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.

REPLY BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES, INTERVENORS-APPELLANTS

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REPLY BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES, INTERVENOR-APPELLANTS

INTRODUCTION

In asking this Court to strike down the Balanced Budget and Emergency Deficit Control Act of 1985 ("Deficit Control Act" or "Act") on non-textual separation of powers grounds, the Executive Branch and the plaintiffs ("challengers") have assailed one very limited, but vital, provision of a major Act on a strained and technical basis. This statute was enacted by Congress and signed by the President to reduce the spiraling deficit and its threat to our national economy, by equal cuts, if necessary, in defense and non-defense spending. The challengers' separation of powers claim would disable the Act, even though the political Branches' authority to provide for such equally-distributed across-the-board cuts is not, and cannot be, questioned on separation of powers grounds. That technical challenge would disable the Act by striking the provision which vested the statutorily-prescribed mathematical calculations of the cuts in the independent Comptroller General ("Comptroller" or "GAO") in order to "wall" off that accounting function from political manipulation.

The constitutionality of the GAO role was not questioned even once by the Executive or by any Member of Congress during the Act's consideration, Brief of the Speaker and Bipartisan Leadership Group ("House parties" and "House Br.") at 22-24; Congress relied on court cases upholding GAO's independent status which had received "wide publicity." Brief for the United States ("Exec. Br.") at 59 n.39. Moreover, the arguments of the Executive have been persuasively refuted by the ruling in *Ameron* v. *U.S. Army Corps of Engineers,* Nos. 85-5226 and 85-5377 (3d Cir. Mar. 27, 1986) (appended to the Senate Reply Brief). As the highest court yet to review the issue, the Third Circuit unanimously sustained the

constitutionality of the GAO's performance of administrative functions, rejecting the contrary arguments of the Executive and the *Synar* district court in light of the GAO's firmly established independence.

The Executive continues to press two arguments for striking down the GAO role. The Executive contends that the role assigned in this Act "may be performed only by" an officer "serving at the pleasure of the President," i.e., that those functions are not suitable for an independent officer. Brief for the United States ("Exec. Br.") at 44; *see id.* at 44–51. Also, the Executive contends that the GAO is not independent. Exec. Br. at 30–44.[1] For neither of these arguments does the Executive proffer any express constitutional provision that the Act may be said to violate, but only a motley collection of imagined constitutional implications.

I. THE ROLE ASSIGNED BY THE DEFICIT CONTROL ACT IS SUITABLE FOR AN INDEPENDENT OFFICER

The House parties described that Act's legislative history, a description which the Executive does not dispute. The Executive's preference has been for the Office of Management and Budget ("OMB"), which carries out the President's program, to perform functions such as those required by this Act. However, Congress declined to assign the economic and mathematical calculations required by the Act, particularly the equal distribution of cuts among defense and non-defense programs, to OMB. Instead, Congress used GAO to "wall" the calculations off from politics. House Br. at 20 (quoting legislative history); *see id.* at 20–24. In so doing, Congress simply followed this Court's directives regarding the broad administrative powers that may be assigned to independent agencies. House Br. at 10–14. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court restated that established law, in a unanimous

[1] The district court soundly rejected plaintiffs' argument that the Congressional Budget Office's advisory role is somehow unconstitutional. Joint Appendix ("J.A.") 55 n.18.

opinion joined by eight of the nine Justices currently serving on this Court:

> All aspects of the Act are brought within the Commission's *broad administrative powers*: rulemaking, advisory opinions, and determinations of eligibility for funds. . . . These functions . . . are of kinds usually performed by independent regulatory agencies. . . . [T]he 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). . . .

Id. at 140–41 (emphasis supplied).

Apparently recognizing the unlikelihood of a change in such a unanimous ruling, particularly in light of the strength of the underlying *Humphrey's Executor* decision, House Br. at 28–30, 35–41, the Executive declines to challenge directly the continuing vitality of *Humphrey's Executor*. Exec. Br. at 46 n.32. The Executive does little more than gratuitously publicize its changed [2] and now incorrect position regarding independent agency rulemaking.[3] While the Executive has challenged the ability of an

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[2] The settled Executive position was that "members of the independent regulatory commissions are 'Officers of the United States' . . In consequence, they can share, much as cabinet officers share, in the power granted by Article II to execute the laws." Brief for the Attorney General as Appellee and for the United States as *Amicus Curiae*, *Buckley* v. *Valeo*, at 121 n.78.

[3] The Executive's new argument against independent agency rulemaking, Exec Br. at 45 n.31, overlooks *Buckley's* language a decade ago, quoted in text, unanimously sustaining rulemaking by independent agencies The Executive's argument that independent agencies can perform only quasi-judicial functions, Exec Br. at 45–47, simply consists of a relabeling of what this Court has always called "quasi-legislative" as "quasi-judicial," Exec. Br. at 45 n.31, and a recycling of arguments previously rejected both outside and inside the Justice Department. *See* House Br. at 37–41 (legislative rejection); *Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 152 (1981) (reprinting Justice Department memorandum which

Continued

independent officer to perform the functions assigned to GAO in this Act, the contradictory statements by the district court, the lack of support from the plaintiffs,[4] and the inability to dispute the teachings of *Buckley* and *Humphrey's Executor* have forced the Executive to rely on two points, both without merit.

Initially, the Executive complains that pursuant to the Act, although the figures are calculated independently, the sequestration order is issued by the President. Exec. Br. at 47–51. The Executive acknowledged in district court that "[i]f the statute had provided for sequestration orders to be issued by the Secretary of the Treasury, we wouldn't be making this argument," Transcript of *Synar* v. *United States,* Jan. 10, 1986, at 62, since final orders by independent agencies, not subject to Executive change, are well established.[5] It now appears, quite unexpectedly, that the Executive takes the provision for signature by the President as an affront to its dignity.

The district court saw no point even in discussing this issue in its opinion, let alone striking down the Act on this ground, for obvious reasons. There is no precedent forbidding or even questioning such a provision, the President never complained about it before the lawsuit, and if anything Congress legitimately anticipated that the President would eagerly make use of that famous budget-cutting pen to sign an order sought so ardently. After all, this is no case, like *United States* v. *Nixon,* 418

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had been internally rejected, which also suggested "that the Supreme Court would today retreat" from *Humphrey's Executor* and not sustain independent agency rulemaking); section 1(d) of Executive Order 12291, 46 Fed Reg. 13193 (1981) (excluding independent agency rulemaking from OMB review) (citing 44 U.S.C. § 3052(10)(1976)).

[4] *Compare* Exec. Br. at 60 n.40 and district court opinion, J.A. 80 *with* Brief for Appellee National Treasury Employees Union ("NTEU Br.") at 40 n.37 and district court opinion, J.A. 60.

[5] *See, e.g., United States* v. *Marine Bancorporation,* 418 U.S. 602 (1974); *United States* v. *ICC,* 337 U.S 426 (1949); *cf. Miguel* v. *McCarl,* 291 U.S. 442 (1934) (separate appearances in this Court by Solicitor General and by counsel for Comptroller General)

U.S. 683 (1974), involving application of compulsory process to a President, or a damage remedy, or any other penalty or intrusion [6] (although the courts upheld even such process, in that case). This is simply another statute providing that reports by lesser officers require the President's signature to become final orders.[7]

Second, the Executive complains that the Act assigns the Comptroller a large-scale role, one that it deems "central," "broad," "government-wide," and "sweeping and pervasive." Exec. Br. at 44, 47, and 48. Again, no precedent is offered for this complaint, and it is hard to make out the Executive's theory for striking down the Act. The Executive's analysis of the nature of the Comptroller's role is incorrect. As noted above, *Buckley* v. *Valeo* sanctioned "broad administrative powers" for independent officers appointed by the President (which include the Comptroller General). While the Comptroller's role was a necessary element of the political compromise responsible for the Act, that role is unconnected with the formation of policy. J.A. 51. The Comptroller does not decide what an appropriate deficit level would be or whether some

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[6] Another question altogether, and a major one, would be presented if the Act suggested some kind of civil or other penalty for the President, *Nixon* v. *Fitzgerald,* 457 U.S. 731, 748 n.27 (1982), and *id.* 763 n.7 (Burger, C J., concurring), but of course it suggests nothing of the kind. Premising the challenge on the Opinions Clause, which merely states that the President can obtain opinions from his Cabinet, Exec Br at 49–50, is a meritless attempt to transform into a mighty engine a provision universally deemed "trifling." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 641 & n.9 (1952) (Jackson, J., concurring).

[7] *See, e.g., Runkle* v. *United States,* 122 U.S. 543, 561 (1887); E.S Corwin, *The President: Office and Powers: 1787–1957* 369–70 (4th ed. 1957) That the President has such nondiscretionary duties under the law, like any other officer, is axiomatic. *United States* v. *Lee,* 106 U.S. 196, 220–21 (1882); *Kendall* v. *United States ex rel. Stokes,* 37 U.S. (12 Pet) 524, 610 (1838); *National Treasury Employees Union* v. *Nixon,* 492 F.2d 587, 606–13 (D.C. Cir. 1974). Congress provides for such signatures "not for the purpose of imposing a very great [signature] burden upon the President but rather as a congressional recognition of the right in him as the Chief Executive," *United States ex rel. French* v. *Weeks,* 259 U.S. 326, 333 (1922), to issue such orders.

programs should be cut by a different percentage than others. GAO merely makes projections and calculations, employing economic and mathematical formulae pursuant to statute on OMB's and CBO's advice, of uniform reductions in budget accounts and programs. As Circuit Judge Scalia aptly commented, "what the Comptroller General has to do here is, you know, it is something for a guy with a green eye shade. It isn't power. . . . It is an accountant's job." Transcript of *Synar* v. *United States,* Jan. 10, 1986, at 72.

As the House parties pointed out, without contradiction by the Executive, the scale of responsibility devolved upon the GAO by this Act is far less than that of the independent Federal Reserve Board, which the district court and the plaintiffs accept as an appropriate standard of comparison.[8] In contrast to the mere accounting and economic predictive functions assigned to the GAO here, the independent Federal Reserve Board formulates "national monetary policy," *Federal Open Market Committee* v. *Merrill,* 443 U.S. 340, 343 (1979), steering the monetary power of the United States in the global currents of debt crises, inflation, and the economic cycle. *See* House Br. at 13–14.

The Executive offers this Court no basis on which to judge the constitutionality of assignments by scale, and the matter is thoroughly inhospitable for judicial resolution. Rather, the well-established law leaves it to the democratic processes alone to decide whether the scale of a task is appropriate for a particular department or agency. Critics of those decisions are remitted to their political remedies. The Judiciary properly confines its inquiry to the nature of the functions assigned, and as fur-

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[8] *See* Brief of Appellees Mike Synar, Member of Congress, *et al.,* at 23 n.8; *see also* district court opinion, J.A. 51 (comparison with Federal Reserve Board's determination of "discount rate") Many independent agencies operate government-wide or economy-wide, such as the Merit Systems Protection Board, the Federal Trade Commission, and the Securities and Exchange Commission.

ther discussed below, the functions here are entirely appropriate for the GAO.

II. THE GAO IS AN INDEPENDENT AGENCY, CONSIDERING ITS STATUS, ITS FUNCTIONS, AND THE PROVISION FOR REMOVAL BY PUBLIC LAW

A. The Comptroller is not a "Head of Department"

The Executive's main thrust assails the GAO as not an independent agency, and thus unable to perform either its traditional or current functions. The challengers never point to an express constitutional provision which may be said to be violated by this Act, and so their attack lacks the power that drive the successful challenges in *Buckley, Immigration & Naturalization Service* v. *Chadha,* 462 U.S. 919 (1983), and *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50 (1982), namely the express provisions of the Appointments Clause, the Presentation Clause, and the "good Behavior" Clause. Rather, the Executive here seeks an expansive Judicial ruling allocating to the Executive one of those "vast open spaces in the text of that mysterious document, the Constitution of the United States," although "[t]he authors of that document implicitly delegated the power to fill those spaces to future generations of lawmakers," and asked for "self-restraint" from "the judges of the future." Stevens, *Judicial Restraint,* 22 San Diego L. Rev. 437, 451–52 (1985).

To claim those "open spaces," the Executive would constitutionalize certan nebulously-formulated principles of "energy," "respectability," and "unity" among agencies, Exec. Br. at 16. Its argument relies on a laborious demonstration of points regarding the Cabinet which, although undisputed, are irrelevant to the Comptroller. The Executive argument simply restates at length the rule regarding the "Heads of Department" and the "principal officer in each of the executive Departments" expressly singled out in Article II—that the President may remove at will, without Senate involvement, these "principal," "top-ranking," "high-ranking," "most important" officers, the

"heads of departments" or "cabinet members." Exec. Br. at 7, 24, 25 n.16, 20, 21, and 25 n.16 (quotations omitted). The Executive presents a detailed history of the Constitutional Convention's decision not to raise the Cabinet to the level of a governing Council, discusses the "Decision of 1789" and the repeal of the Tenure of Office Act which both concerned Presidential removability of Cabinet members, recapitulates the decision in *Myers* v. *United States,* 272 U.S. 52 (1926) which recited the Presidential removability of Cabinet members, and notes a number of Supreme Court cases regarding Cabinet members. Exec. Br. at 17–25.[9] However, this point has not been disputed; the House parties have freely acknowledged it. House Br. at 34.

Where that disquisition on abstract principles goes awry is that it has nothing to do with the Comptroller, in contrast to the House parties' treatment, House Br. at 25–36, which focuses precisely on that office. When the Constitution provides for "Officers of the United States," it contrasts the high-ranking "Heads of Departments," or Cabinet-level officers, with the "inferior Officers." U.S. Const., art. II, sec. 2, J.A. 92; *United States* v. *Germaine,* 99 U.S. 508, 510 (1879); *United States* v. *Mouat,* 124 U.S. 303, 307 (1888) ("the heads of the departments were defined in [*Germaine*] to be what are now called the mem-

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[9] *Myers* also discusses purely executive officers such as the postmaster at issue in that case; the Comptroller is certainly not such an officer. The Executive discusses the Appointments Clause, Exec. Br. at 17–19, but this hardly contributes to its challenge to this Act. The President appointed the Comptroller General, Charles Bowsher, in 1981 in full compliance with that Clause, a strong element of the GAO's constitutionality. *See Buckley,* 424 U.S. at 128 n.165. Furthermore, the Executive eliminates its own argument, when it necessarily concedes that officers appointed by the President pursuant to that clause may or may not be subject to Presidential removal, depending on their status and functions. Exec. Br. at 45–47; *see* House Br. at 18 & n 18 (discussing Appointments Clause).

bers of the cabinet").[10] The Executive does not proffer a single citation or authority for deeming the Comptroller an officer belonging in the higher rank to which its entire argument pertains. The Comptroller has functions that are important, and sometimes even vital, but his office has never been assigned to the Cabinet, and has never warranted regular advisory attendance upon the President. This Court deems such lesser figures to be "Officers of the United States" required to be appointed pursuant to the Appointments Clause, but not the "Heads of Departments" addressed in the Executive argument. *Germaine,* 99 U.S. at 510–11.

Rather, the Comptroller is like other specially-titled officers, such as the former Commissioner of Pensions, whose status was adjudicated by this Court in *Germaine,* the Surgeon General, or the Comptroller of the Currency. When Congress created the Department of the Treasury in 1789, it established the Comptroller with an independent checking function, but his rank, like that of the Registrar and the Auditor, fell distinctly below that of the head of the Department, the Secretary of the Treasury. Act of Sept. 2, 1789, ch. 12, § 3, 1 Stat. 66 (1789). When the comptroller function was vested in 1921 in the Comptroller General, the concept of the office as necessarily independent from the President was reinforced, but not by conferring the status of Cabinet rank. Rather, the overwhelming evidence shows that "it was agreed by the manager of the 1921 bill, by the President in his veto message, and by the leading contemporaneous commenta-

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[10] In *Germaine,* the Court explained that "by the term 'heads of departments,' " "something different is meant from the inferior commissioners and bureau officers," *id.* at 511. The Court lined up the Cabinet, the "principal Officer in each of the executive Departments" of the Opinions Clause, and the "Heads of Departments" of the Appointments Clause, as one consistent class *Id.* Thus, *Germaine* determined that the Commissioner of Pensions was not "the head of a department, within the meaning of the Constitution." 99 U.S. at 510. *Germaine*'s discussion of officers continues to be the law *Buckley,* 424 U.S. at 125–26 (quoting *Germaine* extensively).

tor, that the Comptroller General could be appointed as an 'inferior officer.' " House Br. at 47 & n.55 (citing legislative history and article).[11]

In light of the Comptroller's appropriately lesser status, the Executive's expansive argument regarding asserted constitutional imperatives for Presidential control must be sharply deflated. For example, a central principle of the government for the past century has been the rule of *United States* v. *Perkins*, 116 U.S. 483 (1886), regarding inferior officers: that Congress "may limit and restrict the power of removal as it deems best for the public interest." *Id.* at 485 (quotation omitted). The Executive concedes that principle as it must, Exec. Br. at 25, since *Perkins* expressly rejected any notion that limits on Presidential removability for such officers constituted "an infringement upon the constitutional prerogative of the Executive," *Perkins*, 116 U.S. at 485.[12]

Of course, as the Executive contends, the Constitutional Convention decided not to make the President an instrument of Cabinet government in exercising his constitutional powers or to have more than one President. In the famous anecdote, President Lincoln could poll his Cabinet and announce the result as "seven noes, one aye—the ayes have it," so long as the one was Lincoln. R.F. Fenno, *The Cabinet in Perspective* 29 (1959). However, it would

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[11] As President Wilson emphasized regarding the offices of Comptroller General and Deputy Comptroller General, "[i]t would have been within the constitutional power of Congress, in creating these offices, to have vested the power of appointment in the President alone, in the President with the advice and consent of the Senate, or even in the head of a department." 59 *Cong. Rec.* 8609 (1920) (Presidential message). The Executive disputes this, citing no authority but the district court, which itself cites none. Exec Br. at 26 n.16; J A. 62 n.23.

[12] *See Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1982) (finding an unrestricted Presidential power of removal only over "the most important of his subordinates"); *id.* at 787 (White, J., dissenting) (for officers not of that high rank, "restrictions on executive authority are the rule and not the exception," and it would be a "frivoulous contention" to deem such restrictions a violation of a "constitutionally assigned Presidential function").

astound the Framers to hear that principle transformed into an enormous Executive prerogative to strike down any Acts of Congress deemed inconsistent with Presidential preferences for "responsibility" in lesser officers, Exec. Br. at 16–17.

Rather, the Constitutional Convention balanced its rejections of a plural Presidency with sharp criticism of any strong or "monarchical" prerogatives for the President.[13] The Framers' hostile reaction to the leading example before them of expansive executive prerogatives, namely, George III, has played a key role in this Court's conclusions about the limited nature of Executive powers.[14] It was James Madison, the American oracle on separation of powers, who struck the note at the Convention that harmonized the acceptance of a single President with the disdain for the hated example during colonial rule. "[E]xecutive powers . . . shd. be *confined and defined*—if large we shall have the Evils of elective Monarchies—[but] probably the best plan will be a single Executive . . . ." 1 Farrand 70 (emphasis supplied).

As Justice Frankfurter set forth, quoting Justice Holmes: "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Youngstown*, 343 U.S. at 610 (concurring opinion). The Framers intended that the

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[13] *See, e.g.*, 1 M. Farrand, *The Records of the Federal Convention of 1787* 65 (1966 ed.) (Pinkney) (fearing power grants that "would render the Executive a Monarchy, of the worst kind, towit [sic] an elective one"); *id* 66 (Randolph) (fearing "the foetus of monarchy"); *id.* (Wilson) (agreeing "that he was not governed by the British Model"); *id* 83 (Franklin); *id.* 100 (Butler) ("Gentlemen seemed to think we had nothing to apprehend from an abuse of the Executive power. But why might not a Cataline or a Cromwell arise in this Country as well as in others"); *id.* 101 (Mason) ("We are not indeed constituting a British Government, but a more dangerous monarchy, an elective one"); *id.* 103 (Franklin) ("The Executive will be always increasing here, as elsewhere, till it ends in a monarchy"); *id.* 113 (Mason).

[14] *See Youngstown*, 343 U.S. at 640–41 (Jackson, J., concurring); *Fleming* v. *Page* 50 U.S. (9 How.) 603, 618 (1850).

President would carry out the laws as Congress wrote them; they did not intend that he possess sweeping inherent prerogatives, above and beyond the laws, regarding the organization of administrative duties of lesser officers in the government. That power belongs to Congress, which creates offices "by Law," U.S. Const., art. II, sec. 2, J.A. 92, employing its authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., art. I, sec. 8, cl. 18. As described above, this Court has repeatedly and unanimously sanctioned broad administrative duties for independent agencies. Thus, only if one of the President's "confined and defined" powers plainly forbade this Act, could the Congress be barred from passing it.

B. The Comptroller's Functions are Suitable for Independence

The Executive premises a major portion of its argument on the contention that "the functions assigned to the Comptroller general under section 251 of the Act" are inherently executive. Exec. Br. at 27 (heading); *id.* at 27–30, 35 (seeking to depict functions under the Act as "matters [that] are committed . . . . to [the Chief Magistrate's] superintendance" (quotation omitted). Applying the Framers' intent to the Act's functions exposes the lack of merit in this contention. In the Deficit Control Act, Congress assigned the functions of making economic projections and mathematically calculating the formula-based cuts to the independent GAO, rather than to the President's OMB, because of the need to "wall" off those calculations from politics, particularly the calculations that equal cuts come from defense and non-defense spending. House Br. at 5, 21. *See id.* at 4–6, 20–23; J.A. 60. The Framers' pronouncements strongly support assigning to GAO these calculations, which are functionally similar to impoundment control insofar as they concern amounts

not made available for spending. *See* 2 U.S.C. §§ 686–87 (1982) (Impoundment Control Act). Such functions as impoundment control, and calculation of across-the-board cuts, conform with the historically independent, quasi-judicial and quasi-legislative comptroller function of determining whether Executive spending remains within the law. House Br. at 25–28.[15]

The independent Comptroller's function is integral to the power of the purse. In the *Federalist,* Madison had pointed to the Congress's periodic exercise of the power of the purse, including its control over how "revenue may be appropriated," as "the best possible precaution against danger from standing armies," *The Federalist No. 41* at 259. In the Virginia ratifying convention, Madison elaborated:

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[15] The Executive lays claim to the function of the "application and disbursement of the public moneys," Exec. Br. at 34 (quotation omitted) However, the Deficit Control Act, like the Impoundment Control Act, does not tamper in the least with the application and disbursement of the public moneys. Just as the Impoundment Control Act uses GAO to prevent Executive withholding of funds by Presidential fiat, prior to application and disbursement, the Deficit Control Act uses GAO calculations of across-the-board reductions in appropriation accounts and program levels prior to application and disbursement. Section 251(b)(1), J A. 116–17.

Under both acts, the Executive apparatus of disbursement operates as before. Pre-application GAO calculation of across-the-board reductions, or of impoundments, interferes no more with disbursement than has GAO's post-applicaton account settlement. *See* General Accounting Office, *Principles of Federal Appropriatons Law* 2–21 (1982) (GAO account settlement occurs after fund application and disbursement, following certification by agency officers of voucher for payment); McGuire, *Legislative or Executive Control over Accounting for Federal Funds,* 20 Ill. L. Rev. 455, 470 (1926) ("application and disbursement of public money is an entirely different function from [the Comptroller's settlement and adjustment function which] . . . . insures to the American people through their elected representatives the same control over their executive officers as has been exercised by the Anglo-Saxon over executive officers since the days of Charles II"). Even the Executive concedes the non-executive nature of post-application settlement and adjustment of claims. Exec. Br. at 35 n.19 (conceding the Court of Claims could perform the function).

> [T]he sword and purse are not to be given to the same member. Apply it to the British government, which has been mentioned. The sword is in the hands of the British king. The purse [is] in the hands of the parliament. It is so in America, as far as any analogy can exist. . . . The purse is in the hands of the representatives of the people. They have the appropriation of all monies.[16]

Madison further articulated the Framers' view of the power of the purse in shaping the First Congress's statute creating the Treasury Department. That act treated the machinery for spending quite differently than that for the war and foreign affairs functions: it installed an elaborate system of checks against Executive abuse, with a far more limited Presidential role and a far greater Congressional one, and in particular, relied on a Comptroller's office with its traditional independence.[17] Madison delivered several historic addresses concerning the Comptroller, in which he explained the Comptroller's necessary independence from Executive will, carefully delineating the distinctions between the Comptroller's function and that of a Secretary of Foreign Affairs, who is necessarily subject to Presidential removal at will. House Br. at 28 & n.31 (discussing Madison's speeches regarding the Comptroller); *Humphrey's Executor,* 295 U.S. at 631 (noting Madison's view that "a different rule in respect of executive removal might well apply" to "the Comptroller").[18]

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[16] 3 J. Elliott, *Debates on the Adoption of the Constitution* 367 (1836); *See* 4 *id.* 175-76, 178-79 (dialogue between Mr. Locke and Mr. Maclaine regarding the purse and the sword).

[17] *See* Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power,* 63 B.U.L. Rev. 59, 71-74 (1983) (discussing the act creating the Treasury Department, Act of Sept. 2, 1789, ch. 12, § 3, 1 Stat. 66 (1789)); House Br. at 30-31 & nn.33, 35 (Comptroller's independence).

[18] The Executive seems to suggest that the 1789 debate on the Department of Foreign Affairs represented a Congressional conclusion

Continued

In sum, the Executive presents no persuasive argument that the functions in the Deficit Control Act must be carried out subject to the will of the Executive. The Act's cuts may be painful substantively in all sectors of the budget, but in its withholding of all-encompassing power from the Executive over calculations of the amounts not made available for disbursement, the Act accords with the Framers' intent.

C. The Provisions for Removal by Public Law

Ultimately, the Executive relies heavily on its abstract arguments concerning the provision in the 1921 act that requires a public law, based on cause, to remove the Comptroller. Exec. Br. at 30–35. As the House parties described, the provision derived from a unique historical background: the Appropriations Clause, U.S. Const., art. I, sec. 9, cl. 7, J.A. 91, and the powerful British, state, and federal history underlying it. These showed the Framers' understanding that the power of the purse implied a Comptroller independent of the Executive, with a significance well understood down to the present. House Br. at 25–36. The Executive acknowledges the force of this background, Exec. Br. at 33–35, but presents no persuasive response.[19]

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that the President's power to remove the Comptroller must necessarily override any statute regarding protection of tenure. Exec. Br. at 21–23. The view on which the Executive relies commanded "less than a third of the membership of the House," Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 362 (1927) (detailing positions and votes of House Members). Moreover, Madison himself, as "the highest source [of] even those who—a minority of a minority—put the President's power of removal on the loftiest constitutional grounds in 1789, nevertheless recognized that it might be curtailed in certain cases," namely, that of " 'the tenure by which the Comptroller is to hold his office.' " *Id.* at 366 (quoting 1 Annals of Cong. 635 (J. Gales ed. 1789)).

[19] The Executive's discussion of the Treasurer, Exec. Br. at 34, only proves the House parties' point. The proposed Treasurer discussed at the Convention was the predecessor of the Secretary of the Treasury, a

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Thus, the Executive challenge to that provision becomes a challenge to the authority of Congress to provide for a process of action by public law, in a historic context of maximum constitutional strength for that authority. The 1921 act responded to a background of Presidential use of removal threats to obtain the Comptroller's subservience, House Br. at 31–32; pursuant to that act, whether the President can effect a removal depends on the persuasiveness, in the particular circumstances, of his showing of the cause required by the 1921 Act as a basis for enacting the requisite public law. This constitutes the great protection of the Comptroller's independence, but the Executive assails it as "an even *more severe* restraint on the President," Exec. Br. at 32 (emphasis supplied), than the legislative veto-like mechanism struck down in *Myers*.

The House parties showed in detail the lack of merit in this Executive argument, House Br. at 42–49. Fundamentally, *Chadha* itself shows that the Executive's argument fails because that argument proves far too much. The provision struck down in *Myers* gave power outside the Article I enactment procedures to one chamber of Congress (the Senate) to decide, as with a legislative veto, whether to authorize an Executive action of removal. Yet, Congress may require the President to obtain authority

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Cabinet-level policymaking financial officer. He had nothing to do with the entirely separate function noted by Madison of "the independent officers of Comptroller and Auditor." 1 Annals of Cong. 393 (J. Gales ed. 1789); House Br. at 28. The Framers understood the Comptroller's function to be quite different:

> One State after another resorted to the appointment of a special officer to assist the Treasurer and to scrutinize the general fiscal administration, laying statements of the public finances before the Legislature. He was usually called the Comptroller.

A. Nevins, *The American States During and After the Revolution: 1775–89* 514 (1924); *id.* at 514–15 & nn.68, 70 (further describing Comptrollers and similar officers created in Virginia (1780), Connecticut (1786), Massachusetts (1786), North Carolina, and New Hampshire) This distinction between a Cabinet-rank arm of the Executive, and the independent Comptroller, was understood throughout the English-speaking world, both then and now. House Br. at 25–28.

by a later law in order to act, either by expressly denying such authority pending later enactment, or by granting authority with a time limit necessitating reauthorization.[20] If *Chadha* means anything, it is that the President certainly has every right to complain when a statute subjects him to one or both Houses outside the enactment process, as in *Myers,* 272 U.S. at 161; however, he cannot complain when he must obtain their authorization *through* that process, as in this provision for removal by public law.[21] The Framers thus certainly imposed a "severe restraint," but that was simply their deliberate decision in setting up elaborate checks and balances in the enactment process. *Chadha,* 462 U.S. at 946–51.[22]

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[20] *See, e.g., Chadha,* 462 U.S. at 955 n.19 (the President may be required to obtain enactment of reauthorizations in order to act, by placing "durational limits on authorizations"); *Youngstown,* 343 U S. at 638 (Jackson, J., concurring);

[21] The sole exception is if the President's inherent authority to remove the Comptroller were shown to be so overwhelming, so "conclusive and preclusive," *Youngstown,* 343 U.S. at 638 (concurring opinion), that a requirement of authorization by public law for such removal is unconstitutional In light of the powerful constitutional history showing that the Framers deeply understood protection from removal for an independent Comptroller to be implicit in the power of the purse of U.S. Const., art. I, sec. 9, cl. 7, House Br. at 25–28, the Executive cannot make such a showing, and for this officer devoid of the attributes of Cabinet rank, it has certainly not made that showing.

[22] The Executive also discusses the House's power of impeachment, and the Senate's power of trial following impeachment, as though these were no different from the removal provision in the 1921 act, Exec. Br. at 31–2 However, *Chadha* discussed the powers of impeachment and conviction as examples when each House "act[s] alone and outside of its bicameral legislative role . . . These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution." 462 U.S. at 955–56. Here, similarly, the House parties would "underscore the difference" between action by one or both Houses alone, as in impeachment and in the provision struck down in *Myers,* and the entirely different authority of Congress and the President when they enact a public law with "presentment and bicameralism," *Chadha,* 462 U.S. at 956, as would occur pursuant to the provision in the 1921 act for removal by joint resolution.

Lastly, the Executive proffers the spectre of Congressional "influence," asserting that the removal provision "can only be understood as the reservation of a right to exercise substantive control" over the Comptroller. Exec. Br. at 32. The Third Circuit's *Ameron* opinion (reprinted as an appendix to the Senate Reply Brief) addresses persuasively why the argument is without merit. Just as this Court has deemed the GAO an "independent agency," *Bowsher* v. *Merck & Co., Inc.,* 460 U.S. 824, 844 (1983), the Third Circuit has found the Comptroller to be "one of the most independent officers in the whole of the federal government," *Ameron,* slip op. at 19. "[A] practical analysis of how the Comptroller General and the GAO actually function reveals that the removal power" is "a power of limited importance." "In more than 60 years of the GAO's existence," that power has "*never*" been exercised. *Id.*

As a rhetorical device, the challengers attribute the removal power under that provision to Congress "alone," as though one or both Houses could remove the Comptroller. However, as the *Ameron* concurring opinion added, the provision is "no sword of Damocles over the Comptroller General's head," for it requires both a showing of cause and "a joint resolution," *id.* at 43, i.e., a public law. Such a law must be presented to the President. *See* Corwin, *supra* note 18, 27 Colum. L. Rev. at 396–97 (describing significance of presentation of that joint resolution).

The Third Circuit scorned any comparison between the mechanisms in *Buckley* and *Chadha* for Congressional control by legislative appointments and vetoes, and this GAO provision which works only through enactment of a public law:

> It is particularly instructive in this regard to compare this case with *INS* v. *Chadha, supra,* heavily relied upon by the [Executive] . . . . [for] the nature of the infringements are very different. The unicameral legislative veto struck down in *Chadha* had all the earmarks of a hastily considered, unjust bill of attainder . . . . Here, by

> contrast, there is no direct congressional involvement, and consequently the danger sought to be avoided in *Chadha* . . . is simply not present.

Ameron, slip op. at 43–44 (concurring opinion).

A host of commentators, including many relied upon by the Executive, agree on the GAO's constitutionality.[23] No more conscientious opinion has been advanced then the opinion of the very counsel who presented *Myers* for the Executive, Solicitor General Beck:

> My further study and reflection . . . have convinced me that my first position in this matter was unsound and that it is necessary, to prevent irresponsible spending of public funds, that the Comptroller General be responsible only to Congress.[24]

As he elaborated:

> Congress has the power over the public purse. It is its greatest power, and in the history of the English-speaking race, it has been a most potent one, not merely in safeguarding the Commonwealth but the liberties of the citizen. . . . [T]he Comptroller General . . . must be independent of the Executive.

Id. The value of that counsel has hardly diminished. On the contrary, today more than ever, the GAO serves as the nation's vital check on Executive abuse in matters such as impoundment control and procurement. To

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[23] The following commentators, cited in Exec. Br. at 41 n.28 & 43 n 30, examine and sustain GAO's constitutionality: F. Mosher, *The GAO: The Quest for Accountability in American Government* 242 (1979) ("independent agency"); R. Sperry, D. Desmond, K. McGraw & B Schmitt, *GAO 1966-1981: An Administrative History* 257 (1981) (confirming the GAO's "delicate constitutional balance"); Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies,* 21 Cornell L.Q. 215, 240–41 (1936).

[24] J.M. Beck, *Our Wonderland of Bureaucracy* 190 (1932).

render it either impotent or subject to the Executive would be perilous.[25]

CONCLUSION

No constitutional provision supports a facial challenge to this Act. The challengers have failed to meet the standards required for this Court to wield the weapon most disruptive to democracy—the power to strike down Acts of Congress. This Court should allow the political Branches to work their will with the intractable problems of budgeting. The Act should be upheld.

Respectfully submitted,

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[25] Of course, no sound ruling could be so sweeping as to call the impoundment control and procurement acts into question. The district court, J.A. 71-72 n.29, and the Executive, Exec Br. at 41 n.29, both noted some of the distinctions More substantially, the Deficit Control Act did not respond to a particular Executive abuse, but rather to the intractable deficit problem. In contrast, the impoundment control and procurement acts responded to major historic problems necessitating an outside check on the Branch subject to those problems, for which GAO's role, as the outside tool for the power of the purse, was peculiarly necessary