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., APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

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

REPLY BRIEF OF APPELLANT UNITED STATES SENATE

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REPLY BRIEF OF APPELLANT UNITED STATES SENATE

This reply addresses three issues: (1) plaintiffs' contention, rejected by the United States, that the Act unconstitutionally delegates legislative power; (2) the argument of the United States, not joined by the plaintiffs, that the Act may be administered only by an officer who serves "at the pleasure of the President"; and (3) the contention of all appellees that the fallback procedure requires the invalidation of the Act's reporting procedures. With regard to other issues, we join the replies of the Comptroller General and the House.

In an addendum to this reply we have reproduced the Third Circuit's decision in *Ameron, Inc.* v. *U.S. Army Corps of Engineers,* Nos. 85-5226 & 85-5377 (Mar. 27, 1986), issued after the filing of appellants' opening briefs. In that case, the Executive branch is challenging the constitutionality of provisions of the Competition in Contracting Act of 1984 which stay executive procurements pending the Comptroller General's disposition of timely bid protests. 31 U.S.C. 3553-3554. Even though the Comptroller General's ultimate disposition of bid protests is recommendatory only, the Executive branch is contesting the stay provisions on the ground that control over the timing of procurements is an executive function, which cannot be performed by the Comptroller General.

Because the Executive's challenge in *Ameron* presaged its arguments in this Court, *see* U.S. Br. 30-44, 51-55, the Third Circuit's convincing rejection of them is of great importance to these appeals. The court rejected the Executive's reliance both on "dicta and conclusory statements" about the Comptroller General (slip op. at 14) and on the existence of the legislative removal provision as probative of the Comptroller General's constitutional status. *Id.* at 14-18. The court held that the removal provision's lack of use over sixty-five years renders the removal question unripe, *see* Sen. Br. 25-29, and took specific issue with the conclusion of the district court in this

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case that *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50 (1982), supports a facial adjudication of the removal question. Slip op. at 17–18. The Third Circuit held further that, even if the removal issue were justiciable and the provision were found to be unconstitutional, the remedy would be "not to hold the 'stay' powers of the Comptroller General to be unconstitutional, but to sever as unconstitutional the provision which grants Congress the power to remove him." *Id.* at 18. Finally, the court sustained the Comptroller General's exercise of delegated executive functions because he is appointed by the President and he exercises his statutory duties independently. *Id.* at 19–25.

I. THE DISTRICT COURT CORRECTLY DECIDED THAT CONGRESS MADE THE CRITICAL LEGISLATIVE JUDGMENTS AND THAT THE ACT DELEGATES NO POLICY-MAKING POWER

As an alternative, and in their view preferred, ground for affirmance, plaintiffs claim that the Act unconstitutionally delegates legislative power by vesting in an administrative official the authority to determine whether projected deficits require application of the Act's standby administrative deficit reduction mechanism. Synar Br. 21–42; NTEU Br. 8–33. The district court soundly rejected this claim because "Congress has made the policy decisions which constitute the essence of the legislative function." J.A. 54.[1] We rely principally on the district court's considered disposition of plaintiffs' claim, J.A. 38–55, and here only highlight several of the reasons for upholding this portion of its decision.

Plaintiffs allege that the "one purpose" for creating the standby administrative mechanism was "to lower the budget deficits without requiring members to vote for spe-

[1] The United States agrees that the assignment to the Comptroller General "of the authority to make the economic calculations that determine the estimated federal deficit and the required budget cuts does not constitute an unconstitutional delegation by Congress of the 'legislative Powers' vested in it by Article I, Section 1, of the Constitution." U S. Br. 11 n.8

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cific spending cuts or tax increases." Synar Br. 23-24; *see also* NTEU Br. 13. In their view, "this motive of avoiding political responsibility alone is enough to set aside the delegation." Synar Br. 31. However, as Justice Brandeis has observed, "No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of Congress." *Hamilton* v. *Kentucky Distilleries Co.,* 251 U.S. 146, 161 (1919). Furthermore, plaintiffs' supposition about the "one purpose" of the majorities in each House which coalesced in support of this legislation fails to appreciate the expressed objectives of the Act's proponents. They made clear their expectation that the stand-by administrative mechanism would be a "disciplining agent" to promote, not to avoid, responsibility in enacting the budget, by providing the Congress and the President with certain knowledge of the consequences of any failure to develop legislation adhering to the maximum deficits established by the Act. Sen. Br. 12, 42-43.

Congress made the specific policy judgment that the health of the nation's economy requires that the federal government gradually reduce its budget deficit to achieve a balanced budget by October 1, 1990, and Congress precisely "prescribed the method of achieving that objective." *Yakus* v. *United States,* 321 U.S. 414, 423 (1944). First, Congress has established a statutory ceiling on the size of the deficit for the present and the next five years. Second, Congress has established a standby mechanism, including detailed procedures and schedules, for the execution of the deficit reduction necessary to achieve the deficit ceilings. Third, Congress has required, if sequestration is triggered, that the expenditure reductions be achieved through equal sacrifice on the defense and non-defense sides of the budget. Fourth, Congress has stipulated that, subject to its legislated exceptions, the sacrifice from any sequestration must be spread uniformly across every account and program in the budget. Viewing these elements of the Act in combination, Congress has made

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the "important choices of social policy." *Industrial Union Department* v. *American Petroleum Institute,* 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in judgment).[2]

Plaintiffs challenge only one aspect of the delegation to the Comptroller General, namely the task of projecting the annual federal budget deficit and comparing that deficit estimate to the deficit ceiling legislated in the Act.[3] Economic forecasting is neither simple nor precise, but undisputedly requires judgment about many complex issues. Nevertheless, the task remains one of the expert estimation of facts, which Congress may properly assign to an administrative agency. "It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment. . . ." *Yakus,* 321 U.S. at 425.

The Comptroller General's duty is to estimate the magnitude of the anticipated deficit based on the revenue and expenditure choices that Congress has made; he is not asked to determine the size of the deficit that he believes would be best for the economy. An agency like the Federal Reserve Board wields "substantial economic power" through its exercise of the delegated authority to conduct the nation's monetary policy.[4] In contrast to such delegations of policy-making authority, "the *only* discretion conferred [upon the Comptroller General in the Act] is in the

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[2] The district court held that "[t]hrough specification of maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function " J.A. 54

[3] Plaintiffs do not challenge on grounds of excess delegation the Comptroller General's duty to allocate any required spending reduction among the government's financial accounts, presumably because they recognize that the comprehensiveness and detail of Congress' stipulations governing the distribution of spending reductions would undermine the viability of any such challenge

[4] *Riegle* v *Federal Open Market Committee,* 656 F.2d 873, 875 (D C Cir), *cert. denied,* 454 U S 1082 (1981)

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ascertainment of facts and the prediction of facts. The Comptroller General is not made responsible for a single *policy* judgment." J.A. 51 (emphasis in original; footnote omitted). Whatever amount of discretion the Comptroller General must exercise, for example, in order to *forecast* interest rates, a task to which plaintiffs specifically object, *see* Synar Br. 9, that discretion pales in comparison to the discretion that Congress has delegated to the Federal Reserve Board to *determine* interest rates.[5]

As the district court observed, the fact-finding task delegated to the Comptroller General in the Deficit Control Act contrasts sharply with previously sustained assignments of policy-laden duties to determine "what is a 'fair price,' *see Yakus,* 321 U.S. at 414, or when it would be 'appropriate' to freeze wages and prices, *see Amalgamated Meat Cutters & Butcher Workmen* v. *Connally,* 337 F. Supp. 737 (D.D.C. 1971) (three-judge court), or wherein lies the 'public interest,' *see National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943)."[6] The district court

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[5] Congress has provided the Federal Reserve with three discretionary means to control monetary policy: setting the interest rates at which member banks borrow from it, 12 U S C 248(b), imposing reserve requirements for member banks, *id.,* § 463, and engaging in open-market purchases and sales of financial obligations to control "the general credit situation of the country," *id.,* §§ 263, 353–359. *See generally Reuss* v *Balles,* 584 F 2d 461, 462–65 (D C Cir), *cert denied,* 439 U.S 997 (1978) (describing Federal Reserve Board's functions in conducting national monetary policy)

[6] J A 51 In *Yakus* the Court upheld a statutory delegation to the President of the authority to "fix[ ] prices of commodities which 'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act' " 321 U S at 420 (quoting Emergency Price Control Act of 1942) In *Amalgamated Meat Cutters* a three-judge district court sustained Congress' grant of authority to the President to freeze virtually all prices and wages in the economy. Unlike the price control law sustained in *Yakus,* the statute upheld in *Amalgamated* provided the President with the sole discretion to determine whether to impose a wage-price freeze, "if the President should wish to adopt that prescription, following his further reflection and taking into account future developments and experience." 337 F. Supp at 751. In *National*

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correctly concluded that, in comparison, "the present delegation is remote from legislative abdication." J.A. 51. The delegation is constitutional because Congress has made the "fundamental policy decisions underlying [this] important legislation." *Industrial Union Department,* 448 U.S. at 687 (Rehnquist, J., concurring in judgment).[7]

II. THE CONSTITUTION DOES NOT REQUIRE THAT THE COMPTROLLER GENERAL'S DUTIES UNDER THE ACT BE PERFORMED BY AN OFFICER SERVING AT THE PRESIDENT'S PLEASURE

The Executive branch advances the argument, which the district court did not reach, that the Comptroller General's duties "are so central to the administration of the Executive Branch and the responsibilities of the President that they may be performed only by the President or by an Officer of the United States serving at the pleasure of the President." U.S. Br. 44. The adoption of this view would defeat the indispensable predicate of the Act's administrative mechanism, namely that economic projections and the application of the detailed procedures of the Act should *not* be used to implement the separate political judgments of *either* the Congress or the President but should implement only the policy that the Congress and the President together enacted into law.

A. The Independence Permitted by Humphrey's Executor is Critical to the Act's Neutral Implementation

In *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935), the Court sustained Congress' right to preclude the

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Broadcasting the Court upheld the delegation to the Federal Communications Commission of the authority broadly to regulate network radio to promote "public convenience, interest, or necessity." 319 U.S at 214 (quoting Communications Act of 1934).

[7] The district court explained that, although the Comptroller General's delegated duty to estimate deficits "is assuredly an estimation that requires some judgment, and on which various individuals may disagree, we hardly think it is a distinctively *political* judgment, much less a political judgment of such scope that it must be made by Congress itself." J.A. 54 (emphasis in original).

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President from removing commissioners of the Federal Trade Commission in the absence of "inefficiency, neglect of duty, or malfeasance in office." [8] The Court described the Federal Trade Commission as "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." 295 U.S. at 628. "We think it plain under the Constitution," the Court held, "that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named." *Id.* at 629. The Court has twice since confirmed its holding in *Humphrey's Executor. Wiener* v. *United States,* 357 U.S. 349, 352–56 (1958); *Buckley* v. *Valeo,* 424 U.S. 1, 136, 141 (1976) (per curiam).

The constitutionality of Congress' assignment of duties under the Deficit Control Act to the Comptroller General stands on an equal footing with the protections from removal conferred by Congress upon Federal Trade Commissioners and dozens of other Officers of the United States.[9] As the Third Circuit recently held, this Court's

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[8] 295 U.S. at 620 (quoting § 1 of FTC Act, 15 U S.C 41) The Budget and Accounting Act attempts to inhibit presidential removal for any reason Although the Court has never addressed such a removal limitation, that issue is not currently before the Court, because the position of the United States is not that the President has the constitutional power to remove the Comptroller General for cause, but that an officer performing the Comptroller General's duties must be removable by the President without cause.

The question whether the Congress may entirely restrict the President's removal of the Comptroller General would be presented only if the President alleged that cause existed warranting his removal If, in such a case, the Court were to sustain the President's removal of the Comptroller General and invalidate the statutory removal prohibition, the standard for presidential removal of the Comptroller General would continue to be for cause only. *See Wiener* v. *United States,* 357 U.S. 349 (1958).

[9] The list of officers who may not be removed at the will of the President includes the Governors of the Federal Reserve Board (12

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description of the Federal Trade Commission "provides a close analogy for describing the GAO and the Comptroller General: 'The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law.'" *Ameron,* slip op. at 21–22 (quoting *Humphrey's Executor,* 295 U.S. at 624).

Because of the Comptroller General's mission to discharge his assigned duties impartially and apolitically, his selection to administer the trigger was critical to Congress' adoption of the budget reduction mechanism. Unlike the Congress and its advisors and the President and his advisors, the Comptroller General is not a participant in the intensely political debate to establish the government's priorities and adopt a budget each year. Congress' legislative goal is that, if the Act's administrative mechanism needs to be employed, then it must be implemented in accordance with strictly neutral, professional economic forecasts and accounting judgments. The Congress effectuated this objective by providing that the Act's administrator, the Comptroller General, is not to make "a single *policy* judgment." J.A. 51 (emphasis in original). Because the Act contained Congress' "'hard political choices' . . . to impose the severe constriction of federal spending" and to determine "which program budgets will be reduced in order to achieve that result, and by how much" (J.A. 54), Congress refrained from delegating any authority to diverge from those policies incor-

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U.S.C. 242) and the Postal Service Board (39 U.S C. 202), the Members of the National Labor Relations Board (29 U.S.C. 153(a)), and the Commissioners of the Interstate Commerce Commission (49 U.S.C. 10301(c)), the Nuclear Regulatory Commission (42 U.S.C. 5841(e)), and the Consumer Product Safety Commission (15 U.S.C 2053(a)). Under *Wiener* an implicit for-cause limitation on presidential removal presumably applies also to Commissioners of the Federal Communications Commission, the Securities and Exchange Commission, the Federal Election Commission, and the Commodity Futures Trading Commission. Appendix B to the Reply Brief for the Comptroller General compiles statutory provisions governing removal of independent officers.

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porated in the Act. Key to the Act's bipartisan support was the adoption of an amendment by Senator Levin to ensure that, in implementing the budget reductions, no power be delegated to "undo the Congress' priorities" established in the budget. 131 Cong. Rec. S12944 (Oct 9, 1985) (Sen. Levin); *see* Act, § 252(e); J.A. 134.

The Comptroller General's freedom from presidential removal at will is essential to his ability to "discharge [his Deficit Control Act] duties independently of executive control. . . . [f]or it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor,* 295 U.S. at 629. To guarantee the neutrality of the implementation of the Act, the Congress determined that the trigger mechanism could be administered only by an officer who performs no political duties and is independent of both Congress and the President "except in [his] selection, and free to exercise [his] judgment without the leave or hindrance of any other official or any department of the government." *Id.* at 625–26 (emphasis omitted).

B. The United States Misreads Humphrey's Executor

The Court's opinion in *Humphrey's Executor* does not support the Executive's cramped reading of the case, but to the contrary confirms that Congress may constitutionally restrict the removability of officers who perform a broader range of administrative tasks than the adjudication of "discrete transaction[s] or controvers[ies] affecting a particular private party." U.S. Br. 47. In *Humphrey's Executor* "[t]his Court saved [the FTC] from executive domination only by recourse to the doctrine that 'In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially.' " *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 488 (1952) (Jackson, J., dissenting) (quoting *Humphrey's Executor,* 295 U.S. at 628). The authority to

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"fill[ ] in and administer[ ] the details" that the Court was discussing was its power "to prevent persons, partnerships, and corporations . . . from using unfair methods of competition in commerce." [10] The Court explained that Congress had created the FTC as "an administrative body . . . to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed." 295 U.S. at 628. The reason that the FTC, in Justice Jackson's words, "escaped executive domination" was because "it exercises legislative discretions as to policy in completing and perfecting the legislative process." *Ruberoid Co.,* 343 U.S. at 488. Contrary to the claim of the United States, the Court did not sustain the FTC's independence from presidential removal solely because the FTC could conduct investigations for Congress or sit as a master in chancery, but importantly because Congress had delegated to the FTC the task of "filling in and administering the details" of the statute. [11]

This task of "filling in" a statute, upon which the Court predicated Congress' authority to restrict the President's removal of the Commissioners, is a quintessential example of "the performance of a significant governmental duty exercised pursuant to a public law." *Buckley* v. *Valeo*, 424 U.S. at 141. Nevertheless, the United States seeks to contract the actual scope of the Court's ruling in *Humphrey's Executor* by describing "the FTC's interpretation and application of the law as an incidental aspect of individual adjudicatory proceedings . . . [which] in our view . . . is more appropriately characterized for present purposes as 'quasi-judicial'." U.S. Br. 45 n.31. This conjec-

[10] 295 U.S. at 620 (quoting § 5 of the FTC Act, 15 U.S.C. 45).

[11] Although in describing the FTC's authority to "fill in" the legislative standard, the Court used the term "quasi-legislative", 295 U.S. at 628, the Court did not employ this term in the same sense in which it used it when describing the FTC's investigatory functions. Investigatory duties are termed "quasi-legislative" because Congress can perform investigatory and reporting functions. However, the duty to "fill in" a statutory standard is termed "quasi-legislative" for the entirely different reason that it substitutes for more detailed legislation.

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tured limitation on *Humphrey's Executor* does not explain the Court's express recognition of the FTC's power to initiate its cases by "issu[ing] a complaint stating its charges," 295 U.S. at 620, as well as to adjudicate cases. Moreover, the Commission's application of law is not "incidental" to its activities, but the very purpose of its initiation of civil enforcement proceedings.[12] The Executive's apparent attempt constitutionally to differentiate administrative enforcement by rulemaking from enforcement by adjudication is inconsistent with the Court's recognition "that 'the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.' "[13]

Further, although the FTC may not have conducted rulemaking prior to *Humphrey's Executor, see* U.S. Br. 45 n.31, this Court has subsequently established specifically that regarding rulemaking authority, "the President may not insist that such functions be delegated to an appointee of his removable at will." *Buckley,* 424 U.S. at 141. The Executive has acknowledged in this Court that "members of the independent regulatory commissions . . . can share, much as cabinet officers share, in the power granted by Article II to execute the laws." [14] The Court should adhere to its holdings, and the previous understanding of the Executive branch, that Congress may legislate limitations on presidential dismissal of officers performing administrative duties other than solely adjudicatory functions.

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[12] *See Ruberoid Co.*, 343 U S. at 488–89 (Jackson, J., dissenting) (Congress created independent agencies such as FTC to exercise policy discretion in enforcing statutory standards).

[13] *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

[14] Brief for the Attorney General as Appellee and for the United States as *Amicus Curiae, Buckley* v. *Valeo,* at 121 n.78.

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C. *Humphrey's Executor Sustains the Comptroller General's Exercise of the Administrative Functions Delegated by the Act*

The true issue after *Myers* v. *United States,* 272 U.S. 52 (1926), and *Humphrey's Executor* is the distinction drawn between two constitutionally distinguishable types of executive functions. In *Humphrey's Executor,* the Court recognized, on the one hand, that those agencies that can "be characterized as an arm or an eye of the executive" exercise "executive power in the constitutional sense." 295 U.S. at 628. In this category the Court placed the postmaster whose removal it had sustained in *Myers,* because "such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." *Id.* at 627. Similarly, the Court pointed out, in Congress' "decision of 1789," which the Court had relied upon in *Myers,* "the office under consideration by Congress was not only purely executive, but the officer [the Secretary of Foreign Affairs, now the Secretary of State] one who was responsible to the President, and to him alone, in a very definite sense." *Id.* at 631.

The Court recognized, on the other hand, that some agencies exercise "executive *function[s]*—as distinguished from executive *power* in the *constitutional* sense." *Id.* at 628 (emphasis added). Agencies like the Federal Trade Commission and the Interstate Commerce Commission are in this category, because "[t]he authority of Congress . . . to require them to act in discharge of their duties *independently of executive control* cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime." *Id.* at 629 (emphasis added). Thus, the Court derived Congress' authority to limit the President's removal authority from Congress' power to require an officer to perform his duties independently of the Presi-

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dent's control. Because Congress cannot require the President to relinquish control over the key political advisors and Cabinet officers who share in the exercise of the President's constitutionally conferred power, Congress similarly cannot restrict the President's ability to remove only those officers.

The Court grounded the distinction between those officers who exercise "executive power in the constitutional sense", and those other officers who perform executive duties under the direction of Congress' statutory directives, on *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803). *Humphrey's Executor,* 295 U.S. at 631. In *Marbury* the Court observed that the Constitution invests the President "with certain important political powers, in the exercise of which he is to use his own discretion. . . . To aid him in the performance of those duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts. . . ." 5 U.S. at 165–66. The Court illustrated this category of executive officers with the Secretary of Foreign Affairs, who "is to conform precisely to the will of the president: he is the mere organ by whom that will is communicated." *Id.* at 166. The Court contrasted such "heads of departments [who] are the political or confidential agents of the executive, merely to execute the will of the president," *ibid.,* with an officer whose delegation of statutory duties by Congress renders him "the officer of the law," *ibid.* Subsequently, in *Kendall* v. *United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 610 (1838), the Court confirmed the *Marbury* distinction between "political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president," and other duties delegated to executive officers by Congress, which "are subject to the control of the law, and not to the direction of the president." The holding in *Humphrey's Executor* was grounded soundly upon the Court's conclusion, in reading this line of cases,

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that FTC Commissioners, like the nonpolitical officers discussed in *Marbury,* are within the group of officials who are "not removable at the will of the President." 295 U.S. at 630–31.

The Comptroller General is neither "an arm or an eye of the executive," *id.* at 628, nor the President's "subordinate and aid," *id.* at 627. To the contrary, Congress mandated that the Comptroller General perform his duties "without direction from any other officer." Budget and Accounting Act, § 304; J.A. 95. Like FTC Commissioners, the Comptroller General is "an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." *Humphrey's Executor,* 295 U.S. at 628. The Executive's claim that the role of the Comptroller General "is by no means 'wholly disconnected from the executive department'," U.S. Br. 48 (quoting *Humphrey's Executor,* 295 U.S. at 630), is flatly inconsistent with Congress' explicit establishment of the GAO, which the Comptroller General heads, as "independent of the executive departments," Budget and Accounting Act, § 301; J.A. 93.

The Executive's objection to the Comptroller General's independent performance of his duties is based on its view that "[a] more sweeping and pervasive connection between the Comptroller General's actions and the administration of the laws that are under the President's supervision and control can scarcely be imagined." U.S. Br. 48. The question, however, is not whether the Comptroller General's actions under the Deficit Control Act have a "connection" to the President or to executive departments, but whether under the Act the Comptroller General exercises "executive power in the constitutional sense." He does not. The Comptroller General does not perform constitutionally conferred executive functions,

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for example, in the conduct of foreign relations or the command of the armed forces [15]

To the contrary, the Comptroller General does not exercise "distinctively political judgment" of any kind under the Act. J.A. 54 (emphasis omitted). The United States confuses the statutory *effect* of the Comptroller General's actions on the level of funds available for expenditure by the government, with the constitutional *nature* of the Comptroller General's actions. The Comptroller General simply does not exercise "sweeping authority . . . over the operations of the departments and agencies of the Executive Branch." U.S. Br. 51. Instead, he exercises particularized, apolitical fact-finding duties,

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[15] One variant of the Executive's argument rests on its claim that the Act permits the Comptroller General to "direct the execution of the laws by the President," U S Br 48, by the Comptroller General's "issuance of binding determinations directly to the President himself [, which t]he Act requires the President to implement . . in a sequestration order," *id* , 49. Although the Act provides for a presidential order incorporating the Comptroller General's report, section 252(a)(1), (3), (b)(1); J.A. 124, 128, 132–33, the purpose of that step was only because, as "the Chief Executive officer of the country," the President "can enforce what he is supposed to do," 131 Cong Rec S12703 (Oct 5, 1985) (Sen Rudman)

Before the district court the United States made clear that its objection "is one limited to the personal office of the President and not everyone in the executive branch If this statute had provided for sequestration orders to be issued by the Secretary of the Treasury, we wouldn't be making this argument." Transcript of District Court Argument, Jan 10, 1986, at 62. This objection need not precipitate a constitutional issue, but can be resolved by the President's use of his general delegation authority to delegate this duty to a subordinate officer 3 U.S.C. 301. When the Congress assigns a delegable duty directly to the President rather than to a subordinate officer, such as the Secretary of the Treasury, it enhances the power of the President over the organization of the government, because the President may unilaterally determine where within the Executive branch to place the responsibility to perform the duty

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to which Congress has statutorily given significant effect.[16]

For that reason, the assignment to the Comptroller General of the triggering function in the Act does not raise the threat that the United States fears that Congress may usurp the President's authority by vesting control over Executive powers in independent officers. The same law that established the Comptroller General's office created the Bureau of the Budget, the forerunner of the Office of Management and Budget, and charged it with the duty to assemble and to revise the budget requests of the Executive departments in order to prepare the federal budget on behalf of the President. Budget and Accounting Act, § 207, 42 Stat. 22. Because of the nature of those duties, the Director of the Budget Bureau, unlike the Comptroller General, was intended to function "under the immediate direction of the President." H.R. Rep. No. 14, 67th Cong., 1st Sess. 6 (1921). Recognizing that the Budget Bureau was to be "the mere agency of the President in exercising these powers," *ibid.*, the Congress respected the President's right to remove the Bureau's Director at will. Today this Court's decisions similarly establish that the Director of the Budget Bureau's successor agency, OMB, serves at the President's pleasure. Upholding the constitutionality of the Deficit Control Act would not alter the President's ability to control the

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[16] The United States argued identically before the district court that no other independent agency exercises authority "that is nearly as broad or sweeping and affects levels of spending for the Department of Defense and all executive agencies." Transcript of District Court Argument, Jan. 10, 1986, at 72. Judge Scalia responded,

> You say it affects it. Actually, the Comptroller General is given very, very little power . . . [T]he fact that its effects may be sweeping is a consequence of congressional action; it is a consequence of the statute Because of his prediction, the President has to cut various budgets a certain amount. But actually, what the Comptroller General has to do here is, you know, it is something for a guy with a green eye shade.

Ibid.

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preparation of his budget with the assistance of his advisors, to advocate the adoption of that budget with their aid, or to administer the obligation of budgeted funds within the deficit ceiling that the joint action of the Congress and the President has made binding by law.

III. THE PROPER APPLICATION OF THE FALLBACK PROVISION MUST BE GOVERNED BY CONGRESSIONAL INTENT

In our opening brief (at 31–43) we explained that, if the Comptroller General's duties under the Deficit Control Act are incompatible with the removal provision in the Budget and Accounting Act, then the Court must determine which provision to sever. Because this severability question presents a question of legislative intent, we marshaled the historical evidence that Congress would have both established the Comptroller General's office in 1921 and delegated to him the administrative duty of triggering the deficit-reduction mechanism in 1985, irrespective of the statutory provision permitting removal of the Comptroller General by joint resolution. In response, the appellees rely almost exclusively and mechanically on the fallback provision contained in section 274(f) of the 1985 Act, J.A. 165–66, to contend that severing the legislative removal provision in the 1921 Act would be "contrary to the express desire of Congress, which specified what was to happen in the event Section 251 was held unconstitutional." U.S. Br. 56. Adhering to our understanding that both severability and the use of the fallback provision must be governed by congressional intent, we will discuss their application to the three principal claims against the constitutionality of the Act.

1. The fallback provision should be invoked if the plaintiffs are correct that the Act unconstitutionally delegates legislative power. If the Court holds that the Congress may not delegate deficit reduction powers to any administrative official, then the constitutional characteristics of the official designated in the Act would be of no consequence. Deficit reduction could be achieved only through annual legislation, such as under the fallback provision.

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2. If the Court were to sustain the claim of the United States that the Comptroller General cannot perform his assigned duties because he does not serve at the President's pleasure, then adherence to the intent of Congress would require the Court to invalidate the reporting mechanism and permit the fallback mechanism to operate. The Congress sought to take the Act's administrative determinations "out of the hands of the President and the Congress." 131 Cong. Rec. H9846 (Nov. 6, 1985) (Rep. Gephardt). If the Constitution does not permit the Congress to safeguard the Act's administration from political control by delegating the Act's responsibilities to an independent officer, then we agree that the Congress would not have created the administrative mechanism. The fallback mechanism must then be used.

3. However, the fallback mechanism is not the constitutionally or statutorily required consequence of a ruling that the Comptroller General may not be removed by a joint resolution of the Congress under the 1921 Budget and Accounting Act. If the issue is ripe, *but see Ameron,* slip op. at 17–18, severance of the 1921 removal provision would not impair the intent of Congress in 1985 that the Comptroller General's functions under the Deficit Control Act be performed independently of both the Congress and the President. In our brief (at 40) we stated that there was no evidence in the legislative history of the Deficit Control Act that the Congress viewed the removal provision as relevant to the legislation; none of the appellees or amici has pointed to any such evidence. In these circumstances, the intent of Congress, which must guide any decision on severability, would be served only by severing the dormant 1921 removal provision and preserving Congress' present and critical determination that a standby procedure administered by an independent official is essential to assuring deficit reduction.

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CONCLUSION

For the reasons stated in this reply and in our opening brief, the declaratory order of the district court should be reversed.

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