 ("[I]n establishing [SIGTARP], Congress set strict directives that . . . require [the Treasury Secretary] to explain if he declines to follow any of Mr. Barofsky's recommendations. That led to constitutional questions over whether Congress violated the separation of powers and invaded the executive branch's turf.").

III. Analysis of SIGTARP's Separation of Powers Issue Based on Supreme Court Precedent

A. Supreme Court Precedent Regarding the Separation of Powers

Inconsistency pervades the Supreme Court's decisions with respect to the separation of powers principle.⁶⁸ Although the Court has vacillated between formalist⁶⁹ and functionalist⁷⁰ approaches to the separation of

68. See FISHER, *supra* note 1, at 287 ("The Supreme Court offers limited help in resolving the basic disputes of separation of powers. Over the last three decades it has bounced back and forth, sometimes embracing a functional, pragmatic approach, and at other times adopting a doctrinaire, formalistic model."); *id.* at 290 (noting both the Court's "failure to develop a consistent and coherent theory of separated powers" and the Court's "record of avoiding many of the disputes between Congress and the President"); Magill, *supra* note 2, at 1129 ("[T]he Supreme Court's case law is no more settled than the commentary: It has been called an 'incoherent muddle,' produced by a Court that is 'stumped' by separation of powers questions." (footnotes omitted)).

69. See T.J. HALSTEAD, CONGRESSIONAL RESEARCH SERV., THE SEPARATION OF POWERS DOCTRINE: AN OVERVIEW OF ITS RATIONALE AND APPLICATION 7–8 (1999) (defining formalism). "A formalist approach to the consideration of separation of powers issues focuses upon the text of the Constitution in an effort to ascertain to what degree branch powers and functions may be intermingled." *Id.* at 7. Because the Constitution divides governmental power into three defined categories, "the crux of formalism is that the power delegated to a branch should be exercised exclusively by that branch." *Id.* "The effect of this approach is to ascertain whether the activity in question is judicial, executive, or legislative in nature, and to circumscribe power which extends beyond the constitutionally assigned functions of a particular branch." *Id.* at 7–8. For a further discussion of formalism, see William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21–22 (1998), and see generally Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

70. See HALSTEAD, *supra* note 69, at 8 (defining functionalism). "Contrary to formalism's textual focus, a functionalist approach to separation of powers issues centers on the notion that precise definitional boundaries cannot serve as a basis for the resolution of separation of powers issues." *Id.* Justice Jackson propounded this functionalist premise when he stated that "the actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context." *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). "Thus, a functionalist approach permits the sharing of power between branches, concerning itself mainly with the preservation of the core function of a particular branch where there has been no exclusive textual commitment to a particular branch." *Id.* (citing *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)). "This notion of a core function derives from the functionalist theory that the Constitution ascribes a unique and essential power to each branch of government, which must be protected from usurpation by the competing branches." *Id.* "Branches may exercise the powers of another, so long as the ability of the original branch to exercise such power is not impaired." *Id.* (citations omitted). For a further discussion of the functionalist approach, see Eskridge, *supra* note 69, at 21–22, and

powers issues it has confronted, the Court's current precedent reveals a proclivity for functionalism.⁷¹

see generally Strauss, *supra* note 69.

The functionalistic "core function" approach is generally more flexible than the "definitional boundaries" approach espoused by the formalistic dogma. HALSTEAD, *supra* note 69, at 8. Eskridge observes that "[s]eparation of powers' connotes relatively formalist inquiries of rules, deductions, and sharp lines" whereas "[c]hecks and balances[]" . . . connotes relatively functionalist inquires of standards, inductions, and flexible interactions." Eskridge, *supra* note 69, at 22.

71. See FISHER, *supra* note 1, at 12–13 ("Between 1983 and 1986, the Court flirted with a rigid[,] . . . impractical notion of separation of powers Although not directly overruling those decisions, the Court in 1988 and again in 1989 issued rulings more favorable toward the overlapping of powers, emphasizing checks and balances over a pure separation of powers." (footnote omitted)). For an overview of the Court's separation of powers jurisprudence over the last three decades, see *id.* at 287–90.

Justice Kennedy, in a concurring opinion, sought to paint a more systematic portrait of the Court's separation of powers jurisprudence. See Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85, 135 (1995) ("At first blush, Justice Kennedy's organization of the cases appeared to bring a refreshing order to chaos."). In *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), Justice Kennedy divided the Court's separation of powers opinions into two classes. *Id.* at 484–87. First, Justice Kennedy delineated cases in which the presidential power upon which Congress was allegedly infringing "was not explicitly assigned by the text of the Constitution to be within the sole province of the President, but rather was thought to be encompassed within the general grant to the President of the 'executive power.'" *Id.* at 484 (quoting U.S. CONST. art. II, § 1, cl. 1). In this line of cases, according to Justice Kennedy, "[the Court has] employed something of a balancing approach, asking whether the statute at issue prevents the President 'from accomplishing [his] constitutionally assigned functions.'" *Id.* (internal quotation marks omitted) (quoting *Morrison v. Olson*, 487 U.S. 654, 695 (1988)). Justice Kennedy explicitly incorporated *Morrison* into this grouping of cases, remarking that the relevant aspect of the Court's decision in *Morrison* "involved the President's power to remove Executive officers, a power . . . not conferred by any explicit provision in the text of the Constitution (as is the appointment power), but rather . . . inferred to be a necessary part of the grant of the 'executive Power.'" *Id.* (citing *Myers v. United States*, 272 U.S. 52, 115–16 (1926)).

Second, Justice Kennedy defined cases in which "the Constitution by explicit text commits the power at issue to the exclusive control of the President." *Id.* at 485. When confronted with such cases, the Court "ha[s] refused to tolerate *any* intrusion by the Legislative Branch." *Id.*; see also *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 999 (1983) (White, J., dissenting) ("The separation-of-powers doctrine has heretofore led to the invalidation [by the Supreme Court] of Government action only when the challenged action violated some express provision in the Constitution."). Justice Kennedy observed that "[w]here a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself." *Pub. Citizen*, 491 U.S. at 486. "It is improper for this Court to arrogate to itself the power to adjust a balance settled by the explicit terms of the Constitution [W]here the Constitution draws a clear line, we may not engage in such tinkering." *Id.* at 486–87. Justice Kennedy illustrated this line of cases by identifying *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). *Id.* at 486. In *Chadha*, the Court

Although the Court has not entertained a case involving the constitutionality of IGs,⁷² the Court has resolved separation of powers issues that are analogous to the issue posed by SIGTARP. In *Morrison v. Olson*,⁷³ the Court ruled that a congressionally imposed "good cause" restriction on the President's removal power over an independent counsel did not "impermissibly interfer[e]" with the President's ability to perform his constitutional function.⁷⁴ The Court reaffirmed *Morrison's*

invalidated a legislative veto provision on the ground "that it violated the explicit constitutional requirement that all legislation be presented to the President for his signature before becoming law." *Id.* (citing *Chadha*, 462 U.S. at 946–48, 957–59).

However, Justice Kennedy brought under fire his dual-sectored structure by transgressing it himself at the end of the same concurring opinion in which he introduced the configuration. See *Murchison*, *supra*, at 135 ("The Kennedy concurrence, however, for all its doctrinal strivings, was not without serious problems of its own."). After setting forth his structure, Justice Kennedy resolved the separation of powers question at issue in *Public Citizen*, which involved the President's textually explicit appointment power, by engaging in a form of balancing. See *id.* at 135–36 ("Having stated that *Public Citizen* involved a textual grant of power and that balancing is 'inapplicable,' Justice Kennedy's last paragraph referred to the section of the district court's opinion that cited *Morrison* and engaged in balancing." (quoting *Pub. Citizen*, 491 U.S. at 487)).

72. See MILLER CTR. OF PUBLIC AFFAIRS, *supra* note 3, at 4 (noting that IGs' presence in executive agencies is of "dubious constitutionality, though the issue has not been raised in court").

73. See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (concluding that a "good cause" removal provision of the Ethics in Government Act of 1978 "does not violate the separation-of-powers principle by impermissibly interfering with the functions of the Executive Branch."). In *Morrison*, the Court considered the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978 (Act), 28 U.S.C. §§ 49, 591–99. *Id.* at 659–60; see also Geoffrey M. McNutt, Note, *Formal and Functional Approaches to Separation of Powers: The Political Cost of Checks and Balances in Nixon v. United States and Morrison v. Olson*, 2 GEO. MASON U. L. REV. 281, 288–92 (1995) (dissecting the *Morrison* opinion). The Act required the Attorney General (AG), upon receipt of relevant information, to conduct a preliminary investigation into a supposed violation of federal criminal law by any person implicated by the Act. *Morrison*, 487 U.S. at 660. If the AG determined that "there are 'reasonable grounds to believe that further investigation or prosecution is warranted,'" the Act required the AG to apply to a special court created by the Act for appointment of an independent counsel (IC). *Id.* at 661. If, however, the initial investigation proved fruitless, the Act required the AG merely to notify the special court of this result. *Id.* In *Morrison*, the Court found that the IC appointment power vested by the Act in the special court did not contravene either Article III or the Appointments Clause of Article II. *Id.* at 670–85. The Court also ruled that the Act's "good cause" restriction on the AG's power to remove the IC satisfied the separation of powers because the restriction did not "unduly trammel[]" on the President's ability to perform his constitutional function and did not "unduly interfer[e]" with the executive branch's role. *Id.* at 685–97.

For an argument entreating the Court to overrule *Morrison*, see Steven G. Calabresi & Christopher S. Yoo, *Remove Morrison v. Olson*, 62 VAND. L. REV. EN BANC 103 (2009).

74. See *Morrison*, 487 U.S. at 697 (concluding that the removal restrictions do "not violate the separation-of-powers principle by impermissibly interfering with the functions of the

functionalist⁷⁵ construction of the separation of powers doctrine in *Mistretta v. United States*.⁷⁶ Although the Court's decisions embrace a functionalist interpretation of the separation of powers, they have not overruled previous opinions that espouse a formalist vision.⁷⁷ In *Bowsher v. Synar*,⁷⁸ one of

Executive Branch").

75. See HALSTEAD, *supra* note 69, at 15 (finding that the "functional approach" to separation of powers issues "was extended in *Morrison*").

76. See *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (concluding that Congress did not violate either the nondelegation or the separation of powers doctrines by creating the United States Sentencing Commission). In *Mistretta*, the Court considered the constitutionality of the Sentencing Guidelines (Guidelines) promulgated by the United States Sentencing Commission (Commission) pursuant to the Sentencing Reform Act of 1984 (Act), as amended, 18 U.S.C. §§ 3551–3742, and 28 U.S.C. §§ 991–98. *Id.* at 362. The Act established the Commission as an independent entity within the judicial branch and delegated to the Commission the authority to craft the Guidelines, from which a sentencing judge was able to depart only if the judge found an aggravating or mitigating factor that the Commission did not adequately consider when formulating the Guidelines. *Id.* at 367–68. In *Mistretta*, the Court found that the Act did not violate the nondelegation doctrine because Congress's assignment to the Commission of the authority to formulate the Guidelines was accompanied by sufficiently specific instructions with respect to the Commission's use of that delegated authority. *Id.* at 371–79. The Court also concluded that the independent structure of the Commission within the judicial branch did not violate the separation of powers principle because the Commission's placement could not "possibly be construed as preventing the Judicial Branch 'from accomplishing its constitutionally assigned functions.'" *Id.* at 395–96 (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

77. See FISHER, *supra* note 1, at 12–13 ("Between 1983 and 1986, the Court flirted with a [formalist] notion of separation of powers Although not directly overruling those decisions, the Court in 1988 and again in 1989 issued rulings more favorable toward the overlapping of powers, emphasizing checks and balances over a pure separation of powers." (footnote omitted)).

78. See *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (concluding that the assignment by Congress to the Comptroller General of certain functions violated the separation of powers because Congress's reservation of the removal power over the Comptroller General was tantamount to congressional supervision of the execution of its laws). In *Bowsher*, the Court considered the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act (Act), Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended in scattered sections of 31 U.S.C.). *Id.* at 717. The purpose of the Act was to "eliminate the federal budget deficit" by imposing a "maximum deficit amount." *Id.* If this maximum deficit amount was exceeded, the Act required the Comptroller General (CG) to prepare a report detailing "across-the-board cuts in federal spending." *Id.* at 717–18. Once the CG forwarded the report to the President, the Act required the President to implement the spending reductions. *Id.* at 718, 733. The Court in *Bowsher* found that the CG, removable only by Congress, exercised executive power under the Act's provisions requiring the CG to prepare the spending reduction report. *Id.* at 732–33. The Court concluded that this arrangement violated the separation of powers by reserving to Congress control over an official charged with execution of the laws. *Id.* at 734. "By placing the responsibility for execution of the [Act] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function." *Id.*

these older formalist⁷⁹ decisions, the Court concluded that, once Congress enacts a piece of legislation, it may not supervise or control the execution of that statute.⁸⁰

These three decisions yield a consolidated rule with respect to separation of powers clashes between Congress and the President: Congress (1) may not impermissibly interfere with the President's ability to fulfill his constitutional role, and (2) may not itself supervise or control the execution of its laws.

B. Application of Supreme Court Precedent to SIGTARP's Separation of Powers Issue

1. Why the SIGTARP Dynamic Violates the Separation of Powers

Anterior to an application of this Supreme Court precedent to the SIGTARP issue is an understanding of why SIGTARP poses a separation of powers question. What follows is a synopsis of the argument for why the SIGTARP dynamic violates the separation of powers pursuant to the Supreme Court's precedent.

EESA's amendment mandates that the Treasury Secretary must either (1) act to address the deficiencies identified by SIGTARP with respect to TARP, or (2) certify to Congress that no action is necessary or appropriate.⁸¹ This certification requirement could impermissibly interfere⁸² with the President's ability to fulfill his constitutional function by compelling executive accountability to Congress with respect to how Treasury utilizes its discretion in executing EESA.⁸³ This accountability

79. *See id.* at 759 (White, J., dissenting) (lamenting the majority's "willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives through the means chosen by the Congress and the President in the legislative process established by the Constitution").

80. *See id.* at 726, 734 (majority opinion) ("The structure of the Constitution does not permit Congress to execute the laws . . . [or to] retain[] control over the execution of [its laws] and [thereby] intrude[] into the executive function."). "[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Id.* at 733–34 (citing *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 958 (1983)).

81. SIGTARP Act, Pub. L. No. 111-15, sec. 4(2)(f), § 121.

82. *See supra* notes 73–74 and accompanying text (discussing Supreme Court precedent that finds that Congress may not, consistent with the separation of powers, act vis-à-vis the President in a manner that impermissibly interferes with the President's ability to fulfill his role as delineated by the Constitution).

83. *See* SIGTARP Act, sec. 4(2)(f)(2), § 121 (providing that, if the Treasury Secretary

dynamic might impose upon the Treasury Secretary a mild congressional threat in the form of an "either/or" demand—either the Secretary must comply with SIGTARP's recommendations or the Secretary must justify to Congress his refusal to comply with those recommendations.⁸⁴ By forcing this choice on the Secretary, EESA arguably imposes a severe constraint on the executive's discretion in administering TARP, especially considering the political arena in which the President operates.⁸⁵ The President will likely bear in mind that the Secretary's refusal to comply with SIGTARP will not sit well with the voting public, who will likely perceive SIGTARP as a civil servant operating in the public interest to monitor Treasury's dispersal of the \$700 billion of TARP taxpayer money.⁸⁶

However, EESA's certification provision would tend to coerce presidential action even without the aid of the political machine.⁸⁷ By

elects not to follow SIGTARP's recommendations, the Secretary must "certify" to the appropriate congressional committees that no action is necessary or appropriate).

84. *Id.*, sec. 4(2)(f), § 121.

85. *Cf. Morrison v. Olson*, 487 U.S. 654, 702, 713–14 (1988) (Scalia, J., dissenting) (discussing the negative political effects on the President should he choose not to appoint an independent counsel in response to a congressional request for such an appointment for the purpose of investigating alleged criminal violations of lower executive officials).

86. *See* 155 CONG. REC. H3,849 (daily ed. Mar. 25, 2009) (statement of Rep. Erik Paulsen) ("[T]he American people deserve to know when Washington is spending taxpayer dollars, and we are making every effort [through creating SIGTARP] to ensure that those taxpayer dollars are being spent wisely American taxpayers deserve no less."). Congressman Paulsen stated:

When the Federal Government is literally spending hundreds of billions of dollars, it is critical that we have the most stringent oversight of that spending. That is our obligation to the taxpayer They have the absolute right to know that their money—it is their money—is being spent properly and wisely.

Id. at H3,851; *see also Morrison*, 487 U.S. at 702, 713–14 (Scalia, J., dissenting) (noting the political consequences of a presidential refusal to comply with an ostensibly just demand by Congress to appoint an independent counsel). "As a practical matter," Scalia observed, "it would be surprising if the Attorney General had any choice . . . but to seek appointment of an independent counsel to pursue the charges against the principal object of the congressional request . . ." *Id.* at 701–02. "Merely the political consequences (to . . . the President) of seeming to break the law by refusing to do so would have been substantial." *Id.* at 702. "How could it be, the public would ask, that a 3,000-page indictment drawn by our representatives over [two-and-a-half] years does not establish 'reasonable grounds to believe' that further investigation or prosecution is warranted with respect to at least the principal alleged culprit?" *Id.*

87. *Cf. Morrison*, 487 U.S. at 702 (Scalia, J., dissenting) (discussing the negative political consequences of a presidential refusal to acquiesce to a congressional request to appoint an independent counsel and then observing that "the [independent counsel statute] establishes more than just practical compulsion"). Justice Scalia then analyzed his

requiring the Secretary to report to Congress, EESA implicitly obliges the executive to determine whether the action recommended by SIGTARP is necessary or appropriate.⁸⁸ If the Secretary determines that the recommended action is necessary or appropriate, EESA could be interpreted to *mandate* the executive's compliance with SIGTARP's recommendation. In other words, EESA's certification requirement, apart from levying upon the executive branch a constitutionally questionable duty of explanation, might impermissibly interfere with the President's ability to execute the laws according to his own judgment by imposing upon the President an obligation to comply with SIGTARP's recommendations unless the responses recommended by SIGTARP are both unnecessary and inappropriate.⁸⁹

If SIGTARP were an official subject to full executive supervision and control, perhaps this statutory construction might not arouse serious separation of powers concerns. However, although SIGTARP is removable by the President,⁹⁰ SIGTARP appears to be completely immune to Treasury supervision and might not even be part of the Treasury Department.⁹¹ Conversely, because SIGTARP reports only to Congress,⁹² and because SIGTARP's duty as an IG requires him to maintain an evaluative detachment from the executive branch,⁹³ SIGTARP's loyalties are more likely directed toward Congress⁹⁴ and,

interpretation of the statute, which he construed to mandate presidential compliance unless there were no reasonable grounds to believe that further investigation was warranted into supposed criminal violations by lower executive officials. *Id.*

88. SIGTARP Act, Pub. L. No. 111-15, sec. 4(2)(f)(2), § 121.

89. *Cf. Morrison*, 487 U.S. at 701-03 (Scalia, J., dissenting) (making a parallel argument with respect to the effect of another congressional statute, namely, that the statute "requires the Attorney General to apply for the appointment of an independent counsel . . . unless he determines . . . that 'there are no reasonable grounds to believe that further investigation or prosecution is warranted.'" (quoting 28 U.S.C. § 592(b)(1))).

90. *See supra* note 60 (observing that the power to remove is tantamount to the power to control).

91. *See supra* notes 57-60 and accompanying text (noting EESA's vague language with respect to SIGTARP's independence from Treasury).

92. *See supra* notes 57-58 and accompanying text (observing that EESA explicitly requires SIGTARP to report only to Congress).

93. *See* MILLER CTR. OF PUBLIC AFFAIRS, *supra* note 3, at 4 (explaining that Congress passed the IG Act to "check abuse in the executive branch").

94. *See* Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 680 (2005) (stating that the Department of Justice initially denounced the IG Act as making "the [IGs] subject to divided and possibly inconsistent obligations to the executive and legislative branches, in violation of the doctrine of separation of powers" (internal quotation marks omitted)).

furthermore, SIGTARP is likely subject to congressional influence.⁹⁵ Hence, the recommendations that SIGTARP conveys to Treasury could be intermingled with congressional instructions to Treasury with respect to administering TARP. This likelihood directly affects the equilibrium of power between the executive and legislative branches if, as discussed above, EESA is interpreted to require both executive accountability to Congress and executive compliance with SIGTARP recommendations that are either necessary or appropriate.⁹⁶ In essence, Congress could have strategically inserted SIGTARP into the TARP program in a subtle effort to supervise the execution of its monumental⁹⁷ \$700 billion governmental bailout program in violation of the Supreme Court's separation of powers precedent.⁹⁸

2. *Supreme Court Precedent Applied to the SIGTARP Separation of Powers Issue*

a. *Compelling Executive Accountability to Congress Through the Certification Requirement*

Congress, through EESA, presents to the Treasury Secretary two options: (1) act to address TARP-related deficiencies identified by SIGTARP, or (2) certify to Congress that "no action is necessary or appropriate."⁹⁹ By obliging the Secretary to "certify" to Congress when he elects not to take action, Congress essentially has compelled executive accountability with respect to how the Secretary responds to SIGTARP's recommendations. This congressionally imposed "either/or" ultimatum raises both *Morrison* and *Bowsher* issues, as

95. See FISHER, *supra* note 1, at 83 ("[Congress] can apply irresistible pressure both for and against [executive] agency employees through its investigative power." (citing Louis Fisher, *Congress and the Removal Power*, in *DIVIDED DEMOCRACY* 255–74 (James A. Thurber ed., 1991))); see also *id.* at 80 ("One scholar estimated that congressional pressure is responsible for more firings and reassignments of executive branch personnel than is presidential action.").

96. See SIGTARP Act, Pub. L. No. 111-15, sec. 4(2)(f), § 121 (requiring the Treasury Secretary to certify to Congress that no action with respect to a SIGTARP recommendation is necessary or appropriate).

97. See *supra* notes 6, 8 and accompanying text (observing that Congress's TARP program qualifies as the largest governmental economic intervention program in history).

98. See *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (finding that Congress may not, consistent with the Constitution, supervise or control the execution of its laws).

99. SIGTARP Act, sec. 4(2)(f), § 121.

constraining the executive to choose between these two alternatives could impermissibly interfere with the President's ability to execute EESA according to his own constitutional prerogative,¹⁰⁰ and could likewise constitute a congressional attempt to supervise the execution of EESA.¹⁰¹

(1) *Ascertaining the Meaning of "Certify"*

Before this constitutional analysis may proceed, however, the precise import of the term "certify" must be considered.¹⁰² "Certify" could signify simply that the Secretary must notify Congress of his decision not to heed a SIGTARP recommendation. In essence, a stoic communication, indicating that the Secretary will not address a TARP-related deficiency identified by SIGTARP because no action is necessary or appropriate (merely parroting the statutory language), might satisfy the certification requirement.¹⁰³ However, this benign construal of the statute likely contradicts congressional intent.¹⁰⁴ EESA's legislative history reveals that Congress contemplated extracting from the Secretary a statement explaining and justifying his belief that no action is necessary or appropriate with respect to a recommendation from SIGTARP.¹⁰⁵ Furthermore, this latter

100. See *supra* notes 73–74 and accompanying text (discussing the rule set forth by the Court in *Morrison*, namely, that Congress violates the separation of powers when it impermissibly interferes with the executive's ability to accomplish its constitutional function).

101. See *supra* notes 78, 80 and accompanying text (discussing the Court's precedent in *Bowsher*, which stands for the proposition that Congress may not, consistent with the Constitution, supervise or control the execution of its laws).

102. SIGTARP Act, Pub. L. No. 111-15, sec. 4(2)(f)(2), § 121.

103. See MILLER CTR. OF PUBLIC AFFAIRS, *supra* note 3, at 4 (noting that "perfunctory" responses have satisfied similar executive reporting requirements in the past). "A President may remove an IG, but only after reporting his reasons to Congress [pursuant to the IG Act], which raises separation of powers concerns." *Id.* "We note, however, that in practice the reasons can be perfunctory, as when President Reagan told Congress that he was removing all the IGs because he needed to have the 'fullest confidence in the ability, integrity and commitment' of each." *Id.*; see also FISHER, *supra* note 1, at 73 ("In 1981 Reagan removed a dozen [IGs] governed by the [IG Act] but did not submit reasons to Congress other than a general desire to have nominees of his own choosing.").

104. See *Yakus v. United States*, 321 U.S. 414, 425 (1944) ("[T]he only concern of courts is to ascertain whether the will of Congress has been obeyed.").

105. See 155 CONG. REC. H3,848 (daily ed. Mar. 25, 2009) (statement of Rep. Dennis Moore) (noting that EESA "requir[es] the Treasury Secretary to explain why any SIGTARP recommendation is not implemented"); see also H.R. REP. NO. 111-41(I), at 8–9 (2009) (noting that EESA's certification provision "[r]equires Treasury to notify Congress of the

interpretation harmonizes more closely with the broader thrust of EESA, which contains other provisions evidencing Congress's desire to receive continuing details on the executive's management of TARP.¹⁰⁶ The important point is that, whichever interpretation prevails, the certification requirement effectively compels executive accountability,¹⁰⁷ provoking separation of powers questions.

(2) *The Certification Provision as a Mechanism for
Congressional Oversight*

As discussed above, the Court in *Bowsher* concluded that, once Congress enacts legislation, it may not supervise the execution of those

reason for failing to follow any written recommendations made by SIGTARP"). The House Report's use of the word "notify" could suggest Congress's intent to require only a stoic communication, void of any explanation, in the event that Treasury opts not to comply with a SIGTARP recommendation. *Supra* note 103 and accompanying text. However, the House Report also manifests Congress's intent to oblige Treasury to proffer a "reason" for the executive's failure to take action on a recommendation from SIGTARP. H.R. REP. NO. 111-41(I), at 8–9. This suggests that, by imposing the certification requirement upon Treasury, Congress sought to elicit from the executive more than a mere bare-bones notification.

106. *See, e.g.*, EESA, 12 U.S.C. § 121(c)(1) (listing a host of factors involving the executive's administration of TARP upon which Congress desires to remain informed). EESA commissions SIGTARP to

conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets by the Secretary of the Treasury under [TARP] . . . , including by collecting and summarizing the following information:

- (A) A description of the categories of troubled assets purchased or otherwise procured by the Secretary.
- (B) A listing of the troubled assets purchased in each such category described under subparagraph (A).
- (C) An explanation of the reasons the Secretary deemed it necessary to purchase each such troubled asset.
- (D) A listing of each financial institution that such troubled assets were purchased from.
- (E) A listing of and detailed biographical information on each person or entity hired to manage such troubled assets.
- (F) A current estimate of the total amount of troubled assets purchased pursuant to [TARP], the amount of troubled assets on the books of the Treasury, the amount of troubled assets sold, and the profit and loss incurred on each sale or disposition of each such troubled asset.

Id. § 121(c)(1)(A)–(F).

107. It is acknowledged, however, that the substance of the executive's certification will vary depending upon which interpretation is embraced.

laws except through adopting new legislation.¹⁰⁸ Despite the Court's straightforward ruling, congressional supervision of executive implementation of the laws nonetheless persists.¹⁰⁹ In fact, one of the recognized ways in which Congress controls the execution of its laws is through executive reporting requirements.¹¹⁰ The IG Act itself imposes

108. See *supra* notes 78–80 and accompanying text (discussing the separation of powers rule in *Bowsher*).

109. See FISHER, *supra* note 1, at 289 (spurning the *Bowsher* rule as an "unrealistic opinion" and one that has been rendered moot by practical considerations); Fisher, *supra* note 28, at 143 (finding that "congressional oversight of executive activities is a legitimate constitutional responsibility"). "[T]he Court claims in *Bowsher* that 'once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.'" *Id.* at 143 (quoting *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986)). "That, of course, is nonsense. Congress controls the execution of its laws through hearings, committee investigations, studies by the General Accounting Office, informal contacts between members of Congress and agency officials, and nonstatutory controls." *Id.*; see also FISHER, *supra* note 1, at 289 (reviewing the *Bowsher* rule and then observing that "[n]o one who reads the newspapers can believe that"); Frederick M. Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto"*, 32 ADMIN. L. REV. 667, 668 (1980) ("[S]ome observers have attributed substantial influence to nonstatutory controls in regulatory as well as other matters."). "Congress controls the execution of laws when each house invokes its contempt power and when committees issue subpoenas." Fisher, *supra* note 28, at 143. In reality, "[c]ontinued participation by Congress does not require the passage of public laws." FISHER, *supra* note 1, at 289.

This continued participation by Congress is referred to as congressional oversight. Some argue that, "without some means of overseeing the postenactment activities of the executive branch, Congress would be unable to determine whether its policies have been implemented in accordance with legislative intent and thus whether legislative intervention is appropriate." Jacob K. Javits & Gary J. Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 460 (1977); see 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 169 (J.V. Pritchard ed., Thomas Nugent trans., Fred. B. Rothman & Co. rev. ed. 1991) ("[T]he legislative power in a free state . . . has a right and ought to have the means of examining in what manner its laws have been executed . . ."); Javits & Klein, *supra*, at 472–73 ("The purpose of congressional oversight is to ensure that the Executive is administering the law in accordance with a dynamic political intent based on Congress's current interpretation of the public interest."); but see Gates & Knowles, *supra* note 53, at 501 ("The DOJ emphasized that it 'ha[d] repeatedly taken the position that continuous oversight of the functioning of Executive agencies . . . is not a proper legislative function.'" (footnote omitted)). "As an instrument of political accountability then, congressional or legislative oversight is implicit in the constitutional system of checks and balances." Javits & Klein, *supra*, at 460 (footnote omitted).

110. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 955 n.19 (1983) ("The Constitution provides Congress with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as . . . formal reporting requirements, lie well within Congress' [sic] constitutional power."); see also Javits & Klein, *supra* note 109, at 460–61 (finding that legislative oversight includes "formal reporting requirements").

upon the President a reporting requirement, enjoining the President, in the event that he removes an IG from office, to explain to Congress the reasons for that removal.¹¹¹

Two executive reporting requirements survived the Court's review in *Morrison*. By upholding the independent counsel statute, the Court in *Morrison* implicitly ratified two component reporting provisions compelling the executive to convey information to Congress. One of the provisions required the President to file an explanatory report with Congress in response to a congressional request for the appointment of an independent counsel,¹¹² and the other provision required the President to submit an explanatory report to Congress in the event that the President removed the independent counsel from office.¹¹³

Despite the Court's favorable treatment of this congressional control mechanism, the Constitution explicitly recognizes only one instance in

111. See IG Act, 5 U.S.C. App. § 3(b) ("An [IG] may be removed from office by the President. The President shall communicate the reasons for any such removal to both Houses of Congress."). This provision is applicable to SIGTARP through EESA. EESA § 121(b)(4). The Department of Justice's OLC initially opposed this reporting provision. See 1 U.S. Op. Off. Legal Counsel 16, 18 (1977) ("[T]he requirement that the President notify both Houses of Congress of the reasons for his removal of an [IG] constitutes an improper restriction on the President's exclusive power to remove Presidentially appointed executive officers." (citing *Myers v. United States*, 272 U.S. 52 (1926))). Although OLC conceded that Congress wields the power to restrict the President's removal power over quasi-judicial and quasi-legislative officers, *id.* (citing *Wiener v. United States*, 357 U.S. 349 (1958), and *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)), OLC asserted that "the power to remove a subordinate appointed officer within one of the executive departments is a power reserved to the President acting in his discretion." *Id.* However, OLC eventually capitulated to the passage of the IG Act in a legislative-executive compromise. See *Gates & Knowles, supra* note 53, at 502 ("The most important provisions of the compromise were to require that [IGs] report to Congress through the Secretary, who could not change the content of the report but who could respond to it, and to eliminate the limits on the President's authority to remove an IG." (footnote omitted)). However, the Supreme Court has never considered the constitutionality of the IG Act. See *supra* note 72 and accompanying text (observing that the constitutionality of IGs has never been entertained by the Court).

112. See *Morrison v. Olson*, 487 U.S. 654, 694 (1988) ("The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit." (citations omitted)); *id.* at 702–03 (Scalia, J., dissenting) ("Where, as here, a request for appointment of an independent counsel has come from [Congress], the Attorney General must, if he decides not to seek appointment, explain to that [congressional] Committee why." (citations omitted)).

113. See *id.* at 663 (majority opinion) ("If an independent counsel is removed pursuant to this section, the Attorney General is required to submit a report to [appropriate congressional committees] specifying the facts found and the ultimate grounds for such removal." (internal quotation marks omitted)).

which the President is required to report to Congress.¹¹⁴ Apart from this patent constitutional concern with respect to the executive reporting requirement involving SIGTARP, this reporting provision could also transgress *Morrison*. Because TARP is such a politically charged program, the executive accountability dynamic created by EESA automatically bootstraps into the equation the political implications surrounding TARP.¹¹⁵ The glare of the public eye upon the executive's administration of billions of dollars of TARP taxpayer money, coupled with the duty to answer to Congress if the Secretary spurns one of SIGTARP's recommendations, combines to produce a potent weapon for executive coercion.¹¹⁶ The Secretary might feel pressured into complying with SIGTARP just so that he does not have to account to Congress and so that he does not appear to the watchful public to be disregarding the recommendations of an independent auditor commissioned to safeguard TARP's massive public fund.¹¹⁷ Therefore, this dual-accountability dynamic created by EESA's "either/or" ultimatum might contravene *Morrison* by impermissibly restricting the executive's discretion in administering TARP.

114. See U.S. CONST. art. II, § 3 ("[The President] shall from time to time give to the Congress Information of the State of the Union . . ."). Furthermore, it was the view of at least some of the Founders that "[t]he principle of the Constitution is that of a separation of legislative, executive, and judiciary functions, *except in cases specified*." ALLISON ET AL., *supra* note 27, at 623 (quoting 7 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 27, at 108 (emphasis added)).

115. See *supra* notes 6, 8 and accompanying text (observing that Congress's TARP program qualifies as the largest governmental economic intervention program in history). The fact that Congress has committed at least \$700 billion of taxpayer money to TARP will simply increase the political attention surrounding the administration of TARP. See *supra* notes 38–39 and accompanying text (observing that, although Congress has expressly allocated only \$700 billion to TARP, the total expenditures with respect to TARP could exceed \$23 trillion).

116. Cf. *Morrison*, 478 U.S. at 701–02 (Scalia, J., dissenting) (recognizing that the executive accountability contemplated by the independent counsel statute gave rise to grave political concerns). "As a practical matter, it would be surprising if the Attorney General had any choice . . . but to seek appointment of an independent counsel to pursue the charges against the principal object of the congressional request . . ." *Id.*; see also *supra* notes 85–86 and accompanying text (exploring further the political consequences implicated by the potentially coercive provisions of both EESA and the independent counsel statute in *Morrison*).

117. See Dugan & Rose, *supra* note 40 ("SIGTARP's stated goal is to ensure that taxpayers are aware of who is receiving TARP funds and how those funds are being used.").

(3) *The Court's Record of Upholding Executive Reporting Requirements*

Justice Scalia advanced a similar argument in *Morrison*, expressing disquietude concerning the potential for politically generated coercion in the event that the executive declined to respond affirmatively to a congressional request for the appointment of an independent counsel.¹¹⁸ However, notwithstanding Justice Scalia's concerns, the majority in *Morrison* acknowledged no such possibility. Likewise, in the event a question of SIGTARP's constitutionality reaches the Supreme Court, the Court is unlikely to acknowledge such a possibility with respect to SIGTARP.

Hence, even though EESA's executive certification requirement operates as a tool for congressional supervision over the execution of EESA¹¹⁹ (in direct contravention of *Bowsher*), similar reporting requirements have been upheld by the Court. In fact, a reporting requirement examined by the Court in *Morrison* mirrors the certification requirement at issue in this Note.¹²⁰ Based on the Court's lack of anxiety with respect to upholding the reporting requirement in *Morrison*, this same attitude will likely prevail with respect to the certification requirement in EESA.

118. See *supra* notes 85–86 (discussing the political consequences involved with the independent counsel statute in *Morrison*).

119. See *supra* note 110 and accompanying text (observing that one of the recognized ways in which Congress supervises the execution of its laws is through reporting requirements).

120. Compare 28 U.S.C. § 592(b)–(c) (2006) (mandating that the Attorney General must notify a special judicial body if he determines that "there are no reasonable grounds to believe that further investigation is warranted" and, thus, that an independent counsel should be appointed), with SIGTARP Act, Pub. L. No. 111-15, sec. 4(2)(f), § 121 (requiring the Treasury Secretary to certify to Congress that no action with respect to a recommendation from SIGTARP is necessary or appropriate). With respect to the statute at issue in *Morrison*, when Congress itself (as opposed to the special judicial body) requested the Attorney General to investigate possible criminal activity within the executive branch, the Attorney General was required to respond to Congress regardless of whether the Attorney General decided to apply for the appointment of an independent counsel. 28 U.S.C. § 592(g)(2). This unconditional reporting requirement could be considered more exacting than EESA's conditional reporting requirement, obliging the Secretary to report to Congress only in the event that the Secretary elects not to address a TARP-related deficiency identified by SIGTARP. SIGTARP Act, sec. 4(2)(f), § 121.

b. Mandating the Treasury Secretary's Compliance with SIGTARP Recommendations that Are Either Necessary or Appropriate

Although the certification requirement functions as a mechanism for congressional supervision over the execution of EESA, this constitutional issue is dwarfed by the loss of executive discretion that is contemplated by the language of this provision. EESA's plain language requires the Secretary either (1) to take action to address TARP-related deficiencies identified by SIGTARP or (2) to certify to Congress that "no action is necessary or appropriate."¹²¹ As noted above, one plausible interpretation of this provision *requires* the executive to take action with respect to a TARP-related deficiency identified by SIGTARP unless "no action is necessary or appropriate."¹²² Pursuant to this statutory construction, one interpretation of the Secretary's protocol as mandated by the provision would be as follows.

(1) Determining Whether SIGTARP's Recommended Action Is Necessary or Appropriate

First, the provision is framed in a manner that creates a presumption of action, as the first option presented to the executive requires the Secretary to take action to address a deficiency identified by SIGTARP.¹²³ If the executive desires to avoid addressing a deficiency identified by SIGTARP or, in other words, if the executive desires to rebut this presumption of action, the Secretary must make a precedent determination that no action is necessary or appropriate.¹²⁴ Hence, the Secretary first must consider whether taking action to address a TARP-related deficiency identified by SIGTARP is "necessary."¹²⁵ Before arriving at the determination of whether action is necessary, the Secretary must delineate the precise meaning of the word "necessary." In *M'Culloch v. Maryland*,¹²⁶ Chief Justice Marshall rejected a

121. SIGTARP Act, sec. 4(2)(f), § 121.

122. *See* CONG. REC. H3,849 (daily ed. Mar. 25, 2009) (statement of Rep. Erik Paulsen) (noting that EESA is intended to "requir[e] the Secretary of the Treasury to take action, or certify that no action is necessary, when any problems or deficiencies are identified by [SIGTARP]").

123. SIGTARP Act, sec 4(2)(f)(1), § 121.

124. *See id.*, sec 4(2)(f)(2), § 121 (stating that the Secretary must certify to Congress that no action is necessary or appropriate).

125. *Id.*

126. *See M'Culloch v. Maryland*, 17 U.S. 316, 425, 436 (1819) (concluding that a federal statute incorporating a bank was constitutional pursuant to Congress's power under

rigid, "indispensable necessity" construction of the term "necessary"¹²⁷ and, instead, adopted a permissive¹²⁸ interpretation that now serves as the bedrock for the meaning of the Necessary and Proper Clause.¹²⁹

the Necessary and Proper Clause and, thus, that a state statute purporting to levy a tax upon that federal bank was "unconstitutional and void"). In *M'Culloch*, the Court considered the constitutionality of a Maryland statute that imposed a tax upon a federally chartered bank that lay within the borders of the state. *Id.* at 319. After the federal bank refused to pay the tax, the state of Maryland contended that, because the Constitution does not expressly allocate to Congress the power to charter a bank, the federal law establishing the bank was therefore repugnant to the Constitution. *Id.* at 406–07. However, the Court, in an opinion authored by Chief Justice Marshall, concluded that Congress, pursuant to the Necessary and Proper Clause, received the power to charter the bank as an implied power flowing from Congress's enumerated taxing power. *Id.* at 400–25. In the seminal excerpt from the opinion, interpreting the Necessary and Proper Clause, Chief Justice Marshall penned, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421. Hence, because the bank was chartered by Congress pursuant to the supreme law of the land, Maryland, as a state, lacked the power to levy a tax upon that bank. *Id.* at 425–37.

127. *See id.* at 413 (rejecting the argument that "the 'word' necessary [means] limiting the right to pass laws for the execution of granted powers[] to such as are indispensable"); *see also* U.S. v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805) ("In construing [the Necessary and Proper Clause] it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorised [sic] which was not indispensably necessary to give effect to a specified power."); David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801–1805*, 49 U. CHI. L. REV. 887, 930 (1982) (noting that Chief Justice Marshall rejected a construction of the Necessary and Proper Clause contemplating "a requirement of indispensable necessity [that] would have been so confining that it could hardly have been intended"). The Court in *M'Culloch* observed that "[i]t must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution." *M'Culloch*, 17 U.S. at 415. "This could not be done, by confining the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end." *Id.*

128. *See M'Culloch*, 17 U.S. at 413–14 ("To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable."); *see also* Fisher, 6 U.S. (2 Cranch) at 396 ("Where various systems might be adopted for that purpose, it might be said . . . that it was not necessary because the end might be obtained by other means, [but] Congress . . . must be empowered to use any means which are . . . conducive to the exercise of a power granted by the constitution."). Marshall observed that "[a] thing may be necessary, very necessary, absolutely or indispensably necessary." *M'Culloch*, 17 U.S. at 414. In the passage for which *M'Culloch* has come to be known, the Court concluded, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

129. *See* U.S. CONST. art. I, § 8, cl. 18 (stating that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing

However, in defining the term "necessary" as it appears in EESA, deference may be given to Chief Justice Marshall's practice of also considering the context in which the term is utilized.¹³⁰ In *M'Culloch*, "necessary and proper" comprised the context in which the word "necessary" was employed by the drafters of the Constitution.¹³¹ Marshall recognized a direct correlation between the two words, deducing that "proper" relaxed the "strict and rigorous meaning" of the preceding term, "necessary."¹³²

However, employing Marshall's modus operandi likely will result in a different conclusion with respect to EESA's certification provision. The word "and," as utilized in the Necessary and Proper Clause, suggests a connection between the contiguous words, implying that "necessary" and "proper" should be considered jointly as part of a single, unified analysis. Conversely, Congress inserted the word "or" between the terms "necessary" and "appropriate" as they appear in EESA. In contrast to the word "and," the term "or" signifies not a mutual correlation, but instead, a distinct detachment between the adjacent words.¹³³ Hence, within the context of EESA, the terms "necessary" and "appropriate" should be considered separately and sequentially, and not as part of a single, unified analysis.

For this reason, when determining whether to take action to address a TARP-related deficiency identified by SIGTARP, the Secretary initially must make an isolated determination with respect to whether action is necessary.¹³⁴ If the Secretary concludes that action is necessary, EESA

Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof").

130. See *M'Culloch*, 17 U.S. at 418 ("In ascertaining the sense in which the word 'necessary' is used in [the Necessary and Proper Clause], we may derive some aid from that with which it is associated.").

131. *Id.* at 418–19.

132. See *id.* ("If the word 'necessary' was used in [a] strict and rigorous sense . . . , it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is, to qualify that strict and rigorous meaning . . .").

133. While the word "or" might also be employed to connote similarity between two adjoining words (such as in the phrase "substance or meaning"), this construction likely does not comport with the phrase "necessary or appropriate," in which the adjoining words do not bear such similarity. SIGTARP Act, Pub. L. No. 111-15, sec. 4(2)(f)(2), § 121. Furthermore, although Chief Justice Marshall found correspondence between two seemingly incompatible words ("necessary and proper"), the connector "and," not "or," was utilized in that phrase. *Supra* notes 130–33.

134. See *supra* notes 125–33 (endeavoring to ascertain the precise meaning of the term "necessary" as used in EESA's executive certification requirement). Although the precise meaning of "necessary" is unclear, it is not the purpose of this Note to discern the specific

could be construed to compel the Secretary to undertake that action. According to the statutory language, if the Secretary elects not to take action, he must certify to Congress that no action is necessary or appropriate.¹³⁵ Thus, if action is in fact necessary, then the Secretary cannot, in accordance with the statute, proffer a contrary certification to Congress.¹³⁶

If the executive determines that no action is necessary, the inquiry does not end there. Instead, the Secretary must proceed to the second, distinct question of whether action is "appropriate."¹³⁷ If the executive determines that taking action on a TARP-related deficiency as identified by SIGTARP is not appropriate, then the Secretary may elect not to take action and may certify to Congress, in accordance with the statute, that no action is necessary or appropriate.¹³⁸ However, if the Secretary believes that action is appropriate,¹³⁹ the Secretary must initiate that action because the Secretary in fact could not, in accordance with the statute, certify to Congress that no action is necessary or appropriate.¹⁴⁰ If the Secretary determined that action was appropriate, yet nonetheless tendered to Congress a contrary certification, this false certification in direct contravention of the statute would comprise a blatant refusal to execute the law according to statutory directives.¹⁴¹

congressional intent behind the word's precise meaning.

135. SIGTARP Act, sec. 4(2)(f)(2), § 121.

136. *See id.* (mandating that the Secretary must certify to Congress that no action is necessary or appropriate).

137. *Id.*

138. *Id.*

139. *Id.* It is not the purpose of this Note to pinpoint the precise import of the term "appropriate." Suffice it to say, however, that the Secretary, according to the statute, must determine whether action is appropriate.

140. *Id.*

141. In discussing the independent counsel statute at issue in *Morrison*, Justice Scalia argued that the statute imposed upon the Attorney General a duty to comply with a congressional request for the appointment of an independent counsel unless the Attorney General could conclude that there were no reasonable grounds to believe that further investigation was warranted. *Morrison v. Olson*, 487 U.S. 654, 702 (1988) (Scalia, J., dissenting). Scalia then commented that the majority "makes much of the fact that the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment." *Id.* (internal quotation marks omitted). Scalia countered by asserting, "Yes, but *Congress* is not prevented from reviewing it. The context of this statute is acrid with the smell of threatened impeachment." *Id.* (footnote omitted); *see* U.S. CONST. art. I, § 3, cls. 4–5 (conferring upon Congress the power of impeachment). For a more detailed discussion of *Morrison* and the independent counsel statute, *see supra* notes 73–74 and accompanying text, and *infra* notes 142–45 and accompanying text.

However, this situation does not constitute the only discretion-restricting problem created by EESA's certification provision. The provision also produces a decision-making dynamic in which SIGTARP creates a baseline consisting of problems that it has determined must be addressed by Treasury. The Secretary is required to "take action" to address these problems. The implication is that the Secretary is to take such action without delay. The Secretary's only other option is to certify that immediate action is neither necessary nor appropriate. As such, Congress has created a presumption of action that the Secretary may rebut—but only within the parameters set by Congress. The Secretary is therefore preempted from concluding that action is "necessary" but best pursued at a later time or under different circumstances. Furthermore, if the Secretary determines that immediate action on SIGTARP-identified deficiencies is not necessary, he must proceed to determine whether such action is nevertheless "appropriate." If he determines that action on SIGTARP-identified deficiencies is indeed "appropriate," but that action on other deficiencies not identified by SIGTARP is more appropriate for immediate action, EESA's certification provision restricts his discretion to elect the latter option.

(2) *The Independent Counsel Statute in Morrison*

Whether the previous analysis (concluding that the Secretary *must* take immediate action to address TARP-related deficiencies identified by SIGTARP that are either necessary or appropriate) accurately comports with what the statute requires ultimately distills into a question of statutory interpretation. A contrary construction of the statute is likewise plausible. In *Morrison*, the Court entertained a statute that was susceptible to a meaning similar to the one advocated by this Note with respect to EESA's certification provision.¹⁴² The problematic statute in *Morrison* provided, in relevant part, that:

If the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court, and the division of the court shall have no power to appoint an independent counsel with respect to the matters involved.

142. See *Morrison*, 487 U.S. at 659 (stating that the case presented the Court with a constitutional challenge with respect to the Ethics in Government Act of 1978).

....

The Attorney General shall apply to the division of the court for the appointment of an independent counsel if... the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are reasonable grounds to believe that further investigation is warranted; or... the 90-day period... and any extension granted... have elapsed and the Attorney General has not filed a notification with the division of the court...¹⁴³

In his dissent in *Morrison*, Justice Scalia urged the Court to adopt a statutory construction that imposed upon the Attorney General "a duty to comply [with a request for the appointment of an independent counsel] unless he could conclude that there were 'no reasonable grounds to believe,'... that 'further investigation' was warranted."¹⁴⁴ However, despite Scalia's insistence to the contrary, the majority in *Morrison* adopted an interpretation of the independent counsel statute that contemplated no such executive duty of compliance.¹⁴⁵ Unless EESA's certification clause is distinguishable from the independent counsel statute, the Court's reasoning in *Morrison* will likely control.

143. 28 U.S.C. § 592(b)–(c) (2006).

144. *Morrison*, 487 U.S. at 702 (Scalia, J., dissenting) (emphasis omitted) (quoting 28 U.S.C. § 592(b)(1)). "Thus, by the application of this statute in the present case, Congress has effectively compelled a criminal investigation of a high-level appointee of the President..." *Id.* at 703. Justice Scalia continued by asserting:

[W]e... know that the investigation of [this high-level presidential appointee] has been commenced, not necessarily because the President or his authorized subordinates believe it is in the interest of the United States, ... and not even ... because the President or his authorized subordinates necessarily believe that an investigation is likely to unearth a violation worth prosecuting; but only because the Attorney General cannot affirm, as Congress demands, that there are *no reasonable grounds to believe* that further investigation is warranted.

Id. Justice Scalia noted that the statute gave rise to a "condition that renders... a request [for the appointment of an independent counsel] mandatory." *Id.* at 707. That condition, according to Scalia, was the "inability to find 'no reasonable grounds to believe' that further investigation is warranted." *Id.*

145. *See id.* at 694 (majority opinion) ("The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit." (citing 28 U.S.C. § 592(g))). The majority also noted that, "[u]nlike previous cases, [like] *Bowsher v. Synar*, this case simply does not pose a 'dange[r] of congressional usurpation of Executive Branch functions.'" *Id.* (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 (1986)).

(3) *The Court's Willingness to Tolerate Congressional Restriction of Executive Discretion as long as the Stripped Discretion Is Not Absorbed by Congress*

Although the statutory language is different, the general meaning behind both statutes is similar.¹⁴⁶ Despite the *Morrison* majority's unwillingness to read into the statute an executive duty of compliance, the statutory language clearly imposes upon the executive a duty to comply with a request for the appointment of an independent counsel if the executive "determines that there are reasonable grounds to believe that further investigation is warranted."¹⁴⁷ Furthermore, the Court in *Morrison* never explicitly rejected the construction that the statute both effectuated a degree of executive coercion and mandated compliance if reasonable grounds exist.¹⁴⁸ Instead, the Court hung its hat on the fact that Congress did not "retain[] for itself . . . [the] power[] of control or supervision over an independent counsel," and that Congress did not attempt "to increase its own powers at the expense of the Executive Branch."¹⁴⁹ Hence, it seems that the Court will tolerate congressional restriction of executive discretion as long as the stripped discretion is not subsumed by Congress.¹⁵⁰

146. Compare 28 U.S.C. § 592(b)–(c) (hinging the Attorney General's obligation to apply for the appointment of an independent counsel upon a determination of whether there exist "reasonable grounds to believe that further investigation is warranted"), with SIGTARP Act, Pub. L. No. 111-15, sec. 4(2)(f), § 121 (predicating the Treasury Secretary's obligation to take action with respect to a TARP-related deficiency as identified by SIGTARP upon an implicit determination of whether action is "necessary or appropriate").

147. 28 U.S.C. § 592(c)(1).

148. *Morrison v. Olson*, 487 U.S. 654, 694 (1988). Rather, the Court concluded only that the Attorney General "has no duty to comply with the request [for the appointment of an independent counsel]." *Id.* The Court did not deny that the executive had a duty to comply with a request if there existed reasonable grounds to believe that further investigation was warranted. 28 U.S.C. § 592(c)(1).

149. *Morrison*, 487 U.S. at 694; see also Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court was Wrong*, 38 AM. U. L. REV. 313, 351 (1989) (observing that *Morrison* stands for the proposition that "separation of powers challenges based on attempts by one branch to encroach on another's functions should be reviewed much more stringently than attempts by one branch to take away the power of one branch but not draw it to itself").

150. Cf. *Morrison*, 487 U.S. at 694 ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."). The Court noted that the statute in *Morrison* did not pose the danger of "congressional usurpation of Executive Branch functions" as did a statute in *Bowsher*. *Id.* (internal quotation marks omitted); see also *supra* notes 78–80 and accompanying text (offering an overview of the Court's decision in *Bowsher*). In *Bowsher*, the statute at issue required the President to implement budgetary cuts exactly in accordance with the report of an officer

Therefore, although EESA's certification provision appears to restrict executive discretion by obliging the Secretary to take action with respect to a SIGTARP recommendation when such action is either necessary or appropriate, this congressional restriction on executive discretion will likely pass constitutional muster, pursuant to *Morrison*, as long as the lost discretion is not absorbed by Congress.¹⁵¹ The stripped executive discretion at issue here is the discretion to execute EESA and to administer TARP according to the President's own judgment.¹⁵² The Treasury Secretary's ability to exercise his discretion in expending executive resources in managing TARP is hampered by the statutory construction advocated above.¹⁵³ Hence, the issue now concerns the entity that has absorbed the discretion removed from the executive by Congress. By decree of EESA, SIGTARP has subsumed this executive discretion.¹⁵⁴ Therefore, the inquiry necessarily becomes whether Congress controls SIGTARP and, thus, whether Congress, in violation of the separation of powers, is the entity that has implicitly absorbed the executive discretion that has been stripped from the executive by EESA.

over whom Congress had retained the power to remove. *See* *Bowsher v. Synar*, 478 U.S. 714, 718, 733 (1986) ("The President . . . must issue a[n] . . . order mandating the spending reductions specified by the Comptroller General Indeed, the Comptroller General commands the President himself to carry out, without the slightest variation . . . , the directive of the Comptroller General as to the budget reductions" (citing 2 U.S.C. § 252(a)(3))); HALSTEAD, *supra* note 69, at 16 (noting that the report "by the Comptroller General would . . . be forwarded to the President who was required to issue an order enforcing the spending reductions"). The Court's decision in *Bowsher* seems to stand for the proposition that, although Congress may restrict executive discretion, this stripped discretion may not, in turn, be absorbed by Congress into its own vortex. *See* THE FEDERALIST NO. 48 (James Madison), *supra* note 27, at 343 (observing that the legislative branch has a tendency to "extend[] the sphere of its activity, and draw[] all power into its impetuous vortex").

151. *Supra* note 150 and accompanying text.

152. *See supra* Part III.B.2.b (discussing how EESA could be construed to limit executive discretion through mandating the Secretary's compliance with SIGTARP recommendations that are either necessary or appropriate).

153. *Supra* Part III.B.2.b.

154. *See* IG Act, 5 U.S.C. App. § 4(a)(2)–(3) (providing that an IG possesses the duty to "review . . . legislation and regulations relating to . . . such establishment and to make [related] recommendations . . . [and] to recommend policies for . . . [the] activities [of] such establishment" in order to promote economy and efficiency and in order to prevent and to detect fraud or abuse). In response to these deficiencies presented to the executive by SIGTARP, the Secretary must either take action to address them or certify to Congress that no action is necessary or appropriate. SIGTARP Act, Pub. L. No. 111-15, sec. 4(2)(f)(2), § 121. Hence, SIGTARP in essence possesses the discretion to direct execution of EESA through recommending to the Secretary TARP-related action that is either necessary or appropriate and, thus, action that the Secretary may not refuse to undertake pursuant to the statute.

c. SIGTARP's Independence from the Executive Branch

The Supreme Court has ruled that the power to remove equates to the power to control.¹⁵⁵ Hence, because the executive branch retains removal power over SIGTARP,¹⁵⁶ cursory reflection suggests that Congress has not absorbed the discretion that is stripped from the executive by means of EESA's certification provision.¹⁵⁷ Pursuant to this perfunctory analysis, the dynamic between SIGTARP and the executive branch (created by EESA's certification provision) does not transgress the separation of powers principle.

However, the above analysis fails to appreciate the subtlety of the issue with respect to which entity controls SIGTARP—in essence, this issue comes "clad . . . in sheep's clothing."¹⁵⁸ The unusual independence from executive supervision with which SIGTARP operates, coupled with the loyalty to Congress that characterizes SIGTARP's station, strongly challenges the conclusion that Congress lacks control over SIGTARP. Hence, this issue warrants a more comprehensive examination.

155. See *Bowsher v. Synar*, 478 U.S. 714, 720 (1986) ("Under the separation of powers established by the Framers of the Constitution, . . . Congress may not retain the power of removal over an officer performing executive functions. The congressional removal power created a 'here-and-now subservience' of the Comptroller General to Congress." (citations omitted)). The Court in *Bowsher* concluded that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." *Id.* at 726. "To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws." *Id.* "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Id.* (citations and internal quotation marks omitted).

156. EESA, 12 U.S.C. § 5231(b)(4); see also IG Act § 3(b) ("An Inspector General may be removed from office by the President.").

157. See *supra* Part III.B.2.b.(3) (querying whether Congress, in violation of the separation of powers, has retained control over SIGTARP and, thus, has subsumed the discretion stripped from the executive through EESA's certification provision).

158. See *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis.").

(1) *SIGTARP's Distinctive Independence from the Executive Branch*

The degree of independence from executive supervision with which SIGTARP functions distinguishes SIGTARP from all other IGs.¹⁵⁹ SIGTARP's unprecedented independence from the executive branch is a significant factor, considering both that the executive exercises only "nominal" supervisory authority over all other IGs in the first place¹⁶⁰ and that IGs are already supposed to operate with an "unusual" degree of independence from the executive branch.¹⁶¹ All other IGs, pursuant to the IG Act, must submit reports to their respective agency head, yield to the general supervision of the agency head, and keep that agency head fully and currently informed.¹⁶² Furthermore, although an agency head may not alter

159. See *supra* notes 57–59 and accompanying text (observing that the accountability relationship between SIGTARP and the executive branch is unique among all other IGs).

160. See U.S. Nuclear Regulatory Comm'n, Wash., D.C. v. Fed. Labor Relations Auth., 25 F.3d 229, 235 (4th Cir. 1994) (referring to the supervisory authority exercised by agency heads over IGs as "nominal"). In this case, the Fourth Circuit upheld the independence of IGs from the executive branch by declining to interpret a statute in a manner that would have "impinge[d] on the statutory independence of the [specific IG at issue in the case]." *Id.* at 234; see *id.* at 235 ("[W]e would indirectly be authorizing the parties to collective bargaining to compromise, limit, and interfere with the independent status of the [IG] under the [IG Act].").

161. See S. REP. NO. 95-1071, at 9 (1978), as reprinted in 1978 U.S.C.C.A.N. 2676, 2684 ("[Congress] wants [IGs] of high ability, stature and an unusual degree of independence—outsiders, at least to the extent that they will have no vested interest in the programs and policies whose economy, efficiency and effectiveness they are evaluating."). In fact, Congress intended for IGs to function with such independence from the executive branch that the IG Act originally was referred to the Senate as "the bill to reorganize the executive branch of the Government." *Id.* at 1. During the time of the congressional debates preceding passage of the IG Act, various governmental officials expressed concern that IGs "would not be clearly accountable to anyone in the executive branch." Gates & Knowles, *supra* note 53, at 485. Furthermore, since the passage of the IG Act, others have expressed dismay with respect to IGs' increasingly enhanced independence. See MILLER CTR. OF PUBLIC AFFAIRS, *supra* note 3, at 5 ("The fundamental problem is that no one watches the watchdogs. There is no central agency that collects information about what each [IG] is doing The IGs, born independent by design, are now so independent that some have begun to run amok. They constantly seek more authority").

162. *Supra* notes 55–56 and accompanying text. Although an agency head wields "general" supervisory power over an IG, Congress intended that no other agency official would exercise supervisory authority over an IG. See S. REP. NO. 95-1071, at 7 ("The [IG] would be under the general supervision of the head of the agency or his deputy, but not under the supervision of any other official in the agency."). However, as discussed above, even the "general" supervisory authority possessed by the agency head amounts to only "nominal" efficacy. *Supra* note 160 and accompanying text. Congress did not intend for the agency head to be able to "prevent the [IG] from initiating and completing audits and investigations he believes necessary." S. REP. NO. 95-1071, at 7; see also *id.* at 26 ("If the head of an establishment asked the [IG] not to undertake a certain audit or investigation or to

the periodical reports that IGs must submit to Congress, an agency head may comment on those reports.¹⁶³

Despite the "unique"¹⁶⁴ independence that all other IGs already enjoy within the executive branch, SIGTARP stretches this independence yet further. While EESA explicitly requires that SIGTARP submit reports to Congress, EESA does not explicitly require that SIGTARP report to or be supervised by an agency head.¹⁶⁵ Furthermore, EESA makes no explicit allowance for the Treasury Secretary to comment on the reports that SIGTARP prepares for Congress.¹⁶⁶ EESA's failure to provide explicitly for these accountability arrangements stands in bold contrast to the requirements imposed upon all other IGs by the IG Act.¹⁶⁷ In fact, subjecting SIGTARP to even the slightest degree of Treasury supervision seems to cut against both the language of EESA and congressional intent.¹⁶⁸

discontinue a certain audit or investigation, the [IG] would have the authority to refuse the request and to carry out his work."). In fact, Congress subjected IGs to the general supervision of agency heads only to foster a "smooth working relationship with the department head." *Id.*

163. *Supra* note 57.

164. *See* S. REP. NO. 95-1071, at 31 ("[Congress] intends to confer upon the [IG] a unique status within the executive branch.").

165. *Supra* notes 57–58 and accompanying text.

166. *Supra* note 57.

167. *See supra* note 57 (discussing the confusion spawned by the ambiguity between EESA and the IG Act with respect to SIGTARP's relationship with the executive branch).

168. *See* Letter from Neil M. Barofsky to Bernard Knight, Jr., *supra* note 62, at 1 ("SIGTARP believes that [EESA] provides that SIGTARP is an independent entity within Treasury[] [and] that SIGTARP is not subject to the Secretary's supervision . . ."). In his letter, Barofsky noted that, by expressly depositing SIGIR and SIGAR under the supervision of their respective agency heads, Congress "demonstrated its ability to assign supervisory authority to [IGs], . . . when it intends to do so." *Id.* at 2–3. Barofsky continued by asserting, "Given that Congress knows how to assign supervisory duties, the omission of this language in EESA signifies its clear intention to preserve SIGTARP's independence and *not* subject us to the Secretary's [supervision]." *Id.* at 3; *see also* Dugan & Rose, *supra* note 40 (observing that Treasury's claim of supervisory authority over SIGTARP "seems contrary to Congress's intent to charge SIGTARP with responsibility for aggressively guarding the TARP program from fraud and abuse [A] lack of independence from Treasury could tarnish the perception that SIGTARP has the ability to do its job effectively"). Furthermore, Barofsky stated, Congress incorporated into EESA only specific, enumerated provisions of the IG Act and established SIGTARP not "within the IG Act[,] [but] placed us within [another] chapter . . . of the United States Code." Letter from Neil M. Barofsky to Bernard Knight, Jr., *supra* note 62, at 3. Barofsky then cited the statement of Senator Max Baucus, the "legislative architect" of the EESA section that created SIGTARP: "I designed the office of this [IG] to be truly Independent . . ." *Id.* at 3 (internal quotation marks omitted).

(2) *The Tense Relationship Between SIGTARP and Treasury*

SIGTARP's unparalleled independence from the executive branch is aggrandized by the tension that naturally characterizes the relationship between an IG and its respective agency head.¹⁶⁹ Congress inserts IGs into executive agencies to operate as "[c]ongressional ferrets"¹⁷⁰ whose prime role is to expose corruption and abuse within the executive branch.¹⁷¹ In performing this function, IGs exercise complete discretion in pursuing audits and investigations,¹⁷² enjoy unrestricted access to executive documents and materials,¹⁷³ and wield the pungent subpoena power.¹⁷⁴ A

169. See S. REP. NO. 95-1071, at 9 (1978), as reprinted in 1978 U.S.C.C.A.N. 2676, 2684 ("[Congress] does not doubt that some tension can result from th[e] relationship [between an agency head and an IG] . . ."). Congress noted "a natural tendency for an agency administrator to be protective of the programs that he administers. In some cases, frank recognition of waste, mismanagement or wrongdoing reflects on him personally." *Id.* at 7. "Even if he is not personally implicated, revelations of wrongdoing or waste may reflect adversely on his programs and undercut public and congressional support for them. Under these circumstances, it is a fact that agency . . . supervisors in the executive branch do not always identify or come forward with evidence of failings in the programs they administer." *Id.* For this reason, Congress asserted, "the audit and investigative functions should be assigned to an individual whose independence is clear." *Id.* However, Congress acknowledged concerns "that the [IG] may become an adversary of the agency head and undermine his ability to run the agency." *Id.* at 9.

170. See MILLER CTR. OF PUBLIC AFFAIRS, *supra* note 3, at 4 ("IGs . . . serve as members of the Executive Branch yet report to Congress about the internal workings of their agencies. They serve, in other words, within executive agencies as Congressional ferrets of dubious constitutionality . . .").

171. See IG Act, 5 U.S.C. App. § 2(2)(B) (establishing IGs to "prevent and detect fraud and abuse" in executive agencies).

172. See BURROWS, *supra* note 46, at 9 ("[M]ost IGs have virtually unfettered discretion over initiating and conducting audits and investigations dealing with waste, fraud, and abuse within their own agencies. As a corollary, they may accept, delay, modify, or reject a request to conduct an audit or investigation from any party . . ."); *supra* note 162 (observing that an IG possesses the authority to rebuff a request from an agency head not to perform an audit or an investigation).

173. See 1 U.S. Op. Off. Legal Counsel, *supra* note 111, at 17 (expressing concern with respect to IGs' "unrestricted access to executive branch materials and information"); see also EESA, 12 U.S.C. § 121(e)(4)(A) ("Upon request of [SIGTARP] for information or assistance from any department, agency, or other entity of the Federal Government, the head of such entity shall, insofar as practicable and not in contravention of any existing law, furnish such information or assistance to [SIGTARP] . . ."); IG Act § 6(a)-(b) (establishing IGs' authority to "have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that [IG] has responsibilities").

174. See EESA § 121(d)(1) (providing that SIGTARP "shall have the authorities provided in Section 6 of the [IG Act]"); IG Act § 6(a)(4) (providing that each IG is authorized "to require by subpoena [sic] the production of all information, documents, reports,

resourceful IG that burrows tenaciously through an executive agency in search of evidence of fraud or abuse will likely aggravate an agency head, sparking the internal tension of which Congress spoke.¹⁷⁵ However, the friction between SIGTARP and the Treasury Secretary appears to rival the level of tension that customarily defines the relationship between an IG and an agency head. Apart from the public showdown between SIGTARP and the Secretary with respect to Treasury's supervisory authority over SIGTARP,¹⁷⁶ Barofsky continues to assert his "aggressive posture" in discharging his responsibilities.¹⁷⁷ Barofsky's unyielding fidelity in tracking Treasury's management of TARP's mega-taxpayer fund surely will kindle additional discomfort in the Treasury Secretary against SIGTARP as the Secretary's every move is thrust under the microscope of public scrutiny.¹⁷⁸

answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned [to each IG], which subpoena [sic], . . . shall be enforceable by . . . any . . . United States district court").

175. *Supra* note 169 and accompanying text.

176. *See supra* notes 61–65 and accompanying text (recounting the 2009 faceoff between SIGTARP and the Secretary with respect to Treasury's supervisory authority over SIGTARP).

177. *See* Perez & Solomon, *supra* note 62 ("Barofsky has gained a reputation for his aggressive posture and demands for information from government officials and Wall Street."); *see also* *AIG Investigator: Where the Billions Went*, CNBC, Jan. 26, 2010, http://m.cnn.com/us_news/35076141 (last visited Feb. 16, 2011) ("Barofsky is setting off fireworks on Capitol Hill as he quietly and methodically pieces together the most complete historical record yet of the financial bailout. His reports are careful but not cautious, showing a willingness to stand up to some of the most powerful people and institutions in Washington . . .") (on file with the Washington and Lee Law Review).

"There are, in fact, several other panels charged with reviewing and monitoring the bailout. But Mr. Barofsky is the only one backed by federal agents who carry guns and badges and, if necessary, can break the locks off file cabinets." *Id.* "Those added powers, and an attitude honed during . . . years of fighting white-collar criminals and Colombian drug lords as [a federal prosecutor]—he still has the knife from a foiled attempt on his life in a field outside Bogota—are propelling . . . Barofsky over barriers that have slowed the others." *Id.*

In SIGTARP's most current quarterly report, Barofsky boldly announces the deficiencies with respect to Treasury's recent management of TARP, declaring that, "even if TARP saved our financial system from driving off a cliff back in 2008, absent meaningful reform, we are still driving on the same winding mountain road, but this time in a faster car." OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS 6 (Jan. 30, 2010), *available at* http://www.sig tarp.gov/reports/congress/2010/January2010_Quarterly_Report_to_Congress.pdf.

178. *See* 155 CONG. REC. H3,850 (daily ed. Mar. 25, 2009) (statement of Rep. Dennis Moore) (referring to Congress's creation of TARP and posing the question, "What did the American people get or what can they expect to get from the \$700 billion rescue plan?"). Legislative history indicates that Congress invented SIGTARP "to make sure that the

(3) *SIGTARP's Loyalty to Congress*

These twin issues—the extreme independence from the executive branch and the elevated tension with the Treasury Secretary—that typify SIGTARP's relationship with the executive branch combine to produce the appearance that SIGTARP is steadily pulling away from the executive branch. In contrast to this uneasy association, EESA structures a relationship between SIGTARP and Congress that is characterized by mutual loyalty. The potential for congressional loyalty has sparked debate with respect to the constitutionality of IGs since the inception of the IG Act.¹⁷⁹ An IG essentially serves as an extension of Congress's oversight arm within executive agencies,¹⁸⁰ seeking to ascertain whether "funds are being spent in accordance with the mandate and will of Congress."¹⁸¹ In addition both to reporting directly to Congress and to keeping Congress fully and currently informed, an IG is "the *only* executive branch Presidential appointee who speaks directly to Congress without clearance from the Office of Management and Budget."¹⁸² Furthermore, Congress

taxpayers receive meaningful answers to these questions [and] to make certain that the money is spent wisely and to ensure that waste, fraud and mismanagement is avoided." *Id.*

179. See 1 U.S. Op. Off. Legal Counsel, *supra* note 111, at 17 ("An even more serious problem is raised, in our opinion, by the provisions that make the [IGs] subject to divided and possibly inconsistent obligations to the executive and legislative branches, in violation of the doctrine of separation of powers."). Congress acknowledged that, "[f]ocusing on the special responsibilities to report to Congress, some critics have argued that the [IG] will be serving two masters, making the position untenable." S. REP. NO. 95-1071, at 9 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2676, 2684. The Department of Justice underscored this issue by asserting that

the [IG]'s obligation to keep Congress fully and currently informed, taken with the mandatory requirement that he provide any additional information or documents requested by Congress, and the condition that his reports be transmitted to Congress without executive branch clearance or approval, is inconsistent with his status as an officer in the executive branch, reporting to and under the general supervision of the head of the agency.

1 U.S. Op. Off. Legal Counsel, *supra* note 111, at 17.

180. See BURROWS, *supra* note 46, at 9 ("IGs are intended to serve as an oversight arm of Congress within agencies . . .").

181. Gates & Knowles, *supra* note 53, at 484 (footnote and internal quotation marks omitted).

182. *Id.* at 475. "This ability to speak directly to Congress provides a potential source of substantial clout for an active inspector general." *Id.*; see also Hartmus, *supra* note 57, at 249 ("[T]his ability to speak directly to Congress protects the independence of the IG and is a source of significant power.").

possesses the power to request IGs to acquire specific executive information.¹⁸³

Perhaps Congress encapsulated the issue best when it stated that IGs were fashioned by Congress in such a way that their "responsibility runs directly to the agency head and ultimately to the Congress."¹⁸⁴ SIGTARP recently demonstrated this innate allegiance to Congress when, after Treasury asserted supervisory authority over SIGTARP, SIGTARP threatened to inform Congress if Treasury interfered with SIGTARP's independence.¹⁸⁵

d. Whether the Combination of Executive Independence and Congressional Control over SIGTARP Violates the Separation of Powers

This analysis with respect to SIGTARP's independence from the executive branch reveals that Congress wields a substantial measure of control over SIGTARP. Ultimately, SIGTARP's supposed "independence" from the executive amounts, in reality, not to independence *from* the executive, but to loyalty *to* Congress.¹⁸⁶ More freedom from the executive branch results merely in more control by Congress.¹⁸⁷ Despite the fact that

183. See BURROWS, *supra* note 46, at 9 ("The legislative history of the IG Act supports the understanding that Congress could ask IGs for information." (citing 124 CONG. REC. 32,032 (1978))). However, ambiguity pervades the congressional history with respect to this point. Compare 124 CONG. REC. 32,032 (1978) ("[T]here is no prohibition [in the IG Act] with respect to filing [with congressional committees] all the information which Congress wants. We will be able to get it. There is no problem about it."), with S. REP. NO. 95-1071, at 9-10 (stating that deletion from the final version of the IG Act of an express provision requiring IGs to provide executive information to Congress upon request should allay fears that "the [IG] could be used as a conduit of sensitive executive branch materials to Congress"). But see *id.* at 28 ("The relevant committees and subcommittees of Congress will undoubtedly be calling the [IG] to testify about the issues within his domain.").

184. S. REP. NO. 95-1071, at 7.

185. See Dugan & Rose, *supra* note 40 ("SIGTARP has asserted that 'should Treasury take actions that would impede our ability to independently conduct audits and investigations, we would report such interference to Congress without delay.'").

186. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 83 (1994) ("[Agency] [i]ndependence [from presidential authority], in short, might be a way of increasing legislative power over agencies." (citing Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 115 (1994))).

187. See *id.* ("[Agency] independence can be understood as a form of [congressional] aggrandizement. Congress might make agencies independent not to create real independence, but in order to diminish presidential authority over their operations precisely in the interest of subjecting those agencies to the control of congressional committees.")

independence from the executive results in congressional aggrandizement, the Court nonetheless has upheld the constitutionality of executive officials' independence from the executive.¹⁸⁸

However, the Court's willingness to uphold executive officials' independence from the executive branch is not boundless. In *Bowsher*, Congress retained the removal power over an independent officer who exercised executive power.¹⁸⁹ The Court determined that this arrangement violated the separation of powers because Congress essentially controlled the exercise of executive power.¹⁹⁰ In contrast, Congress retained no removal power over the independent officer in *Morrison* who exercised executive power.¹⁹¹ The Court concluded that, although the statute restricted the President's removal power over the officer, Congress neither absorbed that stripped executive discretion nor controlled the exercise of the executive power at issue.¹⁹² The question therefore becomes whether

(citing Lessig & Sunstein, *supra* note 186, at 115)). "[T]here are no 'independent' government actors in Washington, D.C." *Id.* at 83–84 (citing Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994)). "There are only actors influenced by the President, actors influenced by the Congress and its committee shadow governments, and actors who are tugged one way or the other. Anything that weakens the presidential set of incentives and controls strengthens Congress and *vice versa*." *Id.* at 84. "There is no such thing as a truly independent agency in Washington, D.C." *Id.* (citing Symposium, *The Independence of Independent Agencies*, 99 DUKE L.J. 215 (1988)).

188. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1173 (1992) ("Current constitutional case law allows Congress to vest core executive power in officers and agencies 'independent' of the President . . ." (footnote omitted)); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001) ("Accepted constitutional doctrine holds that Congress possesses broad, although not unlimited, power to structure the relationship between the President and the administration, even to the extent of creating independent agencies, whose heads have substantial protection from presidential removal."); see also Calabresi, *supra* note 186, at 32–33 (noting the argument that "Congress has used its power to structure the cabinet departments and agencies in ways that make it very difficult for the President to oversee and control them, most especially by making certain officers independent and removal only 'for cause.'").

189. *Bowsher v. Synar*, 478 U.S. 714, 720 (1986).

190. See *id.* at 726 ("To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws.").

191. See *Morrison v. Olson*, 487 U.S. 654, 694 (1988) ("[W]ith the exception of the power of impeachment—which applies to all officers of the United States—Congress retained for itself no powers of control or supervision over an independent counsel . . . Congress' [sic] role . . . is limited to receiving reports or other information and oversight of the independent counsel's activities . . .").

192. *Id.*

the issue presented by SIGTARP's independence from the executive branch is more analogous to the issue confronted by the Court in *Bowsher* or in *Morrison*.¹⁹³

The fact that Congress has retained no role in SIGTARP's removal, but instead has allocated to the President the removal power, suggests categorizing this issue into the *Morrison* class.¹⁹⁴ However, notwithstanding Congress's relinquishment of the removal power, Congress has fashioned SIGTARP's relationship with the executive branch in such a manner that SIGTARP is independent from the executive in virtually every other aspect. SIGTARP reports only to Congress,¹⁹⁵ transmits to Congress TARP-related reports that are immune from executive comment,¹⁹⁶ enjoys essentially unrestricted access to all executive branch documents,¹⁹⁷ responds to congressional requests to testify and to produce information with respect to Treasury's management of TARP,¹⁹⁸ serves as the only presidentially appointed executive official who speaks directly to Congress without executive permission,¹⁹⁹ and functions impervious to executive supervision.²⁰⁰ SIGTARP's strained relationship with the Treasury Secretary,²⁰¹ and its status as a mere cog in the machine of congressional oversight of executive agencies,²⁰² amplify the constitutional issues

193. Although the Court's decisions on separation of powers issues exceed its decisions in *Bowsher* and *Morrison*, these additional decisions need not be examined for purposes of this precise analysis. Most specifically, the Court in *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), decided only that "illimitable power of removal is not possessed by the President in respect of [quasi-legislative or quasi-judicial] officers." *Id.* at 629; *see id.* ("The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted . . ."). Furthermore, the Court in *Myers v. United States*, 272 U.S. 52 (1926), held that a law that subordinated to congressional approval the President's power to remove an executive official violated the separation of powers. *Id.* at 176; *see Morrison*, 487 U.S. at 687 n.24 (stating that "the only issue actually decided in *Myers* was that 'the President had power to remove a post-master of the first class, without the advice and consent of the Senate as required by an act of Congress'" (quoting *Humphrey's Ex'r*, 295 U.S. at 626)).

194. *See supra* note 41 and accompanying text (noting that the President possesses the power to remove IGs from office).

195. *Supra* notes 57–58 and accompanying text.

196. *Supra* note 57.

197. *Supra* notes 172–73 and accompanying text.

198. *Supra* note 183 and accompanying text.

199. *Supra* note 182 and accompanying text.

200. *Supra* notes 165, 167–68 and accompanying text.

201. *Supra* Part III.B.2.c.(2).

202. *Supra* note 180 and accompanying text.

surrounding SIGTARP's independence from the executive branch and its close connection to Congress.

Hence, the issue becomes whether congressional assignment to the President of the removal power over SIGTARP transmutes what would otherwise be a *Bowsher* situation into a *Morrison* situation. In other words, the inquiry is whether removal power is dispositive in determining the level of congressional control over the execution of the laws that qualifies as a violation of the separation of powers principle under *Bowsher*.²⁰³ Perhaps Congress contemplated this very issue as it crafted the legislation that conceived SIGTARP. Based on the foregoing analysis, Congress might have relinquished to the executive branch the removal power over SIGTARP in an attempt to comply facially with *Bowsher*,²⁰⁴ while concomitantly retaining virtually all remaining control over SIGTARP in an attempt to direct subtly the execution of EESA and its massive TARP fund.²⁰⁵ If, as argued above, the Treasury Secretary must take action with respect to TARP-related deficiencies identified by SIGTARP that are either necessary or appropriate,²⁰⁶ and if Congress possesses all control, except for removal power, over SIGTARP, then SIGTARP's capacity to compel executive action with respect to TARP borders on congressional execution of EESA.

It is plausible, if not likely, that SIGTARP is susceptible to congressional influence based both on SIGTARP's independence from and tense relationship with the executive branch²⁰⁷ and on SIGTARP's loyalty

203. Cf. Calabresi, *supra* note 186, at 32–33 (noting the argument that Congress employs its power "to structure . . . agencies in ways that make it very difficult for the President to oversee and control them, most especially by making certain officers independent").

204. See *supra* note 78 (discussing the Court's decision in *Bowsher*, in which the Court concluded that congressional retention of the removal power over an executive official amounted to congressional control over the execution of the laws in violation of the separation of powers).

205. See Calabresi & Rhodes, *supra* note 188, at 1173 ("Congress's power to vest executive functions in officers and agencies independent of the President allows it to bring executive functions under its own potential domination and control, or at least to remove them from the President's domination and control."). "When Congress creates an independent counsel or an independent agency to exercise an executive function, it transfers executive power from the President, who is constitutionally independent of Congress and responsive to a different national electoral constituency, to officers who are not constitutionally independent of Congress." *Id.*

206. See *supra* Part III.B.2.b (arguing that EESA's certification provision mandates executive compliance with SIGTARP recommendations that are either necessary or appropriate).

207. See *supra* Part III.B.2.c.(1)–(2) (examining SIGTARP's independence from and

to and connection with Congress.²⁰⁸ Pursuant to this prospect, SIGTARP functions merely as a transmission belt on which Congress seeks to enforce its intent with respect to the manner in which EESA and its massive TARP fund are executed.²⁰⁹ Congress likely does not want to relinquish so easily its control over its historic TARP program.²¹⁰

If the President suspected congressional interference with Treasury's execution of EESA, he easily could exercise his removal power and dismiss the individual serving at any given time as SIGTARP.²¹¹ While this is true, this fact does not alter the reality that the office endures. Even if the President removed and replaced SIGTARP dozens of times, the same susceptibility to congressional influence and control would exist with respect to the new appointee based on the unchanging relationship dynamic fashioned by EESA.

This situation veers dangerously close to qualifying as a *Bowsher* issue. However, the Court in *Morrison* concluded that the President's minimal control over the independent counsel was adequate such that Congress did not possess sufficient control over the independent executive officer to transmute the case into a *Bowsher* issue.²¹² The President's

tense relationship with the executive branch).

208. See *supra* Part III.B.2.c.(3) (examining SIGTARP's loyalty to and connection with Congress). SIGTARP's vulnerability to congressional influence also stems from the fact that SIGTARP lacks the self-defense mechanisms enjoyed by the President. See Calabresi & Rhodes, *supra* note 188, at 1173 ("These [independent] officers, who may be called to account by congressional committees or powerful members of Congress in oversight or appropriations hearings, lack the weapons of self-defense that the Constitution gives to the President." (footnote omitted)).

209. Cf. Kagan, *supra* note 188, at 2255 ("[Administrative] agencies . . . function as little more than transmission belts for implementing legislative directives.").

210. See 155 CONG. REC. H3,849 (daily ed. Mar. 25, 2009) (statement of Rep. Erik Paulsen) (expressing Congress's feeling that "it is critical that we have the most stringent oversight . . . possible" with respect to Treasury's management of TARP funds); see *id.* (statement of Rep. Jackie Speier) (advocating for "aggressive and competent oversight" of Treasury's expenditure of TARP funds).

211. See *supra* note 41 and accompanying text (noting that the President possesses the power to remove IGs from office).

212. See *Morrison v. Olson*, 487 U.S. 654, 694 (1988) ("We observe . . . that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. Unlike some of our previous cases, most recently *Bowsher v. Synar*, this case simply does not pose a 'dange[r] of congressional usurpation of Executive . . . functions.'" (citations omitted)). "This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws." *Id.* at 692. "Rather, because the independent counsel may be terminated for 'good cause,' the Executive, through the Attorney General, retains ample authority to assure that the counsel is

supervisory authority over the independent counsel amounted to the power to remove for cause (a more restrictive standard than the unlimited removal power enjoyed by the President over SIGTARP)²¹³ and the power to define the independent counsel's prosecutorial jurisdiction.²¹⁴ Apart from these dual sources of executive control, the independent counsel possessed "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."²¹⁵ Furthermore, the same tension that characterizes the executive's relationship with SIGTARP also afflicted the executive's relationship with the independent counsel.²¹⁶

Although Congress resigned the removal power over the independent counsel to the executive branch, Congress retained various other methods of oversight with respect to the counsel.²¹⁷ The statute provided that the independent counsel "may" transmit to Congress periodical reports on the counsel's activities.²¹⁸ The statute mandated that the counsel inform

competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act." *Id.*

213. *See* 28 U.S.C. § 596(a)(1) (2006) ("An independent counsel . . . may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical or mental disability, or any other condition that substantially impairs the performance of such independent counsel's duties." (footnote omitted)).

214. *See id.* §§ 592(d), 593(b) (providing that the Attorney General's application to the special court for the appointment of an independent counsel "shall contain sufficient information to assist the [court] . . . in defining that independent counsel's prosecutorial jurisdiction" and providing that the court "shall define that . . . jurisdiction" based upon the Attorney General's application).

215. *Id.* § 594(a).

216. *See Morrison*, 487 U.S. at 713 (Scalia, J., dissenting) ("Besides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support."). "Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, 'crooks' The statute's highly visible procedures assure, moreover, that unlike most investigations these will be widely known and prominently displayed." *Id.* at 713–14.

217. *See id.* at 664–65 (majority opinion) (listing the methods of congressional oversight pertaining to the independent counsel). "The 'appropriate committees of the Congress' are given oversight jurisdiction in regard to the official conduct of an independent counsel, and the counsel is required by the Act to cooperate with Congress in the exercise of this jurisdiction." *Id.* at 664 (quoting 28 U.S.C. § 595(a)(1)).

218. *See id.* ("An independent counsel may from time to time send Congress statements or reports on his or her activities." (citing 28 U.S.C. § 595(a)(2))).

Congress of "substantial and credible information which [the counsel] receives . . . that may constitute grounds for an impeachment."²¹⁹ Apart from the power to request the Attorney General to apply for the appointment of an independent counsel, the Court in *Morrison* ultimately summarized Congress's role under the statute as "limited to receiving reports or other information and oversight of the independent counsel's activities, functions that we have recognized generally as being incidental to the legislative function of Congress."²²⁰

It is clear from this overview of *Morrison* that the logistics of executive independence and congressional supervision are very similar between the independent counsel and SIGTARP.²²¹ These similarities could guide the conclusion that SIGTARP's separation of powers issue fits more neatly within the *Morrison* class, instead of within the *Bowsher* class.²²² However, although the specifics with respect to the independence from the executive branch and the close supervisory relationship with Congress are similar between SIGTARP and the independent counsel, the functions served by and the ultimate effect of the executive powers wielded by the separate officers are substantially distinct.

The independent counsel in *Morrison* exercised investigative, prosecutorial, and law enforcement power.²²³ In sharp contrast, SIGTARP possesses the power to recommend to the executive actions that, pursuant to the statutory interpretation advocated above, must be implemented if necessary or appropriate.²²⁴ SIGTARP possesses the power indirectly to dictate the execution of a statute, a power not exercised by the independent counsel in *Morrison*.²²⁵ In essence, SIGTARP may commandeer the whole

219. 28 U.S.C. § 595(c) (2006).

220. *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (citing *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927)).

221. See *supra* Part III.B.2.c (discussing the specifics of SIGTARP's independence from the executive and its close relationship with Congress).

222. See *supra* notes 189–93 and accompanying text (discussing the distinguishing features between *Bowsher* and *Morrison*).

223. See *Morrison*, 487 U.S. at 662 (stating that independent counsel statute grants to the counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice" (citing 28 U.S.C. § 594(a))).

224. *Supra* Part III.B.2.b.

225. See *supra* note 223 and accompanying text (observing that the independent counsel exercised investigative and prosecutorial authority, and not the power indirectly to execute a statute). The Court in *Morrison* explicitly stated that the independent counsel did not possess "any authority to formulate policy for the Government." *Morrison*, 487 U.S. at 671.

executive machine to execute EESA according to SIGTARP's recommendations. Hence, the critical distinction between the power wielded by SIGTARP and the power wielded by the independent counsel likely removes the SIGTARP separation of powers issue from the confines of the *Morrison* case.²²⁶ Moreover, SIGTARP's ability to compel the executive branch to execute EESA pursuant to recommendations that are either necessary or appropriate, coupled with the fact that Congress possesses significant control, supervision, and influence over SIGTARP, likely conveys this case into the *Bowsher* realm.²²⁷

Under *Bowsher*, Congress may not reserve for itself an active role in the execution of the laws.²²⁸ Congress's transgression of this rule through the SIGTARP dynamic²²⁹ constitutes an impermissible interference with the executive's constitutional right to take care that the laws be faithfully executed and, thus, a violation of the separation of powers principle.²³⁰

IV. Solving SIGTARP's Separation of Powers Problem Through Compliance with Bowsher

Pursuant to the above analysis, Supreme Court precedent applied to the separation of powers issue presented by the SIGTARP dynamic likely results in a finding that Congress has transgressed the separation of powers

226. See *supra* notes 191–92 and accompanying text (laying out the parameters of the *Morrison* decision).

227. See *supra* notes 189–90 and accompanying text (setting forth the parameters of the *Bowsher* decision).

228. See *supra* notes 78, 80 and accompanying text (summarizing the Court's reasoning and holding in *Bowsher*).

229. The fact that the Court might never entertain a constitutional challenge with respect to the SIGTARP dynamic does not render this analysis moot. See *In re Chrysler LLC*, 576 F.3d 108, 121 (2d Cir. 2009) (concluding that various citizen groups lacked standing to challenge the constitutionality of the Treasury Secretary's decision, pursuant to EESA, to utilize TARP money to finance the sale of Chrysler's assets); *Texans Against Governmental Waste and Unconstitutional Governmental Conduct v. U.S. Dep't of Treasury*, 619 F. Supp. 2d 274, 282 (2009) (concluding that a citizen group lacked both citizen and taxpayer standing to challenge the constitutionality of Treasury's distribution of TARP funds to automobile manufacturers pursuant to EESA). If a prerequisite to scrutinizing the constitutionality of congressional legislation is that a challenge against that legislation must wind up in court, then Congress essentially could shed all constitutional restraints and act unfettered by public scrutiny as long as no one possesses standing to challenge the constitutionality of that congressional action.

230. See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (finding that Congress may not "impermissibly interfere" with the President's constitutional duty to execute the laws).

by reserving for itself an active role in the execution of EESA.²³¹ The task now becomes fashioning a solution to this separation of powers violation.

As discussed above, the Supreme Court has upheld congressionally imposed executive reporting requirements.²³² The Court has also upheld congressional restriction of executive discretion as long as the stripped discretion is not subsumed by Congress.²³³ Hence, EESA's imposition of executive accountability and EESA's restriction of executive discretion with respect to managing TARP may survive Supreme Court review.²³⁴ However, a solution must defuse the problematic element of congressional usurpation of the stripped executive discretion.²³⁵

This congressional usurpation of executive discretion originates from two separate elements of the SIGTARP dynamic. First, Congress retains a high level of control over SIGTARP due to SIGTARP's extreme independence from the executive branch.²³⁶ Second, Congress's control over SIGTARP is exacerbated by the compulsory effect of EESA's certification provision.²³⁷ Because EESA's certification provision obligates Treasury to comply with SIGTARP recommendations that are either necessary or appropriate, Congress's significant control over SIGTARP amounts, in reality, to congressional control over the execution of EESA.²³⁸ Hence, the solution to the SIGTARP separation of powers issue must neutralize each of these two problematic elements.

231. *Supra* Part III.B.2.d.

232. *Supra* Part III.B.2.a.(3).

233. *Supra* notes 147–50 and accompanying text.

234. *See supra* Parts III.B.2.a–b (examining EESA's executive reporting requirement and EESA's mandate that Treasury comply with SIGTARP recommendations that are either necessary or appropriate).

235. *See supra* note 150 and accompanying text (stating that the Court will tolerate congressional restriction of executive discretion as long as the stripped discretion is not subsumed by Congress).

236. *See supra* Part III.B.2.c (discussing SIGTARP's extreme independence from the executive branch).

237. *See supra* Part III.B.2.b (discussing the coercive language of EESA's executive certification provision).

238. *See supra* notes 194–230 and accompanying text (arguing that EESA's certification provision and Congress's control over SIGTARP combine to produce a result of congressional control over the execution of EESA).

A. Reducing Congress's Control over SIGTARP

The first prong of the solution must diminish Congress's control over SIGTARP through increasing SIGTARP's accountability to Treasury.²³⁹ All other IGs, by way of the IG Act, are subject to the general supervision of and must report directly to their respective agency heads.²⁴⁰ Furthermore, an agency head may comment on the reports that an IG submits to Congress.²⁴¹ However, SIGTARP evades these requirements through EESA's failure to provide expressly for these elements.²⁴² Hence, Congress should amend EESA to embrace these features of executive control.

Specifically, Congress should expressly incorporate into EESA §§ 3(a), 4(a), and 5 of the IG Act. This change will enhance Treasury's supervisory authority over SIGTARP in several ways. First, § 3(a) of the IG Act mandates that each IG "shall report to and be under the general supervision of the head of the establishment involved."²⁴³ Besides merely integrating into EESA this section of the IG Act, Congress should expressly provide in EESA that SIGTARP functions as an entity within Treasury and that the Treasury Secretary serves as the agency head to whom SIGTARP is accountable.²⁴⁴ Second, § 4(a) of the IG Act enumerates certain duties and responsibilities incumbent upon each IG, including the duty "to keep the head of such establishment . . . fully and currently informed, by means of the reports required by section 5."²⁴⁵ Third, as noted, § 5 specifies the content of the reports that IGs must submit both to Congress and to their respective agency heads.²⁴⁶ In addition to incorporating into EESA these three provisions from the IG Act, Congress should amend EESA to authorize the Treasury Secretary to comment on the reports that SIGTARP submits to Congress.²⁴⁷

239. *See supra* notes 186–87 and accompanying text (stating that increased independence from the executive amounts, in reality, to increased control by Congress).

240. *Supra* notes 55–56 and accompanying text.

241. *Supra* note 57.

242. *See supra* notes 57–60 and accompanying text (noting the ambiguity in EESA with respect to SIGTARP's accountability to Treasury).

243. IG Act, 5 U.S.C. App. § 3(a).

244. *See supra* note 60 and accompanying text (noting that the vagueness of EESA's language leaves unclear whether SIGTARP actually belongs within the Treasury Department and whether the Treasury Secretary serves as SIGTARP's agency head).

245. IG Act § 4(a)(5).

246. *Id.* § 5.

247. *See supra* note 57 (observing that, with respect to all IGs except for SIGTARP, an agency head may comment on the periodical reports that IGs are required to submit to Congress). Allotting to the Treasury Secretary this power to comment on SIGTARP's

Through integrating these features into EESA, the executive branch retains more control over SIGTARP, indirectly alleviating the sting of compulsion contemplated by EESA's executive certification requirement.²⁴⁸

B. Disarming the Compulsory Component of EESA's Executive Certification Requirement

Even with the above amendment, the specter of congressional control over the execution of EESA (by means of the certification provision) is not fully removed. As long as SIGTARP is still susceptible to a degree of congressional influence or control, Congress may endeavor to control the execution of EESA by exploiting SIGTARP's capacity to bind the executive branch through TARP-related recommendations that are either necessary or appropriate.²⁴⁹ Hence, the compulsory component of EESA's executive certification provision must be defused in order to square the SIGTARP dynamic with the separation of powers principle propounded by the Court in *Bowsher*.²⁵⁰

As stated above, the problematic certification provision currently provides: "The [Treasury] Secretary shall . . . (1) take action to address deficiencies identified by a report or investigation of [SIGTARP] or other auditor engaged by the TARP; or (2) certify to appropriate committees of Congress that no action is necessary or appropriate."²⁵¹

To disarm this provision's compulsory component, Congress should redraft the provision as follows:

congressional reports seems only proper considering that Congress's departure from this component with respect to SIGTARP constitutes a breach of the original compromise between the legislative and executive branches that resulted in the passage of the IG Act. See Gates & Knowles, *supra* note 53, at 502 ("The most important provisions of the compromise [between Congress and the President with respect to the passage of the IG Act] were to require that [IGs] report to Congress through the Secretary, who could not change the content of the report but who could respond to it . . .").

248. See *supra* notes 194–230 and accompanying text (arguing that EESA's certification provision and Congress's control over SIGTARP combine to produce a result of congressional control over the execution of EESA).

249. See *supra* notes 194–230 and accompanying text (arguing that EESA's certification provision and Congress's control over SIGTARP combine to produce a result of congressional control over the execution of EESA).

250. See *supra* notes 78, 80 and accompanying text (encapsulating the Court's holding in *Bowsher*, that Congress may not retain a role in the execution of its laws).

251. SIGTARP Act, Pub. L. No. 111-15, sec. 4(2)(f), § 121. For a discussion of the compulsory element contemplated by the language of this provision, see *supra* Part III.B.2.b.

The Treasury Secretary shall (1) consider deficiencies identified by a report or investigation of SIGTARP or other auditor engaged by the TARP; and (2) certify to appropriate committees of Congress with respect to how the Secretary responds to such deficiencies. The Secretary's certifications to Congress shall be made available to the public, subject to the requirements of other law or to other overriding concerns such as national security, within twenty-four hours after submission to Congress.

This proffered amendment eliminates the either/or ultimatum²⁵² imposed upon the Secretary by the current provision and defuses the compulsory element that converts the current clause into a weapon of congressional control over Treasury's execution of EESA.²⁵³ Pursuant to this proposal, the statute's certification requirement would no longer require the Secretary to implement SIGTARP recommendations that are either necessary or appropriate. Hence, Congress would lack the teeth to control through SIGTARP the execution of EESA because SIGTARP no longer wields the power to dictate Treasury's management of TARP.

However, SIGTARP would continue to recommend TARP-related actions to the Secretary, who would remain obliged to consider these recommendations. Hence, this amendment satisfies Congress's desire to bring TARP-related deficiencies to Treasury's attention. Furthermore, Congress's desire to remain informed with respect to how the executive branch manages the multi-billion-dollar TARP fund is also satisfied through the requirement that the Secretary certify to Congress with respect to how the Secretary responds to SIGTARP recommendations.

The proposed amendment constitutes a workable²⁵⁴ solution that balances both executive and legislative concerns and that facilitates the SIGTARP dynamic's compliance with *Bowsher*. With Treasury's increased control over SIGTARP,²⁵⁵ and SIGTARP's inability to dictate

252. See *supra* note 84 and accompanying text (advancing the position that the accountability dynamic created by EESA's certification provision might impose upon the Secretary a mild congressional threat in the form of an "either/or" dilemma, requiring the Secretary either to comply with SIGTARP's recommendations or to justify to Congress his refusal to comply with SIGTARP's recommendations).

253. See *supra* notes 194-230 and accompanying text (arguing that EESA's certification provision and Congress's control over SIGTARP combine to produce a result of congressional control over the execution of EESA).

254. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (accounting for how "practice will integrate the dispersed powers into a workable government!").

255. See *supra* Part IV.B (proposing an amendment to EESA that reduces Congress's control over SIGTARP by subjecting SIGTARP to increased executive supervision).

any longer the execution of EESA through proffering necessary or appropriate recommendations,²⁵⁶ the proposed amendment divests Congress of its capacity to control indirectly the execution of EESA.²⁵⁷ Therefore, the change enables the SIGTARP dynamic to comply with *Bowsher's* rule that Congress may not retain a role in the execution of its laws.²⁵⁸

C. Executive Accountability to the People with Respect to Treasury's Responses to SIGTARP Recommendations

As advanced above, the proposed amendment requires that Treasury's certification to Congress be made available to the public.²⁵⁹ In contrast, EESA's current certification provision embraces the notion of executive accountability to Congress.²⁶⁰ Although the Court has upheld executive reporting requirements and other forms of congressionally imposed tools of executive accountability,²⁶¹ the Founders intended "[t]he people [to be] the only censors of their governors."²⁶²

All governmental power in America's republic emanates from the people, the sovereign entity.²⁶³ Because the people are the repository of all

256. See *supra* Part IV.B (proposing an amendment to EESA that removes from the executive certification requirement the compulsory component that empowered SIGTARP to direct the execution of EESA through submitting TARP-related recommendations that are either necessary or appropriate).

257. See *supra* notes 194–230 and accompanying text (arguing that EESA's certification provision and Congress's control over SIGTARP combine to produce a result of congressional control over the execution of EESA).

258. See *supra* notes 78, 80 and accompanying text (summarizing *Bowsher* and its rule with respect to the separation of powers principle).

259. See *supra* Part IV.B (setting forth the proposed amendment).

260. See *supra* Part III.B.2.a (discussing how EESA compels executive accountability to Congress).

261. See *supra* Part III.B.2.a.(3) (noting the Court's record of upholding executive reporting requirements).

262. ALLISON ET AL., *supra* note 27, at 575 (quoting 6 THE WRITINGS OF THOMAS JEFFERSON 57 (Albert Ellery Bergh ed., 1907)); see also *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("[T]he President, under Article II, is responsible not to the Congress, but to the people, subject only to impeachment proceedings which are exercised by the two Houses as representatives of the people." (citing U.S. CONST., art. II, § 4)).

263. See ALLISON ET AL., *supra* note 27, at 577 ("I consider the people who constitute a society or nation as the source of all authority in that nation." (quoting 3 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 262, at 227)); *id.* ("All authority belongs to the people." (quoting 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 27, at 190)); FISHER, *supra* note 1, at 1 ("To be worthy of the name, a constitution embodies a philosophy of government with sovereignty resting with the people, not with elected officials or judges.");

governmental power, the public officers selected by the people to administer the government are accountable only to the people for the discharge of their duties.²⁶⁴ The Founders intended the three branches of government to stand independent and to act for themselves, unfettered by accountability to the other branches.²⁶⁵

In fact, some Founders believed that not even the Supreme Court was intended to possess the power to determine the constitutionality of actions or laws vis-à-vis the other branches.²⁶⁶ Instead, some Founders stated, the

JAY A. PARRY ET AL., *THE REAL GEORGE WASHINGTON* 754 (1991) ("The power under the Constitution will always be in the people. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own choosing; and whenever it is executed contrary to their interest, . . . their servants can, and undoubtedly will, be recalled." (quoting 29 *THE WRITINGS OF GEORGE WASHINGTON* 311 (John C. Fitzpatrick ed., 1931–44))).

264. See DAVID BARTON, *ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION* 262 (5th ed. 2008) ("All power residing originally in the people and being derived from them, the several magistrates and officers of government vested with authority—whether Legislative, Executive, or Judicial—are their substitutes and agents and are at all times accountable to them." (quoting MASS. CONST. of 1780, part I, art. V)).

265. See ALLISON ET AL., *supra* note 27, at 497 (quoting Thomas Jefferson as stating that the "Constitution intended that the three great branches of the government should be coordinate, and independent of each other. As to acts, therefore, which are to be done by either, it has given no control to another branch" (quoting 11 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 262, at 213)). The Constitution relaxes the independence of the three branches only through specifically enumerated checks and balances. See *infra* note 283 (noting that the partial mixture of powers contemplated by the concept of checks and balances comports with the separation of powers doctrine only where this commingling of powers is specifically identified by the Constitution).

266. See, e.g., ALLISON ET AL., *supra* note 27, at 497 (quoting Thomas Jefferson as stating that "nothing in the Constitution has given [judges] a right to decide [on the validity of a certain sedition law] for the executive, more than to the executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them" (quoting 11 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 262, at 50)). In a letter to Abigail Adams, Jefferson stated:

The judges, believing the [sedition] law Constitutional, had a right to pass a sentence of fine and imprisonment, because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it, because that power has been confided to them by the Constitution. That instrument meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide which laws are Constitutional and what not, not only for themselves in their own sphere of action, but for the legislature and executive also in their spheres, would make the judiciary a despotic branch.

Id.

Elsewhere, Jefferson declared that the Constitution "did not intend to give the judiciary . . . control over the executive I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, and

Constitution contemplates each branch interpreting the Constitution for itself, within its own sphere, and determining the constitutionality of its own actions.²⁶⁷ Who, then, checks the independent discretion exercised by each branch? The Founders intended for the people to fill this role.

Thomas Jefferson stated:

When the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity. The exemption of the judges from that is quite dangerous enough. I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion by education. This is the true corrective of abuses of Constitutional power.²⁶⁸

This great principle—the people as the protectors of the Constitution—serves as the foundation for the amendment's provision that Treasury's certifications to Congress be made available to the public.²⁶⁹ By imposing upon the executive branch accountability to the people (rather

denounced as not law." *Id.* (quoting 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 262, at 213).

267. *See id.* at 498 ("My construction of the Constitution . . . is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action" (quoting 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 262, at 212)). Jefferson also declared:

The question whether the judges are invested with exclusive authority to decide on the Constitutionality of a law has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the Constitution which has given that power to them more than to the executive or legislative branches. Questions of property, of character, and of crime being ascribed to the judges through a definite course of legal proceeding, laws involving such questions belong, of course, to them; and as they decide on them ultimately and without appeal, they of course decide *for themselves*. The Constitutional validity of the law or laws again prescribing executive action, and to be administered by that branch ultimately and without appeal, the executive must decide *for themselves* also whether, under the Constitution, they are valid or not. So also as to laws governing the proceedings of the legislature, that body must judge *for itself* the Constitutionality of the law, and equally without appeal or control from its coordinate branches. And, in general, that branch which is to act ultimately and without appeal on any law is the rightful expositor of the validity of the law, uncontrolled by the opinions of the other coordinate authorities.

Id. at 497–98 (quoting 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 27, at 517).

268. *Id.* at 499 (quoting 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 262, at 277); *see also* BARTON, *supra* note 264, at 282 (noting that "the people and their use of the ballot box was the check" upon abuses by the governmental branches).

269. *See supra* Part IV.B (setting forth the proposed amendment).

than accountability to Congress) with respect to its execution of EESA, the amendment seeks to restore the people to their proper place as the "true corrective of abuses of Constitutional power."²⁷⁰ If the executive irrationally spurns SIGTARP's recommendations under the amendment proposed above, it is the people who should rectify this choice. Congress's unwillingness to relinquish control over its multi-billion dollar economic bailout program, though superficially justifiable, finds no sympathy in the Constitution's separation of powers principle. Therefore, Congress's misguided efforts to supervise the execution of EESA must bow to the separation of powers and to the people's prerogative to ensure the proper execution of the laws.

V. The People: A Principle for Preserving the Separation of Powers in Future Crises

In addition merely to analyzing a specific legal issue and to offering proposals for change with respect to that isolated issue, this Note advances a principle for sustaining the separation of powers principle in an age of American history when historic financial and societal crises will likely elicit more bold legislative responses.²⁷¹ Just as accountability to the people emerges as an element of the solution with respect to the SIGTARP issue, accountability to the people also applies within the context of the separation of powers principle. However, before describing the people's central role in upholding this principle, we must first consider briefly the grave importance of preserving the separation of powers within this nation's government.

A. A Brief Examination into the Critical Importance of Preserving the Separation of Powers

The separation of powers principle serves as the cornerstone of the United States' constitutional form of government—a governmental formula that has triggered an age of freedom and of technological and societal advancement the likes of which no other government on earth has ever

270. ALLISON ET AL., *supra* note 27, at 499 (quoting 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 262, at 277).

271. *See supra* pp. 384–85 (stating the intention to advance a principle for preserving the separation of powers during future crises that may arise as a result of America's uncertain future).

produced.²⁷² A government that has engendered such coveted results establishes itself a model to be emulated and demands perpetuation.²⁷³ The separation of powers principle, as the foundational ingredient in America's successful governmental formula, likewise necessitates perpetuation.²⁷⁴

272. See generally W. CLEON SKOUSEN, *THE FIVE THOUSAND YEAR LEAP: TWENTY-EIGHT IDEAS THAT CHANGED THE WORLD* (Nat'l Ctr. for Constitutional Studies, 5th prtng. 1987) (1981). "Colonies of civilized human beings have been emerging and disappearing on the continental fringes of the Planet Earth for over 5,000 years. Each of these ganglia of civilized mankind had similar aspirations, but none fulfilled them. At least, not in their fullest dimensions." *Id.* at 1. "Some built cities for over a million people that now lie buried in the skeletal debris of the Sahara sands." *Id.* "Others built cities that were even larger—in Asia and South America—but snakes, rodents, and entangled vines are about all that live today in the ghostly grandeur of their ruined past." *Id.*

"One need not be an American citizen to feel a sense of genuine pride in the fantastic list of achievements which bubbled up from the massive melting pot of humanity that swarmed to the shores of this new land and contributed to its mighty leap in technical, political, and economic achievement." *Id.* at 3. "The spirit of freedom which moved out across the world in the 1800s was primarily inspired by the fruits of freedom in the United States." *Id.* "The climate of free-market economics allowed science to thrive in an explosion of inventions and technical discoveries which, in merely 200 years, gave the world the gigantic new power resources of harnessed electricity, the internal combustion engine, jet propulsion, exotic space vehicles, and all the wonders of nuclear energy." *Id.* "Communications were revolutionized, first by the telegraph, then the telephone, followed by radio and television. The whole earth was explored from pole to pole—even the depths of the sea." *Id.* "Then men left the earth in rocket ships and actually walked on the moon. They sent up a space plane that could be maneuvered and landed back on the earth." *Id.* "The average length of life was doubled; the quality of life was tremendously enhanced." *Id.* "Homes, food, textiles, communications, transportation, central heating, central cooling, world travel, millions of books, a high literacy rate, schools for everybody, surgical miracles, medical cures for age-old diseases, entertainment at the touch of a switch, and instant news, twenty-four hours a day. That was the story." *Id.* at 3–4.

"Of course, all of this did not happen just in America, but it did flow out primarily from the swift current of freedom and prosperity which the American Founders turned loose into the spillways of human progress all over the world. In 200 years, the human race had made a 5,000-year leap." *Id.* at 4.

273. See generally W. CLEON SKOUSEN, *THE MAKING OF AMERICA* (2d ed., rev. 1986) [hereinafter SKOUSEN, AMERICA]. "[T]here has been a need to review the history and development of the making of America in order to recapture the brilliant precepts which made Americans the first free people in modern times." *Id.* at ix. "It would be a disastrous loss to all humanity if these great principles were allowed to become neglected or lost." *Id.*

274. See BARTON, *supra* note 264, at 278 (establishing the importance of "maintaining the separation of powers"); see also *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 957–58 (1983) ("To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) ("The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question."). Thomas Jefferson warned, "[T]o preserve the republican form and principles of our Constitution and [to] cleave to the salutary distribution of powers

To grasp the critical importance of protecting the separation of powers, we must first comprehend the Founders' reasons for inculcating this principle into the constitutional government that they fashioned. The purpose of government is to secure to individuals their rights and freedoms such that these individuals are able lawfully to pursue life, liberty, and happiness unrestrained by the interference of others.²⁷⁵ Citizens surrender certain rights for the public good and entrust their leaders with the power both to protect their retained rights and to govern the affairs of the civilization in the way that best facilitates the pursuit of happiness.²⁷⁶ However, human nature is afflicted by the tendency to abuse power.²⁷⁷ Hence, the allocation to mortals of the authority to govern must be accompanied by safeguards sufficiently potent to counteract the tendency of leaders to abuse their power and to oppress those over whom they preside.²⁷⁸

which [the Constitution] has established . . . are the two sheet anchors of our Union. If driven from either, we shall be in danger of foundering." BARTON, *supra* note 264, at 278 (quoting Letter from Thomas Jefferson to William Johnson (June 12, 1823), in 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES 375 (Thomas Jefferson Randolph ed., 1830)).

275. See generally EZRA TAFT BENSON, *THE PROPER ROLE OF GOVERNMENT* (1968). See *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That, to secure these rights, Governments are instituted among Men . . ."); ALLISON ET AL., *supra* note 27, at 463 ("It is to secure our rights that we resort to government at all." (quoting 7 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 27, at 4)); see also 1 *THE FOUNDERS' CONSTITUTION*, *supra* note 4, at 108 (observing that "the happiness of society is the end of government" (quoting 4 *PAPERS OF JOHN ADAMS* 86 (Robert J. Taylor ed., 1977))). "From this principle it will follow, that the form of government, which communicates ease, comfort, security, or in one word happiness to the greatest number of persons, and in the greatest degree, is the best." *Id.* (quoting 4 *PAPERS OF JOHN ADAMS*, *supra*, at 86).

276. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 368 (Peter Laslett ed., 2d ed. 1967) (1690) ("[B]ecause no political Society can . . . subsist without having in itself the Power to preserve the Property . . . of all those of that Society, . . . there only is political Society where every one of the Members hath quitted this natural Power, resigned it up into the Hands of the Community . . .").

277. See 1 MONTESQUIEU, *supra* note 109, at 161 ("[C]onstant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go."); see also BARTON, *supra* note 264, at 277 ("It was the lesson of history that the tendency of human nature was to accrue and abuse power . . ."). In his famed Farewell Address, George Washington noted "the love of power, and proneness to abuse it, which predominates in the human heart." PARRY ET AL., *supra* note 263, at 787 (quoting 35 *THE WRITINGS OF GEORGE WASHINGTON*, *supra* note 263, at 228).

278. PARRY ET AL., *supra* note 263, at 787 (recognizing, due to the tendency of those with power to abuse that power, the "necessity of reciprocal checks in the exercise of political power" (quoting 35 *THE WRITINGS OF GEORGE WASHINGTON*, *supra* note 263, at 228); see also 1 MONTESQUIEU, *supra* note 109, at 161 ("To prevent this abuse, it is

The Founders resolved that the three basic powers of government²⁷⁹ must not unite in the hands of one entity, for a single entity possessing all three governmental powers would surely fall prey to the tendency to abuse that power, typifying the very definition of tyranny.²⁸⁰ To guard against power's inclination to consolidate, the Founders undertook to structure a government in which the three distinct powers were separated.²⁸¹ However,

necessary from the very nature of things that power should be a check to power."). William Grayson, a Revolutionary War officer and a Virginia lawyer, stated, "Power ought to have such checks and limitations as to prevent bad men from abusing it. It ought to be granted on a supposition that men will be bad; for it may be eventually so." See SKOUSEN, *AMERICA*, *supra* note 273, at 188 (quoting 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 563 (Jonathan Elliot ed., 1901)); *see also* 1 *THE FOUNDERS' CONSTITUTION*, *supra* note 4, at 314 (asserting the importance of "presuming the worst" and assuming "that men in Power may be unrighteous" (quoting 9 W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* 131 (1965))). In a moving plea for the establishment of a government that defends against the human proclivity for abusing power, Thomas Jefferson declared:

Nor should our assembly be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them. They should look forward to a time, and that not a distant one, when corruption in this, as in the country from which we derive our origin, will have seized the heads of government, and be spread by them through the body of the people; when they will purchase the voices of the people, and make them pay the price. Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes. The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.

Id. at 320 (quoting THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 121 (William Peden ed., 1954)).

279. *See* 1 MONTESQUIEU, *supra* note 109, at 162–63 ("In every government there are three sorts of power: the legislative; the executive . . . ; and the . . . judiciary . . .").

280. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 27, at 336 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 375 (4th ed., 1891) ("In absolute governments the whole executive, legislative, and judicial powers are . . . exclusively confined to a single individual; and such a form of government is denominated a despotism If the same powers are exclusively confided to a few persons, . . . the government may be appropriately denominated a . . . despotic aristocracy."); *see also* BARTON, *supra* note 264, at 277 ("It was the lesson of history that . . . tyranny occurred whenever government power was consolidated in one branch.").

281. *See* U.S. CONST., arts. I–III (allocating among the three separate branches the legislative, executive, and judicial powers of the federal government); 1 *THE FOUNDERS' CONSTITUTION*, *supra* note 4, at 311 (observing that the remedy against "the kind of arbitrary, tyrannical rule against which the governed had to be protected" lay in a "separation

the Framers recognized that mere parchment barriers as recorded in the Constitution were insufficient to maintain in practice the degree of separation that was necessary to combat tyranny.²⁸² For this reason, the Founders instituted "auxiliary precautions" in the form of internal checks and balances to preserve the equilibrium of power among the three branches.²⁸³

of [the three] governmental functions" (citing Max Radin, *The Doctrine of the Separation of Powers in Seventeenth Century Controversies*, 86 U. PA. L. REV. 842, 855–86 (1938)); see also *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) ("The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the separation of powers as a vital check against tyranny."). Thomas Jefferson stated:

The concentrating these [three governmental powers] in the same hands is precisely the definition of despotic government An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.

1 THE FOUNDERS' CONSTITUTION, *supra* note 4, at 319–20 (emphasis omitted) (quoting JEFFERSON, *supra* note 278, at 120–21).

282. See THE FEDERALIST NO. 48 (James Madison), *supra* note 27, at 347 ("[A] mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."); see also 1 STORY, *supra* note 280, at 383 (noting the inadequacy of mere parchment barriers in maintaining separation among the three branches of governmental power). Story observed:

Power . . . is of an encroaching nature, and it ought to be effectually restrained from passing the limits assigned to it. Having separated the three great departments by a broad line from each other, the difficult task remains to provide some practical means for the security of each against the meditated or occasional invasions of the others. Is it sufficient to declare on parchment in the Constitution, that each shall remain, and neither shall usurp the functions of the other? No one, well read in history in general, or even in our own history during the period of the existence of our State constitutions, will place much reliance on such declarations.

Id.

283. See THE FEDERALIST NO. 51 (James Madison), *supra* note 27, at 356 (emphasizing the need for "auxiliary precautions" as internal controls on government); see also JOHN L. FITZGERALD, CONGRESS AND THE SEPARATION OF POWERS 27 (1986) ("The framers believed that if they could divide the national authority into three autonomous branches, . . . and if each of these branches possessed a particular function with built-in defenses and powers to prevent dominance by another branch, then these provisions, . . . would . . . prevent the . . . government from achieving ascendancy over its citizens." (citing A. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 48 (1953))); 1 STORY, *supra* note 280, at 384 ("[I]n order to preserve in full vigor the constitutional

barrier between each department, when they are entirely separated, it is obviously indispensable that each should possess equally, and in the same degree, the means of self-protection."); Calabresi & Rhodes, *supra* note 188, at 1155–56 ("The genius of the American Constitution lies in its use of structural devices to preserve individual liberty By thus fragmenting and institutionalizing conflict [through checks and balances], the new political science of the eighteenth century sought to oblige a government by men and over men 'to control itself.'" (emphasis omitted)).

In an oft-quoted passage, James Madison penned:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

THE FEDERALIST NO. 51 (James Madison), *supra* note 27, at 356.

The drafters of the Constitution inserted these checks and balances by distributing to each department certain "negatives" over the other branches. *See* 1 STORY, *supra* note 280, at 381 (observing that the occasional mixture of powers contemplated by the scheme of checks and balances set forth in the Constitution involves only the "power of *rejecting*, rather than *resolving*, . . . [such that no branch] has . . . any power of doing wrong, but merely of preventing wrong from being done"). Naturally, then, the Constitution does not institute an absolute separation of powers among the three branches. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 27, at 339 (looking to state constitutions and observing that "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct [, due to the] impossibility and inexpediency of avoiding any mixture whatever of these departments"); *id.* No. 48 (James Madison) at 343 ("[T]he political apothegm . . . does not require that the legislative, executive, and judiciary departments should be wholly unconnected [U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the [proper] degree of separation . . . can never in practice be duly maintained."); *id.* No. 51 (James Madison) at 355 (asserting the importance of "so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places"); *id.* at 356 ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."); *see also* SKOUSEN, AMERICA, *supra* note 273, at 187–90 (discussing the practicality of checks and balances).

Rather, the crux of the separation of powers principle lies in the proposition that "the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments." THE FEDERALIST NO. 48 (James Madison),

In short, governments are installed in societies to guarantee to individual citizens their basic rights.²⁸⁴ In order to secure to citizens their liberty, government must be apportioned the power that is necessary to function effectively.²⁸⁵ However, human nature suffers from the tendency to abuse power.²⁸⁶ Because government entails mortals governing mortals, government must be structured to neutralize the human predisposition to abuse power.²⁸⁷ The Founders grasped these important truths and crafted their government accordingly. The separation of powers and the system of checks and balances comprise the governmental structure implemented by the Framers for the purpose of counteracting the human tendency to abuse power such that individual liberty could be preserved.²⁸⁸

Hence, because the purpose of America's government is to secure to its citizens their rights, it is absolutely critical to preserve the internal structure designed by the Framers, or else governmental power will

supra note 27, at 343; *see also id.* NO. 47 (James Madison) at 338 ("[W]here the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."); *id.* at 339–40 ("It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted.").

However, this partial mixture of powers comports with the separation of powers doctrine only where such commingling of powers is specifically identified by the Constitution. *See Myers v. United States*, 272 U.S. 52, 116 (1926) ("[T]he reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires." (citing 1 ANNALS OF CONG. 497 (Joseph Gales ed., 1834))); ALLISON ET AL., *supra* note 27, at 623 ("The principle of the Constitution is that of a separation of legislative, executive, and judiciary functions, *except in cases specified*." (quoting 7 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 27, at 108 (emphasis added))).

Some of the explicit checks and balances enumerated by the Constitution include the President's legislative veto power, the Senate's power over executive appointments, and the judiciary's tenure in office during good behavior. U.S. CONST., art. I, § 7 (allocating to the President the power to veto congressional legislation); *id.*, art. II, § 2, cl. 2 (allotting to the Senate the power to affirm or to reject presidential appointments of lower executive officials); *id.*, art. III, § 1 (providing that the judges of the Supreme Court shall hold their offices during good behavior); *see also* 1 STORY, *supra* note 280, at 390–91 (detailing the checks and balances itemized by the Constitution). The Constitution enumerates a total of seventeen checks between the three branches of government. SKOUSEN, AMERICA, *supra* note 273, at 188.

284. *Supra* note 275 and accompanying text.

285. *Supra* note 276 and accompanying text.

286. *Supra* note 277 and accompanying text.

287. *Supra* note 278 and accompanying text.

288. *Supra* notes 278–83 and accompanying text.

centralize and the very government intended to protect freedom will be wielded in the hands of tyrants as a powerful weapon for the destruction of freedom.²⁸⁹ The parchment guarantees of the Constitution are meaningless if the governmental structure corrodes.²⁹⁰ The separation of powers as established by the Constitution must be preserved, not merely for separation's sake, but for the sake of preserving for ourselves and for our posterity the liberty²⁹¹ for which Americans have fought and died.²⁹²

B. The People as the True Guardians of the Separation of Powers

As our nation plunges into an era of economic uncertainty, Congress likely will respond to future crises by undertaking more bold, innovative legislation.²⁹³ Hasty legislative responses (such as Congress's passage of EESA) to pressing national problems can disregard constitutional norms that would otherwise govern more deliberative legislative action.²⁹⁴

289. See *Bowsher v. Synar*, 478 U.S. 714, 730 (1986) ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.").

290. See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) ("Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours."). It is because "the mere words of a Bill of Rights are not self-effectuating," asserted Justice Scalia, that the separation of powers structure is the "central guarantee of a just Government." *Id.* at 697–98.

291. See U.S. CONST., pmbl. (declaring that the Constitution is established to "secure the Blessings of Liberty to ourselves and our Posterity").

292. See *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting) ("The purpose of the separation and equilibration of powers in general, . . . was not merely to assure effective government but to preserve individual freedom."); *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787.").

293. See *supra* notes 30–31, 33 and accompanying text (noting the likelihood both of future crises and future legislative experimentation in response to these crises).

294. See *Bowsher*, 478 U.S. at 758–59 (Stevens, J., concurring) (discussing how inventive congressional legislation in response to a "national budget crisis" violated the separation of powers); see also FISHER, *supra* note 1, at 292 (warning against "shortsighted reactions to immediate events and the failure to take into account the longer view").

The Court in *Chadha* recognized that the limitations imposed by the separation of powers upon the governmental branches likely would cause inconvenience and inhibit hasty responses. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983). The Court stated:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient,

However, even the most pressing national crises do not justify sacrificing the separation of powers principle.²⁹⁵ As the sovereign entity guarding America's governmental structure,²⁹⁶ the people must ensure that the separation of powers is not "swept into the dustbin of repudiated constitutional principles."²⁹⁷ Although the Court has attempted to fill this role,²⁹⁸ this function belongs by right to the people.²⁹⁹

America's citizens must fulfill their duty as the guardians of America's freedom experiment.³⁰⁰ This trust imposes upon the people an obligation to educate themselves concerning the separation of powers and other constitutional principles,³⁰¹ enabling them to gauge the constitutionality of governmental action and to discern departures from constitutional norms so

even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Id. (citations omitted).

295. See *Bowsher v. Synar*, 478 U.S. 714, 758–59 (1986) (Stevens, J., concurring) ("Neither the unquestioned urgency of the national budget crisis nor the Comptroller General's proud record of professionalism and dedication provides a justification [for violating the separation of powers]."); see also *Chadha*, 462 U.S. at 944–45 ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution . . . [E]ven useful 'political inventions' are subject to the demands of the Constitution . . ."). For an examination of the critical importance of preserving the separation of powers principle, see *supra* Part V.A.

296. See *supra* notes 263, 268 and accompanying text (explaining that the people are the repository of all power in America's constitutional republic and that the duty to preserve this republic therefore devolves on the people).

297. *Morrison v. Olson*, 487 U.S. 654, 725 (1988) (Scalia, J., dissenting).

298. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (seizing the judicial review power).

299. See *supra* note 268 and accompanying text (stating that the people serve as the "true corrective of abuses of Constitutional power").

300. See Ronald Reagan, President of the United States, Speech at the Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House (Sept. 26, 1986), in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 97 (Steven G. Calabresi ed., 2007) ("[W]e the people are the ultimate defenders of freedom.").

301. See *ALLISON ET AL.*, *supra* note 27, at 578 ("[I]f we think [the people] not enlightened enough to exercise their control [over government] with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education." (quoting 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 262, at 278)).

that they can quickly rectify these deviations through the political process.³⁰² It is the "people—not the courts—[who] must control the destiny of the nation."³⁰³

Lawmakers and government officials must remember that they serve the people.³⁰⁴ They must confine their actions within the boundaries set by the Constitution, regardless of crises that present seemingly new problems. However, those who wield governmental power can fail to observe the limitations imposed upon them by the Constitution.³⁰⁵ As such, an entity detached from the fierce power struggle among the governmental branches must assume the role of ensuring that government observes the limits imposed by the separation of powers principle.

The American people must unite in relearning the truths underlying the constitutional structure so that they are able to preserve the separation of powers through holding governmental leaders accountable for their actions based on the standard set forth by the Constitution, the supreme law of the land.³⁰⁶ President Ronald Reagan admonished:

We the people created the government and gave it its powers. And our love of liberty and our spiritual strength, our dedication to the Constitution, are what, in the end, preserves our great nation and this great hope for all mankind. All of us, as Americans, are joined in the great common enterprise to write the story of freedom—the greatest adventure mankind has ever known and one we must pass on to our children and their children—remembering that freedom is never more than one generation away from extinction.³⁰⁷

302. See *supra* note 268 and accompanying text (observing that the "true corrective of abuses of Constitutional power" requires the people to censor the government through the elective process).

303. BARTON, *supra* note 264, at 284.

304. See *supra* notes 275–76 and accompanying text (observing that the purpose of government is to secure to citizens their rights and to allocate to leaders the power to ensure that government fulfills its proper function).

305. See *supra* notes 277–78 and accompanying text (noting the tendency of human nature to grasp at power, necessitating the implementation of internal safeguards to counteract the predisposition of leaders to abuse their power and to oppress those over whom they preside).

306. See *Graves v. New York ex rel. O'Keefe*, 306 U.S. 446, 491 (1939) (Frankfurter, J., concurring) ("The ultimate touchstone of constitutionality is the Constitution itself. . . ."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179–80 (1803) ("[I]t is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature [I]n declaring what shall be the supreme law of the land, the constitution itself is first mentioned" (emphasis omitted)).

307. Reagan, *supra* note 300, at 97.

In order for the separation of powers to weather the stormy seas ahead, it is the people who must rise to the occasion—this is the age-old principle that this Note advances as the surest safeguard against the deterioration of the separation of powers and of America's republic. In the same speech, President Reagan declared:

The warning, more than a century ago, attributed to Daniel Webster, remains as timeless as the document he revered. "Miracles do not cluster," he said, "Hold on to the Constitution of the United States of America and to the Republic for which it stands—what has happened once in 6,000 years may never happen again. Hold on to your Constitution, for if the American Constitution shall fall there will be anarchy throughout the world."³⁰⁸

This Note echoes President Reagan's words, sounding a call to the American people to "hold on to [their] Constitution" during the times of future crisis that might occasion hasty governmental innovation that disregards the separation of powers principle.³⁰⁹

Upon exiting the Constitutional Convention in Philadelphia, a woman inquired of Benjamin Franklin, "Well Doctor what have we got a republic or a monarchy?" In his characteristic wisdom, Franklin responded, "A republic if you can keep it."³¹⁰

308. *Id.*

309. *Id.*

310. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 85 (Max Farrand ed., 1966).