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1. Introduction

This paper discusses how the position of independent administrative agencies, with broad regulatory powers, can be reconciled with the US Constitution and how the legitimacy of their regulatory actions can be ensured. The experiences with the problems of legitimacy of US administrative agencies might well contribute to the resolution of questions that arise as regards the constitutional position of (independent) regulatory agencies in the EC Member States.

The US constitution is based on the principle of the Separation of Powers, reflected in Articles I, II and III of the Constitution[2]. Pursuant to Article I all legislative powers granted in the Constitution are vested in Congress. Pursuant to Article II the Executive Power shall be vested in a President. Article III vests the judicial Power of the United States in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Framers of the Constitution had the conviction that the centralized accumulation of power in any person or single group of persons meant tyranny: the division and separation of powers, both vertically (along the axis of federal, state, and local authority) and horizontally (along the axis of legislative, executive and judicial authority) meant liberty[3]. It was thus essential that no department, branch or level of government would have the power to achieve dominance on its own[4].

Except for the institution of these named three branches, the US Constitution does not provide any further information on how central government must be organized nor on the question of how 'legislative', 'executive' and 'judicial' must be defined[5]. Neither does the Constitution explicitly mention the power of Congress to found administrative agencies[6].

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[2] L. H. Tribe, *American Constitutional Law*, third ed, Foundation Press, 2000, p. 7.

[3] Tribe, 2000, p. 7.

[4] Tribe, 2000, p. 7.

[5] Tribe, 2000, p. 137 en P.L. Strauss, ' The Fourth Branch', *Columbia Law Review* 1984, p. 597-602.

It might seem that the position and the powers of the administrative agencies contravene the Separation of Powers principle in three ways. Firstly, Congress has founded agencies, headed by officers that do not serve at the will of the President, meaning the latter is restricted in removing them from office. These agencies are commonly referred to as the independent or regulatory agencies. These agencies can be distinguished from executive agencies. The officers of the latter type of administrative agencies serve at the will of the President. In the opinion of critics of the administrative state the position and the powers of the independent administrative agencies contradict with the Separation of Powers principle of the Constitution[7]. Indeed, it can be questioned whether Congress can legitimately place agencies with a mandate to execute the law out of control of the President.

Secondly, when Congress adopts acts it usually delegates broad regulatory powers to administrative agencies to implement the acts. It is not uncommon for Congress to leave it up to the agency to take important policy decisions on which Congress itself could reach no consensus. This means that non-elected officials may have the power to create new rights and obligations for the citizens. It can be questioned whether the practice of Congress to delegate broad rulemaking powers to the agencies does not contravene article I, which vests all legislative power within Congress.

Thirdly, administrative agencies combine powers previously distributed among the President, Congress and the Judiciary. For instance, the Securities and Exchange Commission (SEC) formulates law by writing rules that spell out what disclosures must be made in a stock prospectus. The SEC then enforces these rules by prosecuting those who violate its regulations through disciplinary actions against broker-dealers or through stop order proceedings against corporate issuers. Finally, the SEC also acts as a judge and jury in deciding whether its rules have been violated. In exercising the latter function it conducts adjudicatory hearings to determine guilt and mete out punishment[8].

The tremendous growth of administrative agencies with broad regulatory powers in the twentieth century has raised many policy and coordination problems in government. These developments led Brownlow to make his famous statement that the administrative agencies are a “headless fourth branch of government”, acting irresponsible and not being coordinated

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[6] This contribution will only deal with independent agencies and executive agencies. Paragraph 2 describes the distinction between these two types of agencies.

[7] P.P. Swire, ‘Incorporation of Independent Agencies into the executive branch’, (94) *Yale Law Review*, 1985, p. 1766.

[8] E. Gellhorn en R.M. Levin, *Administrative law and process*, St Paul, 4 ed, 1997, p. 9-10.

by the President[9]. This paper will analyse to what extent the position and the powers of (independent) administrative agencies conflict with the Separation of Powers principle. The paper mainly explores how the US Supreme Court has dealt with constitutional problems relating to administrative agencies and their powers. From this analysis, it will be concluded that the case law of the US Supreme Court, supports the view that the powers of Congress, the President and the Judiciary can be mingled and that there is room for Congress to adapt government structure to the necessities of new governmental policy. A more functional Separation of Powers approach will be advocated that is both legal and more practical in order to assess the constitutional position of administrative agencies[10].

After having concluded that from a more functional Separation of Powers perspective the position and powers of the US (independent) administrative agencies may well be reconciled with the structure of the US Constitution, the paper discusses to which institutions administrative agencies are accountable. It is described how the actions of administrative agencies are checked and balanced by the President, Congress and the Judiciary. Furthermore, the paper illustrates the President, Congress and the Judiciary are not the only three players that control the agencies' activities. Since the agencies have to follow administrative procedures in which the public may participate, interest groups influence the agencies' activities as well. From this overview it can be concluded that administrative agencies represent anything but a "headless fourth branch". The analysis shows the process of checks and balances is not static, and adapts to changing economic and political circumstances.

2. The role and the concept of independent agencies

2.1. Organization, terminology and constitutional position (questions 1, 2, 3, 12, 13)

There are many different administrative agencies within the US administration[11]. Generally, the administrative agencies can be classified in four categories. Firstly, there are the executive departments mentioned in the Constitution, which are attached to the cabinet officers who

[9] *Report of the Committee with studies of Administrative Management in the Federal Government* 1937, p. 39-43.

[10] P.L. Strauss, 1984, p. 574.

[11] See for a clear description of the organization of US administrative agencies, R. Pierce, S. A. Shapiro and P.R. Verkuil, Administrative Law and Process, third edition, Foundation Press, 1999, p. 92 to 96.

control them[12]. These administrative organizations have the most important policy and budgetary responsibilities. Important examples are the Departments of Defense, State, Justice, Agriculture and Health and Human Services (HHS). Secondly, there are sub-agencies that are within these departments, but that are often organizationally distinct, such as the Food and Drug Administration (FDA) in HHS. Thirdly, there are also agencies that are separate from the executive departments, but that are nonetheless 'executive'. Here the Environmental Protection Agency (EPA) and the Office of Management and Budget (OMB) are prominent examples. Finally, there are agencies designated 'independent' by Congress and they are also referred to as 'regulatory agencies'. A lot of the latter agencies were founded during the New Deal period. Prominent agencies are: The Federal Communications Commission (FCC), The Federal Trade Commission (FTC), the National Labor Relations Board (NLRB) and the Securities and Exchanges Commission (SEC). This paper will mainly deal with the distinction between 'executive' and 'independent' agencies. If the word administrative agency is used, both the independent and the executive agencies are meant.

An important difference between independent and executive agencies is related to the President's restricted power to remove officials of the independent agency. Unlike the officials of executive agencies, who are subject to dismissal at the will of the President, the President can remove the officers of independent agencies only 'for cause'. For instance, pursuant to the Federal Trade Commission Act the President may remove the Commissioners of the FTC only 'for inefficiency, neglect of duty or malfeasance in office'. Since the Supreme Court has never said what 'for cause' means, there is no controlling judicial decision on how 'independent' the independent agencies actually are. According to some authors, the 'for cause clause' ensures that a President will not be able to discipline an official for purely political reasons, or for no reasons at all[13]. Lessig and Sunstein argue, that it would be possible to interpret the relevant statutes as allowing a large degree of removal and supervisory power to remain in the President, enabling the latter to remove the agencies officials for political reasons under some circumstances[14]. According to Lessig and Sunstein the statutory words might even allow the discharge of commissioners who have frequently or on important occasions acted in ways inconsistent with the President's wishes with respect to what is required by sound policy.

[12] Pursuant to U.S. Constitution Article II, section 2, the President may require the Opinion, in writing, of the principal Officer, in each of the Executive Departments, upon any subject relating to the duties of their respective Offices.

[13] P.R. Verkuil, 'The purposes and limits of independent agencies' , 1988 *Duke L.J.*, p. 260.

[14] L. Lessig and C. Sunstein, 'The President and the administration', 94 *Colum. L. Rev*, p. 110-111.

There are several other ways in which independent agencies can be legally or structurally distinguished from executive agencies[15]. Like the heads of executive agencies, the officials of independent agencies are appointed by the President and confirmed by the Senate. However, the terms of the officials of the independent agencies may exceed the four-year term of the President, reducing the influence of the President on the agency. In addition, the members of the independent commissions are required by statute to be selected on a bipartisan basis. Unlike the appointment of executive officials, the President is restricted to naming only a majority of the members of his own party: the remainder must be from the other party or registered independents. Sometimes independent agencies possess additional characteristics, although these do not have to be decisive for their independent status[16]. For instance, whereas executive agencies tend to be shaped around single administrators, independent agencies may be organized as commissions consisting of five or seven members. This makes their deliberations and decisions the product of collegial decision-making, which is a process that has its closest analogue in the appellate judicial setting[17].

From this analysis it follows 'independence' in US constitutional law means less susceptible to presidential control. Indeed, less susceptible indicates the President still has quite some power to influence the independent agencies' actions. Although related, independence and impartiality are two different concepts. Since independence only relates to the amount of presidential control, it is a narrower concept than impartiality. Impartiality means that an agency should justify its decisions on objective grounds without being influenced by private and political interests. Administrative law imposes strict impartiality requirements on the agencies as regards the exercise of their adjudicatory powers in order to ensure procedural fairness and to prevent abuse (see paragraph 6).

2.2. Are independent agencies really different from executive agencies?

Although, from a legal perspective, independent agencies are to some extent independent from political control, it might be questioned whether those agencies enjoy a constitutional or legal position which is very different from executive agencies[18].

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[15] R. Pierce et al, 1999, p. 94-95.

[16] T. Zwart, 'Independent Regulatory Agencies in the US', in: L. Verhey and T. Zwart (eds), *Agencies in European and comparative perspective*, Intersentia, 2003, p. 4.

[17] R. Pierce et al, 1999, p. 95.

[18] S. Breyer et al, 2002, p. 118-120.

The President has the power to appoint, with the advice and consent by the Senate, the agency officials of both the independent and the executive agencies. It is generally agreed, that President Reagan was able to achieve significant policy changes by appointing agency heads who shared his objective of reducing the burdens of regulation of business[19]. The political effects of the power to appoint officials have not been limited to executive agencies, since President Reagan could implement his policies through the officials of independent agencies as well.

Although the President might remove the officers of independent agencies, unlike the officials of executive agencies, only 'for cause', the distinction between those two categories of agencies should not be overemphasized[20]. The fixed terms of office and removal for cause obligations do not pose serious obstacles to the President's ability to influence regulatory policy through the appointments process, because a newly elected President almost always has the opportunity to make key appointments early in his administration. Moreover, if the President formally requests an administrator's resignation, it is not unreal that the officer will actually resign[21]. In addition, the President can influence the independent's agency policy by way of his power to appoint the chairs of the independent commissions. Although the chair can only be removed from the agency for cause, he holds the chairmanship at the will of the President, making him susceptible to the President's policy views. Since the chair of the agency is responsible for the management of agency's operations, a change in leadership often results in policy changes.

Furthermore, from a strictly legal point of view it is not clear to what extent the President is really prevented from dictating policy to independent agencies. After all, the President has the constitutional duty to "Take care that the Laws Be Faithfully Executed"[22]. This duty requires the President to maintain significant, ongoing relationships with all agencies for law administration[23]. According to Strauss the unitary responsibility does not admit relationships in which the President is permitted so little capacity to engage in oversight that the public could no longer rationally believe in that responsibility[24]. To the extent permitted by the

[19] Gellhorn & Levin 1997, p. 50.

[20] Gellhorn & Levin 1997, p. 57.

[21] Gellhorn & Levin 1997, p. 58.

[22] U.S. Constitution, Article II, section 3.

[23] L. Lessig and C.R. Sunstein, 'The President and the administration', 94 *Colum. L. Rev*, p. 107-114.

[24] Strauss 1984, p. 644.

boundaries of the law, the President is believed to have the power to review the agencies actions by imposing on the agencies the duty to engage in economic analysis before exercising their rulemaking powers. For instance, President Reagan's Executive Order No. 12,291[25] required agencies to adopt rules only if they were both cost-beneficial and benefit-maximizing. Although this Order was formally not applicable to the independent agencies, the executive orders were widely followed by them. President Reagan made clear that he had left out the independent agencies to avoid political controversies, not because he believed he lacked authority to apply the order to the independent agencies[26]. In addition to the power to impose the duty to engage in economic analysis, it must be assumed that the President has a general power to coordinate the agencies' actions in order to ensure that overlapping policies of the different agencies do not conflict.

It follows, that the President cannot be prevented from giving policy guidance to the agencies to the extent permitted by the law. However, it would seem irreconcilable with the independent agency's primary decision-making power that the President would substitute the agency's policy judgements with his own judgement. This, however, does not clearly distinguish the position of an independent agency from an executive agency, for in a sense the President is also prevented from dictating policy to units within the executive branch. Paragraph 5 discusses there is no authoritative answer to the question whether and in what sense the President can order executive branch officials to decide at the will of the President. For instance, despite the fact that the Federal Aviation Administration (FAA) is part of the department of Transportation, it is questionable whether the President could directly overrule the FAA's decision to grant a licence to fly, for Congress has delegated the authority to licence to the administrator and not to the President[27]. Whether or not the President is allowed to substitute the agencies' views, it is certain that his directions should remain within the legal boundaries of the statutes.

Both the President and Congress have many formal and informal instruments to influence the activities of independent and executive agencies. Furthermore, it is important to note that both independent and administrative agencies are subject to the same procedural requirements of the APA (paragraph 6) and that the scope of judicial review of the agencies' actions is the same for all the agencies (par. 7). Therefore, it can be concluded that the differences between

[25] 46 Fed. Reg. 13193 (1980).

[26] Strauss 1984, p. 662.

[27] S. Breyer, W.H. Stewart, C.R. Sunstein and M. L. Spitzer, *Administrative Law and Regulatory Policy*, 2002, Aspen Law, 2002, p. 118.

independent and executive agencies should not be exaggerated[28]. Nevertheless, in practice, independent agencies may be more responsive to Congress and the President treats independent agencies more independently than executive agencies. For instance, the Office of Management and Budget (OMB) may treat the independent agencies' budget requests or legislative recommendations with greater respect than those of the executive agencies[29]. Moreover, several Presidents, with the exception of President Clinton, have been reluctant to allow OMB to oversee the process of regulation by independent agencies, even when such Presidents made serious efforts to oversee and coordinate national policy. Presidential control of the agencies' actions, as well as the OMB's reviewing role, will be discussed in more detail in paragraph 5.

2.3. History, tasks and powers of independent agencies (questions 14, 16)

Independent agencies have been active in the United States for more than a hundred years.
For instance, the International Commerce Commission (ICC), which had the task to regulate the railways, was founded in 1887. The Federal Trade Commission was created in 1914 and was modelled after the ICC for the latter's independent power and authority[30]. With the creation of the FTC, it was clear that the ICC would serve as the template for a multitude of new independent regulatory commissions in the early twentieth century[31].

Many of the independent agencies were founded in the course of Roosevelt's New Deal, expanding the role of central government in economic affairs and in promoting social and economic rights for the citizens. The mandate of the administrative agencies to regulate private market behaviour can be justified on several grounds. For instance, some agencies have the power to regulate market behaviour in order to solve market failures, like the need to control monopoly power (Federal Energy Regulatory Commission) or the need to compensate for inadequate information (Securities and Exchanges Commission). Other agencies have the power to redistribute resources from one group to another (National Labor Relations Board), or have the power to promote non-market or collective values like the environment and public

[28] G.P. Miller, 'Introduction: the debate over independent agencies in light of empirical evidence, Nineteenth Annual Administrative Law Issue, Symposium: The Independence of Independent Agencies', 1988, *Duke Law Journal*, p. 218-219 and S. B. Foote, 'Independent agencies under attack: a sceptical view of the importance of the debate', 1988 *Duke L.J.*, p. 232- 237.

[29] Breyer et al, 2002, p. 118.

[30] M.J. Breger en G.J. Edles, 'Established by practice: the theory and operation of independent federal agencies', American Bar Association 2000, p. 1132.

[31] M.J. Breger en G.J. Edles, 2000, p. 1132

broadcasting (Environmental Protection Agency and the Federal Communications Commission)[32]. Although, many of the federal independent agencies have the task of regulating private market parties, like the FERC and the FCC, some of the independent agencies have the task of promoting citizens' rights. For instance, The Equal Employment Opportunity Commission promotes equal opportunity in employment through administrative and judicial enforcement of the federal civil rights laws and through education and technical assistance. The Federal Election Commission administers and enforces the federal statutes governing the financing of federal elections.

The reasons why Congress has insulated to some extent independent agencies from political control cannot be easily explained, because the legislative history on the creation of independent agencies does not always reveal why Congress preferred one organizational format over the other[33]. Although there is no coherent theory on the creation of independent agencies, several authors have supplied a rationale for the foundation of independent agencies[34]. It is plausible that Congress confers this status upon agencies for two reasons. The first reason is that some agencies should function impartially, since political forces could negatively affect how they carry out their tasks. This argument was, for instance, put forward during the debates leading to the adoption of the FTC Act. The FTC has the power to direct cessation of unfair methods of competition in commerce, after adjudicatory hearings. The assurance of impartiality and the absence of political controls are very important for a proper execution of the statutory scheme and the apolitical judgements to be reached[35]. In addition, to the impartiality argument the expertise argument justifies the existence of independent agencies. The application of statutes, like the statutes regulating the capital and communications markets, requires a high degree of technical expertise. Therefore, it is thought that objective experts and not the politicians should apply these statutes.

Independent agencies typically possess a combination of rulemaking and adjudicatory powers. By virtue of adjudicatory powers agencies may determine individual duties and

[32] See for an overview of the legitimate grounds for regulation, S. Breyer et al, 2002, p. 4-13.

[33] P.R. Verkuil, 'the Purposes and limits of independent agencies', 1988 *Duke L.J*., p. 258 and S. B. Foote, 'Independent agencies under attack: a sceptical view of the importance of the debate', 1988 *Duke L.J*., p. 232.

[34] A. L. Peters, ' Independent agencies: Government's scourge or salvation', 1988 *Duke Law Journal*, p. 286 and P.R. Verkuil, 'the Purposes and limits of independent agencies', 1988 *Duke L.J*., p. 260.

[35] According to Strauss the apolitical nature of the FTC's tasks made the Supreme Court decide in Humprey's executor (295 U.S. 602 (1935) that Congress could legitimately restrict the President's removal power, Strauss, 1984, p. 613.

rights, for instance by granting licences, issuing violation orders or imposing penalties. Here the power of the FCC to grant licences to operate broadcasting stations may serve as an example. By virtue of rulemaking powers agencies may formulate rules of general applicability. For instance, the FCC has the power to make such regulations as it may deem necessary to prevent interference between radio stations and to carry out the provisions of the Communications Act 1934. Paragraph 6 discusses more deeply the distinction between adjudication and rulemaking, and more in particular the procedural requirements that apply to the agencies' adjudicatory or rulemaking powers.

2.4. Jurisdiction (question 5)

In addition to the federal agencies many commissions with regulatory powers operate at the state level. The question whether the federal agency or the state commission has the power to regulate a certain activity is mainly a matter of statutory interpretation. The organic acts determine the federal agencies' jurisdiction, which may extend to both interstate and intrastate activities[36]. By virtue of the Supremacy clause federal agency rules pre-empt conflicting rules of state authorities[37]. Moreover, state rules are pre-empted in case it was the intent of Congress to exclude state regulation. The very existence of a federal regulatory agency may signify a congressional determination that the regulated subject matter demands uniform national supervision and that the power of the state authorities to act is withdrawn. However, the presence of a federal agency is not itself determinative for the question whether state action has been pre-empted[38]. Through statutory interpretation the courts should determine whether and to what extent the agencies indeed enjoy the power to regulate intrastate

[36] By virtue of the Commerce clause (U.S. Constitution, Article I, section 8, cl. 3) Congress may only regulate intrastate activities in so far they substantially affect interstate trade and provided that the regulation of those activities complies with the Necessary and Proper clause (Article I section 8(18)). See for an extensive analysis of the Commerce Clause, Tribe 2000, p. 819.

[37] U.S. Constitution, Article VI section 3, According to Tribe, 2000, p. 1176, the Supreme Court typically divides pre-emption analysis into three categories. The first category is express pre-emption where Congress has in so many words declared its intention to preclude state regulation of a described sort in a given area. The second category is implied pre-emption where Congress, through the structure or objectives of its enactments, has by implication precluded a certain kind of state regulation in the area. The third category is conflict pre-emption where Congress did not necessarily focus on pre-emption of state regulation at all, but where the particular state law conflicts directly with federal law, or otherwise stands as an obstacle to the accomplishment of federal statutory objectives.

[38] Tribe, 2000, p. 1214 to 1217.

activities. For instance, in *Louisiana Public Service Commission v. FCC*[39], the Supreme Court rejected a FCC ruling that state regulation of depreciation of telephone equipment was pre-empted. In the view of the Court, Congress had established a system that gave jurisdiction to the FCC to regulate depreciation of such equipment used in interstate communication, but left jurisdiction with the states, and in fact forbade the FCC to exercise jurisdiction over charges, classifications, and practices in connection with intrastate communication, and where in practice, a single piece of telephone equipment may be both used in inter- and intrastate communication[40]. On the other hand, in *AT&T Corp. et al v. IOWA Utilities*[41] the Court confirmed the power of the FCC to implement the local competition provisions of 1996 Telecommunications Act. The FCC had promulgated rules that determined the prices for interconnection and that unbundled access to the local networks should be based on Total Element Long Run Incremental Cost. The state commissions insisted they had the authority to implement these pricing rules rather than the FCC. The Court did not agree with the view of the state commissions. In the view of the Court, by virtue of the 1934 Communications Act the FCC may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the 1934 Act. Since Congress expressly directed that the 1996 Act, along with the local competition provisions, should be inserted in the Communications Act, the Court was of the opinion the Commission's rulemaking authority extended to the implementation of local competition provisions.

3. Constitutional position of the independent agencies

3.1. Constitutional questions (Questions 6,7,8)

Although the independent agencies are a reality in US government, their position and powers have raised and still raise fundamental questions. Under the influence of President Reagan's efforts to assert hierarchical control over the bureaucracy, the constitutional position of independent agencies was questioned. On the basis of the theory of the 'unitary executive', scholars asserted that the creation of independent agencies was constitutionally unfounded. The unitarian view was grounded in the Vesting Clause of Article II, which provides "The Executive power shall be vested in a President". This clause, together with the Take Care clause, that provides that the President has the duty to "Take care that the Laws Be Faithfully

[39] 476 U.S. 355 (1986).

[40] Tribe, 2000, p. 1216.

[41] 97 U.S. 826 (1998).

Executed"[42], would create a hierarchical, unified executive department under the direct control of the President. The President alone possess all of the executive power and he therefore can direct, control and supervise agencies who seek to exercise discretionary executive power[43]. Other scholars oppose the theory of the unitary executive and advocate a more functional approach for the interpretation of the text of the Constitution. They claim that the Necessary and Proper clause[44], that provides that Congress shall have the power " to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all powers vested by this Constitution in the government of the United States", grants Congress the power to structure the executive department and insulate subordinate officers from unfettered removal power of the President[45].

In addition to the questions on the constitutionality of independent agencies, questions arose as regards the constitutionality of the delegation of broad regulatory powers to both independent and executive agencies[46]. According to some scholars, the delegation of rulemaking powers to administrative agencies violated Article I, which provides that "All legislative powers herein granted shall be vested in a Congress of the United States".

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[42] U.S. Constitution, Article II, section 3.

[43] S. G. Calabresi and K.H. Rhodes, 'The structural constitution: Unitary Executive, Plural Judiciary', 105 *Harv. L. Rev* 1153 (1992). According to Lessig and Sunstein, the modern unitarian view as amongst others proposed by Calabresi and Rhodes, does not comport with the intentions of the framers of the Constitution. Lessig and Sunstein argue that history suggests that the framers understood Congress to have broad power to structure government arrangements as they see fit. Nevertheless, Lessig and Sunstein are of the opinion that the belief in a strongly unitary executive has considerable appeal and fits well with important political and constitutional values, like political accountability and coordination of the law. Believing that these interests have constitutional status, they have founded the arguments for a strongly unitary executive not on the history of the Constitution, but on a method to interpret the Constitution faithfully over time and which takes into account changed circumstances. The argument comes down to this. At the founding period, the existence of a degree of independence in administration could not realistically have been thought to compromise fundamental constitutional commitments to political accountability and the avoidance of factionalism. Today, by contrast, a strong presumption of unitariness is necessary in order to promote the original constitutional commitments. The legislative creation of domestic officials operating independently of the President but exercising important discretionary policymaking power now stands inconsistent with founding commitments. Lessig and Sunstein, 1994 *Colum. L. Rev* 1.

[44] U.S. Constitution Art. I, section 8, cl. 18.

[45] M.J. Breger en G.J. Edles, 2000, p. 1157.

[46] D. Schoenbrod, 'The delegation doctrine: Could the Court give it substance?', 83 *Mich L. Rev* 1223 (1985).

Despite the fact that many scholars advocated a more formal approach to the Separation of Powers principle, which would amount to the abolition of independent agencies and the re-introduction of the non-delegation doctrine, the US Supreme Court, has not taken these dramatic steps. As will be discussed later on, the US Supreme Court has instead legitimised the constitutional status of independent agencies and their broad regulatory powers by adhering to a more functional approach to the Separation of Powers principle.

3.2. The constitutional status of independent agencies: Supreme Court case law

3.2.1. Myers, Humprey's and Weiner

The first case concerning the status of independent agencies is *Myers v. United States*[47]. Myers was appointed postmaster for a four-year term at Portland, under a statute providing that postmasters "shall be appointed and may be removed by the President and with the advice and consent of the Senate". President Wilson removed Myers from office, prior to the expiration of this term, without the consent of the Senate. The government claimed Myers's removal was lawful because it is unconstitutional to limit the President's power to remove an executive branch official by requiring the Senate's agreement. The Supreme Court agreed with the Government and reasoned:

> *" the power to remove subordinates is inherently part of the executive power, which article II, section one, vests in a President of the United States".*
> *Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal…*
> *… To require him to file charges and submit them to the consideration of the Senate, might make impossible that unity and co-ordination in executive administration essential to effective action".*

The Court's considerations in *Myers* could be read in two different ways[48]. First *Myers* could be understood to mean Congress may not place any limits on the President's power to remove executive officers: or it could be read as embodying the proposition that, whatever the limits of presidential removal power, Congress could not cede to *itself* any role in removing

[47] 272 U.S. 52 (1926).

[48] L.H. Tribe 2000, p. 704.

government officials. The Court rejected the former reading in *Humprey's executor v. United States*, where it drastically narrowed the application of the Myers rule[49].

W.E. Humprey was a member of the FTC, who was nominated by President Hoover. On the basis of the Federal Trade Commission Act a FTC Commissioner could only be removed for cause, namely for 'inefficiency, neglect of duty or malfeasance in office'. President Roosevelt tried to remove Humprey on the ground that the aims and purposes of the administration with respect to the work of the Commission can be carried out most effectively with personnel of his own selection, but disclaiming any reflection upon the Commissioner personally or upon his services. Humprey never acquiesced in his action and filed a back pay suit. Relying on *Myers v. United States* the Government argued that Humprey's removal was not unlawful, because the removal provision of the FTC Act constituted an unconstitutional interference with the executive power of the President. The Court did not agree with the government this time. It stated that in *Myers* it only decided the narrow point that the President had the power to remove a postmaster of the first class, without the advice and consent of the Senate as required by Act of Congress. In the view of the Court the office of postmaster is so essentially unlike the office at issue in Humprey that the decision in *Meyers* cannot be accepted as controlling the decision in Humprey. Unlike Myers, who was a purely executive officer, a FTC Commissioner occupies no place in the executive department and exercises no part of the executive power vested by the Constitution in the President. In the opinion of the Court the character of the quasi-legislative and in part quasi-judicially powers of the FTC, justified the restrictions of the removal power of the President. Since the Court recognized and accepted that the independence of the agency was necessary for carrying into effect the legislative policies of the Act, it was willing to accept a more functional approach to the Separation of Powers principle by focussing on the goals and the nature of the powers of the FTC. Although the Court in fact followed a more functional approach to the Separation of Powers Principle, it's reasoning was not very strong, since it tried to reconcile the position of the FTC with the formal Separation of Powers principle by labelling the powers of the FTC as non-executive:

> "*The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct of indirect, of either of the others, has often been stressed and is hardly open to serious question"….*

[49] 295 U.S. 602 (1935).

> *The power of the removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as means of carrying into operation legislative and judicial powers, and as an agency of the legislative and the judicial departments…"*

The Supreme Court confirmed its ruling in *Humprey's Executor* in *Weiner v. United States*[50], a case which was comparable to *Humprey's Executor*. In *Weiner* the Supreme Court ruled that President Eisenhower's removal of a member of the War Claims Commission prior to the expiration of his term of appointment was invalid. In reaching this conclusion the Supreme Court, like in *Humprey's Executor*, endorsed its view that the nature of the function that Congress vested in the War Claims Commission, is the most reliable factor for drawing a conclusion regarding the President's power of removal.

3.2.2. INS v. Chadha, Buckley v. Valeo and Bowsher

The Supreme Court decided three cases that were of relevance for the position and powers of both independent and executive agencies in the seventies and eighties. These rulings were an important signal to Congress that it was illegal for Congress to retain supervisory powers over agency decision making after having delegated to those agencies discretionary powers. According to some commentators these rulings indicated that the Supreme Court had taken a more formal approach to the Separation of Powers principle and therefore posed a threat to the legality of independent agencies.

Immigration & Naturalization Services v. Chadha[51] concerned the legality of the legislative veto. The basic goal of the legislative veto was to allow Congress an opportunity to control or veto agency decisions, especially if agencies acted under statutes that gave them broad discretion, amounting in practice to lawmaking[52]. Chadha, an East Indian born in Kenya, remained in the United States, after his visa expired. He was ordered deported. The Attorney General legally suspended his deportation, allowing him to remain in the United States, for reasons of hardship. The statute, however, provided, that either the Senate or the House of representatives could, by resolution, overrule the Attorney General's suspension of deportation. In this case the House of Representatives enacted a resolution overturning the

[50] 357 U.S. 349 (1958)

[51] 462 U.S. 919 (1983)

[52] Breyer et al, 2002, p. 98.

Attorney General's decision. Accordingly the deportation proceedings were resumed and Chadha was ordered deported. The Supreme Court ruled that it was unconstitutional for Congress to reserve to itself the power to overrule an executive officer. According to the Court the veto was essentially legislative in purpose and effect. Therefore, Congress was obliged to comply with the constitutional provisions for the adoption of legislation, which require the affirmative vote of both Houses as well as the concurrence of the President. In the absence of the President's consent, legislation must pass each House by a two-thirds vote. The statutory provisions that empowered either House to overrule the Attorney General were an attempt to avoid these constitutional restrictions and therefore invalid. It follows from this ruling that Congress is not allowed to block the administration of the laws by executive officials, without having to follow the formal process of law making.

In Buckley v. Valeo[53] it was at stake whether Congress could create a Federal Election Commission that was composed of members that were appointed by the leadership of the Senate and the House and of two members that were appointed by the President. The Commission was structured in this way in order to enable the political leaders in Congress to control the Commission. Since the Commission was authorized to bring lawsuits to enforce restrictions on political fund raising, it was a very sensitive topic for the political parties. The Supreme Court declared that the appointments to the Commission were unconstitutional, since they did not conform with the requirements of the Appointments Clause[54]. So this was another unconstitutional attempt by Congress to supervise administration.

In *Bowsher v. Synar*[55] the Court embraced the second reading of *Myers* that Congress cannot delegate any role in removing officers to itself. By virtue of the Balanced Budget and Emergency Deficit Control Act of 1985 (known as the 'Gramm-Rudman-Hollings Act'), Congress delegated to the Comptroller General the power to review estimates of likely budget deficits to determine whether the estimated deficit will exceed a specified amount, and, if so, to determine program by program, according to statutorily specified rules, how much appropriated money the President must not spend. The relevant appointment statutes provided, that the President appoint the Comptroller General from a list of individuals, which

[53] 424 U.S. 1 (1976)

[54] By virtue of US Constitution, Article II, section 2, the President shall nominate, and by and with the advice and the consent of the Senate, shall appoint all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such Officers, as they think proper, in the President alone, in the Courts of Law or in the Heads of Departments.

[55] 478 U.S. 714 (1986).

were recommended by the Speaker of the House and the Senate President. The Senate had to confirm the appointment. Congress could remove the Comptroller General for cause at any time by Joint Resolution (which requires a presidential signature or a two-thirds Congressional override of his veto).

According to the Court the removal clause was unconstitutional:

> *"We noted recently "The Constitution sought to divide the delegated powers of the Federal Government into three defined categories, Legislative, Executive and Judicial….*
>
> *That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of government power.*
>
> *We conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of laws except by impeachment. To permit the execution of 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. …..The structure of the Constitution does not permit Congress to execute the laws…"*

To some critics the Court's ruling pointed to a revival of a formal Separation of Powers doctrine, meaning that a case against the constitutionality of independent agencies might also succeed. Although the Court did seem to follow a formal Separation of Powers approach in *Bowsher,* its ruling is not well grounded since it was not clear at all that Congress could actually control the administration. The Bowsher removal provision actually required presidential participation, for Congress's joint resolution of removal was subject to presidential veto. Moreover, the fact that Congress could remove the Comptroller General only 'for cause' pleaded against effective Congressional control. In fact, the Court had earlier argued a 'for cause' removal was precisely the element creating the independence from the President that justified delegation of judicial and legislative functions to an independent regulatory commission in *Humprey*. Thus, the proposition that the Comptroller General was in fact dependent of Congress by virtue of the removal provision was hard to maintain[56]. Although the result of *Bowsher* was not wrong, the Court could have supported the ruling more convincingly by giving more attention to the impact of the Congressional arrangement on the President, Congress and the Judiciary, and the relationships among them[57]. Like in *Myers, INS v. Chadha and Buckley,* Congress had sought to aggrandize its powers at the

[56] P. L. Strauss, 'Questions-A foolish inconsistency', *Cornell Law Review*, 1987, p. 498.

[57] P.L. Strauss, 1987, p. 517- 521.

expense of the President in *Bowsher*. In contrast, in *Humprey's* and *Weiner* Congress restricted the President's removal power through the 'for cause' limitation, but it did not involve a comparable expansion of the Congressional role.

With regard to the above it can be concluded that, neither *Chadha* nor *Buckley* or *Bowsher* suggest that the executive powers of the sort that were delegated to the Comptroller or the Federal Election Commission may be exercised only by officers removable at will by the President[58].

So unlike in *Humprey's* and *Weiner*, it can be stated that Congress tried to overreach and seize the powers of the other Branches in *INS v. Chadha*, *Buckley* and *Bowsher*. Although the latter three rulings do not cast doubt on the constitutionality of independent agencies as such, commentators are of the opinion that the results of the latter three rulings strengthen the constitutional scheme. The rulings create pressures on Congress to take responsibility for the political choices that are made. Members of Congress might wish that they could legislate generally and imprecisely, delegating policy decisions to agencies but retaining power to easily overrule the agencies when decisions particularly important to them were made. *Chadha*, *Buckley* and *Bowsher* deny them that option. Congress can delegate but then it has to live with that choice.

3.2.3. Morrison

Although the US Supreme Court has confirmed the constitutional status of independent agencies in *Humprey's* and *Weiner*, its approach was quite ambiguous since it did not became clear at all under what conditions the agencies tasks do not qualify as executive, but as quasi legislative or judicial[59]. Moreover, independent agencies frequently exercise functions similar to those performed by all three branches[60]. In *Morrison*[61] the Court finally acknowledged that *Humprey's* had introduced the problem whether the official functioned in an executive or in a 'quasi-legislative' or 'quasi-judicial' role. However, apparently recognizing the imperfection of its analysis in *Humprey's*, the Court accepted a more functional approach of the Separation

[58] Tribe 2000, p. 709 and P. R. Verkuil, 'The Status of independent agencies after Bowsher v. Synar', *Duke Law Journal*, 1986, p. 792 t/m 793. It is interesting to note that in footnote 4 of the Bowsher Opinion, the Supreme Court explicitly endorses this view.

[59] Tribe 2000, p. 706.

[60] P. Verkuil 1986, p. 784.

[61] 487 U.S. 654 (1988).

of Powers principle and insisted that the real question is whether the removal restrictions are of such nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analysed in that light.

With regard to the above, it might be concluded that the Court recognizes the constitutionality of independent agencies as long as Congress has not unacceptably encroached upon the powers of the President, no matter what the nature of the agency's activities are and no matter their position in Government.

3.4. Constitutional problems regarding the delegation of regulatory powers

As mentioned before, Congress delegates various powers to administrative agencies. Whereas the former paragraphs explained that Congress has limited authority in controlling agencies that are performing delegated powers, this paragraph explains to what extent Congress can actually delegate regulatory powers to administrative agencies.

Delegated powers may imply the operation of legislation upon an administrative agency's official' s determination of facts. Alternatively, Congress may grant authority to an agency to specify rules in an area where Congress itself has declared only general principles[62]. This means that agencies may formulate new rights and duties for the governed. It is mainly the last category of delegations that are in tension with the Separation of Powers principle. The legitimacy of Congress's powers to intrude upon private autonomy is founded upon the supposed consent of the governed that have elected members of Congress[63]. Therefore, it would be illegitimate for Congress to grant those powers to officials that are not directly accountable to the electorate. This does not mean that the executive branch lacks accountability, for the President is subject to the will of the people. However, the vesting of lawmaking power in Congress is designed to ensure the combination of deliberation and accountability that comes from saying that government power cannot be brought to bear on individuals unless diverse representatives, from various states of the union, have managed to agree on the details[64]. Despite these concerns of legitimacy, the US Supreme Court has consistently approved acts of Congress that have delegated broad regulatory powers to agencies. However, the Court has acknowledged the implicit constitutional requirements of consensual government under law by stipulating that a constitutional exercise of

[62] Tribe 2000, p. 979.

[63] Tribe 2000, p. 984.

[64] C. Sunstein, 'Is the Clean Air Act unconstitutional?' 98 *Mich L Rev* 1999, p. 336.

congressionally delegated powers requires Congress to 'lay down by legislative act an 'intelligible principle' to which the person or body authorized to act is directed to conform'[65].

3.5. The non-delegation doctrine: Supreme Court case law

The next sections discusses two cases that illustrate how the US Supreme Court deals with the delegation problem and how the court has reconciled this phenomenon with the Constitution. It is important to note that these cases are of relevance for the delegation of powers to both the executive and the independent agencies.

The first case *Whitman v. American Trucking Associations, Inc*[66], concerns the delegation of broad regulatory powers to EPA by virtue of the Clean Air Act. The Clean Air Act requires EPA to promulgate and periodically revise National Ambient Air Quality standards ("NAAQS") for each air pollutant identified by the agency as meeting certain statutory criteria. Section 109(b)(1) of the CAA instructs EPA to set NAAQS the attainment and the maintenance of which in the judgment of the Administrator, allowing an adequate margin of safety, are "requisite to protect the public health".

EPA issued final rules revising the primary and secondary NAAQS for particulate matter ('PM') and ozone in July 1997. Numerous petitions for review have been filed for each rule. EPA regarded ozone definitely, and PM likely, as non-threshold pollutants, i.e. ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero. This means that the only concentration for ozone and PM that is utterly risk free, in the sense of direct health impacts, is zero. However, the EPA did not set the permitted concentration level at zero, instead it set the level at 0.08 ppm level for ozone. EPA explained that its choice is superior to retaining the existing level, 0.09 ppm, because more people are exposed to more serious effects at 0.09 than at 0.08. In defending the decision not to go down to 0.07 EPA never rebutted the intuitive proposition, confirmed by data in its staff paper, that reducing the standard further than 0.08 would bring about comparable changes.

The Court of Appeals found that EPA did not satisfactorily explain the level of residual risk admitted by picking any non-zero level[67]. The Court of Appeals was of the opinion that EPA failed to provide any determinate criterion for drawing lines. It had failed to state intelligibly

[65] Tribe, 2000, p. 984 and 488 U.S. 361 (1989).

[66] 531 U.S. 457 (2001).

[67] 175 F.3d 1027 (D.C. Cir. 1999).

'how much is too much'. Although, the Court of Appeals found the statutory language of the Clean Air Act involved a unconstitutional delegation of power, it was of the opinion the EPA could remedy this constitutional weakness by giving a determinate standard for the interpretation of the statute. So its response to the unconstitutional delegation of power would not be to strike down the statute, but to give the agency the opportunity to formulate clear standards that would restrict the exercise of its powers. Since the Court of Appeals found EPA did not provide any clear standards, it declared its rules unconstitutional. The US Supreme Court did not approve the Court of Appeal's reasoning that the EPA's interpretation (but not the statute itself) violated the non-delegation doctrine:

> *"In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, paragraph I, of the Constitution vests "all legislative Powers herein granted … in a Congress of the United States." This text permits no delegation of those powers, and so we repeatedly have said that when Congress confers decision-making authority upon agencies Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform. We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute…The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise-that is to say the prescription of the standard that Congress has omitted –would itself be an exercise of the forbidden legislative authority. Whether the statute delegated legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.*
>
> *The scope of discretion the CAA allows is in fact well within the outer limits of our non-delegation precedents…*
> *(Congress) must provide substantial guidance on setting air standards that affect the entire economy. But even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did there, that statutes provide a "determinate criterion" for saying "how much (of the regulated harm) is too much".*
>
> *Section 109(b)(1) of the CAA, which to repeat we interpret as requiring the EPA to set NAAQS at the level that is "requisite"-that is no lower or higher than is necessary- to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent".*

Three important conclusions can be drawn from this opinion. Firstly, the US Supreme Court rejected the interpretation of the non-delegation doctrine put forward by the Court of Appeals,

according to which an agency could save a statute from unconstitutionality by limiting its own discretion through statutory interpretation. This interpretation interferes, indeed, with one of the fundamental points of the non-delegation doctrine, namely to ensure legislative rather than administrative judgements about the contents of federal law. The interpretation of the Court of Appeals would convert the non-delegation doctrine into something else, namely a general requirement of administrative transparency, a requirement with no obvious constitutional foundation and not in harmony with Article I[68].

Secondly, the Supreme Court approved that Congress had delegated broad regulating powers to EPA. By virtue of these powers EPA may create new duties for a category of polluters. Moreover, the Court accepted that Congress had referred the making of important policy decisions as regards the permitted level of air pollution to the administrative agency. The substance of the CAA is meagre and merely requires EPA to take the measures "that are requisite to protect health". However, for most pollutants, air quality at various levels is not 'either safe' or 'not safe' for there are diminishing degrees of risks associated with diminishing degrees of exposure. EPA should determine on what basis a particular level of residual risk is appropriate and it should formulate the ingredients of any judgements that a certain risk is too high[69]. EPA's decision will be based on a series of scientific, political, and economic judgements and compromises.

[68] C. Sunstein, 'Is the Clean Air Act unconstitutional'? 98 *Mich L Rev,* 1999, p. 351.

[69] C. Sunstein, 1999, p. 309.

Thirdly, it seems that the Supreme Court has followed a formal approach to the Separation of Powers doctrine by designating the agency's powers as 'not legislative' but rather executive. The application of the Separation of Powers doctrine in *Whitman* looks artificial for the effect of the agency's rules will be comparable with the effect of acts of Congress. If the Court had applied a functional approach to the Separation of Powers principle, it would have achieved the same result. This is also acknowledged by Justice Stevens, with whom Justice Souter joins, concurring in part and concurring in the judgement. He states that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is 'legislative power'. In the opinion of the concurring judge, it seems clear that an executive agency's exercise of rulemaking authority pursuant to a valid delegation from Congress is legislative. He notes, that as long as the delegation provides a sufficient intelligible principle, there is nothing inherently unconstitutional about it.

3.5.1. The delegation of accumulated powers

The opinion of the Supreme Court in *Mistretta v. United States*[70] indicates it is legitimate for Congress to delegate to independent agencies accumulated powers that are originally vested in the President, Congress or the Judiciary.

In *Mistretta* the Court upheld the constitutionality of the independent United States Sentencing Commission, a body composed of seven members, statutorily located in the judicial branch. The Commission had the legal power to write sentencing guidelines that are binding on federal judges who sentence criminal defendants. Congress wrote fairly detailed standards in the statute. The Court held the delegation of power did not violate the non-delegation doctrine and based the ruling on a functional Separation of Powers approach. The Court stated that in having adopted a flexible understanding of the Separation of Powers principle before, it has recognized the teaching of the Framers of the Constitution that the greatest security against tyranny, does not lie in a hermetic division between the Branches, but in a carefully crafted system of checked and balanced power within each Branch. In the view of the Court, Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch, is not unconstitutional, unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary. The Court thinks it is consistent with the Separation of Powers principle that Congress may delegate to the Judicial Branch non-adjudicatory functions that do not tread

[70] 488 U.S. 361 (1989).

upon the Prerogatives of another Branch and that are appropriate to the central mission of the judiciary.

The opinion makes clear that the Court accepts it to be legitimate that independent members of the Federal judiciary are involved in rulemaking. Therefore, this opinion confirms the power of Congress to delegate rulemaking powers to independent agencies that are to some extent independent from the President. Moreover, in the light of Court's reasoning in *Mistretta*, there are good reasons to believe the Court has approved the accumulation of different functions within an administrative agency, on the condition that the prerogatives of each of the Branches are respected and the combination of these functions are central to the mission of the agency.

3.6. A Functional approach to the Separation of Powers doctrine: maintaining the checks and balances (question 7)

It follows that the US Supreme Court is of the opinion that neither the text nor the history of the Constitution forbid Congress to create institutions (independent agencies) and legislative arrangements (delegation) that are not explicitly mentioned in the Constitution. The Court has realised it should give Congress enough space to adapt governmental structure to changing circumstances and policies.

Although the US Supreme Court has followed a quite formal approach to the principle of the Separation of Powers in some cases, like in *Bowsher and Whitman*, the opinion would have been the same in those cases in case the Supreme Court had followed a more functional approach: An approach in which it would have examined whether the 'checks and balances' between Congress, the President and the Judiciary were maintained.

Professor Strauss is a leading advocate of the functional approach to the Separation of Powers principle, which is well established in US legal doctrine and case law by now[71]. This functional approach recognizes that each of the three branches is the ultimate authority for a distinctive governmental authority type (legislate, executive of judicial). However, the

[71] Strauss 1984, p. 575-581, and Strauss 1987, p. 488-497.
Tribe 2000, at p. 139, also adheres to a more functional Separation of Powers approach: "The Court has repeatedly signalled it takes a pragmatic flexible view of differentiated governmental power-one that seeks not to "implement a hermetic division between the Branches" but rather to avoid "encroachment or aggrandizement by one branch against the others".

functional approach does not require administrative government below the apex to be strictly divided in three parts. In assessing Congressional arrangements the important question should be whether the relationships of each of the three named actors of the Constitution to the exercise of their powers is such as to promise a continuation of their effective independence and interdependence. Every Congressional arrangement can be approved as long as adequate checks and balances between the three branches are maintained and they can effectively exercise their core functions in controlling agencies and the exercise of their powers.

A functional approach to the Separation of Powers principle makes the differences between the independent agencies and other agencies less important. Each such agency is to some extent independent of the three named branches and to some extent in relationship with each of them. The continued achievement of the intended balance and interaction among the three named actors at the top of government, with each continuing to have effective responsibility for its unique core function, depends on the existence of relationships between each of these actors and each agency within which that function can find voice[72]. Both executive and independent agencies adopt rules, execute laws and adjudicate cases all pursuant to statutory authority. This conjoining of powers does not violate the Separation of Powers model since from a functional perspective the important fact is an agency is neither Congress nor President nor Court, but an inferior part of government. Each agency is subject to control relationships with some or all of the three constitutionally-named branches, and those relationship give assurance -functionally similar to that provided by the Separation of Powers notion for the constitutionally named bodies- that they will not pass out of control[73].

After having described that the US governmental structure as it exists today may well be reconciled with the Separation of Powers principle of the Constitution, the following paragraphs will analyse more deeply how the 'checks and balances' between the powers of the President, Congress and the Judiciary in controlling the actions of (independent) agencies are maintained in practice. In addition, they will look into how the participation of the public in administrative procedures forms a check upon the exercise of powers by the agencies.

4. Accountability (questions 2, 3, 9, 15, 18, 19)

4.1. Introduction (question 10)

[72] Strauss 1984, p. 580.

[73] Strauss 1984, p. 579-580.

Although independent agencies are to some extent independent from politics, this paragraph discusses that both Congress and the President have many instruments to control the agencies' actions. Agencies are accountable to Congress and the President, in that they should explain and account for their decisions to both institutions. Therefore, the citizens can control the agencies' actions through their representatives in Congress and through the President. Indirect political control by the electorate is not the only way to confer legitimacy upon the exercise of public powers. The following paragraphs will illustrate that in addition to representative democracy, participative democracy, meaning that interested parties have the right to participate in the agencies' administrative procedures, will contribute to the legitimisation of the agencies' actions.

4.2. Accountability: Congressional oversight (question 4)

4.2.1. Overview

Congress has a variety of means at its disposal to control agency action. Indeed, the most direct way for Congress to control the substance of the rulemaking process is to specify the degree of the agency's authority. When agencies formulate rules Congress doesn't like, agency decisions can be overruled by passing legislation or they can be rendered moot by the changing of the agency's jurisdiction[74]. However, it will be difficult for Congress to form an effective check on agencies activities through the formal legislative process, since this process is very heavy.

Congress can also influence agency's actions by placing restrictions on the appropriated funds. Moreover, Congress has tried to change the powers of agencies through appropriations bills in the past. Of particular importance was an appropriations bill containing provisions to limit the power of the EPA. Eventually, because of the threat of a presidential veto and controversies within Congress the proposals were not adopted[75].

Congress can also shape administrative decisions indirectly by applying political pressure through the use of committee reports, through budgetary, oversight or investigatory hearings and hearings on the nominations of administrators and through direct communications with

[74] Pierce et al, 1999, p. 42.

[75] C.R. Sunstein, Congress, ' Constitutional moments and the Cost-Benefit State' , 48 *Stan. L. Rev* 247 (1996), p. 282-284.

administrators[76]. The effectiveness of this last group of controls can be increased by requiring that agencies report to Congress before they act, by utilizing the General Accounting Office to investigate agency conduct and by employing the Congressional Budget Office to consider the economic effects of government programs.

4.2.2. How effective is congressional oversight?

Although it is proved that political oversight techniques are able to influence the agency work[77], the possibility of Congress threatening to use legislative sanctions, however, does not empower Congress to control the bureaucracy[78].

Professor Kagan acknowledges the limits of Congress's ability to impose harsh sanctions. Statutory punishments require the action of full Congress, which is difficult and costly to accomplish. In order to impose sanctions, Congress has to go through the formal legislative process, meaning majority support is not enough: it must gain the approval of either the President or two-thirds of both houses. Moreover, Kagan is concerned about Congress influencing agency behaviour for two reasons. The first reason relates to the identity of the parties most engaged in Congress's oversight system. The fire-alarm system usually goes off in the committee and subcommittee rooms of Congress and not on the floors of the House or Senate. Usually these committees are comprised of legislators whose constituents have a special interest in its jurisdiction and these legislators tend to develop strong ties to these organized interest groups that sound the fire alarms. In the view of Kagan, the administrative policy set by these players rarely will reflect the preferences of Congress as a whole or the general public. The second aspect of concern of congressional control lies in its reactive nature. Mostly Congress will come into action in response to outside complaints. These complaints will usually arise from a change in policy and not from the status quo. The result is that congressional oversight will tend to have a conservative quality. Moreover, these complaints will often be presented as an isolated problem, whereas they form part of broader regulatory issues. Therefore, Kagan concludes that complaint driven nature of congressional oversight, especially in combination with its reliance on committees, pushes toward the ad hoc rather than the systematic consideration of administrative policy.

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[76] Pierce 1999, p. 42.

[77] See for an overview of the use and effectiveness of Congressional oversight techniques, C.M. Kerwin, *How government Agencies write law and make policy*, Congressional Quarterly, 1999, p. 215.

[78] E. Kagan, ' Presidential Administration', *Harvard Law Review*, 2001, p. 2258

Like Kagan, Sunstein is sceptical of Congress's ability to reform administrative policy. He argues that the election of the 104th Congress signalled the transformation of America into a genuinely post New Deal regulatory state[79]. The Acts that were adopted during the New Deal were criticised for not comprising any mechanisms to evaluate regulatory performance. There was consensus on the following problems in existing government regulation: bad priority setting; government should favour flexible, market-based incentives rather than rigid command; government should recognize and counteract harmful intended consequences of regulations; government needs more information and should create better incentives to compile and provide accurate information; government should respond to both expert and citizen judgments in regulating risks; government should concentrate on basic ends rather than the means and should use performance standards rather than design standards. Congress tried to reform the administrative state by proposing several bills that challenged the basic foundations of the New Deal acts. In the regulatory arena cost-benefit balancing dominated the debate.

On 22 March 1995 Congress enacted the Unfunded Mandates Reform Act[80]. This Act contains two provisions that are interesting from the perspective of regulatory reform. First, the Act requires that a statement containing a "qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate" accompany significant regulatory action. This provision is largely procedural and does not make much of a difference[81]. Presidential Executive Orders on Federal regulation impose nearly identical requirements. The second provision is more ambitious and requires that agencies "identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule". The Act exempts agencies from these requirements if compliance would be inconsistent with the law or if the agency explains its reason for not selecting the least burdensome alternative. Despite the fact that the Act does not apply if other statutes prohibit from following it, it encourages agencies to choose cheaper ways of achieving regulatory goals.

[79] C.R. Sunstein, Congress, 'Constitutional moments and the Cost-Benefit State', 48 *Stan. L. Rev* 247 (1996), p. 249.

[80] 2 U.S.C. sections 1501-171.

[81] This obligation is subject to limited judicial review. If an agency fails to prepare the written statement a court may compel the agency to prepare such written statement. The inadequacy or failure to prepare such statement shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting such agency rule.

According to Sunstein, these two provisions of the Unfunded Mandates Reform Act offer cautious steps in the direction of general requirement of cost-benefit balancing[82].

In 1996 Congress enacted another Act strengthening Congress's role in reviewing agency rules. This Congressional Review Act requires agencies to submit all regulations to Congress and gives Congress an opportunity to 'veto' any rule through the formal process of lawmaking[83]. The effect of this procedure should not be overestimated. Before the adoption of the Act Congress already had the power to cancel a rule if it could get the President's concurrence (or override a presidential veto). Moreover, Congress is unlikely to get the presidential approval very often, since the President will defend agency rules most of the time[84].

Sunstein concludes that Congress might be ill-equipped to attempt major reform, at least if it does a great deal at the micro level[85]. Legislators are generalists and not specialists, and they have many issues to address. According to Sunstein such a group of generalists is prone to sharp internal divisions that are not subject to reasonable mediation without a good deal of specialization in regulation. These claims about the institutional capacities are reinforced by the way Congress has been split between two different sets of interests: technocratic forces seeking to discipline agency decisions with better policy analysis and forces of reaction seeking to stop agency action even when it would improve social well-being. From this perspective, Sunstein argues that the executive branch has a major advantage as it can more easily use specialized experience[86]. For this reason it may be best for Congress to limit its efforts to providing broad signals about what is wrong and to allow the executive branch, within limits, to provide solutions. Although Sunstein thinks Congress should restrict itself to providing broad signals, he argues Congress can improve the quality of legislation by laying down clearer standards and giving more guidance to the agencies on which factors they should take into account in making rules. For instance, he argues that Congress should amend the Clean Air Act to identify the factors for EPA to consider in making the judgement about appropriate national standards. Congress might offer substantive guidance by saying, for example, that EPA must consider risk severity, size of affected population and likelihood of adverse effects at various exposure levels. On the procedural side, it might require EPA to

[82] Sunstein, 1996, p. 273.

[83] 5 U.S.C.A. sections 801-808

[84] Pierce et al, 1999, p. 493.

[85] Sunstein, 1996, p. 286.

[86] Sunstein, 1996, p. 251, 252, 308.

identify, to the extent possible, the nature of the risks that it is reducing, and at the same time to quantify the relevant risk reductions[87].

Indeed, Presidents have been more successful in reviewing agency rules on their compliance with cost-benefit and cost-effective principles. The following paragraph discusses and evaluates the techniques the President has at his disposal to influence the agencies' actions.

5. Accountability: presidential oversight (questions 2,3)

5.1. Overview

As discussed in paragraph 2 the President has several instruments at his disposal to manage government and to control the exercise of discretionary powers. An important instrument for the President to control the actions of the administrative agencies is the President's responsibility to present the budget. All but a few administrative agencies must have their budgets approved by the President's policy-coordinating agent, the Office of Management and Budget (OMB). The process of budget approval gives the President the opportunity to review agency performance and establish program priorities. Since the enforcement of statutory responsibilities is tied to funding, the budget process gives the OMB a chance to emphasize priorities of the President that may or may not be instinctively shared by the agencies[88]. The budget process has an important impact on regulatory agencies since the Reagan administration[89]. The Reagan administration used its control over the budget of administrative agencies as part of an overall strategy to deregulate the economy and reduce the deficit. The Clinton administration utilized its control on the agencies' budget to eliminate the deficit. OMB plays an important role in reviewing and influencing the substance of proposed agency's rules. By virtue of the 'Take care duty' President Reagan was the first to institute, through two executive orders, a centralized mechanism for review of agency rulemakings[90].

[87] Sunstein 1999, p. 376.

[88] R.J. Pierce et al, 1999, p. 86-87.

[89] R. J. Pierce et al 1999, p. 86.

[90] Professor Kagan has written in an interesting and enlightening article how these Orders have marked the beginning of an era of Presidential Administration, E.Kagan, 'Presidential Administration', *Harvard Law Review*, 2001, p. 2272-2282.

5.2. Era of presidential administration

By virtue of Executive Order 12, 291[91] agencies were required to submit to OMB's Office of Regulatory Affairs (OIRA) for prepublication review any proposed major rule, accompanied by a 'regulatory impact analysis' of the rule, including a cost-benefit comparison. The order also contained substantial requirements for the agency's rules. "To the extent permitted by the law" an agency could regulate only if the benefits of regulating exceeded the costs and the choice among alternatives involved the "least net cost to society". Although the Order disclaimed any right on OMB or the President himself to dictate or displace agency decisions, the Order gave OMB a form of substantial control over rulemaking for under the Order OMB had the authority to determine the adequacy of an impact analysis. Moreover, OMB could prevent the publication of a proposed or final rule, even indefinitely, until the completion of the review procedure[92]. Executive Order 12498[93] added a mandate that each agency submit for OMB Review an annual regulatory plan listing proposed actions for the year. Consequently OMB got an earlier opportunity to influence agency rulemakings.

In the opinion of Kagan, the Orders provided in practice more consequences than any prior review system and enabled President Reagan to influence the agencies regulatory policies substantially. Whereas during the Bush era the strengthened role of the Presidency in reviewing agencies rules was maintained, presidential control of administration expanded significantly during the Clinton Presidency. It is important to note President Clinton issued Order 12,866[94] to replace Orders 12,291 and 12,498. The new Order confirmed that cost-benefit analysis and cost-effectiveness, to the extent permitted by the relevant statute, continued to serve as the basic principles for the assessment of regulatory decisions. An important innovation of the new Order is that independent agencies are subjected to the regulatory planning process. This provision enabled the OMB to request 'further consideration' of proposed rules that appeared in conflict with other agency action, the Order's regulatory principles or the President's priorities.

In the view of Kagan, President's Clinton's principal innovation in the effort to influence administrative action lay in initiating a regular practice of issuing formal directives to

[91] 46 Fed. Reg. 13193 (1980).

[92] Kagan 2001, p. 2278.

[93] 50 Fed. Reg 1036 (1985).

[94] 58 Fed. Reg. 51735 (1993).

executive branch officials regarding the exercise of their statutory discretion[95]. For instance, on 10 August 1995 President Clinton began a press conference announcing publication of a proposed rule to reduce youth smoking. He stated he would restrict by executive authority the advertisement, promotion, distribution and marketing of cigarettes to teenagers and he would authorize the Food and Drug Administration to initiate a broad series of steps all designed to stop sales and marketing of cigarettes and smokeless tobacco to children. The final versions of the rules eventually adopted by FDA reflected the heart of the proposals made by the President.

Kagan analyses the factors that contributed to Clinton's turn towards administration as a means of realizing his domestic policy ambitions[96]. Some of these factors have a more structural aspect, reflecting long-term trends that are likely to appear to other Presidents as well. She points to the trend that the American public has high and rising expectations about what a President should be able to accomplish. The public demands of the achievements of the President is strengthened by modern press, which makes insatiable demands and places impossible pressures on the office of the President. For these reasons, the pressure on the President to demonstrate action, leadership and accomplishment has grown. Yet the possibility of any significant legislative accomplishment has grown dim in an era of divided government with high polarization between Congressional parties. According to Kagan, given, these changes, it is not surprising that a President would turn to administration: a sphere in which he unilaterally can take decisive action. These factors also make it likely that other Presidents will continue Clinton's practices.

President's Clinton's assertion of directive authority over administration raises, unlike the procedural oversight power exercised under OMB review[97], constitutional questions. No Supreme Court case specifically addresses the question whether the President has the power to direct the executive agencies in exercising their discretionary powers. However, the conventional view is that by virtue of Separation of Powers arguments, implying that Congress must authorize presidential exercises of essentially lawmaking functions, the President does not have this power when Congress has only delegated discretionary powers to

[95] Kagan 2001, p. 2281.

[96] Kagan 2001, p. 2309.

[97] See par. 2.2.

executive branch officials[98]. Conversely Kagan argues the President, indeed, has the power to direct policy decisions of executive agencies (not of independent agencies)[99].

Whether or not Bill Clinton's directions were constitutional, Kagan's article illustrates very well the growing role of the President in managing the administrative state. The increasing role of the President is an inevitable consequence of the growth of the activities of administrative agencies making the coordination of their actions necessary. By virtue of a mandate from the electorate the President can ensure that inconsistencies and redundancies in regulation are resolved. These developments do no have to threaten the balance of power between the three named branches. Indeed, Congress keeps the power to shape the delegated powers and might as a response to growing presidential administration even restrict the scope of delegated powers. However, this would not mean that Congress should stop delegating broad regulatory powers. Instead, as said before, Sunstein argues Congress should improve the quality of legislation, for instance by giving more guidance to the agency on how to characterise the cost and benefits of regulatory action and on how to value those costs and benefits[100]. Furthermore, the courts continue to review the agency's actions, since presidential direction does not insulate the agency's actions from judicial review. However, increasing presidential involvement may stimulate courts to take a more deferential approach to policy choices being made by the agencies. Paragraph 7 will discuss this topic. The following paragraph discusses how interest groups might influence the decisions of agencies.

6. Accountability: Public participation (question 15)

6.1. Introduction

Procedural safeguards are important in enhancing the political and public accountability of agencies. Procedural safeguards make the reasoning and the factual predictions of agency decisions transparent enabling Congress, the President and the Judiciary to review whether the agency has acted within statutory limits and in a reasonable manner. Moreover, procedural

[98] It is important to note here, that is generally accepted the President does not have the power to direct the independent agencies to take certain decisions.

[99] Kagan 2001, p. 2326-2327. She argues that Congress usually has not stated its intent as regards the role of the Presidency when it has assigned discretionary authority to an executive official. At that moment an interpretative question arises and the choice of the correct interpretation would rest upon policy considerations, like accountability and effectiveness.

[100] Sunstein 1996, p. 293.

safeguards give an opportunity to interested parties to state their views on the proposed rules enabling the agency to take account of their interests.

There are five potential sources of procedural requirements that agencies must follow; agency rules, the Constitution (Due Process Clause), statutes, Executive orders and the common law[101]. Since, statutes are the dominant source of the procedures agencies must follow, this paragraph will only deal with the statutory procedural requirements. Two statutory sources are of relevance for the determination of which procedures the agency must follow, namely the Administrative Procedure Act (APA)[102] and the organic legislation that authorizes the agency to take the action under consideration. The APA was enacted in response to criticism of the bad procedural safeguards in the organic acts. The stipulations of those acts were inadequate to protect the private parties affected by agency actions from deprivation of their rights and to ensure that the agencies' actions were in the public interest. Furthermore, the lack of uniformity in federal agency decision-making procedures, made it difficult for parties to participate effectively in agency proceedings because they often could not predict in advance the procedures an agency would use to make a particular decision[103].

The APA comprises four procedures, i.e. two procedures that relate to the agencies adjudicatory powers and two procedures that relate to the agencies' rulemaking powers. The APA, however, does not direct the agency as to which procedure it should follow. The APA refers to the provisions of the agency's organic act as the basis for the determination which of the APA procedures the agency is required to use in taking particular type of actions. It is important to note that the APA applies to the activities of the executive as well to those of the independent agencies.

6.2. Distinction between adjudication and rulemaking

Two old US Supreme Cases are important for analysing the distinction between adjudication and rulemaking. In these cases the Supreme Court had to determine whether The Due Process Clause was violated. By virtue of this clause "No person shall… be deprived of life, liberty, or property, without due process of law" (XIV Amendment). The Due Process Clause only applies to the protected interests of individuals and does not protect the interests of a group of

[101] Pierce et al 1999, p. 221.

[102] 5 U.S.C. 77 551-706.

[103] Pierce et al 1999, p. 104.

people. In *Londoner v. Denver*[104] the US Supreme Court considered whether the City could assess and levy a special tax against individual property owners to cover the costs of paving a public street on which their property fronted, without affording the property owners any opportunity to be heard. The Court was of the opinion that the city had violated the Due Process clause. It put the following reasons forward:

> *"where the legislature of a State, instead of fixing the tax itself, commits to some subordinate the duty of determining whether, in what amount and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice….."*

In *Bi-Metallic Investment Co* the US Supreme Court[105] pointed out under what conditions acts of government do not come within the requirements of the Due Process Clause. Unlike *Londoner*, this case did not concern the levy of specific taxes on individuals, but an order of the City board increasing the valuation of all taxable property in Denver. In the opinion of the Court it would be impracticable that everyone should have a direct voice in the adoption of a rule that applies to more than a few people. The rights of the affected people are protected by their power, immediate or remote over those who make the rule. The Court denied the constitutional right of an individual to be heard before the adoption of a general measure. It distinguished *Bi-Metallic* from *Londoner* by pointing out that in the latter case:

> *"A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds…"*

According to Pierce, the distinction announced in *Londoner* and *Bi-metallic* lies at the core of administrative procedure. It is the basis for the modern relationship between agency rules and agency adjudication, and they remain crucial to legislative and judicial determinations of the types of procedural safeguards that should be required in various administrative decision-making contexts[106]. Pierce is of the opinion that the number of people affected or potentially affected is the dominant factor in determining whether the Due Process Clause applies at all to an agency action that affects protected interests.

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[104] 210 U.S. 373 (1908).

[105] 239 U.S. 441 (1915).

[106] Pierce et al, 1999, p. 250.

With regard to the above, it can be concluded that adjudication, in general, concerns the determination of individual rights and duties in the application of a general rule, whereas rulemaking comprises the formulation of norms of general applicability and future effect. This distinction is also reflected in APA Section 551 (5)-(9) that defines adjudication and rulemaking for the purposes of the APA[107]. In general the APA imposes, in harmony with the Due Process Clause, stricter procedural requirements in the exercise of adjudicatory than in rulemaking powers.

6.3. Adjudication

6.3.1. Formal adjudication

An agency is required to use the APA formal adjudication procedure when Congress has directed it to do so. By virtue of Section 554 APA the formal adjudication procedure is required when the organic statute stipulates that the adjudication should be determined "on the record after opportunity for an agency hearing". But even when statutes lack these words, courts tend to interpret the statute as providing for a hearing on the record in cases where the agency is imposing a sanction or liability on a party. In this way, the Courts can ensure the statutes are interpreted in harmony with the Due Process Clause[108].

The formal adjudication procedure is regulated in Sections 554, 556 en 557 APA. Together these sections create a procedure that resembles a civil trial procedure. The persons entitled to a hearing shall be timely informed of the time, place and the nature of the hearings, the legal authority and jurisdiction under which the hearing is to be held and the matters of fact and law asserted. Interested or affected third parties may be entitled to intervene in the proceeding[109]. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and

[107] It should be noted that the APA definition of adjudication is not the same as the Due process definition, for the APA definition includes many management and administrative functions (eg agency decisions to spend or not to spend money) that would not be regarded as adjudication in the conventional sense, Breyer et al 2002, p. 653.

[108] Breyer et al, 2002, p. 654.

[109] The right to intervene in adjudications is usually controlled by agency enabling acts and agency rules. In addition section 554 (b) APA serves as a basis for intervention. For the determination of which parties are entitled to intervene in the agency procedures the case law on the standing to obtain judicial review plays an important role.

true disclosure of the facts. The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision.

It is interesting to note these formal adjudication procedures often are presided over by an independent Administrative Law Judge (ALJ). This ALJ rules on offers of proof and receives relevant evidence, regulates the course of the hearing and may make or recommend the decisions. When the ALJ makes an initial decision that decision then becomes the decision of the agency without further proceedings, unless there is an appeal to the agency or the agency elects on its own motion to review the decision.

The Administrative Law Judges are almost entirely independent of the agencies at which they preside. The Office of Personnel Management of the President determines their pay, independently of any evaluations or recommendations made by the agency[110]. An agency can only take an action against an ALJ for good cause to be established and determined by another agency on the record after opportunity for hearing[111]. Another important feature of the ALJ is that he cannot be subject to supervision or direction by an agency employee with investigative or prosecutorial functions[112]. Moreover, stipulations are included that guarantee the AJL shall not have any ex parte communications on the merits of the proceedings with interested persons outside of the agency[113].

The idea of the drafters of the APA was to give the ALJs independence for whom they worked, and to provide public evidence that factual determinations were being made by independent officials. But the agency, on review of the ALJ's decision, was free to apply its policy to the facts found by independent officials[114].

[110] Pierce et al. 1999, p. 302 and section 5372 APA.

[111] Section 7521 APA.

[112] Section 554 (d) APA.

[113] Section 554 (d) APA and Section 557 (d) APA.

[114] ALJ's decide on "evidentiary facts", in that they decide what actually happened. Agencies, however, decide how policy impacts on those evidentiary facts. The term "ultimate fact" is used to refer to a factual determination after it has been imbued with the agency's policy input. For example, whether workers were distributing newspapers at street corners under the direction of the publisher would be an "evidentiary fact", but whether those workers would be "employees" within the scope of the National Labor Relations Act would be an "ultimate fact", Cf., National Labor Relations Board v. Hearst Publications, 322 U.S. 111 (1944)

Since this ALJ operates rather independently from the agency, he or she plays an important role in ensuring procedural fairness and impartial decision-making. Moreover, the internal division between fact finding and policy making, may remedy the negative effects of the conjoining of different powers in one agency.

6.3.2. Informal adjudication

About ninety percent of all agency decisions are made through informal adjudication. Therefore, it is remarkable that APA hardly deals with this category of procedures. In instances where a relevant statute does not require the adjudicatory decision to be made "on the record after opportunity for agency hearing", the APA provides little procedural requirements. Section 555 APA only provides that:

-A person compelled to appear in person before an agency or representative is entitled to legal counsel;

-A party can obtain a copy of any data or evidence she provides;

-A party is entitled to a brief statement of the grounds for denying any written petition.

In addition Due Process can be the source of judicially imposed procedural safeguards if the agency's action adversely affects an individual's interest in life, liberty or property[115]. However, the procedural safeguards mandated by Due Process vary substantially on the specific circumstances of the case at issue[116]. Therefore, Pierce argues the APA should be amended to include minimal procedural safeguards for informal adjudication. This would help the agencies in determining which procedures are appropriate for informal adjudication and would eliminate the need for agencies and the courts to attempt the difficult task of determining procedures appropriate for hundreds of types of adjudications through ad hoc application of the Due Process Clause.

6.4. Informal rulemaking

6.4.1. Informal or formal rulemaking

[115] Pierce et al, 1999, p. 343,

[116] The US Supreme Court has formulated a three-part balancing test for the determination of the procedural safeguards mandated under Due Process in Matthews v. Eldridge, 424 U.S. 319 (1979)
Pierce describes that this balancing test sometimes may require procedural safeguards that are also provided in formal adjudication. In other instances less strict requirements, like notice of the charges and informal opportunity to explain the facts, may be sufficient, Pierce et al 1999, p. 344.

When an agency chooses to take an action through rulemaking it has to make a choice whether it takes action trough informal or formal rulemaking. Formal rulemaking is much like a trial type proceeding, which includes the taking of testimony and cross-examination and decision making on the basis of the evidence presented. Therefore, formal rulemaking is a very time-consuming procedure. The order of the *Supreme Court in United States v. Florida East Coast Railway* was an enormous impulse for agencies to shift from adjudication to informal rulemaking to develop law and policy[117]. In this case the US Supreme Court, apparently aware of the delays and other dysfunctions attributed to formal rulemaking, confirmed that agencies were obliged to follow formal rulemaking procedures only when rules are required "by statute to be made on the record after opportunity for an agency hearing"[118].

6.4.2. The notice and comment procedure

As a consequence of *Florida East Coast* most of the rulemaking happens through the 'notice and comment procedure'. The process of informal rulemaking is regulated by section 553 APA and consists of three steps. Firstly, a general notice of the proposed rulemaking shall be published in the Federal Register. This general notice shall include, a statement of the time, place and nature of the public rulemaking proceedings, a reference to the legal authority under which the rule is proposed and either the terms or substance of the proposed rule or a description of the subjects and the issues involved. Secondly, after the agency has given notice it shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without the opportunity for oral presentation. Thirdly, after the agency has considered the relevant matter presented, the agency shall incorporate in the rules adopted a 'concise general statement of their basis and purpose'.

The basic notice and comment model of the APA seems rather simple and does not seem to impose too many procedural constraints on the agencies. However, the circuit courts have interpreted the provisions of the APA in a way that turned the informal procedures into new 'paper hearing' procedures[119]. The *Novia Scotia* case[120] decided by the 2d Cir Court illustrates very well the way federal appellate courts have transformed the notice and comment

[117] 410 U.S. 224 (1973).

[118] Breyer et al, 2002, p. 657.

[119] Breyer et al, 2002, p. 678.

[120] 568 F.2d 240 (2d Cir. 1977)

procedure into a more elaborate paper hearing process that generates a documentary record and full agency opinion as the basis for judicial review[121].

As regards the substance of the administrative record the Court ruled:

> *"If the failure to notify interested parties of the scientific research upon which the agency was relying actually prevented the presentation of relevant comment, the agency may be held not to have considered all "the relevant factors". To suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether".*

As regards the obligation to formulate a 'concise general statement' the Court ruled:

> *" Appellants additionally attack the "concise and general statement" required by section 553 APA as inadequate. We think in the circumstances, it was less than adequate. It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered. The agencies certainly have a good deal of discretion in expressing the basis of a rule, but the agencies do not have quite the prerogatives of obscurantism reserved to legislatures".*

As a result of cases like *Novia Scotia* the agencies should publish in its public notice the factual and scientific basis of a proposed rule. It would indeed be impossible for the public to deliver high quality comments on a proposed rule when such data is not included in the notice. By imposing the requirement to include scientific and factual data the courts have prevented formal rulemaking procedures from becoming useless. Another consequence of *Novia Scotia* is that the agencies should explain in the preambular statement accompanying a final rule their grounds for the decision, including their reasons for rejecting adverse outside comments on proposed regulations and the agency data and analysis disclosed in agency documents[122].

The procedural requirements that were imposed by the courts have posed heavy burdens on the administrative process resulting in the so-called 'ossification' of the administrative process. The ossification of the administrative process became worse, because some courts went beyond the requirements of detailed explanation and a 'paper hearing' by requiring a limited trial-type hearing in notice and comments procedures. Excessive judicial review has slowed the pace of rulemaking at all agencies. Promulgation of a single major rule often

[121] Breyer et al, 2002, p. 689.

[122] Breyer et al, 2002, p. 690.

requires five to ten years and tens of thousands of agency staff hours, with only a 50 percent probability of judicial affirmation of the resulting rule[123]. Consequently, instead of using the rulemaking process, the agencies issued interpretative rules or policy statements that are not subject to the notice and comment procedure.

The Supreme Court seems to have recognized the adverse effect of excessively demanding judicial review on the rulemaking process. In this respect the opinion in *Vermont Yankee*[124] is of great importance, since it put a halt on the development of further judicial requirements going beyond 'paper hearing' rulemaking. In this opinion the Court states agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are not free to impose them if the agencies have not chosen to grant them. Although this opinion to some extent relieves the administrative burdens of some agencies, the remaining requirements of keeping an adequate administrative record and providing adequate justification still generate an enormous amount of work for the agencies. Therefore, various proposals have been made to improve administrative procedures. One suggestion is to relax the demand for extensive records and elaborate agencies' explanations and hard-look judicial review[125]. Other suggestions are referral of major rules to Congress for adoption through 'fast-track legislation', bypassing judicial review in favour of direct political control, or greater reliance on executive oversight and control of rulemaking.

7. Accountability: Judicial review (Questions 9, 18, 19)

7.1. Introduction

Affected parties have a constitutional right to judicial review if an agency action arguably infringes a constitutional right. However, the issue of whether a party has a constitutional right to judicial review of an agency action arises infrequently, because the legislature usually provides an explicit statutory right to judicial review[126]. Congress usually has provided that final agency actions are subject to judicial review in accordance with the provisions of the APA.

[123] R.J. Pierce, ' Seven ways to deossify agency rulemaking', 47 *Admin. L. Rev*. 1995, p. 65.

[124] 435 U.S. 519 (1978).

[125] Breyer, 2002, p. 735.

[126] Pierce et al, 1999, p. 125.

Section 702 refers to the standing requirements for judicial review, by providing that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof". The US Supreme Court applies a two-part test to analyse whether a party has standing[127]. At first, the question has to be answered whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. Secondly, the question has to be answered whether the interest sought to be protected is arguably within the zone of interests protected or regulated by the statute or constitutional guarantee in question. This first part of the standing test is based on the requirements of Article III of the Constitution, that limits the powers of the Federal courts to the resolution of "cases and controversies". The second part of the standing test recognizes that, to the extent permitted by the Constitution, it is up to Congress to decide which parties have the power to obtain judicial review of an agency action. In theory the two part standing test may seem clear. However, both the US Supreme Court and the lower courts have applied it in different ways for many different purposes, producing seemingly inconsistent results[128].

7.2. Scope of judicial review of the agencies' statements of reasons and facts

Since the APA usually is determinant for the judicial scope of review, both the independent and the executive agencies' actions are reviewed under the same standards. Pursuant to section 706 APA the reviewing courts shall determine whether the agencies' findings of facts and reasons are "arbitrary and capricious" and whether the action is not in accordance with the law. In case the agency decision is taken on the record after opportunity for hearing, the agencies statement of reasons and facts will be reviewed under the more strict "substantial evidence test". The original version of the "arbitrary and capricious" test for the review of the agencies' findings of facts and reasons was quite deferential to the agencies' findings. However, since courts have been imposing stricter procedural requirements on the agencies when acting through the notice and comment procedure, they have been scrutinizing the agencies' statement of facts and reasons more thoroughly. Therefore, it seems the "arbitrary and capricious" standard and the "substantial evidence" tests have converged.

While the Supreme Court in *Vermont Yankee* has put a halt on courts taking a hard look on the procedures that agencies should institute for taking their actions, it has not yet addressed in a definitive way to what extent the reviewing courts should engage in a detailed scrutiny of

[127]Association of Data Processing Service Organizations vs. Camp, 397 U.S. 150 (1970).

[128] Pierce et al, 1999, p. 139.

the substantive basis for agency actions that are based on scientific studies. This issue is heavily debated in the USA at this moment. The debate focuses on the question whether or not a substantive 'hard-look doctrine' should be accepted. Pursuant to this doctrine a court would be required to attempt to understand and to assess in detail the data and methodology an agency used to address a complicated scientific issue[129].

Advocates of the hard-look doctrine point out that a hard-look approach would stimulate agencies to take good policy decisions. Political controls would not be adequate to assure agencies make wise policy decisions[130]. Opponents of the hard-look approach point out the courts should defer to the agencies' statement of reasons and facts for most of the agencies' decisions are policy decisions based on the interpretation and determination of uncertain scientific facts. A more detailed consideration of the facts and reasons would not eliminate the need to make policy judgements in favour of one or the other risk. Therefore hard-look review would merely result in delay[131].

Indeed, one may agree with the opponents that it can be questioned whether the hard-look approach will generate better policy decisions. From the perspective of accountability and from the perspective of expertise, the agencies are in a better position than judges to assess complicated facts and scientific data. Therefore, it would be very inefficient when the judges would redo the agency's work and would require the agencies to take a new decision on the basis of their assessment of the facts. With regard to these factors, it would be better if the courts take a more deferential approach to the determinations of facts and reasons by the agencies and only intervene when agencies evidently have made errors in interpreting the facts and justifying their policy decisions.

For now, as will be discussed in the next paragraph, the opinion of the Supreme Court in *Motor Vehicle Manufacturers' Association v. State Farm* provides the standard for the scope of review under the "arbitrary and capricious" test[132].

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[129] Pierce et al, 1999, p. 388.

[130] Rodgers, 'A hard look review at Vermont Yankee: Environmental law under close scrunity', 67 *Geo L.J.* 699 (1979).

[131] Breyer, Vermont Yankee and the courts' role in the Nuclear Energy Controversy 91 *Harv.L.Rev* 1804 (1978).

[132] 463 U.S. 29 (1983).

7.2.1. Hard look review: Case law of the Supreme Court

The National Highway Traffic Safety Administration (NHTSA) had issued a rule that rescinded the passive restraint requirement contained in the Modified Standard 208. This standard required that each car was either equipped with automatic seatbelts or with automatic airbags. The agency's changed view of the standard was related to the election of President Reagan and his deregulation policies. In the view of the Court the revocation of the rule had to be tested under the "arbitrary and capricious" standard. It described the scope of review under this test as narrow and warned that a court is not to substitute its judgment for that of the agency. Nevertheless the Court found the agency must articulate a satisfactory explanation for its action, including a rational connection between facts found and the choices made. The Court then formulates under which circumstances an agency rule would be "arbitrary and capricious":

> *"… if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before it, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise*."

In applying this standard of review the Court reversed the NHTSA's revocation of the rule on two different bases. The first reason for finding the rescission "arbitrary and capricious" is that NHTSA gave no consideration at all to the option of modifying the Standard to require that airbags would be installed. The agency had determined detachable automatic belts would not attain anticipated safety benefits because so many people will detach the mechanism. However, given the effectiveness ascribed to airbag technology by the agency, the Court was of the opinion that the mandate of the Safety Act to achieve traffic safety would suggest that the logical response to the faults of the detachable seatbelts would be to require the installation of airbags. Although the Court confirmed, it generally defers to the policy alternatives being made by the agency, the airbag option was more than a policy alternative to the passive restraint standard: it was a technological alternative within the ambit of the existing standard. Therefore, the agency should have addressed this alternative way of achieving the objectives of the Act and should have given adequate reasons for its abandonment.

The second reason the Court found the revocation of the rule "arbitrary and capricious" was that the agency was too quick to dismiss the safety benefits of automatic seatbelts. NHTSA's critical finding was that, in the light of the industry's plans to install readily detachable belts, it could not reliably predict even a 5 per cent increase as the minimum level of used increase. The Court thought there was no direct evidence in support of the NHTA's finding that detachable automatic belts cannot be predicted to yield a substantial increase in usage. The empirical evidence on the record reveals more than a doubling of the usage rate experiences with manual belts. Although the Court explicitly acknowledged that it should in general defer to an agency's finding with respect to the uncertainty about the efficacy of certain measures, the agency had failed to explain how the findings of less than 5 per cent increase could be reconciled with the evidence of the increased use of manual belts.

It is interesting to note that the majority of the Court did not deal with the question whether the change of policy as a consequence of the election of a new President, should have had implications for the scope of review under the "arbitrary and capricious" standard. The majority confirmed that every change of policy should be based on a reasoned analysis, indicating that presidential involvement in the agency's rulemaking process would not lead to a different review standard. On the other hand, the dissenting judges were of the opinion that the change in administration brought about by the people casting their votes, is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of a regulatory program. Therefore, they were of the opinion that the agency is entitled, within the bounds established by Congress, to change policy in the light of the philosophy of the administration, indicating the Court should defer to those policy choices.

The reasoning of the Court in *State Farm* illustrates that the Court thinks the "capricious and arbitrary" standard empowers the courts to review carefully whether the agency has considered all relevant scientific facts and whether its decision can be justified on the basis of the evidence of the record. However, since the Court makes some remarks on the deference to the agency's choice of policy alternatives and the agency's findings on uncertainty, the opinion of the Court does not indicate that courts should assess the agency's work in detail or should substitute the agency's assessments. Since the NHTSA left out a policy alternative it had previously deemed effective and since its record contained contradicting evidence, the

Court's reversal of the decision can very well be reconciled with this deferring approach. So, therefore it might be argued the Court has not approved the hard-look approach[133].

7.3. Interpretation of the law: Chevron

Before the rise of the regulatory state, it was relatively clear that it was for the courts and not the executive to "say what the law is"[134]. Consequently, the courts reviewed thoroughly whether the administration had respected the law. However, in the twentieth century, the role of the courts in determining the law was complicated, because Congress frequently had delegated discretionary, policy-making powers to administrative agencies. As a consequence of these developments courts sometimes said that agencies were entitled to interpret the statutes they had to administer and that courts would defer as long as the agencies' interpretations were reasonable[135]. This idea represented the principles of administrative autonomy, limited judicial interference with the process of regulation and democratic accountability. At the same time, many courts continued to insist that the interpretation of statutes was first and foremost a judicial task.

It was not until 1984, when the Court decided the famous *Chevron*[136] case, that it became clear under what circumstances the courts should defer to the agencies' interpretations of the law. In *Chevron* the Supreme Court decided that the courts should defer to the agencies' interpretations of the law, if the law permits the agencies to make policy judgements and if the agencies' interpretations are reasonable[137].

In *Chevron* the interpretation of the words "stationary source" in the Clean Air Act were at issue. Under influence of the Reagan administration, the EPA promulgated rules that allowed states to define an entire plant, containing many different kinds of pollution-emitting units, as if it were a single "stationary source". Thus, a firm could modify one unit within the plant and increase its emissions, or introduce a new unit, without complying with requirements of

[133] This opinion is also advocated by H. A. Brooks, 'American Trucking Assocations v. EPA: The D.C. Circuit's missed opportunity to unambiguously discard the hard look doctrine', 27 *Harv. Envtl L. Rev*. 259, p. 272.

[134] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed.60 (1803).

[135] Sunstein analyses these developments in his 'Law and Administration after Chevron', 90 *Colum. L. Rev.* 2071, p. 2072-2082.

[136] 467 U.S. 837 (1984).

[137] Sunstein, 1990, p. 2083-2085, R.J. Pierce, 'Chevron and its aftermath: Judicial review of agency interpretations of statutory provisions' , 41 *VNLR* 301.

the Clean Air Act. It could do this as long as pollution from the plant, considered as a whole, did not increase, because it reduced equivalent emissions from other, existing units (bubble concept). The Court of Appeals held that the statute did not permit the EPA to allow a 'bubble-like' definition of "stationary source", because it would undermine Congress' goal of speedy compliance with national air quality standards.

The Supreme Court did not approve the Court of Appeal's approach. The Supreme Court formulated two important questions that may arise when a court reviews an agency's construction of the statute it administers. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute. Rather if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

In the light of these principles the Supreme Court thought it was clear the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Based on the examination of the legislation and its history, the Supreme Court confirmed Congress did not have a specific intention on the applicability of the bubble concept. According to the Court, EPA's use of the 'bubble concept' was a reasonable policy choice within the ambit of the Clean Air Act, which seeks to accommodate progress in reducing air pollution with economic growth. Therefore, it unanimously reversed the judgement of the Court of Appeals. The Court justified the deference to the agencies' policies decisions on the following grounds:

> "*Judges are not experts in the field, and are not part of either political branch of the government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's view of wise policy to inform its judgements. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the government to make such policy choices-resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in the light of everyday realities."*

The relevance of *Chevron* is that it replaced a statute-by-statute evaluation of the agency's discretion with an across the board presumption that in case Congress has not expressed a clear intent, the agency was meant to enjoy discretion[138]. This discretion is based upon an implicit congressional intent of law-interpreting power, which can be justified on the ground that the resolution of ambiguities in statutes is sometimes a question of policy as much as it is one of law. As a consequence of their expertise and accountability to the President, agencies are in a better position than the courts to make policy choices within the ambit of the law[139].

8. Conclusion

The position of independent agencies with broad regulatory powers may well be reconciled with the Separation of Powers Principle of the US Constitution. It follows from the case law of the Supreme Court that it was never the intent of the Framers of the Constitution to make a hermetic division of government power into three branches. Congress may make any arrangement, not explicitly mentioned in the Constitution, as long as all of the three branches can effectively perform their core function and the checks and balances between the three powers are maintained.

The more functional checks and balances approach to the Separation of Powers principle has been well established in US doctrine and case law by now. In case independent agencies are created each power should be able to check and balance the powers of the other powers in controlling the agencies' actions. The President, Congress and the Judiciary continuously check the actions of both the independent and executive agencies. In addition, a fourth power, not mentioned in the Constitution, plays an important role in maintaining the checks and balances between the three original powers. Indeed, the public forms an effective check on the agencies' actions through the participation in administrative procedures. Judicially imposed procedural requirements, enforce the agencies' duty to adequately respond to comments being made by the public on proposed rules.

From the analysis, it follows that from a legal perspective the way the four actors control the activities of the independent agencies does not differ much from the way they control the activities of the executive agencies. Although the President will give more deference to the policy choices being made by independent agencies, it does not seem that the constitutional

[138] Scalia, 'Judicial Deference to agency Interpretations of the law, 1989, *Duke L.J*. 511.

[139] Sunstein 1990, p. 2087-2088.

position of independent agencies is very different from the constitutional position of executive agencies. The analysis shows each of the three branches and the public have their own role in controlling the agencies' actions.

The way the four actors perform their supervisory roles is a dynamic process and may adapt to changing circumstances. Indeed, due to the enormous growth of the activities of executive and independent agencies there was a growing need for a unitary force that would coordinate the agencies' activities. Due to a lack of institutional capacities, Congress has not been able to lay down a general philosophy for the administrative state, in order to ensure that the agencies actions are cost-effective, beneficial and that the agencies take account of the effects of their decisions on the policies that are formulated by other agencies. These circumstances explain why the Reagan era was the beginning of an era of presidential administration.

The growing importance of the presidential role does not have to upset the checks and balances between the different actors. Up till now, there does not seem a clear trend for courts to give more deference to agencies policies' that were directed by the President. As a matter of fact, the paper has illustrated that the courts have responded to the tremendous growth of administrative rulemaking by imposing strict procedural and substantive requirements on the agencies.

Finally, a lot of the criticism of the agencies' activities can be traced back to the quality of the organic acts. Often, Congress has failed to give substantial guidance to the agencies on which factors they should take into account in formulating rules and on how to evaluate the benefits and costs of their actions. Therefore, various proposals have been made on how Congress could improve the quality of legislation. For instance, it could improve the quality of legislation by laying down clear substantive principles and by trying to formulate legislation that is based on market-based incentives rather than on command-control.

In case Congress succeeds in improving the quality of legislation, there may be less need for the delegation of broad regulatory powers, administrative rulemaking and for presidential administration.