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CONSTITUTIONAL LAW—TERRAN V. SECRETARY OF HEALTH AND HUMAN SERVICES: MODIFICATION OF STATUTES AND THE PRESENTMENT CLAUSE OF THE CONSTITUTION

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CONSTITUTIONAL LAW—Terran v. Secretary of Health and Human Services: Modification of Statutes and the Presentment Clause of the Constitution

INTRODUCTION

In 1986, Congress enacted the National Childhood Vaccine Injury Act1 (the “Vaccine Act”) as a means for “compensating individuals . . . injured by vaccines routinely administered to children.”2 The Vaccine Act contains a Vaccine Injury Table3 (“Initial Injury Table”), which lists common vaccines, complications normally arising from such vaccines, and time periods within which these complications typically arise.4 Section 300aa-14(c) also authorizes the Secretary of Health and Human Services (“Secretary”) to periodically review the Initial Injury Table and amend it5 to conform to current scientific data concerning the complications that typically arise from vaccine administration.6 The Secretary did, in fact, amend the Initial Injury Table in 1995,7 by deleting residual seizure disorder8 as an injury associated with the DTP vaccine9 and narrow-

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4. For example, the Initial Injury Table lists anaphylaxis or anaphylactic shock as a possible injury associated with the inactivated polio vaccine, with a time period of 24 hours for the first symptom or manifestation of onset of this injury. Id.
7. Thereby creating a Revised Vaccine Injury Table (“Revised Injury Table”).
8. The Qualifications and Aids to Interpretation subsection of the Vaccine Act, section 300aa-14(b)(2), provides:
   A petitioner may be considered to have suffered a residual seizure disorder if the petitioner did not suffer a seizure or convolution unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit before the first seizure or convolution after the administration of the vaccine involved and if—(A) in the case of a measles, mumps, or rubella vaccine or any combination of such vaccines, the first seizure or convolution occurred within 15 days after administration of the vaccine and 2 or more seizures or convulsions occurred within 1 year after the administration of the vaccine which were unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit, and (B) in the case of any other vaccine, the first seizure or convolution occurred within 3 days after the administration of the vaccine and 2 or more
ing the definition of encephalopathy. 10

Approximately four months after the 1995 enactment of the Revised Injury Table, Michelle Terran (on behalf of minor Julie F. Terran) filed a petition for compensation under the Vaccine Act in the United States Court of Federal Claims. 11 Her petition was denied on the basis of the Secretary's 1995 revisions to the Initial Injury Table. 12 Terran subsequently brought suit to challenge the constitutionality of the Vaccine Act, 13 specifically the section of the act that authorizes the Secretary to amend the Initial Injury Table, under the theory that this authorization violates the Presentment Clause of the Constitution. 14 The Court of Federal Claims denied seizures or convulsions occurred within 1 year after the administration of the vaccine which were unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit.


9. The DTP vaccine contains vaccines for diphtheria, tetanus, and pertussis. Id. § 300aa-14(a).

10. Compare § 300aa-14(b)(3)(A) (defining encephalopathy as "any significant acquired abnormality of, or injury to, or impairment of function of the brain. Among the frequent manifestations encephalopathy are focal and diffuse neurological signs, increased intracranial pressure, or changes lasting at least 6 hours in level of consciousness, with or without convulsions ...") with 42 C.F.R. § 100.3(b)(2) (2000) which states:

An acute encephalopathy is one that is sufficiently severe so as to require hospitalization . . . . (A) For children less than 18 months of age who present without an associated seizure event, an acute encephalopathy is indicated by a significantly decreased level of consciousness lasting for at least 24 hours. Those children less than 18 months of age who present following a seizure shall be viewed as having an acute encephalopathy if their significantly decreased level of consciousness persists beyond 24 hours and cannot be attributed to a postictal state (seizure) or medication . . . . (C) Increased intracranial pressure may be a clinical feature of acute encephalopathy in any age group . . . . (D) A "significantly decreased level of consciousness" is indicated by the presence of at least one of the following clinical signs for at least 24 hours or greater . . . : (1) Decreased or absent response to environment (responds, if at all, only to loud voice or painful stimuli); (2) Decreased or absent eye contact (does not fix gaze upon family members or other individuals); or (3) Inconsistent or absent responses to external stimuli (does not recognize familiar people or things).

Id.


14. Id. at 334; see also U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have
Terran's challenge,\textsuperscript{15} and the Court of Appeals for the Federal Circuit affirmed.\textsuperscript{16}

\textit{Terran} is the seminal case raising the issue of whether the section of the Vaccine Act that authorizes the Secretary to amend the Initial Injury Table violates the Presentment Clause of the Constitution.\textsuperscript{17} Part I of this note examines both the history of the Vaccine Act and the jurisprudential history of the Presentment Clause. Part II of this note discusses the specific circumstances under which Terran filed this challenge. It also contains an analysis of the majority and dissenting opinions in Terran, comparing these opinions with prior Presentment Clause case law. Part III of this note analyzes the issue involved and, in particular, examines whether the Terran court's constitutional interpretation was accurate in light of separation of powers principles and the nondelegation doctrine. This note concludes by noting that section 300aa-14(c) of the Vaccine Act may be an unconstitutional attempt to authorize a member of the executive branch to exercise strictly legislative power. Finally, it offers a congressional alternative.

\section{I. Legislative and Case-Specific History}

\subsection{A. Promulgation of the Vaccine Act}

Traditionally, the federal government has had the responsibility of preventing the spread of infectious diseases from within and without the country's borders.\textsuperscript{18} Vaccination of children against deadly and disabling, but preventable, infections has been one of the most effective public health initiatives this country has ever undertaken.\textsuperscript{19} The government's assumption of this role has saved billions of medical and health related dollars, and millions of children have grown up without the debilitating effects that have taken their toll on previous generations.\textsuperscript{20} Today, through federal support,
state and local health agencies are able to immunize children against polio, measles, mumps, rubella, diphtheria, pertussis, and tetanus\textsuperscript{21} with scientific study underway to prevent other types of disease.

However, the nation's ability to maintain this level of success has recently been questioned as previously unknown injuries associated with these vaccines have surfaced.\textsuperscript{22} The number of children injured by vaccines each year is relatively small\textsuperscript{23} compared with the number who are not, but serious consequences have resulted from the DTP\textsuperscript{24} and other vaccines.\textsuperscript{25} For the relatively few injured children, there was little opportunity for restitution since tort liability principles often left many victims uncompensated. High transaction costs, including attorney's fees and court payments made litigation unattractive, and lawsuit and settlement negotiations would take months and even years to complete.\textsuperscript{26}

Tort litigation has also been costly for vaccine manufacturers. The growing number of lawsuits caused an increase in liability insurance, making it impossible in some cases for manufacturers to obtain insurance.\textsuperscript{27} Due to this cost impediment, several vaccine manufacturers have withdrawn from the market,\textsuperscript{28} increasing the price of vaccines dramatically.\textsuperscript{29}

The multitude of uncompensated injuries, coupled with the in-

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\textsuperscript{21} Id. at 5, reprinted in 1986 U.S.C.C.A.N. 6344, 6346.


\textsuperscript{23} See Neil Z. Miller, Immunization Theory vs. Reality: Exposé on Vaccinations 41-42, 96-98 (1996) (stating that every year, approximately 12,000 reports of adverse reactions are made to the Food and Drug Administration—including hospitalizations, irreversible brain damage, and death—and, that because upwards of ninety percent of doctors do not report vaccine reactions, this number may be closer to 120,000).


\textsuperscript{26} Id.

\textsuperscript{27} Id.

\textsuperscript{28} See Press Release, American Academy of Pediatrics Washington Office, Vaccine Injury Compensation Program: Helping Children and Families (Sept. 28, 1999), available at http://www.aap.org/advocacy/washing/vacinjcomp.htm (stating that before the introduction of the Vaccine Act, many vaccine manufacturers stopped producing certain vaccines due to potential liability issues and, "[a]s a result, vaccine supplies dwindled, endangering the health and safety of the nation's children").

creasing price of vaccines, prompted Congress to act. In 1986, Congress passed the Vaccine Act as a means of compensating victims of vaccine-related injuries, and prioritizing vaccine safety and progress. The Act provides compensation for victims of vaccine-related injuries while allowing the victims, at their option, to reject the compensation and proceed to trial.

As a means of clarifying and expediting claims of vaccine injuries, Congress included the Initial Injury Table. Following the Initial Injury Table, Congress' findings were as follows:

1. The availability and use of vaccines to prevent childhood diseases is among the Nation's top public health priorities.
2. The Federal government has the responsibility to ensure that all children in need of immunization have access to them and to ensure that all children who are injured by vaccines have access to sufficient compensation for their injuries.
3. Private or non-governmental activities have proven inadequate in achieving either of these goals.
4. Current economic conditions have resulted in an unstable and unpredictable childhood vaccine market, making the threat of vaccine shortages a real possibility.
5. Because of their cost-effectiveness, the Federal government has an interest in the development, distribution, and use of vaccines, including those designed to prevent non-childhood diseases.


Since the Vaccine Act's promulgation, over 5000 claims for compensation have been received, eighty-five percent of which are for vaccines administered prior to the Vaccine Act's effective date of October 1, 1988. See Health Res. and Servs. Admin., Background Information on VICP, available at http://bhpr.hrsa.gov/vicp/advic.htm [hereinafter HRSA].

See also H.R. Rep. No. 99-908, at 3-4, reprinted in 1986 U.S.C.C.A.N. 6344, 6344-45; see also HRSA, supra note 31 (stating that suits against DTP vaccine manufacturers have decreased dramatically since the promulgation of the Vaccine Act, from 255 suits being filed in 1986 to four suits in 1997).

See Miller, supra note 23, at 46-47 (stating that by August 31, 1997, more than $302 million had already been paid out under the compensation component of the Vaccine Act, that thousands of cases are still pending, and that future liability for pre-1988 vaccine injuries could exceed $1.7 billion).

42 U.S.C. § 300aa-21(a) (2001). The process for obtaining compensation under the Vaccine Act requires that a person with an injury resulting from a vaccine that was administered after enactment of the Vaccine Act must file a compensation petition and go through the compensation program before proceeding with any litigation against the vaccine manufacturer. If the victims, after compensation proceedings are complete, are dissatisfied with the award, they may reject the proceeding's findings and seek compensation through the courts. H.R. Rep. No. 99-908, at 17, reprinted in 1986 U.S.C.C.A.N. 6344, 6358. Vaccine Act data shows that only a small percentage of victims reject the award. See HRSA, supra note 31 (stating that out of 3142 vaccine injury claims adjudicated through 1995, only seventy claimants have filed motions to reject the award).

The claimant need not have an injury that falls under this Table. The Vaccine Act provides two ways for claimants to receive compensation: first, by showing they
tial Injury Table is a list of Qualifications and Aids in Interpretation\(^{36}\) (QAIs) that provide explanations of and definitions for the terms within the Table. Because Congress also realized that this Initial Injury Table and the QAIs were going to prove incomplete as new scientific data was developed, Congress included a clause that allows the Secretary to revise the Initial Injury Table and QAIs.\(^{37}\) This section also allows for revision recommendations to be made by the Advisory Commission on Childhood Vaccines or any other person.\(^{38}\) Unless clearly frivolous, these recommendations are submitted to the Secretary for review, and the Secretary is required either to conduct a rulemaking proceeding or to publish reasons for not conducting such a proceeding.\(^{39}\) Any modifications made to the Initial Injury Table or QAIs apply only to petitions filed for compensation after the modification is made.\(^{40}\)

In 1995, the Secretary modified the Initial Injury Table and QAIs.\(^{41}\) Two of the changes made by the Secretary in the 1995 revision were the elimination of Residual Seizure Disorder (RSD) from the Initial Injury Table and a change in the definition for encephalopathy.\(^{42}\) These regulations went into effect on March 10, 1995,\(^{43}\) and Terran filed her claim on July 12, 1995.\(^{44}\)

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36. Id. § 300aa-14(b).
39. Id.
40. 42 U.S.C. § 300aa-14(c) (1994). The statute reads:
   (1) The Secretary may promulgate regulations to modify in accordance with paragraph (3) the Vaccine Injury Table . . . .
   (2) Any person (including the Advisory Commission on Childhood Vaccines) may petition the Secretary to propose regulations to amend the Vaccine Injury Table . . . .
   (3) A modification of the Vaccine Injury Table under paragraph (1) may add to, or delete from, the list of injuries, disabilities, illnesses, conditions, and deaths for which compensation may be provided or may change the time periods for the first symptom or manifestation of the onset of the significant aggravation of any such injury, disability, illness, condition, or death.
   (4) Any modification under paragraph (1) of the Vaccine Injury Table shall apply only with respect to petitions for compensation under the Program, which are filed after the effective date of such regulation.
41. 42 C.F.R. §100.3 (1995). These modifications are at the heart of the issue to be discussed in Part II of this note.
44. Id.
B. The Presentment Clause

In 1787, fifty-five delegates from eleven states met in Philadelphia. Among those present were the nation's most prominent leaders and statesmen, including George Washington, who was elected president of the convention, James Madison, Alexander Hamilton, and Benjamin Franklin. These delegates assembled to remedy problems with the existing Articles of Confederation but opted instead to create an entirely new Constitution.

The ensuing adoption of the Constitution resulted in a division of the United States federal government into three separate but interdependent branches—the executive, legislative, and judicial branches. The Framers of the Constitution chose to divide the government because of a fundamental fear of an overly strong central government, to safeguard against tyranny, and to promote efficiency. By separating the powers of the federal government, the Framers put "checks and balances" on each branch of the government. The President has the power to veto any law that Congress passes; Congress may, in turn, override the veto by a two-thirds majority vote in both houses. Finally, judicial branch review ensures that all laws passed are constitutional.

One incarnation of the principle of separation of powers is the Presentment Clause of the Constitution. The Presentment Clause requires that every bill passed by Congress be presented to the President. The President either signs the bill or returns it to Congress. The Presentment Clause further states that if the President returns the bill, Congress can override the veto with a two-thirds majority vote in both the Senate and House of Representatives.

46. Id. at 112, 120, 131.
47. Id. at 113.
50. Id.
52. Id.
54. Id.
55. Id. (returning the bill is commonly referred to as a Presidential Veto).
56. Id.
The presidential veto power gives the President an important defensive weapon against legislative intrusions on the power of the Executive.\(^{57}\) Concern over precisely this intrusion was noted by the Founding Fathers.\(^{58}\)

A recent Supreme Court decision interpreting the Presentment Clause and discussing the separation of powers principle is *INS v. Chadha*,\(^ {59}\) which found that a provision of the Immigration and Nationality Act of 1952 violated the Presentment Clause.\(^ {60}\) In *Chadha*, the Supreme Court examined the history of the Presentment Clause and noted that requiring all legislation to be presented to the President before becoming law was uniformly accepted by all of the Framers of the Constitution.\(^ {61}\) The Court stated, "[i]t emerges clearly that the prescription for legislative action in article I, sections one and seven represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."\(^ {62}\) The Court then noted that not every action taken by the House is subject to the Presentment Clause.\(^ {63}\) Only those actions that are properly regarded as legislative in character and effect are subject to it.\(^ {64}\) The Court found that because article I, section 8, clause 4 of the Constitution authorizes Congress to establish a uniform Rule of Naturalization, any action the House took in regard to naturalization procedures is a legislative act and subject to the Presentment Clause.\(^ {65}\) The Court found that the section of the Immigration Act allowing the House to veto, without presentment to the


\(^{58}\) See The Federalist No. 51 (James Madison) ("In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, . . . as little connected with each other as the nature of their common functions and their common dependence on the society will admit.").

\(^{59}\) 462 U.S. 919 (1983). Chadha was foreign-born and entered the United States on a non-immigrant visa which subsequently expired. An immigration judge, acting on the authority of the Attorney General, suspended Chadha's deportation. The Immigration and Nationality Act provides that if the Senate or House passes a resolution against suspension, the Attorney General must deport the alien. The House did pass a resolution opposing Chadha's deportation suspension, and Chadha was deported. *Id.* at 923-28.

\(^{60}\) *Id.* at 946.

\(^{61}\) *Id.*

\(^{62}\) *Id.* at 951.

\(^{63}\) *Id.* at 952.

\(^{64}\) *Id.*

\(^{65}\) *Id.*
President, the Attorney General's decision to allow an alien to remain in the country violated the explicit procedures set forth in the Constitution and was, therefore, unconstitutional. 66

The decision in Chadha and the intent of the Framers as evidenced by the Federalist Papers both show that the purpose of the Presentment Clause was to establish a method of checking the power of the legislative branch. 67 This was done so that the legislative branch would not become the solitary source of federal power. 68

II. THE PRINCIPAL CASE

A. Terran v. Secretary of Health and Human Services:

Background

Julie F. Terran was born in apparently good health on February 10, 1992, in Phoenix, Arizona. 69 Her score on the Apgar test was an eight/nine out of ten when she was discharged from the hospital on February 11, 1992. Julie received her first DPT vaccine on March 27, 1992, her second on June 3, 1992, her third on August 10, 1992, and her fourth (an acellular DPT vaccine) on September 22, 1993. 70 The August vaccine, Julie's third, was the only one at issue in the present case. 71

On August 11, 1992, Julie suffered a seizure that lasted approximately seven seconds and caused one of her arms to become stiff. 72 On August 12, Julie experienced four more afebrile seizures, each lasting roughly one minute. Julie was immediately rushed by ambulance to Phoenix's Children's Hospital at the Good Samaritan Medical Center. Along the way, paramedics observed Julie to be alert

66. Id. at 957-58 (finding unconstitutionality because, by not presenting their action to the President for approval, the House had taken legislative action without following the steps outlined in the Presentment Clause).
67. Id.
68. Id.
70. Id. The Apgar test, named for Dr. Virginia Apgar, measures physical traits of infants, such as heartbeat, respiratory effort, and muscle tone. As newborns are unable to communicate that something hurts or does not feel right, the test is a means to determine the health of the child. The best Apgar score is a ten. Id. at 332 n.2.
71. Id. at 332.
72. Prior to the third vaccine, Julie had a meningocele lump removed from her skull, but tests, also completed before the third vaccine, indicated that she had no brain abnormalities. On May 18, 1992, an MRI scan reported her brain structure as normal and a biopsy concluded that the removed lump was not cancerous. Id.
73. Id.
and active; in fact, she was playing with her oxygen mask. The hospital admitted Julie and she remained there for observation until August 14, 1992.

On August 13, 1992, while at the hospital, Julie experienced a seizure that lasted for five and one-half minutes. The hospital prescribed Phenobarbital,\(^\text{74}\) but the seizures continued throughout the next year. On September 12, 1992, Julie suffered a seizure that lasted almost fifty minutes despite her being on Phenobarbital at the time. Julie's seizures were continuing as of the date of trial. In addition, she suffers from mental retardation.\(^\text{75}\)

On July 12, 1995, Michelle Terran filed a petition for compensation under the Vaccine Act on behalf of minor Julie Terran.\(^\text{76}\) The Special Master for the United States Court of Federal Claims denied compensation under the Vaccine Act.\(^\text{77}\) On appeal to the United States Court of Federal Claims, it was alleged that Julie suffers from RSD and encephalopathy as defined prior to the 1995 modification of the Initial Injury Table.\(^\text{78}\) The court recognized that Julie would have been able to recover had she brought her petition prior to the modification, but decided that under the current Revised Injury Table, Julie could not recover under the Vaccine Act.\(^\text{79}\)

On appeal to the Federal Circuit Court of Appeals, Julie contended that the Vaccine Act was not constitutionally valid since it permitted the Secretary to modify portions of a statute in violation of the Presentment Clause of the Constitution.\(^\text{80}\) The court denied Julie's appeal, despite a strong dissent.\(^\text{81}\)

B. The Majority Opinion

Terran's constitutional challenge to the Vaccine Act alleged that section 300aa-14(c) of the Act, which authorizes the Secretary to alter the Initial Injury Table,\(^\text{82}\) violated the Presentment Clause

\(^{74}\) Phenobarbital is an anti-convulsant. \textit{Id.}

\(^{75}\) \textit{Id.; see also} 42 U.S.C. § 300aa-14(b) (1994) (stating that encephalopathy may result in various degrees of permanent impairment.)

\(^{76}\) \textit{Terran,} 41 Fed. Cl. at 332.

\(^{77}\) \textit{Id.} For the jurisdiction mandated by the Vaccine Act, see 42 U.S.C. § 300aa-12 (2001).

\(^{78}\) \textit{Terran,} 41 Fed. Cl. at 334.

\(^{79}\) \textit{Id.} at 335.


\(^{81}\) \textit{See Terran,} 195 F.3d at 1302.

of the Constitution. By allowing the Secretary, in effect, to amend and repeal portions of a statute, the plaintiff argued, Congress had bypassed the presentment conditions required of legislative acts by the Presentment Clause.

In response to that claim, the Court of Appeals acknowledged that the Constitution does not allow members of the executive branch to enact, amend, or repeal statutes. Such power is vested exclusively in Congress and the exercise of such legislative power must follow the procedures set forth in the Constitution. The court looked at the Secretary's actions not as an amendment of a statute, but as the promulgation of an administrative rule entirely in the discretion of the executive branch.

The court first stated that the Vaccine Act does not explicitly allow the Secretary to amend the Initial Injury Table because the Initial Injury Table is still on the books and continues to apply to all petitions filed prior to the existence of the 1995 Revised Injury Table. The court looked instead at the section in question as authorizing the Secretary to promulgate an entirely new Vaccine Injury Table that applies only prospectively.

The court stated that Congress enacted the Initial Injury Table knowing that the Table contained flaws. It was Congress' intent that the Secretary should commission studies on the links between vaccines and injuries, create a panel to oversee the collection of data on vaccine-related injuries, and revise the Initial Injury Table

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84. Terran, 195 F.3d at 1312.
85. "Enact" is defined as "to establish by law; to perform or effect; to decree." BLACK'S LAW DICTIONARY 526 (6th ed. 1990).
86. "Amend" is defined as "to improve; to change for the better by removing defects or faults; to change, correct, revise." Id. at 80.
87. "Repeal" is defined as "the abrogation or annulling of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked or abrogated or which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force." Id. at 1299.
88. Terran, 195 F.3d at 1312.
89. Administrative rulemaking is, by definition, not a legislative act, but rather an exercise of executive function properly entrusted to administrative agencies. See Am. Trucking Ass'ns, Inc. v. United States, 344 U.S. 298, 310-13 (1953).
90. Terran, 195 F.3d at 1312.
91. Id.
93. Terran, 195 F.3d at 1312.
94. Id. at 1313.
based on the information obtained from such studies.  "Congress clearly intended the Initial Table would cease to apply to newly filed petitions when the Secretary promulgated a revised injury table." Therefore, the court reasoned, because the Initial Injury Table becomes ineffective (not non-existent) upon the Secretary's promulgation of a revised table, the statutory scheme does not violate the intentions of the Presentment Clause.

The court found support for its reasoning in Field v. Clark. The court analogized its current decision to Field, decided over a century before, by reasoning that Congress had anticipated that the scientific data linking vaccines and injuries may change in the future and had intended that the Secretary act when more accurate data became available.

The reasoning in Field is echoed in the majority's holding in Terran. In the majority's view of Field, the President's power to suspend the provisions of the Tariff Act was contingent on conditions that did not exist at the time the law was passed. Likewise, the Terran court held that the Secretary's power to modify the Initial Injury Table was also contingent on scientific data not known or

95. Id.
96. Id.
97. Id.
98. 143 U.S. 649 (1892). The Field case involved Congress' enactment of the Tariff Act of October 1, 1890 (hereinafter "Tariff Act"), which authorized the President of the United States to suspend, "for such time as he shall deem just," free importation under the Tariff Act from any country or countries that impose unfair tariffs on U.S. exports.

Challengers sought to show that this part of the Tariff Act, in so far as it authorized the President to suspend provisions of the Act, is unconstitutional as it delegates legislative power to the Executive and violates the Presentment Clause. Their challenge was rejected. The Supreme Court noted that the concept that Congress cannot delegate legislative power to the President is a "principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." However, the Act does not invest the President with the power of legislation; rather, Congress itself determined that the free introduction of imports to the United States should be suspended as to any country which the President believes to be unfairly placing tariffs on U.S. exports, and Congress determined duties to be levied on these products in the event of suspension. Id. at 692-93. Therefore, the Court reasoned, the Act required the President to periodically examine the commercial regulations of other countries producing and exporting these products and form a judgment as to whether they were reciprocally reasonable and fair. If a country was placing tariffs on U.S. exports unfairly, the President could issue a proclamation declaring a suspension on the free import of their goods. The President has no discretion on when to act, only as to how long the suspension would endure. Obedience to legislative will is not a legislative function reserved for Congress. Id. at 693.

99. Terran, 195 F.3d at 1313.
100. Id.
realized at the time the Vaccine Act was passed. Due to this, Congress anticipated that the facts underlying its legislation (the scientific data linking various injuries to vaccinations) might change in the future.\textsuperscript{101}

Further, the \textit{Terran} majority noted that in \textit{Field}, the President had the discretion to determine when another country was placing unfair tariffs on U.S. exports and to determine how long suspensions would endure under the Tariff Act.\textsuperscript{102} The \textit{Terran} majority explained that, under the Vaccine Act, the Secretary has similar discretion to promulgate a Revised Injury Table.\textsuperscript{103} To illustrate the shared narrow discretion, the court noted that the Vaccine Act requires the Secretary to act when new scientific data comes to his attention or when a person petitions for a modification of the Initial Injury Table; similarly, the Tariff Act required the President to order a suspension when he determined that another country was acting unfairly.\textsuperscript{104} Concluding that the \textit{Field} decision applied to the challenge in \textit{Terran}, the majority found that the Vaccine Act was not in violation of the Presentment Clause.\textsuperscript{105}

\textit{Terran} also raised \textit{Clinton v. City of New York}\textsuperscript{106} in her challenge to the Vaccine Act, but the majority in \textit{Terran} found the deci-

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\item[101.] \textit{Id}.
\item[102.] \textit{Id.} at 1314.
\item[103.] \textit{Id}.
\item[104.] \textit{Id}.
\item[105.] \textit{Id}.
\item[106.] 524 U.S. 417 (1998). The Line Item Veto Act (hereinafter “Veto Act”) gives the President the power to cancel certain discretionary spending provisions within five days of the bill being signed into law, subject to restrictions such as consideration of the legislative history, the purposes of the provision, and other relevant information about the provision. 2 U.S.C. §§ 691(e)(4)(B)-(C), (b) (Supp. II 1996). The Supreme Court found that the Veto Act violated the Presentment Clause. \textit{Clinton}, 524 U.S. at 421. The Court recognized that there is no provision in the Constitution that authorizes the President to enact, amend, or repeal statutes; he may influence and initiate legislative proposals, but he may not modify existing laws. \textit{Id.} at 438. The President must either sign or return a bill that has passed both Houses of Congress, according to the Presentment Clause. \textit{Id}. The Court noted that there are important differences between the return of the bill pursuant to the Presentment Clause and the exercise of the President’s cancellation under the Veto Act. The constitutional return takes place before the bill becomes a law, while the statutory cancellation occurs after the bill has become law. The Court then stated that “although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.” Therefore, the Supreme Court concluded that the Veto Act violated the Presentment Clause by giving the President the power to repeal items of a statute. The President is, in effect, creating a new statute without having it pass through both Houses of Congress. \textit{Clinton}, 524 U.S. at 420-39.
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sion in *Clinton* was inapplicable to the case before them.107 In *Clinton*, the Supreme Court held that the Line Item Veto Act was an unconstitutional violation of the Presentment Clause.108 The Terran majority agreed with the *Clinton* Court that the Constitution does not authorize the President to enact, amend, or repeal statutes.109 The Terran majority noted key differences, however, between the facts and law raised in *Clinton*, those raised in *Field*, and those raised in the case before them.110

Initially, the Terran court reiterated that in the Tariff Act in *Field*, and in the Vaccine Act, Congress had anticipated that the facts underlying its legislation might change in the future and had formulated the statute to accommodate those changes.111 In the Veto Act, at issue in *Clinton*, because there was only a five-day time period in which the President could exercise his power to cancel provisions in legislative enactments, any action the President took would have to be based on the same conditions contemplated by Congress.112

Next, the Terran majority noted that the Veto Act provided little constraint on the President's discretion to cancel a portion of a statute.113 In *Field*, however, the Tariff Act had limited the President's discretion to declare a suspension.114 Accordingly, the Terran majority found the Vaccine Act to be more closely related to the Tariff Act than the Veto Act.115 Although the Secretary has the ultimate discretion in revising the Initial Injury Table, the Vaccine Act requires not only that the Secretary respond to petitions by any persons, regarding the Initial Injury Table, but it also sets forth procedural requirements that govern any modification the Secretary may make, thereby somewhat limiting the Secretary's discretion.116

Finally, the Terran majority noted that, in *Field*, it was presumed that the President was fulfilling congressional policy when he declared a suspension under the Tariff Act.117 In *Clinton*, how-

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110. *Id.*
111. For example, scientists could uncover new information regarding the relationships between various vaccines and injuries associated with them. *Id.* at 1313.
112. *Id.*
113. *Id.*
114. *Id.* at 1314.
115. *Id.*
116. *Id.*
117. *Id.*
ever, the President was clearly contravening congressional policy by canceling spending items Congress had just passed.\textsuperscript{118} The \textit{Terran} majority found that the Vaccine Act more closely aligned with the Tariff Act, as it seemed to be Congressional policy that the Secretary subsequently modifies the Initial Injury Table.\textsuperscript{119} Due to this fidelity to congressional intent, the \textit{Terran} court held that the analysis used in \textit{Field} was more applicable than the analysis used in \textit{Clinton}.\textsuperscript{120}

The majority concluded that under the Vaccine Act, the Secretary does not have the power to alter or amend the Act itself. Instead, the Secretary only has the power to promulgate a revised table that is in accord with current scientific data. Thus, the Secretary's action is not a violation of the Presentment Clause.\textsuperscript{121}

\textbf{C. The Dissenting Opinion}

The basis of Judge Plager's dissent was his strong disagreement with the majority's conclusion that the Vaccine Act did not grant the Secretary the ability to amend and repeal a statute in violation of the Presentment Clause.\textsuperscript{122} Judge Plager recognized that in order for a bill to become a law it must first pass through both Houses of Congress and then be presented to the President of the United States for approval or veto. Neither House acting alone, nor the President or any other member of the executive branch, may constitutionally enact, amend, or repeal statutes.\textsuperscript{123} By permitting the executive branch to make the amendment to the Injury Table, Judge Plager contended, Congress is providing for the amendment of otherwise valid, enforceable, and existing legislation in a manner contrary to the intention of the Constitution.\textsuperscript{124}

Judge Plager drew on \textit{Clinton v. City of New York}\textsuperscript{125} when noting that the Supreme Court has recognized and made clear that any amendment or modification of a statute must follow the exact procedures defined in the Presentment Clause.\textsuperscript{126} Judge Plager relied on the \textit{Clinton} Court's analysis in his assertion that the Vaccine Act

\begin{itemize}
  \item \textsuperscript{118} \textit{Id}.
  \item \textsuperscript{119} \textit{Id}.
  \item \textsuperscript{120} \textit{Id}.
  \item \textsuperscript{121} \textit{Id}.
  \item \textsuperscript{122} \textit{Id}.
  \item \textsuperscript{123} \textit{Id}, at 1317 (Plager, J., dissenting).
  \item \textsuperscript{124} \textit{Id}.
  \item \textsuperscript{125} \textit{524 U.S. 417} (1998); see supra note 106 (providing \textit{Clinton} facts and holding).
  \item \textsuperscript{126} \textit{Terran}, 195 F.3d at 1319 (Plager, J., dissenting).
\end{itemize}
does violate the Presentment Clause. Judge Plager found Clinton applicable, not only because it was a Supreme Court decision decided only one year before, but also because the Court in Clinton had made it clear that any modification to a statute must follow the procedures set forth in the Presentment Clause. Judge Plager reasoned that the Supreme Court in Clinton had found that the President had legally and effectively amended an act of Congress by repealing a portion of it and that the cancellation of one section of a statute may be the equivalent of a partial repeal even if a portion of the section is not cancelled. Judge Plager determined that the Secretary was basically doing the same thing, amending an act of Congress by repealing a portion of it (the Initial Injury Table).

Judge Plager disagreed with the majority in Terran by reasoning that because the Vaccine Act gives the Secretary the unilateral power to modify an existing statute (the Initial Injury Table), it is in violation of the bicameralism and presentment guidelines set forth by the Presentment Clause. Judge Plager examined the majority's contention that this is not a modification of an existing statute, but merely promulgation of a new regulation that only nullifies that existing statute. He concluded that the majority's unstated premise was that an amendment that leaves an earlier provision unrepealed means that the earlier provision was not amended. He pointed out that in almost all cases where Congress changes an existing law, the provisions of the original statute still apply to cases arising prior to the effective date of the change. Therefore, Judge Plager reasoned, when Congress changes a statute, it does not amend it unless the provision it is changing is totally repealed with retroactivity.

Judge Plager stated that as a result of the Secretary's promulgation of the 1995 Revised Injury Table, the Initial Injury Table was no longer effective and that the Secretary had deleted a portion of a statute that would have been available to Julie Terran. Therefore, the Secretary had amended a statute by repealing a portion of

127. Id. (Plager, J., dissenting).
128. Id. (Plager, J., dissenting).
129. Id. at 1320 (Plager, J., dissenting).
130. Id. (Plager, J., dissenting).
131. Id. at 1319 (Plager, J., dissenting).
132. Id. at 1319-20 (Plager, J., dissenting).
133. Id. at 1320 (Plager, J., dissenting).
134. Id. (Plager, J., dissenting).
135. Id. (Plager, J., dissenting).
136. Id. (Plager, J., dissenting).
it, even if that portion was still on the books.\textsuperscript{137} The Vaccine Act gives the Secretary complete authority to modify the Initial Injury Table that was included within the statute, and, as a result, the Secretary was modifying that statute without having to go through the steps required by the Presentment Clause.\textsuperscript{138} Judge Plager stated that he would have found the 1995 Revised Injury Table to be without legal effect, thereby allowing Terran to recover.\textsuperscript{139}

III. Legal Analysis

Section 300aa-14(c), the Vaccine Act, authorizes the Secretary to issue a Revised Injury Table that renders the Initial Injury Table inapplicable to subsequent petitions filed under the Vaccine Act.\textsuperscript{140} Whether or not the Secretary’s power violates the Presentment Clause of the Constitution has faced little scrutiny in the courts. The \textit{Terran} court, the only court to decide the issue, held that “[s]ection 300aa-14(c) of the Vaccine Act does not violate the Presentment Clause.”\textsuperscript{141} This analysis will examine both sides of the issue, to determine whether the Vaccine Act violates the Presentment Clause and to determine available solutions. The analysis begins by distinguishing between functional and formalistic views of the separation of powers concept, as well as discussing the potential delegation of power issue involved in the Secretary’s actions. This will be followed by application of these ideologies to the present issue and a determination of the correct outcome. In conclusion, there will be a brief discussion of constitutionally permitted alternatives.

A. Form Versus Function: In General

The form versus function debate has been a long-standing tradition throughout American jurisprudence. In its basic form, the question is whether courts ought to follow the exact, literal wording of a statute or manipulate a statute to accommodate a situation that perhaps the authors of the statute did not foresee? This debate is as prevalent when it comes to separation of powers as it is in any other field. Should courts respect a complete separation of power between the executive, legislative, and judicial branches? Or, should

\begin{itemize}
  \item \textsuperscript{137} \textit{Id.} at 1320-21 (Plager, J., dissenting).
  \item \textsuperscript{138} \textit{Id.} at 1321 (Plager, J., dissenting).
  \item \textsuperscript{139} \textit{Id.} (Plager, J., dissenting).
  \item \textsuperscript{140} \textit{Id.} at 1308.
  \item \textsuperscript{141} \textit{Id.} at 1314.
\end{itemize}
they allow the branches to commingle their powers to promote efficiency in a modern United States that the Framers of the Constitution perhaps did not envision when promulgating this document?

1. The Formalistic Approaches

When the founders convened to create the Constitution, there was a fundamental fear of government. This fear presumably arose from the tyrannical control of Great Britain, from which they had recently fled, and led them to distribute the powers of the federal government among three branches with distinct duties and responsibilities. Each branch, in addition to the exclusive powers and duties granted it, was given the power to "check" the other branches of the government. For example, if Congress passes an act, the President may sign it or veto it, thus creating an executive "check" over the legislative function.

A formalistic view of the separation of powers concept requires that courts examine the words of the Constitution to see if the text permits the challenged action. Under the formal view, a statute that allows a member of the executive branch to employ legislative power will be struck down because it violates the separation of powers principle.

An example of the formal view is the position taken by the Supreme Court in Clinton, where the Court held the Line Item Veto Act unconstitutional as a violation of the Presentment Clause. A fundamental principle of separation of powers is found within the Presentment Clause, which requires that every act passed by Congress must be presented to the President before it will have the force of law. The majority in Clinton, led by Justice Stevens, adopted the formal approach in its opinion when it found that the Veto Act's grant of power to the President violated the express words of the Presentment Clause. In finding that the Veto Act authorized action in violation of the Presentment Clause,


Id. at 56.

Id. at 91.

Clinton v. City of New York, 524 U.S. 417 (1998); see supra note 106 and accompanying text.

Clinton, 524 U.S. at 448.

See U.S. CONST. art. I, § 7, cl. 2.

Clinton, 524 U.S. at 439-40. "What has emerged in these cases from the President's exercise of his statutory cancellation powers [of the Veto Act], however, are truncated versions of two bills that passed both Houses of Congress. They are not the
Justice Stevens noted that the only options the President has with respect to an act passed by Congress and presented to him is to approve it or veto it. One year later, following the majority opinion in *Clinton*, Judge Plager's dissent in *Terran* utilized the formal approach in urging that the Vaccine Act is also in violation of the text of the Presentment Clause.

The formalistic view of separation of powers has been applied in other situations and seems to be the trend of the Supreme Court after their decision in *Clinton*. In *Terran*, the dissenting opinion utilized formalistic reasoning, but the majority decided the Presentment Clause issue before them following a functional approach.

### 2. The Functionalist Approach

The functional approach developed because of a perceived need to promote efficiency among the branches of the government. In essence, this approach allows power reserved for one branch of the government to be exercised by a member of another branch. The underpinning for the modern functionalist approach was stated by Justice Breyer in his dissent in *Clinton*, where he noted that at the time the United States was founded and the Constitution written, the population was less than four million, there were fewer than five thousand federal employees, and the annual budget totaled approximately four million dollars. In contrast, the product of the "finely wrought" procedure that the Framers designed. *Id.* (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)) (citation omitted).

149. *Id.* at 440.


152. *See*, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73-74, 87 (1982) (striking down the 1978 revisions to the Bankruptcy Act, which allowed Article I bankruptcy judges to perform the same judicial functions as Article III judges, because the Constitution did not specifically grant jurisdiction to Article I bankruptcy judges to hear issues involving public rights).


154. *Id.* at 1312-14.

155. *See id.* at 1312 (stating that the Presentment Clause is inapplicable to administrative rulemaking, even though agencies are technically part of the administrative branch, because "rulemaking is by definition not a legislative act, but rather an act of executive function properly entrusted").


Justice Breyer continued, the current U.S. population is approximately two hundred and fifty million, there are over four million federal employees, and an annual budget of over one and a half trillion dollars.\textsuperscript{158} Justice Breyer believed that, given this extreme change in circumstances coupled with the "Framers' pragmatic vision," the Constitution allows for "necessary institutional innovation."\textsuperscript{159} Congress may use novel means to accomplish a constitutionally legitimate end, even if such means is the delegation of some of its power to another branch of the government.\textsuperscript{160}

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."\textsuperscript{161} The Supreme Court, in interpreting this language, has derived the "nondelegation doctrine," which mandates that Congress may not delegate its legislative powers to any other branch of government.\textsuperscript{162} The influence of functionalists within the Supreme Court has led it to the creation of exceptions to the nondelegation doctrine.\textsuperscript{163} Delegations are exempted from violating separation of powers principles so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform . . . ."\textsuperscript{164} Therefore, Congress may delegate its legislative power so long as it requires the branch exercising the power to follow standards that can be labeled by the Court as "intelligible principles."\textsuperscript{165}

Functionalists, therefore, have succeeded in implanting their approach into American jurisprudence, most notably by the exception to the nondelegation doctrine. Some authors believe this ap-

\begin{itemize}
  \item \textsuperscript{158} Id. at 471 (Breyer, J., dissenting).
  \item \textsuperscript{159} Id. at 472 (Breyer, J., dissenting).
  \item \textsuperscript{160} Id. at 472-73 (Breyer, J., dissenting).
  \item \textsuperscript{161} U.S. \textit{Const.} art. I, § 1.
  \item \textsuperscript{163} "The Constitution permits Congress to 'see[k] assistance from another branch' of Government, the 'extent and character' of that assistance to be fixed 'according to common sense and the inherent necessities of the governmental co-ordination.'"
  \item \textit{See Clinton}, 524 U.S. at 484 (Breyer, J., dissenting) (quoting \textit{J.W. Hampton, Jr. & Co. v. United States}, 276 U.S. 394, 406 (1928)).
  \item \textsuperscript{164} \textit{J.W. Hampton, Jr. & Co.}, 276 U.S. at 409.
  \item \textsuperscript{165} \textit{See}, e.g., \textit{Nat'l Broad. Co. v. United States}, 319 U.S. 190, 225-26 (1943) (upholding delegation to the Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" requires); \textit{Fed. Powers Comm'n v. Hope Natural Gas Co.}, 320 U.S. 591, 600-03 (1944) (upholding delegation to the Federal Power Commission to determine "just and reasonable" rates).
\end{itemize}
proach to be both important and unavoidable.¹⁶⁶ The division of courts in adopting the formal versus functional approach is on-going and is nowhere more apparent than in the Terran case.

B. *Form versus Function: The Vaccine Act and the Presentment Clause*

The Vaccine Act at issue in Terran prompts the same questions as do most separation of powers issues: Does the Vaccine Act violate the express language of the Constitution? Even if the Vaccine Act does violate such express language, is it possibly a constitutionally legitimate delegation of power?

1. The Vaccine Act Does Not Violate the Presentment Clause

The majority in Terran stated that the main reason that the Vaccine Act does not violate the Presentment Clause is that when the Secretary promulgates the Revised Injury Table, the Initial Injury Table is not repealed, amended, or ever modified.¹⁶⁷ The Initial Injury Table is still on the books and is still effective to petitions for relief that have been filed prior to the promulgation of the Revised Injury Table.¹⁶⁸ This reasoning may seem to be an issue of semantics, but it is how the Supreme Court has responded to Presentment Clause challenges in the past.¹⁶⁹

In the Field case, the Supreme Court found that, because the Tariff Act envisioned a change in circumstances and required the President to suspend free importation when another country began to tax U.S. exports unfairly, it did not violate the Presentment Clause.


¹⁶⁸. Id.

¹⁶⁹. See, e.g., Field v. Clark, 143 U.S. 649, 693 (1892).
Clause. The Tariff Act in Field and the Vaccine Act in Terran authorize a member of the executive branch to effectively cancel an existing statute. In the case of the Tariff Act, the executive branch member would be canceling a statute that implements the free importation of goods from certain countries. Similarly, under the Vaccine Act, the executive branch member would be in effect canceling the Initial Injury Table by promulgating the Revised Injury Table. These parallels may be the reason the majority in Terran relied on the Field decision in its opinion.

The difficulties with the Field decision are its age, having been decided 108 years ago, and that it did not involve the actual modification of a statute that Terran did. Under the Vaccine Act, the Secretary was authorized to promulgate a Revised Injury Table, while under the Tariff Act, the President was authorized to declare a suspension. The difference is only a matter of the weight that can be given to a written regulation. Also, under the Tariff Act, the President was required to act upon certain conditions; whereas, the Vaccine Act gives the Secretary discretion as to whether and when to revise the table. Another distinction between the Tariff Act and the Vaccine Act is that the Tariff Act allowed the President to only temporarily suspend free importation of goods from certain countries. Under the Vaccine Act, however, the Secretary's promulgation of a Revised Injury Table effectively cancels the Initial Table for all subsequent petitions for relief.

Under the reasoning in Field, it seems as though the Supreme Court of 1892 would have decided the issue in Terran the way the majority did. But, we are at a time when the Supreme Court has a wealth of knowledge and precedent at its disposal, some of which suggests that the decision in Terran would be decided differently if it were before the Court today.

Several authors have criticized the reasoning in Clinton in a manner that lends credit to the Terran result. One author argues

170. Id. at 693.
171. Terran, 195 F.3d at 1320-21 (Plager, J., dissenting).
172. See Field, 143 U.S. at 680-94.
173. Terran, 195 F.3d at 1320-21 (Plager, J., dissenting).
175. Id.
176. Terran, 195 F.3d at 1318 (Plager, J., dissenting).
177. See, e.g., Thomas Charles Woodworth, Note, Meet the Presentment Clause: Clinton v. New York, 60 LA. L. REV. 349, 363 (1999) (stating that the Supreme Court erred in its decision in Clinton because once the bill was signed into law and the President cancelled a provision under the Veto Act, the Presentment Clause no longer ap-
that *Clinton* would have been decided differently under delegation of authority doctrines and that by deciding the case under the Presentment Clause, the Supreme Court effectively avoided the tougher question of inherent separation of powers.\(^{178}\) Another author points out that historically, the Supreme Court has given credence to delegation of authority from Congress to the President, but that in *Clinton*, the Court seemed to be caught up in the textual ramifications of the Veto Act.\(^{179}\) These authors' points are well taken, but the Court in *Clinton* reached an opposite result, a result that should have caused the *Terran* court to reconsider its reasoning.

2. Delegation of Legislative Power and the Vaccine Act

In *Terran*, the majority incorporated its functionalist view by concluding that the Vaccine Act's grant of authority to the Secretary is a constitutionally permissible delegation of legislative power.\(^{180}\) Judge Clevenger noted that for a delegation of legislative power to be constitutionally legitimate, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform ...."\(^{181}\)

The statutory grant of power seems to leave Vaccine Act Injury Table revisions in the sole discretion of the Secretary,\(^{182}\) hardly what a court could find to be an "intelligible principle." Yet the majority found that the Vaccine Act constrains the Secretary's discretion by requiring that she consult with the Advisory Commission on Childhood Vaccines before proposing rules to revise the Injury Table. Therefore, Congress "clearly intended the Secretary to be guided by the findings from [the Commission's] studies when she decides to promulgate regulations to revise the injury table."\(^{183}\)

If Congress clearly intended the Secretary to be guided by the

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\(^{178}\) Woodworth, *supra* note 177, at 353.

\(^{179}\) Schmitt, *supra* note 177, at 186-88.

\(^{180}\) *Terran*, 195 F.3d at 1315.

\(^{181}\) Id. at 1315 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928)).

\(^{182}\) 42 U.S.C. § 300aa-14(c) (1994).

\(^{183}\) *Terran*, 195 F.3d at 1315 (noting that the Advisory Commission is comprised of health professionals, family members of those suffering vaccine-related injuries, and...
Advisory Commission’s findings, would it not have stated so in the statute? Section 300aa-14(c) only requires that the Secretary accept petitions for proposed regulations to amend the Injury Table from the Commission, or any person. The petitions are referred to the Commission for their recommendation to the Secretary, but there are no standards to guide the Secretary as to what recommendations to accept; all the statute states is that “the Secretary shall conduct a rulemaking proceeding on the matters proposed . . . or publish . . . reasons for not conducting such proceeding.”

Nothing in the statute requires the Secretary to follow a standard in determining what regulations to make. By the express words of the statute, the Secretary can either conduct a rulemaking proceeding or publish reasons for not doing so, with no guidelines regarding when to do either. This is hardly what has been deemed an “intelligible principle” in the past. Based on standards that have been deemed “intelligible principles” by the Supreme Court in the past, and on what seems to be a total lack of standards in the Vaccine Act, the Act does not pass as a constitutionally legitimate delegation of legislative power.

3. The Vaccine Act Violates the Presentment Clause

The decision in Clinton indicates that the Supreme Court may decide the issue in the Terran case differently than the Terran majority did, and may, in fact agree with the dissent. In Clinton, which is far more recent than the Field decision, the Court embraced the formalist approach and recognized that any legislative action must follow the explicit procedures set forth in the Presentment Clause of the Constitution. The Supreme Court determined that an Act authorizing action by the President to cancel discretionary spending items after a bill has become a law violates

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185. Id.
186. See id.
188. Terran, 195 F.3d at 1320 (Plager, J., dissenting).
the Presentment Clause. The situation presented in *Clinton* resembles that presented in *Terran*. In *Clinton*, Congress promulgated a legislative act that authorized a member of the executive branch to cancel certain portions of a statute. In *Terran*, Congress promulgated a legislative act that authorized a member of the executive branch to create a regulation that effectively cancels certain portions of a statute. In this basic form, the two cases seem indistinguishable, but the opinions are in opposition.

The *Terran* dissent incorporated the same reasoning and formalist feel as the Supreme Court's in *Clinton*. Congress, through section 300aa-14(c) of the Vaccine Act, bypassed the procedural requirements of the Presentment Clause by authorizing the Secretary to promulgate the Revised Injury Table. This effectively repeals the Initial Injury Table, included in the statute, to all subsequent petitions for relief. The Supreme Court in *Clinton* found that, through the Veto Act, Congress had bypassed the procedural requirements of the Presentment Clause by authorizing the President to repeal portions of spending statutes. The dissent in *Terran* and the Supreme Court majority in *Clinton* concluded that, as acts by Congress that allow a member of the executive branch to do something that, in effect, repeals portions of existing statutes, both were unconstitutional violations of the Presentment Clause.

Therefore, it seems that if the Supreme Court were to grant certiorari in a case that presents the same issue as *Terran*, it would conclude that the Vaccine Act unconstitutionally violated the Presentment Clause of the Constitution. The reason for this is two-fold: (1) The *Clinton* case was decided recently, possibly showing the Court's present disposition; and (2) at their cores, the *Clinton* case and the *Terran* case are nearly identical and therefore the decisions would, conceivably, be nearly identical.

On the other hand, the Supreme Court could recognize some defect in its reasoning in *Clinton* and implement the reasoning of the *Field* decision. This would lead to the same result as the *Terran*

190. *Id.* at 449.
191. *Id.* at 417 (stating that the Veto Act authorized the President to cancel certain discretionary spending provisions in statutes that he had already signed into law).
192. *Terran*, 195 F.3d at 1308. The Vaccine Act authorizes the Secretary to promulgate a revised Injury Table that effectively makes the Initial Table ineffective to all petitions filed after the promulgation of the revised table. *Id.*
193. *Terran*, 195 F.3d at 1317-21 (Plager, J., dissenting) (relying on the reasoning from *Clinton* and citing throughout).
194. *Id.* at 1320 (Plager, J., dissenting).
majority's decision in that the promulgation of the Revised Injury Table was held to be a legislatively required act that did not effectively repeal an existing statute. Consequently, the Initial Injury Table would still be effective towards all petitions filed prior to the revision.\footnote{Terran, 195 F.3d at 1312.}

Realizing that the Supreme Court may not grant certiorari, the question becomes less what the Supreme Court would decide and more whether the Terran decision is correct and the Vaccine Act is in violation of the Presentment Clause in light of prior history and subjective opinions.

The reasoning the Supreme Court set forth in Clinton seems logical but has been criticized by several authors.\footnote{See Woodworth, supra note 177, at 363; Schmitt, supra note 177, at 190.} Despite this, the reasoning set forth by the majority in Terran seems to be based on a different interpretation of the Presentment Clause when compared to that of the Supreme Court in the Clinton case. The Vaccine Act authorizes the Secretary to promulgate the Revised Injury Table that effectively repeals the Initial Injury Table (as the Initial Injury Table ceases to apply to subsequent petitions). Therefore, the Vaccine Act is no longer the same Act that was passed through both Houses of Congress and presented to the President. In effect, it is an altered Act containing an ineffective Initial Injury Table and a new Revised Injury Table that was not approved by either House of Congress or the President. One can only speculate as to whether the modified Vaccine Act would have become a law if it had been presented as a bill in its present form. Even if the Vaccine Act can be considered substantively the same as when it was initially promulgated, there is still a policy argument against allowing the provision authorizing the Secretary's actions to stand. If we allow this type of legislation authorizing the executive branch to create new laws, we diminish the effect of the Constitution's system of checks and balances.

The power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered procedure."\footnote{INS v. Chadha, 462 U.S. 919, 951 (1983).} The Framers of the Constitution placed great importance on the government being divided into the tripartite model, with each branch retaining powers exclusive and independent of the other branches as a way to limit power vested in one branch.

\begin{footnotes}
\item[196] Terran, 195 F.3d at 1312.
\item[197] See Woodworth, supra note 177, at 363; Schmitt, supra note 177, at 190.
\end{footnotes}
After narrowly escaping the tyranny of England, the Framers clearly wanted to place carefully considered limits on each branch of the government, allowing no branch to dominate. The principles of separation of powers are fundamental to the success of the United States government, so allowing Congress to bypass the express words of our founding document facilitates a shift in power that the Framers of the Constitution sought to avoid. Congress erred in the promulgation of the Vaccine Act because it allows the Secretary to employ legislative power without employing an "intelligible principle," something a member of the executive branch is forbidden from doing under the Constitution.

**Conclusion**

The Terran case presents a new spin on a long debated topic in American jurisprudence. The Presentment Clause embodies in a single sentence the essence of the Constitution—the idea of separation of powers and a system of checks and balances. Violations of the Presentment Clause are necessarily avoided as they are in opposition to the very ideas that enabled the Framers to build a government—free of tyranny—that would stand the test of time. Even though the Terran court found that the Vaccine Act did not violate the Presentment Clause of the Constitution, prior cases and careful legal analysis indicates that this decision may be decided differently in another court. Therefore, the Supreme Court may wish to reconsider whether or not to grant certiorari when this issue arises again. Congress may also wish to amend the Vaccine Act and set forth standards the Secretary must employ in making revisions to the Injury Table. Congress should strive to create standards that may be deemed "intelligible principles" so that the Vaccine Act contains a constitutionally legitimate delegation of legislative power. Until such time, the Vaccine Act’s grant of authority to the Secretary remains unconstitutional with repercussions that not only threaten

199. See The Federalist No. 73 (Alexander Hamilton).

200. A standard that has been found to be an "intelligible principle" in the past and might fit the Vaccine Act situation requires the responsible agency to make regulations as "public interest, convenience, or necessity" requires. See Nat’l Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943) (upholding delegation to the Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" requires).
our system of government, but also deprive sick children such as Julie Terran of compensation for their injuries.

Erik Loftus