THE PRICE OF "POLITICAL INDEPENDENCE": THE UNCONSTITUTIONAL STATUS OF THE LEGAL SERVICES CORPORATION

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The Legal Services Corporation ("LSC") was born in controversy and has lived in it ever since. Because lawyers and the courts have become in recent times far more potent agents of social change than other governmental structures, it is hardly surprising that the transcendent legal and political issues relating to federally funded legal services concern the government's control of the activities of thousands of lawyers litigating at the federal taxpayers' expense in state and federal courts throughout the country. The avowed congressional purpose of the Legal Services Corporation Act ("LSCA")[1] was to free the federally funded legal services program from presidential supervision. This article examines the constitutionality of Congress' invention — the Legal Services Corporation — for accomplishing this purpose. Part I briefly outlines the genesis of the LSC and its statutory structure. Part II examines the structure and functions of the LSC in light of the Supreme Court's decisions enforcing the constitutional separation of powers. A consequence of this doctrine is that certain statutory functions assigned to the Board of Directors of the LSC can constitutionally be performed only by "officers of the United States." Members of the LSC's governing board must therefore be considered government "officers" in the constitutional sense, notwithstanding contrary language in the LSCA. Because some of the government functions performed by the LSC are executive in nature, the President must have constitutional authority to direct and control their performance. By stripping the President of all power to remove LSC board members, the LSCA effectively denies the President of supervisory authority over his subordinates. This article thus concludes that the LSCA violates the constitutional separation of powers.

I. THE HISTORICAL BACKGROUND OF THE LEGAL SERVICES CORPORATION

Prior to enactment of the LSCA, the federal legal services grant program was administered by the Office of Economic Opportunity, the Executive Branch agency that administered grantmaking under the Economic Opportu-

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[1] Legal Services Corporation Act, 42 U.S.C. §§ 2996-2996l (1988).

nity Act.[2] The legal services program was marked by controversy throughout its history, particularly during the Nixon Administration. In early 1973, for example, the Director of the Office of Economic Opportunity withheld funds appropriated for the Community Action Agencies which provided legal and other services. This and other assertions of presidential impoundment authority were struck down by the courts and led to congressional enactment of the Budget and Impoundment Control Act.[3] Critics maintained that the program inappropriately devoted federal funds to controversial "social engineering" litigation, while supporters contended that the efforts of Administration officials to curb such "abuses" constituted improper political interference in the delivery of legal services.[4] This controversy over Executive Branch involvement in the funding and delivery of legal services ultimately led to the enactment of the LSCA, which was designed to remove the legal services grant program from the Executive Branch.

Although one of the Act's express purposes was to free "the legal services program . . . from the influence of or use by it of political pressures,"[5] the language and legislative history of the Act made clear that the "political pressures" from which the Corporation was intended to be freed related solely to the Executive Branch, not to Congress.[6] For example, both the House and Senate Reports of the initial authorization of the LSC in 1974 quoted approvingly from the President's Commission on Executive Reorganization: "[W]e believe strongly that its (the Legal Services program's) retention in the Executive office of the President is inappropriate."[7] The LSC was to be "free from any outside interference, political or otherwise . . . [and to] remain accountable to the public through, (sic) Congressional appropriations and the Presidentially-appointed Board of Directors . . . ."[8] The House Report on the 1977 reauthorization of the LSC, however, abandons any pretense that the LSC was to be as accountable to the President as to the Congress. It states, "[t]he

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[2] *See* Economic Opportunity Act, § 222(a)(3), 42 U.S.C. § 2809(a)(3) (1967).

[3] Local 2677, American Fed. of Gov't. Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973). *See* Train v. City of New York, 420 U.S. 35 (1975); Sioux Valley Empire Electric Ass'n v. Butz, 504 F.2d 168 (8th Cir. 1974); State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973).

[4] *See* JOHN A. DOOLEY & ALAN W. HOUSEMAN, LEGAL SERVICES HISTORY 15-31 (1984); Warren E. George, *Development of the Legal Services Corp.*, 61 CORNELL L. REV. 681, 694 (1976).

[5] 42 U.S.C. § 2996(5).

[6] There is very little legislative history other than the House and Senate Reports in 1974 and 1977.

[7] H.R. REP. No. 247, 93d Cong., 1st Sess. 1 (1973); S. REP. No. 45, 93d Cong., 1st Sess. 3 (1973).

[8] H.R. REP. No. 247 at 3. *See* DOOLEY & HOUSEMAN, *supra* note 4, at 19 ("A central theory behind the LSC Act was to insulate LSC and the legal services program from political interference and control by the White House (Of course, LSC was still accountable to and ultimately controlled by Congress.)"). *See also* S. REP. No. 45 at 4, 6 & 9-10.

Legal Services Corporation Act assures that the Corporation is accountable directly and only to Congress."[9] The Committee Report reaffirmed that some of the Act's "key provisions [were] designed to protect the Corporation from inappropriate control by the Executive Branch . . . ."[10] The Report also stressed that "the entire statutory scheme . . . makes clear the congressional understanding of the critical importance of the Corporation's independence from control by OMB."[11] The Senate Report contains similar statements, and every expression of congressional intent, from supporters and opponents alike, is consistent with this understanding of the Congressional scheme.[12]

To insulate the legal services grant program from any claim of presidential supervisory authority, Congress invented a nongovernmental entity — the Legal Services Corporation — to administer the LSCA. Under the Act, the LSC is a "private non-membership, non-profit corporation" established "in the District of Columbia."[13] It "shall not be considered a department, agency, or instrumentality of the Federal Government," and its Board members are not to be "considered officers or employees of the United States."[14]

In keeping with the LSC's statutory designation as a private corporation, a Board member "may be removed by a vote of seven [other] members [of the Board] for malfeasance in office or for persistent neglect or inability to discharge duties or for offenses involving moral turpitude, and for no other

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[9] H.R. REP. NO. 310, 95th Cong., 1st Sess. 6 (1977).

[10] *Id.*

[11] *Id. See also*, notes 22 & 23, *infra*. The Office of Management and Budget (OMB), of course, is located within the Executive Office of the President, 31 U.S.C. § 501 (1988), and is subject to the President's exclusive direction and control, 31 U.S.C. § 502(a) (1988).

[12] An earlier Senate version of the bill contained a provision that would have expressly prohibited any department or employee of the United States from exercising "any direction, supervision, or control with respect to the Corporation . . . to the attorneys providing legal assistance under this title, or eligible clients receiving legal assistance under this title." S. REP. NO. 45 at 44. The deletion of this provision from the final bill arguably suggests, by negative inference, that Congress intended to allow officers of the United States, presumably including executive officers, to exercise some supervision over the Corporation. The evidence for such an inference, however, is thin and ambiguous. First, the inference would be based solely on Congressional silence and would run contrary to the entire thrust of the rest of the Act. Moreover, while the legislative history provides no explanation of why this prohibition was deleted, it is likely that the prohibition was simply viewed both as superfluous in light of the rest of the statute and as capable of being misconstrued to limit the equitable powers of a judge, who is an officer of the United States, in cases involving the Corporation's activities. This explanation gathers additional credence from the fact that there is no provision in the Act providing for judicial review or a private cause of action to enforce the Act.

[13] 42 U.S.C. § 2996b(a).

[14] *Id.* at § 2996d(e)(1).

cause."[15] By vesting authority to remove Board members exclusively in the Board itself, Congress thus denied the President any role in the matter. Congress further insulated the LSC from executive control by providing that the Office of Management and Budget ("OMB") may not propose a budget for LSC; however, it may submit comments on the Corporation's annual budget request at the time it is transmitted to Congress.[16] Furthermore, Congress freed the Corporation from all reporting and regulatory requirements of the OMB and the Department of Treasury. According to the Act, the LSC does not draw checks on a Treasury account, but is issued a letter of credit which it draws down on an "as needed" basis without any requirement of justification.[17]

Congress, on the other hand, retained significant control over the activity of the LSC and its grantees through specific provisions in the Act and subsequent appropriations bills as to the type of political and litigation activity that LSC-funded providers may undertake.[18] "These include bars on the use of funds . . . for, *inter alia*, criminal defense work, political activity, labor organizing, strikes, abortion and school desegregation litigation, and lobbying."[19]

II. THE LEGAL SERVICES CORPORATION ACT VIOLATES THE SEPARATION OF POWERS DOCTRINE

The constitutional question raised by Congress' creation of the LSC is whether divesting the President of all authority to supervise or otherwise influ-

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[15] *Id.* at § 2996c(e). *But see infra* Section II.B.

[16] 42 U.S.C. § 2996d(e)(2). Power to control the budgetary request of Executive Branch departments and agencies is among the President's most important methods of establishing the policies and arranging the priorities of the federal bureaucracy. That the Congress has authorized the President to "comment" upon the LSC's budget proposal is hardly significant; presumably, Congress has no power to restrict the President, or anyone else, from commenting on the LSC's budget proposal. In any event, the ability to "comment" on a federal agency's budget proposal is a far cry from the ability to establish the agency's budget proposal. To be sure, the President's power to veto any congressional appropriation for the LSC theoretically ensures that he retains a substantial measure of control over the Corporation's spending authority, but he has this power over the congressional appropriation for the Judicial Branch and the Legislative Branch as well. And vetoing the LSC's appropriation bill would come at no small cost, for it is traditionally included in an omnibus spending measure covering the Departments of Justice, Commerce, and State, the Judicial Branch and other federal agencies. *See* Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, 104 Stat. 2101 (1990).

[17] *See* Memorandum of Understanding Between the Legal Services Corporation and the Department of Treasury (Dec. 12, 1980); Memorandum from Pamela L. Woods to Walter Johnson, Deputy Assistant Comptroller for Financing, Department of the Treasury (Feb. 27, 1976).

[18] *See* 42 U.S.C. § 2996f(b). *See also* Texas Rural Legal Aid, Inc. v. LSC, 940 F.2d 685, 689 (D.C. Cir. 1991).

[19] *Texas Rural Legal Aid, Inc.*, 940 F.2d at 688.

ence the operation of the Corporation can be squared with the Constitution's separation of powers doctrine. In resolving this problem, this Article will address several subsidiary issues: whether the LSC performs a governmental or nongovernmental function; if governmental, whether that function must be performed by an officer of the United States who belongs to the Executive Branch; if the LSC functions must be performed by an executive officer, whether the Constitution confers on the President, as Chief Executive Officer, an irreducible minimum of authority to supervise and to remove officers within the Executive Branch, and by extension, LSC; if the Executive has inherent authority to supervise and to remove Executive Branch officers, whether the LSCA's restrictions on presidential authority over the LSC contravene that constitutional minimum; and finally, if the LSCA unconstitutionally detracts from Presidential authority, whether the LSCA can survive without its constitutionally offensive provisions.

A. *The LSC Performs Government Functions That Must Be Executed By Officers of the United States*

The threshold question is whether "a private non-membership, non-profit corporation" that is not a federal "department, agency or instrumentality" and whose directors are not governmental "officers or employees" can constitutionally perform the functions required under the LSCA. This Article answers that question in the negative.

Notwithstanding provisions of the LSCA purporting to create a nongovernmental entity, the LSC is virtually indistinguishable in its purposes and powers from a host of executive branch and independent government agencies. First, the Corporation's Board of Directors are appointed in the same manner as officers of the United States.[20] The Act authorizes the President to appoint, with the advice and consent of the Senate, all eleven members of the Corporation's Board of Directors.[21] Indeed, the appointment power is the only significant authority Congress conferred upon the President, and it surrendered this grudgingly[22] and only after qualifying that power with substantial restrictions.[23]

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[20] *See* U.S. CONST. art. II, § 2, cl. 2.

[21] 42 U.S.C. § 2996c(a).

[22] Two earlier versions of the bill had not granted the appointment power to the President. This led to considerable controversy and the demise of both bills through a veto and threatened veto by President Nixon. *See* S. 1305, 92d Cong., 1st Sess. (1971); H.R. 6360, 92d Cong., 1st Sess. (1971); 7 Weekly Comp. Pres. Doc. 727, 729 (1971); S. 3193, 92d Cong., 2d Sess. (1972); H.R. 12350, 92d Cong., 2d Sess. (1972); 120 CONG. REC. S1001 (daily ed. Jan. 31, 1974). *See generally* George, *supra* note 4, at 693.

[23] As it happened, the appointment power that Congress finally surrendered has been substantially whittled away by certain statutory eligibility requirements. For example, LSCA mandates that no more than six Board members may belong to the same political party, and the Board must "include eligible clients . . . and . . . be

Second, and significantly, the Corporation is directed to ensure that grantees satisfy certain criteria and otherwise comply with the requirements of the Act, and it is given the power to issue binding regulations to implement the purposes of the Act.[24] Its regulations are published in the Federal Register,[25] and its books are subject to audit by the General Accounting Office.[26] Although the Corporation is not subject to the requirements of the Administrative Procedure Act, analogous procedural safeguards are built into the LSCA itself, which provide for notice and comment rulemaking and elaborate adjudicatory procedures to defund grantees.[27] The LSC is also subject to the Freedom of Information Act.[28]

The Act further vests the LSC Board with authority to establish the "general policies" necessary to carry out the purposes of the Act and the Corporation.[29] The Corporation is also given broad discretion to enter into grants "as are necessary to carry out the purposes of" the Act,[30] to "ensure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance" to eligible clients,[31] and to "monitor and evaluate and provide for independent evaluations of programs."[32] In short, the Corporation plainly acts as the governmental administrator of a federal grant program. This fact alone was sufficient to persuade the D.C. Circuit that the LSC "is a state actor for First Amendment purposes when it issues regulations pursuant to [the LSCA]."[33]

Conversely, if administering the program is not a governmental, but rather a nongovernmental function, it presumably may be performed by a private actor, in this case, a corporation. The LSC, however, possesses none of the attributes of a truly private corporation. The Act precludes it from having any shareholders. It has no means of generating its own revenues or otherwise obtaining funds (save for gifts) other than Congressional appropriations. Its employees' salaries are tied to the federal pay scale, and they share in the benefits provided federal employees. Moreover, it serves no commercial or private purpose — its only purpose is the statutorily mandated public purpose of administering a federal grant program. On a more basic level, neither the Cor-

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generally representative of the organized bar, attorneys providing legal assistance to eligible clients, and the general public." 42 U.S.C. § 2996c(a). Each member serves for a three-year term, but may continue to serve until a successor has been appointed and qualified. *Id.* at § 2996c(b). The Board, rather than the President, appoints its Chairman by majority vote. *Id.* at § 2996c(d).

[24] 42 U.S.C. § 2996e(b)(1) (1988).

[25] *Id.* at § 2996g(e).

[26] *Id.* at § 2996h(b).

[27] *Id.* at § 2996j.

[28] *Id.* at § 2996d(g).

[29] *Id.* at § 2996d(b)(1).

[30] *Id.* at § 2996e(a)(1)(B).

[31] *Id.* at § 2996f(a)(3).

[32] *Id.* at § 2996f(d).

[33] Texas Rural Legal Aid, Inc. v. LSC, 940 F.2d 685, 699 (D.C. Cir. 1991).

poration nor its directors possess the degree of autonomy that fundamentally distinguishes private officers and entities from those in government.

Furthermore, the LSCA allows the Corporation to "exercise the powers conferred upon a non-profit corporation by the District of Columbia Non-Profit Corporation Act" only to "the extent consistent with the provisions of this [title]."[34] Since the attributes of a truly private corporation are inconsistent with many of the purposes and provisions of the Act, it is likely that Congress did not intend the Corporation to possess the characteristics that define a genuinely private actor.[35] For example, a private corporation could revise its articles of incorporation to redefine its corporate purpose, could dispose of its property as it wishes, could operate free from constitutional constraints such as due process and equal protection, and could assert its own First Amendment and other constitutional rights.[36] Notably, a truly private corporation would have the unfettered ability to dissolve itself, a power the LSCA expressly denies to the Corporation.[37]

More fundamentally, if the LSC truly possessed private, nongovernmental status, it would resemble a private recipient of federal funds, rather than a governmental administrator of federal funds. As a private recipient, it would necessarily possess the power unilaterally to terminate the delivery of federal legal services by simply refusing to accept federal funds. Congress did not grant the LSC such power. As mentioned above, the LSC has no significant means of generating its own revenues other than Congressional appropriations, and it has no discretion in altering its statutorily mandated purpose of administering the grant program.

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[34] 42 U.S.C. § 2996e(a).

[35] There is an ambiguity in the legislative history in this regard. The Senate version of the LSCA provided that the Corporation should not be considered a department, agency, or instrumentality of the federal government "for purposes of any Federal law or Executive order." S. 2686, 93d Cong., 1st Sess., § 1005(e), p. 35. This language suggests that the Senate intended that the LSC should be "considered a private nonprofit entity for all *statutory* purposes," but, by negative inference, should be considered a government agency for constitutional purposes. S. REP. NO. 45, 93d Cong., 1st Sess. 12 (1973) (emphasis added). The final version of the Act, however, deletes this qualifying phrase and simply states that the LSC should not be considered a "department, agency or instrumentality of the federal government," thus suggesting that Congress intended that the Corporation not be a federal entity even for constitutional purposes. The House version of the Act, however, contained no assertion that the Corporation was not a federal agency, and the Conference Report simply states that the House receded to the Senate version "with a perfecting amendment." CONF. REP. NO. 1039, 93d Cong., 2d Sess. 19 (1974). It seems doubtful that the House, which had *no* provision relating to the nongovernmental status of the Corporation, insisted on a more expansive disclaimer of federal status than that contained in the initial Senate bill.

[36] *See, e.g.*, Grove City College v. Bell, 465 U.S. 555, 575 (1983); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[37] *Id.* at § 2996e(a).

It is true, however, that some federal grant programs provide for the distribution of federal funds by genuinely private or state governmental actors. These "recipients" of federal grants have no authority to regulate the subrecipients to whom they distribute federal funds; nor do they otherwise exercise significant authority under federal law. Another fundamental distinction between recipients and administrators of federal grants is that recipients voluntarily participate in the federal funding program and thus retain the ability to withdraw from it. The congressional spending power plainly does not include the authority to force an unwilling person to accept federal largesse.[38] In light of these distinctions, the LSC would appear to be an administrator, rather than a private recipient, of the federal grant program. This conclusion is consistent with the Act's frequent description of the Corporation as "provid[ing] financial assistance" and "grants" to "recipients," the Corporation's ability to control such recipients through legally binding regulations, and the Corporation's inability to raise revenues other than those appropriated by Congress.[39]

It thus appears that Congress intended to create an entity that is neither fish nor fowl, but rather is some of both — that is, an entity that functions as a government agency for some purposes and as a private corporation for other purposes. Congress apparently intended the Act's designation of the LSC as a private corporation to immunize the legal services grant program from any claim by the President of inherent constitutional authority to remove the program's administrators, to impound its federal funds, or otherwise to supervise its activities. Indeed, a principal impetus for enactment of the LSCA in 1974 had been presidential assertions of inherent constitutional authority to impound grant funds appropriated to its precursor, the Office of Economic

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[38] *See, e.g., Grove City College*, 465 U.S. at 575 ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'."); Massachusetts v. Mellon, 262 U.S. 447, 480 (1922) ("The powers of the state are not invaded, since the statute imposes no obligation, but simply extends an option which the state is free to accept or reject."). In contrast, government officers are obliged to accept federal appropriations and to follow explicit congressional spending directives, at least absent invocation of the constitutionally controversial executive authority to impound funds. *See, e.g.*, Train v. City of New York, 420 U.S. 35 (1975); United Auto., Aerospace and Agric. Element Workers of America v. Donovan, 746 F.2d 855, 863 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 825 (1985); State Highway Comm'n v. Volpe, 479 F.2d 1099, 1106 (8th Cir. 1973); National Council of Community Health Ctrs., Inc. v. Weinberger, 361 F. Supp. 897, 900-02 (D.D.C. 1973), *rev'd. on other grounds*, 546 F.2d 1003 (1976).

[39] In the alternative, if the LSC is merely a "recipient" of federal funds, it follows that the LSC is free to refuse all federal monies and to unilaterally terminate the legal services program.

Opportunity.[40] For all other constitutional purposes, however, Congress apparently intended the LSC to possess all the characteristics of an agency of the federal government, or at least to be no less subject to Congress's legislative direction and control than any other federal government agency.

The Supreme Court's decision in *Buckley v. Valeo*[41] indicates, however, that Congress may not go to such lengths to delegate the functions specified in the LSCA to an entity fitting the Legal Services Corporation's description. *Buckley* involved a challenge to the composition of the Federal Election Commission, whose members had not been appointed in accordance with the Appointments Clause[42] and thus could not constitutionally qualify as "officers of the United States." Because "any appointee exercising significant authority pursuant to the laws of the United States" must be qualified as an "officer of the United States" under the Constitution,[43] the Court concluded that Federal Election Commissioners may "properly perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law . . . ."[44] The Court then focused its inquiry on the statutory functions of the Federal Election Commission:

> All aspects of the [Federal Election Campaign] Act are brought within the Commission's broad administrative powers: *rulemaking*, advisory opinions, and *determinations of eligibility for funds* and even for federal elective office itself. These functions . . . are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress . . . . Yet each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. While the President may not insist that such functions be delegated to an appointee of his removable at will, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), none of them operates merely in aid of Congressional authority to legislate or is *sufficiently removed from the administration and enforcement of public law* to allow it to be performed by the present Commission. *These administrative functions may therefore be exercised only by persons who are "Officers of the United States."*[45]

Thus, *Buckley* establishes that certain functions performed by the LSC Board members — such as rulemaking and determinations of eligibility for federal funds — are governmental duties that can only be performed by constitutionally qualified "officers of the United States."

The LSC is far from "removed from the administration and enforcement of public law." Rather the LSC's *exclusive* function is to administer and enforce

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[40] *See supra* text accompanying notes 3 & 4.

[41] 424 U.S. 1 (1976) (per curiam).

[42] U.S. CONST. art. II, § 2, cl. 2.

[43] 424 U.S. at 125-26.

[44] *Id.* at 139.

[45] *Id.* at 140-41 (emphasis added).

the provisions of the Legal Services Corporation Act. It is thus exceedingly difficult to maintain that members of the LSC's governing Board do not exercise "significant authority pursuant to the laws of the United States."[46] And while the LSCA explicitly states that Board members are not officers,[47] that statement obviously does not control the constitutional analysis. As the Court held in *Buckley*, it is the power exercised, not the statutory characterization, that governs whether an individual is an "officer" for constitutional purposes.[48] Were it otherwise, Congress could strip the President of all power simply by designating his Cabinet members "non-officers" and their agencies "private corporations."

In a variety of non-constitutional contexts, the Supreme Court and lower federal courts have examined the question of whether a government corporation or similar "quasi-governmental" entity is an "agency," or whether the entity's employee is a "public official."[49] Although such a statutory analysis is not necessarily coextensive with the constitutional question of whether the relevant actor is an "officer of the United States," it is nevertheless significant that the primary attributes identified in these cases as determining that an entity or individual is acting in a public or sovereign capacity for statutory purposes (e.g., administrative authority over federal funds, regulatory author-

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[46] *Id.* at 126.

[47] 42 U.S.C. § 2996d(e)(1).

[48] *Id.* at 138-39.

[49] *See, e.g.*, Dixson v. United States, 465 U.S. 482, 497 (1984) (state administrator of a block grant program is "public official" under bribery statute; "[b]y accepting the responsibility for distributing these federal fiscal resources, petitioners assumed the quintessentially official role of administering a social service program established by the United States Congress"); Forsham v. Harris, 445 U.S. 169 (1980) (private recipient of federal grants not an agency under FOIA); United States v. Orleans, 425 U.S. 807 (1976) (recipient of Economic Opportunity Act funds not federal employee under Federal Tort Claims Act); Department of Employment v. United States, 385 U.S. 355 (1966) (American Red Cross is a federal government instrumentality for purposes of intergovernmental tax immunity statute); Cherry Cotton Mills v. United States, 327 U.S. 536, 539 (1945) (counterclaim by Reconstruction Finance Corporation is a claim "on part of the government;" "that the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by the government to accomplish purely governmental purposes"); Inland Waterway Corp. v. Young, 309 U.S. 517 (1940) (funds of government corporation "public" monies for purposes of banking act); Graves v. New York, 306 U.S. 466 (1939) (same result for Homeowner's Loan Corporation); New York *ex rel.* Rogers v. Graves, 299 U.S. 401 (1937) (same result for Panama Railroad Company); Public Citizen Health Research Group v. Dep't of Health Educ. & Welfare, 668 F.2d 537 (D.C. Cir. 1981) (National Capital Medical Foundation is not agency under FOIA); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976) (Federal Home Loan Mortgage Corporation is an agency under FOIA); Lombardo v. Handler, 397 F. Supp. 792, 802 (D.D.C. 1975), *aff'd*, 546 F.2d 1043, *cert. denied*, 431 U.S. 932 (1977) (National Academy of Sciences is not an agency under FOIA because it did not "perform 'government functions' . . . like an administrative agency.").

ity over funding recipients) are possessed by LSC. The cases are also noteworthy in that, even in the statutory context, they look primarily at the function of the entity, rather than the statutory characterization, as the most important criteria in resolving this inquiry.

It may be possible to construe the designation of Board members as non-officers as intended to control only for *statutory*, but not constitutional purposes. Such a construction was given to the statute in *McCalpin v. Dana*,[50] where the district court concluded that Board members are "officers" for purposes of the Recess Appointments Clause, primarily because a contrary conclusion would "likely run afoul" of *Buckley*.[51] By this construction, statutes applicable to federal "officers or employees" do not cover Board members, while constitutional restrictions on federal officers do.

Accordingly, it seems clear that, notwithstanding the Act's statement to the contrary, the LSC Board members are and must be "officers of the United States," at least in the constitutional sense. As "officers of the United States," the LSC Board members are subject to a number of constitutional requirements.[52] Most relevant for present purposes are the Constitution's require-

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[50] McCalpin v. Dana, No. 82-542 (D.D.C. Oct. 5, 1982), *vacated as moot sub. nom.* McCalpin v. Durant, 766 F.2d 535 (D.C. Cir. 1985) (per curiam).

[51] The same district court, however, in *Crane v. United States*, No. 87-2763 (D.D.C. July 29, 1988), concluded that "the board members are not Officers of the United States within the meaning of the Appointments Clause." The court held that an individual Board member lacked standing to challenge congressional restrictions on the Corporation because no violation of the Appointments Clause "could . . . have occurred to serve as the requisite injury of which [the Board member] complains." McCalpin v. Dana, No. 82-542 at 13.

[52] At the procedural level, officers of the United States must be appointed in accordance with the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, must be commissioned as officers by the President, *id.* at art. II, § 3, and must take an oath to support the Constitution, *id.* at art. VI. Board members are appointed under the Act by the President with the advice and consent of the Senate, so the requirements of the Appointments Clause are satisfied. (The questions whether the Act's eligibility criteria for appointees to the Board (1) are binding on the President, and if so (2) are constitutional, exceed the scope of this Article. *See supra* note 23.) Board members also receive a commission signed by the President. The oath that Board members are required to sign however, does not conform to the oath prescribed by statute for civil officers, *see* 5 U.S.C. § 3331 (1988), and does not contain a pledge of support for the Constitution, as required under Article VI. A person cannot become an "officer of the United States," and thus cannot exercise "significant authority pursuant to the laws of the United States," unless he or she has taken a constitutionally sufficient oath. *See* Glavey v. United States, 182 U.S. 595 (1901); Bartlett v. United States, 39 Ct. Cl. 338 (1904), *aff'd*, 197 U.S. 230 (1905). Board members appointed by President Bush took the statutorily prescribed oath of office for civil officers. Although the oath was ceremonial and was not administered until well after the Board members had been performing their statutory functions, it appears that the requirements of Article VI were satisfied as to those Board members.

Similarly, the Board's members are "officers" for purposes of the Recess Appoint-

ments pertaining to their removal from office by the President. As discussed more fully below, the Act cannot be squared with the separation of powers doctrine of the Constitution because the only method of removing a Board member permissible under the Legal Services Corporation Act is by vote of seven members of the Board.

B. *The President Must Have Authority To Supervise, and Thus To Remove, Government Officers Who Perform Executive Functions*

Article II of the Constitution provides that the "executive Power shall be vested" in the President and charges him with responsibility to "take care that the Laws be faithfully executed."[53] While the President's power to remove executive officials is not mentioned in the Constitution, it has been recognized by the Supreme Court as an incident of his appointment power.[54] More importantly, it is essential to his ability — indeed, his responsibility — to exercise the executive power. Under this view, subordinate executive officers derive all their constitutional authority from the President and thus must perform their official functions under his supervision and direction. The removal power is necessary to ensure meaningful enforcement of this supervisory authority.

The constitutional necessity of removal power as an element of supervisory authority was found decisive in *Myers v. United States*,[55] although the Court also found support for the removal power as an incident of the power to appoint and in the historical evidence surrounding the so-called "Decision of 1789."[56] In *Myers*, the Court struck down a statute conditioning the Presi-

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ments Clause. U.S. CONST. art. II, § 2, cl. 3. *See* McCalpin v. Dana, No. 82-542 (D.D.C. Oct. 5, 1982) *vacated as moot sub. nom.* McCalpin v. Durant, 766 F.2d 535, 537 (D.C. Cir. 1985) (per curiam). Accordingly, the President can make appointments to the LSC Board during a congressional recess.

Other specific constitutional provisions relating to "officers" include: Article I, section 3 (prescribing "disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States" as punishment in cases of impeachment); Article I, section 6 (prohibiting members of Congress from concurrently "holding any Office under the United States" and from being appointed to any civil office, if the office was either created or received an increase in "emoluments" during the Senator's or Representative's congressional term); Article I, section 9 (prohibiting officers of the United States from accepting, without congressional consent, "any present, Emolument, Office, or Title" from a foreign state); Article II, section 1 (prohibiting officers of the United States from serving in the electoral college); Article II, section 2 (requiring "the principal Officer in each of the executive Departments" to provide his written opinion on departmental matters to the President upon request); and Article II, section 4 (subjecting "all civil officers of the United States" to Congress's impeachment power).

[53] U.S. CONST. art. II, § 3, cl. 1.

[54] Shurtleff v. United States, 189 U.S. 311 (1903); Reagan v. United States, 182 U.S. 419 (1901); *Ex parte* Hennen, 38 U.S. (13 Pet.) 230 (1839).

[55] 272 U.S. 52 (1926).

[56] The "Decision of 1789" refers to the First Congress' decision, after heated debate, not to give the President express statutory power to remove the Secretary of Foreign

dent's removal of a postmaster on the advice and consent of the Senate. The Court concluded that this restriction on presidential removal impermissibly infringed the President's constitutional authority because "Article II grants to the President the executive power of the Government, i.e., the general administrative control over executing the laws, including the appointment and removal of executive officers — a conclusion confirmed by his obligation to take care that the laws be faithfully executed."[57] According to the *Myers* Court, since the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible."[58]

The apparent holding in *Myers* that the President has an illimitable, exclusive removal power over executive officers has been eroded by the Court's subsequent decisions. In analyzing whether the President has been impermissibly deprived of his constitutional powers, the Supreme Court has attached significant weight to whether Congress has usurped executive power for itself or has simply transferred it to another entity. The Court has repeatedly struck down any congressional effort to enhance its own power at the expense of the executive branch, pursuant to a straightforward analysis that looks to the respective roles assigned by the Constitution to the coordinate branches of government.[59] In contrast, where Congress has not directly usurped the President's authority for itself, the Court engages in a two-step analysis that looks primarily to the nature of the function at issue and the extent to which the President is deprived of control over it.[60]

Affairs. Such an express provision was ultimately deemed redundant because the President had the inherent constitutional power to take the action in question. *See Myers*, 272 U.S. at 113-15. In the course of this debate, James Madison argued that the President possesses inherent removal authority:

> But there is another part of the Constitution, which inclines, in my judgment, to favor the construction I put on it; the President is required to take care that the law be faithfully executed. If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended that he have that species of power which is necessary to accomplish that end.
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> [I]f the President should alone possess the power of removal from office, those who are employed in the execution of the law will be in their proper situation and the chain of dependence be preserved; the lowest officer, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.

1 Cong. Deb. 495, 499 (J. Gales ed. 1834) (remarks of James Madison).

[57] *Myers*, 272 U.S. at 163-64.

[58] *Id.* at 117.

[59] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983); Buckley v. Valeo, 424 U.S. 1 (1976).

[60] *See* Morrison v. Olson, 487 U.S. 654 (1988). *Cf.* CFTC v. Schor, 478 U.S. 833 (1986); Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977).

In *Morrison v. Olson*[61] the Court upheld the statutory establishment of an "Independent Counsel" to prosecute crimes by high-ranking Executive Branch officials, although the Counsel is not appointed by the President and can be removed only for "good cause."[62] The Court held that presidential control over the Independent Counsel, who exercised the "purely executive" functions of criminal investigation and prosecution, could be limited by a statutory "good cause" restriction on the President's removal power. In reaching this conclusion, the Court expressly eschewed reliance on "rigid categor[ization]" of functions as "executive," or "quasi-legislative" as a definitive touchstone in resolving separation of powers questions. This sort of inquiry had characterized earlier separation of powers cases and, the *Morrison* Court concluded, had yielded confusing and inconsistent precedent.[63] Acknowledging that the separation of powers requires that some "purely executive" officials be removable at the pleasure of the President, the *Morrison* Court described its earlier removal cases as "designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."[64] Accordingly, the Court concluded that, while "an analysis of the functions served by the officials at issue is [not] irrelevant," the "real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."[65]

Turning to that question, the *Morrison* Court held that the "good cause" removal limitation did not "unduly trammel executive authority" because the Independent Counsel, in performing a concededly executive function, played a limited and subordinate role. Since "the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority," the Court "simply [did] not see how the President's need to control the exercise of [the Independent Counsel's] discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."[66]

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

[62] An Independent Counsel can be removed only by the Attorney General and only for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596(a)(1). Since the Attorney General is removable at will by the President, the Attorney General's statutory removal power over an Independent Counsel is tantamount to presidential removal power.

[63] *Morrison*, 487 U.S. at 689-90, n.28. *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[64] *Morrison*, 487 U.S. at 689-90 (footnote omitted).

[65] *Id.* at 691.

[66] *Id.* at 691-92.

The Court's analysis in *Morrison* thus yields certain conclusions regarding the constitutional dimension of presidential removal power. First, certain "purely executive" officials, because of the nature of their functions and the closeness of their relationship to the President, must serve at the pleasure of the President; any restraint on their removability by the President would impermissibly impair his ability to perform his constitutional responsibilities. Cabinet members and other heads of executive departments would obviously fall within this category of executive officials.

Second, presidential removal of certain other "purely executive" officials, such as an Independent Counsel, can be statutorily restricted by a "good cause" limitation. In holding that an Independent Counsel need not serve at the pleasure of the President, the *Morrison* Court emphasized that an Independent Counsel is an "inferior" officer under the Appointments Clause of the Constitution; that an Independent Counsel's jurisdiction is limited to the investigation and prosecution of a single individual or group of individuals; that an Independent Counsel's tenure is temporary, lasting only so long as it takes to complete the assigned investigation and, if necessary, prosecution; and that an Independent Counsel lacks significant policymaking and administrative authority. Thus, while the Court did not attempt to provide definitive criteria for distinguishing between executive officials whose removal by the President may be limited by a "good cause" requirement and those officials whose removal may not be thus limited, the Court's analysis does provide useful guidance.

Third, any officer of the United States who performs a function that is in any respect executive in nature must be subject to removal from office by the President, at least for "good cause." The President has neither a duty nor a right under the Constitution to perform a function that is properly characterized as purely judicial or purely legislative, and thus need not possess any supervisory authority over the performance of such functions in order to discharge his own constitutional responsibilities. Only an officer who performs purely legislative functions or purely judicial functions can be immunized entirely from presidential removal authority.

Application of this analysis to the Legal Services Corporation yields the conclusion that the LSCA unconstitutionally deprives the President of all supervisory authority over officials — the Corporation's Board members — who perform functions that are at least partially executive in nature. The LSCA gives the Board broad discretion to implement its legislative mandate of establishing priorities for legal services and of selecting, funding, and overseeing the organizations that deliver those services.[67] It is also provided with broad rulemaking[68] and administrative authority to enforce the statutory obli-

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[67] Texas Rural Legal Aid, Inc. v. LSC, 940 F.2d 685, 689-92 (D.C. Cir. 1991).

[68] *See, e.g.*, 42 U.S.C. §§ 2996e(b), 2996g(e). As to the Corporation's rulemaking authority, the Court's treatment of whether such a function is an executive or legislative power has been particularly confused. In *Chadha* the Court, although interpreting *Humphrey's Executor* to suggest that rulemaking is a "quasi-legislative" function,

gations of federal grantees. For example, the Corporation may litigate on its own behalf,[69] and may, at its own option, provide to beneficiaries certain non-litigation services, such as legal research and acting as a clearinghouse.[70] Indeed, the Corporation cannot be materially distinguished in this regard from many cabinet level agencies, such as the Department of Health and Human Services, among whose primary functions are to provide funds to, and enforce the statutory obligations of federal grant recipients.

Under any analysis, the LSC's authority plainly cannot be characterized as purely legislative. In *Buckley*, as previously noted, the Court found that the Federal Election Commission's functions of "rulemaking . . . and [making] determinations of eligibility for [federal] funds" are not appropriate legislative functions and thus can be performed only by officials appointed by the President pursuant to Article II of the Constitution.[71] Similarly, in *Bowsher v. Synar*,[72] the Comptroller General's implementation of a statute providing him far more circumscribed duties than those granted the LSC was held to be a impermissible execution of the laws by an official removable by, and thus an agent of, Congress.[73]

Indeed, the Court in *Bowsher* squarely held that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[74] The primary responsibility of the Comptroller General under the Balanced Budget and Emergency Deficit Control Act was the preparation of a report that contained detailed estimates of projected federal revenues and expenditures.[75] The report was required to "specify the reductions, if any, necessary to reduce the deficit to the target for the appropriate fiscal year."[76] The Comptroller General thus had "the ultimate authority to determine the budget cuts to be made" and to "command[] the Presi-

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stated that rulemaking is not an exercise of legislative power, but is "Executive action." *INS v. Chadha*, 462 U.S. 919, 953, n.16 (1983). In its decision in *Mistretta v. United States*, 488 U.S. 361 (1989), however, the Court stated that *Chadha* was "not intended to undermine our recognition in previous cases and in over 150 years of practice that rulemaking pursuant to a legislative delegation is not the exclusive prerogative of the Executive." *Id.* at 387, n.14. The Court then asserted that "rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch." *Id.* The *Mistretta* Court thus upheld a delegation of rulemaking authority over sentencing of federal offenders to a commission expressly located in the judicial branch. The LSC is not located, either expressly or implicitly, in the judicial branch; if it is located anywhere in the federal government, it is in the executive branch.

[69] 42 U.S.C. §§ 2996e(a), (e), (f).

[70] 42 U.S.C. § 2996e(a)(3).

[71] Buckley v. Valeo, 424 U.S. 1, 140-41 (1976) (per curiam).

[72] 478 U.S. 714 (1986).

[73] *Id.* at 731-34.

[74] *Id.* at 733.

[75] *Id.* at 732.

[76] *Id.*

dent himself to carry out . . . the directive of the Comptroller General as to the budget reductions . . . ."[77] The Court concluded that the Comptroller General's functions were "executive" in nature because he was obliged to "exercise judgment concerning facts that affect the application of the Act" and "to interpret the provisions of the Act to determine precisely what budgetary calculations are required."[78] In comparison, the LSC has much broader range for discretionary judgment.

To be sure, the Supreme Court has not consistently characterized the implementation of a broad legislative mandate as "executive." In *Buckley*, the Court indicated that the nonlitigation functions of the FEC were not required to be performed by "an appointee of [the President] removable at his will" and were variously described as "administrative," "more legislative and judicial in nature than are the Commission's enforcement powers," and "of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress."[79] The Court had gone further in *Humphrey's Executor*, stating that the Federal Trade Commission "occupie[d] no place in the executive department" even though it was "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid."[80]

In this regard, however, it should be noted that the LSC's authority is considerably broader and more executive in nature than that of the FTC at the time of *Humphrey's Executor*. The activities described as "quasi-legislative" in that opinion were simply the authority to make investigations on behalf of, and submit reports to, Congress — activities that were characterized by the Court in *Buckley* as "falling in the same general category as those powers which Congress might delegate to one of its own committees . . . ."[81] Particularly noteworthy is the fact that the FTC at that time had no litigation enforcement power and, unlike the LSC, had no rulemaking or other broad

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[77] *Id.* at 733.

[78] *Id. See also* Springer v. Philippine Islands, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them."); Myers v. United States, 272 U.S. 52 (1926).

[79] Buckley v. Valeo, 424 U.S. 1, 140-41 (1976) (per curiam).

[80] Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935). However, in a noted case in which President Roosevelt removed the chairman of the board of directors of the Tennessee Valley Authority for refusing to respond to the President's questions, the Sixth Circuit Court of Appeals rejected the chairman's assertion that the President was without removal power under *Humphrey's Executor*. The court reasoned that the TVA's authority to "manage and develop government property" was not "quasi-legislative," but was "predominantly an executive or administrative function." Morgan v. TVA, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941).

[81] *Buckley*, 424 U.S. at 137. *See also* Hannah v. Larche, 363 U.S. 420, 444 (1960) (United States Commission on Civil Rights' functions are "purely investigative and fact-finding.").

administrative authority.[82] It should also be noted that the statutory scheme upheld in *Humphrey's Executor* permitted the President to remove officers for "cause." The Court was not faced with a statute that divested the President of the authority to remove commissioners for any and all reasons, and thus completely eliminated his ability to influence the manner in which the laws were executed by the FTC. Nor is there anything in the Court's opinion in *Humphrey's Executor* suggesting that a statute denying the President even "good cause" removal authority over executive officers could survive constitutional scrutiny. Indeed, *Morrison* makes clear that such a statute could not stand.

Because the LSC performs a governmental function that is neither purely legislative nor purely judicial,[83] members of its governing board must be removable by the President at least for "good cause." Indeed, a persuasive argument can be made under *Morrison* that Board members must be removable by the President *at will*. The LSC Board satisfies none of the criteria emphasized by the Supreme Court in *Morrison* as justifying a "good cause" limitation on the President's removal power over an Independent Counsel. Board members, unlike an Independent Counsel, are not "inferior" officers. As previously discussed, the LSC is statutorily responsible for certain government functions that can only be performed by constitutionally qualified "officers of the United States." Board members are the Corporation's highest ranking officers — indeed, they are subordinate to no one — and thus must be the agency's "principal" officers. Nor is the Board's jurisdiction over the legal services grant program limited to specific assigned grants or recipients in the manner that an Independent Counsel's jurisdiction over the investigation and prosecution of federal criminal law is limited to specific assigned individuals. And, while Board members are appointed for fixed terms, their tenure is not tied to the completion of a specific assigned task and thus is not temporary in the sense meant by the *Morrison* Court in its description of the Independent Counsel. Finally, unlike an Independent Counsel, the Board has broad policymaking and administrative authority to fulfill its discretionary functions under the LSCA.

One need not resolve, however, whether Board members must be removable at will by the President, for it is clear that they must, at a minimum, be removable by the President for "good cause." Under the LSCA, the President is "completely stripped" of all removal authority over Board members and

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[82] *See* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); Synar v. United States, 626 F. Supp. 1374, 1397, n.24 (D.D.C. 1986) (three-judge court), *aff'd*, Bowsher v. Synar, 478 U.S. 714 (1986).

[83] None of the LSC's statutory responsibilities can fairly be described as "quasi-judicial," let alone "purely judicial." *See* Humphrey's Executor v. United States, 295 U.S. 602, 621, 628 (1935) (FTC's performance of individual adjudications and duties as a master in chancery were "quasi-judicial").

thus is powerless "to ensure the 'faithful execution' of the [LSCA]."[84] Indeed, the President is without authority to take corrective action even if the Board flagrantly violates provisions of the LSCA.

In addition, quite apart from his lack of removal authority, the President possesses no other power to influence the Board's execution of the LSCA. Again, this contrasts markedly with *Morrison*, where the Court relied on the fact that "the Act does give the Attorney General several means of supervising and controlling the prosecutorial powers that may be wielded by an independent counsel."[85] Among these were the Attorney General's nonreviewable discretion not to appoint an independent counsel, his authority to submit facts guiding the scope of the counsel's jurisdiction, and the requirement that "the counsel abide by Justice Department policy unless it is not 'possible' to do so."[86] The President possesses no analogous powers over the LSC.

It is true that the Independent Counsel statute differs from the LSCA in two significant respects. First, the LSCA vests the President with power to appoint Board members, subject to the Senate's advice and consent, while the Independent Counsel statute grants appointment authority to a special court consisting of three circuit court judges appointed by the Chief Justice.[87] Although the appointment power is an important presidential prerogative under the Constitution, the Supreme Court has never suggested that the authority to appoint an officer ameliorates, let alone cures, deprivations of removal authority. Both the Comptroller General in *Bowsher* and the postmaster in *Myers* were appointed by the President, but in neither case did the Court attach any significance to this fact when striking down the limitations on the President's removal authority. The President's control over the officer's *performance* of his duties determines the President's ability to ensure the faithful execution of the law — the relevant inquiry under *Morrison*. As the *Bowsher* Court noted, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."[88] For these reasons, it has never been supposed that the President exercises constitutionally significant authority or control over the judicial branch simply because he appoints judges.

The second distinction between the LSCA and the Independent Counsel statute is that the latter involved the "core" executive function of criminal prosecution, while the LSC's functions, although it executes the law, arguably lie somewhat farther from the core of presidential power. This distinction, however, cannot be dispositive in light of *Morrison*. The Constitution vests the President with the executive power and assigns him the duty to ensure the

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[84] Morrison v. Olson, 487 U.S. 654 , 692 (1988).

[85] *Id.* at 696.

[86] *Id.* at 695-96.

[87] 28 U.S.C. § 49 (Supp. 1988).

[88] Bowsher v. Synar, 478 U.S. 714, 726 (1986) (quoting Synar v. United States, 626 F. Supp. 1374, 1401 (D.D.C. 1986)).

faithful execution of the laws. If the President is unable to influence, let alone control, those who perform a government function that is even partially executive, he is unable to fulfill this aspect of his constitutional responsibility. A statute depriving him of this ability cannot, under *Morrison*, pass constitutional muster, whether the executive function at issue lies at the core or at the periphery of Article II.

The two cases other than *Morrison* that upheld limits on the President's removal power involved agencies performing functions less executive than those exercised by the LSC Board. *Humphrey's Executor* involved "quasi-legislative" and "quasi-judicial" powers, while *Wiener v. United States*,[89] involved the War Claims Commission, whose sole tasks were of an "intrinsic judicial character."[90] In both cases, the Court was careful to limit its decision to the question whether the Constitution required that the President be able to terminate these officers "at will."[91]

A final distinction between the Independent Counsel and the LSC lies in the justifications behind the independence of each from the executive branch. It is not apparent that the LSC's independence from the Executive is "necessary to the proper functioning of the agency."[92] Unlike the Independent Counsel statute, which addressed the need to insulate the prosecutor from the absolute control of those being investigated, no such conflict of interest is presented by Executive Branch administration of the LSCA. LSC, unlike the entities in *Wiener v. United States*,[93] and *Humphrey's Executor*, does not exercise any power of an "intrinsic judicial" or even "quasi-judicial" character, where the need for political impartiality is at its strongest and the claim of the Executive for sharing such power is at its weakest.[94]

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[89] Weiner v. United States, 357 U.S. 349 (1958).

[90] *Id.* at 355.

[91] *Id.* at 356 ("We have not a removal for cause involving the rectitude of a member of an adjudicatory body . . . ."); Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935) ("illimitable power of removal is not possessed by the President in respect of officers of the character of those just named").

[92] Morrison v. Olson, 487 U.S. 654, 691, n.30 (1988). *See also* CFTC v. Schor, 478 U.S. 833 (1986).

[93] 357 U.S. 349 (1958).

[94] *See Morrison*, 487 U.S. at 691, n.30 ("It is not difficult to imagine situations in which Congress might desire that an official performing 'quasi-judicial' functions . . . would be free of executive or political control."). It was for fear of an executive exercise of judicial powers that James Madison did not support having the Comptroller of the Treasury serve "at the pleasure of the Executive Branch," stating that his ability to settle individual claims against the United States "partake[s] of a judiciary quality as well as Executive; perhaps the latter obtains in the greatest degree." 1 Cong. Deb. 611-612 (J. Gales ed. 1834) (remarks of James Madison). Even here, however, the only limitation suggested by Madison was that the Comptroller serve a fixed term "unless sooner removed by the President." Madison ultimately withdrew his proposal. *Id.* at 612, 615. *See also* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (territorial courts); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803) (dictum) (Dis-

Indeed, the desire to avoid a much more credible threat of partisan political abuse than anything conceivable here was dismissed by the Court in *Buckley* as a facially insufficient justification for departing from separation of powers principles:

> We are also told by appellees and *amici* that Congress had good reason for not vesting in a Commission composed wholly of Presidential appointees the authority to administer the [Federal Election Campaign] Act, since the administration of the Act would undoubtedly have a bearing on any incumbent President's campaign for re-election. While one cannot dispute the basis for this sentiment as a practical matter, it would seem that those who sought to challenge incumbent Congressmen might have equally good reason to fear a Commission which was unduly responsive to members of Congress whom they were seeking to unseat. But such fears, however rational, do not by themselves warrant a distortion of the Framers' work.[95]

Review of the legislative history of the LSCA reveals that the sole — indeed, avowed — purpose of the LSC's "independence" from the Executive Branch was to ensure that Congress alone established the policies and priorities of the legal services grant program through the appropriations process. Congress included a series of political judgments in the Act itself.[96] For example, the LSC is excluded from involving itself in politically charged litigation concerning such issues as school desegregation and abortion.[97] And Congress has continued its detailed policy management of the LSC's activities through the annual appropriation process.[98]

It would seem that this naked desire to enhance congressional control over the administration of the federal legal services grant program is an insubstantial, if not wholly illegitimate, basis for eliminating all presidential supervision over the performance of the LSC's government functions. Indeed, this type of congressional aggrandizement of its own power has triggered the Supreme Court's most rigorous separation of powers scrutiny.[99]

To be sure, the LSCA's legislative history suggests that the need for political impartiality is particularly acute in this area because grant recipients are attorneys with the professional responsibility to represent their impoverished clients zealously and unimpeded by partisan political concerns. This rationale is multiply flawed. First, it fails to distinguish between the LSC and the cabinet agencies previously described. For example, doctors and educators receiving grants from the Departments of Health and Human Services or Education have a similar professional responsibility to provide the best possible service to

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trict of Columbia justices of the peace given irrevocable five-year term).

[95] Buckley v. Valeo, 424 U.S. 1, 134 (1976) (per curiam).

[96] 42 U.S.C. § 2996f.

[97] *Id.*

[98] Texas Rural Legal Aid, Inc. v. LSC, 940 F.2d 685, 688 (D.C. Cir. 1991); *see* Crane v. United States, No. 87-2763, slip op. at 1-7 (D.D.C. July 29, 1988).

[99] *See supra* notes 60-61 and accompanying text.

their patients or students. Second, there is no conflict between establishing priorities for federal legal aid and the recipients' ability to represent their clients zealously. The only potential conflict is that which flows from the very fact of establishing legal priorities and thus limiting the types of cases a recipient may bring. But surely there can be no serious objection to directing the flow of scarce resources to areas where there is the greatest need. Moreover, since litigation in today's society is an important means of effecting controversial and significant social change, government would seem to have a special responsibility to ensure that public funds are not used to pursue cases which many or most taxpayers may find offensive or an unwarranted expansion of the judicial role.

For this reason, the decision to give *recipients* unfettered discretion over which cases to pursue is itself a political act. In any event, removing the President from this process hardly eliminates any such conflict, since Congress, quite appropriately, has itself limited the types of litigation recipients may pursue.[100]

In any event, even if Congress had not enhanced its own authority by extinguishing the President's, the benefits of shielding a policymaking agency from political accountability in a democratic society are debatable. As the three-judge district court in *Synar* put it:

> It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process.[101]

This observation is particularly true in the context of the LSC, for there is nothing unique about its statutory mission. A host of Cabinet departments — the Departments of Health and Human Services, Housing and Urban Development, Education, Labor — administer and regulate grant programs no different from LSC's. If congressional desire to "depoliticize" such activities is sufficient to remove them from presidential control, all of these programs could be transferred to "corporations," wholly free from presidential supervision. Such a result would not be faithful to the constitutional principle of separation of powers.

C. *There is No Saving Construction of LSCA Which Could Avoid Infringing the Executive's Constitutional Grant of Powers*

The statute cannot be given a saving construction — one vesting removal power in the President — to avoid the constitutional infirmity otherwise

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[100] *Texas Rural Legal Aid*, 904 F.2d at 688.

[101] Synar v. United States, 626 F. Supp. 1374, 1398 (D.D.C. 1986).

presented.[102] As a general matter, the Supreme Court will construe a statute to avoid "any serious doubt" about its constitutionality if such a savings interpretation is "fairly possible,"[103] but " 'it must not and will not carry this to the point of perverting the purpose of a statute' . . . or judicially rewriting it."[104]

Although the LSCA affirmatively vests a majority of the Board with power to remove another Board member, it does not affirmatively prohibit the President from exercising similar removal authority.[105] The absence of such an affirmative prohibition is particularly significant here, because the President appoints the Board and the Supreme Court has repeatedly held that the removal power inheres in the power to appoint, "unless taken away by . . . [statute]."[106] In *Shurtleff v. United States*,[107] this principle was invoked, notwithstanding the interpretive maxim that the "expression of one thing is the exclusion of another," to hold that a presidentially appointed customs official confirmed by the Senate could be removed by the President for reasons other than the limited causes specified in the statute. The Court stressed that any removal limitation "would require very clear and explicit language."[108] Congress may be presumed to have knowledge of this principle of construction since "[f]ew contests between Congress and the President have so recurringly had the attention of Congress as that pertaining to the power of removal."[109]

In the context of the LSC, however, the Court's reasoning in *Shurtleff* is unpersuasive. First, *Shurtleff* is plainly distinguishable in that the Court

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[102] *See* NRLB v. Catholic Bishop of Chicago, 440 U.S. 490, 500-01 (1979).

[103] Crowell v. Benson, 285 U.S. 22, 62 (1932).

[104] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964) (quoting Scales v. United States, 367 U.S. 203, 211 (1961))).

[105] Congress knows how to foreclose presidential removal expressly when it so desires. *See, e.g.*, Morgan v. TVA, 115 F.2d 990, 993 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941) (Comptroller General can be removed for specified causes "and in no other manner except by impeachment.").

[106] Shurtleff v. United States, 189 U.S. 311, 318 (1903). *See* Wallace v. United States, 257 U.S. 541 (1922); Reagan v. United States, 182 U.S. 419 (1901); Blake v. United States, 103 U.S. (13 Otto.) 227 (1881); *Ex parte* Hennen, 38 U.S. (13 Pet.) 230 (1839).

[107] 189 U.S. 311 (1903).

[108] *Shurtleff*, 189 U.S. at 315. This principle was also invoked by the Court in a case holding that a specified term of office for a United States Attorney does not limit the President's power to remove that official before the term's expiration. Parsons v. United States, 167 U.S. 324 (1897). Similarly, in *Morgan v. TVA*, the court of appeals gave a saving construction to the Tennessee Valley Authority's enabling act when President Roosevelt removed a director of the TVA, although the statute designated TVA an "independent corporation," gave *Congress* unrestricted removal authority by *concurrent* resolution, and empowered the President to remove a Board member only when the member had violated a specific statutory provision not applicable in that case. Morgan v. TVA, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941).

[109] Wiener v. United States, 357 U.S. 349, 353 (1958).

placed heavy reliance on the fact that Congress had "classed [the customs official] as appropriately coming under the direct supervision of the President . . ." and that a contrary construction would mean that the official held office for life unless he could be removed for cause.[110] Further, more recently in *Schor*, the Court rejected a saving construction that would preclude common-law claims from being heard by a non—Article III tribunal, stating that "[t]he canon of construction that requires courts to avoid unnecessary constitutional adjudication did not empower the Court of Appeals to manufacture a restriction on the CFTC's jurisdiction that was nowhere contemplated by Congress and to reject plain evidence of congressional intent because that intent was not specifically embodied in a statutory mandate."[111]

For similar, indeed even more compelling reasons we believe a presidential removal power can be inferred here "only by doing violence to the [LSCA], for [this] distinction cannot fairly be drawn from the language or history of the [LSCA], nor reconciled with the congressional purpose motivating the creation of the [Corporation]."[112] As noted earlier, the primary purpose of creating the LSC was to take the existing legal services program out of the President's hands; indeed, it is difficult to discern what other purpose the Act served. The LSCA, moreover, expressly provides that Board members were not to be deemed "public officers" of the sort generally removable by the President even if appointed by him. It thus seems quite clear that the statutorily prescribed method of removal was intended to be exclusive. Accordingly, reading the statute to permit presidential removal would be a revision, not an interpretation, of the Act. Nor is the Act's removal provision likely to be held severable from the rest of the statute. Since presidential removal would "significantly alter the [LSC], possibly by making [it] subservient to the Executive Branch," it seems clear that Congress would not have passed the Act if it contained such a provision.[113]

III. CONCLUSION

Board members of the LSC are "officers of the United States" in the constitutional sense, and they are required to perform functions under the LSCA that are at least partially executive in nature. Accordingly, by denying the President any authority to remove, and thus to supervise Board members, the LSCA unconstitutionally encroaches upon the President's inherent power under Article II.[114]

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[110] Shurtleff v. United States, 189 U.S. 311, 315-16 (1903).

[111] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847 (1986). *See also* Heckler v. Mathews, 465 U.S. 728, 742-43 (1984).

[112] *Schor*, 478 U.S. at 842.

[113] *See* Bowsher v. Synar, 478 U.S. 714, 734-35 (1986).

[114] As "officers of the United States," Board members must be subject to removal by Congress through impeachment. If the statutory designation of Board members as non-officers was intended to immunize them from Congress' impeachment power as well as the President's removal power (an issue of statutory construction that we do not

The Founders purposefully placed the executive power of the national government in a single pair of hands — the President's. They well understood that the Chief Executive would have to rely upon department heads and countless other subordinate officials to discharge his responsibilities and, accordingly, that the acts of the subordinates would, in the constitutional sense, be the acts of the President. And because the President is answerable to the people for the faithful execution of the laws, the President's subordinates must likewise be answerable to him for their executive acts. The power to remove an officer is the only effective method available to a President to enforce the officer's obedience. Put another way, an executive officer need not fear, and thus need not obey, a President who is powerless to get rid of him. Were Congress able to relieve subordinate executive officials of the threat of presidential removal, it could, and no doubt would, reduce the President to little more than a spectator in the Executive Branch.

Congress understands these realities, and its efforts to diminish the President's influence on public policy have historically centered on limiting his removal authority. The Supreme Court, however, understands these realities too, and it has permitted Congress to fetter the President's ability to remove government officers only in narrow and limited circumstances. By denying the President any authority to remove Board members of the LSC, Congress ensured that the President could do no more than complain about the official performance of government functions that are at least partially executive in nature. Accordingly, the LSCA unconstitutionally encroaches upon the President's inherent power under Article II.

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address), it follows that the LSCA is unconstitutional for this reason as well.