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

IN THE

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A BOWSHER,
COMPTROLLER GENERAL OF THE UNITED STATES, *et al.*,
Appellants,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

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

REPLY BRIEF FOR APPELLANT COMPTROLLER GENERAL OF THE UNITED STATES

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REPLY BRIEF FOR APPELLANT COMPTROLLER GENERAL OF THE UNITED STATES

In its brief for the United States, the Department of Justice puts forward two independent grounds, not adopted by the district court, for affirming the judgment below: It asserts that the Comptroller General is an "officer of the Legislative Branch" who cannot perform administrative functions for that reason alone, even if the removal provision is held invalid and severed from the 1921 Act.[1] It also asserts that *no* independent officer could perform the predictive factfinding functions assigned to the Comptroller General by the 1985 Act, because they can be performed only by officers removable at the pleasure of the President.[2]

Neither argument is correct. Moreover, the Department's defense of the ground the district court did adopt —that the 1985 delegation, rather than the 1921 removal provision, must be struck down—highlights the basic flaw in the district court's ruling. The Department's contention that the removal provision is "constitutionally defective in its own right," [3] if accepted, would make the 1921 removal provision a nullity that could have no bearing on the validity of the 1985 delegation.

I. THE COMPTROLLER GENERAL IS NOT A MERE LEGISLATIVE OFFICER BUT AN INDEPENDENT OFFICER OF THE UNITED STATES.

The Department asserts that the Comptroller General "uniformly has been regarded by all three Branches of Government . . . as an officer of the Legislative Branch" and that as such he cannot perform administrative functions.[4] On that view, Congress acted gratuitously in au-

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[1] Dept. Justice Br. at 9, 36-44.

[2] *Id.* at 9-11, 44-51.

[3] *Id.* at 9.

[4] *Id.*

thorizing the President to appoint the Comptroller General by and with the advice and consent of the Senate.[5]

The Department's contention is wholly inconsistent with the historical antecedents of the Comptroller General's office and with the understandings of the Congress in enacting the 1921 Act, of President Wilson in his 1920 veto message, and of this Court in *Myers v. United States*[6] when it quoted President Wilson's position with approval. As we have shown in our opening brief, the premise of the 1921 Act was to create the Comptroller General as an officer of the United States charged with administrative as well as legislative and judicial functions. The statute transferred to him all of the administrative and other functions previously performed in the Treasury Department by the Comptroller of the Treasury, an officer of the United States.[7] That is why Congress provided for appointment of the new officer by the President with the advice and consent of the Senate, as Article II requires. It was precisely because of the Comptroller General's status as a presidentially appointed officer of the United States charged with administrative functions that President Wilson objected to congressional participation in his removal, an objection that this Court, at the urging of Solicitor General Beck, expressly seconded in *Myers*.[8] After the veto, the House

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[5] *Id.* at 37 n.22.

[6] 272 U.S. 52 (1926).

[7] Comp. Gen. Br. at 18-21; *see Ameron, Inc. v. United States Army Corps of Engineers*, Nos. 85-5226, 85-5377, slip op. at 5 (3d Cir. Mar. 27, 1986); *Globe Indemnity Co. v. United States*, 291 U.S. 476, 479-80 (1934). The Department thus misreads history in terming the Comptroller General "the Legislative Branch counterpart of the Director of the Bureau of the Budget." Dept. Justice Br. at 36. There was no legislative counterpart of the Bureau of the Budget (now OMB) until CBO was created by the Congressional Budget and Impoundment Control Act of 1974, tit. 2, Pub. L. No. 93-344, 88 Stat. 297, 302. *See, e.g.*, S. Rep. No. 579, 93d Cong., 1st Sess. 31 (Nov. 28, 1973).

[8] 272 U.S. at 52; *see* Substitute Brief for the United States on Reargument 94-101 (Apr. 13, 1925).

floor manager expressly agreed with President Wilson that "the officer we are creating here [is] an officer of the United States, and his appointment would have to fall under the provisions of Article II of section 2 of the Constitution." [9] Congress in 1921 disagreed only on what manner of removal the Constitution permitted for such an officer.

If the 1921 Act had created the Comptroller General as a merely legislative officer, there would have been no constitutional need or authority for the provision authorizing his appointment by the President.[10] There would have been no constitutional basis for President Wilson's objection to the removal provision or for this Court's approval of President Wilson's position in *Myers*.[11] Justices

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[9] 59 Cong. Rec. 8612 (1920) (Rep. Good) Chief Justice Taft, testifying between his presidency and his appointment to the Supreme Court, agreed that presidential appointment was not gratuitous but essential: "There is no doubt you could create the officer, but, in view of the provision that the President appoints . . . officers of the United States, I doubt whether you could appoint him." *National Budget System: Supplement to Hearings Before the House Select Comm. on the Budget*, 66th Cong., 1st Sess. 479 (1919).

[10] The Constitution treats legislative officers very differently from officers of the United States. Each House "shall chuse" its own officers, U.S. Const. art. I, §§ 2(5), 3(5), without action by the President. *See Buckley v. Valeo*, 424 U.S. 1, 137-38 (1976) (per curiam). Members of Congress and legislative officers, unlike the Comptroller General and other officers of the United States, are not impeachable. *See, e.g.*, J. Story, *Commentaries on the Constitution of the United States* § 793 (Boston 1905); 3 A. Hinds, *Hinds' Precedents of the House of Representatives* §§ 2310, 2316, 2318 (1907).

[11] In addition to quoting from the Wilson veto message, 272 U.S. at 169, the majority held that the Tenure of Office Act of 1867 was unconstitutional "in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, . . . *and that subsequent legislation of the same effect was equally so.*" *Id.* at 176 (emphasis added). That reference plainly included the removal provision of the 1921 Act, which had been called to the Court's attention by counsel on both sides. *See* 272 U.S. at 62; Substitute Brief for the United States on Reargument 94-101 (Apr. 13, 1925).

Brandeis and McReynolds, in separate dissents joined by Justice Holmes, interpreted the majority ruling as invalidating the removal provision of the 1921 Act.[12] That could be so, of course, only if the Comptroller General is an officer of the United States charged with administrative duties. And the Department would have no basis for contending now that the removal provision is "constitutionally defective in its own right" [13] if the Comptroller General were not such an officer but were merely a legislative officer.[14]

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[12] 272 U.S. at 181-82 (McReynolds, J.); *id.* at 263-64 (Brandeis, J.). Professor Thomas Reed Powell reached the same conclusion. Powell, *Spinning Out Executive Power*, 48 New Republic 369 (1926).

[13] Dept. Justice Br. at 9.

[14] See Professor Powell's thoughtful 1920 article on President Wilson's veto message, concluding that the Comptroller General is an officer of the United States. Powell, *The President's Veto of the Budget Bill*, 9 Nat'l Mun. Rev. 538 (1920). The Comptroller General's status precisely fits the definition of an officer of the United States set forth in *Buckley v. Valeo*: "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]." 424 U.S. at 126; *see id.* at 131, 141. The Court observed that the Comptroller General, who "had significant duties" under the 1971 version of the 1974 statute at issue in *Buckley*, is so appointed. *Id.* at 128 n.165.

The Department finds support for the "legislative" character of GAO in the 1980 statute authorizing Congress to propose names to the President for appointment as Comptroller General. Dept. Justice Br. at 40-41; *see also* Synar Br. at 47; NTEU Br. at 40. But the Department misstates the effect of that statute. The 1980 law does not, as the Department implies, limit the President to names proposed by Congress. Congress in enacting that law accepted the Executive's view that the President must constitutionally "retain[] the sole authority of nomination, and may, in his discretion, select for appointment an individual whose name is not" on a recommended list in order to "preserve[] the President's authority under the Appointments Clause." S. Rep. No. 570, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Ad. News 732, 741; *see id.* at 14, 1980 U.S. Code Cong. & Ad. News at 745. The Executive had insisted on that prerogative precisely because the Comptroller General is an officer of the United States performing administrative functions, *see infra* p. 8; and it indicated to Congress its ac-

It is true, of course, that Congress, the courts, and commentators have frequently referred to the Comptroller General as "legislative" or as an "arm" or "agent" of Congress or the Legislative Branch. As we have shown, many of these references were intended to reflect the Comptroller General's independence of the Executive, just as those who attacked this independence, like Solicitor General Beck in *Myers*, claimed that the Comptroller General was performing "executive" functions and as an "executive" officer ought to be under the control of the President.[15] And these characterizations were made for purposes unrelated to the Comptroller General's constitutional status—indeed, most of them were made simultaneously with other congressional declarations of his "executive" status.[16] The most significant of the Comp-

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ceptance of the 1980 statute as consistent with its constitutional position. *E.g., GAO Legislation: Hearings on S.1878 & S.1879 Before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 87 (1979) (Dep. Asst. Att'y Gen. Hammond) (*"1979 Senate Hearings"*); *General Accounting Office Act of 1979: Hearing on H.R. 24 Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 90 (1979) (OMB Dir. McIntyre) (*"1979 House Hearing"*).

[15] *See* Comp. Gen. Br. at 26-27.

[16] For example, the "legislative" labels that the Department appears to find most significant—the Reorganization Acts of 1945 and 1949 (Dept. Justice Br. at 39)—are utterly devoid of constitutional significance. In 1932, President Hoover had proposed to emasculate GAO by transferring many of its duties to the Bureau of the Budget. F. Mosher, *The GAO: The Quest for Accountability in American Government* 86-88 (1979). Congress in 1945 and 1949 used the "legislative" label to prevent similar presidential efforts, as is explained in the Senate report on the 1945 statute. S. Rep. No. 638, 79th Cong., 1st Sess. 4-5 (1945). Eight days after the 1945 Act, Congress categorized GAO among the "Independent Executive Agencies" in other legislation. 59 Stat. 632, 635, 639 (1945). Three days after the 1949 statute, Congress categorized GAO among the "Independent Offices," 63 Stat. 231, 253 (1949), and two months later among the "executive bureaus, boards, commissions, corporations, agencies and offices," 63 Stat. 631, 644 (1949).

troller General's characteristics—independence from Congress, as well as from the executive—is reflected in this Court's most recent passing reference to GAO as "an independent agency within the Legislative Branch that exists in large part to serve the needs of Congress." [17] That description is not inconsistent with the Comptroller General's status as an independent officer of the United States charged with administrative functions in addition to his legislative and judicial duties.[18]

The other references cited by the Department are equally irrelevant to the constitutional issue here. The Department observes that the Comptroller General is required to report to Congress and assist it in other ways.[19] So, of course, are innumerable other independent officers and officers in the executive departments.[20] The Depart-

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[17] *Bowsher v. Merck & Co.*, 460 U.S. 824, 844 (1983).

[18] Congress has assigned administrative functions to other duly appointed officers of the United States sometimes associated with the Legislative Branch. *E.g.*, 2 U.S.C. § 136 (1982); 17 U.S.C. §§ 701(a), 702 (1982) (Librarian of Congress, appointed by President with advice and consent of Senate, oversees Copyright Office, including issuance of copyright regulations); 44 U.S.C. §§ 301, 1506 (1982 & Supp. II 1984) (Public Printer, appointed by President with advice and consent of Senate, has administrative functions); 40 U.S.C. §§ 13a, 13b, 13e, 162 (1982) (Architect of Capitol, appointed by President alone, has administrative functions).

Congress recognized that the administrative functions assigned to these officers necessitated that they be appointed as prescribed in the Appointments Clause. *See, e.g.*, 2 Cong. Rec. 3120 (1874) (remarks of Rep. Hale); 29 Cong. Rec. 386 (1896) (remarks of Rep. Cannon). The Department's argument apparently would invalidate these officers' performance of administrative functions. Rejecting a similar argument, the Fourth Circuit has upheld the Librarian's administration of the copyright laws on the ground that he is a duly appointed officer of the United States. *Eltra Corp. v. Ringer*, 579 F.2d 294, 300 (4th Cir. 1978).

[19] Dept. Justice Br. at 38.

[20] Reporting responsibilities have been imposed on officers of the United States since the beginning of the Republic. *E.g.*, Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66 (current version at 31 U.S.C. § 331(d) (1982)) (Secretary of Treasury required to report to

ment notes that GAO's appropriations are currently included among those of the Legislative Branch.[21] It does not mention that GAO's appropriations were included among the "independent executive" agency appropriations by the Congress that enacted the 1921 Act and by all subsequent Congresses until they found their way into "legislative" appropriations in 1964.[22] The Department finds significance in the requirement that the President forward GAO's budget estimates to Congress without change.[23] But many other independent agencies have the same protection, while still others are authorized to submit their requests to Congress directly.[24]

Moreover, the Department's asserted "uniform[ity]" of characterization disregards the numerous instances—some mentioned in our opening brief—in which all three Branches have characterized the Comptroller General as

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either House of Congress on request). Current examples include: 15 U.S.C. § 1519 (1982) (Secretary of Commerce); 2 U.S.C. § 475(d) (1982) (executive departments or agencies required to furnish information to Office of Technology Assessment); 29 U.S.C. § 6 (1982) (Bureau of Labor Statistics). The Department fails to note that the same section of the 1921 Act on which it relies requires the Comptroller General also to make reports to the President. 1921 Act § 312(a), J.A. 98.

[21] Dept. Justice Br. at 39-40.

[22] *See, e.g.*, 42 Stat. 635, 640 (1922); 42 Stat. 1227, 1231 (1923). GAO's appropriations were again included among the "independent executive agencies" in 1965 and 1966. For a list of the relevant appropriations bills from 1922-69, see Appendix A.

[23] Dept. Justice Br. at 40; *see* Synar Br. at 47.

[24] *See* 39 U.S.C. § 2009 (1982) (U.S. Postal Service); 19 U.S.C. § 2232 (1982) (International Trade Commission); 31 U.S.C. § 1108(f) (1982) (Interstate Commerce Commission); 15 U.S.C. § 2076(k)(1) (1982) (Consumer Product Safety Commission); 7 U.S.C. § 4a(h)(1) (1982) (Commodities Futures Trading Commission); 2 U.S.C. § 437d(d)(1) (1982) (Federal Election Commission); 49 U.S.C. § 1903(b)(7) (1982) (National Transportation Safety Board); 5 U.S.C. § 1205(j) (1982) (Merit Systems Protection Board); *cf.* 42 U.S.C. § 7171(j) (1982) (Federal Energy Regulatory Commission).

an executive officer or as an officer of the United States. The Senate sponsors of the final 1985 Act described the Comptroller General as an "executive" officer and proposed him for his role under the statute precisely because of that status.[25] The Department itself has joined in that characterization, as early as Solicitor General Beck's 1925 assertion in his brief in *Myers* that the removal provision is invalid because the Comptroller General is an "official of the executive department" [26] and as recently as 1979. When the possibility arose in the 1970s that Congress might authorize itself to appoint the Comptroller General, a Department spokesman responded:

> "You can't do that. You could do it if the General Accounting Office were an agency that only performed legislative functions. But there are a number of responsibilities that GAO now has and I am sure it would want to retain that are really executive in nature—their enforcement of a variety of programs that come within what is customarily thought of as execution of the laws.
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> "If that is the case, then the head of that department has to be selected in a way consistent with the appointments clause of the Constitution." [27]

The Department also has published its opinion that the GAO is an "independent agency of the United States" for purposes of Title V of the Ethics in Government Act, which punishes conflict of interest violations by officers "of the executive branch of the United States Govern-

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[25] *See* Comp. Gen. Br. at 40 & n.118; *see also supra* note 16.

[26] *See* Comp. Gen. Br. at 27, 47.

[27] *1979 Senate Hearings* at 77 (Dep. Asst. Att'y Gen. Hammond); *accord 1979 House Hearing* at 96 (OMB Dir. McIntyre); *Strengthening Comptroller General's Access to Records; New Procedure for Appointment: Hearings on H.R. 12171 Before a Subcomm. of the House Comm. on Government Operations*, 95th Cong., 2d Sess. 56, 77-79 (1978) (Dept. Asst. Att'y Gen. Hammond); *cf. id.* at 47-48 (Comp. Gen. Staats). Congress accepted that view. *See supra* note 14.

ment, [and] of any independent agency of the United States." [28]

The courts too have recognized that the Comptroller General has administrative or "executive" functions and —except for the decision below—have uniformly upheld his capacity to perform them.[29] And the very scholars who the Department asserts have "recognized the position of the Comptroller General within the Legislative Branch" in fact mostly disagree with the Department's position here.[30]

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[28] 3 Op. Off. Legal Counsel 433, 433, 436 (1979) (construing 18 U.S.C. § 207).

[29] *Ameron, supra* (criticizing the decision below), *aff'g*, 607 F. Supp. 962 (D.N.J. 1985); *Lear Siegler, Inc. v. Lehman*, No. CV 85-1125-KN (C.D. Cal. Nov. 21, 1985); *see United States ex rel. Brookfield Construction Co. v. Steward*, 234 F. Supp. 94, 99-100 (D.D.C.), *aff'd*, 339 F.2d 753 (D.C. Cir. 1964) (Comptroller General performs "executive" as well as "legislative" functions, in same manner as other independent agencies); *Lawrence v Staats*, 665 F.2d 1256, 1258 (D C. Cir. 1981) ("GAO [is] an executive agency as defined in 5 U.S.C. § 105"); *Williams v. Phillips*, 360 F. Supp. 1363, 1370 (D.D.C. 1973) (GAO is among the "Executive agencies not contained within the Executive departments"); *cf. Buckley v. Valeo*, 424 U.S. at 128 n.165. *But cf. Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 201 n.1 (D.C. Cir. 1984).

[30] Dept. Justice Br. at 43 n.30. The first work the Department cites is a 1929 article that concluded from the 1921 Act and its legislative history that the Comptroller General is an executive officer and that the 1921 Act's removal provision is void under *Myers*. Langeluttig, *Legal Status of the Comptroller General of the United States*, 23 Ill. Rev. 556, 582-83, 586 (1929). Another work simply characterizes the Comptroller General as an "agent" of Congress and then demonstrates that he is indistinguishable in this respect from the Federal Trade Commission and is thus covered by *Humphrey's Executor v United States*, 295 U.S. 602 (1935). Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 Cornell L.Q. 215, 240 (1936). Mosher notes that Congress has characterized GAO as "legislative" in exempting that agency from the President's reorganization power. But he goes on to observe that the Comptroller General in his nonlegislative functions "is an independent officer of the United States, substantially independent of either branch." F. Mosher,

In any event, this Court properly has avoided "the tyranny of labels." [31] In *Humphrey's Executor* and subsequent decisions, the Court has recognized that independent officers of the United States usually perform functions that appertain to more than one Branch, and it has determined the constitutional capacity of such officers from their manner of appointment, tenure, and functions.[32]

In upholding the power of independent officers properly appointed under the Appointments Clause to perform administrative along with legislative and judicial functions, the Court has not found it necessary to pigeonhole each independent officer within a single Branch of the Government. In *Humphrey's Executor*, the members of the Federal Trade Commission, while "wholly disconnected from the executive department" (except for their appointment), were termed "an agency of the legislative and judicial departments" [33]—a characterization that belies the Justice Department's notion that every officer must be categorized on an either/or basis like male or female. In *Wiener*, the War Claims Commission was found to be independent of "either the Executive or the Congress" [34] in performing its judicial functions, but it was not categorized as within any one of the three Branches. In *Buckley*, the mixed functions of the Fed-

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The GAO: The Quest for Accountability in American Government 104-05, 242 (1979). The Department does not cite Professor Powell's 1920 article, *supra* note 14, concluding that the Comptroller General is an officer of the United States.

[31] *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) (Cardozo, J.).

[32] *See Buckley v. Valeo*, 424 U.S. at 137-41; *Wiener v. United States*, 357 U.S. 349, 353-56 (1958); *Humphrey's Executor*, 295 U.S. at 628, 631-32; *cf. Glidden Co. v. Zdanok*, 370 U.S. 530, 552-61, 572-83 (1962). Both the majority and concurring opinions in *Ameron, supra,* recognize the mixture of functions that independent officers of the United States commonly perform.

[33] 295 U.S. at 630.

[34] 357 U.S. at 355-56.

eral Election Commission were found to include enough administrative duties to require that its members be duly appointed officers of the United States, and the Commission was compared to other independent regulatory agencies whose members the President had no right to remove at will, but it was not classified as belonging to any particular Branch.[35]

As Justice Sutherland noted in *Springer*, in a passage quoted twice in *Buckley*, "while the legislature cannot engraft executive duties upon a legislative office[r]" appointed by the legislature, "the case might be different if the additional duties were devolved upon an appointee of the executive." [36] Accordingly, so long as an official whose functions appertain in some respects to the Legislative Branch is a properly appointed officer of the United States, this Court has not denied him the constitutional capacity to perform administrative functions.[37]

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[35] 424 U.S. at 140-41.

[36] *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 202 (1928), *quoted in Buckley*, 424 U.S. at 136, 139.

[37] The congressional appellees argue that, regardless of the constitutional capacity of the Comptroller General, the 1985 Act is invalid because he "shares" the administration of the Act with the Director of CBO, a mere legislative officer Synar Br. at 42-48. That argument is no more correct than the "rubber stamp" argument they made below, which the district court rejected in a footnote J.A. 55 n.18. The Act is clear in giving the Comptroller General the factfinding authority and the Directors of OMB and CBO merely advisory roles, as the Department of Justice recognizes in attacking the delegation to the Comptroller General. *See* Dept. Justice Br. at 27-28. The Comptroller General's affidavit makes clear that he understands that the Act gives him, and not the Directors, the duty to make the statutory findings J.A. 21-25. His initial report disagreed with the Directors' positions on a number of issues; and he found it unnecessary to resolve other issues relating to their economic forecasts because the statutory cap on sequestrations in 1986 rendered those issues moot. *See* GAO, Budget Reductions for FY 1986, Report to the President and Congress, 51 Fed. Reg. 2811, 2813-14 (1986).

II. THE FACTFINDING DUTIES ASSIGNED TO THE COMPTROLLER GENERAL BY THE 1985 ACT ARE NOT REQUIRED TO BE DELEGATED TO AN OFFICER REMOVABLE AT THE PLEASURE OF THE PRESIDENT.

The Department argues that the duties assigned to the Comptroller General by the 1985 Act can be delegated only to an officer removable at the pleasure of the President.[38] That position, which goes beyond the decision below, is contrary to almost a century of constitutional history. Its adoption would bring an end not only to the important independent functions of the Comptroller General but also to the principal functions of a host of other independent agencies.[39]

The authorities cited by the Department provide little support for its view. The Decision of 1789 establishes at most that the Secretary of State and comparable officers must be removable at the President's will.[40] And *Myers*, after *Humphrey's Executor*, stands only for the proposition that there are some "purely executive officers" who must be so removable.[41] *Myers* does not say what officers or functions besides the Secretary of State and his broad foreign affairs duties fall within that category.[42]

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[38] Dept. Justice Br. at 44-51.

[39] Appendix B sets forth statutory provisions relating to the appointment, tenure, and responsibilities of a number of officers who perform administrative functions and enjoy some degree of protection against removal at the pleasure of the President.

[40] *See* Dept. Justice Br. at 21-23. Historians have concluded that a majority of the first Congress did not subscribe even to that proposition. *E.g.*, Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353, 360-62 (1927).

[41] *Myers* may establish also that Congress is forbidden to participate in the removal of an officer of the United States. *See infra* Part III.

[42] As we have noted, postmasters before and since *Myers* have been transferred out of the "purely executive" category without constitutional challenge. *See* Comp. Gen. Br. at 46-47.

The Department apparently concedes that Congress can "immunize" an "inferior Officer" from presidential removal. Dept. Justice

Only a week after the Decision of 1789, Madison expressed the insight that protection against removal at will is appropriate for officers whose responsibilities appertain to more than one Branch, when he argued with respect to the Comptroller General's predecessor, the Comptroller of the Treasury, that "an officer of this kind should not hold his office at the pleasure of the executive branch of the Government" and that "the legislative power is sufficient to establish this office on such a footing as to answer the purposes for which it is prescribed." [43]

The Department acknowledges that *Humphrey's Executor* upheld the power of Congress to create independent officers of the United States removable by the President only for cause. But it appears to argue that such officers may perform only "quasi-judicial" functions, which the Department defines narrowly as "find[ing] historical facts pertaining to a particular person or transaction and render[ing] a decision regarding the legal consequences of past conduct." [44] An independent officer cannot, on that view, be empowered to take civil enforcement action, to make predictive findings, or to adopt substantive rules to carry out the responsibilities assigned him by statute.[45] That position is inconsistent with *Humphrey's Executor*

Br. at 25-26 n 16. However, it asserts that "there can be no serious contention . . . that the Comptroller General . . . is an 'inferior officer' " *Id.* To the contrary, both President Wilson and the congressional sponsors of the 1921 Act considered the Comptroller General to be an "inferior Officer." *See* 59 Cong. Rec. 8609 (1920); 61 Cong. Rec. 982 (1921); *cf. id.* at 1856-57 (Reps. Denison and Byrns); *Myers*, 272 U.S. at 204 (McReynolds, J., dissenting) (equating superior officers with members of the cabinet). Professor Powell shared that view. Powell, *supra* note 14, 9 Nat'l Mun. Rev. at 539.

[43] 1 Annals of Cong. 635-36 (1789) (J. Gales ed. 1834); *see* Comp. Gen. Br. at 21.

[44] Dept. Justice Br. at 10; *see id.* at 46.

[45] *See id.* at 10, 45-47.

and other decisions and would, if accepted, invalidate the charters and functions of many independent agencies.

The Department's crabbed reading of *Humphrey's Executor* ignores the point that the FTC had then and still has administrative duties that cannot be squeezed within the Department's narrow "quasi-judicial" category.[46] This Court recognized that the FTC had direct enforcement powers under Section 5 of the Federal Trade Commission Act.[47] The FTC had (and still has) authority under the Clayton Act to make predictive findings that proposed mergers "may . . . substantially lessen competition or tend to create a monopoly" and the power to enforce those findings through administrative orders and injunctive suits in federal courts.[48]

There is nothing unique about the Comptroller General's responsibility to make predictive findings of fact under the 1985 Act. Among the many independent agencies whose statutory responsibilities involve making broad predictive findings of fact are the Governors of the Federal Reserve Board in establishing the discount rate, regulating open-market transactions, and setting standards for bank holding company financial structures and reserves;[49] the Interstate Commerce Commission, the Federal Communications Commission, the Federal Reserve Board, and (as noted above) the FTC in enforcing

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[46] *See* Comp. Gen. Br. at 43; *see also Buckley v. Valeo,* 424 U.S. at 141.

[47] *See* Comp. Gen. Br. at 42-44.

[48] Clayton Act §§ 2, 3, 7, 11, ch. 323, 38 Stat. 730, 730-32, 734 (1914) (codified at 15 U.S.C. §§ 13, 14, 18, 21).

The Department grudgingly acknowledges in a footnote that "agencies such as the FTC often perform functions that are indistinguishable from the enforcement of the law undertaken by executive departments." Dept. Justice Br. at 46 n.32. What it does not acknowledge are the implications of that practice, and of this Court's decisions upholding the practice.

[49] 12 U.S.C. §§ 263, 357, 461 (1982).

the antimerger provisions of the Clayton Act;[50] the International Trade Commission in finding threatened injury to a domestic industry from imports;[51] the Federal Communications Commission in allocating radio frequencies and "deregulating" common carriers;[52] the Securities and Exchange Commission and the Commodities Futures Trading Commission in making rules as to commission rates, tender offers, disclosure by issuers, and the conduct of securities markets;[53] the Consumer Product Safety Commission in setting product safety standards;[54] the Nuclear Regulatory Commission in setting safety standards and issuing licenses to build and operate nuclear power plants;[55] the Federal Energy Regulatory Commission in issuing licenses for interstate gas pipelines and for importation and exportation of natural gas and in ordering interconnection of transmission lines;[56] and the Interstate Commerce Commission in regulating railroad and trucking rates and issuing common carrier licenses.[57] On the Department's reading, *Hum-*

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[50] 15 U.S.C. §§ 13, 14, 18, 21 (1982 & Supp. II 1984).

[51] 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673d, 2251 (1982 & Supp. II 1984).

[52] *E.g.*, 47 U.S.C. §§ 307(a), 309(a) (1982) (radio licensing); *Policy & Rules Concerning Rates for Competitive Common Carrier Services & Facilities* (First Report & Order), 85 F.C.C.2d 1 (1980) (common carrier deregulation); *see FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-14 (1978) (FCC often must determine "the direction in which future public interest lies").

[53] *E.g.*, 15 U.S.C. §§ 77j(c), 77s(a), 78f(a),(e)(1)-(2), 78j, 78k-1(a)(2),(c), 78n(a),(b),(d)(1),(4),(5), 78o(a), 78q-1(d)(1), 78s(c), 78w(a)(1),(2) (1982 & Supp. II 1984) (SEC); 7 U.S.C §§ 6a(1), 6c(e) (1982) (CFTC).

[54] 15 U.S.C. § 2056(a) (1982).

[55] 42 U.S.C. §§ 2133, 2201(b) (1982).

[56] 15 U.S.C. §§ 717b, 717f (1982); 42 U.S.C. § 7172(a) (1982); *see FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961) (upholding predecessor of FERC in forecasting "the direction in which future public interest lies").

[57] *E.g.*, 49 U.S.C. §§ 10704, 10901-03 (1982); *see United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945)

phrey's Executor would not allow Congress to enact laws delegating these functions to independent officers of the United States protected against removal by the President at will.

The Department's contention thus threatens the status and functions of a considerable number of independent officers and agencies in addition to the Comptroller General, just as was true of the Government's argument rejected in *Humphrey's Executor*. The Court there noted that "[t]he Solicitor General, at the bar, . . . with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims." [58] This Court expressly rejected Solicitor General Reed's invitation as to the Federal Trade Commission and the Interstate Commerce Commission, both of which then performed (and still perform) functions that require making broad predictive findings of fact. This Court should now reject this renewed invitation as to the Comptroller General and all the other independent officers of the United States whose functions would otherwise be struck down.[59]

(holding that "[f]orecasts as to the future are necessary" in ICC application of public interest standard).

[58] 295 U.S. at 629.

[59] The Department's assertion that the Comptroller General's duties under the 1985 Act are unusually "sweeping," Dept. Justice Br. at 48, 51, 51 n.33, is answered by the district court's observations that "the *only* discretion conferred is the ascertainment of facts and the prediction of facts" and that the Comptroller General "is not made responsible for a single *policy* judgment." J.A. 51 (emphasis in original). The Department's contention cannot be squared with its own argument, successful below, that the delegation to the Comptroller General complies with the delegation doctrine because it has been thus narrowly circumscribed.

We agree with the court below that the 1985 Act does not involve an unconstitutional delegation of power, and we join the reply brief of the Senate on that issue.

The Department also argues that the functions delegated by the 1985 Act have the particular vice of resulting in findings that "are binding upon the President and, through him, the heads of the executive departments and agencies." [60] But that is the result of the Act, as is generally true when an independent officer performs a statutory function.[61] The Executive is bound by and must act on the personnel decisions of the Merit Systems Protection Board; [62] the "injury" determinations of the International Trade Commission; [63] the regulations of the Federal Reserve Board under the Truth in Lending Act; [64] the orders of the Federal Labor Relations Authority with respect to executive agency labor practices and collective bargaining; [65] the rulings of the Consumer Product Safety Commission with respect to products that must be refused admission into the United States; [66] the decisions of the National Transportation Safety Board on review of actions by the Secretary of Transportation with respect to operating certificates or licenses; [67] the common carrier

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[60] Dept. Justice Br. at 10.

[61] The Department suggests that the Comptroller General is given the authority to "direct the execution of the laws by the President." *Id.* at 48. But it is the 1985 Act, not the Comptroller General, that directs the President to sequester funds in accordance with the Act's provisions. *Cf. United States v. Grimaud,* 220 U.S. 506, 510, 515, 522-23 (1911).

[62] 5 U.S.C.A. § 1205(a)(2) (West Supp. 1986); *see Kerr v. National Endowment for the Arts,* 726 F.2d 730, 733 (Fed. Cir. 1984).

[63] 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673d, 2251-52 (1982 & Supp. II 1984).

[64] 15 U.S.C. § 1607(a) (1982); *see* Comp. Gen. Br. at 44-46.

[65] 5 U.S.C. §§ 7104-05 (1982 & Supp. II 1984); *see id.* § 7101 note, Ex. Order 11491; *NTEU v. FLRA,* 732 F.2d 703 (9th Cir. 1984); *AFGE v. FLRA,* 716 F.2d 47, 50 (D.C. Cir. 1983); *IRS v. FLRA,* 671 F.2d 560, 561 (D.C. Cir. 1982).

[66] 15 U.S.C. § 2066 (1982).

[67] 49 U.S.C. § 1903(a)(9) (1982).

rate decisions of numerous independent regulatory agencies on services purchased by the Executive; [68] and, since 1921, the decisions of the Comptroller General on Executive Branch accounting standards and on the settlement of Executive Branch disbursement accounts.[69] In short, the Department's declaration that, where a law imposes responsibilities on the President, he has the "right . . . to make any necessary legal or factual determinations that Congress has not resolved in the statute itself" [70] is at odds with the reality of existing administrative practice and the practicalities of modern government. If the delegation of a particular function to an independent officer is otherwise valid, the binding effect of his decisions on the Executive is not a ground for voiding the delegation.[71]

The role assigned to the Comptroller General in the 1985 Act was a compromise arising out of the unwillingness of the House to delegate the factfinding responsibility to the President's agent, the Director of OMB, and the unwillingness of the Senate and the Executive (for

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[68] *See, e.g., AT&T (TELPAK Service)*, 38 F.C.C. 370, 374-75, 382, 387-90, *aff'd*, 37 F.C.C. 1111 (1964), *recon. denied*, 38 F.C.C. 761 (1965).

[69] Budget & Accounting Act of 1921, § 309, ch. 18, 42 Stat. 20, J.A. 96 (current version at 31 U.S.C. § 3511(c) (1982)). The courts also may issue orders requiring particular action by the President and other Executive Branch officers. *See United States v. Nixon*, 418 U.S. 683, 714 (1974) (upholding district court subpoena issued to President); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584, 589 (1952) (upholding district court order enjoining Secretary of Commerce from carrying out Executive Order issued by President).

[70] Dept. Justice Br. at 50.

[71] Congress considered the President's role in issuing the order to be largely a formality. *See* 131 Cong. Rec. S12,645-46 (daily ed. Oct. 4, 1985) (Sen. Boren); *id.* at S12,703 (Sen. Rudman); *id.* at S12,670 (Sen Rudman). Senators Boren and Gramm discussed similar procedures used in Oklahoma and Texas. *Id.* at S12,645, S12,647. Senator Gramm stated that such procedures are used in 43 states. *Id.* at S12,645.

constitutional reasons, among others) to see that responsibility delegated to a legislative officer, the Director of CBO.[72] The solution, not unlike that adopted in many previous disputes between the two Branches, was to delegate a responsibility arguably appertaining to both Branches to an officer of the United States substantially independent of either. The Department's extreme view that the Constitution, except for its expressly enumerated instances, bars any such "involvement by one Branch in the affairs of another," [73] would put an end not only to this innovative experiment but also to the century-old concept of the independent agency. Indeed, the Department's view, taken literally, would even encompass any delegation to executive departments of substantive rulemaking authority (a "legislative" function)—a practice the Department naturally defends.[74] No decision of this Court interprets the doctrine of separation of powers with such stultifying either/or rigidity.

III. IF THE CONSTITUTION FORBIDS CONGRESSIONAL INVOLVEMENT IN REMOVAL OF AN OFFICER OF THE UNITED STATES, THEN THE 1921 REMOVAL PROVISION HAS BEEN VOID FROM THE OUTSET AND HAS NO BEARING ON THE VALIDITY OF THE 1985 ACT.

The Department's defense of the ruling below actually highlights the error in that ruling. The Department argues, in effect, that the 1921 removal provision is void on its face. If so, then it is and has always been a nullity,

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[72] *See* Comp. Gen. Br. at 39; *see also* 131 Cong. Rec. S13,113 (daily ed. Oct. 10, 1985) (Senate Minority Leader Byrd) ("The Administration can . . . manipulate when the automatic cuts will go into effect if [OMB] cooks the numbers."); *id.* at S12,701 (Oct. 5) (Sen. Hart) (OMB "cooks its books regularly"). For a confirmation of the congressional suspicion that the Director of OMB was "cooking the books," see David Stockman's vivid confessions about "Rosy Scenario" in the excerpts from *The Triumph of Politics* published in Newsweek, April 21, 1986, at 52-59.

[73] Dept. Justice Br. at 14.

[74] *See id.* at 46 n.32.

and the district court erred in invoking that nullity to strike down the 1985 delegation of functions.

The Department reads *Myers* to establish that the Constitution forbids any congressional role in the removal of any officer of the United States, except by impeachment.[75] Our position is that, in the case of independent officers, Congress may play such a role under a statute authorizing removal by new legislation after hearing for cause. While *Myers* involved a "purely executive" officer, we recognize that the majority opinion can be read to bar any congressional role in the removal of any presidential appointee and that the Court in *Myers* was aware of the 1921 removal provision for the Comptroller General.[76] This aspect of *Myers* was not touched by *Humphrey's Executor* or *Weiner*, neither of which involved a statute asserting a congressional role in the removal process.

If the Department's reading of *Myers* is correct, the inescapable conclusion is that the 1921 removal provision is and always has been a nullity. Indeed, this was the position advocated by Solicitor General Beck.[77] The Department struggles to avoid this logical consequence of its own constitutional position, but without success. It cites the removal provision as evidence defining the Comptroller General as a purely legislative official.[78] But this

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[75] "[The Impeachment Clause] negates any implication of a power in Congress to vest itself (or either of its Houses) with the authority to remove any [civil officer of the United States] in some other manner or for some other reason." Dept. Justice Br. at 19-20; *see id.* at 9, 30-31.

[76] *See supra* pp. 2-4 & n.11.

[77] Mr. Beck not only urged the unconstitutionality of the 1921 removal position, but he also regarded it as severable. He argued that, after President Wilson's veto, President Harding had signed the 1921 Act "only because he was indisposed to defeat the whole budget law because of *one* provision, and he presumably felt that the constitutionality of *that* provision would be determined in due course." Substitute Brief for the United States on Reargument 96 (Apr. 13, 1925) (emphasis added), *Myers v. United States.*

[78] Dept. Justice Br. at 36-37.

attempt to make the tail wag the dog must fail, since Congress plainly intended the Comptroller General to be an officer of the United States capable of performing administrative functions, and since President Wilson and the entire Court in *Myers* plainly agreed that he was such an officer.[79] If the 1921 removal provision is incompatible with the status Congress intended for the Comptroller General, then there is no avoiding the issue whether that provision is unconstitutional and severable from the rest of the 1921 Act.

The Department defends the district court's refusal to consider the constitutionality of the removal provision as a part of the 1921 Act, but does appear to concede that the reason given by the district court was wrong. The Department recognizes that this Court in *Glidden* said that the statutes the Court found to be "inconsistent with the Tribunal's constitutional status" would have to fall, even though they were not the statutes that, in the district court's words, "either allegedly prohibit[] or allegedly authorize[] the injury-in-fact that confers standing upon the plaintiff." [80] *Glidden* applied the accepted principle that an asserted constitutional incompatibility between two statutes, like other severability issues, should be resolved in the manner that best achieves congressional intent. The district court did not follow that principle, but used the 1921 removal provision as a sword to strike down the 1985 delegation without even considering the constitutionality and severability of the 1921 removal provision in the context of the 1921 Act.

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[79] *See supra* pp. 2-4.

[80] Dept. Justice Br. at 56 n.36; *see* NTEU Br. at 44; J.A. 60. The Department asserts that "there was no majority of the Court on the severability issue" in *Glidden*. That is incorrect Justice Clark and Chief Justice Warren agreed with the plurality in concluding that the earlier jurisdictional statutes were invalid and that the courts should, "if and when such a case arose, . . . refuse to exercise such jurisdiction." 370 U.S. at 589 (footnote omitted); *see id.* at 587. *See also Ex Parte Bakelite Corp.*, 279 U.S. 438, 460 (1929).

The fallback mechanism in the 1985 Act, on which the Department places great reliance, is irrelevant to the severability of the removal provision from the 1921 Act. If the Department is correct in urging that the removal provision is invalid under *Myers*, that provision cannot affect the validity of a statute enacted 65 years later delegating an additional function to the Comptroller General. The fallback mechanism by its terms comes into play only "[i]n the event that any of the reporting procedures described in section 251 are invalidated." [81] There is no invalidity in the 1985 delegation of the reporting function to the Comptroller General, because either the 1921 removal provision is permissible for an officer of the United States performing administrative functions or it is not; if it is not, it has been void since 1921 and is severable from the 1921 Act. In either event, it cannot affect the validity of the 1985 Act.

The Department is asserting, in effect, that the existence of the fallback provision in the 1985 Act is itself a ground for invalidating the reporting mechanism. That is a result Congress obviously did not intend.

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[81] 1985 Act § 274(f)(1), J.A. 165.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

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