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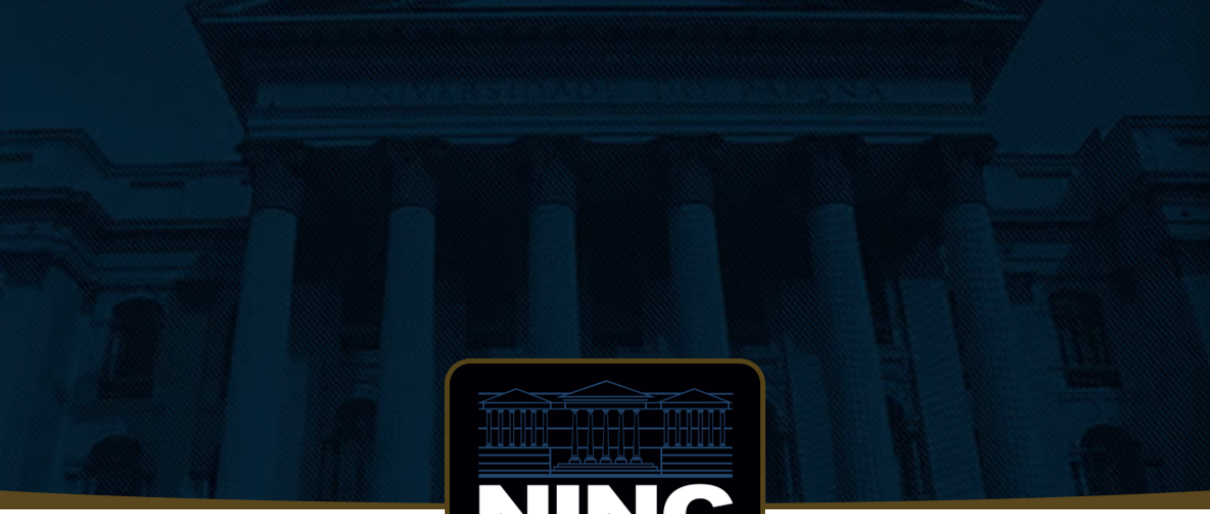

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Unconstitutional limbo: why the Smithsonian Institution may violate the separation of powers doctrine

Limbo inconstitucional: por que a Instituição Smithsonian pode violar a doutrina da separação dos poderes

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Abstract

With the opening of the National Museum of African-American History, people are once again coming in mass to the National Mall to see the Smithsonian's newest edition. And just about everyone in America knows of the Smithsonian--its name recognition is well over 90% in public surveys. Each year 30 million people visit the Smithsonian museums along the National Mall in Washington, D.C., the National Air and Space Museum, the National Museum of American History, and the National Museum of Natural History among them. But is that about to change? The Smithsonian is an odd government entity. Despite its private, non-profit status, the Smithsonian still receives federal funds, is chartered by an Act of Congress, employs a majority civil service staff, and operates through a board overseen by the Chief Justice of the Supreme Court, the Vice President, and legislators from the United States Senate and Congress. As such, the Smithsonian has been deemed a governmental entity is some instances and a private entity in others. However, with a new bill being introduced to Congress and recent Supreme Court precedent regarding government

Resumo

Com a abertura do Museu Nacional de História Afro-Americana, as pessoas estão novamente vindo em massa ao National Mall para ver a mais nova edição do Smithsonian. E quase todos americanos conhecem o Smithsonian – de modo que seu reconhecimento ultrapassa os 90% nas pesquisas públicas. Todos os anos, 30 milhões de pessoas visitam os museus Smithsonian ao longo do National Mall em Washington, D.C., o Museu Nacional do Ar e do Espaço, o Museu Nacional de História Americana e o Museu Nacional de História Natural. Mas algo pode mudar? O Smithsonian é uma peculiar entidade governamental. Apesar de sua natureza privada, sem fins lucrativos, o Smithsonian recebe recursos federais, e amparado por uma lei do Congresso, a maioria do pessoal empregado é agente público. Seu funcionamento é supervisionado pelo Presidente da Suprema Corte, pelo Vice-Presidente, e pelos parlamentares do Senado e do Congresso. Deste modo, o Smithsonian ora é considerado como entidade governamental, ora como entidade privada. No entanto, essa indecisão pode mudar, tendo em vista um Projeto de Lei apresentado no Congresso e novo precedente da Suprema Corte. Neste esteio, o Smithsonian

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instrumentalities, the Smithsonian may face dissolution of its current supervisory board less it run the risk of violating the separation of powers doctrine.

pode ter dissolvido seu atual conselho de supervisão, veredito que gera menos impacto na doutrina da separação dos poderes.

Keywords: unconstitucional; separation of powers; Smithsonian Institution; American Administrative Law; governmental entity.

Palavras-chave: *inconstitucionalidade; separação de poderes; Instituição Smithsonian; Direito Administrativo norteamericano; entidade governamental.*

CONTENTS

1. INTRODUCTION

In July 2016, Congresswoman Eleanor Holmes Norton of the District of Columbia introduced Smithsonian Modernization Act that if passed, would change the composition of Smithsonian Institution's governing board—the Board of Regents— and increase transparency of internal operations and deliberations. Norton justified the legislation, saying there needs to be greater transparency and accountability of the Smithsonian's operations given that it expends taxpayer dollars. Norton was motivated to introduce the bill because of "[t]he recent history of mismanagement at the Smithsonian" under the former Secretary of the Smithsonian, Lawrence Small. Norton explained that the Board of Regents have significant "fiduciary responsibility[ies]" and the Smithsonian being "supported primarily by federal funds must be accountable to the American people."[1]

But for Norton, transparency is not enough; the composition of the Board of Regents also needs to be reformed. Norton thinks Board of Regents should "be comprised entirely of private citizens, who can assist with fundraising, to replace highly-placed public officials currently serving on the board."[2] Norton's fundraising complaint seems largely superficial as the

Smithsonian raises more $200 million in private funds annually. Nevertheless, Norton's bill draws attention to the unique high-ranking U.S. officials who serve on the Board of Regents--the Vice President of the United States, the Chief Justice of the Supreme Court, three members of the U.S. Senate, three members of the House of Representatives, and nine citizen members.

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[1] **Norton Introduces Bill to Increase Transparency & Accountability at the Smithsonian Institution**, NortonHouse.Gov (July 29, 2015). Avaiable at: <https://norton.house.gov/media-center/press-releases/norton-introduces-billto-increase-transparency-and-accountability-at>.

[2] *Id.;* Smithsonian Modernization Act of 2015.

Although some legal scholars have in the past drawn attention to the unique composition of the Smithsonian's governing board, recent decisions regarding corporate agencies that constitute government instrumentalities bring to bear special attention in considering possible separation of powers problems for the Smithsonian especially in the context of a formalist analysis.

2. ESTABLISHMENT AND DESCRIPTION OF THE SMITHSONIAN

In 1826, James Smithson wrote his will in London. Smithson was the illegitimate son of an English aristocrat who made a fortune in investments in the early industrial revolution and also inherited money from his mother.[3] In his will, he left a bequest to his nephew, but noted that if his nephew died without leaving an heir, his fortune would go "to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an Establishment for the increase & diffusion of knowledge among men."[4]

Smithson died in 1829, and it was only a few years later that officials in the U.S. were informed of the bequest, which amounted to about £100,000 or about $500,000, which then was a large sum of money.[5] The U.S. Congress debated for some time whether or not to accept the funds.[6] Opponents pointed to the fact that accepting the funds and founding an institution as Smithson had specified was not something the Federal government had the constitutional power to do.[7] Supporters ingeniously argued that the U.S. could accept the bequest and establish the institution under the powers granted Congress of exclusive legislation over the District of Columbia,[8] where the Smithsonian would be established—even though its purpose would be for "among men" presumably everywhere.[9]

Congress passed a bill to acquire the Smithson bequest from England in 1835, and three years later, the funds came to the U.S. and were deposited in the U.S. Treasury. Several years of debate ensued in Congress with alternative proposals for what the Smithsonian should be and do—with some proposing a national library, others a national

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[3] SMITHSONIAN INSTITUTION. General History. **Smithsonian Archives**. Available at: <http://siarchives.si.edu/history/general-history>.

[4] CURRIE, David P. The Smithsonian. **The University of Chicago Law Review**, Chicago, vol. 70, n. 1, p. 65-71, jan./mar. 2003.

[5] SMITHSONIAN INSTITUTION. General History. **Smithsonian Archives**. Available at: <http://siarchives.si.edu/history/general-history>.

[6] SMITHSONIAN INSTITUTION. General History. **Smithsonian Archives**. Available at: <http://siarchives.si.edu/history/general-history>.

[7] SMITHSONIAN INSTITUTION. General History. **Smithsonian Archives**. Available at: <http://siarchives.si.edu/history/general-history>.

[8] UNITED STATES. **Constitution** art. I, § 8, cl. 17 (exercise exclusive Legislation in all Cases whatsoever, over such District).

[9] SMITHSONIAN INSTITUTION. General History. **Smithsonian Archives**. Available at: <http://siarchives.si.edu/history/general-history>.

university, an astrophysical observatory, a museum, and an agricultural research center. Finally, in 1846, Congress passed and President Polk signed into law the statue establishing the Smithsonian. Sections of that act are reproduced below:

> *AN ACT TO ESTABLISH THE "SMITHSONIAN INSTITUTION" FOR THE INCREASE AND DIFFUSION OF KNOWLEDGE AMONG MEN***.**
>
> *James Smithson, esquire, of London, in the Kingdom of Great Britain, having by his last will and testament given the whole of his property to the United States of America, to found at Washington, under the name of the "Smithsonian Institution," an establishment for the increase and diffusion of knowledge among men; and the United States having, by an act of Congress, received said property and accepted said trust; Therefore, For the faithful execution of said trust, according to the will of the liberal and enlightened donor;*
>
> *Be it Enacted By the Senate and House of Representatives of the United States of America in Congress assembled. That the President and Vice-President of the United States, the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Postmaster-General, the Attorney General, the Chief Justice, and the Commissioner of the Patent*
>
> *Office of the United States; and the mayor of the city of Washington, during the time for which they shall hold their respective offices, and such other persons as they may elect honorary members, be, and they are hereby constituted, an "establishment," by the name of the "Smithsonian Institution," for the increase and diffusion of knowledge among men; and by that name shall be known and have perpetual succession, with the powers, limitations, and restrictions, hereinafter contained, and no other. . .*
>
> *And be it further enacted, That the business of the said Institution shall be conducted at the City of Washington by a board of regents, by the name of regents of the "Smithsonian Institution," to be composed of the Vice-President of the United States, the Chief Justice of the United States, and the Mayor of the City of Washington, during the time for which they shall hold their respective offices; three members of the Senate, and three members of the House of Representatives; together with six other persons, other than members of Congress, two of whom shall be members of the national institute in the City of Washington, and resident in the said city; and the other four thereof shall be inhabitants of States, and no two of them of the same State. And the regents to be selected as aforesaid shall be appointed immediately after the passage of this act-the members of the Senate by*

the President thereof, the members of the House by the Speaker thereof, and the six other persons by Joint resolution of the Senate and House of Representatives...

And the said Regents shall meet in the City of Washington, on the first Monday of September next after the passage of this act, and organize by the election of one of their number as chancellor, who shall be the presiding officer of said board of regents, by the name of the Chancellor of the "Smithsonian Institution," and a suitable person as secretary of said Institution, who shall also be the secretary of said board of regents; . . .

And be it further enacted, That, in proportion as suitable arrangements can be made for their reception, all objects of art and of foreign and curious research, and all objects of natural history, plants, and geological and mineralogical specimens, belonging, or hereafter to belong, to the United States, which may be in the city of Washington, in whosesoever custody the same may be, shall be delivered to such persons as may be authorized by the board of regents to receive them, and shall be arranged in such order, and so classed, as best [to] facilitate the examination and study of them, in the building so as aforesaid to be erected for the institution; . . .

And be it further enacted, That the secretary of the board of regents shall take charge of the building and property of said institution, and shall, under their direction, make a fair and accurate record of all their proceedings, to be preserved in said institution; and the said secretary shall also discharge the duties of Librarian and of keeper of the museum, and may, with the consent of the board of regents, employ assistants; and the said officers shall receive for their services such sums as may be allowed by the board of regents, to be paid semi-annually on the first day of January and July; and the said officers shall be removable by the board of regents, whenever, in their judgment, the interests of the institution require any of the said officers to be changed.[10]

Of note, the Smithsonian "Establishment" of which the President of the United States serves as the "presiding officer" has only rarely met – formally nine times in all, and for the last time in 1877.[11] The business of the Smithsonian is conducted by the Board of Regents. The founding act charged the Regents with the building of the

[10] UNITED STATES. **An Act to Establish the Smithsonian Institution for the Increase & Diffusion of Knowledge Among Men**, 9 Stat 102 (1846). Available at: <http://siarchives.si.edu/sites/default/files/pdfs/9_Stat_102.pdf>.

[11] Conference on the Future of the Smithsonian Institution is Held, Smithsonian Archives (1927). Available at: <http://siarchives.si.edu/collections/siris_sic_11657>. GOODE, George Brown (Ed.). **The Smithsonian Institution, 1846-1896, The History of its First Half Century**. New York: De Vinne Press, 1897.

institution's headquarters, now popularly known as the Castle. The Chancellor was in the first years of the Smithsonian the Vice President of the United States, but after a series of deaths, the office became, by custom occupied by the Chief Justice. The Secretary served as the executive officer of the Smithsonian, selected by the Regents, but not on the board. In its early years, the Smithsonian's budget came entirely from the funds left by Smithson. In the mid-1850s the Smithsonian received its first appropriated budget from the federal government. Given that the position of Mayor of the District of Columbia was superseded by the Governor in 1871 and that office abolished after 1874, the position was dropped from the Board of Regents in a 1894 amendment to the Smithsonian statute. In 1970, the statute was again amended so that nine, rather than six citizens served on the board.

Currently, the Smithsonian is a complex museum, research and educational organization.

It has grown to include 19 museums, most but not all of them authorized by Congress. It receives $840 million in annual appropriations from Congress via the Interior and Related Agencies Subcommittee in the House and Appropriations Subcommittee on the Interior, Environment and Related Agencies Committee in the Senate. It also gets grants from government agencies like NASA, US AID, and the Department of Education. It receives gifts from donors, foundations and corporate sponsors amounting to over $200 million. It runs businesses like Smithsonian magazine and a cable television channel that generate more than $150 million in revenue annually. The funds that came with the Smithson bequest have grown to an endowment of over $1 billion. Of its 6,500 employees, over 4,000 are federal employees paid with annually appropriate funds, the others are known as "trust-fund" employees, and they are paid with nonfederal, private funds and earned revenue.[12]

The Smithsonian's Board of Regents meets regularly, several times a year. Its powers include electing the Secretary, approving the submission of the federal budget to Congress, approving annual trust fund spending and the investment of the Smithsonian endowment, accepting gifts, designating names of galleries and museums, selecting sites of new museums, approving strategic and other plans, appointing members of museum boards, acquiring properties, and exercising other governance functions. All Regents serve as principal officers as they are entitled to one vote.[13-14] Approval or disproval of any action is done by majority vote.[16]

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[12] SMITHSONIAN INSTITUTION. **Smithsonian Institution FY 2016 Budget Justification to Congress**. Available at: <http://www.si.edu/content/pdf/about/fy2016-budgetrequest.pdf>.

[13] See UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225, 1240 (2015) (Alito, J. concurring) ("ever multimember body heading agency must also be a principal officer [because] every member could cast the deciding vote with a particular decision."); Bylaws of the Board of Regents §2.06 (2014) 16 Bylaws of the Board of Regents §2.06 (2014).

[14] 20 U.S.C. § 44; Smithsonian Inst. Bylaws of the Board of Regents §2.09 (2014).

Regents may abstain from voting on an action. Eight members are required for quorum.[17]

3. THE SMITHSONIAN'S LEGAL STATUS

Congress, the Smithsonian itself, the Department of Justice Office of Legal Counsel [15] and even the courts have been hard pressed to take on the challenge of defining the Smithsonian exact legal status; for doing so can pose a nightmare in considering where in and out of the government it belongs, and whether or not its status violates the separation of powers.[16]

In 1927, former U.S. President Howard Taft, then serving as Chief Justice and also Smithsonian Chancellor, declared, "the Smithsonian Institution is not, and has never been considered a government bureau. It is a private institution under the guardianship of the Government."[17]

Taft's argument was reframed by the Office of Legal Counsel in 1976, which opined:

> *The Smithsonian is an establishment created by Federal statutes in order to fulfill a basic trust obligation originating in the will of James Smithson. But it is so uniquely distinctive a fusion of public and private cooperation and of joint action by all three traditional branches of our government that it seems fairly evident that the Congress could not have meant it to be treated as a traditional agency.*[18]

The Office of Legal Counsel considered whether the Smithsonian was in the executive branch, but although the Vice President is a member of the Board of Regents, he is *ex officio* and not appointed to that post by the President and thus "under no executive power of control or appointment." If the Smithsonian were an "executive agency" the fact that fifteen of its seventeen members – the three senators, three representatives and nine citizens – were appointed by Congress would raise serious separation of

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15 UNITED STATES. **Memorandum for the Director**, Office of Personnel Management from Assistant Attorney General Ulman, 3 Op. O.L.C. 274, 277 (1979) ("The Smithsonian is sui generis: a fusion of a private and public body and a joint instrument, in a sense, of all three branches of the Government.")

16 COLUMBIA. **Dong v. Smithsonian Inst**. United States Court of Appeals, District of Columbia Circuit. 125 F.3d 877, 877 (D.C. Cir. 1997) 125 F.3d 877, 879. ("Indeed, if the Smithsonian were to wield executive powers, the method by which its Regents are appointed would appear to violate the Constitution's separation of powers principles.").

17 SMITHSONIAN INSTITUTION. **Memorandum to Peter Powers**, General Counsel, the Smithsonian Institution from Deputy Assistant Attorney General Ulman, 19 feb. 1976.

18 SMITHSONIAN INSTITUTION. **Memorandum to Peter Powers**, General Counsel, the Smithsonian Institution from Deputy Assistant Attorney General Ulman, 19 feb. 1976.

powers issues since the Congress cannot appoint executive officers of the U.S. under Article II, Section II of the Constitution.

The Office of Legal Counsel also opined that the Smithsonian, given its function, could not be considered an "independent regulatory agency," and "not the sort of instrumentality of the United States which the Congress intended to include" as either "administrative," or "executive," or "regulatory" at least in the context of particular laws.[19] The Office of Legal Counsel in 1976 wrote that "it could be argued that the Smithsonian is ... an arm of the Congress itself," but has failed to take up or buttress that argument.[20] The best the Office of Legal Counsel could come up with is that the "bequest was accepted and has since been treated by the United States as a solemn testamentary trust independent of any traditional branch or role of government but operated as a responsibility of the Nation."[21] In another opinion, the Office of Legal Counsel wrote, "The Smithsonian is *sui generis:* a fusion of a private and public body and a joint instrument, in a sense, of all three branches of the Government."[22] Thus, in the mindset of one analyst, the practice of Constitutional avoidance about the Smithsonian's status had been strictly abided.[23]

This practice has generally resulted in various opinions from the Office of Legal Counsel treating the Smithsonian's legal status in the context of particular legislation.[24] The U.S.

Attorney General has found that the Smithsonian enjoys sovereign immunity from state and local regulation in some instances because the Smithsonian is "so closely connected" to the federal government.[25] The Smithsonian has federal sovereign immunity for some lawsuits, except those that Congress has explicitly authorized, which include FTCA, Copyright Act, the Tucker Act for contract, and discrimination under Title VII of the Civil Rights Act.[26] In *O'Rourke*, the Court found the FTCA did apply to the

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19 SMITHSONIAN INSTITUTION. **Memorandum to Peter Powers**, General Counsel, the Smithsonian Institution from Deputy Assistant Attorney General Ulman, 19 feb. 1976.

20 SMITHSONIAN INSTITUTION. **Memorandum to Peter Powers**, General Counsel, the Smithsonian Institution from Deputy Assistant Attorney General Ulman, 19 feb. 1976.

21 SMITHSONIAN INSTITUTION. **Memorandum to Peter Powers**, General Counsel, the Smithsonian Institution from Deputy Assistant Attorney General Ulman, 19 feb. 1976.

22 SMITHSONIAN INSTITUTION. Memorandum for the Director, Office of Personnel Management from Assistant Attorney General Ulman. **Opinion of the Office of Legal Concern**, Washington, vol. 3, 1979.

23 See, e.g., UNITED STATES. **O'Rourke v. Smithsonian Inst. Press**, 399 F.3d 113, 114 (2d Cir. 2005); SMITHSONIAN INSTITUTION. **Memorandum to Peter Powers**, General Counsel, the Smithsonian Institution from Deputy Assistant Attorney General Ulman, 19 feb. 1976.

24 See KMIEC, Douglas W. The Status of the Smithsonian Institution Under the Federal Property and Administrative Services Act. **Opinion of the Office of Legal Concern**, Washington, vol. 12, 122-127, june 1988. Available at: <https://www.justice.gov/file/24096/download>.

25 See SMITHSONIAN INSTITUTION. **Memorandum to Assistant General Counsel**, the Smithsonian Institution from Deputy Assistant Attorney General Moss, 25 apr. 1997.

26 SMITHSONIAN INSTITUTION. **Legal Nature of the Smithsonian**. Available at: <www.si.edu/OGC/legal history>.

Smithsonian because the definition of a federal agency "includes ... independent establishments of the United States.[27]

In *Cotton v. Adams*, the court found the Smithsonian was subject to FOIA because Congress had amended the definition of a qualifying agency "to include those entities which may not be considered agencies under section 551(1) of Title 5, U.S.Code, but which perform governmental functions and control information of interest to the public."[28] The court stated that "The Smithsonian is subject to the FOIA because it performs governmental functions as a center of scholarship and national museum responsible for the safekeeping and maintenance of national treasures." The court also found other factors indicative FOIA's applicability, including that "the Smithsonian receives federal funds for many of its operations, that it is chartered by an Act of Congress, and that it has a majority of civil service employees. Furthermore, the Smithsonian receives the benefits of agency status by virtue of the fact that it receives representation from the United States Attorney, absolute governmental immunity in libel suits, and other benefits in property transfers."[29]

In *Rivera v. Heyman*, the district court dismissed the plaintiff's claim that the Smithsonian had discriminated against him in violation of the Rehabilitation Act of 1973. The court, ruled that such lawsuits did not apply to the Smithsonian because at that time the Rehabilitation Act incorporated the Civil Rights Act's limited sovereign immunity waiver provision.[30] Under that provision, suits against the federal government extended only to "executive agencies as defined in Section 105 of title 5" or those listed in the Act.[31] In *Rivera* the court rule against the plaintiff because the Smithsonian was not a listed entity nor was the Smithsonian an "executive" agency because it lacked characteristics of being an establishment in the executive branch. Specifically, the Smithsonian didn't report to the President or perform an executive activity.[32-33-34]

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[27] UNITED STATES. **O'Rourke v. Smithsonian Inst**. Press, 399 F.3d 113, 114 (2d Cir. 2005) The Court of Federal Claims held that the Smithsonian Institution fell within term "United States," for purposes granting the Court exclusive jurisdiction over copyright infringement because – more than two-thirds of Smithsonian's workforce were federal employees, Congress appropriated funds expressly for Smithsonian's preparation and publication of books, judgments against Smithsonian were paid from United States Treasury, Smithsonian was represented by federal attorneys, and persons responsible for Smithsonian's operations were either United States officials of highest rank or Congressional appointees.

[28] COLUMBIA. **Cotton v. Adams**. District Court for the District of Columbia - June 26. 1992. 798 F. Supp. 22, 24.

[29] COLUMBIA. **Cotton v. Adams**. District Court for the District of Columbia - June 26. 1992. 798 F. Supp. 22, 24.

[30] NEW YORK. **Rivera v. Heyman**. District Court for the Southern District of New York - 982 F. Supp. 932. October 7, 1997, 982 F. Supp. 932 (S.D.N.Y. 1997), *aff'd in part, rev'd in part,* 157 F.3d 101 (2d Cir. 1998).

[31] NEW YORK. **Rivera v. Heyman**. District Court for the Southern District of New York - 982 F. Supp. 932. October 7, 1997, 982 F. Supp. 932 (S.D.N.Y. 1997), *aff'd in part, rev'd in part,* 157 F.3d 101 (2d Cir. 1998).

[32] NEW YORK. **Rivera v. Heyman**. District Court for the Southern District of New York - 982 F. Supp. 932. October 7, 1997, 982 F. Supp. 932 (S.D.N.Y. 1997), *aff'd in part, rev'd in part,* 157 F.3d 101 (2d Cir. 1998).

[33] 42 USC § 2000e-16(a)

[34] 29 U.S.C. § 633a

However, the Smithsonian became subject to suits under Title VII and Rehabilitation Act when Congress amended the Workforce Investment Act, which added the Smithsonian to the list of federal government employers that are prohibited from engaging in such discrimination. Similarly, Congress amended the Age Discrimination in Employment Act, adding the Smithsonian to the list of entities prohibited from discriminating on account of age in Federal Government employment.

In *Dong*, a case involving the privacy rights of a Smithsonian employee of the Hirschhorn Museum and Sculpture Garden, the court found that the Smithsonian's was not an "agency" covered under the Privacy Act.[35] Similar to *Rivera*, the court reasoned that based on the definition of agency "it is plain that the Smithsonian is not an establishment in the executive branch." Additionally, the *Dong* Court held that the Administrative Procedures Act did not apply to the Smithsonian because it lacked "substantial independent authority to take final binding action affecting the rights and obligations of individuals, particularly by the characteristic procedures of rule-making and adjudication." [36]

Courts have similarly rejected the idea that the Smithsonian is not a government controlled corporation. In *Dong*, the court rejected that argument because the relevant section listed only corporations in the executive branch.[37]A federal corporation may however be considered a government instrumentality subject to coverage without being strictly established in the executive branch.[38] For example, the Tennessee Valley Authority is a government corporation, understood to be outside of the executive branch – it being essentially a government-run business. However, Assistant Attorney General Ulman found Section 461(a) of the Act, 42 U.S.C. § 661(a), authorizes the President to promulgate regulations implementing § 459 for the executive branch, including any wholly owned Federal corporation created by act of Congress, [and therefore] may cover payments for Federal workers' compensation payments from the Tennessee Valley Authority (TVA) retirement system."[39] Thus TVA may be a Federal instrumentality based on the view that the retirement system was established by a "under statutory authority to further its purposes by enhancing the welfare of its employees."[40]

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[35] COLUMBIA. **Dong v. Smithsonian Inst.** United States Court of Appeals, District of Columbia Circuit. -, (D.C. Cir. 1997) 125 F.3d 877.

[36] COLUMBIA. **Dong v. Smithsonian Inst.** United States Court of Appeals, District of Columbia Circuit. -, (D.C. Cir. 1997) 125 F.3d 877.

[37] COLUMBIA. **Dong v. Smithsonian Inst.** United States Court of Appeals, District of Columbia Circuit. -, (D.C. Cir. 1997) 125 F.3d 877.

[38] *See* UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225 (2015); UNITED STATES. **Lebron v. Nat'l R.R Passenger Corp.** Supreme Court Of The United States. 513 U.S. 374, 377-78 (1995).

[39] UNITED STATES. Memorandum for the Director, Office of Personnel Management from Assistant Attorney General Ulman. **Opinion of the Office of Legal Concern**, Washington, vol. 3, 274-242, 1979.

[40] UNITED STATES. Memorandum for the Director, Office of Personnel Management from Assistant Attorney General Ulman. **Opinion of the Office of Legal Concern**, Washington, vol. 3, 274-242, 1979.

4. OTHER GOVERNMENT INSTRUMENTALITIES

The TVA opinion raises the question of how the status of other federal instrumentalities may bear on the status of the Smithsonian, its constitutionality and regard for the separation of powers.

Consider Lebron v. National Railroad Passenger Corporation, in which Michael Lebron, an artist, sued Amtrak because it rejected his lease of a billboard advertisement at Penn Station in New York. Lebron's advertisement consisted of a photo-montage depictions of war in Nicaragua including a Coors beer can and textual criticism of the Coors family for supporting the Contras, a right-wing counter-revolutionary group.[41] Lebron had signed a contract giving Amtrak approval as to the character, text, illustration, design, and operation of the advertisement. Amtrak deemed the artistic depiction on the billboard to be "political" and rejected the work. Lebron sued

Amtrak claiming the basis for the rejection violated the First Amendment. The case went to the Supreme Court over the issue of Amtrak's governmental status, with Lebron first claiming Amtrak was close to the government and then later a "government entity." The court, with Scalia writing for the majority, held that Amtrak was a government instrumentality, thus part of the Government for purposes of a First Amendment claim.[42] Although the Federal statute chartering Amtrak disavowed it was a government agency, the Court found the disclaimer is insufficient for exempting the Government from Constitutional restrictions where the government has used Amtrak as an instrument for government action. Thus, the court considered several factors in determining what about Amtrak's status that qualified it as a government instrumentality.

Scalia noted that "Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals." Six of the corporation's directors are appointed by the President of the United States – four of them with the advice and consent of the Senate. For Scalia, Amtrak "is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees. It is in that respect no different from the so-called independent regulatory agencies such as the Federal Communications Commission or the Securities Exchange Commission, which are run by Presidential appointees with fixed terms." The directors, except for the Secretary of Transportation are "not, by the explicit terms of the statute, removable by the President for cause, and are not impeachable by Congress."[43]

If Amtrak's status is suggestive of some of the characteristics of the Smithsonian, another case, *Dep't of Transp. v. Ass'n of Am. Railroads* asserts that a government

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41 UNITED STATES. **Lebron v. Nat'l R.R Passenger Corp.** Supreme Court Of The United States. 513 U.S. 374, 377-78 (1995).

42 UNITED STATES. **Lebron v. Nat'l R.R Passenger Corp.** Supreme Court Of The United States. 513 U.S. 374, 377-78 (1995).

43 513 U.S. 374, 397-98.

instrumentality exercising vested power that affects private rights must comply with the constitutional separation of power requirements. In 2008, under the Passenger Rail Investment and Improvement Act, Congress gave Amtrak and the Federal Railroad Administration the authority to issue metrics and standards concerning the on-time and delayed performance of passenger railroad service on track caused by host railroads, like the members of The Association of Railroads. The Association sued the Department of Transportation—because it held all of Amtrak's preferred stock and most of its common stock, claiming it was unconstitutional for Congress to allow Amtrak as a private company to exercise authority over such standards. The District Court rejected the Association's claim, but the DC Circuit reversed on the separation of powers claim that a private corporation could not constitutionally be granted regulatory power. The Supreme Court vacated the Circuit ruling on the grounds that Amtrak was a governmental entity under the purposes of the Act.

Justice Kennedy, writing for the majority, noted that both the Respondent and the Court of Appeals relied upon statutory directives that Amtrak "shall be operated and managed as a for profit corporation" and is "not a department, agency, or instrumentality of the United States Government." §§ 24301(a)(2)-(3). But he rejected that assertion, noting the appointees to the Amtrak board of directors, and that it had received about $1 billion a year from the federal government. Kennedy cited Lebron and wrote that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervisions prevails over Congress' disclaimer of Amtrak's governmental status. Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an unaccountable actor. The political branches created Amtrak, control its Board, define its mission, specify many of its day to day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Accordingly, the Court holds that Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in this case.[44]

Kennedy asserted that "exercise of governmental power must be consistent with the design and requirements of the Constitution, including those provisions relating to the separation of powers."[45]

Though he concurs with Kennedy, Justice Thomas takes the matter further. He argues that "A determination that Amtrak acts as a government entity in crafting the metrics and standards says nothing about whether it properly exercises governmental power when it does so."

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[44] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225.

[45] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225.

Thomas does not believe Amtrak is "properly constituted to exercise a power under one of the Vesting Clauses."[46] To the extent Amtrak's promulgation of metrics and standards rules for the private railroads to follow constitute legislative power, Thomas says it is unconstitutional. "Amtrak is not Congress." Amtrak's rules do not "comply with bicameralism and presentment" under Article I, § 7."[47]

Justice Alito's concurrence explains more about what constitutional restrains would qualify to make Amtrak remain subject to Presidential control.[48] "[A]ccountability demands that principal officer be appointed by the President, and this principle applies with special force to those who can 'exercise significant authority' without direct supervision."[49] Alito acknowledges that "a multimember body may head an agency," such as in the case of *Free Enterprise Fund*. But in such instances, Alito clarifies, that "those who head agencies must be principal officers."[50] Alito says "because agency heads must be principal officers, ever multimember body heading an agency must also be a principal officer." "[E]very member of a multimember body could cast the deciding vote with a particular decision."[51] Therefore, because "anyone who has the unilateral authority to tip a final decision one way or the other cannot be an inferior officer."[52]

Alito discounts the notion that Amtrak's president could be an inferior officer. But even entertaining the idea the Amtrak president was, there would still be constitutional defects.[53] Under Art. II § 2, cl. 2, Congress would be able to vest the head of a department with the authority to appoint of an inferior officer. However, "it is not clear that Amtrak is a Department."[54]

Members of Congress, with power over the Smithsonian's legislation and budget also sit on its Board of Regents. Given the arguable need for a federal instrumentality to comply with the separation of powers, the case of *Metro. Washington Airports Auth. (MWAA) v. Citizens for Abatement of Aircraft Noise, Inc.*, may be instructive. MWAA, concerned with the operation of District of Columbia area airports, challenged the constitutionality of a review board created by legislation transferring control of airports from Congress to a local authority. The Federal Government has a strong and continuing

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46 UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225. at 1253 (Thomas, J. concurring).

47 UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225. at 1254 (Thomas, J. concurring).

48 UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225. at 1240 (Alito, J. concurring)

49 UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225. at 1240 (Alito, J. concurring)

50 UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225 at 1239.

51 UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225 at 1239.

52 UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225 at 1239.

53 UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225 at 1239.

54 UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225 at 1239.

interest in the efficient operation of the airports, which are vital to the smooth conduct of Government business conditioned the transfer to the Airport Authority provided that legislators had voting rights on Board of Review, which had authority over air transportation decisions.[55]

The Supreme Court stated that for a separation of powers analysis, it is unnecessary to determine as the Court of Appeals did, that the Board of Review exercised "quintessentially executive power" by making 'key operational decisions' affecting a local public airport (public entity). It is sufficient to conclude that Congress exceeded its constitutional authority in its manner of inserting itself into the execution of the airport affairs. Specifically, by requiring members of Congress be on the Board of Review, capable of vetoing particular plans regarding the operation or management of airport failed to comply with legislative power constraints of bicameralism and presentment.[56]

Congress' conditioning of transfer of District of Columbia area airports to local authority upon creation of Board of Review composed of congressmen and having veto power over decisions of local authority's directors violated separation of powers. The Court stated that "if the power is executive, the Constitution does not permit an agent of Congress to exercise it." The Court then turned to analyze whether Congress exercising veto power over the airport's board of directors's decision was an unconstitutional exercise of legislative power. The Court stated that "if the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirement."[57]

5. ANALYSIS: DOES THE SMITHSONIAN VIOLATE THE SEPARATION OF POWERS?

5.1. The Formalist Objection

The doctrine of separation of powers reflects a view that the Constitution restricts the exercise of Federal Government power that may be judicially redressible. The two prominent views for separation of powers analysis are functionalism and formalism.

Functionalists believe that "Congress is substantially free reign to innovate as long as the particular scheme satisfies the functional aims of the constitutional structure taken as a whole."[58]

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[55] UNITED STATES. **Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise**. Supreme Court of United States. Inc., 501 U.S. 252, 266-(1991).

[56] UNITED STATES. **Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise**. Supreme Court of United States. Inc., 501 U.S. 252, 266 (1991).

[57] UNITED STATES. **Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise**. Supreme Court of United States. Inc., 501 U.S. 252, 266 (1991) at 276.

[58] MANNING, John F. Separation of Powers As Ordinary Interpretation. **Harvard Law Review**, Cambridge, vol. 124, p. 1942-2040, 1939.

Functionalist are interested in maintaining a "workable government." The "primary concern is whether the challenged government scheme disrupts the proper balance between coordinate branches." The problem with Functionalism, as one scholar notes, is that the approach "guards against sudden grasps of power, but not against step-by-step encroachment that result in large power grabs."[59]

Formalism, on the other hand, invokes a strict textualist approach to the Constitution. A formalist will enforce what he regards as the text's formal lines of separation." A challenged exercise of government power is checked against Constitutional "procedural requirements," such as the Vesting and Appointments Clauses. The "Constitution draws sharply defined and judiciable enforceable lines among the three distinct government branches." Formalists also believe the Constitution's structure within the document support a "free standing separation of powers." Therefore, the challenged arrangement must affect powers in a manner or degree that is constitutionally prohibited."[60]Although a formalist analysis may be more restrictive on government arrangements and possibly less supportive of realistic means for governance or the New Deal administrative state, the advantages of formalism is that the adherence to Constitutional text is more reliable. The analysis construes the Constitution in a manner that gives notice of prohibited behavior and thus promotes more consistent rulings, and reliance in devising a statutory scheme or other exercise of Vested federal government power. Accordingly, this paper applies a formalist analysis in reviewing challenged government action discussed below.

Determining whether a branch of the Federal Government or its delegate violates the separation of powers turns on whether the Constitution forbids allocating "legislative, executive, or judicial powers of the Federal Government" stemming from the Vesting Clauses "to an ineligible entity."[61]

Justice Thomas analyzes a separation of power by applying the non-delegation doctrine.

Justice Thomas says that "[t]he Constitution does not vest the Federal Government with an undifferentiated governmental power" but instead "identifies three types

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[59] STRAUSS, Peter. Formal & Functional Approcaches to Separation of Powers Questions – A Foolish Inconsistency? **Cornell Law Review**, New York, vol. 72, n. 3, p. 488-526, mar. 1987. p. 513.

[60] MANNING, John F. Separation of Powers As Ordinary Interpretation. **Harvard Law Review**, Cambridge, vol. 124, p. 1942-2040, 1939. Manning explains — This aspect of formalism makes itself felt in so-called "encroachment" cases, which deal with the claim that Congress has violated the separation of powers through its regulation or oversight of the executive or judicial powers. Because the Necessary and Proper Clause, as noted, gives Congress at least some authority to prescribe-and thus to shape and channel--the means by which all the branches carry their powers into execution,one cannot demonstrate impermissible legislative encroachment merely by showing that a statute regulates or structures the exercise of another branch's powers. Rather, the challenged arrangement must somehow affect those powers in a manner or to a degree that the Constitution otherwise prohibits.

[61] In short, the "private non delegation doctrine" is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private. UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225 at 1225.

of governmental power and in the Vesting Clauses, commits them to three branches of Government." Article I § 1 vests all legislative powers in the Congress.[62] And under Article II § 1, the executive power vests in the President of the United States.[63] Thomas says "[t]hese grants are exclusive ... [and w]hen the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it."[64]

Additionally Thomas notes that the Constitution not only "allocate[es] power among the different branches[,]"but it also "identifies certain restrictions on the *manner* in which those power are to be executed."[65] The Constitution requires, in Article I, § 7 cl. 2, that Congress exercise its legislative power through the manner of bicameralism and presentment. The Article states that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it..."[66]

Thomas says that "the Constitution is less specific about how the President shall exercise [executive] power, it is clear that he may carry out his duty to take care that the laws be faithfully executed with the aid of subordinates."[67]

Congress improperly delegates power when it "authoriz[es] an entity to exercise power in a manner inconsistent with the Constitution."[68] Congress "improperly delegates legislative power to itself when it authorizes itself to act without bicameralism and presentment."[69] Congress also acts in a manner inconsistent with the Constitution when it "authorizes the exercise of executive power" to "individuals or groups outside the President's control to perform a function that requires the exercise of that power."[70]

Thomas recognizes that in some cases "[i]t may never be possibly perfect to distinguish between legislative and executive power, but that does not mean we may look the other way when the Government asks us to apply a legally binding rule that is not enacted by Congress pursuant to Article I."[71]

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[62] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225 at 1225.

[63] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1240 (Thomas, J. concurring)

[64] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225 at 1225.

[65] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225 at 1225.

[66] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225 at 1225

[67] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225, 1253 (2015) (Thomas, J. concurring).

[68] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. 1225, 1253 (2015) (Thomas, J. concurring).

[69] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. (citing INS v. Chadha, 462 U.S. 919, 959 (1983)).

[70] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. (citing Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477 (2010)).

[71] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. at 1251-52 (2015) (Thomas, J. concurring).

In instances where the court is uncertain whether the power at issue is executive or legislative, the Court has analyzed the power from both perspectives.

According to Justice Thomas, it should matter little whether the Smithsonian is labeled a federal agency, a trust instrumentality, or private entity. The ultimate question whether the government created "entity is properly constituted to exercise a power under one of the Vesting clauses."[72] If it is not "properly constituted to do so, it is no better qualified to be an agent of that power that a purely private entity."[73] Thus, the question is whether the Board of Regents properly constituted to exercise a power under one of the Vesting Clauses?

The analysis has two steps. The first is to classify the power the legislation purports to authorize the entity (government instrumentality) to exercise. Second would be to "determine whether the Constitution's requirements for the exercise of that power have been satisfied."[74] According to Justice Thomas the:

> *first constraint is illustrated by the Court's holdings in Springer v. Philippine Islands, 277 U.S. 189 (1928), and Bowsher v. Synar, 478 U.S. 714 (1986). Springer involved the validity of Acts of the Philippine Legislature that authorized a committee of three—two legislators and one executive—to vote corporate stock owned by the Philippine Government. Because the Organic Act of the Philippine Islands incorporated the separation-of-powers principle, and because the challenged statute authorized two legislators to perform the executive function of controlling the management of the government-owned corporations, the Court held the statutes invalid.*[75]

> *The second constraint is illustrated by our decision in Chadha. That case involved the validity of a statute that authorized either House of Congress by resolution to invalidate a decision by the Attorney General to allow a deportable alien to remain in the United States. Congress had the power to achieve that result through legislation, but the statute was nevertheless invalid because Congress cannot exercise its legislative power to enact laws without following the bicameral and presentment procedures specified in Article I.*[76]

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[72] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct. at 1251-52 (2015) (Thomas, J. concurring).

[73] at 1251-52 (2015) (Thomas, J. concurring).

[74] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct., 1253 (2015) (Thomas, J. concurring).

[75] UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States. 135 S. Ct., 1253 (2015) (Thomas, J. concurring).

[76] 135 S. Ct. 1225 (citing UNITED STATES. **Lebron v. Nat'l R.R Passenger Corp.** Supreme Court Of The United States. 513 U.S. 374, 377-78 (1995)).

In *Dong*, the court said in dicta it was concerned about having members of the judicial and legislative branches serving on the Smithsonian's governing board because if the Institution was an executive branch establishment this could constitute a violation of the separation of powers.[77]

5.2. From Exercising Executive and Legislative Functions to Affecting Private Rights

The status of a number of actions by the Smithsonian and its Board of Regents indicate possible separation of powers problems inherent in the work of the Smithsonian.

In 1988, the Office of Legal Counsel offered its opinion that the Smithsonian was as an executive agency under the Federal Property and Administrative Services Act ("Property Act"), 40 U.S.C. §§ 471-544[78] The Property Act is administered under the General Services Administration and establishes procedures for the management of governmental property. According to Section 3, the Property Act applies to "executive agencies" and to "federal agencies [79]" defined as:

> *(a) The term "executive agency" means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.*
>
> *(b) The term "Federal agency" means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction).*

As the Office of Legal Counsel noted, "it has long been understood that transactions with the Smithsonian involving federal property or appropriated funds are subject to federal property and contract law."[80] Both the Smithsonian and Office of Legal Counsel agree the Property Act applies to the Smithsonian. The Smithsonian took the position that it was not an executive agency, but rather a Federal agency for the

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[77] COLUMBIA. **Dong v. Smithsonian Inst.** United States Court of Appeals, District of Columbia Circuit. 125 F.3d 879 (D.C. Cir. 1997).

[78] KMIEC, Douglas W. The Status of the Smithsonian Institution Under the Federal Property and Administrative Services Act. **Opinion of the Office of Legal Concern**, Washington, vol. 12, 122-127, june 1988. Available at: <https://www.justice.gov/file/24096/download>. p. 124.

[79] 40 U.S.C. §§ 471-544.

[80] Act of Dec. 30, 1982, Pub. L. No. 97-394, 96 Stat. 1966, 1991-92 (1982) (provisions for appropriations to the Smithsonian presume the applicability of the procurement provisions of the Property Act); 45 Comp. Gen. at 686-88; 12 Comp. Gen. 317 (1932).

purposes of The Property Act. Because Congress did not specify the status of the Smithsonian for the Property Act and the legislative history was silent, the Office of Legal Counsel in its analysis found the strongest evidence in the fact that The Property Act repealed the Smithsonian's prior statutory authority for certain property exchanges and replaced it with a provision applicable only to executive agencies.[81]

If the Property Act places the Smithsonian more firmly in the executive branch with regard to its source of funds, spending and acquisition of property, the court's consideration of *Cotton* buttresses that notion. In *Cotton*, the court considered the Smithsonian in terms of it governmental functions and found that it serves as "a center of scholarship and national museum responsible for the safekeeping and maintenance of national treasures."[82] The court considered that the Smithsonian received federal funds for many of its operations and has a majority of civil service employees. The Smithsonian employs more than 4,000 civil service staff – the other 2,000 are trust fund employees. The Smithsonian's federal workers in the competitive service are paid for with federally appropriated funds, while the trust fund workers are paid with funds from business activities, gifts, grants, contracts and payout from the Smithsonian endowment. As Picard notes, "by definition, the competitive service includes "all civil service positions in the executive branch."[83]

Who then oversees the Smithsonian workforce? Seemingly, by its founding charter, the trust-funded, non-civil service Smithsonian Secretary hired by the Board of Regents. But if the Regents are exercising executive power, they would seem to lack the requisite condition of having employees, particularly its executive branch civil service staff being subject to the President's control.

This issue became interesting during one of the Smithsonian's major controversies. In 1995, the Smithsonian's National Air and Space Museum planned an exhibition of the Enola Gay—the plane that dropped the atomic bomb on Hiroshima, leading to the end of World War II and ushering in the nuclear age. Veterans groups were shown the script of the exhibit in the planning stage and were incensed by what they saw as overly kind treatment of the Japanese as victims and the demonization of American forces and leaders in the decision to drop the bomb. The protested to members of Congress and to President Clinton. 81 members of Congress signed a letter calling for the dismissal of the Air and Space Museum director Martin Harwitt.[84] President Clinton as

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[81] KMIEC, Douglas W. The Status of the Smithsonian Institution Under the Federal Property and Administrative Services Act. **Opinion of the Office of Legal Concern**, Washington, vol. 12, 122-127, june 1988. Available at: <https://www.justice.gov/file/24096/download>. p. 124.

[82] COLUMBIA. **Cotton v. Adams**. District Court for the District of Columbia - June 26. 1992. 798 F. Supp. 22, 24.

[83] 5 U.S.C. § 2102 (a)(1) (2006).

[84] HIRSCH, Arthur. Smithsonian Cancels Exhibit on Atomic Bomb. **Baltimore Sun Times**, Baltimore, jan. 31, 1995. Available at: <http://articles.baltimoresun.com/1995-01-31/features/1995031159_1_heyman-atomic-enola-gay>.

the head of the executive branch had no removal authority, no ability to fire Harwitt nor dismiss Heyman. In the end, Harwitt resigned.[85]

For Regents, the process of removal is more complex and rare. There is only one instance where a Regent was removed from his position.[86] Congress removed the Regent by joint resolution. This was during the Civil War. The Regent was a member of the House of Representatives and the reason for his expulsion was for providing "aid and comfort to enemies of the government."[87-88]

If there are issues with executive functions, the Smithsonian has also ventured into what seem like legislative matters. The Board of Regents has promulgated standards and directives that decree what may be accepted into the national collections, rules about what kind of donations may be accepted and so on without necessarily having explicit legislative authority to do so. These may be regarded as somewhat minor infractions, but sometimes they emerge as contentious. For example, most of the Smithsonian's national museums have been created by Congressional legislation, but the Smithsonian has itself created the Cooper-Hewitt Smithsonian Design Museum and the Anacostia Community Museum without legislation, earning Congressional criticism.

This seeming Smithsonian infringement on legislative authority emerged in a controversy in 1985 where the former Smithsonian Secretary S. Dillon Ripley had negotiated a $5 million gift from the Government of Saudi Arabia for support of a Center for Islamic Arts and Culture to be part of the Smithsonian International Center, to be located in the Smithsonian's newly built Quadrangle building complex adjacent to its Castle headquarters on the National Mall and largely underground.[89] The Smithsonian's plan was for the Quadrangle to house the National Museum of African Art, the Sackler Gallery of Asian Art and the International Center. Ripley's plan was to couple the Saudi gift with appropriated federal funds to support the enterprise, and in the Smithsonian agreement with the Saudis, the Smithsonian agreed to rename a gallery the Asian and African Gallery.[90] Sidney Yates, the chair of the House subcommittee on appropriations overseeing the Smithsonian's federal budget the arrangement, and renaming something approved by Congress came as a surprise to him and were unacceptable. The

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[85] Official Resigns Over Exhibit of Enola Gay, **New York Times** (May 3, 1995), Available at: <http://www.nytimes.com/1995/05/03/us/official-resigns-over-exhibit-of-enola-gay.html>.

[86] H.R.J. Res. 21, 37th Cong. (1868).

[87] H.R.J. Res. 21, 37th Cong. (1868).

[88] SMITHSONIAN. 20 U.S.C. §§ 44-80; **Smithsonian Inst. Bylaws of the Board of Regents** §§ 1.01-6.06 (2014); **Smithsonian Directives** (2013).

[89] BATTIATA, Mary. Saudi Gift Controversy at the Smithsonian. **Washington Post**, Washington, 9 oct. 1985. Available at: <https://www.washingtonpost.com/archive/lifestyle/1985/10/09/saudi-gift-controversy-at-thesmithsonian/ac61fda89bf5-4398-9b78-296ed18e7678/>.

[90] BATTIATA, Mary. Saudi Gift Controversy at the Smithsonian. **Washington Post**, Washington, 9 oct. 1985. Available at: <https://www.washingtonpost.com/archive/lifestyle/1985/10/09/saudi-gift-controversy-at-thesmithsonian/ac61fda89bf5-4398-9b78-296ed18e7678/>.

Regents agreed to renege on the deal, and returned the Saudi gift.[91] The Washington Post opined that the controversy could "be attributed to the Smithsonian's unique, quasi-federal status," as well as Ripley's ruling style which Congressional critics charged was "Kremlinesque" as he failed to "tell Capitol Hill too much about what it was doing."[92]

The question is whether or not these indiscretions really amount to much legally. For Scalia, dissenting in Mistretta v. United States, declared that, "where no government power is at issue, there is no strict constitutional impediment to a branchless agency..."[93] Scalia dissented on the formation of a Sentencing Commission because "[t]he lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law.[94] "[T]he Commission neither exercises any executive power on its own, nor is subject to control of the President ..."[95] "The only functions it performs...are data collection and intragovernmental advice giving and educational [activities] ...similar to the functions performed by congressional agencies and even congressional staff [that] neither determine nor affect private rights, and do not constitute an exercise of government power.[96]

Courts and the Office of Legal Counsel have seized on the similar notion that the work "currently exercised by the presently existing congressional agencies" such as the "functions undertaken by the Library of Congress, the basic accounting tasks of the Government Accounting Office, and all of the duties of the Architect of the Capitol can comfortably be described as in aid of the legislative process."[97] Even the Smithsonian's and its bureaus' activities, the Office of Legal Counsel claims, "fit under a broad construction" of providing aid to the legislative branch. In short, the Office of Legal Counsel opines, that the exercise of powers by such agencies "may be deemed constitutionally harmless."[98]

So, does the Smithsonian exercise government power that might affect private rights?, because that was indeed the issue in *Dep't of Transp*., where Amtrak with FRA

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[91] BATTIATA, Mary. Saudi Gift Controversy at the Smithsonian. **Washington Post**, Washington, 9 oct. 1985. Available at: <https://www.washingtonpost.com/archive/lifestyle/1985/10/09/saudi-gift-controversy-at-the smithsonian/ac61fda89bf5-4398-9b-78-296ed18e7678/>.

[92] BATTIATA, Mary. Saudi Gift Controversy at the Smithsonian. **Washington Post**, Washington, 9 oct. 1985. Available at: <https://www.washingtonpost.com/archive/lifestyle/1985/10/09/saudi-gift-controversy-at-the smithsonian/ac61fda89bf5-4398-9b-78-296ed18e7678/>.

[93] UNITED STATES. **Mistretta v. United States**. Supreme Court of United States. 488 U.S. 361, 423 (1989) (Scalia, J., dissenting).

[94] UNITED STATES. **Mistretta v. United States**. Supreme Court of United States. 488 U.S. at 420 (1989).

[95] UNITED STATES. **Mistretta v. United States**. Supreme Court of United States. 488 U.S. at 420 (1989).

[96] UNITED STATES. **Mistretta v. United States**. Supreme Court of United States. 488 U.S. at 420-412 (1989). (emphasis added)

[97] DELLINGER, Walter. The Constitutional Separation of Powers Between the President and Congress. **Opinion of the Office of Legal Concern**, Washington, vol. 20. p. 124-181, may 1996. Available at: <https://www.justice.gov/sites/default/files/olc/opinions/1996/05/31/op-olc-v020-p0124_0.pdf>. p. 172.

[98] DELLINGER, Walter. The Constitutional Separation of Powers Between the President and Congress. **Opinion of the Office of Legal Concern**, Washington, vol. 20. p. 124-181, may 1996. Available at: <https://www.justice.gov/sites/default/files/olc/opinions/1996/05/31/op-olc-v020-p0124_0.pdf>. p. 172.

was exercising government power by creating a regulatory standard that affected private rights. When a government instrumentality performs a function that determines or affects private rights or the prerogatives of the other branches," that entity is exercising government powers.[99]

The Smithsonian has historically exercised such powers with regard to excavations and the collection of both antiquities and objects of natural history. The Antiquities Act of 1906 provided a federal mechanism for the retrieval of these objects on federal land.[100] Many of the sites were Native American historic and prehistoric sites. Excavating on those sites required a permit, and such permits were originally issued only by the Smithsonian Institution.[101] This had the advantage of professionalizing archaeology early on by restricting such activities to competent scholars and scientists. But it also restricted access and availability of Native items to their tribes and tribal members. Other laws through the 20th century authorized the Smithsonian to "cooperate with any State, educational institution, or scientific organization in the United States to continue independently or in cooperation anthropological researches among the American Indians and the natives of lands and the excavation and preservation of archaeological remains.[102] Such provided that "all such cooperative work and division of the result thereof shall be under the direction of the Secretary of the Smithsonian Institution."[103] "Where lands under the jurisdiction of the Bureau of Indian Affairs or the National Park Service, cooperative work would proceed under regulations and conditions as the Secretary of the Interior may provide."[104]

This role of the Smithsonian extended to lands that might be flooded by Government built dams with consequences for private property. "The Secretary of the Smithsonian Institution is authorized to cooperate with any State, educational institution, or scientific organization in the United States for continuing paleontological investigations, and the excavation and preservation of fossil remains, in areas which will be flooded by the construction of Government dams or otherwise be made unavailable

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99 See UNITED STATES. **Dep't of Transp. v. Ass'n of Am. Railroads**. Supreme Court of the United States.135 S. Ct. 1225, 1253 (2015); UNITED STATES. **Mistretta v. United States**. Supreme Court of United States. 488 U.S. 361, 425 n3 (1989) (Scalia, J., dissenting) In his dissent, Justice Scalia argued – There are of course agencies within the Judicial Branch (because they operate under the control of courts or judges) which are not themselves courts, see, e.g., 28 U.S.C. § 601 et seq. (Administrative Office of the United States Courts), just as there are agencies within the Legislative Branch (because they operate under the control of Congress) which are not themselves Senators or Representatives, see, e.g., 31 U.S.C. § 701 et seq. (General Accounting Office). But these agencies, unlike the Sentencing Commission, exercise no governmental powers, that is, they establish and determine neither private rights nor the prerogatives of the other Branches. They merely assist the courts and the Congress in their exercise of judicial and legislative powers. *Mistretta*, 488 U.S. at 425 n3 (Scalia, J., dissenting).

100 UNITED STATES. **The Antiquities Act**, 1900-06 (codified 16 U.S.C. §§ 431- 433 (2009))

101 UNITED STATES. **The Antiquities Act**, 1900-06 (codified 16 U.S.C. §§ 431- 433 (2009))

102 20 U.S.C. § 69.

103 20 U.S.C. § 70.

104 20 U.S.C. § 70.

for such investigations because of such construction."[105] Even now, with the passage of the National Museum of the American Indian Act in 1989 which applies solely to the Smithsonian,[106] and the Native American Graves Protection and Repatriation Act (NAGPRA), passed in 1990,[107] the Department of Interior relies on discretionary standards developed and promulgated by the Smithsonian to make decisions about repatriation of human materials, sacred and funerary objects to Native peoples.[108] To the extent that the Smithsonian engages in these types of activities and establishes standards affecting private rights, it is either an impermissible exercise of executive power—assuming it is a legislative agency; but if it is in the legislative branch then it is an impermissible exercise of legislative power because the Regent resolution process fails to comply with the bicameralism and presentment requirement.

5.3. Ineligibility of Appointment

The most obvious violation of the separation of powers is the membership on the Board of Regents, particularly with regard to its Congressional members. According to the U.S. Constitution:

> *No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.*[109]

The question then becomes, does being a Regent of the Smithsonian qualify as holding any Office under the United States?

According to DOJ, "The most common problem under the Ineligibility Clause arises from legislation that creates a commission or other entity and simultaneously requires certain ...members be Representatives or Senators, either *ex officio* or by selection or nomination by congressional leadership."[110] Although advisory or purely ce-

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[105] 20 U.S.C. § 78.

[106] UNITED STATES. National Museum of the American Indian Act, **Public Law**. 101-185, 103 Stat. 1336 (Nov. 28, 1989) .

[107] UNITED STATES. Native American Graves Protection and Repatriation Act, **Public Law**. 101-601, 104 Stat. 3048 (Nov. 16, 1990).

[108] MITTAL, Anu K. **Key Federal Agencies' and the Smithsonian Institution's efforts to Identify and Repatriate Indian Human Remains and Objects**. Available at: <http://www.gao.gov/assets/130/126466.pdf>.

[109] UNITED STATES. Constitution. art. I, § 6, cl. 2

[110] DELLINGER, Walter. The Constitutional Separation of Powers Between the President and Congress. **Opinion of the Office of Legal Concern**, Washington, vol. 20. p. 124-181, may 1996. Available at: <https://www.justice.gov/sites/default/files/olc/opinions/1996/05/31/op-olc-v020-p0124_0.pdf>. p. 160.

remonial roles are permissible, appointing a currently serving member of Congress to a role in which he would perform executive functions would violate the Ineligibility Clause.[111]Given that the Smithsonian Congressional Regents are appointed respectively by the President of the Senate and the Speaker of the House, ie., their role as Regents would violate the ineligibility clause to the extent the duties of the Regents were regarded as performing executive functions.

According to DOJ "designating a member of Congress to serve on a commission with any executive functions, even in what was expressed a purely ceremonial role, may render the delegation of significant governmental authority to the commission unconstitutional as a violation of the anti-agrandizement principle."

Both *MWAA* and *Springer* struck down on general separation of powers principles provisions that envisioned the presence of legislators on managerial boards of public entities engaged in proprietary activities.[112]

Interestingly enough, the same problem might not obtain for judges and particularly the Chief Justice who serves on the Board of Regents. In *Mistretta v. United States*, "the principle of separation of powers does not absolutely prohibit Article III judges from serving on commissions..."[113]

6. CONCLUSION

The Smithsonian cannot survive a formalist critique of its status as a violation of the separation of powers. While the Smithsonian is clearly a government entity, and as it itself describes an "instrumentality" of the U.S., its powers are unclear. Its powers cannot be clearly described as judicial, legislative or executive. Its connection to the Vesting clauses is also unclear. While they perhaps tend toward the executive, the Smithsonian governing Board of Regents has no direct connection with the President of the United States. Though the President is legally the presiding officer of the "establishment, that body exercises no power and has not met in almost 90 years. Furthermore, no one on the Board of Regents, nor the Secretary of the Smithsonian is appointed by the President. The composition of the Board of Regents is problematic, particularly members of Congress. Norton's idea for the reformation of the Board, which would mean Congress appointing all private individuals to the Board of Regents would eliminate the latter problem. Alternatives might be reforming the Smithsonian to make it more clearly federal and executive, like the National Archives and Record Administration that has a

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111 DELLINGER, Walter. The Constitutional Separation of Powers Between the President and Congress. **Opinion of the Office of Legal Concern,** Washington, vol. 20. p. 124-181, may 1996. Available at: <https://www.justice.gov/sites/default/files/olc/opinions/1996/05/31/op-olc-v020-p0124_0.pdf>. p. 160.

112 Currie ("as an original matter one might argue that the separation of power provisions with which we are concerned . . . apply only to the business of governing, not to government-run business.").

113 UNITED STATES. **Mistretta v. United States**. Supreme Court of United States. 488 U.S. 361, 404 (1989)

similar mission or putting the Smithsonian under say the Department of the Interior in the executive branch, or placing it under the Congress, like the Library of Congress. But these alternatives remain unexplored and would involve a radical reformulation of the Smithsonian's functions and certainly its board. More appropriately, the Smithsonian is likely to continue as has for 170 years, an early form of encroachment on the three branches theory of government, a bundle of contradictions and compromises based upon historical idiosyncrasy and convenience, bereft of principle, but none-the-less effective as the world's largest and most popular museum, educational and research complex.

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