Nos. 85-1377, 85-1378, and 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A BOWSHER, COMPTROLLER GENERAL
OF THE UNITED STATES,

Appellant,

v

MIKE SYNAR, MEMBER OF CONGRESS, ET AL

UNITED STATES SENATE,

Appellant,

v

MIKE SYNAR, MEMBER OF CONGRESS, ET AL

THOMAS P O'NEILL, JR., SPEAKER OF THE UNITED STATES
HOUSE OF REPRESENTATIVES, ET AL ,

Appellants,

v

MIKE SYNAR, MEMBER OF CONGRESS, ET AL

On Appeals from the United States District Court for the District of Columbia

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the assignment of executive functions under Section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 to the Comptroller General, an officer of the Legislative Branch who is subject to removal by Congress, but not by the President, violates the constitutionally mandated separation of powers.

PARTIES TO THE PROCEEDING

Plaintiffs in Civil Action No. 85-3945 were Representatives Mike Synar, Gary L. Ackerman, Albert G. Bustamante, Silvio O. Conte, Don Edwards, Vic Fazio, Robert Garcia, John J. LaFalce, Jim Moody, Claude D. Pepper, Robert G. Torricelli, and James A. Traficant. Plaintiff in Civil Action No. 85-4106 was the National Treasury Employees Union. On March 31, 1986, this Court granted a motion to add a member of the Union, Van Riddel, as a plaintiff in the Union's action. The United States was the defendant in both actions. The Comptroller General of the United States, the United States Senate, and the Speaker and Bipartisan Leadership Group of the House of Representatives, composed of Thomas P. O'Neill, Jr., Jim Wright, Robert Michel, Thomas Foley, and Trent Lott, intervened as defendants in both actions in the district court.

The district court intervenors are appellants in this Court. Plaintiffs and the United States are appellees.

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v.

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No. 85-1378

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

No. 85-1379

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (J.A. 27-80) is reported at 626 F. Supp. 1374.

JURISDICTION

The order of the district court (J.A. 81-82) was entered on February 7, 1986. The notices of appeal in Nos. 85-1377 and 85-1378 were filed on February 7, 1986, and the notice of appeal in No. 85-1379 was filed on February 10, 1986. The jurisdictional statements were filed on

February 18, 1986, and the Court noted probable jurisdiction on February 24, 1986. The jurisdiction of this Court is invoked under Section 274(b) of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1098 (J.A. 163-164), and 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Constitution; the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 *et seq.*; 31 U.S.C. 702 and 703; and the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, Tit. II, 99 Stat. 1038 *et seq.*, are set forth at J.A. 91-167.

STATEMENT

1. Congress enacted the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, Tit. II, 99 Stat. 1038 *et seq.*, in December 1985. The Act is intended to achieve a balanced federal budget by 1991 through the establishment of progressively lower deficit targets for the next six fiscal years. § 201(a)(1) (J.A. 104). The Act provides that the Comptroller General will issue a report to the President and Congress each fiscal year that contains an estimate of the size of the deficit and specify the budget cuts, if any, that are necessary in each federal spending account to meet the applicable deficit target. § 251(b) (J.A. 116-118). The President then is required to sequester federal funds in accordance with the Comptroller General's report. § 252 (J.A. 124-134).

The Comptroller General is the head of the General Accounting Office (GAO), "an instrumentality of the United States Government independent of the executive departments" (31 U.S.C. 702(a) and (b)). The Comptroller General is appointed for a 15-year term by the President, with the advice and consent of the Senate (31 U.S.C. 703(a)(1) and (b)), but he is subject to removal by joint resolution of Congress (31 U.S.C. 203(e)(1)(B)). At issue in this litigation is the constitutionality of the Comptroller General's authority to specify the spending reductions that must be effected by the President to reach the deficit targets established under the Act.

a. The deficit reduction process established by the Act requires the Director of the Office of Management and Budget (OMB) and the Director of the Congressional Budget Office (CBO) to prepare a joint report for the Comptroller General estimating the size of the federal deficit on the basis of their projections of government revenues and outlays and economic growth for the next fiscal year.[1] For items in the report on which OMB and CBO are unable to agree, "they shall average their differences" and "shall also indicate the amount [each of them] initially proposed." § 251(a)(5) (J.A. 115). If they predict that the deficit will exceed the Act's target for that year by more than a specified amount, the Directors of OMB and CBO must identify the reductions in each budget account that are necessary to eliminate the excess of the projected deficit over the statutory ceiling. Subject to certain exceptions, one-half of the deficit excess must be eliminated by proportionately reducing outlays in defense programs and the other half by proportionately reducing outlays in nondefense programs. § 251(a) (J.A. 109-116).

After he receives the OMB-CBO report, the Comptroller General is required to issue a report to the President and Congress setting forth his own determinations for each of the items contained in the OMB-CBO report. § 251(b) (J.A. 116-118). The Act requires the Comptroller General to undertake an "independent analysis" (S. Rep. 99-433, 99th Cong., 1st Sess. 84 (1985)), giving "due regard for the data, assumptions, and methodologies used [by

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[1] OMB is "an office in the Executive Office of the President" (31 U.S.C. 501), and the Director of OMB is appointed by the President, with the advice and consent of the Senate (31 U.S.C. 502(a)(1)). CBO is "an office of the Congress" (2 U.S.C. 601(a)). The Director of CBO is appointed for a four-year term by the Speaker of the House of Representatives and the President pro tempore of the Senate, although he may be removed at any time by a resolution passed by either House (2 U.S.C. 601(a)(4)).

OMB and CBO]" and basing his report on their "estimates, determinations, and specifications." § 251(b)(1) and (2) (J.A. 116, 117). The Comptroller General must "explain fully any differences between the contents of [his] report and the report of [OMB and CBO]." § 251(b)(2) (J.A. 118).

In any year in which the Comptroller General predicts that the deficit will exceed the target by more than $10 billion (or by more than $0 in fiscal years 1986 and 1991), the President "shall [issue an order] eliminat-[ing] the full amount of the deficit excess" as determined by the Comptroller General. § 252(a)(1) (J.A. 124). To accomplish that purpose, the President's order must sequester all forms of federal budget resources "in accordance with" the Comptroller General's report and must modify or suspend certain automatic spending increases. § 252(a)(1)(A) and (B) (J.A. 124-125). The President's order "must be consistent with" the Comptroller General's report "in all respects," and he "may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages." § 252(a)(3) (J.A. 128).[2] Except with respect to fiscal year 1986, the President's initial sequestration order becomes effective as of October 1 (the beginning of the fiscal year), and on that date all sequestered funds "shall be withheld from obligation" pending a final order. § 252(a)(4) and (6) (J.A. 128, 129). Following submission of revised reports by the Directors of OMB and CBO and then by the Comptroller General, the President must issue a final sequestration order by October 15 that implements the reductions specified in the Comptroller General's revised report. §§ 251(c), 252(b) (J.A. 118-119, 132-134). The Comptroller General must submit a report to Congress and the President by November 15 of

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[2] Subject to the Comptroller General's approval, the President may terminate or modify existing defense contracts and credit the net savings against the amount of defense budget authority that he would otherwise be required to sequester. § 251(d)(3) (J.A. 121-123).

each fiscal year "on the extent to which the President's order" complies with the Act. § 253 (J.A. 134).

The Act also provides a special fallback mechanism to take effect automatically "[i]n the event that any of the [OMB-CBO and Comptroller General] reporting procedures * * * are invalidated." § 274(f)(1) (J.A. 165). Under this mechanism, the OMB-CBO report is to be transmitted to a joint congressional committee, which is directed to report within five days a joint resolution setting forth the contents of the OMB-CBO report. § 274 (f)(2) and (3) (J.A. 165-166). Floor debate on the joint resolution is limited to two hours. § 274(f)(4) (J.A. 166). Upon enactment of the joint resolution (which requires presentment to the President), the resolution is "deemed to be the report received by the President [from the Comptroller General]." § 274(f)(5) (J.A. 166).

b. The Act further includes special provisions for fiscal year 1986, which already had commenced when the statute was enacted.[3] Pursuant to these provisions, OMB and CBO submitted their joint report to the Comptroller General on January 15, 1986, and the Comptroller General issued his report to the President and Congress six days later. § 251(a)(2) and (b)(1) (J.A. 109, 117). On February 1, 1986, the President issued an order making the required reductions, which totalled $11.7 billion. The President's sequestration order became effective on March 1, 1986. § 252(a)(6)(A) and (D) (J.A. 129, 131).

2. These consolidated actions were filed in the United States District Court for the District of Columbia in December 1985, seeking a declaratory judgment that the Act is unconstitutional. One action was filed by Representative Mike Synar, who was later joined by eleven other Members of the House of Representatives. J.A.

[3] See, *e.g.*, § 252(a)(6)(C)(i) (J.A. 129-130) (automatically suspending cost-of-living increases as of date of enactment through issuance of first sequestration order); § 252(a)(2)(C) (J.A. 127) (providing the President with limited flexibility in allocating defense reductions among programs, projects, and activities).

9-12. The other action was filed by the National Treasury Employees Union (J.A. 13-15).[4] The United States informed the House and Senate of its position that the role of the Comptroller General under the Act is unconstitutional, and the Comptroller General, the Senate, and the Speaker and Bipartisan Leadership Group of the House intervened as defendants in both actions to support the constitutionality of the Act (J.A. 30-32). A three-judge court was convened, as required by Section 274(a)(5) of the Act (J.A. 163). See J.A. 29 n.1.

The district court held that the Act is unconstitutional because "the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress" (J.A. 78).[5] The court observed that although the Comptroller may function as an aid to Congress in other respects, his "powers under the automatic deficit reduction process * * * do not come within that category" (J.A. 72).[6] Rather, his duties under the Act require "interpretation of the law" and "the exercise of substantial judgment concerning present and future facts that

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[4] By order dated March 31, 1986, this Court granted the Union's motion, to which all other parties consented, to add an individual member of the Union, Van Riddel, as a plaintiff.

[5] The district court first concluded that the Union has standing to represent its members, who include retirees whose cost-of-living allowances were suspended under the Act and cancelled under the sequestration order, and that the Members of Congress have standing under binding circuit precedent to assert that the Act interferes with their lawmaking powers (J.A. 32-38). The court then concluded that the Constitution permits Congress to delegate to administrative officials the power to make the economic calculations that determine the estimated federal deficit and the required budget cuts (J.A. 38-55).

[6] The court reasoned that this objection was ripe for adjudication even though no attempt has been made to remove the Comptroller General, because "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems" (J.A. 57 (footnote omitted)).

affect the application of the law," both of which are "power[s] normally committed initially to the Executive under the Constitution's prescription that he 'take Care that the Laws be faithfully executed'" (J.A. 72, 73 (quoting Art. II, § 3)). Most critically, in the court's view, "both of these specifications by the Comptroller General are, by the present law, made binding upon the President in the latter's application of the law" (J.A. 73 (emphasis omitted)). Because "congressional removal power cannot be approved with regard to an officer who actually participates in the execution of the laws," the court concluded that the Comptroller General's role under the Act violates the constitutional doctrine of separation of powers (J.A. 75).[7]

Accordingly, the court issued an order declaring the Act unconstitutional in this respect and invalidating the sequestration order issued on February 1, 1986 (J.A. 81-82). Pursuant to Section 274(e) of the Act (J.A. 165), the court stayed the effect of its order pending appeal to this Court (J.A. 82).

SUMMARY OF ARGUMENT

I. The central principle of the Constitution of the United States is the separation of the powers of the Federal Government among its three Branches. One aspect of the separation of powers under the Constitution concerns the appointment and removal of the "Officers of the United States" who are charged with administering the laws enacted by Congress. The Constitution provides that the President shall nominate and, with the advice and consent of the Senate, shall appoint the principal officers of the Government. Art. II, § 2, Cl. 2. The authority of the President to remove officers charged with administering the laws has long been regarded as

[7] The court also concluded that, especially in light of the fallback mechanism provided in the Act in the event of invalidation of the reporting procedures (see page 5, *supra*), Congress intended that "the Comptroller General's powers under this Act, rather than his manner of removal, * * * should yield if both cannot coexist" (J.A. 60).

incidental to his power of appointment, as well as an aspect of the "executive Power" vested in the President (Art. II, § 1) that is essential to fulfillment of his obligation to "take Care that the Laws be faithfully executed" (Art. II, § 3). See *Myers* v. *United States*, 272 U.S. 52, 115-123 (1926). In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court held that Congress could bar the President from removing a member of the Federal Trade Commission except for cause, in light of what the Court termed the "quasi-legislative" and "quasi-judicial" powers of the FTC (*id.* at 628) and its status as an agency "wholly disconnected from the executive department" (*id.* at 630). *Humphrey's Executor* did not, however, question the holding of *Myers* that Congress may not itself participate (except through the impeachment process) in the removal of an officer of the United States who is charged with the administration of the laws.

II. Section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 (the Act) is inconsistent with these principles of separations of powers. The Comptroller General is the central decision-maker in the administrative implementation of that Act. The President of the United States, and the executive departments and agencies that are otherwise subject to his direct control, are subordinated to the Comptroller General. This arrangement suffers from two fundamental defects. Each derives from the nature of the office of the Comptroller General, who, though appointed by the President with the advice and consent of the Senate for a term of 15 years, may be removed during this period not only by impeachment, but also by joint resolution of Congress. 31 U.S.C. 703(a)(1), (b) and (e)(1).

The first defect in the assignment to the Comptroller General of substantive responsibilities in the budget reduction process prescribed by Section 251 of the Act is that, by statute, the Comptroller General is subject to removal by Congress. Under *Myers*, neither Congress nor either of its Houses may participate in the removal of an Officer of the United States who is engaged in the administration and execution of the law. This is not a technical rule of protocol. It is a fundamental aspect of the doctrine of separation of powers. For as the district court held, once an officer is appointed, the designation of the authority to remove him is the clearest indication of the authority to which he is accountable. Section 251 therefore results in a prohibited influence by Congress over an officer who is charged with implementing an Act of Congress.

The violation of the separation of powers occasioned by such an arrangement is particularly acute in this case, because the provision for congressional removal of the Comptroller General, while constitutionally defective in its own right, also is but one aspect of a far more pervasive nexus between the Comptroller General and Congress. The Comptroller General is an officer of the Legislative Branch whose principal duty is to "serve the needs of Congress" (*Bowsher* v. *Merck & Co.*, 460 U.S. 824, 844 (1983)), particularly by assisting in investigations of the expenditure of public funds and other operations of the Executive Branch. Consistent with this charter, the Comptroller General has regarded himself—and he uniformly has been regarded by all three Branches of Government—as an officer of the Legislative Branch. Such an officer cannot be vested with authority to render administrative determinations that bind the President and those under his superintendence in the Executive Branch.

III. The second fundamental constitutional defect results from the fact that the Comptroller General does not serve at the pleasure of the President. This Court held in *Humphrey's Executor* that Congress could limit the President's power to remove a member of a commission that performed what the Court described as "quasi-judicial" functions and rendered investigatory assistance to Congress with respect to a discrete subject matter, while remaining "wholly disconnected from the executive department" (295 U.S. at 630). In this case, however, the Comptroller General's functions under Section 251 of the Act are not quasi-judicial: he does not find historical facts pertaining to a particular person or transaction and render a decision regarding the legal consequences of past conduct. Rather, the Comptroller General is charged with making broad predictions regarding the future performance of the economy and the impact of that performance on federal receipts and expenditures and the budget deficit. Nor does he merely investigate these matters and render advice to Congress; the Comptroller General's projections, as well as his calculation of the necessary budget reductions, are binding upon the President and, through him, the heads of the executive departments and agencies.

Nothing in *Humphrey's Executor* can be stretched so far as to permit Congress to vest an officer who does not serve at the pleasure of the President with the power to intrude upon and effectively direct the execution of the laws by the President and his subordinates within the wide range of *their* responsibilities. The Framers deliberately settled upon a unitary Executive in order to promote a sense of personal responsibility and accountability to the people in the execution of the laws—and thereby to ensure vigorous administration of the laws and protection of the liberty, property, and welfare of the people. *The Federalist No. 70* (A. Hamilton) (C. Rossiter ed. 1961) [hereinafter cited as *The Federalist*]. A division between the President and the Comptroller General of authority over the administration of the laws throughout the Executive Branch cannot be reconciled with this considered judgment by the Framers. Of course, Congress, by enacting a *law*, could itself prescribe the precise spending reductions that must be implemented by the President and subordinate officials in the Executive Branch. That is the course contemplated under the "fallback" mechanism in Section 274(f) of the Act, which will be triggered if this Court affirms the district court's invalidation of Section 251 because of the role of the Comptroller General. See page 5, *supra*, and pages

57-58, *infra*. In that event, the elected representatives of the people in the Legislative Branch would be directly accountable to the people for the spending reductions that result. But if Congress chooses instead to enact a law that provides for administrative calculation of the precise spending cuts required throughout the Executive Branch, the execution of that law is the responsibility of the President, who is the people's elected representative in the Executive Branch.[8]

IV. Section 251 is not saved from unconstitutionality on the ground that Congress has not actually sought to remove the Comptroller General from office. Far more is at stake than a personal right of the incumbent to remain in office. Under the doctrine of separation of powers, in order to preserve the integrity of our system of government, the Comptroller General is disqualified from performing the duties assigned to him under Section 251 because the provision for congressional removal and his status as an officer of the Legislative Branch affect the nature of his office, and because those duties must in any event be performed by a person who serves at the pleasure of the President. That issue of disqualification is directly implicated here and should be resolved.

Section 251 also cannot be saved from unconstitutionality simply by "severing" the statutory provision for congressional removal of the Comptroller General from office. That action would not eliminate the constitutional defects in Section 251 because it would not undo Congress's repeated designation of the Comptroller General as an officer of the Legislative Branch, nor, presumably, would such severance make him subject to removal by the President at will. Moreover, Congress specified the alternative procedures to be followed "[i]n the event

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[8] We agree with the district court that Congress's assignment to administrative officials of the authority to make the economic calculations that determine the estimated federal deficit and the required budget cuts does not constitute an unconstitutional delegation by Congress of the "legislative Powers" vested in it by Article I, Section 1, of the Constitution. See J.A. 38-55.

that any of the reporting procedures described in Section 251 are invalidated" (§ 274(f)), and that specification is binding on the courts. Congress did not, sub silentio, authorize the courts instead to fundamentally alter the nature of the office of the Comptroller General as it has existed for 65 years.[9]

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[9] On March 31, 1986, this Court granted the Union's unopposed motion to add an individual member of the Union, Van Riddel, as a plaintiff. Riddel, a retired federal employee, plainly has standing under Article III and Section 274(a)(2) of the Act (J.A. 163) to challenge the constitutionality of Section 251 of the Act because the President's sequestration order permanently cancelled a cost-of-living increase that had been scheduled to go into effect January 1, 1986. See J.A. 35-36 & n.5, 83-86; § 252(a)(6)(C) (J.A. 129-130). For the reasons stated in our brief in *International Union, UAW* v. *Brock*, No. 84-1777 (argued Mar. 25, 1986), and in our petition for a writ of certiorari in *Burke* v. *Barnes*, cert. granted, No. 85-781 (Mar. 3, 1986) (copies of which we are providing to counsel), we do not believe that either the Union or the individual Members of Congress, who filed complaints as plaintiffs in the district court, have standing. (With respect to the standing of an individual Member of Congress to challenge a law duly enacted by Congress, see also *Bender* v. *Williamsport Area School District*, No. 84-773 (Mar. 25, 1986), slip op. 9-10 & n.7.) There is, however, no need for the Court to address the standing of these parties in light of Riddel's standing to bring this action. See, *e.g.*, *Secretary of the Interior* v. *California*, 464 U.S. 312, 319 n.3 (1984); *Carey* v. *Population Services International*, 431 U.S. 678, 682 (1977); *Buckley* v. *Valeo*, 424 U.S. 1, 12 (1976). In our view, questions of representational and congressional standing would best be addressed in *Brock* and *Barnes*, rather than in this case, where they are not essential to a resolution of the merits.

The district court believed that, despite the consolidation of the two suits that originally were filed, it was necessary to consider the standing of the plaintiffs in each of those suits (J.A. 32-38). However, such an inquiry is not required by this Court simply because separate actions were originally filed below. *Secretary of the Interior* v. *California*, 464 U.S. at 319 n.3. See also *Norton* v. *Mathews*, 427 U.S. 524 (1976).

ARGUMENT

SEPARATION OF POWERS UNDER THE CONSTITUTION BARS THE COMPTROLLER GENERAL FROM PERFORMING THE EXECUTIVE FUNCTIONS ASSIGNED TO HIM BY SECTION 251 OF THE BALANCED BUDGET AND EMERGENCY DEFICIT CONTROL ACT OF 1985

Section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 vests the Comptroller General with power to execute critical aspects of the Act by making economic and fiscal projections and deficit reduction calculations that are binding on the President and the entire Executive Branch. The constitutional doctrine of separation of powers bars the Comptroller General from participating in the execution of the Act: *first*, because the Comptroller General is subject to removal by Congress and indeed is an officer of the Legislative Branch; and *second*, because the performance of these functions in a manner that binds the President and the heads of the executive departments and agencies under his control can be undertaken only by the President or by an Officer of the United States who serves at the pleasure of the President. Before elaborating upon these defects, we first discuss the constitutional principles of separation of powers that govern this case.

I. THE PRESIDENT'S POWERS OF APPOINTMENT AND REMOVAL ARE INTEGRAL ASPECTS OF THE SEPARATION OF POWERS

A. The Doctrine Of Separation Of Powers

The Constitution divides the powers of the Federal Government among its three Branches as part of a system of checks and balances. This separation of powers lies "at the heart of the Constitution" (*Buckley* v. *Valeo*, 424 U.S. 1, 119 (1976)) and is embodied in its "very structure" (*INS* v. *Chadha*, 462 U.S. 919, 946 (1983)). Thus, the Constitution declares that "All legislative powers herein granted shall be vested in a Congress of the United States" (Art. I, § 1); "The executive Power shall be vested in a President of the United States" (Art. II, § 1); and "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" (Art. III, § 1). Each of these first three Articles specifies the powers of a particular Branch.

The division of responsibilities among the Branches was not a mere housekeeping measure. The Framers had a profound purpose in mind. As James Madison explained in *The Federalist No. 47*, quoting Montesquieu, "'[w]hen the legislative and executive powers are united in the same person or body, * * * there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner'" (*id.* at 303 (emphasis in original)). In order to avoid that consequence, the separation of powers was intended to assure, as nearly as possible, that each Branch will operate only within its assigned sphere of responsibility. *Chadha*, 462 U.S. at 951. Thus, "the Constitution diffuses power the better to secure liberty" (*Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)) and to furnish "a vital check against tyranny" (*Buckley*, 424 U.S. at 121).

At the same time, the Framers included in the Constitution certain express checks—such as the Presidential veto of legislation and its override, and Senate consent to appointments and ratifications of treaties—by which one Branch could protect against encroachment or aggrandizement by another. In this way, the power of the government as a whole was to be contained. The Court generally has understood such express constitutional provisions for the involvement by one Branch in the affairs of another to be exclusive, and it has construed the Constitution to bar such involvement where it is not affirmatively authorized. See, *e.g.*, *Chadha*, 462 U.S. at 955-956; *Buckley*, 424 U.S. at 127; *Myers*, 272 U.S. at 116; *Kilbourn* v. *Thompson*, 103 U.S. 168, 191 (1880). The Constitution thus was intended to be faithful to

Montesquieu's theory of distinct and separate departments of government, except where a departure from that theory was deemed necessary by the Framers as a "self-executing safeguard" (*Buckley*, 424 U.S. at 122) against possible abuse by one of those departments (*The Federalist No. 47*, at 302-303, 307-308). It is only through such specific provisions in the Constitution itself that one Branch may have a "*partial agency* in" or "*control* over" the actions of another Branch, to which Madison referred, quoting Montesquieu (*id.* at 302 (emphasis in original)).[10] This Court has "not hesitated to enforce the principle of separation of powers embodied in the Constitution" when "its application * * * prove[s] necessary for the decisions of cases or controversies properly before it" (*Buckley*, 424 U.S. at 123).

The vesting of the "executive Power" in the President and his correlative duty to "take Care that the Laws be faithfully executed" (Art. II, § 3) give expression to the Framers' conclusion that there must be a unitary, vigorous, and independent Executive who is responsible directly to the people, not to Congress (except by impeachment). To that end, the Constitution provides for the election of the President by an independent body of electors chosen by the people. Art. II, § 1, Cls. 2-3; Amend. XII. See *The Federalist No. 68*, at 411-414 (A. Hamilton); *The Federalist No. 70*, at 423-431.[11]

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[10] Indeed, the purpose of *The Federalist No. 47* was to defend against the charge that even the checks expressly provided for by the Constitution violated "the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct" (*id.* at 301). The House of Representatives therefore errs in relying (Br. 16) on the quoted language in *The Federalist No. 47* for the notion that one Branch may exert control over the affairs of another in circumstances where the Constitution does not specifically so provide.

[11] See also Art. II, § 1, Cl. 7 (President's compensation may not be increased or decreased); Art. I, § 6 (no person holding any Office under the United States shall be a Member of either House of Congress); Art. II, § 1, Cl. 2 (no Senator or Representative may be an elector).

Energy in the execution of the laws was deemed by the Framers to be "a leading character in the definition of good government" (*The Federalist No. 70*, at 423). The attributes deemed necessary for energy in the Executive were "unity; duration; an adequate provision for its support; and competent powers" (*id.* at 424). The first of these—unity, with "power in a single hand"—was regarded as particularly essential for there to be decisiveness, activity, and dispatch in carrying into effect the measures that the "numerous legislature" had adopted following debate, circumspection, and compromise (*id.* at 424, 427). In Hamilton's view, "[t]his unity may be destroyed * * * by vesting it ostensibly in one man, subject in whole or in part to the control and cooperation of others, in the capacity of counselors to him" (*id.* at 424).[12] Dissension among several responsible officials would "lessen the respectability" and "weaken the authority" of the Executive (*id.* at 426) and embarrass and delay the implementation of measures adopted by Congress (*id.* at 427).[13]

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[12] The Constitutional Convention rejected several plans that would have undermined the unity of the Executive. The first was Edmund Randolph's proposal that the Executive consist of three members drawn from separate geographical regions (1 M. Farrand, *The Records of the Federal Convention, 1787*, at 66, 71-74, 88, 91-92, 97 (rev. ed. 1966) [hereinafter cited as Farrand]). James Wilson successfully opposed that proposal on the ground that it would lead to "nothing but uncontrolled, continued, and violent animosities; which would not only interrupt the public administration, but diffuse their poison through the other branches of government, through the states, and at length through the people at large" (*id.* at 96). The Convention also rejected the proposal for the President to have a Privy Council or similar body, consisting either of the Chief Justice and the heads of executive departments (2 Farrand 335-337) or representatives of regions (*id.* at 533, 537, 542). Finally, the Framers rejected proposals for participation by judges or others in the exercise of the veto power (1 Farrand 97-98; 2 Farrand 73-80).

[13] The unity of the Executive under the direction of the President is reflected not only in the Take Care Clause, but also in the President's status as "Commander in Chief of the Army and Navy"

In addition, the Framers believed that an absence of unity in the Executive would create an absence of responsibility and accountability, and thereby "deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power": "the restraints of public opinion" and "the opportunity of discovering with facility and clearness the misconduct of the persons they trust" (*The Federalist No. 70*, at 428-429). See generally 1 Farrand, *supra* note 12, at 65-67, 71-74, 96-97, 109, 254, 266-267.

Of course it is quite irrelevant to the crucial importance of maintaining the integrity of these foundational principles that in a particular instance where the principles are ignored no immediate threat to individual liberty, or even to governmental responsibility, impends. What protects these values, and offers constant reassurance to the people of that protection, is the structure of the Constitution itself; and what threatens these values and the security of the people is any disposition to dilapidate that structure. The Framers concerned themselves with potential abuses of power and sought to structure a system that would prevent or contain them in their incipiency.

B. The Power Of Appointment

Consistent with their intention regarding the stature and authority of the President, the Framers recognized that the President's power and duty to execute the laws must carry with it the right to choose the subordinate officers of government who will assist him in that task. As this Court has held (*Buckley,* 424 U.S. at 135-136 (quoting *Myers,* 272 U.S. at 117)):

(Art. II, § 2, Cl. 1); his power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices" (*ibid.*); and his prerogative to "receive Ambassadors and other public Ministers" (Art. II, § 3), which is an aspect of the "'plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.'" *Dames & Moore* v. *Reagan,* 453 U.S. 654, 661 (1981) (quoting *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 320 (1936)).

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. * * * As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.

The Framers did not, however, leave that matter to implication. Article II, Section 2 provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States * * * which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Framers' decision to vest the power of nomination and appointment in the President was consistent with their conception of a strong, unitary, and responsible Chief Executive. A number of delegates to the Convention expressed the fear that individual members of a numerous legislative body would not have the requisite sense of personal responsibility for the selection of officers and might be prone to cabal, parochial biases, and considerations of personal regard. By contrast, the President was expected to be more capable of selecting a suitable person and to be held accountable by the people for his selection. As James Wilson explained: "Good laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute" (2 Farrand 538-539). See generally *id.* at 41-44, 80-83, 314-315, 339.

The President's power to appoint officers of the United States of course was explicitly made subject to the advice and consent of the Senate. Madison referred to this provision as a check against "any incautious or corrupt nomination by the Executive" (1 Farrand 43) and a protection for the interests of the smaller States (*id.* at 80-81; *Myers*, 272 U.S. at 119-120). See generally *The Federalist No. 76*. But as Hamilton stressed (*The Federalist No. 66*, at 405 (emphasis in original)):

> There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice of the President.

The persons appointed to office as the heads of the departments were intended to be the agents of the President in the execution of the laws. *The Federalist No. 72*, at 435-436. See *In re Neagle*, 135 U.S. 1, 64 (1890); *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279-280 (1888). Thus the President's power to select the Officers of the United States who will administer the laws passed by Congress is at the very core of the "executive Power" vested in the President by Artcle III.

C. The Power Of Removal

Although the Constitution expressly confers on the President the power to appoint Officers of the United States, it does not mention removal of such officers by the President. The only reference to removal is in Article II, Section 4, which provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The House of Representatives has "the sole Power of Impeachment" (Art. I, § 2, Cl. 5), and the Senate has "the sole Power to try all Impeachments" (Art. I, § 3, Cl. 6). This express provision for one method of removal by Congress of "all civil Officers of the United States" for specified causes negates any implication of a power in Congress to vest itself (or either of its Houses) with the authority to remove any such officer in some other manner or for some other reason.

By contrast, the absence of an express provision in the Constitution for the President to remove Officers of the United States who are responsible for the administration of the laws has never been thought to mean that the Constitution restricts that prerogative of the President. Such a construction would substantially impede the President in the fulfillment of his constitutional obligations. As this Court recently reiterated, the President is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity[,] * * * includ[ing] the enforcement of federal law * * * and management of the Executive Branch—a task for which 'imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.'" *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749, 750 (1982) (quoting *Myers*, 272 U.S. at 134-135).

Moreover, the fact that the Constitution provides for the advice and consent of the Senate for *appointments*, but makes no comparable provision for participation by the Senate in *removals*, strongly indicates that the Constitution forecloses Congress from making the advice and consent of the Senate a condition to the President's exercise of his right to remove an Officer of the United States. Compare *Chadha*, 462 U.S. at 955-956; *Buckley*, 424 U.S. at 127. For, as Madison pointed out in the debate on this very point during the First Congress, the participation of the Senate in the concededly executive function of the appointment of the officers who will administer the laws is such an exception to the basic constitutional principle of the separation of powers that it must be construed strictly and not be extended by implication (1 Annals of Cong. 462, 463, 496-501 (J. Gales ed. 1789)). See *Myers*, 272 U.S. at 122-123.

The purposes underlying the requirement of the Senate's advice and consent to appointments as a check against the President's selection of a person who is unsuited to office certainly do not support such an extension. To the contrary, the imposition of such conditions on removal would interfere with the very discretion that the Appointments Clause was intended to furnish the President to receive the assistance of subordinates in whom he has complete confidence, and it also would have the perverse effect of retaining in office a person whom even the President had determined was not suited to serve.[14] The result of implying any Senate role in removals would be seriously to undermine the unity and sense of responsibility that were deemed essential to the Office of the President as established by the Constitution. See *Myers*, 272 U.S. at 119, 121-122, 131-135; *The Federalist No. 66*, at 404. It therefore is not surprising that, as we now explain, the unrestricted power of the President to remove officers who are principally responsible for the administration of the laws was formally recognized by Congress at the time of the organization of the Government under the Constitution, and it has been acknowledged ever since.

1. *The Decision Of 1789*

The matter of the President's authority to remove the principal officers of government was considered by the First Congress during its debate on bills to establish the departments in the Executive Branch. The question arose as to whether the President inherently had, or should be affirmatively granted by Congress, the authority to remove the heads of departments, and whether the advice and consent of the Senate should be required for removals. Congress determined that, under the Constitution, the removal authority resides in the President alone. This "Decision of 1789" reflects a nearly contemporaneous construction of the Constitution by the First Congress, which was composed of many members of the Constitutional Convention. That construction is entitled to great weight. See, *e.g. Parsons* v. *United States*, 167

[14] The advice and consent requirement as applied to removals would effectively enable the Senate, instead of the President, to choose the person (the incumbent) who will occupy an office in the future, contrary to Hamilton's assurance that the Senate would not be entitled to make such a choice. See page 19, *supra*.

U.S. 324, 328-330 (1897); *Myers*, 272 U.S. at 111-132. Compare *Marsh* v. *Chambers*, 463 U.S. 783, 786-790 (1983).

The reasons underlying Congress's decision are contained in three major speeches by James Madison.[15] The heart of Madison's arguments is contained in his speech of June 22, 1789 (1 Annals of Cong. 581-582):

> [I]f there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with greater caution, it is that which relates to officers and offices. The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases.

Earlier in the debate, Madison had given three grounds for the thesis that the Constitution vests the removal power solely in the President. First, he relied on the general rule of construction that "the power of removal resulted by a natural implication from the power of appointing" (1 Annals of Cong. 496). Second, inasmuch as the President has the responsibility for the faithful execution of the laws (Art. II, § 3), he necessarily must have the authority to remove those officials he does not trust (1 Annals of Cong. 462-465, 496-501). See *Myers*, 272 U.S. at 121-122. Third, Madison referred to the "great principle of unity and responsibility in the Executive department, which was intended for the security of liberty and the public good" (1 Annals of Cong. 499). He also feared that government officers defying the President could join "in cabal with the Senate" (*id.* at 462), thus preventing their removal and substantially undermining the power of the President (*id.* at 462, 497-500).

[15] June 16, 1789 (1 Annals of Cong. 461-465); June 17, 1789 (*id.* at 495-501); and June 22, 1789 (*id.* at 581-582).

The House of Representatives accepted Madison's arguments and approved the bill establishing the Department of Foreign Affairs in a form that was intended to be a legislative construction of the Constitution that the power to remove the Secretary of Foreign Affairs was vested in the President by virtue of the Constitution. 1 Annals of Cong. 580, 585, 591. The Senate (with Vice President Adams casting the deciding vote) concurred in this interpretation (*Myers*, 272 U.S. at 114-115), and the bill was passed in that form. Act of July 27, 1789, ch. 4, § 2, 1 Stat. 29.

2. *Subsequent Developments*

The large number of political dismissals by President Jackson raised again the issue of the President's removal power. See 2 J. Story, *Commentaries on the Constitution of the United States* § 1543 (5th ed. 1891). However, many of those who opposed President Jackson's actions nevertheless concluded either that the Decision of 1789 was based on the correct interpretation of the Constitution, or that it could no longer be challenged after nearly half a century of established constitutional practice. *Ibid. Myers*, 272 U.S. at 148-152; 1 J. Kent, *Commentaries on American Law* *310 (14th ed. 1896). This Court likewise regarded the Decision of 1789 as "having become the settled and well-understood construction of the [C]onstitution" (*In re Hennen*, 38 U.S. (13 Pet.) 258, 259-260 (1839)). See also *Blake* v. *United States*, 103 U.S. 227, 231-233 (1880); 4 Op. Att'y Gen. 1 (1842); *id.* at 603, 608 (1847); 5 *id.* at 288, 290 (1851); 6 *id.* at 4, 6 (1853).

Thereafter, beginning with the Currency Act of 1863 (§ 1, 12 Stat. 665), Congress passed a series of statutes relating to the removal of executive officers. See *Myers*, 272 U.S. at 165-166. The most important of these was the Tenure of Office Act of 1867, ch. 154, 14 Stat. 430 *et seq.*, which was passed during the period of conflict between President Andrew Johnson and Congress. Under that Act, members of the Cabinet were to hold office for the term of the President who had appointed them and for one month thereafter, subject to removal with the advice and consent of the Senate. President Johnson vetoed this legislation on the ground that it conflicted with the well-settled interpretation of the Constitution, but it was repassed over his veto (*Parsons*, 167 U.S. at 340). "The continued and uninterrupted practice of the Government from 1789 was thus broken in upon and changed by the passage of this act" (*ibid.*). However, as soon as President Johnson's term ended, Congress relaxed those restrictions (Act of Apr. 5, 1869, ch. 10, 16 Stat. 6 *et seq.*), and President Grant, in his first annual message to Congress, recommended their complete repeal on constitutional grounds. *Myers*, 272 U.S. at 168. The Tenure of Office Act eventually was repealed (Act of Mar. 3, 1887, ch. 354, 24 Stat. 500 *et seq.*), with the intended result that

> the law will then stand as it stood from the foundation of the Government up to 1867, when, in a time of great party excitement, the said legislation was enacted, which, to say the least, was unusual, and tended to embarrass the President in the exercise of his constitutional prerogative.

H.R. Rep. 3539, 49th Cong., 2d Sess. 1 (1887).

3. *The Decisions In* Myers, Humphrey's Executor *and* Wiener

The question whether Congress can limit the President's power to remove top-ranking Executive Branch officials was presented to this Court in *Myers* v. *United States*, *supra*, nearly 40 years after Congress repealed the Tenure of Office Act. *Myers* arose under the Act of July 12, 1876, ch. 179, 19 Stat. 78 *et seq.*, pursuant to which postmasters were appointed by the President with the advice and consent of the Senate and could be discharged by him only in a like manner. This Court held that the 1876 Act unconstitutionally limited the President's power to remove such officers. In so holding, the Court thoroughly reexamined and endorsed the Decision of 1789 and the principles underlying it and traced the acceptance of that Decision in subsequent years (272 U.S. at 110-154).

In particular, the Court reaffirmed that the President's power to appoint executive officers carries with it the power to remove them, and that the provision for the Senate to consent to appointments cannot be extended to removals (272 U.S. at 122). Moreover, the Court endorsed the view that Congress cannot interfere with the President's performance of his duty to take care that the laws be faithfully executed by curtailing his control over the subordinates whom he has appointed to assist him in that task (*id.* at 162-164, 177). The Court stressed, however, that where Congress wishes to limit the evils of patronage with regard to the tenure of *inferior* officers, it may do so by vesting the appointment of those officers (with limited power of removal) in the heads of departments, as the Appointments Clause allows (*id.* at 159-164). Finally, the Court stated that although the President cannot properly interfere with the quasi-judicial decisions of executive officers, he may consider their rulings as a reason for removal. Otherwise, the Court reasoned, the President "does not discharge his own constitutional duty of seeing that the laws be faithfully executed" (*id.* at 135).[16]

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[16] Justice Brandeis filed a dissenting opinion (272 U.S. at 240-295), as did Justice McReynolds (*id.* at 178-239), and Justice Holmes agreed with the conclusion they reached (*id.* at 177). In context, it would seem that the dissenters were principally concerned not to cast doubt on the constitutionality of statutes establishing the civil service system as an alternative to the "spoils system." Accordingly, Justice Brandeis emphasized that, in his view, the rationale of the Decision of 1789, involving cabinet members and other high-ranking officers, had no bearing on the President's power over postmasters, whom he regarded as "inferior officers" for purposes of the Appointments Clause. Justice Brandeis was of the view that because the Constitution permits Congress to set limitations upon the President's removal of inferior Officers by placing their appointment in the heads of department, Congress could exempt such Officers from the realm of patronage by making their removal dependent upon the consent of the Senate. Justice McReynolds likewise stressed that postmasters were, in his view, "inferior

Nine years after *Myers* was decided, the Court revisited the removal question in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). That case involved an attempt by President Roosevelt to remove a Commissioner of the FTC because of a disagreement on questions of policy (*id.* at 619). However, by statute (15 U.S.C. 41), FTC Commissioners were appointed for a term of seven years and were removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." The Court sustained the constitutionality of this restriction on the President's removal authority. The Court reasoned that the FTC exercised what the Court termed "quasi-judicial" and "quasi-legislative" powers (295 U.S. at 624, 628, 629 (see pages 45-47 & note 31, *infra*) and was "wholly disconnected from the executive department" (295 U.S. at 630). The Court accordingly disapproved the language in *Myers* insofar as it recognized an unrestricted power in the President to remove officers who perform quasi-judicial functions (*id.* at 628, 632).

The last decision of this Court involving the removal of an Officer of the United States was *Wiener* v. *United States*, 357 U.S. 349 (1958). *Wiener* was a back-pay suit by a member of the War Claims Commission who had been removed by President Eisenhower for no reason other than the desire to replace him with a person of the President's own choosing (*id.* at 350). Despite the absence of any explicit prohibition on such a removal, the Court inferred from the premise that the War Claims Act precluded the President from influencing the adjudication of any particular claim that Congress intended the Commission to be independent of the President with respect to removal from office, at least in the absence

officers" (see *id.* at 178, 187, 192). As the district court in this case concluded (J.A. 62 n.23), there can be no serious contention under the current statutory scheme that the Comptroller General, as the head of GAO, is an "inferior officer" whom Congress could immunize from Presidential removal by vesting his appointment in the head of a department.

of cause (*id.* at 356). As in *Humphrey's Executor*, however, the Court did not question the holding in *Myers* as regards the President's unrestricted power to remove "'purely executive officers'" (357 U.S. at 352 (citation omitted)) and the bar to participation by the Senate in removals generally.[17]

II. THE EXERCISE OF AUTHORITY BY THE COMPTROLLER GENERAL PURSUANT TO SECTION 251 OF THE ACT VIOLATES THE DOCTRINE OF SEPARATION OF POWERS BECAUSE THE COMPTROLLER GENERAL IS SUBJECT TO REMOVAL BY CONGRESS AND IS AN OFFICER OF THE LEGISLATIVE BRANCH

Section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 is unconstitutional under the principles just discussed regarding the separation of powers under the Constitution. As we explain below in Point A, the functions assigned to the Comptroller General under Section 251 constitute the execution of the law. The Comptroller General cannot perform these functions because, as we explain in Point B, the Comptroller General is subject to removal by Congress under the organic act establishing his Office, and because, as we explain in Point C, he is an officer of the Legislative Branch who is intended to serve as an agent of Congress.

A. The Functions Assigned To The Comptroller General Under Section 251 Of The Act Constitute The Execution Of The Law

Section 251 of the Balanced Budget and Emergency Deficit Control Act vests in the Comptroller General the authority, and indeed the duty, to perform functions

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[17] In *Morgan* v. *Tennessee Valley Authority*, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941), the court of appeals sustained the President's removal of the Chairman of the TVA's Board of Directors. The court stressed that the Board did not adjudicate controversies and that administration of the TVA was an executive function. For these reasons, the Directors were found to be removable by the President at will (115 F.2d at 994).

that are critical steps in the execution of that law. Section 251(a) provides for the Directors of OMB and CBO to furnish the Comptroller General with a report for each fiscal year, containing an estimate of revenues and outlays, a determination of the projected deficit, and an estimate of real economic growth during various periods. After reviewing this report, the Comptroller General is required by Section 251(b) to prepare and submit his own report to the President and Congress. This "report" in fact is an order that the President must follow; all the difficult determinations requiring exercise of judgment in implementing the law are assigned to the Comptroller General.

Although the Comptroller General is to have "due regard for the data, assumptions, and methodologies used" by the Directors (§ 251(b)(1)), he is to undertake an independent analysis and is free to reach conclusions different from those of OMB and CBO. Section 251(b) first requires the Comptroller General to make broad judgments concerning the state of the Nation's economy and anticipated total budget outlays and receipts for the coming fiscal year, in order to project whether the budget deficit will exceed the statutorily prescribed maximum. The Comptroller General then decides the amount by which budget outlays must be reduced to bring the estimated deficit within the annual statutory maximum. He next specifies the amount by which outlays in each nondefense account must be lowered to achieve the required deficit reduction, and in the case of defense programs he specifies reductions at a more detailed, sub-account level. In both instances, he also must determine the base from which reductions are to be taken. These determinations depend in large measure on underlying predictions that are inherently uncertain and are based on assumptions about which there may often be sharp differences of professional opinion. That potential in fact is demonstrated by Congress's provision for the Comptroller General to choose between the views of OMB and CBO or to reach an altogether different conclusion.

The President is required to issue an order implementing the Comptroller General's report, without exercising independent judgment in any respect. And the President must do so even if the Comptroller General's report differs from that of the Director of OMB, the President's expert agent in these matters. Thus, once the Comptroller General completes his tasks of rendering economic and fiscal forecasts, and applying the law as he interprets it to all non-exempt accounts, his conclusions are binding upon and constitute, in substance, a directive to the President on which compliance with the Act throughout the Executive Branch is based. Indeed, the Comptroller General is required to report to Congress regarding the President's compliance with the Comptroller General's report. § 253 (J.A. 134).

The court below, after reviewing this statutory scheme, found that Section 251 "requires the exercise of substantial judgment concerning present and future facts that affect the application of the law—the sort of power normally conferred upon the executive officer charged with implementing a statute" (J.A. 72). The court further concluded that the Comptroller General is required to interpret the law enacted by Congress in order to "specify which particular budget items are required to be reduced by the various provisions of the Act (which are not in all respects clear), and in what particular amounts" (*ibid.*). This is "a power normally committed initially to the Executive under the Constitution's prescription that he " 'take Care that the Laws be faithfully executed' " (J.A. 72-73 (quoting Art. II, § 3)). On the basis of these considerations, the court below held that the Comptroller General's duties under the Act "cannot be regarded as anything but executive powers in the constitutional sense" (J.A. 73). Unless the term "executive Power" is to be rendered meaningless, this conclusion by the court below is unquestionably correct. Appellants do not appear to argue otherwise.

B. Responsibility For The Administration Of A Law Cannot Be Assigned To An Officer Who Is Subject To Removal By Congress

The text and purposes of the Constitution and this Court's decisions establish that the Constitution does not permit the assignment of responsibility for executing the laws to an officer, such as the Comptroller General, who is subject to removal by Congress. To conclude otherwise would be to permit the very uniting of legislative and executive powers that the Framers feared. For as the district court concluded: "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey" (J.A. 75). Giving Congress such power over one responsible for executing the laws would violate a basic tenet of the separation of powers, identified by Madison, that "none of [the Branches] ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers" (*The Federalist No. 48*, at 308).

In fact, *Humphrey's Executor*, upon which appellants principally rely, expressly recognized this principle (295 U.S. at 629-630):

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. * * * The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.

And of course the statute at issue in *Humphrey's Executor*, although it limited the President's power of removal, in no way sought to intrude Congress into the functioning of the Executive Branch by reserving to Congress the power of removal. As *Myers* held, the Constitution prohibits such an arrangement.

1. The Constitution provides for congressional removal of an Officer of the United States only upon impeachment by the House of Representatives and conviction by the Senate, and only for "Treason, Bribery, or other high Crimes and Misdemeanors" (Art. II, § 4). Removal is thus accomplished following a trial before the Senate, sitting as a court of impeachments (see Art. III, § 2, Cl. 3; *Kilbourn* v. *Thompson*, 103 U.S. 168, 191 (1880)), at which the Members are under oath and the concurrence of two-thirds of the Members present is necessary for conviction (Art. I, § 3, Cl. 6). These procedures were carefully wrought by the Framers in light of the delicacy and political faction that might often attend efforts by a multi-member legislative body to remove an officer of a coordinate Branch. See *The Federalist Nos. 65 and 66*, at 396-407 (A. Hamilton).

The provision in 31 U.S.C. 703(e)(1)(B) for removal of the Comptroller General by joint resolution bespeaks a conception that is very different from the one the Framers contemplated. Removal may be accomplished by a majority vote of each House, rather than the two-thirds vote required for conviction following impeachment, and the grounds for removal go far beyond treason, bribery, and other high crimes and misdemeanors to include "permanent disability," "inefficiency" and "neglect of duty." 31 U.S.C. 703(e)(1)(B)(i), (ii) and (iii). It is instructive in the latter regard that the Constitutional Convention declined to extend the power of impeachment to instances of "maladministration," in light of Madison's objection that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate" and Gouvernor Morris's observation that "[a]n election of every four years will prevent maladministration" (2 Farrand 550). The terms "'high crimes [and] misdemeanors'" were substituted in place of "maladministration" (*ibid.*). See generally *id.* at 65-69, 116, 185-186, 499. This background of the impeachment provision makes clear that the Framers regarded deficiencies in the performance of an executive officer that are short of an impeachable offense to be an impermissible basis for removal by Congress, and instead to be a matter for which the President is to be accountable directly to the people. Congress's reservation of the power to remove the Comptroller General by joint resolution for cause falling short of an impeachable offense therefore can only be understood as the reservation of a right to exercise substantive control over that officer, and it cannot be squared with the Constitution insofar as the Comptroller General exercises executive power. It follows that the Comptroller General cannot be vested with the very large executive authority under Section 251 of the Balanced Budget and Emergency Deficit Control Act.

The provision for removal of the Comptroller General only by Congress of course imposes an even more severe restraint on the President than would a provision for removal by the President subject to the advice and consent of the Senate. Under the latter arrangement, the President at least would initiate a removal, and the concurrence of only the Senate would be required. See J.A. 74-75. Yet even that lesser intrusion by Congress has been definitively rejected in the Decision of 1789 and *Myers*, and neither *Humphrey's Executor* nor *Wiener* casts any doubt on the proposition that participation by the Senate in the distinctly executive power of removal is constitutionally prohibited. The provision for removal by Congress of an officer who is responsible for administering the laws thus presents even more acutely the potential for undermining the unity and responsibility of the Executive in the administration of the law. Cf. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 78-79 & n.30 (1982) (plurality opinion); *United States* v. *Raddatz*, 447 U.S. 667, 683 (1980); *id.* at 685 (Blackmun, J., concurring).[18]

[18] Although a joint resolution to remove the Comptroller General from office would be subject to a veto by the President, that veto in turn could be overridden by a two-thirds vote of the Senate and House of Representatives (Art. I, § 7, Cls. 2-3). Congress thus

Of course, we intend no personal reflection upon the Comptroller General, nor upon his judgment or motives in issuing the report for fiscal year 1986, when we note that the statutory scheme Congress has established under Section 251 threatens the principle of Executive responsibility that was of such importance to the Framers. Congress has expressly authorized the Comptroller General to make estimates and judgments regarding budget reductions that may differ from those of the President's agent, the Director of OMB. The Comptroller General may choose to adhere to what might be widely different projections and recommendations by the Director of CBO, who is both appointed by and subject to removal by Congress. Section 251 thus requires the President to abide by the Comptroller General's report and execute the law, under the standards prescribed by Congress, in a way that may differ from the judgments he would have made. The President, therefore, cannot be held directly responsible by the people for the faithful execution of the laws —neither the budget reduction law itself nor the numerous laws affected by the spending reductions under that Act. Indeed, even if the Comptroller General were to act in a way that totally disragarded the statute's dictates, the President would be powerless because he has no removal authority. Section 251 thus destroys the unity of the Executive in the very way the Framers sought to avoid, "by vesting [power] ostensibly in one man, subject in whole or in part to the control and cooperation of others" (*The Federalist No. 70*, at 424).

2. The House of Representatives argues (Br. 27-31), however, that different considerations should apply with respect to removal of the Comptroller General because of what the House contends is the need to maintain congressional control over the expenditure of appropriated

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has reserved the authority to remove the Comptroller General even where the President opposes that action. And, conversely, the President cannot initiate a removal no matter how egregious the Comptroller General's personal conduct or performance in office might be.

funds. The House relies on the constitutional limitation that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" (Art. I, § 9, Cl. 7). However, that Clause was adopted to negate the existence of an *inherent* authority in the Executive to draw money from the Treasury. See *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937). It furnishes no basis for implying a right in Congress to appoint or remove the officers responsible for making administrative determinations regarding the expenditure of money when Congress has passed an appropriations act. To the contrary, the Clause refers to "Appropriations made by *Law*," and it is the Executive, not Congress, that is responsible for the execution of such a law.

Early plans for the government that were submitted to the Constitutional Convention in fact provided for the appointment of the Treasurer of the United States by Congress (2 Farrand 144, 168, 182, 570). The premises underlying this proposal were (i) that the money in the Treasury belongs to the people and "the legislature representing the people ought to appoint the keepers of it" (*id.* at 315), and (ii) that "[a]s the two Houses appropriate money, it is best for them to appoint the officer who is to keep it" (*id.* at 614). However, the provision was stricken, so that the Treasurer would be appointed "in the same manner with other officers" (*ibid.*). The House's argument for a unique power of congressional control over officers responsible for appropriated funds is inconsistent with this considered judgment by the Constitutional Convention. Hamilton similarly explained that "the application and disbursement of the public moneys in conformity to the general appropriations of the legislature * * * constitute what seems to be most properly understood by the administration of government," and that "[t]he persons * * * to whose immediate management these matters are committed ought to be subject to * * * [the Chief Magistrate's] superintendence" (*The Federalist No. 72*, at 435-436). As the House points out (Br. 27-28), Madison suggested during the First Congress that the Comptroller of the Treasury perhaps should serve for a term of years rather than at the pleasure of the President—a suggestion that he later withdrew and that Congress declined to adopt (1 Annals of Cong. 611-614). But Madison did *not* suggest that the Comptroller of the Treasury could properly be made subject to removal by Congress.[19]

The district court therefore was clearly correct in holding that the statutory provision in 31 U.S.C. 703(e)(1)(B) for Congress to remove the Comptroller General is a fatal constitutional defect in those provisions of Section 251 of the Act that vest substantive responsibilities in the Comptroller General. See J.A. 71-78.[20]

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[19] Moreover, Madison's remarks, read in context, refer to functions similar to those now performed by the Claims Court: "settling and adjusting the legal claims of individuals against the United States." 1 Annals of Cong. 614. These remarks thus are not applicable to an officer who is given the far different executive function described in Section 251. See page 47, *infra*.

[20] Contrary to the assertions by the Senate (Br. 15) and the Comptroller General (Br. 29), this Court did not hold in footnote 165 of its opinion in *Buckley* (424 U.S. at 128) that the Comptroller General may administer laws passed by Congress. The Court in *Buckley* was concerned with the Federal Election Campaign Act of 1971 (2 U.S.C. (Supp. V 1975) 437a), which created a Federal Election Commission, none of whose members was appointed in accordance with the Appointments Clause. 424 U.S. at 137. In the brief footnote upon which the Senate and Comptroller General rely, the Court rejected the Commission's attempt to compare itself to the Comptroller General, who also had significant duties under the 1971 Act. 424 U.S. at 128 n.165. The Court simply observed that the Commission could draw no support from the status of the Comptroller General because the latter at least had been appointed in conformity with the Appointments Clause (*ibid.*). In other words, the Court held that the appointment of an individual in the manner described in the Appointments Clause is a *necessary* condition to his exercise of authority in the administration of the laws. Because the duties of the Comptroller General under the 1971 Act were not at issue in *Buckley*, the Court had no occasion to decide whether such an appointment is a *sufficient* condition, even where the officer has substantial ties to the Legislative Branch. Cf. 42 Op. Att'y Gen. 65 (1962); H.R. Rep. 2205, 55th Cong., 3d Sess. 11 (1899).

C. The Comptroller General Cannot Perform The Responsibilities Assigned To Him Under Section 251 Because He Is An Officer Of The Legislative Branch

As we have shown in Point B, the statutory authorization for Congress to remove the Comptroller General is in itself a constitutional obstacle to his exercise of the powers assigned to him by Section 251 of the Act. But the removal provision also is emblematic of a far deeper and more pervasive association between the Comptroller General and Congress, which renders the Comptroller General an officer of the Legislative Branch. Such an officer cannot execute the laws passed by Congress insofar as they affect persons outside the Legislative Branch.

1. In the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 *et seq.*, Congress created the General Accounting Office (GAO) as an "establishment of the Government * * * independent of the executive departments and under the control and direction of the Comptroller General of the United States." § 301, 42 Stat. 23. Congress believed that it "needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations." H. Mansfield, *The Comptroller General: A Study in the Law and Practice of Financial Administration* 65 (1939). The Comptroller General was envisioned by Congress as the counterpart of the Director of the Bureau of the Budget, which Congress simultaneously established in the Executive Branch. §§ 201, 207, 42 Stat. 20, 22; see 61 Cong. Rec. 982 (1921) (Rep. Good); *id.* at 987 (Rep. Sisson).

The statutory provision for removal of the Comptroller General by Congress signifies the placement of his office in the Legislative Branch.[21] The importance of this

[21] President Wilson vetoed an earlier version of the legislation, which provided for removal of the Comptroller General by concurrent resolution. 59 Cong. Rec. 8609-8610 (1920). In the version subsequently enacted into law (which was signed by President Harding), Congress revised the earlier bill to provide for a 15-year term of office and removal by joint, rather than concurrent, resolu-

provision goes far beyond the potential consequence of removal itself, because the constitutional principles of separation of powers are intended to preserve the integrity of the office, not any personal interest the incumbent might have in the office. As the district court recognized, once the Comptroller General is appointed, his continuance in office depends upon Congress's continued satisfaction with his performance (J.A. 75). The inclination to obey the wishes of Congress, real or imagined, inheres in such an arrangement and creates the potential for the influence by Congress over the administration of the laws that the Framers sought to prevent. See page 30, *supra*.

The significance of the removal provision further extends beyond even the congressional influence occasioned by the threat of removal. That provision properly serves as a constant reminder of the identity of the principal for whom the Comptroller General is an agent and to whom he is accountable in the performance of his duties.[22]

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tion (§ 303, 42 Stat. 23-24). The change to a joint resolution did not eliminate President Wilson's objections, which were (i) that Congress could not limit the President's authority to remove an officer whom he had appointed with the advice and consent of the Senate, and (ii) that Congress could not in any event vest removal authority in itself. See 59 Cong. Rec. 8609-8610 (1920); F. Mosher, *The GAO: The Quest for Accountability in American Government* 55 (1979).

[22] The fact that the Comptroller General is appointed by the President does not preclude his being an agent of Congress and an officer of the Legislative Branch. Nothing in the Constitution prevents Congress from assigning to the President the task of selecting an officer that Congress itself could appoint. There often may be an advantage in its doing so, in light of the difficulty that would be experienced by a bicameral, multi-member legislative body in agreeing upon a particular individual. Cf. 2 U.S.C. 136 (Librarian of Congress appointed by President); 40 U.S.C. 162 (Architect of the Capitol appointed by President). But cf. *Eltra Corp.* v. *Ringer*, 579 F.2d 294, 300-301 (4th Cir. 1978).

This Court has held that the nature of an office is defined not only by the method of appointment, but by its tenure as well. See *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867). In this instance, the Comptroller General's tenure is defined by reference to Congress. See 61 Cong. Rec. 987 (1921) (Rep. Sisson).

However, there was more in the 1921 Act than the removal provision to establish the Comptroller General's status as an agent of Congress. That status also was demonstrated by Section 312 of the Act (42 Stat. 26), which required the Comptroller General to report to Congress regarding the adequacy of accounting and inspection by federal agencies, as well as every unlawful expenditure or contract. § 312 (d) and (c). The Comptroller General was further required to "make such investigation and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures," and to "direct assistants from his office to furnish the committee such aid and information as it may request" (§ 312(b)). These and similar provisions remain in effect. 31 U.S.C. 712(4) and (5), 717(d)(1)(A), 719(d) and (e). See *Bowsher* v. *Merck & Co.*, 460 U.S. at 828-829 n.4, 833-834, 844.

Consistent with these statutory duties, the congressional debates on the 1921 Act are filled with statements that the Comptroller General "is to be the arm of the Congress" (61 Cong. Rec. 983, 1080 (1921) (Rep. Good)) and a "representative of Congress," unlike the Director of the Bureau of the Budget, "who serves the President and who is the personal representative of the President" (*id.* at 1081 (Rep. Byrns)).[23] As Representative Byrns explained, the removal provision was included because "[Congress] felt that [the Comptroller General] should be brought under the sole control of Congress, so that Congress at any moment when it found he was inefficient and was not carrying on the duties of his office as he should and as the Congress expected, could remove him without the long, tedious process of a trial by impeachment" (*ibid.*).[24]

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[23] See also 61 Cong. Rec. 1084 (1921) (Rep. Fess) ("under the legislative [branch]"); 58 Cong. Rec. 7215 (1919) (Rep. Purnell) ("responsible only to Congress").

[24] See also 61 Cong. Rec. 987 (1921) (Rep. Sisson) ("The Congress of the United States will have absolute control of the man's

During the period of 65 years since the creation of the office, Congress repeatedly has made clear that it considers the Comptroller General to be an officer of the Legislative Branch. For example, the Reorganization Acts of 1945 and 1949 both specified that the Comptroller General and GAO are "a part of the legislative branch of the Government." § 7, 59 Stat. 616; § 7, 63 Stat. 205.[25] Similarly, in the Accounting and Auditing Act of 1950, Congress directed that the auditing of government accounts be "conducted by the Comptroller General of the United States as an agent of the Congress" (§ 111(d), 64 Stat. 835).[26] Moreover, the appropriations for GAO

destiny in office."); *id.* at 1080 (Rep. Good) ("Congress has its remedy, and it can reach out and say that if the man is not doing his duty, if he is inefficient or guilty of any of these other things, he can be removed."); 58 Cong. Rec. 7138 (1919) (Rep. Tilson) (Comptroller General "should be easily removable by the responsible party in power in Congress"); *id.* at 7136 (Rep. Hawley) ("If he does not do his work properly, we, as practically his employers, ought to be able to discharge him from his office."); *id.* at 7129 (Rep. Taylor) ("[Congress] can throw him out very quickly, and they will not hesitate to do so."); *id.* at 7211 (Rep. Temple) ("this would give the legislative branch of the Government control of the audit, not through the power of appointment, but through the power of removal").

[25] Comptroller General Warren stated to Congress: "During most of my public life, * * * I have been a member of the Legislative Branch. Even now, although heading a great agency, it is an agency of the Congress, and I am an agent of Congress" (*To Provide for the Reorganization of Agencies of the Government: Hearings on H.R. 3325 Before the House Comm. on Expenditures*, 79th Cong., 1st Sess. 69 (1945)).

[26] Contrary to the contention of the Senate (Br. 14 n.13) and the Comptroller General (Br. 40 n.118), although GAO is included within the general definition of the term "Executive agency" in 5 U.S.C. 104 and 105, those provisions in fact confirm GAO's unique status. An "Executive agency" is defined as an "Executive department, a government corporation, and an independent establishment." 5 U.S.C. 105. An "independent establishment" in turn is defined as "(1) an establishment in the executive branch * * * which is not an Executive department, military department, Government corporation, or part thereto, or part of an independent establishment; and (2) the General Accounting Office." 5 U.S.C. 104. The GAO

are set forth annually in the Legislative Branch Appropriations Act. See, *e.g.*, Pub. L. No. 99-151, 99 Stat. 792 *et seq.*; H.R. Rep. 99-144, 99th Cong., 1st Sess. 31 (1985). Although the Comptroller General transmits a copy of his budget proposal to the President for inclusion in the annual budget, his proposal—with those of Congress and the Judiciary—must be included in the President's budget "without change." 31 U.S.C. 1105(b).[27]

Finally, in 1980, Congress provided that when a vacancy occurs in the office of the Comptroller General, a commission consisting of the Speaker of the House of Representatives, the President pro tempore of the Senate, and other congressional officials shall submit not less than three names to the President. The President then must select a nominee from that list or request additional names. 31 U.S.C. 703(a)(2). This new provision was included because of "the special interest of both Houses in the choice of an individual whose primary function is to provide assistance to Congress" (S. Rep. 96-570, 96th Cong., 2d Sess. 10 (1980)) and who "func-

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thus is listed separately and is not included in the general definition of the term "independent establishment," which includes such agencies as the FTC, FCC, SEC, and ICC.

[27] Similarly, the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383, 41 U.S.C. (& Supp. II) 601 *et seq.*, specifically exempts the GAO from its coverage. 41 U.S.C. 601(2). The Senate report explained: "The judicial and legislative branches, including the General Accounting Office, are not subject to the provisions of this legislation. Acquisition activity by these agencies is relatively small, and subjecting them to regulations promulgated by the executive branch agencies could raise constitutional questions under 'the separation of powers' doctrine." S. Rep. 95-1118, 95th Cong., 2d Sess. 16 (1978). In the Ethics in Government Act of 1978, Congress specified by statute that GAO is within the "legislative branch" (2 U.S.C. 701(e)), and the Comptroller General accordingly is required to file his financial disclosure report with the Secretary of the Senate (2 U.S.C. 703(b)). See also 5 U.S.C. 2302(a) and (c), 3132(a)(1), 4301(1), 7103(a)(3)(A); 31 U.S.C. 731-755 (exempting GAO from Civil Service Reform Act provisions and establishing separate personnel system for GAO).

tions as an agent of Congress" (H.R. Rep. 96-425, 96th Cong., 1st Sess. 14 (1979)).[28]

This Court, too, has described the GAO as "an independent agency within the Legislative Branch that exists in large part to serve the needs of Congress." *Bowsher* v. *Merck & Co.*, 460 U.S. at 844. The courts of appeals have similarly characterized the GAO as an agency of Congress and the Comptroller General as an agent of the Legislative Branch. See, *e.g.*, *McDonnell Douglas Corp.* v. *United States*, 754 F.2d 365, 368 (Fed. Cir. 1985); *United States* v. *McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984); *John Reiner & Co.* v. *United States*, 325 F.2d 438, 442 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964).[29] In a recent decision, the

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[28] The Comptroller General also has traditionally taken the position that his office is part of the Legislative Branch and is accountable to Congress. See note 25, *supra*; *In re Ex-Cell Fiber Supply, Inc.*, 62 Comp. Gen. 86 (1982) (GAO proceedings are not agency adjudications under 5 U.S.C. 551 because the APA "does not apply to the legislative branch, of what our Office is a part"); *In re J.C. Yamas Co.*, No. B-211105.2 (Comp. Gen. Jan. 19, 1984); R. Sperry *GAO 1966-1981, An Administrative History* 84 (1981) (published by the GAO) (the Comptroller General has "line responsibility to the Congress alone"). Indeed, in his brief (at 11) in this Court in *Miguel* v. *McCarl*, 291 U.S. 442 (1934), the Comptroller General, acting on his own behalf, defended his asserted power to overrule a decision by the Secretary of War to pay a retired Philippine scout on the ground that the GAO was carrying out the constitutional authority of the Legislative Branch. This Court did not address that issue. Cf. 291 U.S. at 450-451. It did, however, reject the Comptroller General's argument on the merits of the payment issue, finding that the Secretary's duty to pay under the governing statutes was so clear as to warrant mandamus relief. *Id.* at 451-454. The Court then added: "It seems unnecessary to add that this duty cannot be affected by a contrary decision of the Comptroller General." *Id.* at 454.

[29] In *Ameron, Inc.* v. *United States Army Corps of Engineers*, No. 85-5226 (3d Cir. Mar. 27, 1986), the court of appeals upheld the constitutionality of a provision of the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, § 2741, 98 Stat. 1199-1201. The majority's analysis is both confused and seriously flawed. First, it erred in failing to take Congress at its word in placing the Comptroller General and GAO in the Legislative Branch and provid-

District of Columbia Circuit observed that "[s]ince the GAO has been thought to be 'an arm of the legislature,' * * * there might be a constitutional impediment [if de-

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ing for his removal by Congress. See *Northern Pipeline Construction Co*, 458 U.S at 61 (plurality opinion); cf. *Glidden Co* v *Zdanok*, 370 U.S 530, 540 (1962) (plurality opinion) Second, the majority's reasoning—that GAO performs enough other executive-type functions to justify characterizing it as a "hybrid agency" that is not actually part of the Legislative Branch—begs the question. The very issue before the court was whether the congressional removal provision and Congress's placement of GAO in the Legislative Branch prevent the Comptroller General from participating in the execution of the law.

In a separate opinion, Judge Becker correctly criticized the majority for believing that GAO could constitutionally be regarded as a "hybrid" agency located outside *any* of the three Branches (*Ameron*, slip op. 34-37, 45-46); concluded that the "legislative intent is clear—he belongs to the legislative branch" (slip op. 38); and further concluded that the Comptroller General's power to lift an automatic stay of a contract is executive in nature (slip op. 39-40). But although it would seem to have followed ineluctably from these premises that the statutory provisions were unconstitutional, Judge Becker nevertheless believed that the statutory provisions were valid because he did not perceive that the coalescence of powers in the Legislative Branch was sufficient to pose an actual threat to individual liberty in the particular context at issue (slip op 40-44)

Judge Becker's amphorous, ad hoc approach completely misapprehends the doctrine of separation of powers and its particular expression in the context of appointments and removals. The powers were divided among the Branches as a structural matter in order to furnish a "self-executing safeguard" (*Buckley*, 424 U.S. at 122)—a prophylaxis—against potential abuses. A court is not free to disregard that constitutional structure based on its own view of whether the abuses the Framers feared are likely to occur in a particular instance. Judge Becker's reliance (see *Ameron*, slip op 40-41) on this Court's decision in *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), also was misplaced. In that case, Congress had passed a law establishing standards and procedures for the disclosure of former President Nixon's papers; but, as the Court repeatedly stressed, Congress vested responsibility for administering that law in the Executive Branch, under the aegis of an official who was subject to the President's authority. See 433 U.S. at 441-446. Congress thus did not interfere with the President's responsibility to take care that the Presidential records law be faithfully executed through officers who were subject to his superintendcisions by the Comptroller General were given] * * * binding effect [on Executive Branch agencies]." *Delta Data Systems Corp.* v. *Webster*, 744 F.2d 197, 201 n.1 (1984) (quoting *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1971).[30]

2. Thus, Congress repeatedly has considered the status of GAO, and it repeatedly has determined that GAO is an agency in and of the Legislative Branch. "We rarely see as clear an expression of congressional intent." *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 13 n.30. The constitutional doctrine of separation of powers therefore bars the Comptroller General from performing functions—such as those under Section 251 of the 1985 Act—that involve the administration of the law, because he then is interfering with the operation of another Branch (*Nixon* v. *Administrator of General Services*, 433 U.S. 425, 442-443 (1977); *Humphrey's Executor*, 295 U.S. at 629-630) and affecting the legal rights and duties of persons outside of the Legislative Branch. *Chadha*, 462 U.S. at 952.

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ence. By contrast, in *Ameron* and this case, Congress vested responsibility for an aspect of administering the law in an officer who is subject to removal by Congress, not the President.

In any event, *Ameron* is quite different from this case. As the Third Circuit stressed (slip op. 25), under the statute at issue there, the Comptroller General only has authority to make a recommendation to the executive agency on the merits of the contract dispute; the constitutional issue arose only with respect to the narrow question of the Comptroller General's ability to affect the timing of the contract award. In this case, by contrast, the Comptroller General's report is immediately, permanently and pervasively binding on the President. The President has no authority to override that report when the agency's circumstances so require.

[30] Many scholars and commentators have recognized the position of the Comptroller General within the Legislative Branch and his direct accountability to Congress. See Langeluttig, *Legal Status of the Comptroller General of the United States*, 23 Ill. L. Rev. 556 (1929); Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 Cornell L.Q. 215, 240 (1936); F. Mosher, *supra*, at 104-105, 242; R. Sperry, *supra*, at 16-17; R. Brown, *The GAO: Untapped Source of Congressional Power* 5 (1970); H. Mansfield, *supra*, at 65, 248-251.

Congress disarranges the fundamental organization of the government under the Constitution if it attempts to invest itself, its Members, or its officers with either executive or judicial power. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928). Because Congress may not itself execute the laws, it may not entrust that duty to its Members or agents. See *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928); *AFGE* v. *Pierce*, 697 F.2d 303, 306 (D.C. Cir. 1982). This limitation applies even when Congress has plenary authority to legislate in a particular subject area, as it did with respect to the elections involved in *Buckley*, the immigration and naturalization involved in *Chadha*, and the expenditure of appropriated funds involved in this case. *Buckley*, 424 U.S. at 134-135. Congress's authority to give directives by passing legislation does not permit it to delegate authority to execute its general commands to a legislative officer. As *Chadha* reaffirms, the Constitution empowers Congress to act only through the process of legislation.

III. THE SUBSTANTIVE REPORTING FUNCTIONS UNDER SECTION 251 CANNOT IN ANY EVENT BE PERFORMED BY THE COMPTROLLER GENERAL BECAUSE HE DOES NOT SERVE AT THE PLEASURE OF THE PRESIDENT

For the reasons stated in Point II, the statutory provision for the removal of the Comptroller General by Congress, and his status as an officer of the Legislative Branch, render the Comptroller General constitutionally disqualified to perform the substantive reporting functions assigned to him by Section 251 of the Balanced Budget and Emergency Deficit Control Act. But even aside from those defects, the Comptroller General cannot constitutionally perform the role contemplated for him. The duties involved are so central to the administration of the Executive Branch and the responsibilities of the President that they may be performed only by the President or by an Officer of the United States serving at the pleasure of the President.

1. This Court held in *Myers* that the Constitution confers on the President the unrestricted power to remove officers who were appointed by him with the advice and consent of the Senate and who are responsible for the administration of the law. The Court regarded this power of removal as an element of the "executive Power" that is essential to the President's fulfillment of his obligation to take care that the laws be faithfully executed.

In *Humphrey's Executor*, while not questioning the result in *Myers*, the Court held that the Constitution does not bar Congress from imposing limitations on the President's ability to remove a member of a commission (the FTC) that was charged by Congress with the exercise of "quasi-judicial" functions. 295 U.S. at 628-629.[31] The Court stated that Congress has the authority to create

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[31] In describing the FTC's functions, the Court used the term "quasi-legislative" as well as "quasi-judicial." The former term cannot be understood to refer to the issuance of binding rules of broad applicability to implement the FTC's organic statute, because, as the district court pointed out (J.A. 66 n.24), the FTC did not assert that it possessed substantive rulemaking authority until 1962, well after *Humphrey's Executor* was decided. See *National Petroleum Refiners Ass'n* v. *FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

It therefore appears that the Court may have used the term "quasi-legislative" in *Humphrey's Executor* to refer to two other aspects of the FTC's functions. The first was the FTC's investigations on behalf of Congress (see 295 U.S. at 621, 628). However, such investigations are similar to the functions performed by congressional committees, and they therefore may be performed by a person appointed by or subject to removal by Congress. *Buckley*, 424 U.S. at 137-138. The Comptroller General's duties under Section 251 of course are not limited to investigating and submitting recommendations; his report is legally binding.

The second activity the Court might have included under the rubric "quasi-legislative" was the FTC's interpretation and application of the law as an incidental aspect of individual adjudicatory proceedings (see 295 U.S. at 620-621, 624, 628, 629). However, in our view, that activity is more appropriately characterized for present purposes as "quasi-judicial," rather than "quasi-legislative," in nature. Cf. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). We therefore use the term "quasi-judicial" in the text to include that activity.

such bodies and to require them to act independently of executive control in the discharge of their duties. On this premise, the Court then held that "that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime." 295 U.S. at 629. The Court also stressed that, in its view, the FTC was "wholly disconnected with the executive department" (*id.* at 630) and "exercise[d] no part of the executive power vested by the Constitution in the President" (*id.* at 628). The Court followed *Humphrey's Executor* in *Wiener* with regard to a member of the War Claims Commission, in view of the "intrinsic judicial character" of the Commission's duties.[32]

2. The Comptroller General's statutory responsibilities at issue in this case are wholly different from those

[32] There is no occasion here to consider the current soundness of the premises underlying *Humphrey's Executor*. As the district court concluded (J.A. 61-70), developments since *Humphrey's Executor* do, however, appear to have cast a shadow upon those premises. For example, the Court explained in *Chadha* that the fact that Executive Branch officers perform what might be characterized as "quasi-legislative" or "quasi-judicial" functions does not mean that they are exercising something other than executive power within the meaning of Article II. 462 U.S. at 953 n.16. This Court also affirmed the decision in *Consumers Union* v. *FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc), aff'd, 463 U.S. 1216 (1983), which invalidated a legislative veto provision applicable to the FTC, thereby establishing that at least for that aspect of the doctrine of separation of powers, the FTC is not to be distinguished from other agencies in the Executive Branch.

In addition, many of the executive departments and agencies currently perform "quasi-judicial" functions identical to that of the FTC upon which the Court focused in *Humphrey's Executor*. See, e.g., J.A. 74; *Consumer Energy Council* v. *FERC*, 673 F.2d 425, 472 n.198 (D.C. Cir. 1982), aff'd, 463 U.S. 1216 (1983); *Marcello* v. *Bonds*, 349 U.S. 302 (1955); 42 U.S.C. 1395*oo*(f). Conversely, agencies such as the FTC often perform functions that are indistinguishable from the enforcement of the law undertaken by executive departments. Furthermore, agency decision-making in general is subject to greater due process protections, statutorily prescribed procedures for rulemaking and adjudication (see 5 U.S.C. 553-559), and provisions for judicial review (see 5 U.S.C. 701-706). See J.A. 69.

of the commissions involved in *Humphrey's Executor* and *Wiener* in two critical respects.

a. First, the Comptroller General does not act in a "quasi-judicial" capacity when he prepares and submits his report under Section 251 of the 1985 Act. He does not, for example, make findings of historical facts that are relevant to a discrete transaction or controversy affecting a particular private party; nor does he construe and apply a law passed by Congress only as an incident to such an adjudication. Rather, the Comptroller General must make broad determinations about the present and future state of the economy and anticipated federal receipts and expenditures. He then must interpret and apply the law on a government-wide basis in order to specify which budget items must be reduced by what amount. As the district court observed, the first of these is "the sort of power normally conferred upon the executive officer charged with implementing a statute" (J.A. 72), and the second is "similarly a power normally committed initially to the Executive under the Constitution's prescription that he 'take Care that the Laws be faithfully executed' " (J.A. 73 (quoting Art. II, § 3)).

Accordingly, unlike *Humphrey's Executor* and *Wiener*, the function involved here does not have an "intrinsic judicial character" requiring independence of action in the interest of identifiable private parties to administrative proceedings. Cf. *Heckler* v. *Campbell*, 461 U.S. 458, 467-468 (1983); *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915). It therefore is not a function to which, under *Humphrey's Executor* and *Wiener*, a restriction on the President's power of removal might constitutionally be attached as an "appropriate incident" (295 U.S. at 629). Because Congress has altogether withheld from the President the power to remove the Comptroller General, it follows *a fortiori* that the substantive reporting requirements under Section 251 of the Act may not constitutionally be performed by the Comptroller General.

b. The second critical distinction between this case and *Humphrey's Executor* and *Wiener* is that the role of the Comptroller General under Section 251 is by no means "wholly disconnected from the executive department" (*Humphrey's Executor*, 295 U.S. at 630)—*i.e.*, it is not removed from the responsibilities of the President and those departments and agencies in the Executive Branch that Congress has not sought to make independent of Presidential control. To the contrary, the determinations contained in the Comptroller General's report—as well as the findings, predictions and legal judgments on which they are based—bind the President and the heads of all departments and agencies in the Executive Branch in the implementation of the deficit reduction requirements of the Act. As a consequence, the Comptroller General's report also has a direct and substantial impact on the execution by the President and his subordinates of the funding statutes and other laws under their respective jurisdictions that are dependent upon the availability of money appropriated by Congress. A more sweeping and pervasive connection between the Comptroller General's actions and the administration of the laws that are under the President's supervision and control can scarcely be imagined. In *Humphrey's Executor*, by contrast, the FTC's substantive activities were confined to a discrete subject matter that Congress had carved out for it, and the governing statute did not purport to authorize the FTC to impose its will on the President or the heads of other executive departments and agencies.

Whatever may be the nature and scope of the functions that Congress constitutionally may remove from the general administration of the laws and assign to an agency composed of members who are independent of the President's control, Congress clearly cannot vest in such an officer the authority to intrude upon and effectively direct the execution of the laws by the President and by the subordinate officers who serve at his pleasure and who are therefore subject to his superintendence in the performance of their duties. Cf. *Nixon* v. *Administrator of General Services*, 433 U.S. at 443-444. Within the broad sphere of governmental activity in question here, such an arrangement would destroy the unity and responsibility of the Executive that the Framers concluded was essential for the vigorous execution of the laws and the welfare of the people. The resulting division of authority would "lessen the respectability" and "weaken the authority" of the President in the performance of his constitutionally assigned functions (*The Federalist No. 70*, at 426), "embarrass" and prevent "expedition" in the implementation of measures passed by Congress (*id.* at 427), diminish the Executive's accountability to the public (*id.* at 428-429), and create the potential for "animosities" that would "interrupt the public administration" (1 Farrand 96).

The intrusion upon the President's responsibility for the execution of the laws is particularly vivid in this case, because it is occasioned by the Comptroller General's issuance of binding determinations directly to the President himself. The Act requires the President to implement those determinations in a sequestration order, without the exercise by him of the independent judgment that the Constitution requires if he truly is to "take Care" that the laws be faithfully executed. The Constitution does not permit a lesser officer to impose directly upon the President administrative determinations of such sweeping impact and binding effect. Cf. *Nixon* v. *Fitzgerald*, 457 U.S. at 749-757; *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866); *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 610 (1838).

The Constitution provides that the President "may require the *Opinion* in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the duties of their respective Offices" (Art. II, § 3 (emphasis added)). Use of the word "Opinion" strongly indicates that the Framers intended that the President's would be the ultimate judgment on the matter, and that he would remain free to disagree with the views of the head of the department. This construction is confirmed by the plan for a Council of State to advise the President, which was submitted to the Constitutional Convention and which gave rise to the Opinion Clause. That plan expressly provided that the President "shall in all cases exercise his own judgment, and either conform to such opinions or not as he may think proper" (2 Farrand 337). See also *id.* at 367 ("'their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt'"). Earlier in the debates, Madison had likewise expressed the opinion that the Executive might consist of one person, "aided by a Council, who should have the right to advise and record their proceedings, *but not to control his authority*" (1 Farrand 74 (emphasis added)). Cf. *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109-113 (1948).

Thus, if Congress passes a law that imposes responsibilities directly on the President to be undertaken in accordance with statutory standards, the President has the correlative right and duty to execute that law and (after obtaining the opinion of the heads of departments) to make any necessary legal or factual determinations that Congress has not resolved in the statute itself. Section 251 is unconstitutional because it vests the authority to make such determinations regarding the amount of the budget reductions not in the President or his agents, but in the Comptroller General, who is not subject to presidential control.[33]

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[33] The Comptroller General refers (Br. 19) to certain other administrative functions performed by GAO. Those functions of course are not involved here. However, we do not question the authority of the Comptroller General to conduct audits and investigations of Executive Branch finances and operations on behalf of Congress (see note 31, *supra*). Nor, of course, do we question the right of the Comptroller General to reach his own conclusions on questions of fact and law as they arise in the performance of that function and to report his conclusions to the agency concerned or to Congress. The degree, if any, to which and in what contexts

If the Comptroller General may exercise the sweeping authority under Section 251 over the operations of the departments and agencies of the Executive Branch that are subject to the President's control, it may be difficult to conclude that Congress cannot vest numerous other such powers in the Comptroller General or some other officer not subject to the President's superintendence—much as the legislative veto device gained currency at an accelerating pace prior to this Court's decision in *Chadha.* See 462 U.S. at 944-945. The Court should reject Congress's attempt to introduce into the system of government established by the Constitution the potential for such a drastic erosion of the strength, unity, and energy the Framers deemed essential in the Executive.

IV. APPELLANTS' ARGUMENTS FOR AVOIDING THE CONCLUSION THAT SECTION 251 IS UNCONSTITUTIONAL ARE WITHOUT MERIT

A. The Challenge To The Role Of The Comptroller Is Ripe For Judicial Resolution

The Senate contends (Br. 25-31) that the challenge to the Comptroller General's authority under Section 251 of the Act is not ripe for review because Congress has not sought to remove the Comptroller General pursuant to 31 U.S.C. 703(e)(1). The district court correctly rejected this contention (J.A. 56-57).[34] The Senate's argument

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the relevant statutes contemplate that such a determination is "binding" on the agency concerned, what the consequences of a "binding" effect might be, and the constitutionality of any such effect would present complex questions that could be resolved only in a particular legal and factual context. See, *e.g.*, *Miguel* v. *McCarl*, *supra*, discussed in note 28, *supra*, 42 Op. Att'y Gen. 405, 415-416 (1969); F. Mosher, *supra*, at 206-212; House Select Comm. on Government Organization, 75th Cong., 3d Sess., *Constitutionality of the General Accounting Office* (Comm. Print 1938). Suffice it to say that these other functions of the Comptroller General do not remotely resemble his sweping powers under Section 251. See note 29, *supra.*

[34] The Conference report on the Act states that the conferees "took into account both Article III of the Constitution and applicable case law relating to standing and ripeness" and agreed

proceeds as if the removal provision threatens only the personal interests of the incumbent and involves only a matter of intragovernmental relations. In response to similar arguments in *Chadha*, this Court emphatically rejected that narrow and parochial view of the separation of powers under the Constitution. 462 U.S. at 935-936, 940-943. The division of authority among the Branches and the system of checks and balances were intended to preserve the powers of each Branch, not as an end in itself, but in order to secure the liberty, property, and welfare of the people.

In this case, it is not the actual removal of an incumbent Comptroller General that would cause injury to a person affected by his actions. The impact of the removal provision arises while the Comptroller General remains in office and performs his duties. As the district court observed, "[i]t is the prior assertion of authority to remove embodied in the tenure statute that has the immediate effect, and presumably the immediate purpose, of causing the Comptroller General to look to the legislative branch rather than the President for guidance" (J.A. 58). For this reason, it is not necessary for Congress actually to attempt to remove the Comptroller General in order for the constitutional issue presented here to be ripe. The violation of separation of powers inheres in the very performance of functions under Section 251 by a person who is constitutionally forbidden to take such action.

In this respect, the instant case is no different from others in which this Court has ruled on challenges to the

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that the judicial review provisions "fit within those guidelines" and that "any actions brought pursuant to these expedited review provisions should be reviewed by the courts." H.R. Conf. Rep. 99-433, 99th Cong., 1st Sess. 100 (1985). The challenge to the Comptroller General's role must therefore be considered to be ripe for review if it is consistent with Article III. As we explain in the text, plaintiffs have clearly presented a sufficient claim of present injury and a ripe case or controversy regarding the constitutionality of the Comptroller General's authority under the Act.

constitutional authority of federal judges or other officers to perform tasks assigned to them by statute. For example, in *Northern Pipeline*, the Court considered a constitutional challenge to the exercise of judicial authority by a bankruptcy judge who did not have the protections required by Article III—even though no actual removal of the judge or diminution in his salary had been attempted. 458 U.S. at 60-61, 87 (plurality opinion). The Court stressed that the Article III guarantee of life tenure was intended to protect against the possibility that a judge might be influenced in his decisions by a desire to obtain reappointment and that the other protections likewise were intended to ensure the independence of the Judiciary (*id.* at 57-60). The Court held that the vesting of "essential attributes of judicial power" in judges who did not have those protections violated the fundamental principle "that the 'judicial Power of the United States' must be reposed in an independent Judiciary" (*id.* at 60, 87). "Such a grant of jurisdiction," the Court concluded, "cannot be sustained" (*id.* at 87). Accord *id.* at 89 (Rehnquist, J., concurring).

The challenge in this case is directly analogous. Here the claim is that essential attributes of the "executive Power" cannot be exercised by an officer who is subject to removal by—and hence is not independent of—Congress, and that "[s]uch a grant of jurisdiction cannot be sustained" (458 U.S. at 87). Contrary to the contention by the Comptroller General (Br. 27-33) and the Senate (Br. 27-31), a violation of the separation of powers doctrine in this setting does not require a showing of *actual* influence by Congress over a particular decision of the Comptroller General (whether by a threatened removal or in some other manner), any more than a violation of Article III depends upon a showing of an actual loss of the independence that life tenure and the protection against diminution of salary were intended to secure. In order to provide the broadest protection against abuse, the Constitution in effect erects a presumption that such circumstances may be present. See pages 14, 17, *supra.* Within this framework, the district court was correct in concluding that "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation of powers problems" (J.A. 57 (footnote omitted)). See also *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 9-13 (Article III challenge to an arbitral scheme found ripe even though no plaintiff had been injured by the arbitrators' exercise of jurisdiction).

It is no answer that there is alleged or shown no instance that a decision—by a bankruptcy judge or the Comptroller General—was in fact influenced by a desire to satisfy the authority to which he is accountable. The argument about accountability through removal is structural, not personal; and in devising that structure the Framers guarded against the worst.

These principles are not confined to challenges to the authority of judicial officers. In *Buckley*, this Court concluded that the particular defect in the tenure of the members of the Federal Election Commission—their appointments in a manner other than that prescribed by the Appointments Clause—disabled them from exercising any of the powers of their offices except those in aid of Congress's legislative authority. The Court did not consider whether particular decisions they rendered were improper or were affected by the dangers against which the Appointments Clause was designed to guard. 424 U.S. at 137-143. Moreover, the Court found the challenge ripe for judicial resolution even though many of the FEC's powers had not yet been exercised. 424 U.S. at 113-118.[35]

[35] See also *Palmore* v. *United States*, 411 U.S. 389 (1973); *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962); *United States* v. *Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc), cert. denied, No. 85-5872 (Mar. 3, 1986). The Senate relies (Br. 27 n.36) on *Hastings* v. *Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985), petition for cert. pending, No. 85-1301, but the allegations of injury in that case were quite different from those at issue here or in *Northern Pipeline*. In *Hastings*, the District of Columbia Circuit refused, on ripeness grounds, to consider the con-

The Senate's ripeness argument is unavailing in any event, because the fact that the Comptroller General is subject to removal by Congress is only one of the constitutional defects in his performance of the duties assigned to him under Section 251. Accordingly, if the specific challenge to the removal provision were found not to be ripe, it then would be necessary to consider whether either the Comptroller General's status as an officer of the Legislative Branch or the fact that he does not serve at the pleasure of the President disqualifies him from assuming the broad executive powers under Section 251. The Senate does not contend that those defects are in any way dependent upon an actual exercise of the removal power or that they are not ripe for judicial resolution. Because, as the district court recognized, the presence of the statutory removal provision furnishes the narrowest and most straightforward ground on which to invalidate the Comptroller General's role under Section 251, it makes little sense to avoid that ground of decision on the basis of the strained ripeness argument advanced by the Senate.

B. Because The Comptroller Cannot Exercise The Substantive Authority Assigned To Him Under Section 251, The Fallback Procedures Under Section 274(f) Must Be Given Effect

We have demonstrated in Points II and III that the Comptroller General was without authority under the Constitution to perform the duties conferred on him by

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stitutionality of actions that might be taken against the plaintiff judge at the completion of a judicial council investigation (770 F.2d at 1099-1102). No final action had been taken against Judge Hastings, and the court relied on principles of comity and exhaustion in relation to the on-going administrative proceedings in another circuit. By contrast, the individual plaintiff in this case is currently affected by the final actions of an official who is without constitutional authority. Although *Hastings* might support the proposition that the Comptroller General could not bring an action at the present time to challenge Congress's power to remove him, that decision does not undermine the ripeness of a constitutional attack on final governmental action by a person who is adversely affected by that action.

Section 251. The Comptroller General and Senate attempt to avoid that consequence by arguing (Comp. Gen. Br. 33-47; Sen. Br. 31-43) that the Court should sever the statutory provision enacted in 1921 that provides for congressional removal of the Comptroller General. But that judicial revision of the office of Comptroller General would not render Section 251 constitutional, and it would be remarkable in any event for a court to sever a provision in another Act that has been in effect for 65 years in order to save a statutory provision enacted only four months ago to confer sweeping and unfamiliar authority on the Comptroller General. Moreover, the result urged by appellants is contrary to the express desire of Congress, which specified what was to happen in the event Section 251 was held unconstitutional.[36]

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[36] The approach the Comptroller General and the Senate urge would in any event be a departure from this Court's settled practice. As the district court explained, "the cases specifically involving incompatible authorization and tenure (or appointment) statutes amply demonstrate [that] the courts set aside the statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff" (J.A. 59-60, citing *Springer, Myers, Northern Pipeline,* and *Buckley*).

The only decision of this Court relied upon by the Comptroller General (Br. 16-18) and the Senate (Br. 34-35) in support of a contrary result is *Glidden* v. *Zdanok*, 370 U.S. 530 (1962). However, that decision does not support their position. In *Glidden,* the Court held that judges of the Court of Claims and the Court of Customs and Patent Appeals were Article III judges. The plurality opinion found that those courts were constituted as Article III courts, despite the fact that Congress had authorized them to render advisory opinions, and the plurality found that Congress would have preferred the severing of the authorization for such opinions if that practice were inconsistent with the courts' Article III status. 370 U.S. at 579-583. Thus the effect of the plurality's approach in *Glidden* was consistent with that of the district court in this case, eliminating the jurisdiction that was deemed to be inconsistent with the tribunal's constitutional status, rather than altering that status. Moreover, there was no majority of the Court on the severability issue. The concurring Justices were of the view that the statutes providing for advisory opinions had been effectively repealed by Congress (*id.* at 586-587 (Clark, J., concurring)), and

1. This is not an instance in which the Court is required to speculate about what Congress would have intended if it had known that a particular provision in a statute would be held unconstitutional. Congress foresaw when it passed the 1985 Act that there would be constitutional challenges to the deficit reduction procedures in Section 251. It therefore provided for expedited judicial determination of such challenges (§ 274(a)(1) and (2), (c)) and for a carefully structured alternative reporting mechanism "[i]n the event that any of the reporting procedures described in section 251 are invalidated" (§ 274(f)(1)).[37]

This fallback procedure assures that Congress and the President—the elected representatives of the people—will make the projections and exercise the judgment that underlie a sequestration order, thereby eliminating the constitutional defects occasioned by the Comptroller General's issuance of binding determinations. Because Congress unequivocally directed that this fallback mechanism be followed if the reporting procedures are held unconstitutional, and because that mechanism "'is fully operative as a law'" (*Buckley*, 424 U.S. at 108, quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932)), there is no reason for this Court to prevent it from going into effect.[38]

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the dissenting Justices had no occasion to address the question (*id.* at 589-606 (Douglas, J., dissenting)).

[37] Under that alternative, the report of the Directors of OMB and CBO is to be submitted to a joint committee of Congress, composed of the entire membership of the Budget Committees of the House and Senate. § 274(f)(1) and (2). Within five days, the committee must report to both Houses a joint resolution setting forth the contents of the report of the Directors. § 274(f)(3). Upon its enactment, the joint resolution "shall be deemed to be the report received by the President under section 251(b)" (§ 274(f)(5))—*i.e.*, the Comptroller General's report—which then triggers the President's duty to make the sequestration order.

[38] In their memorandum in the district court (at 62-65), the Speaker and the Bipartisan Leadership Group of the House agreed with our submission herein. They stressed that Section 274(f) was

The Comptroller General argues (Br. 41) that the fallback mechanism does not apply if the reporting procedures are invalidated because of the role of the Comptroller General; in his view, it applies only if those procedures are invalidated because of the role of CBO or because Section 251 is found to be an unconstitutional delegation of legislative power. This argument is refuted by the plain language of Section 274(f)(1), which requires resort to the fallback mechanism "[i]n the event that *any* of the reporting procedures described in section 251 are invalidated" (emphasis added). Because the Comptroller General's report is central to the operation of Section 251, it hardly seems likely that Congress would have intended implicitly to exclude a constitutional defect in that report from the events that trigger the fallback procedure—especially since, under the fallback mechanism itself, the joint resolution is expressly "deemed" to be the report of the Comptroller General (§ 274(f)(5)). Neither the Senate nor the Comptroller General has pointed to any indication in the legislative history that Congress intended the fallback mechanism to apply to only some constitutional defects, or that Congress would have preferred to alter the tenure or status of the Comptroller General, rather than the reporting procedures under Section 251, if those procedures were invalidated. In fact, the Comptroller General concedes (Br. 40) that there is no mention of the congressional removal provision of the 1921 Act in the legislative history of the 1985 Act.[39]

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included because "[a]voiding uncertainty on this point was a matter of the absolutely highest importance to Congress" (House Dist. Ct. Br. 62), and argued that "[s]ince the Act's whole structure makes section 274(f)'s significance apparent, the Court would have to defy that whole structure to tamper with the specific instructions of that section" (House Dist. Ct. Br. 64). These appellants have now changed their position and endorse the severability argument advanced by the Comptroller General and Senate, albeit only in passing and without explaining why they have changed their minds. See House Br. 49 & n.58.

[39] The Comptroller General's suggestion (Br. 40) that Congress could not have anticipated that the Comptroller General's role

2. The Comptroller General and Senate's argument also ignores the fact that the elimination of the removal provision in the 1921 Act would affect not just the Comptroller General's role under Section 251 of the 1985 Act, but all of his functions—including his most basic duty of investigating expenditures and operations of the Executive Branch on behalf of Congress, which is constitutionally compatible with the congressional removal provision. See notes 31 and 33, *supra*. As we have explained above (see pages 36-38, *supra*), Congress created the office of Comptroller General to serve the needs of Congress and to be responsible to it alone. The removal provision is an integral feature of the office, serving to bring the Comptroller General "under the sole control of Congress" (61 Cong. Rec. 1081 (1921) (Rep. Byrns)) and to confirm that the office is a part of, and the Comptroller General is accountable to, the Legislative Branch. See pages 36-39 & notes 23, 24, *supra*. The Comptroller General's submission (Br. 33-37) that Congress in 1921 would have readily dispensed with the removal provision therefore is mistaken.

Moreover, since 1921 Congress repeatedly has reaffirmed the original conception of the office (see pages

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under the Act would be challenged is simply wrong. The President's signing statement indicates that Congress was well aware that the status of the Comptroller General was a potential constitutional defect: "[E]xecutive functions may only be performed by officers in the executive branch. The * * * Comptroller General [is an] agent[] of Congress, not [an] officer[] in the executive branch * * * * *. My administration alerted Congress to [this] problem[] throughout the legislative process in an effort to achieve a bill free of constitutionally suspect provisions." *Balanced Budget Legislation,* 21 Weekly Comp. Pres. Doc. 1490-1491 (Dec. 12, 1985). Moreover, the United States had previously challenged the Comptroller General's exercise of executive functions, and two cases in which that issue is raised received wide publicity. *Ameron, Inc.* v. *United States Army Corps of Engineers,* 610 F. Supp. 750 (D.N.J. 1985), aff'd, No. 85-5226 (3d Cir. Mar. 27, 1986); *Lear Siegler, Inc.* v. *Lehman,* No. 85-1125 (C.D. Cal. Nov. 21, 1985). See *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House of Comm. on Government Operations,* 99th Cong., 1st Sess. (1985).

39-41, *supra*), by enacting the provision in 1980 for Congress to play a formal role in the selection of the Comptroller General (see pages 40-41, *supra*) and by vesting new responsibilities in him that may well have been withheld in the absence of the removal provision and the nexus to Congress that it exemplifies. See, *e.g.*, J.A. 71-72 n.29. These numerous intervening statutes would have to be considered by a court in determining whether the provision for congressional removal—and all that it implies—properly could be extricated from the web of statutes that define the Comptroller General's status and functions. The very complexity of assessing the cumulative effect of these enactments underscores the fact that any refashioning of the office of Comptroller General would be uniquely the responsibility of Congress.

3. Judicial severing of the congressional removal provision in the 1921 Act would not in any event eliminate the other fundamental defect in Section 251, which is that the duties of the Comptroller General under that Section may be performed only by an officer who serves at the pleasure of the President. See pages 44-51, *supra*. For this reason, the Court should resolve any remaining doubts on the severability issue by construing the 1985 Act so as to avoid the serious constitutional question regarding the Comptroller General's role under Section 251 that would remain even if the congressional removal provision were severed from the 1921 Act. *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).[40] All that is required for that purpose is to give effect to the fallback mechanism that Congress itself prescribed in Section 274(f).

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[40] As the district court observed, "[i]t is doubtful that the automatic deficit reduction process would have passed without [a role for the Comptroller General], and doubtful that the protection would have been considered present if the Comptroller General were not removable by Congress itself—much less if he were removable * * * at the discretion of the President, like the Director of OMB himself" (J.A. 60). The district court recognized that the latter tenure might be required by the Constitution in light of the nature of the Comptroller General's functions under Section 251 (*ibid.*).

CONCLUSION

The judgment of the district court should be affirmed. The Court should stay its judgment for 60 days to permit the operation of the fallback deficit reduction procedures contained in Section 274(f) of the Act. See *Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976); *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88-89 (1982); cf. § 274(e), (f)(3) and (4) of the Act.

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