Nos. 85-1377, 85-1378, 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 , *Appellees.*

UNITED STATES SENATE, *Appellant,*
v
MIKE SYNAR, MEMBER OF CONGRESS, ET AL., *Appellees*

THOMAS P O'NEILL, JR , SPEAKER OF THE UNITED STATES
HOUSE OF REPRESENTATIVES, ET AL , *Appellants,*
v
MIKE SYNAR, MEMBER OF CONGRESS, ET AL , *Appellees.*

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

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO; AMERICAN POSTAL WORKERS UNION, AFL-CIO; and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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NATIONAL ASSOCIATION OF LETTER CARRIERS,
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AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

This brief *amici curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 94 national and international unions with a total membership of over 13,000,000 working men and women. The Public Employee Department is composed of 30 of the AFL-CIO's affiliated unions with a total membership of some 2,000,000 public employees. The American Federation of Government Employees, the American Postal Workers Union, and the National Association of Letter Carriers are each AFL-CIO affiliate unions whose members are current or former federal employees. Employees who are represented by these and other of AFL-CIO's affiliate unions have been and will be directly affected by spending reductions required under the Balanced Budget and Emergency Deficit Control Act of 1985.[1]

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[1] AFGE has filed a separate suit challenging the Act's so-called "fallback" mechanism for the sequestration of funds. *AFGE v. United States*, Civ. No. 86-154 (D.D.C.). APWU is the plaintiff in another case in which the District Court entered summary judgment on the basis of the lower court's opinion that is now before this Court. *APWU v. United States*, Civ. No. 86-147 (D.D.C.).

ARGUMENT

Introduction and Summary

In *First National Bank v. United Airlines*, 342 U.S. 396, 398 (1952), Justice Jackson, with his customary elegance, explained why he had written a concurring opinion:

> I part company with the Court as to the road we will travel to reach a destination where all agree we will stop, at least for the night. But sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place in which we choose to lodge.

This brief *amici curiae* is filed in the same spirit. We agree with the court below that the Balanced Budget and Emergency Deficit Control Act of 1985 (hereinafter "the Act") violates the Constitution by conferring significant responsibilities in carrying out that law on the Comptroller General, an officer whose removal from office Congress retains the exclusive power to initiate and whose removal Congress can accomplish over the President's objection.[2] However, we believe that the path fol-

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[2] The Senate argues that the "restraint with which the Court approaches separation of powers controversies and the respect that the Court shows coordinate branches counsel against adjudicating the potential exercise of the removal provision in these appeals." Sen. Br. 25. We entirely agree that judicial restraint should be exercised with respect to separation of powers issues, because these are among the most sensitive and far-reaching of constitutional questions. For this reason, among others, we urge in our argument that the judgment of the court below should be affirmed only on narrow grounds.

We cannot, however, agree with the Senate's contention that this Court can and should refrain from passing on the constitutionality of the 1985 Act insofar as that Act vests powers to carry out the law in the Comptroller General. The Senate's argument, that the issue is not ripe until removal proceedings are instituted, is wrong. The constitutional issue herein is not whether an officer who has the responsibilities created by the 1985 Act may constitutionally be removed by joint resolution as provided in the 1921 Act, but whether an officer who *is* so removable may perform those responsi-

lowed by the Court below to that result would unnecessarily cast into doubt the constitutionality of valuable institutions in the administrative structure of the federal government.

The office of Comptroller General is—so far as our research, the decision below, and the presentations of the appellants show—unique among federal offices with respect to the power of removal. The Comptroller General is the only federal officer with the responsibility to carry out a duly enacted federal law as to whom Congress has retained the power actively to participate in the removal process—let alone the exclusive power to initiate removal from office.[3] The Comptroller General is also the only federal officer with such a responsibility

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bilities. The latter issue is, as the District Court correctly decided, ripe for decision now because if the removal provisions of the 1921 Act render the Comptroller General too dependent on Congress or insufficiently dependent on the President (or some combination of the two) the impact on his performance of his functions under the 1985 Act is immediate. It is the *potential* of removal by Congress and the *immunity* from removal by the President for cause or otherwise which give rise to the constitutional issues in this case. For the Court to wait until the Comptroller General is removed and then to decide whether his removal was constitutional is to risk that important decisions in carrying out federal laws will be made by an officer in whom such authority may not constitutionally be vested; the primary object of constitutional concern is the decision-making process, rather than protection of the Comptroller General.

The separate argument of the Comptroller General and the Senate —that, if the removal provision applicable to the Comptroller is constitutionally incompatible with his functions under the Act, then the removal provision should be severed from the earlier statute (CG Br. 33-48; Sen. Br. 31-43)—is similarly flawed. Rather than burden the Court with a full elaboration of the reasons for rejecting the severability argument, we rely on the arguments on this issue that are presented in the briefs of the appellees. We note here only that Congress expressly ruled out appellants' suggestion by legislating a "fallback" provision in the 1985 Act to take effect in the event that the Comptroller General's duties under that Act were held invalid, § 274(f).

[3] See pp. 28-29, *infra*.

as to whom the President is denied all power, on any grounds, to initiate removal from office.

These attributes of the office of Comptroller General raise two distinct issues in the context of the significant responsibilities conferred on the Comptroller by the Act. The first, and in our view the decisive, issue is whether the Constitution permits Congress to retain for itself the ability to control on an ongoing basis the actions of federal officers in carrying out duly enacted federal laws by making such officers responsible, here exclusively responsible, to Congress. The focus of this issue is the role of Congress: specifically, the extent to which, if at all, Congress may be actively involved in the administration, elaboration and execution of a federal law after that law has been enacted. As to this issue, as we show in part I, *infra*, the answer is clear: Congress may not delegate the task of carrying out a law Congress has passed to federal officers who are responsible exclusively to Congress.

The second issue has a very different focus. As already mentioned, apart from the role that Congress has reserved for itself in the removal process, Congress has denied the President the power to initiate removal of the Comptroller General. The second issue thus posed is the extent to which Congress, acting in its legislative capacity, may specify the standards and procedures that will govern the President in exercising the power to remove federal officers. This issue implicates a central dilemma of our modern federal administrative structure: the tension between Congress' authority to provide for certain federal agencies and officers that operate independently of direct political control and influence, on the one hand, and the constitutional requirement of a unitary Chief Executive who is politically accountable for the execution of the laws, on the other hand. This issue focuses on the role of the President: specifically, what does the Constitution mandate wtih regard to the rela-

tionship a President must have with a federal agency or officer. The Court has several times spoken to this second issue—most notably in *Myers v. United States*, 272 U.S. 52 (1926), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)—without arriving at a conclusive answer.

The analysis of the court below confuses these two issues. And, as a result, that court dealt unnecessarily with the issue of the degree of control the Constitution grants the President over federal agencies and officers who have been delegated a role in carrying out federal law. As we show in part II, *infra*, this Court need not and should not reach this second issue. Over the years, Congress has concluded that certain functions of the federal government should be placed in the hands of agencies or officers that are insulated to some degree from political influence or control. Congress has adopted myriad means of providing such insulation, often in the form of limitations on the President's removal power with respect to the office in question. Because any pronouncement by this Court on this issue would, therefore, have significance far beyond the case at hand, and because this issue has thus far proved complex and difficult to resolve, it is particularly important that the Court not address this issue unless that is required. And, for the reasons already noted, the issue need not be addressed here: Whatever limitations may properly be put on the President's control over a federal agency or officer, Congress may not create "independent" agencies or officers by substituting congressional control for presidential control.

I. The Question Of Congress' Authority To Play An Active Role In The Removal Of Officers Of The United States.

A. There is much dispute in this case as to the proper labels to be affixed to the status of the Comptroller General and to his various functions. It is debated whether the Comptroller is an officer of the executive branch or of the legislative branch and whether his functions in the main are part of the legislative process or part of the process of carrying out duly enacted laws. In our view, these questions of characterization are largely beside the point. For what is critical here is not in dispute: the substance of the Comptroller General's responsibilities under the Act and the manner in which the Comptroller may be removed from office. Those concrete particulars rather than generalities or labels are the proper starting point in analyzing this case.

1. The Act sets a "maximum deficit amount" for each fiscal year over the five-year period ending in 1991, § 201(a)(1). In advance of each of these fiscal years the Director of the Office of Management and Budget (hereinafter "OMB") and the Director of the Congressional Budget Office (hereinafter "CBO") are required to prepare a report containing: (a) an estimate of the anticipated "budget base levels of total revenues and budget outlays" for the fiscal year; (b) a determination "whether the projected deficit for such fiscal year will exceed the maximum deficit amount for [that] year" by more than a specified amount; and (c) an estimate of the "rate of real economic growth that will occur during such fiscal year, the rate of real economic growth that will occur during each quarter of such fiscal year, and the rate of real economic growth that will have occurred during each of the last two quarters of the preceding fiscal year," §§ 251(a)(1), (2) & 251(c). If these estimates and determinations show that the deficit will exceed the limits set forth in the Act, the OMB and CBO

Directors are then, by applying the formula set forth in § 251(a)(3) of the Act, to specify the amounts and percentages by which each budget account is to be reduced. Upon completion, the report of the OMB and CBO Directors is to be submitted to the Comptroller General.

The Act instructs the Comptroller General to "review and consider" this report and with "due regard for the data, assumptions, and methodologies" to issue his own report to the President and Congress, §§ 251(b) & 251(c)(2). The Comptroller General's report is required to "contain estimates, determinations, and specifications for all the items contained in the report submitted by the Directors" of OMB and CBO, and specifically to "provide for the determination of reductions [in the various budget accounts] in the manner specified in subsection (a)(3)," §§ 251(b)(2) & 251(c)(2)(B).

The Act directs the President to implement the Comptroller General's determinations as to the reductions to be made in the various budget accounts through issuance of a presidential order, § 252. And the Act makes clear that the President is bound by the Comptroller General's determinations:

> ORDER TO BE BASED ON COMPTROLLER GENERAL'S REPORT.—The [Presidential] order must provide for reductions in the manner specified in section 251(a)(3), must incorporate the provisions of the [Comptroller General's] report submitted under section 251(b), and must be consistent with such report in all respects. The President may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages set forth in the report submitted under section 251(b) in determining the reductions to be specified in the order with respect to programs, projects, and activities, or with respect to budget activities, within an account, with the exception of the authority granted to the President for fiscal year 1986 with respect to defense programs pursuant to paragraph (2)(C). [§ 252(a)(3); see also § 252(b)(1)].

Thus, the Comptroller General's responsibilities under the Act are most substantial. In essence, the Comptroller General is to determine in each of five fiscal years the required level of budget reductions and the amount to be sequestered in each budget acocunt. These determinations can in no respect be understood as merely ministerial calculations. Although the Act sets forth guidelines and definitions that frame the inquiry, it remains true that projections of economic growth and estimates of budget revenues and outlays ultimately require the exercise of a large measure of judgment and discretion based on economic and budgetary expertise. And, upon a determination that reductions are called for, the further determination of the amounts to be reduced in the various budget accounts requires interpretation and application of a complex statutory formula. The determinations made by the Comptroller General in this manner are binding on the President. The Act requires the President to put these determinations into effect and denies the President power to alter what the Comptroller General has done.

The Comptroller General's role under the Act cannot be viewed as part of the legislative process; that process *ended with the passage of the Act.* Were the legislative process still under way the President would as a matter of constitutional prerogative retain a veto power over the Comptroller General's determinations. In short, the Comptroller's job under the Act is purely to carry out the objectives of a duly enacted law.

It is of course often possible to characterize such responsibilities as in the nature of a "legislative" or "judicial" task. Any authority delegated by Congress respecting determinations that make a general rule concrete in a particular instance and that Congress might have made itself could be termed in the nature of legislative authority, or because the delegatee is to determine what the general rule means could be termed in the

nature of judicial authority. But such characterizations have no meaning in the present context. This Court stated in *INS v. Chadha,* 462 U.S. 919, 953-954 n.16 (1983), that the implementation of law, no matter how characterized, is not a legislative function:

> Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.

2. Congress chose the Comptroller General to carry out the responsibilities stated in §§ 251(b) & (c) of the Act precisely because Congress did not trust the President or the federal officers subject to the President's control to do so. The office of Comptroller General was created in 1921 to provide for a federal officer independent of the President and his administration who could audit the flow of federal moneys and perform other fiscal "watchdog" functions.[4] In order to insulate the Comptroller General from interference by the President or his administration, the 1921 Congress deemed it necessary to deny the President the power to initiate, on any grounds, removal of the person serving as the Comptroller. Indeed, Congress specifically rejected an amendment that would have provided the President a very lim-

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[4] Aside from the responsibilities given him by the 1985 Act, many of the Comptroller General's functions fall clearly within the category of duties in aid of the legislative process. See Joint Appendix ("JA") at 71-72 n.29. Other functions of that office may not be so clearly labeled. See, e.g., *Ameron, Inc. v. United States Army Corps of Engineers,* No. 85-5226, slip op. at 5 (3d Cir. March 27, 1986). The only functions of the Comptroller General at issue in this case are those arising under the Act presently under challenge.

ited power to remove the Comptroller General. That amendment proposed to provide for removal

> . . . by the President after notice and hearing when in his judgment the comptroller general . . . has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner . . . . [61 Cong. Rec. 1079, 1083].

The floor debate shows that Congress rejected even this limited presidential removal power because it is inconsistent with the degree of independence Congress believed is required of a Comptroller General. *Id.* at 1083-1084.

The 1921 Congress, however, did not stop at this point. Rather, Congress determined to confer upon itself the very power denied the President: the power to initiate removal from office of the person serving as Comptroller General. Indeed, Congress gave itself the power to initiate removal of the Comptroller General on the very grounds explicitly denied to the President as inconsistent with the independence of the office. Thus, Congress reserved for itself the power, by joint resolution, to effect removal of the Comptroller General on the following grounds: "permanent disability," "inefficiency," "neglect of duty," "malfeasance," or "a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1)(B)[5].

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[5] As the Brief for appellant Comptroller General (hereinafter "CG Br.") acknowledges, proponents of the various Comptroller General bills in 1919 and 1921 repeatedly referred to the Comptroller General as an "arm" or "agent" of Congress. CG Br. at 26-27. And, numerous subsequent statutes refer to the Comptroller General and the General Accounting Office as "part of" or "an agency of" the legislative branch. See the authorities cited in the lower court's opinion at JA 72 n.29. The Comptroller General's brief attempts to explain these references away as "merely conclusory synonyms for 'independence.'" CG Br. at 27. But this explanation simply reinforces the conclusion that Congress' concern for

B. Given the responsibilities delegated to the Comptroller General by the Act, and the means by which the Comptroller may be removed from office, the factors that frame the decisive question here may be stated as follows: The Act grants to the Comptroller General a significant responsibility in carrying out the law, including making determinations that are binding on the President as to whether and how much to cut the budget. No matter how the Comptroller General performs that responsibility, the President has no recourse; the President has no power to initiate removal of the Comptroller even if the President believes that the Comptroller is carrying out the responsibility in a manner that is biased or incompetent. The Congress, however, is *not so limited;* the Congress may initiate removal of the Comptroller General if the Congress is not satisfied with how the Comptroller carries out his responsibility under the Act. And, the Comptroller General will carry out that responsibility, when matters of discretion or judgment are at issue, knowing whom it is he must please—*viz.*, knowing that Congress is his true master.[6]

"independence" is defined in terms of independence from the President and does not include a concern that political influence emanating from Congress might affect the determinations of the Comptroller General.

In fact, the congressional debates described the Comptroller General's relationship to Congress in far more explicit terms than the Comptroller General's brief suggests. See, *e.g.*, 61 Cong. Rec. 1081 (1921) (Rep. Byrns) ("we felt that this man should be brought under the sole control of Congress, so that Congress at any moment when it was found he . . . was not carrying on the duties of his office . . . as the Congress expected, could remove him"); *id.* at 1084 (Rep. Fess) ("If there is anything that we want to do, it is to take this man from under the influence of the executive . . . and put him under the legislative . . ."); 58 Cong. Rec. 7278 (1919) (Rep. Byrns) (removal provisions "make[] him responsible to Congress and not to the President"); *id.* at 7280-81 (Rep. Temple) ("control should lie with the appropriating power"); *id.* at 7282 (Rep. Good).

[6] The point here is not merely that the Comptroller General will be moved by a fear of removal; the locus of the power to remove

The issue thus framed goes well beyond what standards the Congress may legislate to confine the President's power to remove an officer of the United States. Rather, the issue under discussion now involves the Congress' attempt to act in a different capacity. The power to initiate removal, other than by impeachment, of a federal officer charged with the responsibility of carrying out a duly enacted federal law, is, we submit, a non-legislative power in the critical sense relevant here—a power that *goes beyond* the powers conferred on Congress by Article I of the Constitution.

One of the Constitution's paramount aims is to grant the Congress only that portion of a parliament's powers that goes to enacting laws and at the same time to deny Congress direct control of the remainder of what it takes to make a law effective in practical terms, whether the latter is called law execution, administration or interpretation. Simply stated, Congress may not retain for itself the power to participate in or control the process of implementing the laws Congress enacts.

Article I of the Constitution vests "All legislative powers herein granted" in the Congress, and contains an enumeration of those legislative powers. Article II states that "The executive power shall be vested in a President of the United States," and places upon the President the responsibility to "take care that the laws be faithfully executed." The Constitution, moreover, expressly creates certain exceptions to those general grants of authority. Thus, for example, Article I, § 7 carves out for the President a role in the legislative process: the power to approve or veto legislation. And, Congress is expressly given the right to participate in specified executive func-

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determines where one who is subject to removal looks for guidance as to what is good performance and what is not as well as to what will enhance and what will limit his long term acceptability. The Comptroller General is in all these senses Congress' servant. See *supra*, note 5.

tions: For example, Article II, § 2 provides that the making of treaties and the appointment of certain officers of the United States shall be the responsibility of the President "by and with the advice and consent of the Senate"; and Article I specifies the respective roles for the houses of Congress in the impeachment process. Art. I, § 2, cl. 5 & § 3, cl. 6.[7]

While the Constitution expressly confers upon the Senate an active role in the appointment process, no such role is given in the removal process—except in impeachment proceedings . And, it is inconsistent with the constitutional scheme as just described to permit such a role. *Cf. INS v. Chadha, supra,* 462 U.S. at 955-956. This point is at the core of the congressional debate, discussed at legnth in the various opinions in *Myers v. United States,* 272 U.S. 52 (1926), over what has become known as "the Decision of 1789." Thus, the opinion in *Myers* states:

> It is very clear from this history that the exact question which the House voted upon was whether it should recognize and declare the *power of the President under the Constitution to remove* the Secretary of Foreign Affairs *without the advice and consent of the Senate.* That was what the vote was taken for. [272 U.S. at 114 (emphasis added)].[8]

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[7] Of course, by the passage of laws pursuant to the enumerated powers in Article I, Congress directs and confines the substance and the manner of executive action. But Congress' role in shaping executive action through the legislative process must be distinguished from Congress actually playing a part in the process of carrying out duly enacted laws. For elaboration of this point, see Part II *infra.*

[8] See also *Ex parte Hennen,* 38 U.S. (13 Pet.) 230, 259 (1839), where this Court described the issue debated in the Decision of 1789 as follows:

> This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related . . . to the power of the President to remove officers appointed with the concurrence of the Senate: and the great question was whether

And, statements throughout the debate focused on whether Congress had the power directly to participate in a decision to remove an officer of the United States. The following statements by James Madison are illustrative:

> Vest this power in the Senate jointly with the President, and you abolish at once that 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, quoted in *Myers*, 272 U.S. at 131; see also, 272 U.S. at 131 (statement of Mr. Boudinot)].
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> * * *
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> Perhaps there was no argument urged with more success or more plausibly grounded against the Constitution under which we are now deliberating than that founded on the mingling of the Executive and Legislative branches of the government in one body. It has been objected that the Senate have too much of the Executive power even, by having control over the President in the appointment to office. Now shall we extend this connection between the Legislative and Executive departments which will strengthen the objection and diminish the responsibility we have in the head of the Executive? [1 Annals of Cong. 380, quoted in *Myers*, 272 U.S. at 120-121].
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> * * *
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> 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. They ought to have nothing to do with designating the man to fill the office. That I conceive

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the removal was to be by the President alone, or, with the concurrence of the Senate, both constituting the appointing power.

The Court went on to state that "it was very early adopted as the practical construction of the Constitution that this power was vested in the President alone." *Ibid.*

> to be of an Executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to consider the Constitution with an eye to the principles upon which it was founded. [1 Annals of Cong. 581, quoted in *Myers*, 272 U.S. at 128-129].

Myers itself likewise involved a congressional assertion of the power to participate in the actual decision to remove an officer. The statute at issue in *Myers* provided for removal of certain classes of postmasters "by the President *by and with the advice and consent of the Senate.*" 272 U.S. at 107. That statute did not purport to establish substantive standards that would govern the removal process, and so the question of the extent to which Congress, acting within its legislative role, may limit the President's power of removal was not presented in that case. There are, to be sure, broad dicta in *Myers* that do touch on this latter point. These dicta proved controversial and were later limited in *Humphrey's Executor*—a matter we discuss *infra* at 26. But the actual ruling of *Myers*—that Congress may not directly participate in the removal process through the advice and consent procedure—has never been questioned by later decisions.

The point here is not one of mere technicality but goes to the heart of the constitutional scheme. Although the legislative and executive branches were each expressly granted certain carefully confined roles to play within the other's general area of authority, it was a central concern of the Framers that neither the legislative branch nor the executive branch aggrandize its own powers at the expense of the other. See The Federalist Nos. 47 & 48, at 325-327, 332-335 (J. Cooke ed. 1961) (Madison). Thus, Madison quoted Montesquieu's famous maxim that "When the legislative and executive powers are united in the same person or body . . . there can be no liberty. . . ."

Id. at 326. And, Madison translated that maxim, in the context of our constitutional structure, into the proposition that "neither of [the branches] ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers." *Id.* at 332.

Given the parameters of our constitutional structure, this proposition must be understood as referring not to the control that each branch has, acting within its delineated sphere specified in the Constitution, over the exercise of powers by the other branches. Obviously, the President can veto an act of Congress; this Court can strike down a piece of legislation or invalidate an executive action; and, Congress can establish, through legislation, both the substantive enactments the President is to execute and the institutions of government through which he is to execute those enactments. Rather, the Framers' objective was to prohibit one branch from arrogating to itself the power to undertake the *actual performance* of the functions allocated to another branch. For such an accumulation of power would nullify the checks and balances that are the cornerstone of our form of limited government.

Such an accumulation of power exists in the present case in a more dramatic form than was addressed in either the Decision of 1789 or *Myers*. Here, Congress has not merely asserted the power to participate in the removal decision by requiring that the President obtain the advice and consent of the Senate. Here, Congress has reserved to itself the exclusive power to initiate—and complete—the Comptroller General's removal. Here, then, Congress has in a real sense asserted the power to implement a duly enacted law: Congress has conferred the responsibility to carry out that law upon an officer answerable only to Congress. When Congress delegates to its own agent the power to implement a law, Congress

does precisely what the Framers most fervently sought to prevent.[9]

Though the instances have been few, this Court has always been quick to set aside comparable efforts by one branch to seize for itself the powers of another branch. Thus, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-588 (1952), when the shoe was on the other foot, this Court stated:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ."

And, in *Buckley v. Valeo*, 424 U.S. 1 (1975), and *INS v. Chadha, supra*, this Court rejected congressional asser-

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[9] Another aspect of the Act, not directly at issue in this litigation, illustrates how dramatically Congress has offended this elementary principle of separation. Section 251(d)(3) provides a mechanism by which the President can shift monies about, within the defense budget, while honoring the overall constraints the new law enacts; he is empowered to terminate or modify existing contracts and credit the monies thus freed to projects whose funding would otherwise be reduced. The President must, however, report his decisions implementing this authority, in a specified format, to the Comptroller General. The President's decisions may take effect *only* if the Comptroller General certifies to him and to Congress that stated judgmental criteria are met. The constitutional offense is clear: The Comptroller General, who is subject to removal only by Congress, is authorized to overrule the executive judgment of the Prseident himself as to how the laws shall be faithfully executed. U.S. Const., Art. II, § 3. *Cf. Chicago & Southern Air Lines v. Waterman Corp.*, 333 U.S. 103 (1948).

tions of the power to participate directly in the implementation of laws.

In *Buckley*, Congress created a commission, to which were delegated wide-ranging rulemaking and enforcement powers, and then provided that a majority of the commission would be appointed by officers of Congress. As here, Congress was seeking direct control over the officers who were charged with implementing the law. This Court struck down that arrangement as violative of the Appointments Clause in Article 2, § 2 of the Constitution, which provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint" federal officials of the rank of the commissioners in *Buckley*. While relying on that specific constitutional provision, the Court made clear that the Appointments Clause is part of an overall constitutional framework which prohibits each of the three branches of the federal government from taking over the work of the other branches. Thus, the *Buckley* Court stated:

> Our inquiry of necessity touches upon the fundamental principles of the Government established by the Framers of the Constitution, and all litigants and all of the courts which have addressed themselves to the matter start on common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another. [424 U.S. at 120].

And, in that context, the Court expressed the central constitutional concern which governs the instant case as well as *Buckley*:

> [T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches. [424 U.S. at 129 (footnote omitted)].

In *Chada*, Congress had by statute delegated to the Attorney General, upon certain findings of fact, the discretion to decide whether to suspend deportation of an alien. However, Congress attached a string to that delegation. The statute that made the delegation provided that either house of Congress could, within certain time limits, pass a resolution nullifying any particular decision of the Attorney General to suspend deportation. This Court struck down that scheme on the ground that the so-called "one-house veto" was an exercise of the legislative power that did not conform to the express constitutional requirements that all legislation must be passed by both houses of Congress and presented to the President before becoming law.

Congress' failure in *Chadha* to conform to the requirements of the legislative process expressly stated in Article I suggests an illuminating perspective on this case: Congress in *Chadha* having delegated the responsibility to carry out the law, attempted to retain the ability to control the execution of the law in individual cases. This attempt by Congress makes *Chadha* akin to the situation here:

> Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto. [*Chadha*, 462 U.S. at 954 n.16].

Just as Congress may not "control administration of the laws" in the fashion challenged in *Chadha*, Congress may not "control administration of the laws" by delegating the responsibility for such administration to an officer who is Congress' agent, as Congress attempted both in *Buckley* and in this case.

One commentator has succinctly stated the principles that we believe should inform the proper resolution of this case:

> The issue of aggrandizement seems inevitable, however, where Congress asserts the right itself to control the removal question. It has not only limited the President's ordinary political authority by imposing a "for cause" requirement, but also greatly expanded its own political authority by insisting on a voice in that determination. The latter measure defeats any claim that the measure has an apolitical end such as assuring objectivity.
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> At least within a certain range, . . . Congress readily can exclude the President from political control of regulatory outcomes. Yet the rationale for these measures, and for the apparent offense they give to the President's claim to serve as the unitary head of executive government, equally requires that Congress exclude itself from such controls. A measure that enhances Congress's political controls while isolating the President would threaten both his position as unitary head of government, and his continuing capacity to function as a political counterweight to Congress. [Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 614, 638 (1984) (footnote omitted).]

Under these principles the Act now before the Court must be held unconstitutional.

II. The Question Of Congress' Authority To Enact Laws That Set Standards Or Procedures Governing The Removal Of Officers Of The United States.

The court below rested its holding on the theory we have just developed (JA 78):

> We hold . . . that since the powers conferred by 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, those powers cannot be exercised . . . .

As we stated at the outset, our difference with that court thus lies not with its holding, but in the path taken to reach that result. The court below mixed into its analysis a lengthy discussion of a second, distinct issue: the extent to which Congress may establish by *statute* standards and procedures that limit the President's ability to remove officers of the United States. See JA 65-76.

In part I we showed that this further issue *need not* be reached. In this part of our argument, we show that this Court *should not* reach this issue.

A. The question of what limits the Congress may by statute place on the President's removal power is not answered in terms by the Constitution, or by any of the contemporaneous materials that sometimes throw light on the intention of the Framers.

Article I, to begin with, does provide a heavy counter on Congress' side. Unlike the power actively to participate in the decision to remove individual officers of the United States, the authority to legislate standards and procedures governing the removal process *is* within the terms of the legislative power vested in Congress by Article I of the Constitution. Art. I, § 8, cl. 18, grants to Congress the power:

> To make all laws which shall be necessary and proper for carrying into *execution* the foregoing powers, *and all other powers vested by this Constitution in the government* of the United States, *or in any department or officer thereof.* [Emphasis added].

Certainly an enactment specifying the standards and procedures for removing a federal officer entrusted with carrying out federal law is a "proper" law for "carrying into execution . . . powers vested by this Constitution in the government of the United States or in any department or officer thereof"; these words affirmatively cover, rather than exclude, laws directed to the Executive Branch.

The question as to the nature and extent of Congress' power to legislate respecting standards for removal thus

reduces to whether Article I's grant of authority is somehow limited by an overriding grant of authority to the President. Nothing in the Constitution expressly states such a grant of authority to the President. Except for the impeachment provisions, the Constitution does not in terms so much as notice the question of removal of federal officers from their positions. While, as we discussed in part I, the power to remove is part of "the executive power," that fact does not negate Congress' authority to set standards governing the exercise of the removal power. As just stated, both Article I and the scheme of the Constitution make it plain that to a great extent "the executive power" will be defined and limited by statutes enacted by Congress. Strauss, 84 Colum. L. Rev. at 601.

The laws that the President is to "take care [to] . . . faithfully execute[]" are for the most part laws adopted by Congress. By and large statutes enacted by Congress define the substantive standards the President has the obligation to implement and often prescribe the procedures the executive is to follow in performing that duty. Thus, the President's role in executing the laws is primarily dedicated to carrying out the will of Congress as expressed in statutory laws.

These general propositions are undoubtedly applicable to the President's power to appoint officers of the United States. While the power to appoint is expressly granted to the President in Art. II, § 2, cl. 2—albeit subject to the advice and consent of the Senate—the Constitution is silent as to whether Congress may prescribe by statute standards governing appointments. But there is no doubt that Congress has that power. It is Congress which creates the offices—not the Constitution—and it has been unquestioned from the outset that Congress may establish by statute the qualifications for appointment to the various offices the President has the authority to fill, the terms of such offices, the salaries of such offices, and other conditions and incidents of the appointment process.

See, *e.g.*, pp. 14-15, *supra*; see also, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Monaghan, *Marbury and the Administrative State*, 83 Colum. 1 (1983).

By a parity of reasoning, it would seem to follow that Congress should have a similar power respecting the removal process—*viz.*, the power to prescribe by statute the conditions for removal. Article I states as much, albeit in general terms, and nothing in the terms of the Constitution, or in the authoritative constitutional materials, expressly indicates otherwise.

But the inquiry does not end at this point. For there are additional considerations which suggest that Congress' power to prescribe standards for removal may be subject to an outer limit. The constitutional structure of government is characterized by tension between competing principals rather than by unlimited grants of authority. The Federalist No. 51, at 349 (J. Cooke ed. 1961) (Madison). Here, Congress' undoubted and broad authority under the necessary and proper clause is held in check by the fundamental judgment in Article II that "the executive power" is to be vested in a *single* executive. A principal reason for a unitary executive is the need for political accountability. The Framers rejected the notion of multiple executives in significant part because the fragmentation of executive power would make it too difficult to hold anyone politically accountable for the exercise of the executive power. See The Federalist No. 70, at 476-48 (Hamilton); see also, Strauss, *supra*, 84 Colum. L. Rev. at 599-601.

Accordingly, standards and procedures that Congress may enact as limitations on the President's removal power must not go so far as to be inconsistent with the concept of a unitary executive adopted by the Constitution. To illustrate by an extreme example, if the President were denied *all* power of removal—as well as all other means of control—of an officer or agency charged

with implementing the law, there would *in effect* be a fragmentation of the executive power, with a resultant absence of political accountability. In the words of Professor Strauss:

> The unitary responsibility thus expressed, and sharply intended, does not admit relationships in which the President is permitted so little capacity to engage in oversight that the public could no longer rationally believe in that responsibility. The charge to "take care [that the laws be faithfully executed]" implies that congressional structuring must in some sense admit of his doing so. An effort, then, to establish an agency over which the President's control went no further than the power to appoint its heads should be found deficient. [84 Colum. L. Rev. at 648-649; *see also id.* at 640-643.]

The limitations on Congress' power may well depend on the nature of the office. The President's removal authority would appear to be subject to the least limitation with respect to cabinet officers and other close political advisors.

B. The discussion thus far suggests that the Constitution safeguards a minimum relationship that the President must have with the agencies or officers to whom Congress delegates authority to carry out the laws.[10] This Court's decisions to date have not defined that relationship. *Myers* and *Humphrey's Executor* are most often cited in this connection, but neither of these cases can be

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[10] In this brief we address only officers of the United States who, like the Comptroller General, are appointed by the President with the advice and consent of the Senate. The Constitution also provides, in the "excepting clause" to Article II, § 2, that "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." It has long been recognized that when Congress acts pursuant to this provision and "vests the appointment of inferior officers in the heads of departments, it may limit and restrict the removal as it deems best for the public interest." *United States v. Perkins*, 116 U.S. 483, 485 (1886); *accord, Myers*, 272 U.S. at 160-61.

considered to have satisfactorily, much less conclusively, done so.

As discussed earlier, *supra* at 15, the issue of the extent to which Congress may prescribe by statute standards that govern removal was not presented for decision in *Myers*. The statute at issue in *Myers* did not purport to set any standards governing removal. Rather, that statute provided for Congress' *participation* in the actual removal decision in individual cases by means of the advice and consent procedure—raising an issue which, as we have shown at length, is distinct from the one now under discussion. And, as we have also shown, the materials on which the *Myers* Court based its decision, most notably the debates in connection with the Decision of 1789, were similarly addressed to the question whether Congress has the power to participate by means of advice and consent in individual removal decisions. See pp. 13-15, *supra*. Thus, the statements in *Myers* suggesting that Congress may not establish standards limiting the President's removal powers are dicta, and indeed dicta unsupported by the constitutional materials cited therein. Again, Professor Strauss has captured the point:

> *Myers* can readily be limited to the issue presented by the provision for senatorial concurrence in removal, the Tenure of Office Act problem. Although the *Myers* Court talked at times as if it regarded the use of fixed terms of office and "for cause" requirements to restrict the President's removal authority as equally difficult, that equation is not convincing. Reservation of senatorial approval for removals suggests political power struggles between President and Senate that are not connoted by a judgment that fixed tenure in office, with limitations on discharge, will be useful for the ends of public policy. [84 Colum. L. Rev. at 614 (footnote omitted).]

Humphrey's Executor establishes (as did *Marbury v. Madison*, *supra*) that functionally related removal restrictions need not threaten "the equilibrium [between

President and Congress] established by our constitutional system." *Youngstown, supra,* 343 U.S. at 638 (Jackson, J., concurring). At the same time, the reasoning of *Humphrey's Executor* is less than satisfactory. That decision limits the dicta in *Myers*—that the President has an illimitable power of removal—"to include [only] all purely executive officers." 295 U.S. at 627-628. And, the opinion then defines commissioners of the Federal Trade Commission out of that category by characterizing their functions as "quasi-legislative or quasi-judicial powers" and by characterizing the FTC "as an agency of the legislative or judicial department of the government." *Id.* at 628.

Such characterizations obscure rather than illuminate analysis. At least part of the responsibility of the FTC commissioners in *Humphrey's Executor* was to carry out laws duly enacted by Congress. That part of their responsibility, no matter how it may be labeled, cannot, consistent with the separation of powers, be under the ongoing control of Congress. See part I, *supra.* Thus, unless that work is to be performed wholly outside the political structure of our government, these commissioners must have some continuing accountability to the President. Cf. *Chevron USA, Inc. v. Natural Resources Defense Council,* —— U.S. ——, 52 L.W. 4845, 4853 (1984).

The opinion in *Buckley* reflects a recognition that notwithstanding the labels, functions of the type performed by the commissioners in *Humphrey's Executor* must be considered to be within the general domain of the Executive Branch:

> All aspects of the [Federal Election Campaign] Act are brought within the [Federal Election] Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. These functions, exercised free from day-to-day supervision of either Congress or the Executive

> Branch, are more legislative and judicial in nature than are the Commission's enforcement powers, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. Congress viewed these broad powers as essential to effective and impartial administration of the entire substantive framework of the Act. Yet each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. While the President may not insist that such functions be delegated to an appointee of his removable at will, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law to allow it to be performed by the present Commission. These administrative functions may therefore be exercised only by persons who are "Officers of the United States." [424 U.S. at 140-141, footnotes omitted.]

The point for now is that the issue of the nature and extent of Congress' authority by statute to limit the President's removal power is one of genuine difficulty, and one that this Court has yet to resolve in any definitive way.

C. The issue is not only difficult and unresolved, it is one of profound significance. It has become a tenet of our modern government that certain administrative decisions should be made by agencies or officers who are insulated, at least to some degree, from political influences. The decision to establish such decision-makers has rested on precisely the kind of policy judgments that the Constitution grants Congress the authority to make. Thus, Congress has decided that there are numerous categories of determinations made by the federal government that are better made by disinterested law enforcement officials than by those subject to the potentially corrupting influences of immediate political pressures. See, *e.g.*, *Humphrey's Executor* and *Weiner v. United States*, 357

U.S. 349 (1958). There is legitimate room for debate over whether these congressional decisions are wise or unwise, but there is no basis for the argument that Congress' efforts in this regard to promote the disinterested and principled execution of the laws are necessarily threats to the structure of our system of government.

In large part, the mechanism that Congress has chosen to accomplish political insulation of this kind has been the enactment of statutory limitations on the President's removal power. The statute books contain a variety of formulations for such limitations, as Congress has grappled with the problem over time and in the context of a wide range of agency functions.

Thus, for example, the members of the Federal Reserve Board are appointed for fourteen-year terms "unless sooner removed for cause by the President." 12 U.S.C. § 242. Members of the FTC serve seven-year terms and may be removed by the President "for inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41. The removal provision respecting members of the National Labor Relations Board, whose normal term is five years, establishes both substantive and procedural restrictions on the removal powers: "Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." 29 U.S.C. § 153(a). Members of the Federal Communications Commission, the Securities and Exchange Commission, and the Federal Election Commission are appointed for terms of seven, five and six years respectively, with no express provisions for removal. 47 U.S.C. § 154; 15 U.S.C. § 78d; and 2 U.S.C. § 437c. *See Weiner, supra.*

With respect to a number of offices, the President is required upon removing the officer to communicate the reasons for removal to Congress. Thus, the President's power to remove the Director of Operational Test and Evaluation in the Department of Defense is not limited by any express language, but the President is required

to "communicate the reasons for any such removal to both Houses of Congress." 10 U.S.C. § 136a. A similar provision obtains for the Inspectors General in the Department of Energy, 42 U.S.C. § 7138, the State Department, 22 U.S.C. § 3929, and the Department of Health and Human Services, 42 U.S.C. § 3522. With respect to the Inspector General in the Synthetic Fuels Corporation, Congress has provided both a substantive limitation—he may be removed by the President only for neglect of duty or malfeasance in office—and the requirement that the President communicate the reasons for removal to Congress. 42 U.S.C. § 8718.

These examples manifest a serious effort by Congress in a variety of contexts to address the inherent tension between the need for decision-makers who are insulated from immediate political influence and the need for a politically accountable Chief Executive. And it is the political branches, working through the legislative process, that the Framers intended would be responsible for working out solutions to these sorts of structural dilemmas. The Constitution provides directly for the three institutions at the apex of the federal government —the Congress, the President, and the Supreme Court, and

> [t]he remainder of government was left undefined, in the expectation that congressional judgments about appropriate structure would serve so long as they observed the two prescriptive judgments embodied in the Constitution: that the work of law-administration be under the supervision of a unitary, politically accountable chief executive; and that the structures chosen permit, even encourage, the continuation of rivalries and tensions among the three named heads of government, in order that no one body become irreversibly dominant and thus threaten to deprive the people themselves of their voice and control.
>
> [This] judgment leaves Congress free in particular cases to choose among a variety of relationships

> the President might have with those who actually do the work of law-administration . . . . [Strauss, *supra*, 84 Colum. L. Rev. at 667.]

The question of Congress' power to legislate with regard to the removal of federal officers is thus at the furthest remove from the separation of powers questions considered in *Buckley* and in *Chadha*. Both of those cases concerned *express constitutional limitations* on the legislative power. Similarly, the point discussed in part I of this brief involves the exercise by Congress of a power not granted to the legislative branch. Here, in contrast, the Constitution and original materials leave no doubt that the political branches are accorded a broad area of freedom within which to reach any of a multitude of practical arrangements in working out the structure of the government and to vary those arrangements from time to time based on experience. This Court should be slow to limit that freedom through a set of rules drawn out of the Constitution by the delicate—and hazardous—process of implication. *Chevron*, *supra*, 52 L.W. at 5853. Against this background there can be no doubt that the Court should not reach out for occasions to set the metes and bounds of the legislative power to regulate the removal process.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

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