AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers

**Bowsher v. Synar, 478 U.S. 714** (1986)

*Though not his highest priority, Ronald Reagan campaigned against budget deficits. The federal government had not run an annual budget surplus (when its revenues for the year exceeded its expenditures) since 1969, and on both a dollar basis and as a percentage of the economy the size of the budget deficits of the late 1970s were far larger than any the government had experienced at any time since World War II. The fiscal situation only worsened during Reagan’s first term of office. The president and his conservative supporters were successful in winning support for his primary commitments of tax cuts and increased defense spending, but Democrats were successful in protecting their favored domestic programs from spending cuts, and a short but deep recession at the beginning of the Reagan administration further strained the federal budget. By the mid-1980s, the accumulating federal debt was increasingly viewed as a political and economic crisis, threatening economic growth and preventing both parties from pursuing their policy goals.*

*Reducing the budget deficit required making hard political choices, however, and there was little agreement about the correct choices to make. The most obvious paths toward reducing the deficit threatened core political commitments of one party or the other. Given the continuation of divided government and the ideological divide between the two parties, fiscal politics absorbed the entire legislative calendar but mostly resulted in stalemate. Some had hoped that the 1984 elections would leave a single party in control of the government, but Reagan won a huge personal victory with short coattails that did not bring a Republican majority in the House of Representatives. After the election, the parties looked for a solution that would work within the context of divided government. The Gramm-Rudman-Hollings Act of 1985 was a bipartisan measure, but also something of an internal compromise within Reagan’s Republican Party. One Republican sponsor of the measure was New Hampshire’s Warren Rudman, a longtime “deficit hawk” and fiscal conservative within the party. The other Republican sponsor was Phil Gramm, a newly elected member of the Senate from Texas. As a then-Democrat in the House of Representatives, Gramm had broken with his party to support Reagan’s early budget initiatives and had become a vocal leader of the tax-cutting wing of the Republican Party.*

*The central feature of the Gramm-Rudman-Hollings Act was a series of targets for the federal deficits for the next five fiscal years. If the actual deficit were to exceed that target by a specified amount, then an “automatic,” across-the-board budget cut would be triggered that would bring the budget within the target. The comptroller general was assigned the responsibility of triggering the automatic cuts, with the president implementing the cuts directed by the comptroller general. After the bill was signed into law, twelve congressmen including Michael Synar filed suit against Charles Bowsher, the comptroller general, in federal district court seeking a declaration that this provision of the act was unconstitutional. A suit was also filed by the National Treasury Employees Union seeking the same, arguing that their members would be injured by an across-the-board spending cut that would reduce the scheduled cost-of-living adjustments to their benefit packages. A special three-judge panel for the district court found that the provision was not an unconstitutional delegation of legislative power but did violate the separation of powers, since a key player in the enforcement of the act, the comptroller general, was not directly accountable to the Chief Executive (since he was removable from office only by congressional resolution). On direct appeal to the U.S. Supreme Court, the justices by a 5–4 decision affirmed the district court and invalidated the provision of the act.*

*Congress revised the statute in 1987 to avoid the constitutional problem. At least on paper, Congress found ways to meet the budget targets of the act without triggering the automatic cuts. There is some evidence that the act did reduce federal spending and deficits in the late 1980s. It was replaced by a new deficit-reduction structure in 1990, negotiated by Republican President George H. W. Bush and the Democrats, who then held majorities in both houses of Congress. Conservatives accused Bush of breaking his “no new taxes” campaign pledge in order to broker the deal.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

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It is clear that Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch. The Reorganization Acts of 1945 and 1949, for example, both stated that the Comptroller General and the GAO are “a part of the legislative branch of the Government.” Similarly, in the Accounting and Auditing Act of 1950, Congress required the Comptroller General to conduct audits “as an agent of the Congress.”

Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch. . . . Comptroller General Warren, who had been a Member of Congress for 15 years before being appointed Comptroller General, testified [in congressional hearings]: “During most of my public life, . . . I have been a member of the legislative branch. Even now, although heading a great agency, it is an agency of the Congress, and I am an agent of the Congress.” . . .

Against this background, we see no escape from the conclusion that, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers. The remaining question is whether the Comptroller General has been assigned such powers in the Balanced Budget and Emergency Deficit Control Act of 1985.

The primary responsibility of the Comptroller General under the instant Act is the preparation of a “report.” This report must contain detailed estimates of projected federal revenues and expenditures. The report must also specify the reductions, if any, necessary to reduce the deficit to the target for the appropriate fiscal year. The reductions must be set forth on a program-by-program basis.

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Appellants suggest that the duties assigned to the Comptroller General in the Act are essentially ministerial and mechanical so that their performance does not constitute “execution of the law” in a meaningful sense. On the contrary, we view these functions as plainly entailing execution of the law in constitutional terms. Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of “execution” of the law. Under § 251, the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.

The executive nature of the Comptroller General’s functions under the Act is revealed in § 252(a)(3) which gives the Comptroller General the ultimate authority to determine the budget cuts to be made. Indeed, the Comptroller General commands the President himself to carry out, without the slightest variation (with exceptions not relevant to the constitutional issues presented), the directive of the Comptroller General as to the budget reductions. . . .

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We conclude that the District Court correctly held that the powers vested in the Comptroller General under § 251 violate the command of the Constitution that the Congress play no direct role in the execution of the laws. Accordingly, the judgment and order of the District Court are affirmed.

Our judgment is stayed for a period not to exceed 60 days to permit Congress to implement the fallback provisions.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, concurring.

 . . . . I agree with the Court that the “Gramm-Rudman-Hollings” Act contains a constitutional infirmity so severe that the flawed provision may not stand. I disagree with the Court, however, on the reasons why the Constitution prohibits the Comptroller General from exercising the powers assigned to him by § 251(b) and § 251(c)(2) of the Act. It is not the dormant, carefully circumscribed congressional removal power that represents the primary constitutional evil. Nor do I agree with the conclusion of both the majority and the dissent that the analysis depends on a labeling of the functions assigned to the Comptroller General as “executive powers.” Rather, I am convinced that the Comptroller General must be characterized as an agent of Congress because of his longstanding statutory responsibilities; that the powers assigned to him under the Gramm-Rudman-Hollings Act require him to make policy that will bind the Nation; and that, when Congress, or a component or an agent of Congress, seeks to make policy that will bind the Nation, it must follow the procedures mandated by Article I of the Constitution—through passage by both Houses and presentment to the President. In short, Congress may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress such as the Speaker of the House of Representatives, the Sergeant at Arms of the Senate, or the Director of the Congressional Budget Office. INS v. Chadha (1983). That principle, I believe, is applicable to the Comptroller General.

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The Gramm-Rudman-Hollings Act assigns to the Comptroller General the duty to make policy decisions that have the force of law. The Comptroller General’s report is, in the current statute, the engine that gives life to the ambitious budget reduction process. . . . It is, in short, the Comptroller General’s report that will have a profound, dramatic, and immediate impact on the Government and on the Nation at large.

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I concur in the judgment.

JUSTICE WHITE, dissenting.

The Court, acting in the name of separation of powers, takes upon itself to strike down the Gramm-Rudman-Hollings Act, one of the most novel and far-reaching legislative responses to a national crisis since the New Deal. The basis of the Court’s action is a solitary provision of another statute that was passed over 60 years ago and has lain dormant since that time. I cannot concur in the Court’s action. Like the Court, I will not purport to speak to the wisdom of the policies incorporated in the legislation the Court invalidates; that is a matter for the Congress and the Executive, both of which expressed their assent to the statute barely half a year ago. I will, however, address the wisdom of the Court’s willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives through the means chosen by the Congress and the President in the legislative process established by the Constitution. . . . In attaching dispositive significance to what should be regarded as a triviality, the Court neglects what has in the past been recognized as a fundamental principle governing consideration of disputes over separation of powers:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

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The practical result of the removal provision is not to render the Comptroller unduly dependent upon or subservient to Congress, but to render him one of the most independent officers in the entire federal establishment. Those who have studied the office agree that the procedural and substantive limits on the power of Congress and the President to remove the Comptroller make dislodging him against his will practically impossible. . . .

The majority’s contrary conclusion rests on the rigid dogma that, outside of the impeachment process, any “direct congressional role in the removal of officers charged with the execution of the laws . . . is inconsistent with separation of powers.” Reliance on such an unyielding principle to strike down a statute posing no real danger of aggrandizement of congressional power is extremely misguided and insensitive to our constitutional role. . . . The Act vesting budget-cutting authority in the Comptroller General represents Congress’ judgment that the delegation of such authority to counteract ever-mounting deficits is “necessary and proper” to the exercise of the powers granted the Federal Government by the Constitution; and the President’s approval of the statute signifies his unwillingness to reject the choice made by Congress. Under such circumstances, the role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law. Because I see no such threat, I cannot join the Court in striking down the Act.

I dissent.

JUSTICE BLACKMUN, dissenting.

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 . . . The only relief sought in this case is nullification of the automatic budget-reduction provisions of the Deficit Control Act, and that relief should not be awarded even if the Court is correct that those provisions are constitutionally incompatible with Congress’ authority to remove the Comptroller General by joint resolution. Any incompatibility, I feel, should be cured by refusing to allow congressional removal—if it ever is attempted—and not by striking down the central provisions of the Deficit Control Act. However wise or foolish it may be, that statute unquestionably ranks among the most important federal enactments of the past several decades. I cannot see the sense of invalidating legislation of this magnitude in order to preserve a cumbersome, 65-year-old removal power that has never been exercised and appears to have been all but forgotten until this litigation.

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