

WHEN THE CHIEF JUSTICE SERVES IN THE LEGISLATIVE BRANCH

*Roy E. Brownell II**

The question of which governmental branch (or branches) the Vice President falls within is one that received a fair amount of attention during the tenure of Dick Cheney.¹ The Vice President performs a myriad of tasks for the President, but he also presides over the Senate, thus placing him in both political branches.² But what of the Chief Justice when he presides over the chamber during presidential impeachment trials? Should he also be viewed as part of the legislative branch during these rare occasions?³ It has been vigorously argued that he cannot be so categorized.⁴ Yet, as counterintuitive as it may initially seem,⁵ the Chief Justice should indeed be considered part of the legislative branch during presidential impeachment trials.⁶

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1. See, e.g., Todd Garvey, Note, *A Constitutional Anomaly: Safeguarding Confidential National Security Information Within the Enigma That is the American Vice Presidency*, 17 WM. & MARY BILL OF RTS. J. 565 (2008).

2. See Roy E. Brownell II, *Vice Presidential Secrecy: A Study in Comparative Constitutional Privilege and Historical Development*, 84 ST. JOHN'S L. REV. 423, 497-500 n.323 (2010). For a detailed discussion of the issue, see Roy E. Brownell II, *Constitutional Chameleon* (forthcoming article).

3. There have been only two presidential impeachment trials in American history: Andrew Johnson in 1868 and Bill Clinton in 1999.

4. See Garvey, *supra* note 1, at 592-93 (quoting Sen. Durbin taking this view in a 2007 letter to Cheney).

5. See *Nixon v. United States*, 506 U.S. 224, 243 n.1 (1993) (White, J., concurring). *But see id.* at 234 (majority opinion) (rejecting Justice White's position). For an assertion that one can hold "[o]bligations to two branches" but still be part of just one, see *Bowsher v. Synar*, 478 U.S. 714, 746 & n.10 (1986) (Stevens, J., concurring).

6. At least one other article has impliedly taken this position, but none has examined the question at any length. See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel*, 79 CORNELL L. REV. 1045, 1123 n.384 (1994).

It should be noted up front that there is no accepted test for discerning which branch an official is “in.”⁷ Many factors, such as text, structure, historical precedent, and practical concerns, all contribute to making such a determination. With that in mind, the reasons for the Chief Justice being considered part of the legislative branch in this context are manifold. First, as a matter of constitutional text, the Chief Justice during presidential impeachment trials steps into the shoes of the president of the Senate. His authority in this vein is granted by Article I, which predominantly governs the legislative branch,⁸ and not Article III, which does the same for the federal judiciary.⁹ Indeed, the only reference to the Chief Justice in the entirety of the Constitution occurs in this context in Article I.¹⁰ In his role as presiding officer, the Chief Justice has power only under this article to fall back on.¹¹ The Chief Justice carries with him no residual Article III authority; he exercises no power of judicial review.

More specifically, the Chief Justice’s authority is provided by Section 3, Clause 6 of Article I.¹² It provides that “[w]hen the President of the United States is tried [in the Senate], the Chief Justice shall preside.”¹³ This provision follows Clause 4, which lays out the Vice President’s authority to preside over the Senate, and Clause 5, which does the same for the President Pro Tempore.¹⁴ The fact that the three clauses governing who presides over the Senate appear consecutively reinforces the notion that they should be read together. That in turn leads to the conclusion that when the Chief Justice takes the gavel, he

7. For judicial treatment of how to categorize positions created by statute (as opposed to those created by the Constitution), compare *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 36 n.1 (1985) (applying an accountability/control test) with *Humphrey’s Executor v. United States*, 295 U.S. 602, 627-28 (1935) (applying a functional test).

8. See, e.g., *Schneider v. Kissinger*, 412 F.3d 190, 195 (D.C. Cir. 2005).

9. See, e.g., *Miller v. French*, 530 U.S. 327, 342 (2000).

10. See U.S. CONST. art. I, § 3, cl. 6. See also Edward T. Swaine, *Hail, No: Changing the Chief Justice*, 154 U. PA. L. REV. 1709, 1724 (2006).

11. See 2 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 847 (1960) (“[T]he rules make evident the intent that when the Senate is sitting for the trial of an impeachment, the presiding officer shall act as the agent or mouthpiece of the Senate and not as an independent authority.”).

12. See U.S. CONST. art. I, § 3, cl. 6.

13. *Id.* See also Swaine, *supra* note 10, at 1713 n.22 (discussing Senate rules governing who presides during an impeachment trial of an acting president and a federal statute implicitly governing who presides if the chief justiceship is vacant or the occupant is disabled).

14. See U.S. CONST. art. I, § 3, cls. 4, 5.

possesses all the attributes that the Senate's other presiding officers enjoy in that same capacity.¹⁵

Second, impeachment is not listed among the aspects of judicial branch power under Article III.¹⁶ Quite simply, as a matter of text, the judicial branch—as opposed to the Chief Justice in a legislative branch capacity—is in no way part of the impeachment process.¹⁷

A third textual provision reaffirms this view. Article I grants the Senate “the sole Power to try all impeachments,”¹⁸ which poses a major obstacle to the view that the Chief Justice is always in the judicial branch. How could the Chief Justice—as presiding officer of the Senate during presidential impeachment trials—not be considered part of the Senate given the upper chamber's exclusive authority to try all impeachments? To view him otherwise is to contradict the constitutional mandate that the Senate alone carries out this duty.

Fourth, a broader structural feature is also at play that further reinforces the view that the Chief Justice is part of the legislative branch during presidential impeachment trials. It has long been established that the judicial branch may not have its final determinations appealed to the other branches.¹⁹ The Supreme Court in *Plaut v. Spendthrift Farms, Inc.* held that “invalidation of final [judicial] judgments [is] . . . categorically unconstitutional.”²⁰ Yet, as presiding officer of the Senate, any rulings by the Chief Justice may be (and indeed have been) overridden by the Senate.²¹

Moreover, the Supreme Court has made clear that regarding impeachment it is the Senate—and not the judiciary—that has the final word: “the Judiciary, and the Supreme Court in particular, were not chosen to have *any* role in impeachments.”²² This view was acknowledged by Chief Justice Salmon Chase just prior to the impeachment trial of President Andrew Johnson. In a letter to the body,

15. Cf. RICHARD C. SACHS, *THE PRESIDENT PRO TEMPORE OF THE SENATE: HISTORY AND AUTHORITY OF THE OFFICE* 11 (2003).

16. See U.S. CONST. art. III, § 2.

17. See *Nixon v. United States*, 506 U.S. 224, 234 (1993).

18. U.S. CONST. art. I, § 3, cl. 6.

19. See, e.g., *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 218-19 (1995).

20. *Printz v. United States*, 521 U.S. 898, 932-33 (1996) (encapsulating the *Plaut* holding).

21. See *Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials*, in SENATE MANUAL, S. DOC. 104-1, at 178-79 (1st Sess. 1995). See also HAYNES, *supra* note 11, at 848. Chief Justice John Jay, Justice William Cushing, and a district court judge concluded in a letter in *Hayburn's Case* that actions taken by a judge that could be overruled by a political branch *ipso facto* meant that the judge was outside of the judicial branch in that setting. See 2 Dall. (2 U.S.) 409, 414 (1792).

22. *Nixon v. United States*, 506 U.S. 224, 234 (1993) (emphasis added).

Chase expressed concern about the course the Senate was taking.²³ “I am informed,” he wrote “that the Senate has proceeded upon other views [than my own]; and it is not my purpose to contest what its *superior wisdom* may have directed.”²⁴ Thus, having the Chief Justice considered part of the judicial branch while at the same time permitting his rulings to be overturned by the Senate would violate a fundamental precept of the federal judiciary: that a final judicial branch judgment may not be voided by either political branch. In order to escape this structural dilemma, the Chief Justice must be considered part of the legislative branch when presiding over the Senate.

Fifth, these textual and structural factors are enhanced by custom²⁵ and practical considerations. For example, the Chief Justice—like the Vice President in more commonplace settings—can vote to break ties during presidential impeachment trials.²⁶ In the Johnson impeachment proceedings, Chief Justice Chase twice voted to resolve a Senate impasse.²⁷ The initial vote was challenged but ultimately upheld by the chamber.²⁸

Moreover, as alluded to earlier, the Chief Justice—like the Vice President and President Pro Tempore—can make a variety of parliamentary rulings subject to possible Senate override.²⁹ In this context, the Chief Justice may even be referred to by senators as “Mr. President,”³⁰ again clearly denoting his legislative branch role and his status as a fill-in for the president of the Senate. As such, the Chief Justice is not resolving cases and controversies under Article III; he is participating in the internal business of the Senate under Article I.

Further, in carrying out his Senate role, the Chief Justice has to rely heavily on legislative branch personnel to complete his work. During the impeachment trial of President Bill Clinton, this reality was laid bare in a humorous exchange between Chief Justice William Rehnquist and one of the House managers.

23. See *Communication from the Chief Justice*, CONG. GLOBE, 40TH CONG., 2D SESS. 1644 (1868) [hereinafter *Chase letter*].

24. *Id.* (emphasis added).

25. The role of past practice in separation of powers disputes is entitled to no small degree of deference. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 401 (1989).

26. See PROCEDURE AND GUIDELINES FOR IMPEACHMENT TRIALS IN THE UNITED STATES SENATE (REV. ED.), S. DOC. 99-33, at 40-41 (2d Sess. 1986) [hereinafter *Procedure*]. See also CONG. GLOBE, 40TH CONG., 2D SESS. 62-63 (1868).

27. See *Procedure*, *supra* note 26, at 40-41.

28. See *id.*

29. See *id.* at 63-64. It should be remembered that the Chief Justice in this capacity is not applying the rules of the Supreme Court. He is applying the Rules of the Senate.

30. See *id.* at 64.

Mr. Manager HUTCHINSON. Mr. Chief Justice, could I object to the form of the question? That was not proper characterizing what I just stated.

The CHIEF JUSTICE. I don't think managers—I am not sure whether the managers—can the managers object to a question? (Laughter.)

Mr. Manager HUTCHINSON. I withdraw my objection.

The CHIEF JUSTICE. Very well. I think—the Parliamentarian says they can only object to an answer, not to a question, which is kind of an unusual thing . . .³¹

In this situation, Chief Justice Rehnquist closely adhered to the counsel provided by the Senate parliamentarian—as Senate presiding officers typically do³²—despite his own apparent inclination to the contrary.³³ He did not render his own judgment or even ask his law clerks for an answer. This is because, for the entirety of his tenure as presiding officer, the Chief Justice is subject to Senate rules. Such a principle was reflected during a break in the Clinton trial. In this setting, the Senate sergeant at arms had to enforce an upper chamber rule that prohibits gambling against the Chief Justice and his law clerks, who were playing low-stakes poker.³⁴

In addition, the Chief Justice—like the Vice President—may speak from the chair from time to time with the permission of the Senate.³⁵ All of these practical features—voting to break ties, making rulings subject to Senate override, being addressed as “Mr. President,” utilizing Senate personnel, being subject to Senate rules, and speaking from the chair with Senate permission—reflect the Chief Justice being part of the legislative branch in this unique setting.

31. 145 CONG. REC. 1250 (1999). A later statement from the chair by Rehnquist could also be interpreted as his having viewed himself as part of the legislative branch during the impeachment proceedings: “I underwent the sort of culture shock that naturally occurs when one *moves* from the very structured environment *of* the Supreme Court to what I shall call, for want of a better phrase, the more free-form environment *of* the Senate.” 145 CONG. REC. 2377 (1999) (emphasis added).

32. See, e.g., Patrick O'Connor & Carrie Budoff Brown, *Ten Who Could Decide Health Care*, POLITICO, Mar. 5, 2010.

33. See 145 CONG. REC. at 1250. For more on Rehnquist's role, see PETER BAKER, *THE BREACH: INSIDE THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON* 365 (2000); NICOL C. RAE & COLTON C. CAMPBELL, *IMPEACHING CLINTON: PARTISAN STRIFE ON CAPITOL HILL* 132-33 (2004).

34. See BAKER, *supra* note 33, at 364.

35. See, e.g., 145 CONG. REC. at 2377.

Yet another practical feature to consider is that the authority of the judicial branch has not been utilized during presidential impeachment. In the Clinton trial, when confronted with an opportunity to exercise the authority of the judicial branch, Chief Justice Rehnquist pointedly declined.³⁶ He was asked by a senator to intervene in a matter involving a lower federal court's granting of permission to the House managers to interview Monica Lewinsky following the beginning of the Senate impeachment trial.³⁷ The Chief Justice chose not to involve himself in the matter.³⁸ He even questioned whether he had the authority to preside over impeachment trial depositions.³⁹ Had Rehnquist considered himself part of the judicial branch in the impeachment context, he seemingly would have been less hesitant to involve himself in oversight of this activity. Such a stance makes all the more sense when one realizes that the Chief Justice was almost certainly not placed in the presiding officer's chair during presidential impeachment trials because he represents the judiciary, but instead because he is not the Vice President and therefore prevents a conflict of interest.⁴⁰ As Chief Justice Chase wrote, "[u]nder the Constitution, . . . it was doubtless thought prudent and befitting that the next in succession should not preside in a proceeding through which a vacancy might be created."⁴¹

Finally, concluding the Chief Justice serves in more than one branch is hardly outlandish in light of past practice in non-impeachment settings. Take the example of the first Chief Justice, John Jay. Under the direction of President George Washington, he negotiated a major treaty with Great Britain in 1794 while on the high court.⁴² In so doing, Jay was unquestionably acting as part of the executive branch as it enjoys a monopoly over diplomatic negotiation.⁴³ Jay himself several

36. See BAKER, *supra* note 33, at 345-46.

37. *Id.* at 345, 365.

38. *Id.* at 365.

39. *Id.* at 368.

40. See, e.g., RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 130 (1999); Swaine, *supra* note 10, at 1724.

41. Chase Letter, *supra* note 23, at 1644.

42. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 398-99 (1989).

43. See, e.g., *United States v. Curtiss-Wright*, 299 U.S. 304, 319 (1936). To highlight still further Jay's placement in the executive branch on that mission, Washington's refusal to turn over documents related to the treaty's negotiation is routinely cited as an early example of *executive* privilege, not *judicial* privilege. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 116 (2d ed. 1996).

years earlier had actually held both the chief justiceship and the top position in what would later be called the Department of State.⁴⁴

Not long afterward, one of Jay's successors, Oliver Ellsworth, held the positions of Chief Justice and Minister to France at the same time.⁴⁵ John Marshall, like Jay, was also for a short period both Chief Justice and Secretary of State.⁴⁶ Each one of these diplomatic roles not only required the act of nomination by the President and acceptance by the Chief Justice himself, but also Senate advice and consent.⁴⁷ Thus, during the formative years under the Constitution,⁴⁸ all three branches of government on several occasions approved this straddling of the executive and judicial branches by the Chief Justice.⁴⁹ And, unlike the Chief Justice's role in presidential impeachment trials, *none of these diplomatic assignments has any basis in constitutional text*. One would think that, if the framers and their contemporaries were so untroubled by the Chief Justice participating in executive branch activities, they would have had no concern whatsoever with his being categorized as part of the legislative branch during presidential impeachment trials because they had explicitly provided for that role in the Constitution.

This article's thesis could be called into some question through four potential counterarguments. First, there is a Supreme Court passage from *Bowsher v. Synar* that seems to point toward the Chief Justice remaining within the judicial branch at all times. The Court opined in dictum that "in the impeachment of a President, the presiding officer of the ultimate tribunal is *not* a member of the legislative branch, but the Chief Justice of the United States."⁵⁰ True enough. As with the Vice President, the Chief Justice is obviously not a *member* of the legislative branch; he is not a senator. He is not elected to six-year terms; the Chief

44. See, e.g., Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 146 n.105; STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 92 (1997).

45. See, e.g., *Mistretta*, 488 U.S. at 398-99.

46. See *id.* at 399.

47. See, e.g., *id.*

48. Constitutional interpretation during this period is entitled to great deference. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412 (1928). In 1948, President Harry Truman publicly proposed sending Chief Justice Fred Vinson on a diplomatic mission to the Soviet Union. Vinson agreed but Truman ultimately rescinded the offer for reasons unrelated to the constitutional placement of the Chief Justice. See DAVID PIETRUSZA, 1948: HARRY TRUMAN'S IMPROBABLE VICTORY AND THE YEAR THAT TRANSFORMED AMERICA 351-53 (2011).

49. For decades, beginning in the early 1790s, the Chief Justice served on the board of the Sinking Fund and played an oversight role with respect to the U.S. Mint, two positions which placed him "within the administration." JAY, *supra* note 44, at 92-93.

50. *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). For dicta from Justices White and Stevens implying the Chief Justice remains at all times in the judicial branch, see *supra* note 5.

Justice has life tenure. He does not represent a state; he represents the nation. However, like the Vice President,⁵¹ the Chief Justice is *part* of the legislative branch under certain circumstances. At the same time, the Sergeant at Arms, the Doorkeeper, the parliamentarian, and Senate staff are not *members* of the upper chamber either, but they are without question part of the legislative branch.⁵² This distinction between being a member of the Senate and a part of the legislative branch is one that the Department of Justice has embraced regarding the Vice President.⁵³ The same reasoning is also applicable to the Chief Justice.

A second counterargument could assert that the Chief Justice—like the President—has a functional legislative role to play even if he is never actually part of the legislative branch. For example, the President signs and vetoes bills, which reflect functional legislative power, even though these actions take place outside the legislative branch.⁵⁴ However, unlike when the President reviews legislation, the Chief Justice exercises functional judicial authority—and not functional legislative power—in his Senate role. Both the Chief Justice and the Senate are utilizing functional *judicial* authority in this capacity but are doing so within the legislative branch.⁵⁵ Moreover, the Chief Justice steps into the shoes of the presiding officer when chairing presidential impeachment trials. Thus, the Chief Justice assumes the same type of *intra*-Senate responsibilities that a presiding officer does and that a President does not. The Chief Justice presides over the upper chamber's proceedings, makes rulings, casts deciding votes, is subject to Senate rules, and identifies senators to speak. The President's functional legislative activities, on the other hand, are performed entirely *outside of the legislative chamber*. The President has no role in Senate rulemaking, he cannot cast a vote in the body, he is not subject to Senate rules, and he cannot choose who speaks on the floor; his only formal, functional

51. See Brownell, *supra* note 2, at 497-500 n.323.

52. Senate staff members, for example, should be considered part of the legislative branch because they are viewed as lawmakers' alter egos and, moreover, are protected under Article I's Speech or Debate Clause. See *Gravel v. United States*, 408 U.S. 606 (1972).

53. See Letter from Laurence H. Silberman, Acting Attorney General, to the Hon. Howard W. Cannon, Chairman, Senate Comm. on Rules and Administration, at 6 (Sept. 20, 1974), available at <http://www.fas.org/irp/agency/doj/olc/092074.pdf>.

54. See, e.g., *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 453 (1899).

55. See, e.g., *Hayburn's Case*, 2 Dall. (2 U.S.) 409, 413 (1792) (letter of Justice Iredell and Judge Sitgreaves); THE FEDERALIST No. 65 at 330 (Alexander Hamilton) (Garry Wills ed. 1982); THOMAS JEFFERSON, OPINION ON POWERS OF THE SENATE RESPECTING DIPLOMATIC APPOINTMENTS (Apr. 24, 1790), in THE PAPERS OF THOMAS JEFFERSON (Julian P. Boyd et al. eds., 1950), available at http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s48.html; RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 140 & n.58 (2d ed. 1974).

legislative actions occur prior to and after the lawmaking process has taken place within Congress.⁵⁶ The Chief Justice, on the other hand, carries out his duties *within* the Senate itself.

A third potential counterargument could be that, because the Chief Justice is carrying out functional judicial power in the presiding officer's chair, he is not part of the legislative branch.⁵⁷ The argument would be that he is performing a different function from that of the Vice President or President Pro Tempore.⁵⁸ This view falls short, however, because it treats functional power and branches of government as if they were one and the same. They are not. As noted above, the President exercises functional legislative power *outside* the legislative branch. At the same time, the Senate exercises functional executive power (e.g., over appointments)⁵⁹ outside the executive branch. And, when holding impeachment trials, the Senate carries out functional judicial power even though the actions take place outside the judicial branch.⁶⁰ In presidential impeachment trials, the Chief Justice is presiding over the Senate within the legislative branch even though the body and he are carrying out functional judicial power. To view his role otherwise would mean that during impeachment trials, the entire Senate would have to be characterized as within the judicial branch because the Senate is exercising functional judicial power. That cannot be so since the chamber's impeachment decision cannot be overturned through judicial appeals.⁶¹

A final potential counterargument is that the Chief Justice's status is unlike that of the other official thought to moonlight in the legislative branch: the Vice President. This is based on the notion that the latter is "President of the Senate" and the former is not.⁶² The Constitution provides only that the Chief Justice shall "preside" during presidential impeachment trials; he is not formally accorded the "President of the

56. *See, e.g.*, *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 587 (1952).

57. The author would like to thank Todd Garvey for raising this question.

58. The underlying premise of this argument is also flawed. The Vice President and President Pro Tempore are not limited to presiding over the Senate and breaking ties only in functional legislative contexts. They can also do so regarding non-legislative matters such as consideration of executive and judicial branch appointments. *See, e.g.*, FLOYD M. RIDDICK, *SENATE PROCEDURE: PRECEDENTS AND PRACTICES* 883-84 (1974). And, of course, the Vice President and President Pro Tempore exercise functional judicial power when they preside over non-presidential impeachment trials. *See, e.g.*, 8 *ANNALS OF CONG.* 92 (1805).

59. *See, e.g.*, 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 137 (3d ed. 2000).

60. *See supra* note 55.

61. *See Nixon v. United States*, 506 U.S. 224 (1993).

62. The author would like to thank Joel Goldstein and Todd Garvey for raising this question.

Senate” title the Vice President enjoys.⁶³ As a result, it could be argued, the Chief Justice has a less clear linkage to the Senate than the Vice President. For two reasons this position falls short of the mark. First, far less important than the title is the reality that the Chief Justice sits in the presiding officer’s chair and does the exact same thing that the Vice President does in that capacity. No matter what the Chief Justice is called he is still playing a role in the *internal* governance and administration of the Senate, just like the Vice President.

Second, according to Senate practice, it is entirely appropriate for senators to refer to the Chief Justice as “Mr. President.”⁶⁴ This, of course, is how the Vice President, the President Pro Tempore and all other Senators are addressed when presiding over the upper chamber. Since the Chief Justice can be addressed in the same way as the Vice President, the Chief Justice’s lack of the formal title “President of the Senate” would seem to matter little in trying to distinguish between the status of the two. At the end of the day, the four potential counterarguments are unpersuasive.

This article has endeavored to show that the Chief Justice in one narrow context is part of the legislative branch—a conclusion that demonstrates the framers rejected a strict application of the doctrine of separation of powers to the U.S. Constitution. Instead, they provided for a degree of sharing of personnel and functional power among the branches.⁶⁵

63. See U.S. CONST. art. I, §§ 4, 6.

64. See *supra* note 30 and accompanying text.

65. See, e.g., Calabresi & Larsen, *supra* note 6.