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I. Introduction

Aaron Sims has written a fine paper on a worthy subject.[1] He carefully examines the details of the statute creating the Special Inspector General for the TARP program (the SIGTARP) and puts them in the context of the Supreme Court's separation of powers jurisprudence. He usefully calls attention to several notable features of the SIGTARP statute.[2] He deserves praise for his good work.

His ultimate conclusion, however, seems mistaken. He gives too little weight to the President's power to remove the SIGTARP at will, and too much weight to the Secretary of the Treasury's obligation to respond to deficiencies in the TARP program identified by the SIGTARP. When the SIGTARP scheme is compared to statutory schemes that have been approved by the Supreme Court, it seems likely that it is constitutional.

This short response first praises the strong aspects of Mr. Sims's paper.[3] It then lays out a general structure for examining separation of powers questions, which suggests that the cases must be placed into distinct categories according to several key factors.[4] Finally, it applies the suggested structure to the SIGTARP statute and concludes that the statute is likely constitutional.[5]

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1. Aaron R. Sims, *SIGTARP and the Executive-Legislative Clash: Confronting a* Bowsher *Issue with an Eye Toward Preserving the Separation of Powers During Future Crisis Legislation*, 68 WASH. & LEE L. REV. 375 (2011).

2. Emergency Economic Stabilization Act of 2008, 12 U.S.C. § 5231 (2006).

3. *Infra* Part II.

4. *Infra* Part III.

5. *Infra* Part IV.

II. Where Praise Is Due

Before turning to critique, it is appropriate to begin with well-merited praise, starting with praise for those who conceived the excellent idea of having a colloquium to highlight student scholarship. The legal academy is currently debating the purposes of law school and the activities that should make up a student's legal education.[6] But no one can doubt that at least one purpose of law schools is the production of legal scholarship, including legal scholarship by students. A forum to celebrate student scholarship is therefore most fitting.

Mr. Sims has contributed to this forum, first of all, by choosing an excellent topic. The constitutional status of Inspectors General has not received the thorough examination that it deserves, and, as Mr. Sims shows, the Special Inspector General for the TARP program has some distinctive characteristics that make him suitable for special attention. Mr. Sims's topic is also very timely. The Supreme Court's recent decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[7] signals that the Court may now be taking a somewhat harder line on congressional intrusions into executive branch prerogatives, so it is especially useful to examine potential violations of separation of powers that take the form of restraints on the President.

Mr. Sims pays careful attention to the details of the SIGTARP statute. He has thoroughly catalogued the various ways in which this Special Inspector General differs from a more ordinary Inspector General. He points out the ways in which these details might give rise to separation of powers concerns. His paper is also well written. It lays out its arguments very clearly, avoids getting sidetracked, and makes good use of authority. Overall, the paper is a worthy contribution to student scholarship.

III. Identifying the Right Test in Separation of Powers Law

To appreciate the difficulties with Mr. Sims's conclusions about SIGTARP, it is necessary first to lay out some background in separation of

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6. *See generally* WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (commonly known as the Carnegie Report).

7. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 (2010) (holding that certain "dual for-cause limitations" on the President's ability to remove members of the Public Company Accounting Oversight Board violated the separation of powers).

powers law. In separation of powers cases, the first step is to identify the applicable test. There is no universal test for separation of powers cases.[8] The landscape is littered with a multitude of tests, each of which has its own area of application. Sometimes the applicable test is whether Congress has "impede[d] the President's ability to perform his constitutional duty,"[9] but other times it is whether Congress has laid down an "intelligible principle" for the executive to follow.[10] In still other cases, the courts apply a multi-factor balancing test.[11] Given all the different tests that swirl around, it is easy to get lost in the separation of powers labyrinth. To find one's way, it is necessary to identify which test applies to a particular case.

Identification of the correct test is aided by categorizing a case based on several factors. First, one should consider the factors articulated in Justice Jackson's famous concurrence in the *Steel Seizure* case.[12] As Justice Jackson observed, cases in which Congress has *authorized* executive action have a different flavor from those in which Congress has *forbidden* executive action, and cases in which Congress has done neither of these are different from either.

A second factor to consider is the branch of government involved. Justice Jackson's opinion considered only whether Congress has authorized or prohibited action by the *executive* branch, but his analysis can be extended to the other branches. Separation of powers cases can also concern matters in which Congress has authorized or prohibited action by itself (the legislative branch) or by the judiciary.

Finally, a remaining factor is that there may be another branch of government that is secondarily involved. If a case concerns a legislative attempt to grant extra power to one branch of government, that power may come at the expense of some other branch. So one may further categorize

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8. Mr. Sims suggests that there is a "consolidated rule," *see* Sims, *supra* note 1, at 397 (stating that the Supreme Court's decisions in *Morrison v. Olson*, *Mistretta v. United States*, and *Bowsher v. Synar* combine to form a "consolidated rule" with respect to separation of powers clashes between Congress and the President), but the cases suggest different rules with different spheres of application.

9. Morrison v. Olson, 487 U.S. 654, 691 (1988).

10. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

11. *E.g.*, Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) (noting that, in Article III separation of powers cases, the Court has "declined to adopt formalistic and unbending rules[,]" but has, instead, elected to "weigh a number of factors").

12. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (setting forth a "grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity").

the cases by asking not only which branch of government is gaining power, but which branch is losing power.

These three factors cannot capture all the subtleties of the separation of powers cases, but they produce useful legal categories. If one asks whether a given case involves congressional authorization, congressional prohibition, or neither; which branch is at the receiving end of congressional attention; and which branch is secondarily affected, the answers to these questions produce categories of cases, and each category typically has its own legal test.

Consider, for example, cases in which Congress has granted power to the Executive, and the question is whether the executive may constitutionally receive this power. These cases are the nondelegation cases, such as *A.L.A. Schechter Poultry Corp. v. United States*,[13] and they teach that the applicable test is whether Congress has laid down an intelligible principle for the executive to follow.[14] On the other hand, where Congress tries to *limit* the power of the executive, the case is more like *Morrison v. Olson*, and the test is whether Congress is impeding the President's ability to perform his constitutional duty.[15]

If the congressional authorization or prohibition runs not to the executive branch, but to the legislative branch, the relevant cases and tests are different. If Congress tries to authorize itself to exercise powers not granted by the Constitution, the relevant cases are *Bowsher v. Synar* and *Immigration and Naturalization Service v. Chadha*, which articulate the nonaggrandizement principle that prohibits such action.[16] In the (rare) case in which Congress tries to prohibit itself from taking action, it runs into the principle that "one legislature may not bind the legislative authority of its successors."[17]

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13. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935) (finding that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested" without first establishing the standard to guide the exercise of the transferred legislative power).

14. *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409.

15. Morrison v. Olson, 487 U.S. 654, 691 (1988).

16. Bowsher v. Synar, 478 U.S. 714, 734–36 (1986) (concluding that the assignment by Congress to the Comptroller General of certain executive functions violated the separation of powers because Congress reserved the removal power over the Comptroller General); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 945–59 (1983) (finding that a statute's one-House legislative veto contravened the separation of powers because it gave to Congress power not granted by the Constitution).

17. United States v. Winstar Corp., 518 U.S. 839, 872 (1996).

A case such as *Commodities Futures Trading Commission v. Schor*[18] may at first seem to challenge the categories so far established. That case concerned a scheme by which Congress gave additional authority to the executive (namely, the authority to resolve certain disputes between private parties), so according to the categories so far one might think the statute would be subject to the generous *Schechter Poultry* test. In fact, the Court applied a more stringent test (although still upholding the statutory scheme). The reason implicates the third factor listed above, which has not yet come into play. Although *Schor* and *Schechter Poultry* are alike in that they both involve the executive branch's obtaining extra power, they differ with regard to the branch from which that power is taken. In *Schechter Poultry*, the executive gained power at the expense of the legislative branch; in *Schor*, the executive gained power at the expense of the judicial branch. The cases therefore show that the third factor must be considered also. Where Congress attempts to give legislative-like power to the executive, *Schechter Poultry* provides the governing test; where Congress gives power to the executive at the expense of the courts, *CFTC v. Schor* applies.

Thus, the separation of powers cases break down into different categories, each of which has its own test. Putting a case into the right category does not resolve the case—having identified the right test, one must still *apply* the test—but the categories help by identifying the right test. They also help by identifying the set of cases that provide the appropriate points of comparison in applying the test. Many of the tests applied in separation of powers cases are rather mushy.[19] In practice, application of such a test usually turns on comparing the case at hand to cases already decided.[20] Other cases in the same doctrinal category provide the best guide to how the next case should come out.

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18. Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833, 857 (1986) (concluding that the "limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III").

19. *See, e.g.*, *Morrison*, 487 U.S. at 691 (stating that the test is whether Congress has impeded the President's ability to perform his constitutional duty); *Schor*, 478 U.S. at 851 (setting forth an explicit multi-factor balancing test for analyzing Article III separation of powers issues).

20. *Cf.* Allen v. Wright, 468 U.S. 737, 751–52 (1984) (observing that, in applying the mushy concepts of standing doctrine, the question presented by a case "can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases").

IV. SIGTARP and Separation of Power

The background established above helps to explain the difficulties with Mr. Sims's conclusions about SIGTARP. The most fundamental question is whether Mr. Sims is applying the correct test. Mr. Sims treats the SIGTARP statute as implicating the nonaggrandizement test of *Chadha* and *Bowsher*.[21] But as discussed above, that test applies when Congress attempts to give additional power to *itself*. Cases in which Congress *restrains* the power of the *executive* are in a different category. As Mr. Sims himself recognizes, a congressional restraint on the power of the President does not implicate the nonaggrandizement principle unless the power that is taken from the President is given to Congress.[22]

Mr. Sims suggests that, notwithstanding the lack of any formal addition of power to Congress in the SIGTARP statute, the statute should be treated as implicating the nonaggrandizement principle because of various subtle ways in which the SIGTARP is made loyal to Congress.[23] This argument, however, gives too little weight to the fact that the President retains full power to remove the SIGTARP. Mr. Sims says that the SIGTARP is a creature of Congress because Congress retains all *other* powers over the SIGTARP, besides the removal power.[24] This arrangement, however, is not so different from the rules applicable to most top-level executive branch officials. If one looks through most of the members of the President's cabinet (putting the military aside), one finds that Congress has almost all the power over them, except the removal power. Congress gives them their duties. Congress fixes their salary. Congress sets their budget. Congress demands reports from them. As to most of them, there is no statute that generally instructs them, "Do what the President tells you to do."[25]

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21. *See* Sims, *supra* note 1, at 428 (applying the *Bowsher* rule and concluding that the SIGTARP dynamic violates this rule).

22. *See id.* at 415 (stating that the Court's separation of powers jurisprudence in *Bowsher* and *Morrison* suggests that the Court will "tolerate congressional restriction of executive discretion as long as the stripped discretion is not subsumed by Congress").

23. *See id.* at 417–23 (describing the SIGTARP's independence from the executive branch and its loyalty to Congress).

24. *Id.* at 425–26.

25. *See generally* Kevin M. Stack, *The President's Statutory Power to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (cataloguing the various ways in which Congress delegates powers to agencies, sometimes with, and sometimes without, requiring that the agency follow the directives of the President).

So why do cabinet officials do what the President tells them to do? Because the President has the removal power. The removal power is the key lever through which the President exercises control over the federal government. The critical importance of the removal power explains why there are epochal battles over whether the President has the power over particular officials.[26] So that power cannot be so easily dismissed—it is critical to separation of powers cases.

But, Mr. Sims suggests, the SIGTARP is in a special position because, even though he serves at the pleasure of the President, the nature of his job is such that he is supposed to exercise independent judgment.[27] He is not supposed to do whatever the President asks, just because the President could remove him. The President could get into political hot water if he actually removed the SIGTARP.

Again, however, this posture is not really unique. The United States Attorneys, for example, serve at the pleasure of the President, but they are not supposed to do just anything the President wants. They follow his general programmatic direction, but they also make individual prosecutorial decisions based on the facts of each case, exercising some independent judgment. And a President did get into hot water for firing some of them.[28] But these officials are not thereby transformed into creatures of Congress. They are still in the executive, even though they exercise some independent judgment.

So the questions Mr. Sims raises about SIGTARP do not fall within the *Chadha-Bowsher* category. The rule of *Morrison* applies. And, comparing the rules governing SIGTARP to the kinds of constraints on presidential power that the Supreme Court has approved under the *Morrison* line of cases reveals that the SIGTARP rules are *less* intrusive on presidential authority than other things that have already been approved.

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26. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 685–97 (1988) (determining that a "good cause" restriction on the executive's power to remove an independent counsel did not violate the separation of powers); Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) ("The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes . . . power to . . . forbid their removal except for cause in the meantime.").

27. *See* Sims, *supra* note 1, at 413–20 (describing the SIGTARP's independence from the executive branch).

28. *See, e.g.*, David Johnston, *House Democrats Push Gonzales on Attorney Dismissals but Gain No Details on Prosecutors*, N.Y. TIMES, May 11, 2007, at 24 ("House Democrats pressed Attorney General Alberto R. Gonzales at a hearing on Thursday to provide specifics about why federal prosecutors had been dismissed, but he stuck to his past assertions that, although ineptly handled, the dismissals were justified and appropriate.").

Let's look at the things that Mr. Sims singles out as potentially problematic. First of all, Mr. Sims claims, the SIGTARP does not report to the Treasury Secretary.[29] We may assume this to be true, although, as Mr. Sims duly notes, the matter is not crystal clear.[30]

Still, the point is hardly unique. After all, the Treasury Secretary does not report to the Treasury Secretary. At every agency, there is someone at the top of the reporting chain who does not report to anybody else. So long as that person is subject to the President's removal power, it can hardly be a problem that the person doesn't report to someone else, because, as observed above, the removal power is all the President might have to control the "someone else" to whom the person might report.

Mr. Sims next points out that, unlike most Inspectors General, the SIGTARP files reports directly with Congress without first running them by a cabinet secretary for comment.[31] This point seems rather trivial. The Secretary of the Treasury may not have the express statutory power to comment on the SIGTARP's reports, but nothing stops him from doing so. Once the reports are filed, anyone in the country is free to comment on them, and that would include the Treasury Secretary. There could hardly be a constitutional difference between getting the Secretary's comment in the same document and receiving it separately, after the report is filed.

Finally, there is the point on which Mr. Sims lays the most stress: The SIGTARP has the power to identify deficiencies in the TARP program, and the Secretary of the Treasury is required either to redress those deficiencies or to certify that no action is necessary or appropriate.[32] There are two answers to this point. First, even reading this requirement for all it is worth, it still just shows that there are two different government officials, each of whom serves at the pleasure of the President, who have some authority over the same issue. That may be bad policy, but it is hardly unconstitutional.

Second, the statute would still be constitutional even if we were to stack the deck in favor of Mr. Sims's argument, and imagine that the SIGTARP were *not* removable at will by the President, but in fact was removable only for good cause. Mr. Sims reads too much into the statutory requirement that the Secretary must act in response to the SIGTARP's identification of a deficiency in the TARP program. Statutes, one must

29. Sims, *supra* note 1, at 389.

30. *See id.* (observing that, while the SIGTARP's organic statute explicitly requires that SIGTARP report to Congress, it does not explicitly require the SIGTARP to report to or to be supervised by an agency head).

31. *Id.*

32. *Id.* at 408–13, 426, 429–30.

remember, should, where possible, be interpreted so as to save their constitutionality, not to create unnecessary constitutional problems.[33] This power of the SIGTARP, properly read, does not create some intolerable burden on the Secretary of the Treasury. Rather, it leaves him ample room to do what he thinks best.

First, it is hardly intolerable that the Secretary of the Treasury should be obliged either to fix a problem identified by the SIGTARP or explain why he is not doing so. There are many situations in which a government agency is required to respond to a request for action. Any citizen can ask a government agency to initiate a rulemaking proceeding, and the agency must either do so, or explain satisfactorily why it is not doing so.[34] Moreover, Congress may lay down mandatory guidelines for agencies to take individual enforcement actions, and in such a case, if someone requests an enforcement action and the agency does not undertake it, the agency's decision is subject to judicial review, which means that the agency must explain to a court's satisfaction why it has not undertaken the requested enforcement.[35] The SIGTARP statute does no more than create another situation in which an agency has to provide an explanation for not acting.

Moreover, even assuming that a pro forma explanation would be unacceptable, the statute, properly read, would not force the Treasury Secretary to act against his will. If the SIGTARP recommends certain action, and the Treasury Secretary thinks the action would be a bad idea, then necessarily he thinks that action is neither "necessary" nor "appropriate." The Treasury Secretary might even agree that the SIGTARP has identified a deficiency in the TARP program, but believe that correcting

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33. *E.g.*, Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 299–300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." (citations omitted)).

34. *See* Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987) ("The [Administrative Procedure Act] requires agencies to allow interested persons to 'petition for the issuance, amendment, or repeal of a rule,' and, when such petitions are denied, to give 'a brief statement of the grounds for denial.'"); *cf.* Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 527 (2007) ("In contrast to nonenforcement decisions, agency refusals to initiate rulemaking 'are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.'" (citations omitted)).

35. With respect to individualized enforcement actions, an agency's failure to act is usually beyond judicial review, Heckler v. Chaney, 470 U.S. 821, 831 (1985), but Congress may provide mandatory guidelines for an agency's exercise of its enforcement powers, and, where Congress has done so, an individual citizen may request an enforcement action and may seek judicial review if the agency declines to bring one. *See generally* Dunlop v. Bachowski, 421 U.S. 560 (1975).

the deficiency would cost more than the benefit that would be gained. Again, that would be a reason to determine that correcting the deficiency is neither necessary nor appropriate.

Thus, while the SIGTARP statute may create some burden of explanation, agencies are constantly called upon to explain why they are or are not doing something. That is hardly a constitutionally forbidden burden.

In the end, therefore, the SIGTARP's powers seem far less constitutionally problematic than those of the independent counsel, which were approved in *Morrison*. The independent counsel actually exercised very considerable governmental power. Although that power was directed to a particular case, and did not involve general policy development, the independent counsel made actual decisions on behalf of the government. All SIGTARP can do is issue reports and call matters to the attention of some other official, who actually makes the decisions, and if that other official would rather do nothing, the statute requires only that he explain why.

If we can tolerate the independent counsel's making actual decisions, we can tolerate the SIGTARP calling matters to the attention of the Treasury Secretary. That would likely be true even if the SIGTARP were protected by a good cause removal provision, and it follows *a fortiori* that it is constitutionally permissible given that in fact the SIGTARP serves at the pleasure of the President.

V. Conclusion

Mr. Sims has written a fine paper that takes on an important issue and does a good job of calling attention to the relevant details. His ultimate conclusion, however, seems incorrect. The separation of powers cases permit more flexibility in government structure than Mr. Sims would allow. In particular, highlighting the SIGTARP's status as serving at the pleasure of the President, and comparing the SIGTARP's powers to those that have been approved even for officials who do not serve at the pleasure of the President, leads to the conclusion that the SIGTARP statute would likely be upheld by a court as constitutional.