

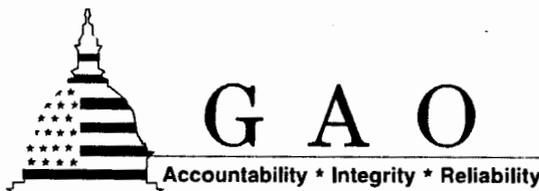
GAO

Report to the Secretary of Defense

June 2003

MILITARY BASE CLOSURES

Better Planning Needed for Future Reserve Enclaves





Highlights of GAO-03-723, a report to the Secretary of Defense

MILITARY BASE CLOSURES

Better Planning Needed for Future Reserve Enclaves

Why GAO Did This Study

While four previous base closure rounds have afforded the Department of Defense (DOD) the opportunity to divest itself of unneeded property, it has, at the same time, retained more than 350,000 acres and nearly 20 million square feet of facilities on enclaves at closed or realigned bases for use by the reserve components. In view of the upcoming 2005 base closure round, GAO undertook this review to ascertain if opportunities exist to improve the decision-making processes used to establish reserve enclaves. Specifically, GAO determined to what extent (1) specific infrastructure needs for reserve enclaves were identified as part of base realignment and closure decision making and (2) estimated costs to operate and maintain enclaves were considered in deriving net estimated savings for realigning or closing bases.

What GAO Recommends

As part of the new base realignment and closure round scheduled for 2005, GAO is recommending that the Secretary of Defense provide the Defense Base Closure and Realignment Commission with data that clearly specify the (1) infrastructure needed for any proposed reserve enclaves and (2) estimated costs to operate and maintain such enclaves.

In commenting on a draft of this report, DOD agreed with the recommendations.

www.gao.gov/cgi-bin/getrpt?GAO-03-723.

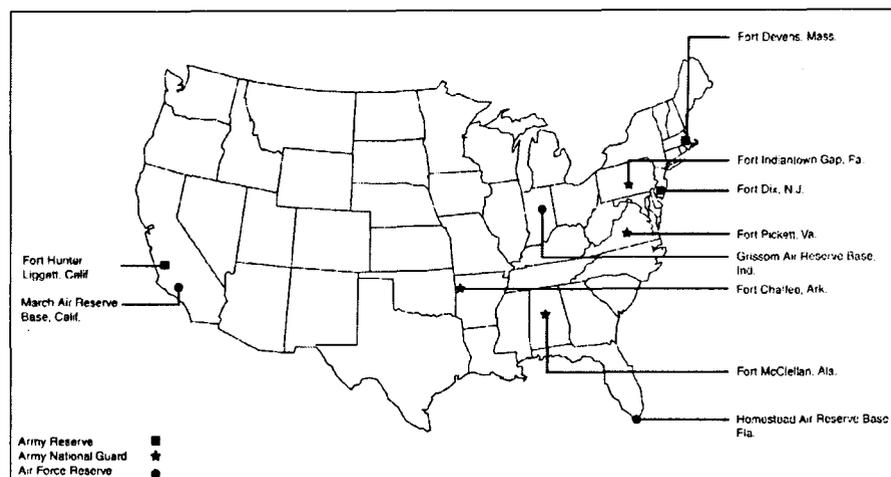
To view the full product, including the scope and methodology, click on the link above. For more information, contact Barry Holman at (202) 512-8412 or holmanb@gao.gov.

What GAO Found

The specific infrastructure needed for many DOD reserve enclaves created under the previous base realignment and closure process was generally not identified until after a defense base closure commission had rendered its recommendations. While the Army generally decided it wanted much of the available training land for its enclaves before the time of the commission's decision making during the 1995 closure round, time constraints precluded the Army from fully identifying specific training acreages and facilities until later. Subsequently, in some instances the Army created enclaves that were nearly as large as the bases that were being closed. In contrast, the infrastructure needed for Air Force reserve enclaves was more defined during the decision-making process. Moreover, DOD's enclave-planning processes generally did not include a cross-service analysis of military activities that may have benefited by their inclusion in a nearby enclave.

The Army did not include estimated costs to operate and maintain its reserve enclaves in deriving net estimated base realignment or closure savings during the decision-making process, but the Air Force apparently did so in forming its enclaves. GAO's analysis showed that the Army overestimated savings and underestimated the time required to recoup initial investment costs to either realign or close those bases with proposed enclaves. However, these original cost omissions have not materially affected DOD's recent estimate of \$6.6 billion in annual recurring savings from the previous closure rounds because the Army subsequently updated its estimates in its budget submissions to reflect expected enclave costs.

Major Reserve Component Enclaves Created under Previous BRAC Rounds



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Abbreviations

BRAC	base realignment and closure
COBRA	Cost of Base Realignment Actions

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United States General Accounting Office
Washington, DC 20548

June 27, 2003

The Honorable Donald H. Rumsfeld
Secretary of Defense

Dear Mr. Secretary:

Since 1988, the Department of Defense (DOD) has undergone four rounds of base realignments and closures and has reportedly reduced its base infrastructure by about 20 percent, saving billions of dollars in the process. While the closure process has afforded DOD the opportunity to divest itself of property it no longer needed¹ to meet its national security requirements, it has, at the same time, retained more than 350,000 acres of land and nearly 20 million square feet of facilities, typically referred to as enclaves,² on closed or realigned bases for use by the reserve components. Most of the larger enclaves were established during the 1995 round of base closures and are now managed by either the Army National Guard or Army Reserve rather than the active component.

We prepared this report under our basic legislative responsibilities as authorized by 31 U.S.C. § 717 and are providing it to you because of your responsibilities in the upcoming base closure round authorized for 2005.³ In view of this round, we undertook this review to ascertain if opportunities exist to improve the planning and decision-making processes that were used to establish reserve enclaves in the previous closure rounds. Specifically, our objectives were to determine to what extent (1) specific infrastructure needs (e.g., needs for acreage and facilities) for reserve enclaves were identified as part of base realignment and closure decision making in previous closure rounds and (2) estimated

¹ DOD reported that, as of December 2002, it had disposed of about 272,000 acres (53 percent) of an approximately 511,000 acres that it had identified during the previous base closure rounds as unneeded and being made available to others for reuse.

² See Defense Base Closure and Realignment Commission, *1995 Report to the President* (Washington D.C.: July 1, 1995), B-2. An enclave is "a section of a military installation that remains intact from that part which is closed or realigned and which will continue with its current role and functions subject to specific modifications."

³ A single round of base realignments and closures in 2005 was authorized with the passage of the National Defense Authorization Act for Fiscal Year 2002.

costs to operate and maintain enclaves were considered in deriving the net estimated savings for realigning or closing bases.

In performing our work, we focused our attention on the processes used by the department to define infrastructure needs for major⁴ reserve enclaves for the Army in the 1995 round and for the Air Force in the earlier rounds. We did not validate the need for any of the department's enclaves nor the specific infrastructure needs for those enclaves. Of the 10 major reserve enclaves created during the previous closure rounds, 7 are within the Army and 3 are within the Air Force. Neither the Navy nor the Marines have formed a major enclave (see app. I for a brief description of DOD's major reserve component enclaves). We visited five major Army enclaves—Fort Hunter Liggett, California; Fort Chaffee, Arkansas; Fort Pickett, Virginia; Fort McClellan, Alabama; and Fort Indiantown Gap, Pennsylvania—that were created during the 1995 closure round and account for nearly 90 percent, or more than 310,000 acres, of DOD's total major reserve component enclave acreage. We also visited two of three major Air Force enclaves at Grissom Air Reserve Base in Indiana (a 1991 round action) and March Air Reserve Base in California (a 1993 round action). We also visited a smaller Air Force enclave at Rickenbacker Air National Guard Base in Ohio (a 1991 round action) to gain a perspective on Air Guard enclave formation processes. Our review efforts were constrained by the limited availability of officials (owing to the passage of time) who had participated in previous rounds of base closure decision making and the general lack of planning documentation regarding enclave infrastructure needs and estimated costs.

Results in Brief

The specific infrastructure needed for many reserve enclaves was generally not identified until after the base closure and realignment commission for a closure round had rendered its recommendations. According to Army officials, while the Army had generally decided it wanted much of the available training land for its enclaves prior to completion of commission decision making during the 1995 round, time constraints precluded the Army from fully identifying specific training acreages and facility needs until after the commission made its recommendations. Consequently, while some of the commission's

⁴ For the purpose of this report, we defined "major" as exceeding 500 acres. The amount of acreage has no bearing on the relative importance of the missions being performed at these or other enclave locations.

recommendation language⁵ for the 1995 closure round suggested that many Army reserve enclaves would be small, it was nevertheless sufficiently general to allow, in practice, the Army wide flexibility in creating such enclaves. Subsequently, the Army created several enclaves that were nearly as large as the closing bases on which they were located. In contrast, the infrastructure needed for Air Force enclaves was more defined during the decision-making process and subsequent commission recommendations were more specific than those provided for the Army. Moreover, the department's enclave-planning processes generally did not include a cross-service analysis of the needs of military activities or organizations near the enclaves that may have benefited by inclusion in them. Without more complete data regarding the extent of needed enclave infrastructure and cross-service needs—important considerations in the decision-making process, the risk continues that a future base closure commission will not have sufficient information to make informed judgments on the establishment of proposed enclaves, including informed decisions on the facility needs of these enclaves, decisions that can affect expected closure costs and savings. Nor can the department be assured that it is taking advantage of opportunities to achieve operational, economic, and security benefits—such as enhanced readiness, savings, and enhanced force protection—that cross-servicing can provide. However, the department recently issued guidance for the upcoming base closure round that addresses the potential benefits of considering cross-service needs in its infrastructure analyses.

Although the Army did not include estimated costs to operate and maintain most of its major reserve enclaves in deriving net estimated base savings during the decision-making process, the Air Force apparently did so in forming its enclaves. The Army Audit Agency reported in 1997⁶ that about \$28 million in estimated annual costs to operate and maintain four of the Army's major enclaves were not considered in the bases' savings calculations as part of the 1995 closure round. Our analysis showed that the omission of these costs had a significant impact on the estimated

⁵ See Defense Base Closure and Realignment Commission, *1995 Report*. The report recommendation language generally provided that the Army bases be "closed, except that minimum essential ranges, facilities, and training areas" be retained for reserve component use.

⁶ U.S. Army Audit Agency, *Base Realignment and Closure: 1995 Savings Estimates*, Audit Report AA97-225 (Washington, D.C.: July 31, 1997).

savings and payback periods⁷—important considerations in the realignment and closure decision-making process—for several of these bases. In particular, the estimated savings were overstated and the estimated payback periods were understated for those specific bases. For example, if expected enclave costs would have been considered at one Army location, the annual recurring savings estimate for the base would have been reduced by over 50 percent. However, these original cost omissions have not materially affected the department's recent estimate of \$6.6 billion in annual recurring savings from the previous closure rounds because the Army has subsequently updated its savings estimates to reflect expected enclave costs. On the other hand, Air Force officials told us that it had considered expected costs to operate and maintain its proposed reserve enclaves in deriving its base closure savings estimates.⁸ We were unable to verify this point, however, because of the passage of time and lack of available supporting documentation. In the absence of more complete data regarding cost and net savings estimates, a base closure commission may be placed in the position of recommending realignment or closure actions without sufficient information on the financial implications of those proposed actions.

We are making recommendations that are intended to ensure that data provided to the Defense Base Closure and Realignment Commission for 2005 round actions clearly specify enclave needs and costs to operate and maintain any proposed enclaves. In commenting on a draft of this report, DOD concurred with our recommendations.

Background

To enable DOD to more readily close unneeded bases and realign others to meet its national security requirements, the Congress enacted base realignment and closure (BRAC) legislation that instituted base closure rounds in 1988, 1991, 1993, and 1995. A special commission established for the 1988 round made recommendations to the Committees on Armed Services of the Senate and House of Representatives. For the remaining rounds, special BRAC commissions were set up to recommend specific base realignments and closures to the President, who in turn sent the

⁷ A payback period is the time required for cumulative estimated savings to exceed the cumulative estimated costs incurred as a result of implementing BRAC actions.

⁸ An exception is the commission-recommended enclave on the former Homestead Air Force Base; DOD did not submit this as a recommendation to the commission and therefore had not considered any costs related to this action in its submission.

commissions' recommendations with his approval to the Congress. The four commissions generated nearly 500 recommendations—on 97 major base closures and hundreds of realignments and smaller closures.

As a result of the BRAC process, DOD has reported that it reduced its infrastructure⁹ by about 20 percent; has transferred over half of the approximately 511,000 acres of unneeded property to other federal and nonfederal users and continues work on transferring the remainder; and generated about \$16.7 billion in estimated savings through fiscal year 2001, with an estimated \$6.6 billion in annual recurring savings expected thereafter.¹⁰ We and others who have conducted reviews of BRAC savings have found that the DOD's savings are substantial, although imprecise, and should be viewed as rough approximations of the likely savings.¹¹ Under the property disposal process, unneeded DOD BRAC property is initially made available to other federal agencies for their use. After the federal screening process has taken place, remaining property is generally provided to state and local governments for public benefit and economic development purposes. In other cases, DOD has publicly sold its unneeded property.

Under the decision-making processes during the last 3 BRAC rounds, DOD assessed its bases or activities for closure or realignment using an established set of eight criteria covering a broad range of military, fiscal, environmental, and other considerations. DOD subsequently forwarded its recommended list of proposed realignments and closures to the BRAC Commission for its consideration in recommending specific

⁹ The BRAC legislation—the Defense Authorization Amendments and Base Realignment Act (P.L. 100-526, as amended) for the 1988 round and the Defense Base Closure and Realignment Act of 1990 (P.L. 101-510, as amended) for the 1991, 1993, and 1995 rounds—was applicable to military installations in the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and any other commonwealth, territory, or possession of the United States.

¹⁰ See U.S. General Accounting Office, *Military Base Closures: Progress in Completing Actions from Previous Realignments and Closures*, GAO-02-433 (Washington, D.C.: Apr. 5, 2002).

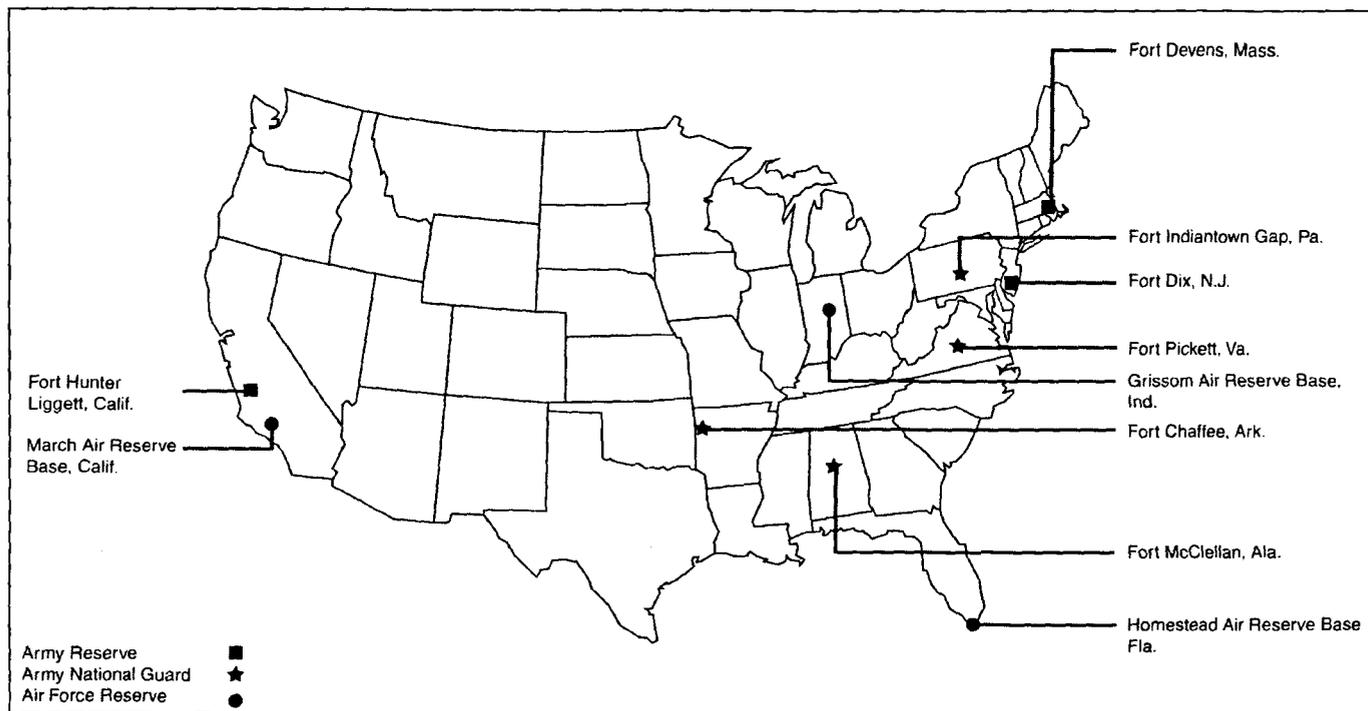
¹¹ See GAO-02-433 and U.S. General Accounting Office, *Military Base Closures: DOD's Updated Net Savings Estimate Remains Substantial*, GAO-01-971 (Washington D.C.: July 31, 2001); Congressional Budget Office, *Review of the Report of the Department of Defense on Base Realignment and Closure* (Washington D.C.: July 1, 1998); Department of Defense, Office of the Inspector General, *Audit Report: Cost and Savings for 1993 Defense Realignments and Closures*, Report No. 98-130 (Washington D.C. May 6, 1998); and U.S. Army Audit Agency, *Base Realignment and Closure: 1995*.

realignments and closure actions. Although military value considerations such as mission requirements and impact on operational readiness were critical evaluation factors, potential costs and savings, along with estimated payback periods associated with proposed closure or realignment actions were also important factors in the assessment process. To assist with the financial aspects of proposed actions, DOD and the BRAC Commissions used a quantitative analytical model, frequently referred to as the Cost of Base Realignment Actions (COBRA), to provide decision makers with a relative assessment of the potential costs, estimated savings, and payback periods of proposed alternative realignment or closure actions. Although the COBRA model was not designed to produce budget-quality financial data, it was useful in providing a relative financial comparison among potential alternative proposed base actions. DOD generally provided improved financial data for each of the services in its annual BRAC budget submission to the Congress following a BRAC Commission's recommendations.¹²

The four previous BRAC Commissions recommended 27 actions in which either a reserve enclave or similar reserve presence was to be formed at a base that was to be realigned or closed (see app. II). In many instances, these actions were relatively minor in that they involved only several acres, but in other cases the actions involved creating enclaves with large acreages and millions of square feet of facilities under reserve component management to conduct training for not only the reserve component but also the active component as well. Figure 1 shows the locations of DOD's 10 major (i.e., sites exceeding 500 acres) reserve component enclaves established under the previous BRAC rounds.

¹² An exception to this involves the Air Force, which did not routinely update its savings estimates from the COBRA model as part of BRAC decision making.

Figure 1: Major Reserve Component Enclaves Created under Previous BRAC Rounds



Source: DOD.

As shown in figure 1, the Army has 7 enclave locations; all of these enclaves, with the exception of Fort Devens (a 1991 round action), were created during the 1995 round. The Air Force has the remaining 3 enclaves: Air Reserve—Grissom Air Reserve Base (a 1991 round action); Homestead Air Reserve Base (a 1993 round action); and March Air Reserve Base (a 1993 round action). Neither the Navy nor the Marines created any major enclaves.¹³

¹³ We have excluded any joint reserve bases established by a BRAC Commission, such as the Navy-managed Joint Reserve Base-Ft. Worth in Texas, because they do not conform to the definition of an enclave as previously defined.

Infrastructure Needs of Many Enclaves Not Identified Until after BRAC Decision Making

Many of DOD's specific enclave infrastructure needs were not identified until after the commission for a BRAC round held its deliberations and had rendered its recommendations. Although the Army's enclave planning process—particularly for the 1995 BRAC round—began before the issuance of commission recommendations,¹⁴ specificity of needed infrastructure was not defined until after the recommendations were finalized. The subsequent size of several of these enclaves was much greater than seemingly reflected in commission recommendations that called for minimum essential facilities and land for reserve use. On the other hand, the Air Force's planning process was reportedly further along and enclave needs were better defined at the time the commission made its recommendations. In addition, DOD's enclave-planning processes generally did not include a cross-service¹⁵ analysis of the needs of military activities or activities in the vicinity of a realigning or closing base with a proposed enclave. As a result, the commission often held deliberations without the benefit of some critical information, such as the extent of the enclave infrastructure needed to support training and potential opportunities to achieve benefits by collocating nearby reserve components on enclave property.

Army Enclave Infrastructure Needs Not As Well Defined As Those of the Air Force during BRAC Decision Making

While the Army's enclave planning process for the 1995 round began previous to completion of the BRAC Commission's deliberations, specific enclave infrastructure needs were not identified until after commission recommendations had been issued on July 1, 1995. Army officials told us that it was recognized early in the process that the Army wanted to retain the majority of existing training land at some of its bases slated for closure or realignment that also served as reserve component maneuver training locations, but time constraints precluded the Army from fully identifying specific enclave needs before the commission completed decision-making. According to a 1999 DOD report on the effect of base closures on future mobilization options, the retention of much of the Army maneuver training acreage at the enclave locations served not only to meet current training needs but also could serve, if necessary, as future maneuver bases with new construction or renovation of existing facilities for an increased force

¹⁴ This advance planning was based on the recommendations for an enclave having already been included in the recommendations of the Secretary of Defense, which were forwarded to the BRAC Commission for its review.

¹⁵ Various service component (both active and reserve) units travel to and conduct training at many reserve enclaves.

structure.¹⁶ In testimony before the commission, the Army had indicated that much of the training land should be retained, but the Army was less specific on the size and facility needs (i.e., in total square footage) for the enclaves. Most facility needs fall within the enclaves' primary infrastructure (or cantonment area)¹⁷ necessary to operate and maintain the enclaves.

The Army formed an officer-level committee—a “Council of Colonels”—that reviewed reserve component enclave proposals but did not approve them for higher-level reviews until July 7, 1995—about 1 week after the BRAC Commission had issued its recommendations. Following the Council of Colonels' approval, a General Officer Steering Committee worked with the Army reserve components to refine the infrastructure needs for the enclaves, needs that the steering committee approved (except for Fort Hunter Liggett¹⁸) in October 1995—more than 3 months following the 1995 BRAC Commission's recommendations.

Although Army approval for most of its enclaves' infrastructure needs occurred in late 1995, the number of acres and facilities for some installations changed as various implementation plans took effect to establish the enclaves. Changes occurred as a result of Army decisions and community reuse plans for property disposed of by the department, as illustrated in the following examples.

- At Fort Hunter Liggett, the number of facilities to be retained in the enclave increased over time based on an Army decision to retain some of the family housing (40 units); morale, welfare, and recreation facilities (9 facilities) and other training-related facilities (3 barracks and 2 classrooms) that had originally been excluded from the enclave.
- At Fort McClellan, the expected cantonment area decreased considerably from an initial proposal of about 10,000 acres (excluding about 22,200 training-range acres) to about 286 acres in response to concerns raised by the local community.

¹⁶ Office of the Deputy Under Secretary of Defense (Installations), *Report on the Effect of Base Closures on Future Mobilization Options* (Washington D.C.: Nov. 10, 1999).

¹⁷ A cantonment area is that part of a base containing the majority of the facilities and most areas that are not part of the training areas.

¹⁸ The infrastructure needs for the Fort Hunter Liggett enclave were not approved until November 1997.

The Air Force's enclave infrastructure needs were reportedly more defined than those of the Army at the time of commission deliberation and decision making. Air Force officials told us that the base evaluation process for the 1991 and 1993 rounds—the rounds when the Air Force's major reserve enclaves were created—included a detailed analysis of the infrastructure needed for the enclaves, including enclave size, identification of required facilities, and expected costs to operate and maintain its proposed enclaves prior to commission consideration of its proposals. These officials did note that some revisions in the sizing of the enclaves and associated enclave boundaries were minor and have occurred over time as plans were further defined, but stated that these changes did not materially affect enclave costs. Although documentation on the initial plans was not available (due to the passage of time), we were able to document some enclave revisions made after the issuance of the BRAC Commissions' recommendations as follows:

- At March Air Reserve Base, the Air Force made at least 3 sets of revisions to its enclave size which now encompasses 2,359 acres. These revisions were relatively minor in scope, such as one revision that expanded the boundaries by about 38 acres to provide a clear zone for flight operations.
- At Grissom Air Reserve Base, the Air Force has made one revision—an exchange of about 70 acres with the local redevelopment authority¹⁹—to its enclave configuration, which now encompasses 1,380 acres. In addition, base officials are negotiating with the redevelopment authority for acquisition of a small parcel to improve force protection at the enclave's main gate.
- At Rickenbacker Air National Guard Base, the Guard made several revisions prior to reaching its current 168-acre enclave, including the transfer of 3.5 acres of unneeded property to the local redevelopment authority after the Guard relocated its fuel tanks for force protection reasons.

The degree of specificity in a commission's recommendation language for proposed enclaves varied between the Army and the Air Force. In general, the recommendation language for the Army's 1995 round enclaves was based largely on the Army's proposed language, specifying that the bases were to be closed, except that minimum essential ranges, facilities, and training areas be retained for reserve component use. In contrast, for Army and Air Force enclaves created in earlier rounds, the

¹⁹ A local redevelopment authority is the DOD-recognized local organization whose role is to coordinate efforts of the community to reuse assets of a former military base.

recommendation language was more precise—even specifying specific acreages to be retained in some cases.

Acting on the authority contained in the commissions' recommendations, the Army and Air Force created enclaves that varied widely in size (i.e., from several acres to more than 164,000 acres). Table 1 provides a comparison of the reported size and number of facilities of pre-BRAC bases with those of post-BRAC enclaves for DOD's 10 major enclaves.

Table 1: DOD Pre-BRAC and Post BRAC Base Acreage and Facilities for Bases Where Major Reserve Enclaves Were Created

Service	Base	Number of acres			Square footage of facilities		
		Pre-BRAC	Post-BRAC	Percent Retained	Pre-BRAC	Post-BRAC	Percent Retained
Army	Fort Hunter Liggett	164,762	164,272	100	836,420	832,906	100
	Fort Chaffee	71,381	64,272	90	4,839,241	1,695,132	35
	Fort Pickett	45,145	42,273	94	3,103,000	1,642,066	53
	Fort Dix	30,997	30,944	100	8,645,293	7,246,964	84
	Fort Indiantown Gap	17,797	17,227	97	4,388,000	1,565,726	36
	Fort McClellan	41,174	22,531	55	6,560,687	873,852	13
	Fort Devens	9,930	5,226	53	5,610,530	1,537,174	27
Air Force	March Air Force Base	6,606	2,359	36	3,184,321	2,538,742	80
	Grissom Air Force Base	2,722	1,380	51	3,910,171	1,023,176	26
	Homestead Air Force Base	2,916	852	29	5,373,132	867,341	16
Total		394,430	351,386	89	46,450,795	19,823,079	43

Source: DOD.

Note: "Major" reserve enclaves refer to those enclaves with more than 500 acres. "Pre-BRAC" refers to base data at the time of the BRAC Commission recommendation while "Post-BRAC" refers to enclave data as of the end of fiscal year 2002. Percentages are rounded to nearest whole number.

As shown in table 1, the vast majority—nearly 90 percent—of the pre-BRAC land has been retained for the major reserve enclaves with most enclaves residing in Army maneuver training sites (e.g., Forts Hunter Liggett, Chaffee, Pickett, and Indiantown Gap). While the management of these Army enclaves has generally shifted from the active to the reserve component, the training missions at these Army bases have remained, although the extent of use²⁰ has decreased slightly in some instances and

²⁰ Comparative data on training day usage were not readily available at the Ft. Devens location.

increased in others (see app. I). On the other hand, the Air Force enclaves are generally much smaller in acreage than those of the Army due in large part to the departure of active Air Force organizations and associated missions from the former bases. While the Army retained much of the pre-BRAC acreage, it generally made greater reductions in the amount of square footage for its enclave facilities. Many of these reductions were due in part to the demolition of older unusable facilities built during World War II, and the transfer of other facilities (such as family housing activities once required for the departing active personnel) to local redevelopment authorities. At Fort Indiantown Gap, for example, the Army has reportedly demolished 349 facilities since the Army National Guard assumed control of the base in 1998. As shown in table 1, the Air Force significantly reduced the amount of its facilities' square footage for 2 of its 3 major enclaves.

While the language of the 1995 BRAC Commission recommendations regarding enclaves allowed the Army to form several enclaves of considerable size, these enclaves are considerably larger than one might expect from the language, which provided for minimum essential land and facilities for reserve component use. In this regard, the Army's Office of the Judge Advocate General questioned proposed enclave plans during the planning process. For example, the Judge Advocate General questioned Fort Indiantown Gap and Fort Hunter Liggett enclave plans,²¹ calling for retention of essentially the entire former base while the commission's recommendation would suggest smaller enclaves comprising a section of the base. Nonetheless, the Army approved the implementation plans based on mission needs. Having more complete information regarding expected enclave infrastructure would have provided previous commissions with an opportunity to draft more precise recommendation language, if they chose to do so, and produce decisions having greater clarity on enclave infrastructure and expected costs and savings from the closure and realignment actions.

²¹ See U.S. Army Judge Advocate General memorandum, *Review of Implementation Plan for Fort Indiantown Gap* (Washington D.C.: Aug. 22, 1995) and U.S. Army Judge Advocate General memorandum, *Legal Review of Fort Hunter Liggett Facilities Utilization Plan* (Washington D.C.: Jan. 25, 1996). These memorandums were prepared for the Army Assistant Chief of Staff for Installation Management in response to his request for a review of plans to implement BRAC actions at these specified locations.

**Enclave Planning
Analyses Generally
Did Not Consider
Cross-Service Needs**

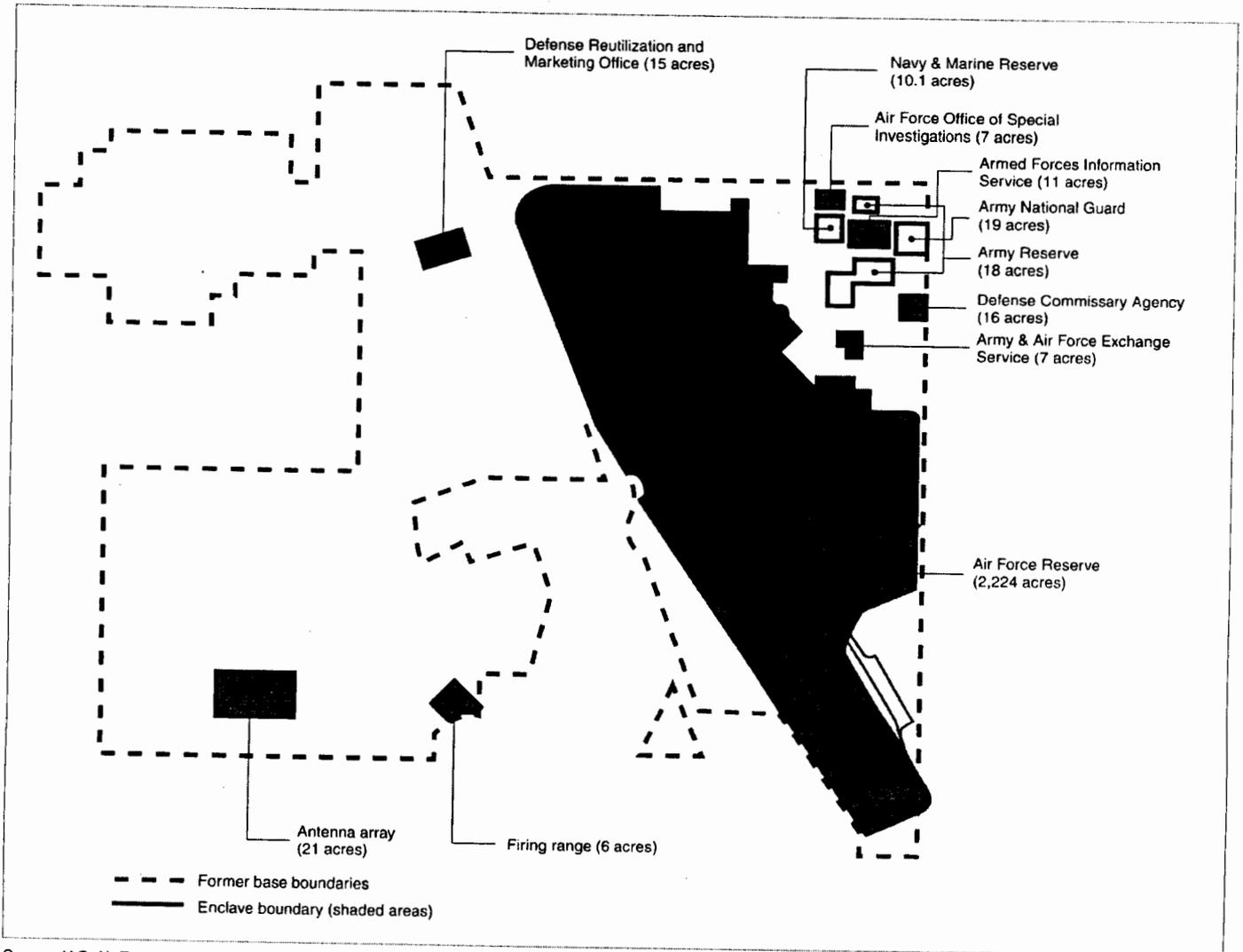
DOD generally did not consider cross-service needs of nearby military activities in planning for many of its reserve enclaves, although their inclusion may have been beneficial in terms of potential for increased cost savings, force protection, or training reasons. While some other reserve activities have subsequently relocated on either enclaves created as part of the closure decision or later on former base property after it was acquired by local redevelopment authorities, those relocations outside enclave boundaries have not necessarily been ideal for either DOD or the communities surrounding the enclaves. Ideally, enclave planning analyses would involve an integrated cross-service approach to forming enclaves and enable DOD to maximize its opportunities for achieving operational, economic, and security benefits while, at the same time, providing for the interests of affected communities surrounding realigning or closing bases.

Officials at several Air Force bases we visited told us that while other service and federal government organizations that had already resided on the former bases may have been included in the enclaves, military activities of other services in the local area were not generally considered for possible inclusion in the proposed enclaves. These officials told us that these activities were either not approached for consideration or were not considered due to service interests to minimize the size and relative costs to operate and maintain the enclaves.

Following the formation of the enclaves, some additional reserve activities have since relocated on either enclave or former base property. Some have occupied available facilities on enclaves as tenants and are afforded various benefits such as reduced operating costs, training enhancements, or increased force protection. For example, a Navy Reserve training center, originally based in South Bend, Indiana, moved its operations to an available facility at Grissom Air Reserve Base in August 2002 because the activity could not meet force protection requirements at its previous facilities in South Bend. After the move, the commander of the activity told us that his personnel have experienced enhanced training opportunities since they can now work closely with other military activities on "hands-on" duties during weekend reserve drills. This opportunity has led, in turn, to his assessment that both his recruiting efforts and readiness have improved.

On the other hand, the relocation of some activities to the former base, or those remaining on the former property outside the confines of the enclave, has resulted in a less-than-ideal situation for both the department and the communities surrounding the former base. For example, at the former March Air Force Base in California, other service activities from the Army Reserve, Army National Guard, Navy Reserve and Marine Corps Reserve reside outside the enclave boundaries in a non-contiguous arrangement. This situation, combined with the enclave itself and other enclave "islands" established on the former base, has resulted in a "checkerboard" effect, as shown in figure 2, of various military-occupied property interspersed with community property on the former base.

Figure 2: Property Layout of the Former March Air Force Base



Source: U.S. Air Force.

Note: Army, Navy, and Marine Corps Reserve properties are owned by DOD but are not a part of the enclave.

Further, some of the activities located outside the enclave boundaries have incurred expenses to erect security fences, as shown in figure 3, for force protection purposes. These fences are in addition to the fence that surrounds the main enclave area.

Figure 3: Navy Compound at March Air Reserve Base



Source: GAO.

Local redevelopment authority officials told us that a combination of factors (including the dispersion of military property on the former base along with the separate unsightly security fences) has made it very difficult to market the remaining property.

In its April 16, 2003, policy guidance memorandum for the 2005 BRAC round, DOD recognizes the benefits of the joint use of facilities. The memorandum instructs the services to evaluate opportunities to consolidate or relocate active and reserve components on any enclave of realigning and closing bases where such relocations make operational and economic sense. If the services adhere to this guidance in the upcoming round, we believe it will not only benefit DOD but also will mitigate any

potential adverse effects, such as the checkerboard base layout at the former March Air Force Base, on community redevelopment efforts.

Many Initial Base Savings Estimates Did Not Account for Projected Enclave Costs

The estimated costs to operate and maintain the infrastructure for many of the Army enclaves were not considered in calculating savings estimates for bases with proposed enclaves during the decision-making process. As a result, estimated realignment or closure costs and payback periods were understated and estimated savings were overstated for those specific bases. The Army subsequently updated its savings estimates in its succeeding annual budget submissions to reflect estimated costs to operate and maintain many of its enclaves. On the other hand, Air Force officials told us that its estimated base closure savings were partially offset by expected enclave costs, but documentation was insufficient to demonstrate this statement. Because estimated costs and savings are an important consideration in the closure and realignment decision-making process and may impact specific commission recommendations, it is important that estimates provided to the commission be as complete and accurate as possible for its deliberations.

Army Enclave Costs Were Not Generally Considered in BRAC Decision-Making Process

During the 1995 BRAC decision-making process, estimated savings for most 1995-round bases where Army enclaves were established did not reflect estimated costs to operate and maintain the enclaves. The Army Audit Agency reported in 1997²² that about \$28 million in estimated annual costs to operate and maintain four major Army enclaves,²³ as shown in table 2, were not considered in the bases' estimated savings calculations.

²² See U.S. Army Audit Agency, *Base Realignment and Closure: 1995*.

²³ The remaining two 1995 major enclaves—Fort Dix and Fort Hunter Liggett—were not reviewed by the Army Audit Agency. An Army BRAC official told us that enclave costs were considered in deriving net savings estimates for Fort Dix but not for Fort Hunter Liggett. Supporting documentation was unavailable to verify this statement.

Table 2: Estimated Annual Costs to Operate and Maintain Selected Army Reserve Enclaves

Dollars in millions			
Installation	Cost*		Total
	Maintenance	Other support	
Fort Chaffee	\$3.6	\$3.2	\$6.9
Fort Indiantown Gap	4.9	3.4	8.3
Fort McClellan	3.3	2.6	5.9
Fort Pickett	3.4	3.2	6.6
Total	\$15.2	\$12.4	\$27.7

Source: U.S. Army Audit Agency.

Note: Estimated costs as reported by the Army Audit Agency in fiscal year 1995 dollars. Totals may not add due to rounding.

*Other support costs include expenses for automated target systems, environmental, personnel, integrated training-area management, and security.

Enclave costs are only one of many costs that may be incurred by DOD in closing or realigning an entire base. For example, other costs include expenditures for movement of personnel and supplies to other locations and military construction for facilities receiving missions from a realigning base. The extent of all costs incurred have a direct bearing on the estimated savings and payback periods associated with a particular closure or realignment. Table 3 provides the results of the Army Audit Agency's review (which factored in all costs) of the estimated savings and payback periods for the realignment or closure of the same Army bases shown in table 2 where enclaves were created. As shown in table 3, the commission's annual savings' estimates were overstated and the payback periods were underestimated for these particular bases.

Table 3: Comparison of Estimated Annual Recurring Savings and Payback Periods for Selected Bases with Reserve Enclaves

Dollars in millions					
Base	Estimated annual recurring savings		Estimated payback period		
	1995 BRAC Commission	Army Audit Agency	1995 BRAC Commission	Army Audit Agency	
Fort Chaffee	\$13.4	\$1.4	1 year	18 years	
Fort Indiantown Gap	18.4	11.8	Immediate	1 year	
Fort McClellan	40.6	27.4	6 years	14 years	
Fort Pickett	21.8	5.9	Immediate	2 years	
Total	\$94.2	\$46.5			

Sources: U.S. Army Audit Agency and 1995 BRAC Commission.

Note: GAO analysis of U.S. Army Audit Agency and 1995 BRAC Commission data.

Our analysis showed that the omission of enclave costs significantly affected the initial estimates of savings and payback periods at all locations except Fort McClellan as shown in table 3. For example, the omission of \$6.8 million in enclave costs at Fort Chaffee (see table 2) accounted for more than 50 percent of the \$12 million in estimated reduced annual recurring savings at that location. Further, the enclave cost omissions were instrumental in increasing Fort Chaffee's estimated payback period from 1 year to 18 years. On the other hand, at Fort McClellan, estimates on costs²⁴ other than those associated with the enclave had a greater impact on the resulting estimated annual recurring savings and payback periods.

Although it is unknown whether the enclave cost omissions or any other similar omissions would have caused the 1995 BRAC Commission to revise its recommendations for these installations, it is important to have cost and savings estimates that are as complete and accurate as possible in order to provide a commission with a better basis to make informed judgments during its deliberative process.

Although the Army omitted enclave operation and maintenance costs from its savings calculations for most of its 1995 actions during the initial phases of the BRAC process, it subsequently updated many of these savings estimates in its annual budget submissions to the Congress. In our April 2002 report on previous-round BRAC actions, we noted that even though DOD had not routinely updated its BRAC base savings estimates over time because it does not maintain an accounting system that tracks savings, the Army had made the most savings updates of all the services in recent years.²⁵ According to Army officials, the Army Audit Agency report provided a basis for the Army to update the annual BRAC budget submissions and adjust the savings estimates at the installations reviewed. As a result, the previous estimated cost omissions have not materially affected the department's estimate of \$6.6 billion in annual recurring savings across all previous round BRAC actions due to the fact that the savings estimates for these locations have been updated to reflect many enclave costs in subsequent annual budget submissions.

²⁴ The cost estimates included about \$19 million in annual recurring costs, about \$40 million in one-time construction costs and about \$26 million in one-time operations and maintenance costs related to the Fort McClellan closure.

²⁵ See GAO-02-433.

Because of the passage of time and the lack of supporting documentation, we were unable to document whether the Air Force had considered enclave costs in deriving its savings estimates for the former air bases we visited at Grissom in Indiana (a 1991 round action), March in California (a 1993 round action), and Rickenbacker in Ohio (a 1991 round action). Air Force Reserve Command officials, however, told us that estimated costs to operate and maintain their enclaves were considered in calculating savings estimates for these base actions. Officials at the bases we visited were unaware of the cost and savings estimates that were established for their bases during the BRAC decision-making process.

Conclusions

With an upcoming round of base realignments and closures approaching in 2005, it is important that the new Defense Base Closure and Realignment Commission have information that is as complete and accurate as possible on DOD-proposed realignment and closure actions in order to make informed judgments during its deliberations. Previous round actions indicate that, in several cases, a commission lacked key information (e.g., about the projected needs of an enclave infrastructure and estimated costs to operate and maintain an enclave) because DOD had not fully identified specific infrastructure needs until after the commission had issued its recommendations. Without the benefit of more complete data during the deliberative process, the commission subsequently issued recommendation language that permitted the Army to form reserve enclaves that are considerably larger than one might expect based on the commission's language concerning minimum essential land and facilities for reserve component use. In addition, because DOD did not adequately consider cross-service requirements of various military activities located in the vicinity of its proposed enclaves and did not include them in the enclaves, it may have lost the opportunity to achieve several benefits to obtain savings, enhance training and readiness, and increase force protection for these activities. DOD has recently issued policy guidance as part of the 2005 closure round that, if implemented, should address cross-service requirements and the potential to relocate activities on future enclaves where relocation makes operational and economic sense.

Recommendations for Executive Action

As part of the new base realignment and closure round scheduled for 2005, we recommend that you establish provisions to ensure that data provided to the Defense Base Closure and Realignment Commission clearly specify the (1) infrastructure (e.g., acreage and total square footage of facilities) needed for any proposed reserve enclaves and (2) estimated costs to operate and maintain such enclaves.

As you know, 31 U.S.C. 720 requires the head of a federal agency to submit a written statement of the actions taken on our recommendations to the Senate Committee on Government Affairs and the House Committee on Government Reform not later than 60 days after the date of this report. A written statement must also be sent to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of this report.

Agency Comments

In commenting on a draft of this report, the Assistant Secretary of Defense for Reserve Affairs concurred with our recommendations. The department's response indicated that it would work to resolve the issues addressed in our report, recognizing the need for improved planning for reserve enclaves as part of BRAC decision making and include improvements in selecting facilities to be retained, identifying costs of operation, and assessing impacts on BRAC costs and savings. DOD's comments are included in appendix III of this report.

Scope and Methodology

We prepared this report under our basic legislative responsibilities as authorized by 31 U.S.C. § 717. We performed our work at, and met with officials from, the Office of the Assistant Secretary of Defense for Reserve Affairs, the Army National Guard, the Air National Guard, the headquarters of the Army Reserve Command and Air Force Reserve Command, and Army and Air Force BRAC offices. We also visited and met with officials from several reserve component enclave locations, including the Army's Fort Pickett, Virginia; Fort Indiantown Gap, Pennsylvania; Fort Chaffee, Arkansas; Fort McClellan, Alabama; and Fort Hunter Liggett, California; as well as the Air Force's March Air Reserve Base, California; Grissom Air Reserve Base, Indiana; and Rickenbacker Air National Guard Base, Ohio. We also contacted select officials who had participated in the 1995 BRAC round decision-making process to discuss their views on establishing enclaves on closed or realigned bases. Our efforts regarding previous-round enclave planning were hindered by the passage of time, the lack of selected critical planning documentation, and the general unavailability of key officials who had participated in the process.

To determine whether enclave infrastructure needs had been identified prior to BRAC Commission decision making, we first identified the scope of reserve enclaves by examining BRAC Commission reports from the four previous rounds and DOD data regarding those enclave locations. To the extent possible, we reviewed available documentation and compared process development timelines with the various commission reporting

dates to determine the extent of enclave planning completed before a commission's issuance of specific BRAC recommendations. We examined available commission hearings from the 1995 round to ascertain the extent of commission discussion regarding proposed enclaves. We also interviewed officials at most of the major enclave locations as well as at the major command level to discuss their understanding of the enclave planning process and associated timelines employed in the previous rounds. We also discussed with these officials any previous planning actions or actions currently underway to relocate various reserve activities or organizations to enclave locations.

To determine whether projected costs to operate and maintain reserve enclaves were considered in deriving estimated savings during the BRAC decision-making process, we reviewed available cost and savings estimation documentation derived from DOD's COBRA model to ascertain if estimated savings were offset by projected enclave costs. We reviewed Army Audit Agency BRAC reports issued in 1997 on costs and savings estimates at various BRAC locations, including some enclave sites. Further, we analyzed how omitted enclave costs affected estimated annual recurring savings and payback periods at selected Army bases. We also discussed cost and savings estimates with Army and Air Force BRAC office officials as well as officials at bases we visited. However, as in our other efforts, we were generally constrained in our efforts by the general unavailability of knowledgeable officials on specific enclave data and adequate supporting documentation. We also examined recent annual BRAC budget submissions to the Congress to ascertain if savings estimates at the major enclave locations had been updated over time.

In performing this review, we used the same accounting records and financial reports DOD and reserve components use to manage their facilities. We did not independently determine the reliability of the reported financial and real property information. However, in our recent audit of the federal government's financial statements, including DOD's and the reserve components' statements, we questioned the reliability of reported financial information because not all obligations and expenditures are recorded to specific financial accounts.²⁶ In addition, we did not validate infrastructure needs for DOD enclaves.

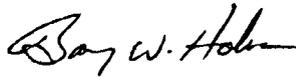
²⁶ U.S. General Accounting Office, *Major Management Challenges and Program Risks: Department of Defense*, GAO-03-98 (Washington, D.C.: January 2003).

We conducted our work from July 2002 through April 2003 in accordance with generally accepted government auditing standards.

We are sending copies of this report to the Secretaries of the Army, Navy, and Air Force; the Commandant of the Marine Corps; the Director, Office of Management and Budget; and interested congressional committees and members. In addition, the report is available to others upon request and can be accessed at no charge on GAO's Web site at www.gao.gov.

Please contact me on (202) 512-8412 if you or your staff have any questions regarding this report. Key contributors to this report are listed in appendix IV.

Sincerely yours,



Barry W. Holman, Director
Defense Capabilities and Management

Appendix I: General Description of Major Reserve Component Enclaves (Pre-BRAC and Post-BRAC)

Installation	BRAC recommendation	Utilization
Fort Hunter Liggett	Realign Fort Hunter Liggett by relocating the Army Test and Experimentation Center missions and functions to Fort Bliss, Texas. Retain minimum essential facilities and training area as an enclave to support the reserve component.	<ul style="list-style-type: none"> • Prior to BRAC 1995, the Army Reserve managed the base, assuming control of the property in December 1994 from the active Army. • In September 1997, the base became a sub-installation of the Army Reserve's Fort McCoy. The training man days have increased by about 55 percent since 1998.
Fort Chaffee	Close Fort Chaffee except for minimum essential ranges, facilities, and training areas required for a reserve component training enclave for individual and annual training.	<ul style="list-style-type: none"> • Prior to BRAC 1995, the active Army managed the base. The reserve components had the majority of training man days (75 percent) while the active component had 24 percent; the remaining training was devoted to non-DOD personnel. • In October 1997, base management transferred to the Arkansas National Guard. Overall training has decreased 51 percent with reserve component training being down 59 percent.
Fort Pickett	Close Fort Pickett except minimum essential ranges, facilities, and training areas as a reserve component training enclave to permit the conduct of individual and annual training.	<ul style="list-style-type: none"> • Prior to BRAC 1995, the Army Reserve managed the base. The reserve components had the majority of the training man days (62 percent) while the active component had 37 percent; the remaining training was devoted to non-DOD personnel. • In October 1997, base management transferred to the Virginia National Guard. Overall training has increased by 6 percent.
Fort Dix	Realign Fort Dix by replacing the active component garrison with an Army Reserve garrison. In addition, it provided for retention of minimum essential ranges, facilities, and training areas as an enclave required for reserve component training.	<ul style="list-style-type: none"> • Prior to BRAC 1995, the active Army managed the base. The reserve components had the majority of training man days (72 percent) while the active component had 8 percent; the remaining training was devoted to non-DOD personnel. • In October 1997, base management transferred to the Army Reserve. Overall training has increased 8 percent.
Fort Indiantown Gap	Close Fort Indiantown Gap, except minimum essential ranges, facilities and training areas as a reserve component training enclave to permit the conduct of individual and annual training.	<ul style="list-style-type: none"> • Prior to BRAC 1995, the active Army managed the base. The reserve components had the majority of training man days (85 percent) while the active component had 3 percent; the remaining training was devoted to non-DOD personnel. • In October 1998, base management transferred to the Pennsylvania National Guard. Overall training has increased by about 7 percent.

Appendix I: General Description of Major Reserve Component Enclaves (Pre-BRAC and Post-BRAC)

Installation	BRAC recommendation	Utilization
Fort McClellan	Close Fort McClellan, except minimum essential land and facilities for a reserve component enclave and minimum essential facilities, as necessary, to provide auxiliary support to the chemical demilitarization operation at Anniston Army Depot, Alabama.	<ul style="list-style-type: none"> • Prior to BRAC 1995, the active Army managed the base. • In May 1999, base management transferred to the Alabama National Guard. Overall training has increased 75 percent.
Fort Devens	Close Fort Devens. Retain 4600 acres and those facilities necessary for reserve component training requirements.	<ul style="list-style-type: none"> • Prior to BRAC 1991, the active Army managed the base. • In March 1996, base management transferred to the Army Reserve as a sub-installation of Fort Dix.
March Air Reserve Base	Realign March Air Force Base. The 445 th Airlift Wing Air Force Reserve, 452 nd Air Refueling Wing, 163 rd Reconnaissance Group, the Air Force Audit Agency and the Media Center will remain and the base will convert to a reserve base.	<ul style="list-style-type: none"> • Prior to BRAC 1993, the active Air Force managed the base, with major activities being the 452nd Air Refueling Wing, 445th Airlift Wing and the 452nd Air Mobility Wing, 163rd Air Refueling Wing. • In April 1996, base management transferred to the Air Force Reserve with major activities being the 63rd Air Refueling Wing and the 144th Fighter Wing as well as tenants such as U.S. Customs.
Grissom Air Reserve Base	Close Grissom Air Force Base and transfer assigned KC-135 aircraft to the Air reserve components.	<ul style="list-style-type: none"> • Prior to BRAC 1991, the active Air Force managed the base with major activities being the 434th Air Refueling Wing and several Air Force Reserve units. • In 1994, base management transferred to the Air Force Reserve. Grissom Air Reserve Base houses the 434th Air Refueling Wing as well as other tenants such as the Navy Reserve.
Homestead Air Reserve Base	Realign Homestead Air Force Base. The 482d F-16 Fighter Wing and the 301 st Rescue Squadron and the North American Air Defense Alert activity will remain in a cantonment area.	<ul style="list-style-type: none"> • Prior to BRAC 1991, the active Air Force managed the base, with major activities being the 482nd Fighter Wing and the 301st Rescue Squadron. • In August 1992, Hurricane Andrew destroyed most of the base. After the base was rebuilt and management transferred to the Air Force Reserve, operations were reinstated with major activities being the 482nd Fighter Wing and the NORAD Air Defense Alert activity.

Sources: 1991, 1993, and 1995 BRAC Commission reports and DOD.

Appendix II: Reserve Enclaves Created under Previous BRAC Rounds

BRAC Round	Bases With Enclaves	Acreage
1988	Fort Douglas, Utah	50
	Fort Sheridan, Ill.	100
	Hamilton Army Airfield, Calif.	150
	Mather Air Force Base, Calif.	91
	Pease Air Force Base, N.H.	218
1991	Fort Benjamin Harrison, Ind.	138
	Fort Devens, Mass.	5,226
	Grissom Air Force Base, Ind.	1,380
1993	Sacramento Army Depot, Calif.	38
	Griffiss Air Force Base, N.Y.	39
	Homestead Air Force Base, Fla.	852
	March Air Force Base, Calif.	2,359
	Rickenbacker Air National Guard Base, Ohio	168
1995	Camp Kilmer, N.J.	24
	Camp Pedricktown, N.J.	86
	Fitzsimmons Medical Center, Colo.	21
	Fort Chaffee, Ark.	64,272
	Fort Dix, N.J.	30,944
	Fort Hamilton, N.Y.	168
	Fort Hunter Liggett, Calif.	164,272
	Fort Indiantown Gap, Pa.	17,227
	Fort McClellan, Ala.	22,531
	Fort Missoula, Mont.	16
	Fort Pickett, Va.	42,273
	Fort Ritchie, Md.	19
	Fort Totten, N.Y.	36
Oakland Army Base, Calif.	27	

Sources: 1988, 1991, 1993, and 1995 BRAC Commission reports and DOD.

Appendix III: Comments from the Department of Defense



RESERVE AFFAIRS

ASSISTANT SECRETARY OF DEFENSE
1500 DEFENSE PENTAGON
WASHINGTON, DC 20301-1500

19 JUN 2003

Mr. Barry W. Holman
Director, Defense Capabilities and Management
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Holman:

This is the Department of Defense (DoD) response to the GAO draft report, GAO-03-723, "MILITARY BASE CLOSURES: Better Planning Needed for Future Reserve Enclaves," dated May 15, 2003 (GAO Code 350231).

An important element of the Base Realignment and Closure (BRAC) process is the timely collection of complete and accurate data used by the Department and the BRAC Commission in the evaluation process. The GAO report provides two recommendations that would require DoD to provide the Commission with specific infrastructure requirements (e.g. acreage and total square footage of facilities), and estimated operation and maintenance costs for any Reserve component enclave proposed in BRAC 2005.

I recognize that in the past, Reserve components may have been required to obtain real property in "all or none/as-is" condition that resulted in higher than projected operation and maintenance costs. However, the Secretary of Defense in his November 2002 memorandum reemphasized efficient and effective basing strategies for BRAC 2005. It is certainly more efficient to capture real property requirements for Reserve components early in the BRAC process to the maximum extent practicable, and present that data to the Commission in the same level of detail as presented for the Active components.

It is imperative that the Reserve components receive early notification of potential realignments or closures to effect efficient planning of future Reserve enclaves. I agree that when establishing a Reserve enclave, it is important to recognize the "move-in" costs associated with assuming the responsibilities of becoming an installation host. In past BRAC rounds, the Reserve components' requirements were considered later in the process, which led to less effective use of Department resources.

I concur with the recommendations as stated, and will work to resolve the issues addressed within this report and ensure that the need for appropriate planning is recognized early in the BRAC process.

Sincerely,

T.F. Hall

Enclosure



GAO DRAFT REPORT, GAO-03-723
“MILITARY BASE CLOSURES: Better Planning Needed for Future
Reserve Enclaves,” (GAO Code 350231).

DEPARTMENT OF DEFENSE COMMENTS
TO THE RECOMMENDATIONS

RECOMMENDATION 1: As part of the new base realignment and closure round scheduled for 2005, the GAO recommended that the Secretary of Defense establish provisions to ensure that the data provided to the base realignment and closure commission clearly specify the infrastructure (e.g., acreage and total square footage of facilities) needed for any proposed reserve enclaves. (Page 20/Draft Report).

DoD RESPONSE: Concur with comment.

As the GAO stated in the report, “information provided to the commission should be as complete and accurate as possible”. The Assistant Secretary of Defense for Reserve Affairs recommends that Reserve component facilities information presented to the BRAC commission should be at the same level of detail as presented for the Active components.

RECOMMENDATION 2: As part of the new base realignment and closure round scheduled for 2005, the GAO recommended that the Secretary of Defense establish provisions to ensure that the data provided to the base realignment and closure commission clearly specify the estimated costs to operate and maintain such enclaves. (Page 21/Draft Report).

DoD RESPONSE: Concur with comment.

In some cases, the Reserve components may have been required to pick up real property in “as-is” condition resulting in higher than projected operation and maintenance (O&M) costs. The Assistant Secretary of Defense for Reserve Affairs recommends that Reserve component cost data presented to the BRAC commission capture as complete and accurately as possible projected O&M costs for future Reserve enclaves.

Appendix IV: GAO Contact and Staff

Acknowledgments

GAO Contact

Michael Kennedy (202) 512-8333

Acknowledgments

In addition to the individual named above, Julie Chamberlain, Shawn Flowers, Richard Meeks, Maria-Alaina Rambus, James Reifsnyder, Donna Weiss, and Susan Woodward made key contributions to this report.

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**BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES v. SYNAR,
MEMBER OF CONGRESS, ET AL.**

No. 85-1377

SUPREME COURT OF THE UNITED STATES

*478 U.S. 714; 106 S. Ct. 3181; 92 L. Ed. 2d 583; 1986 U.S. LEXIS 141; 54
U.S.L.W. 5064*

**April 23, 1986, Argued
July 7, 1986, Decided ***

* Together with No. 85-1378, *United States Senate v. Synar, Member of Congress, et al.*, and No. 85-1379, *O'Neill, Speaker of the United States House of Representatives, et al. v. Synar, Member of Congress, et al.*, also on appeal from the same court.

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

DISPOSITION:

626 F.Supp. 1374, affirmed.

LexisNexis(R) Headnotes

SYLLABUS:

In order to eliminate the federal budget deficit, Congress enacted the Balanced Budget and Emergency Deficit Control Act of 1985 (Act), popularly known as the "Gramm-Rudman-Hollings Act," which sets a maximum deficit amount for federal spending for each of the fiscal years 1986 through 1991 (progressively reducing the deficit amount to zero in 1991). If in any fiscal year the budget deficit exceeds the prescribed maximum by more than a specified sum, the Act requires basically across-the-board cuts in federal spending to reach the targeted deficit level. These reductions are accomplished under the "reporting provisions" spelled out in § 251 of the Act, which requires the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) to submit their deficit estimates and program-by-program budget reduction calculations to the Comptroller General who, after reviewing the Directors' joint report, then reports his conclusions to the President. The President in turn must issue a "sequestra-

tion" order mandating the spending reductions specified by the Comptroller General, and the sequestration order becomes effective unless, within a specified time, Congress legislates reductions to obviate the need for the sequestration order. The Act also contains in § 274(f) a "fallback" deficit reduction process (eliminating the Comptroller General's participation) to take effect if § 251's reporting provisions are invalidated. In consolidated actions in the Federal District Court, individual Congressmen and the National Treasury Employees Union (Union) (who, along with one of the Union's members, are appellees here) challenged the Act's constitutionality. The court held, *inter alia*, that the Comptroller General's role in exercising executive functions under the Act's deficit reduction process violated the constitutionally imposed doctrine of separation of powers because the Comptroller General is removable only by a congressional joint resolution or by impeachment, and Congress may not retain the power of removal over an officer performing executive powers.

Held:

1. The fact that members of the Union, one of whom is an appellee here, will sustain injury because the Act suspends certain scheduled cost-of-living benefit increases to the members, is sufficient to create standing under a provision of the Act and Article III to challenge the Act's constitutionality. Therefore, the standing issue as to the Union itself or Members of Congress need not be considered. P. 721.

2. The powers vested in the Comptroller General under § 251 violate the Constitution's command that

Congress play no direct role in the execution of the laws. Pp. 721-734.

(a) Under the constitutional principle of separation of powers, Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control of the execution of the laws. The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess. Cf. *INS v. Chadha*, 462 U.S. 919. Pp. 721-727.

(b) There is no merit to the contention that the Comptroller General performs his duties independently and is not subservient to Congress. Although nominated by the President and confirmed by the Senate, the Comptroller General is removable only at the initiative of Congress. Under controlling statutes, he may be removed not only by impeachment but also by joint resolution of Congress "at any time" for specified causes, including "inefficiency," "neglect of duty," and "malfeasance." The quoted terms, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will. Moreover, the political realities do not reveal that the Comptroller General is free from Congress' influence. He heads the General Accounting Office, which under pertinent statutes is "an instrumentality of the United States Government independent of the executive departments," and Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch. Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch. Thus, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers. Pp. 727-732.

(c) Under § 251 of the Act, the Comptroller General has been improperly assigned executive powers. Although he is to have "due regard" for the estimates and reductions contained in the joint report of the Directors of the CBO and the OMB, the Act clearly contemplates that in preparing his report the Comptroller General will exercise his independent judgment and evaluation with respect to those estimates and will make decisions of the kind that are made by officers charged with executing a statute. The Act's provisions give him, not the President, the ultimate authority in determining what budget cuts are to be made. By placing the responsibility for execution of the Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the Act's execution and has unconstitutionally intruded into the executive function. Pp. 732-734.

3. It is not necessary to consider whether the appropriate remedy is to nullify the 1921 statutory provisions that authorize Congress to remove the Comptroller General, rather than to invalidate § 251 of the Act. In § 274(f), Congress has explicitly provided "fallback" provisions that take effect if any of the reporting procedures described in § 251 are invalidated. Assuming that the question of the appropriate remedy must be resolved on the basis of congressional intent, the intent appears to have been for § 274(f) to be given effect as written. Pp. 734-736.

COUNSEL:

Lloyd N. Cutler argued the cause for appellant in No. 85-1377. With him on the briefs were John H. Pickering, William T. Lake, Richard K. Lahne, and Neal T. Kilminster. Steven R. Ross argued the cause for appellants in No. 85-1379. With him on the briefs were Charles Tiefer and Michael L. Murray. Michael Davidson argued the cause for appellant in No. 85-1378. With him on the briefs were Ken U. Benjamin, Jr., and Morgan J. Frankel.

Solicitor General Fried argued the cause for the United States. With him on the brief were Assistant Attorney General Willard, Deputy Solicitor General Kuhl, Deputy Assistant Attorney General Spears, Edwin S. Kneedler, Robert E. Kopp, Neil H. Koslowe, and Douglas Letter. Alan B. Morrison argued the cause for appellees Synar et al. With him on the brief was Katherine A. Meyer. Lois G. Williams argued the cause for appellees National Treasury Employees Union et al. With her on the brief were Gregory O'Duden and Elaine D. Kaplan.

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+ Briefs of amici curiae urging reversal were filed for the National Tax Limitation Committee et al. by Ronald A. Zumbrun, Sam Kazman, and Lucinda Low Swartz; and for Howard H. Baker, Jr., pro se.

Briefs of amici curiae urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations et al. by Robert M. Weinberg, Peter O. Shinevar, Laurence Gold, George Kaufmann, Edward J. Hickey, Jr., Thomas A. Woodley, Mark Roth, Darryl J. Anderson, and Anton G. Hajjar; for the Coalition for Health Funding et al. by Stephen E. Lawton and Jack N. Goodman; for the National Federation of Federal Employees by Patrick J. Riley; and for William H. Gray III et al. by Richard A. Wegman, Paul S. Hoff, and Thomas H. Stanton.

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Briefs of amici curiae were filed for the American Jewish Congress by Neil H. Cogan; and for Edward Blankstein by Eric H. Karp.

JUDGES:

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, post, p. 736. WHITE, J., post, p. 759, and BLACKMUN, J., post, p. 776, filed dissenting opinions.

OPINIONBY:

BURGER

OPINION:

[*717] [**3183] [***590] CHIEF JUSTICE BURGER delivered the opinion of the Court.

[***LEdHR1A] [1A]The question presented by these appeals is whether the assignment by Congress to the Comptroller General of the United States of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 violates the doctrine of separation of powers.

I

A

On December 12, 1985, the President signed into law the Balanced [***591] Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038, 2 U. S. C. § 901 et seq. (1982 ed., Supp. III), popularly known as the "Gramm-Rudman-Hollings Act." The purpose of the Act is to eliminate the federal budget deficit. To that end, the Act sets a "maximum deficit amount" for federal spending for each of fiscal years 1986 through 1991. The size of that maximum deficit amount progressively reduces to zero in fiscal year 1991. If in any fiscal year the federal budget deficit exceeds the maximum [*718] deficit amount by more than a specified sum, the Act requires across-the-board cuts in federal spending to reach the targeted deficit level, with half of the cuts made to defense programs and the other half made to nondefense programs. The Act exempts certain priority programs from these cuts. § 255.

These "automatic" reductions are accomplished through a rather complicated procedure, spelled out in § 251, the so-called "reporting provisions" of the Act. Each year, the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) independently estimate the amount of the federal budget deficit for the upcoming fiscal year. If that deficit exceeds the maximum targeted deficit amount for that

fiscal year by more than a specified amount, the Directors [**3184] of OMB and CBO independently calculate, on a program-by-program basis, the budget reductions necessary to ensure that the deficit does not exceed the maximum deficit amount. The Act then requires the Directors to report jointly their deficit estimates and budget reduction calculations to the Comptroller General.

The Comptroller General, after reviewing the Directors' reports, then reports his conclusions to the President. § 251(b). The President in turn must issue a "sequestration" order mandating the spending reductions specified by the Comptroller General. § 252. There follows a period during which Congress may by legislation reduce spending to obviate, in whole or in part, the need for the sequestration order. If such reductions are not enacted, the sequestration order becomes effective and the spending reductions included in that order are made.

[***LEdHR2A] [2A]Anticipating constitutional challenge to these procedures, the Act also contains a "fallback" deficit reduction process to take effect "[in] the event that any of the reporting procedures described in section 251 are invalidated." § 274(f). Under these provisions, the report prepared by the Directors of OMB and the CBO is submitted directly to a specially [*719] created Temporary Joint Committee on Deficit Reduction, which must report in five days to both Houses a joint resolution setting forth the content of the Directors' report. Congress then must vote on the resolution under special rules, which render amendments out of order. If the resolution is passed and signed by the President, it then serves as the basis for a Presidential sequestration order.

B

[***LEdHR3A] [3A] [***LEdHR4A] [4A]Within hours of the President's [***592] signing of the Act, n1 Congressman Synar, who had voted against the Act, filed a complaint seeking declaratory relief that the Act was unconstitutional. Eleven other Members later joined Congressman Synar's suit. A virtually identical lawsuit was also filed by the National Treasury Employees Union. The Union alleged that its members had been injured as a result of the Act's automatic spending reduction provisions, which have suspended certain cost-of-living benefit increases to the Union's members. n2

n1 In his signing statement, the President expressed his view that the Act was constitutionally defective because of the Comptroller General's ability to exercise supervisory authority over the President. Statement on Signing H. J. Res. 372

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Into Law, 21 Weekly Comp. of Pres. Doc. 1491 (1985).

n2 An individual member of the Union was later added as a plaintiff. See 475 U.S. 1094 (1986).

[***LEdHR5A] [5A]A three-judge District Court, appointed pursuant to 2 U. S. C. § 922(a)(5) (1982 ed., Supp. III), invalidated the reporting provisions. *Synar v. United States*, 626 F.Supp. 1374 (DC 1986) (Scalia, Johnson, and Gasch, JJ.). The District Court concluded that the Union had standing to challenge the Act since the members of the Union had suffered actual injury by suspension of certain benefit increases. The District Court also concluded that Congressman Synar and his fellow Members had standing under the so-called "congressional standing" doctrine. See *Barnes v. Kline*, 245 U. S. App. D. C. 1, 21, 759 F.2d 21, 41 (1985), cert. granted *sub nom. Burke v. Barnes*, 475 U.S. 1044 (1986).

[*720] The District Court next rejected appellees' challenge that the Act violated the delegation doctrine. The court expressed no doubt that the Act delegated broad authority, but delegation of similarly broad authority has been upheld in past cases. The District Court observed that in *Yakus v. United States*, 321 U.S. 414, 420 (1944), this Court upheld a statute that delegated to an unelected "Price Administrator" the power "to promulgate regulations fixing prices of commodities." Moreover, in the District Court's view, the Act adequately confined the exercise of administrative discretion. The District Court concluded that "the totality of the Act's standards, definitions, context, and reference to past administrative practice provides an adequate 'intelligible principle' to guide and confine administrative [*3185] decisionmaking." 626 F.Supp., at 1389.

Although the District Court concluded that the Act survived a delegation doctrine challenge, it held that the role of the Comptroller General in the deficit reduction process violated the constitutionally imposed separation of powers. The court first explained that the Comptroller General exercises executive functions under the Act. However, the Comptroller General, while appointed by the President with the advice and consent of the Senate, is removable not by the President but only by a joint resolution of Congress or by impeachment. The District Court reasoned that this arrangement could not be sustained under this Court's decisions in *Myers v. United States*, 272 U.S. 52 (1926), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Under [***593] the separation of powers established by the Framers of the Constitution, the court concluded, Congress may not retain the power of removal over an officer performing

executive functions. The congressional removal power created a "here-and-now subservience" of the Comptroller General to Congress. 626 F.Supp., at 1392. The District Court therefore held that

[*721] "since the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress, those powers cannot be exercised and therefore the automatic deficit reduction process to which they are central cannot be implemented." *Id.*, at 1403.

Appeals were taken directly to this Court pursuant to § 274(b) of the Act. We noted probable jurisdiction and expedited consideration of the appeals. 475 U.S. 1009 (1986). We affirm.

II

[***LEdHR3B] [3B] [***LEdHR4B] [4B]A threshold issue is whether the Members of Congress, members of the National Treasury Employees Union, or the Union itself have standing to challenge the constitutionality of the Act in question. It is clear that members of the Union, one of whom is an appellee here, will sustain injury by not receiving a scheduled increase in benefits. See § 252(a)(6)(C)(i); 626 F.Supp., at 1381. This is sufficient to confer standing under § 274(a)(2) and Article III. We therefore need not consider the standing issue as to the Union or Members of Congress. See *Secretary of Interior v. California*, 464 U.S. 312, 319, n. 3 (1984). Cf. *Automobile Workers v. Brock*, 477 U.S. 274 (1986); *Barnes v. Kline*, *supra*. Accordingly, we turn to the merits of the case.

III

We noted recently that "[the] Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS v. Chadha*, 462 U.S. 919, 951 (1983). The declared purpose of separating and dividing the powers of government, of course, was to "[diffuse] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Justice Jackson's words echo the famous warning of Montesquieu, [*722] quoted by James Madison in *The Federalist* No. 47, that "'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates'. . . ." *The Federalist* No. 47, p. 325 (J. Cooke ed. 1961).

Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers pro-

vided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people. The Framers also provided for a Judicial Branch equally independent with "[the] judicial Power . . . [extending] to all Cases, [***594] in Law and Equity, arising under this Constitution, [**3186] and the Laws of the United States." Art. III, § 2.

Other, more subtle, examples of separated powers are evident as well. Unlike parliamentary systems such as that of Great Britain, no person who is an officer of the United States may serve as a Member of the Congress. Art. I, § 6. Moreover, unlike parliamentary systems, the President, under Article II, is responsible not to the Congress but to the people, subject only to impeachment proceedings which are exercised by the two Houses as representatives of the people. Art. II, § 4. And even in the impeachment of a President the presiding officer of the ultimate tribunal is not a member of the Legislative Branch, but the Chief Justice of the United States. Art. I, § 3.

[**LEdHR6] [6]That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.

[**LEdHR7A] [7A]The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. The President appoints "Officers of the United States" with the "Advice and Consent of [*723] the Senate. . . ." Art. II, § 2. Once the appointment has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. An impeachment by the House and trial by the Senate can rest only on "Treason, Bribery or other high Crimes and Misdemeanors." Art. II, § 4. A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.

[**LEdHR8] [8]This was made clear in debate in the First Congress in 1789. When Congress considered an amendment to a bill establishing the Department of Foreign Affairs, the debate centered around whether the Congress "should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate." *Myers*, 272 U.S., at 114. James Madison urged rejection of a congressional role in the removal of Execu-

tive Branch officers, other than by impeachment, saying in debate:

"Perhaps there was no argument urged with more success, or more plausibly grounded against the Constitution, under which we are now deliberating, than that founded on the mingling of the Executive and Legislative branches of the Government in one body. It has been objected, that the Senate have too much of the Executive power even, by having a control over the President in the appointment to office. Now, shall we extend this connexion between the Legislative and Executive departments, which will strengthen the objection, and diminish the responsibility we have in the head of the Executive?" 1 Annals of Cong. 380 (1789).

[**595] Madison's position ultimately prevailed, and a congressional role in the removal process was rejected. This "Decision of 1789" provides "contemporaneous and weighty evidence" of the Constitution's meaning since many of the Members of the [*724] First Congress "had taken part in framing that instrument." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). n3

n3 The First Congress included 20 Members who had been delegates to the Philadelphia Convention:

IN THE SENATE

Richard Bassett (Delaware)
Pierce Butler (South Carolina)
Oliver Ellsworth (Connecticut)
William Few (Georgia)
William Samuel Johnson (Connecticut)
Rufus King (New York)
John Langdon (New Hampshire)
Robert Morris (Pennsylvania)
William Paterson (New Jersey)
George Read (Delaware)
Caleb Strong (Massachusetts)

IN THE HOUSE

Abraham Baldwin (Georgia)
Daniel Carroll (Maryland)
George Clymer (Pennsylvania)
Thomas FitzSimons (Pennsylvania)
Elbridge Gerry (Massachusetts)
Nicholas Gilman (New Hampshire)
James Madison (Virginia)
Roger Sherman (Connecticut)
Hugh Williamson (North Carolina)

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[**3187] This Court first directly addressed this issue in *Myers v. United States*, 272 U.S. 52 (1925). At issue in *Myers* was a statute providing that certain postmasters could be removed only "by and with the advice and consent of the Senate." The President removed one such Postmaster without Senate approval, and a lawsuit ensued. Chief Justice Taft, writing for the Court, declared the statute unconstitutional on the ground that for Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers." *Id.*, at 161.

[***LEdHR9A] [9A]A decade later, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), relied upon heavily by appellants, a Federal Trade Commissioner who had been removed by the President sought backpay. *Humphrey's Executor* involved an issue not presented either in the *Myers* case or in this case -- *i. e.*, the power of Congress to limit the President's powers of removal of a Federal Trade Commissioner. 295 [*725] U.S., at 630. n4 The relevant statute permitted removal [***596] "by the President," but only "for inefficiency, neglect of duty, or malfeasance in office." Justice Sutherland, speaking for the Court, upheld the statute, holding that "illimitable power of removal is not possessed by the President [with respect to Federal Trade Commissioners]." *Id.*, at 628-629. The Court distinguished *Myers*, reaffirming its holding that congressional participation in the removal of executive officers is unconstitutional. Justice Sutherland's opinion for the Court also underscored the crucial role of separated powers in our system:

"The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality." 295 U.S., at 629-630.

The Court reached a similar result in *Wiener v. United States*, 357 U.S. 349 (1958), concluding that, under *Humphrey's Executor*, the President did not have unrestrained [*726] removal authority over a member of the War Claims Commission.

[***LEdHR9B] [9B]

n4 Appellants therefore are wide of the mark in arguing that an affirmance in this case requires casting doubt on the status of "independent"

agencies because no issues involving such agencies are presented here. The statutes establishing independent agencies typically specify either that the agency members are removable by the President for specified causes, see, *e. g.*, 15 U. S. C. § 41 (members of the Federal Trade Commission may be removed by the President "for inefficiency, neglect of duty, or malfeasance in office"), or else do not specify a removal procedure, see, *e. g.*, 2 U. S. C. § 437c (Federal Election Commission). This case involves nothing like these statutes, but rather a statute that provides for direct congressional involvement over the decision to remove the Comptroller General. Appellants have referred us to no independent agency whose members are removable by the Congress for certain causes short of impeachable offenses, as is the Comptroller General, see Part IV, *infra*.

[***LEdHR7B] [7B]In light of these precedents, we conclude that Congress cannot reserve for itself the [*3188] power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. As the District Court observed: "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." 626 *F.Supp.*, at 1401. The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.

Our decision in *INS v. Chadha*, 462 U.S. 919 (1983), supports this conclusion. In *Chadha*, we struck down a one-House "legislative veto" provision by which each House of Congress retained the power to reverse a decision Congress had expressly authorized the Attorney General to make:

"Disagreement with the Attorney General's decision on Chadha's deportation -- that is, Congress' decision to deport Chadha -- no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.*, at 954-955.

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To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an [***597] officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over [*727] the execution of the laws, *Chadha* makes clear, is constitutionally impermissible.

The dangers of congressional usurpation of Executive Branch functions have long been recognized. "[The] debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley v. Valeo*, 424 U.S. 1, 129 (1976). Indeed, we also have observed only recently that "[the] hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha*, *supra*, at 951. With these principles in mind, we turn to consideration of whether the Comptroller General is controlled by Congress.

IV

[***LEdHR10A] [10A] [***LEdHR11A] [11A] Appellants urge that the Comptroller General performs his duties independently and is not subservient to Congress. We agree with the District Court that this contention does not bear close scrutiny.

The critical factor lies in the provisions of the statute defining the Comptroller General's office relating to removability. n5 Although the Comptroller General is nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President *pro tempore* of the Senate, see 31 U. S. C. [*728] § 703(a)(2), n6 and confirmed by the [***3189] Senate, he is removable only at the initiative of Congress. He may be removed not only by impeachment but also by joint resolution of Congress "at any time" resting on any one of the following bases:

- "(i) permanent disability;
- "(ii) inefficiency;
- "(iii) neglect of duty;
- "(iv) malfeasance; or
- "(v) a felony or conduct involving moral turpitude."

31 U. S. C. § 703(e)(1)B. n7

This provision was included, as one Congressman explained in urging passage of the Act, because Congress "felt that [the Comptroller General] [***598] should be brought under the sole control of Congress, so that Con-

gress at any moment when it found he was inefficient and was not carrying on the duties of his office as he should and as the Congress expected, could remove him without the long, tedious process of a trial by impeachment." 61 Cong. Rec. 1081 (1921).

[***LEdHR11B] [11B]

n5 We reject appellants' argument that consideration of the effect of a removal provision is not "ripe" until that provision is actually used. As the District Court concluded, "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." *Synar v. United States*, 626 F.Supp. 1374, 1392 (DC 1986). *The Impeachment Clause of the Constitution can hardly be thought to be undermined because of nonuse.*

n6 Congress adopted this provision in 1980 because of "the special interest of both Houses in the choice of an individual whose primary function is to provide assistance to Congress." *S. Rep. No. 96-570*, p. 10.

n7 Although the President could veto such a joint resolution, the veto could be overridden by a two-thirds vote of both Houses of Congress. Thus, the Comptroller General could be removed in the face of Presidential opposition. Like the District Court, 626 F.Supp., at 1393, n. 21, we therefore read the removal provision as authorizing removal by Congress alone.

The removal provision was an important part of the legislative scheme, as a number of Congressmen recognized. Representative Hawley commented: "[He] is our officer, in a measure, getting information for us. . . . If he does not do his work properly, we, as practically his employers, ought to be able to discharge him from his office." 58 Cong. Rec. 7136 (1919). Representative Sisson observed that the removal provisions would give "[the] Congress of the United States . . . absolute control of the man's destiny in office." [*729] 61 Cong. Rec. 987 (1921). The ultimate design was to "give the legislative branch of the Government control of the audit, not through the power of appointment, but through the power of removal." 58 Cong. Rec. 7211 (1919) (*Rep. Temple*).

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*JUSTICE WHITE contends: "The statute does not permit anyone to remove the Comptroller at will; removal is permitted only for specified cause, with the existence of cause to be determined by Congress following a hearing. Any removal under the statute would presumably be subject to post-termination judicial review to ensure that a hearing had in fact been held and that the finding of cause for removal was not arbitrary." Post, at 770. That observation by the dissenter rests on at least two arguable premises: (a) that the enumeration of certain specified causes of removal excludes the possibility of removal for other causes, cf. *Shurtleff v. United States*, 189 U.S. 311, 315-316 (1903); and (b) that any removal would be subject to judicial review, a position that appellants were unwilling to endorse. n8*

n8 The dissent relies on *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), as its only Court authority for this point, but the President did not assert that he had removed the Federal Trade Commissioner in compliance with one of the enumerated statutory causes for removal. See *id.*, at 612 (argument of Solicitor General Reed); see also *Synar v. United States*, 626 F.Supp., at 1398.

Glossing over these difficulties, the dissent's assessment of the statute fails to recognize the breadth of the grounds for removal. The statute permits removal for "inefficiency," "neglect of duty," or "malfeasance." These terms are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will. The Constitutional Convention chose to permit impeachment of executive officers only for "Treason, Bribery, or other high Crimes and Misdemeanors." It rejected language that would have permitted impeachment for "maladministration," with Madison [*730] arguing that "[so] vague a term will be equivalent to a tenure during pleasure of the Senate." 2 M. Farrand, *Records of the Federal Convention of 1787*, p. 550 (1911).

[**3190] We need not decide whether "inefficiency" or "malfeasance" are terms as broad as "maladministration" in order to reject the dissent's position that removing the Comptroller General requires "a feat of bipartisanship more difficult than that required to impeach and convict. [***599] " *Post*, at 771 (WHITE, J., dissenting). Surely no one would seriously suggest that judicial independence would be strengthened by allowing removal of federal judges only by a joint resolution finding "inefficiency," "neglect of duty," or "malfeasance."

[***LEdHR10B] [10B]JUSTICE WHITE, however, assures us that "[realistic] consideration" of the "practical result of the removal provision," *post*, at 774, 773, reveals that the Comptroller General is unlikely to be removed by Congress. The separated powers of our Government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress. The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress.

This much said, we must also add that the dissent is simply in error to suggest that the political realities reveal that the Comptroller General is free from influence by Congress. The Comptroller General heads the General Accounting Office (GAO), "an instrumentality of the United States Government independent of the executive departments," 31 U. S. C. § 702(a), which was created by Congress in 1921 as part of the Budget and Accounting Act of 1921, 42 Stat. 23. Congress created the office because it believed that it "needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations." H. Mansfield, [*731] *The Comptroller General: A Study in the Law and Practice of Financial Administration* 65 (1939).

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." 59 Stat. 616; 63 Stat. 205. Similarly, in the Accounting and Auditing Act of 1950, Congress required the Comptroller General to conduct audits "as an agent of the Congress." 64 Stat. 835.

Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch. In one of the early Annual Reports of Comptroller General, the official seal of his office was described as reflecting

"the independence of judgment to be exercised by the General Accounting Office, subject to the control of the legislative branch. . . . The combination represents an agency of the Congress independent of other authority auditing and checking the expenditures of the Government as required by law and subjecting any questions arising in that connection to quasi-judicial determination." GAO Ann. Rep. 5-6 (1924).

Later, Comptroller General Warren, who had been a Member of Congress for 15 years before being appointed

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Comptroller General, testified: "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.*" To Provide for [***600] Reorganizing of Agencies of the Government: Hearings on H. R. 3325 before the House Committee on Expenditures, 79th Cong., 1st Sess., 69 (1945) (emphasis added). And, in one conflict during Comptroller General McCarl's tenure, he asserted his independence of the Executive Branch, stating:

"Congress . . . is . . . the only authority to which there lies an appeal from the decision of this office. . . .

[*732] ". . . I may not accept the opinion of any official, inclusive of the Attorney General, as controlling my duty under the law." 2 *Comp. Gen.* 784, 786-787 [**3191] (1923) (disregarding conclusion of the Attorney General, 33 *Op. Atty. Gen.* 476 (1923), with respect to interpretation of compensation statute).

[***LEdHR1B] [1B] [***LEdHR10C] [10C] 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.

V

[***LEdHR1C] [1C] 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.

In preparing the report, the Comptroller General is to have "due regard" for the estimates and reductions set forth in a joint report submitted to him by the Director of CBO and the Director of OMB, the President's fiscal and budgetary adviser. However, the Act plainly contemplates that the Comptroller General will exercise his independent judgment and evaluation with respect to those estimates. The Act also provides that the Comptroller General's report "shall explain fully any differences between the contents of such report and the report of the Directors." § 251(b)(2).

Appellants suggest that the duties assigned to the Comptroller General in the Act are essentially ministerial and mechanical so that their performance does not con-

stitute "execution of the law" in a meaningful sense. On the contrary, we view these functions as plainly entailing execution [*733] 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 [***601] 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:

"The [Presidential] order *must provide* for reductions in the manner specified in section 251(a)(3), *must incorporate* the provisions of the [Comptroller General's] report submitted under section 251(b), and *must be consistent with such report in all respects.* The President *may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages* set forth in the report submitted under section 251(b) in determining the reductions to be specified in the order with respect to programs, projects, and activities, or with respect to budget activities, within an account. . . ." § 252(a)(3) (emphasis added).

See also § 251(d)(3)(A).

[***LEdHR1D] [1D] [***LEdHR12] [12] Congress of course initially determined the content of the Balanced Budget and Emergency Deficit Control Act; and undoubtedly the content of the Act determines the nature of the executive duty. However, as *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution [*734] of its enactment only indirectly -- by passing new legislation. *Chadha*, 462 U.S., at 958. By placing the responsibility for execution of the Balanced [**3192] Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.

VI

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[***LEdHR2B] [2B]We now turn to the final issue of remedy. Appellants urge that rather than striking down § 251 and invalidating the significant power Congress vested in the Comptroller General to meet a national fiscal emergency, we should take the lesser course of nullifying the statutory provisions of the 1921 Act that authorizes Congress to remove the Comptroller General. At oral argument, counsel for the Comptroller General suggested that this might make the Comptroller General removable by the President. All appellants urge that Congress would prefer invalidation of the removal provisions rather than invalidation of § 251 of the Balanced Budget and Emergency Deficit Control Act.

Severance at this late date of the removal provisions enacted 65 years ago would significantly alter the Comptroller General's office, possibly by making him subservient to the Executive Branch. Recasting the Comptroller General as an officer of the Executive Branch would accordingly alter the balance that Congress had in mind in drafting the Budget and Accounting Act of 1921 and the Balanced Budget and Emergency Deficit Control Act, to say nothing of the wide array of other tasks and duties Congress has assigned the Comptroller General in other statutes. n9 [***602] Thus appellants' [*735] argument would require this Court to undertake a weighing of the importance Congress attached to the removal provisions in the Budget and Accounting Act of 1921 as well as in other subsequent enactments against the importance it placed on the Balanced Budget and Emergency Deficit Control Act of 1985.

n9 Since 1921, the Comptroller General has been assigned a variety of functions. See, e. g., 2 U. S. C. § 687 (1982 ed., Supp. III) (duty to bring suit to require release of impounded budget authority); 42 U. S. C. § 6384(a) (duty to impose civil penalties under the Energy Policy and Conservation Act of 1975); 15 U. S. C. § 1862 (member of Chrysler Corporation Loan Guarantee Board); 45 U. S. C. § 711(d)(1)(C) (member of Board of Directors of United States Railway Association); 31 U. S. C. §§ 3551-3556 (1982 ed., Supp. III) (authority to consider bid protests under Competition in Contracting Act of 1984).

[***LEdHR5B] [5B]Fortunately this is a thicket we need not enter. The language of the Balanced Budget and Emergency Deficit Control Act itself settles the issue. In § 274(f), Congress has explicitly provided "fallback" provisions in the Act that take effect "[in] the event . . . any of the reporting procedures described in section 251 are invalidated." § 274(f)(1) (emphasis added). The fallback provisions are "fully operative as a

law," *Buckley v. Valeo*, 424 U.S., at 108 (quoting *Champion Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)). Assuming that appellants are correct in urging that this matter must be resolved on the basis of congressional intent, the intent appears to have been for § 274(f) to be given effect in this situation. Indeed, striking the removal provisions would lead to a statute that Congress would probably have refused to adopt. As the District Court concluded:

"[The] grant of authority to the Comptroller General was a carefully considered protection against what the House conceived to be the pro-executive bias of the OMB. It is doubtful that the automatic deficit reduction process would have passed without such protection, and doubtful that the protection would have been considered present if the Comptroller General were not removable by Congress itself. . . ." 626 F.Supp., at 1394.

[*736] Accordingly, rather than perform the type of creative and imaginative statutory surgery urged by appellants, our holding simply permits the fallback provisions to [**3193] come into play. n10

[***LEdHR5C] [5C]

n10 Because we conclude that the Comptroller General, as an officer removable by Congress, may not exercise the powers conferred upon him by the Act, we have no occasion for considering appellees' other challenges to the Act, including their argument that the assignment of powers to the Comptroller General in § 251 violates the delegation doctrine, see, e. g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Yakus v. United States*, 321 U.S. 414 (1944).

VII

[***LEdHR13] [13]No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will [***603] not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government. . . ." *Chadha, supra*, at 944.

[***LEdHR1E] [1E]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.

CONCURBY:

STEVENS

CONCUR:

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, concurring in the judgment.

When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons. I [*737] 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." *Ante*, at 732-734; *post*, at 764-765. 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*, 462 U.S. 919 (1983). That principle, I believe, is applicable to the Comptroller General.

I

The fact that Congress retained for itself the power to remove the Comptroller General is important evidence

supporting the conclusion that he is a member of the Legislative Branch of the Government. Unlike [***3194] the Court, however, I am not [***604] persuaded that the congressional removal power is either a necessary, or a sufficient, basis for concluding that his statutory assignment is invalid.

[*738] As JUSTICE WHITE explains, *post*, at 770-771, Congress does not have the power to remove the Comptroller General at will, or because of disagreement with any policy determination that he may be required to make in the administration of this, or any other, Act. The statute provides a term of 15 years for the Comptroller General; it further provides that he must retire upon becoming 70 years of age, and that he may be removed at any time by impeachment or by "joint resolution of Congress, after notice and an opportunity for a hearing, only for -- (i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U. S. C. § 703(e)(1)(B). Far from assuming that this provision creates a "here-and-now subservience" respecting all of the Comptroller General's actions, *ante*, at 727, n. 5 (quoting District Court), we should presume that Congress will adhere to the law -- that it would only exercise its removal powers if the Comptroller General were found to be permanently disabled, inefficient, neglectful, or culpable of malfeasance, a felony, or conduct involving moral turpitude. n1

n1 Just as it is "always appropriate to assume that our elected representatives, like other citizens, know the law," *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979), so too is it appropriate to assume that our elected representatives, like other citizens, will respect the law. As the proceedings in the United States Senate resulting from the impeachment of Justice Chase demonstrate, moreover, if that body were willing to give only lipservice to the governing standard, political considerations rather than "good behavior" would determine the tenure of federal judges. See M. Elsmere, *The Impeachment Trial of Justice Samuel Chase* 205 (1962); 3 A. Beveridge, *The Life of John Marshall* 157-223 (1919). See also W. Wilson, *Congressional Government: A Study in American Politics 186-187* (Meridian Books ed., 1956) (quoted in Levi, *Some Aspects of Separation of Powers*, 76 *Colum. L. Rev.* 369, 380 (1976)):

"If there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, *somebody must be trusted*, in order that when things go wrong it

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may be quite plain who should be punished. . . .
Power and strict accountability of its use are the
essential constituents of good government."
(Emphasis in original.)

[*739] The notion that the removal power at issue here automatically creates some kind of "here-and-now subservience" of the Comptroller General to Congress is belied by history. There is no evidence that Congress has ever removed, or threatened to remove, the Comptroller General for reasons of policy. Moreover, the President has long possessed a comparable power to remove members of the Federal Trade Commission, yet it is universally accepted that they are independent of, rather than subservient to, the President in performing their official duties. Thus, the statute that the Court construed in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), provided:

"Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 38 Stat. 718.

In upholding the congressional limitations on the President's power of removal, the Court stressed the independence of the Commission from [***605] the President. n2 There was no suggestion that the retained Presidential removal powers -- similar to those at issue here -- created a subservience to the President. n3

n2 See *Humphrey's Executor*, 295 U.S., at 625-626 (describing congressional intention to create "a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government") (emphasis in original).

n3 The manner in which President Franklin Roosevelt exercised his removal power further underscores the propriety of presuming that Congress, and the President, will not use statutorily prescribed removal causes as pretexts for other removal reasons. President Roosevelt never claimed that his removal of Humphrey was for one of the statutorily prescribed reasons -- inefficiency, neglect of duty, or malfeasance in office. The President's removal letter merely stated:

"Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission." See *id.*, at 619.

Previously, the President had written to Commissioner Humphrey stating:

"You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence." *Ibid.*

[*740] [***3195] To be sure, there may be a significant separation-of-powers difference between the President's *exercise* of carefully circumscribed removal authority and Congress' *exercise* of identically circumscribed removal authority. But the *Humphrey's Executor* analysis at least demonstrates that it is entirely proper for Congress to specify the qualifications for an office that it has created, and that the prescription of what might be termed "dereliction-of-duty" removal standards does not itself impair the independence of the official subject to such standards. n4

n4 Indeed, even in *Myers v. United States*, 272 U.S. 52 (1926), in its challenge to the provision requiring Senate approval of the removal of a postmaster, the Federal Government assumed that Congress had power to limit the terms of removal to reasons that relate to the office. Solicitor General Beck recognized "that the power of removal may be subject to such general laws as do not destroy the exercise by the President of his power of removal, and which leaves to him the exercise of the power subject to such general laws as may fairly measure the standard of public service." Substitute Brief for United States on Reargument in No. 2, O. T. 1926, p. 9. At oral argument, the Solicitor General explained his position:

"Mr. BECK. . . . Suppose the Congress creates an office and says that it shall only be filled by a man learned in the law; and suppose it further provides that, if a man ceases to be member of the bar, he shall be removed. I am not prepared to say that such a law can not be reconciled with the Constitution. What I do say is that, when the condition imposed upon the creation of the office has no reasonable relation to the office; when it is not a legislative standard to be applied by the President, and is not the declaration of qualifications, but is the creation of an appointing

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power other than the President, then Congress has crossed the dead line, for it has usurped the prerogative of the President." 272 U.S., at 96-97.

The fact that Congress retained for itself the power to remove the Comptroller General thus is not necessarily an adequate reason for concluding that his role in the Gramm-Rudman-Hollings budget reduction process is unconstitutional. It is, however, a fact that lends support to my ultimate [*741] conclusion that, in exercising his functions under this Act, he serves as an agent of the Congress.

II

In assessing the role of the Comptroller General, it is appropriate to consider his already existing statutory [***606] responsibilities. Those responsibilities leave little doubt that one of the identifying characteristics of the Comptroller General is his statutorily required relationship to the Legislative Branch.

In the statutory section that identifies the Comptroller General's responsibilities for investigating the use of public money, four of the five enumerated duties specifically describe an obligation owed to Congress. The first is the only one that does not expressly refer to Congress: The Comptroller General shall "investigate all matters related to the receipt, disbursement, and use of public money." 31 U. S. C. § 712(1). The other four clearly require the Comptroller General to work with Congress' specific needs as his legal duty. Thus, the Comptroller General must "estimate the cost to the United States Government of complying with each restriction on expenditures of a specific appropriation in a general appropriation law and report each estimate to Congress with recommendations the Comptroller General considers desirable." § 712(2) (emphasis added). He must "analyze expenditures of each executive agency the Comptroller General believes will help Congress decide whether public money has been used and expended economically and efficiently. [**3196] " § 712(3) (emphasis added). He must "make an investigation and report ordered by either House of Congress or a committee of Congress having jurisdiction over revenue, appropriations, or expenditures." § 712(4) (emphasis added). Finally, he must "give a committee of Congress having jurisdiction over revenue, appropriations, or expenditures the help and information the committee requests." § 712(5) (emphasis added).

[*742] The statutory provision detailing the Comptroller General's role in evaluating programs and activities of the United States Government similarly leaves no doubt regarding the beneficiary of the Comptroller General's labors. The Comptroller General may undertake such an evaluation for one of three specified reasons: (1)

on his own initiative; (2) "when either House of Congress orders an evaluation"; or (3) "when a committee of Congress with jurisdiction over the program or activity requests the evaluation." 31 U. S. C. § 717(b). In assessing a program or activity, moreover, the Comptroller General's responsibility is to "develop and recommend to Congress ways to evaluate a program or activity the Government carries out under existing law." § 717(c) (emphasis added).

The Comptroller General's responsibilities are repeatedly framed in terms of his specific obligations to Congress. Thus, one provision specifies in some detail the obligations of the Comptroller General with respect to an individual committee's request for a program evaluation:

"On request of a committee of Congress, the Comptroller General shall help the committee to --

"(A) develop a statement of legislative goals and ways to assess and report program performance related to the goals, including recommended ways to assess performance, information to be reported, responsibility for reporting, frequency of reports, and feasibility of pilot testing; and

"(B) assess program evaluations prepared by and for an agency." § 717(d)(1).

[***607] Similarly, another provision requires that, on "request of a member of Congress, the Comptroller General shall give the member a copy of the material the Comptroller General compiles in carrying out this subsection that has been released by the committee for which the material was compiled." § 717(d)(2).

[*743] Numerous other provisions strongly support the conclusion that one of the Comptroller General's primary responsibilities is to work specifically on behalf of Congress. The Comptroller General must make annual reports on specified subjects to Congress, to the Senate Committee on Finance, to the Senate Committee on Governmental Affairs, to the House Committee on Ways and Means, to the House Committee on Government Operations, and to the Joint Committee on Taxation. 31 U. S. C. §§ 719(a), (d). On request of a committee, the Comptroller General "shall explain to and discuss with the committee or committee staff a report the Comptroller General makes that would help the committee -- (1) evaluate a program or activity of an agency within the jurisdiction of the committee; or (2) in its consideration of proposed legislation." § 719(i). Indeed, the relationship between the Comptroller General and Congress is so close that the "Comptroller General may assign or detail an officer or employee of the General Accounting Office to full-time continuous duty with

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a committee of Congress for not more than one year." § 31 U. S. C. § 734(a).

The Comptroller General's current statutory responsibilities on behalf of Congress are fully consistent with the historic conception of the Comptroller General's office. The statute that created the Comptroller General's office -- the Budget and Accounting Act of 1921 -- provided that four of the five statutory responsibilities given to the Comptroller General be exercised on behalf [**3197] of Congress, three of them exclusively so. n5 On at [***608] least three occasions since 1921, moreover, [*744] in considering the structure of Government, Congress has defined the Comptroller General as being a part of the Legislative Branch. In the Reorganization Act of 1945, Congress specified that the Comptroller General and the General Accounting Office "are a part of the legislative branch of the Government." 59 Stat. 616. n6 In the Reorganization Act of 1949, Congress again confirmed that the Comptroller General and the General Accounting Office "are a part of the legislative branch of the Government." 63 Stat. 205. n7 Finally, in the Budget and Accounting Procedures Act of 1950, Congress referred to the "auditing for the Government, conducted [*745] by the Comptroller General of the United States as an agent of the Congress." 64 Stat. 835. Like the already existing statutory responsibilities, then, the history of the Comptroller General statute confirms that the Comptroller General should be viewed as an agent of the Congress.

n5 In pertinent part, the 1921 Act provided:

"SEC. 312(a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

"(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations,

or expenditures. The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

"(c) The Comptroller General shall specifically report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

"(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

"(e) He shall furnish such information relating to expenditures and accounting to the Bureau of the Budget as it may request from time to time." 42 Stat. 25-26 (emphases added).

n6 See also H. R. Rep. No. 971, 79th Cong., 1st Sess., 12 (1945) ("[The] Comptroller General of the United States" and "the General Accounting Office . . . are declared by the bill to be a part of the legislative branch of the Government").

n7 See also H. R. Rep. No. 23, 81st Cong., 1st Sess., 11 (1949) ("[The] Comptroller General of the United States" and "the General Accounting Office . . . (as in the Reorganization Act of 1945) are declared by the bill to be a part of the legislative branch of the Government").

This is not to say, of course, that the Comptroller General has no obligations to the Executive Branch, or that he is an agent of the Congress in quite so clear a manner as the Doorkeeper of the House. For the current statutory responsibilities also envision a role for the Comptroller General with respect to the Executive Branch. The Comptroller General must "give the President information on expenditures and accounting the President requests." 31 U. S. C. § 719(f). Although the Comptroller General is required to provide Congress with an annual report, he is also required to provide the President with the report if the President so requests. § 719(a). The Comptroller General is statutorily required to audit the Internal Revenue Service and the Bureau of Alcohol, Tobacco, and Firearms (and provide congressional committees with information respecting the audits). § 713. In at least one respect, moreover, the Comptroller General is treated like an executive agency: "To the extent applicable, all laws generally related to

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administering an agency apply to the Comptroller General." § 704(a). Historically, as well, the Comptroller General has had some relationship to the Executive Branch. As noted, n. 5, *supra*, in the 1921 Act, one of the Comptroller General's [**3198] specific responsibilities was to provide information to the Bureau of the Budget. In fact, when the Comptroller General's office was created, its functions, personnel, records, and even furniture derived from a previous executive office. n8

n8 See 42 Stat. 23 ("The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished, to take effect July 21, 1921. . . . [All] books, records, documents, papers, furniture, office equipment and other property of the office of the Comptroller of the Treasury shall become the property of the General Accounting Office").

[*746] Thus, the Comptroller General retains certain obligations with respect [***609] to the Executive Branch. n9 Obligations to two branches are not, however, impermissible and the presence of such dual obligations does not prevent the characterization of the official with the dual obligations as part of one branch. n10 It is at least clear that, in most, if not all, of his statutory responsibilities, the Comptroller General is properly characterized as an agent of the Congress. n11

n9 The Comptroller General, of course, is also appointed by the President. 31 U. S. C. § 703 (a)(1). So too, however, are the Librarian of Congress, 2 U. S. C. § 136, the Architect of the Capitol, 40 U. S. C. § 162, and the Public Printer, 44 U. S. C. § 301.

n10 See *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 36-37, and n. 1 (1985) (reviewing the Marshals' statutory obligations to the Judiciary and the Executive Branch, but noting that the "Marshals are within the Executive Branch of the Federal Government"). Cf. Report by the Comptroller General, U.S. Marshals' Dilemma: Serving Two Branches of Government 14 (1982) ("It is extremely difficult for one person to effectively serve two masters"). Surely no one would suggest that the fact that THE CHIEF JUSTICE performs executive functions for the Smithsonian Institution, 20 U. S. C. § 42, affects his characterization as a member of the Judicial Branch of the Government. Nor does the performance of similar functions by three Members of the Senate and

three Members of the House, *ibid.*, affect their characterization as members of the Legislative Branch of the Government.

n11 Despite the suggestions of the dissents, *post*, at 773, n. 12 (WHITE, J., dissenting); *post*, at 778-779, n. 1 (BLACKMUN, J., dissenting), it is quite obvious that the Comptroller General, and the General Accounting Office, have a fundamentally different relationship with Congress than do independent agencies like the Federal Trade Commission. Rather than an independent agency, the Comptroller General and the GAO are functionally equivalent to congressional agents such as the Congressional Budget Office, the Office of Technology Assessment, and the Library of Congress' Congressional Research Service. As the statutory responsibilities make clear, like those congressional agents, the Comptroller General and the GAO function virtually as a permanent staff for Congress. Indeed, in creating the Congressional Budget Office, Congress explicitly required that the GAO provide extensive services for the CBO -- a fact with some significance for this case. The CBO statute enumerates the three "congressional agencies" that must provide assistance to the CBO -- "the General Accounting Office, the Library of Congress, and the Office of Technology Assessment." 2 U. S. C. § 601(e). These "congressional agencies" are authorized to provide the CBO with "services, facilities, and personnel with or without reimbursement," *ibid.*, as well as "information, data, estimates, and statistics." *Ibid.* See also Congressional Quarterly's Guide to Congress 555 (3d ed. 1982) ("In addition to their staffs, committees, facilities and privileges, members of Congress are backed by a number of other supporting organizations and activities that keep Capitol Hill running. Among the largest of these in size of staff are the General Accounting Office (GAO), with about 5,200 employees; the Library of Congress' Congressional Research Service (CRS), with 856; the Congressional Budget Office (CBO), with 218; and the Office of Technology Assessment (OTA), with 130. . . . To an extent, each of the four legislative agencies has its own specialized functions. . . . Although each of the four agencies has been given its own task, their jobs overlap to some extent. This has led in some cases to duplication and waste and even to competition among the different groups. . . . The General Accounting Office is an arm of the legislative branch that was

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created to oversee the expenditures of the executive branch").

Thus, to contend that the Comptroller General's numerous statutory responsibilities to serve Congress directly are somehow like an independent agency's obligations to report to Congress and to implement legislatively mandated standards simply misconceives the actual duties of the Comptroller General and the GAO. It also ignores the clear import of the legislative history of these entities. See, e. g., *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875, 892-893 (CA3 1986) (Becker, J., concurring in part) ("Because the office of the Comptroller General is created by statute, the Comptroller General's status within the government is a matter of statutory interpretation which, like all statutory interpretation, is controlled by legislative intent. . . . There is copious evidence in the legislative history that the GAO (and therefore the Comptroller General) was intended to be in the legislative branch. . . . Because there is no legislative intent to the contrary, I believe that it is incumbent upon us to hold that the Comptroller General is within the legislative branch of government, despite the inconveniences that may attend such a holding").

[*747] [**3199] [***610] III

Everyone agrees that the powers assigned to the Comptroller General by § 251(b) and § 251(c)(2) of the Gramm-Rudman-Hollings Act are extremely important. They require him to exercise sophisticated economic judgment concerning anticipated trends in the Nation's economy, projected [*748] levels of unemployment, interest rates, and the special problems that may be confronted by the many components of a vast federal bureaucracy. His duties are anything but ministerial -- he is not merely a clerk wearing a "green eyeshade" as he undertakes these tasks. Rather, he is vested with the kind of responsibilities that Congress has elected to discharge itself under the fallback provision that will become effective if and when § 251(b) and § 251(c)(2) are held invalid. Unless we make the naive assumption that the economic destiny of the Nation could be safely entrusted to a mindless bank of computers, the powers that this Act vests in the Comptroller General must be recognized as having transcendent importance. n12

n12 The element of judgment that the Comptroller General must exercise is evident by the congressional recognition that there may be "differences between the contents of [his] report and

the report of the Directors" of the Congressional Budget Office and the Office of Management and Budget. § 251(b)(2).

The Court concludes that the Gramm-Rudman-Hollings Act impermissibly assigns the Comptroller General "executive powers." *Ante*, at 732. JUSTICE WHITE's dissent agrees that "the powers exercised by the Comptroller under the Act may be characterized as 'executive' in that they involve the interpretation and carrying out of the Act's mandate." *Post*, at 765. This conclusion is not only far from obvious but also rests on the unstated and unsound premise that there is a definite line that distinguishes executive power from legislative power.

"The great ordinances of the Constitution do not establish and divide fields of black and white." *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). "The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another [*749] would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). As Justice Brandeis explained in his dissent in *Myers v. United States*, 272 U.S. 52, 291 (1926): "The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial."

One reason that the exercise of [***611] legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of Government is that governmental power cannot always be readily characterized with only one of those three labels. On the contrary, as our cases demonstrate, a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned. For this reason, "[when] any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." *INS v. Chadha*, 462 U.S., at 951. n13

n13 "Perhaps as a matter of political science we could say that Congress should only concern itself with broad principles of policy and leave their application in particular cases to the executive branch. But no such rule can be found in the Constitution itself or in legislative practice. It is fruitless, therefore, to try to draw any sharp and logical line between legislative and executive

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functions. Characteristically, the draftsmen of 1787 did not even attempt doctrinaire definitions, but placed their reliance in the mechanics of the Constitution. One of their principal devices was to vest the legislative powers in the two Houses of Congress and to make the President a part of the legislative process by requiring that all bills passed by the two Houses be submitted to him for his approval or disapproval, his disapproval or veto to be overridden only by a two-thirds vote of each House. It is in such checks upon powers, rather than in the classifications of powers, that our governmental system finds equilibrium." Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 *Harv. L. Rev.* 569, 571 (1953) (footnote omitted).

[**3200] The *Chadha* case itself illustrates this basic point. The governmental decision that was being made was whether a resident alien who had overstayed his student visa should be [*750] deported. From the point of view of the Administrative Law Judge who conducted a hearing on the issue -- or as JUSTICE POWELL saw the issue in his concurrence n14 -- the decision took on a judicial coloring. From the point of view of the Attorney General of the United States to whom Congress had delegated the authority to suspend deportation of certain aliens, the decision appeared to have an executive character. n15 But, as the Court held, when the House of Representatives finally decided that Chadha must be deported, its action "was essentially legislative in purpose and effect." *Id.*, at 952.

n14 For JUSTICE POWELL the critical question in the *Chadha* case was "whether Congress impermissibly assumed a judicial function." 462 *U.S.*, at 963.

n15 "It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act." *Id.*, at 953, n. 16.

The powers delegated to the Comptroller General by § 251 of the Act before us today have a similar chameleon-like quality. The District Court persuasively explained why they may be appropriately characterized as executive powers. n16 But, when that delegation is held invalid, [***612] the "fallback provision" provides that the report that would otherwise be issued by the Comptroller General shall be issued by Congress itself. n17 [*751] In the event that the resolution is enacted, the congressional report will have the same legal conse-

quences as if it [**3201] had been issued by the Comptroller General. In that event, moreover, surely no one would suggest that Congress had acted in any capacity other than "legislative." Since the District Court expressly recognized the validity of what it described as the "'fallback' deficit reduction process," *Synar v. United States*, 626 *F.Supp.* 1374, 1377 (DC 1986), it obviously did not doubt the constitutionality of the performance by Congress of the functions delegated to the Comptroller General.

n16 "Under subsection 251(b)(1), the Comptroller General must specify levels of anticipated revenue and expenditure that determine the gross amount which must be sequestered; and he must specify which particular budget items are required to be reduced by the various provisions of the Act (which are not in all respects clear), and in what particular amounts. The first of these specifications requires the exercise of substantial judgment concerning present and future facts that affect the application of the law -- the sort of power normally conferred upon the executive officer charged with implementing a statute. The second specification requires an interpretation of the law enacted by Congress, similarly a power normally committed initially to the Executive under the Constitution's prescription that he 'take Care that the Laws be faithfully executed.' Art. II, § 3." *Synar v. United States*, 626 *F.Supp.* 1374, 1400 (DC 1986).

n17 Section 274(f) of the Act provides, in part:

"ALTERNATIVE PROCEDURES FOR THE JOINT REPORTS OF THE DIRECTORS. -

"(1) In the event that any of the reporting procedures described in section 251 are invalidated, then any report of the Directors referred to in section 251(a) or (c)(1) . . . shall be transmitted to the joint committee established under this subsection.

"(2) Upon the invalidation of any such procedure there is established a Temporary Joint Committee on Deficit Reduction, composed of the entire membership of the Budget Committees of the House of Representatives and the Senate. . . The purposes of the Joint Committee are to receive the reports of the Directors as described in paragraph (1), and to report (with respect to each

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such report of the Directors) a joint resolution as described in paragraph (3).

"(3) No later than 5 days after the receipt of a report of the Directors in accordance with paragraph (1), the Joint Committee shall report to the House of Representatives and the Senate a joint resolution setting forth the contents of the report of the Directors.

....

"(5) Upon its enactment, the joint resolution shall be deemed to be the report received by the President under section 251(b) or (c)(2) (whichever is applicable)." 99 Stat. 1100 (emphasis added).

Under the District Court's analysis, and the analysis adopted by the majority today, it would therefore appear that the function at issue is "executive" if performed by the Comptroller General but "legislative" if performed by the Congress. In my view, however, the function may appropriately [*752] be labeled "legislative" even if performed by the Comptroller General or by an executive agency.

Despite the statement in Article I of the Constitution that "All legislative Powers herein granted shall be vested in a Congress of the United States," it is far from novel to acknowledge that independent agencies do indeed exercise legislative powers. As JUSTICE WHITE explained in his *Chadha* dissent, after reviewing our cases upholding broad delegations of legislative power:

"[These] cases establish that by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation. For some time, the sheer amount of law -- the substantive rules that regulate private conduct and direct the operation of government -- made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. The Administrative Procedure Act, 5 U. S. C. § 551(4), provides that a 'rule' is [***613] an agency statement 'designed to implement, interpret, or prescribe law or policy.' When agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded 'legislative effect.' See, e. g., *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981); *Batterton v. Francis*, 432 U.S. 416 (1977). These regulations bind courts and officers of the Federal Government, may preempt state law,

see, e. g., *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141 (1982), and grant rights to and impose obligations on the public. In sum, they have the force of law." 462 U.S., at 985-986 (footnote omitted).

Thus, I do not agree that the Comptroller General's responsibilities under the Gramm-Rudman-Hollings Act must be [*753] termed "executive powers," or even that our inquiry is much advanced by using that term. For, whatever the label given the functions to be performed by the Comptroller General under § 251 -- or by the Congress under § 274 -- the District Court had no difficulty in concluding that Congress could delegate the performance of those functions to another branch of the Government. n18 If the delegation to a stranger is [**3202] permissible, why may not Congress delegate the same responsibilities to one of its own agents? That is the central question before us today.

n18 "All that has been left to administrative discretion is the estimation of the aggregate amount of reductions that will be necessary, in light of predicted revenues and expenditures, and we believe that the Act contains standards adequately confining administrative discretion in making that estimation. While this 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. Through 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." 626 F.Supp., at 1391.

The District Court's holding that the exercise of discretion was not the kind of political judgment that "must be made by Congress itself" is, of course, consistent with the view that it is a judgment that "may be made by Congress itself" pursuant to § 274.

IV

Congress regularly delegates responsibility to a number of agents who provide important support for its legislative activities. Many perform functions that could be characterized as "executive" in most contexts -- the Capitol Police can arrest and press charges against lawbreakers, the Sergeant at Arms manages the congressional payroll, the Capitol Architect maintains the build-

ings and grounds, and its Librarian has custody of a vast number of books and records. Moreover, the Members themselves necessarily engage in many activities that are merely ancillary to their primary lawmaking [*754] responsibilities -- they manage their separate offices, they communicate with their constituents, they conduct hearings, they inform themselves about the problems confronting the Nation, and they make rules for the governance of their own business. The responsibilities assigned to the Comptroller General in the case before [***614] us are, of course, quite different from these delegations and ancillary activities.

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 the Comptroller General's report that "[provides] for the determination of reductions" and that "[contains] estimates, determinations, and specifications for all of the items contained in the report" submitted by the Office of Management and Budget and the Congressional Budget Office. § 251(b). It is the Comptroller General's report that the President must follow and that will have conclusive effect. § 252. 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.

Article I of the Constitution specifies the procedures that Congress must follow when it makes policy that binds the Nation: its legislation must be approved by both of its Houses and presented to the President. In holding that an attempt to legislate by means of a "one-House veto" violated the procedural mandate in Article I, we explained:

"We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised [*755] only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. . . . It emerges clearly that the prescription for legislative action in Art. I, § 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *INS v. Chadha*, 462 U.S., at 951.

If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade "the carefully crafted restraints spelled out in the Constitution." *Id.*, at 959. n19 That danger -- [**3203] congressional action that [***615] evades constitutional restraints -- is not present when Congress delegates lawmaking power to the executive or to an independent agency. n20

n19 Even scholars who would have sustained the one-House veto appear to agree with this ultimate conclusion. See Nathanson, Separation of Powers and Administrative Law: Delegation, The Legislative Veto, and the "Independent" Agencies, 75 *Nw. U. L. Rev.* 1064, 1090 (1981) ("It is not a case where the Congress has delegated authority to one of its components to take affirmative steps to impose regulations upon private interests -- an action which would, I assume, be unconstitutional"). Cf. *Buckley v. Valeo*, 424 U.S. 1, 286 (1976) (WHITE, J., dissenting) (expressing the opinion that a one-House veto of agency regulations would be unobjectionable, but adding that it "would be considerably different if Congress itself purported to adopt and propound regulations by the action of both Houses").

n20 As I have emphasized, in this case, the Comptroller General is assigned functions that require him to make policy determinations that bind the Nation. I note only that this analysis need not call into question the Comptroller General's performance of numerous existing functions that may not rise to this level. See *ante*, at 734-735, n. 9.

The distinction between the kinds of action that Congress may delegate to its own components and agents and those that require either compliance with Article I procedures or delegation to another branch pursuant to defined standards is [*756] reflected in the practices that have developed over the years regarding congressional resolutions. The *joint* resolution, which is used for "special purposes and . . . incidental matters," 7 Deschler's Precedents of the House of Representatives 334 (1977), makes binding policy and "requires an affirmative vote by both Houses and submission to the President for approval" *id.*, at 333 -- the full Article I requirements. A *concurrent* resolution, in contrast, makes no binding policy; it is "a means of expressing fact, principles, opinions, and purposes of the two Houses," Jefferson's Manual and Rules of the House of Representatives 176 (1983), and thus does not need to be presented to the President. It is settled, however, that if a

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resolution is intended to make policy that will bind the Nation and thus is "legislative in its character and effect," S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897) -- then the full Article I requirements must be observed. For "the nature or substance of the resolution, and not its form, controls the question of its disposition." *Ibid.*

In my opinion, Congress itself could not exercise the Gramm-Rudman-Hollings functions through a concurrent resolution. The fact that the fallback provision in § 274 requires a joint resolution rather than a concurrent resolution indicates that Congress endorsed this view. n21 I think it equally clear that Congress may not simply delegate those functions to an agent such as the Congressional Budget Office. Since I am persuaded that the Comptroller General is also fairly deemed to be an agent of Congress, he too cannot exercise such functions. n22

n21 The fact that Congress specified a joint resolution as the fallback provision has another significance as well. For it reveals the congressional intent that, if the Comptroller General could not exercise the prescribed functions, Congress wished to perform them itself, rather than delegating them, for instance, to an independent agency or to an Executive Branch official. This choice shows that Congress intended that the important functions of the Act be no further from itself than the Comptroller General.

n22 In considering analogous problems, our state courts have consistently recognized the importance of strict adherence to constitutionally mandated procedures in the legislative process. See, e. g., *State v. A.L.I.V.E. Voluntary*, 606 P. 2d 769, 773, 777 (*Alaska* 1980) ("Of course, when the legislature wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having a binding effect on those outside the legislature it may do so only by following the enactment procedures. Other state courts have so held with virtual unanimity. . . . The fact that it can delegate legislative power to others who are not bound by article II does not mean that it can delegate the same power to itself and, in the process, escape from the constraints under which it must operate"); *People v. Tremaine*, 252 N. Y. 27, 44 168 N. E. 817, 822 (1929) ("If the power to approve the segregation of lump sum appropriations may be delegated to any one, even to one or two members of the Legislature, it necessarily follows that the power to segregate such appropriations may also be con-

ferred upon such delegates. . . . To visualize an extreme case, one lump sum appropriation might be made to be segregated by the committee chairmen. Such a delegation of legislative power would be [abhorrent] to all our notions of legislation on the matter of appropriations").

[*757] [**3204] [***616] As a result, to decide this case there is no need to consider the Decision of 1789, the President's removal power, or the abstract nature of "executive powers." Once it is clear that the Comptroller General, whose statutory duties define him as an agent of Congress, has been assigned the task of making policy determinations that will bind the Nation, the question is simply one of congressional process. There can be no doubt that the Comptroller General's statutory duties under Gramm-Rudman-Hollings do not follow the constitutionally prescribed procedures for congressional lawmaking. n23

n23 I have previously noted my concern about the need for a "due process of lawmaking" even when Congress has acted with bicameralism and presentment. See *Fullilove v. Klutznick*, 448 U.S. 448, 549, and n. 24 (1980) (STEVENS, J., dissenting); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 98, and n. 11 (1977) (STEVENS, J., dissenting). When a legislature's agent is given powers to act without even the formalities of the legislative process, these concerns are especially prominent.

In short, even though it is well settled that Congress may delegate legislative power to independent agencies or to the Executive, and thereby divest itself of a portion of its lawmaking power, when it elects to exercise such power itself, it may not authorize a lesser representative of the Legislative [*758] Branch to act on its behalf. n24 It is for this reason that I believe § 251(b) and § 251(c)(2) of the Act are unconstitutional. n25

n24 See also Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 *Calif. L. Rev.* 983, 1067, n. 430 (1975) ("A delegation which disperses power is not necessarily constitutionally equivalent to one which concentrates power in the hands of the delegating agency"); Ginnane, 66 *Harv. L. Rev.*, at 595 ("It is a non sequitur to say that, since a statute can delegate a power to someone not bound by the procedure prescribed in the Constitution for Congress' exercise of the power, it can therefore

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'delegate' the power to Congress free of constitutional restrictions on the manner of its exercise").

n25 JUSTICE BLACKMUN suggests that Congress may delegate legislative power to one of its own agents as long as it does not retain "tight control" over that agent. *Post*, at 779, n. 1. His suggestion is not faithful to the rationale of *Chadha* because no component of Congress, not even one of its Houses, is subject to the "tight control" of the entire Congress. For instance, the Congressional Research Service, whose primary function is to respond to congressional research requests, 2 U. S. C. § 166, apparently would not fall within JUSTICE BLACKMUN's "tight control" test because Congress has guaranteed the Service "complete research independence and the maximum practicable administrative independence consistent with these objectives." § 166(b)(2). I take it, however, that few would doubt the unconstitutionality of assigning the functions at issue in this case to the Congressional Research Service. Moreover, *Chadha* surely forecloses the suggestion that because delegation of legislative power to an independent agency is acceptable, such power may also be delegated to a component or an agent of Congress. Finally, with respect to JUSTICE BLACKMUN's emphasis on Presidential appointment of the Comptroller General, *post*, at 778-779, n. 1, as I have previously pointed out, other obvious congressional agents, such as the Librarian of Congress, the Architect of the Capitol, and the Public Printer are also appointed by the President. See n. 9, *supra*.

Thus, the critical inquiry in this case concerns not the manner in which executive officials or agencies may act, but the manner in which Congress and its agents may act. As we emphasized in *Chadha*, when Congress legislates, when it makes binding policy, it must follow the [***617] procedures prescribed in Article I. Neither the unquestioned urgency of the national budget crisis nor the Comptroller General's proud record of professionalism and dedication provides a justification for allowing a congressional agent to set policy that binds [*759] the Nation. Rather than turning the task over to its agent, if the Legislative Branch decides to act with conclusive effect, it must do so through a process akin to that specified in the fallback provision -- through enactment by both Houses and presentment to the President.

I concur in the judgment.

DISSENTBY:

WHITE; BLACKMUN

DISSENT:

[**3205] 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. Twice in the past four years I have expressed my view that the Court's recent efforts to police the separation of powers have rested on untenable constitutional propositions leading to regrettable results. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92-118 (1982) (WHITE, J., dissenting); *INS v. Chadha*, 462 U.S. 919, 967-1003 (1983) (WHITE, J., dissenting). Today's result is even more misguided. As I will explain, the Court's decision rests on a feature of the legislative scheme that is of minimal practical significance and that presents no substantial threat to the basic scheme of separation of powers. In attaching dispositive significance to what should be regarded as a triviality, the Court neglects what has [*760] 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).

I

The Court's argument is straightforward: the Act vests the Comptroller General with "executive" powers, that is, powers to "[interpret] a law enacted by Congress [in order] to [***618] implement the legislative mandate," *ante*, at 733; such powers may not be vested by

Congress in itself or its agents, see *Buckley v. Valeo*, 424 U.S. 1, 120-141 (1976), for the system of Government established by the Constitution for the most part limits Congress to a legislative rather than an executive or judicial role, see *INS v. Chadha*, *supra*; the Comptroller General is an agent of Congress by virtue of a provision in the Budget and Accounting Act of 1921, 43 Stat. 23, 31 U. S. C. § 703(e)(1), granting Congress the power to remove the Comptroller for cause through joint resolution; therefore the Comptroller General may not constitutionally exercise the executive powers granted him in the Gramm-Rudman-Hollings Act, and the Act's automatic budget-reduction mechanism, which is premised on the Comptroller's exercise of those powers, must be struck down.

Before examining the merits of the Court's argument, I wish to emphasize what it is that the Court quite pointedly and correctly does *not* hold: namely, that "executive" powers of the sort granted the Comptroller by the Act may only be exercised by officers removable at will by the President. [*761] The Court's apparent unwillingness [**3206] to accept this argument, n1 which has been tendered in this Court by the Solicitor General, n2 is fully consistent with the Court's longstanding recognition that it is within the power of Congress under the "Necessary and Proper" Clause, Art. I, § 8, to vest authority that falls within the Court's definition of executive power in officers who are not subject to removal at will by the President and are therefore not under the President's direct control. See, e. g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958). n3 In an earlier day, in which simpler notions of the role of government in society prevailed, it was perhaps plausible to insist that all "executive" officers be subject to an unqualified Presidential removal power, see *Myers v. United States*, 272 U.S. 52 (1926); but with the advent and triumph of the administrative state and the accompanying multiplication of the tasks undertaken by the [***619] Federal Government, the [*762] Court has been virtually compelled to recognize that Congress may reasonably deem it "necessary and proper" to vest some among the broad new array of governmental functions in officers who are free from the partisanship that may be expected of agents wholly dependent upon the President.

n1 See *ante*, at 724-726, and n. 4.

n2 The Solicitor General appeared on behalf of the "United States," or, more properly, the Executive Departments, which intervened to attack the constitutionality of the statute that the Chief

Executive had earlier endorsed and signed into law.

n3 Although the Court in *Humphrey's Executor* characterized the powers of the Federal Trade Commissioner whose tenure was at issue as "quasi-legislative" and "quasi-judicial," it is clear that the FTC's power to enforce and give content to the Federal Trade Commission Act's proscription of "unfair" acts and practices and methods of competition is in fact "executive" in the same sense as is the Comptroller's authority under Gramm-Rudman-Hollings -- that is, it involves the implementation (or the interpretation and application) of an Act of Congress. Thus, although the Court in *Humphrey's Executor* found the use of the labels "quasi-legislative" and "quasi-judicial" helpful in "distinguishing" its then-recent decision in *Myers v. United States*, 272 U.S. 52 (1926), these terms are hardly of any use in limiting the holding of the case; as Justice Jackson pointed out, "[the] mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-488 (1952) (dissenting).

The Court's recognition of the legitimacy of legislation vesting "executive" authority in officers independent of the President does not imply derogation of the President's own constitutional authority -- indeed, duty -- to "take Care that the Laws be faithfully executed," Art. II, § 3, for any such duty is necessarily limited to a great extent by the content of the laws enacted by the Congress. As Justice Holmes put it: "The 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." *Myers v. United States*, *supra*, at 177 (dissenting). n4 Justice Holmes perhaps overstated his case, for there are undoubtedly executive functions that, regardless of the enactments of Congress, must be performed by officers subject to removal at will by the President. Whether a particular function falls within this class or within the far larger class that may be relegated to independent officers "will depend upon the character of the office." *Humphrey's Executor*, *supra*, at 631. In determining whether a limitation on the President's power to remove an officer performing executive functions constitutes a violation of the constitutional scheme of separation of powers, a court must "[focus] on the extent to which [such a limitation] prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Ad-*

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ministrators [**3207] of *General Services*, 433 U.S. 425, 443 (1977). "Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Ibid.* This inquiry [*763] is, to be sure, not one that will beget easy answers; it provides nothing approaching a bright-line rule or set of rules. Such an inquiry, however, is necessitated by the recognition that "formalistic and unbending rules" in the area of separation of powers may "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." *Commodity Futures Trading Comm'n v. Schor*, post, at 851.

n4 Cf. ante, at 733 ("[Undoubtedly] the content of the Act determines the nature of the executive duty").

It is evident (and nothing in the Court's opinion is to the contrary) that the powers exercised by the Comptroller General under the Gramm-Rudman-Hollings Act are not such that vesting them in an officer not subject to removal at will by the President would in itself improperly interfere with Presidential powers. Determining the level of spending by the Federal Government is not by nature a function central either to the exercise of the President's enumerated powers or to his general duty to ensure execution of the laws; rather, appropriating [***620] funds is a peculiarly legislative function, and one expressly committed to Congress by Art. I, § 9, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In enacting Gramm-Rudman-Hollings, Congress has chosen to exercise this legislative power to establish the level of federal spending by providing a detailed set of criteria for reducing expenditures below the level of appropriations in the event that certain conditions are met. Delegating the execution of this legislation -- that is, the power to apply the Act's criteria and make the required calculations -- to an officer independent of the President's will does not deprive the President of any power that he would otherwise have or that is essential to the performance of the duties of his office. Rather, the result of such a delegation, from the standpoint of the President, is no different from the result of more traditional forms of appropriation: under either system, the level of funds available to the Executive Branch to carry out its duties is not within the President's discretionary control. To be sure, [*764] if the budget-cutting mechanism required the responsible officer to exercise a great deal of policymaking discretion, one might argue that having created such broad discretion Congress had some obligation based upon Art. II to vest it in the Chief

Executive or his agents. In Gramm-Rudman-Hollings, however, Congress has done no such thing; instead, it has created a precise and articulated set of criteria designed to minimize the degree of policy choice exercised by the officer executing the statute and to ensure that the relative spending priorities established by Congress in the appropriations it passes into law remain unaltered. n5 Given that the exercise of policy choice by the officer executing the statute would be inimical to Congress' goal in enacting "automatic" budget-cutting measures, it is eminently reasonable and proper for Congress to vest the budget-cutting authority in an officer who is to the greatest degree possible nonpartisan and independent of the President and his political agenda and who therefore may be relied upon not to allow his calculations to be colored by political considerations. Such a [**3208] delegation deprives the President of no authority that is rightfully his.

n5 That the statute provides, to the greatest extent possible, precise guidelines for the officer assigned to carry out the required budget cuts not only indicates that vesting budget-cutting authority in an officer independent of the President does not in any sense deprive the President of a significant amount of discretionary authority that should rightfully be vested in him or an officer accountable to him, but also answers the claim that the Act represents an excessive and hence unlawful delegation of legislative authority. Because the majority does not address the delegation argument, I shall not discuss it at any length, other than to refer the reader to the District Court's persuasive demonstration that the statute is not void under the nondelegation doctrine.

II

If, as the Court seems to agree, the assignment of "executive" powers under Gramm-Rudman-Hollings to an officer not removable at will by the President would not in itself represent a violation of the constitutional scheme of separated [*765] powers, the question remains whether, as the Court concludes, the fact that the officer to whom Congress has delegated the authority to implement the Act is removable by a joint resolution [***621] of Congress should require invalidation of the Act. The Court's decision, as I have stated above, is based on a syllogism: the Act vests the Comptroller with "executive power"; such power may not be exercised by Congress or its agents; the Comptroller is an agent of Congress because he is removable by Congress; therefore the Act is invalid. I have no quarrel with the proposition that the powers exercised by the Comptroller under

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the Act may be characterized as "executive" in that they involve the interpretation and carrying out of the Act's mandate. I can also accept the general proposition that although Congress has considerable authority in designating the officers who are to execute legislation, see *supra*, at 760-764, the constitutional scheme of separated powers does prevent Congress from reserving an executive role for itself or for its "agents." *Buckley v. Valeo*, 424 U.S., at 120-141; *id.*, at 267-282 (WHITE, J., concurring in part and dissenting in part). I cannot accept, however, that the exercise of authority by an officer removable for cause by a joint resolution of Congress is analogous to the impermissible execution of the law by Congress itself, nor would I hold that the congressional role in the removal process renders the Comptroller an "agent" of the Congress, incapable of receiving "executive" power.

In *Buckley v. Valeo*, *supra*, the Court held that Congress could not reserve to itself the power to appoint members of the Federal Election Commission, a body exercising "executive" power. *Buckley*, however, was grounded on a textually based separation-of-powers argument whose central premise was that the Constitution requires that all "Officers of the United States" (defined as "all persons who can be said to hold an office under the government," 424 U.S., at 126) whose appointment is not otherwise specifically provided for elsewhere in its text be appointed through the means specified [*766] by the Appointments Clause, Art. II, § 2, cl. 2 -- that is, either by the President with the advice and consent of the Senate or, if Congress so specifies, by the President alone, by the courts, or by the head of a department. The *Buckley* Court treated the Appointments Clause as reflecting the principle that "the Legislative Branch may not exercise executive authority," 424 U.S., at 119 (citing *Springer v. Philippine Islands*, 277 U.S. 189 (1928)), but the Court's holding was merely that Congress may not direct that its laws be implemented through persons who are its agents in the sense that it chose them; the Court did not pass on the legitimacy of other means by which Congress might exercise authority over those who execute its laws. Because the Comptroller is not an appointee of Congress but an officer of the United States appointed by the President with the advice and consent of the Senate, *Buckley* neither requires that he be characterized as an agent of the Congress nor in any other way calls into question his capacity to exercise "executive" authority. See 424 U.S., at 128, n. 165.

As the majority points out, however, the Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), recognizes additional [***622] limits on the ability of Congress to participate in or influence the execution of the laws. As interpreted in *Chadha*, the Constitution prevents Congress from interfering with the actions of officers of the

United States through means short of legislation satisfying the [**3209] demands of bicameral passage and presentment to the President for approval or disapproval. *Id.*, at 954-955. Today's majority concludes that the same concerns that underlay *Chadha* indicate the invalidity of a statutory provision allowing the removal by joint resolution for specified cause of any officer performing executive functions. Such removal power, the Court contends, constitutes a "congressional veto" analogous to that struck down in *Chadha*, for it permits Congress to "remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory." *Ante*, at 726. The Court concludes [*767] that it is "[this] kind of congressional control over the execution of the laws" that *Chadha* condemns. *Ante*, at 726-727.

The deficiencies in the Court's reasoning are apparent. First, the Court baldly mischaracterizes the removal provision when it suggests that it allows Congress to remove the Comptroller for "executing the laws in any fashion found to be unsatisfactory"; in fact, Congress may remove the Comptroller only for one or more of five specified reasons, which "although not so narrow as to deny Congress any leeway, circumscribe Congress' power to some extent by providing a basis for judicial review of congressional removal." *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875, 895 (CA3 1986) (Becker, J., concurring in part). Second, and more to the point, the Court overlooks or deliberately ignores the decisive difference between the congressional removal provision and the legislative veto struck down in *Chadha*: under the Budget and Accounting Act, Congress may remove the Comptroller only through a joint resolution, which by definition must be passed by both Houses and signed by the President. See *United States v. California*, 332 U.S. 19, 28 (1947).ⁿ⁶ In other words, a removal of the Comptroller under the statute satisfies the requirements of bicameralism and presentment laid down in *Chadha*. The majority's citation of *Chadha* for the proposition that Congress may only control the acts of officers of the United States "by passing new legislation," *ante*, at 734, in [*768] no sense casts doubt on the legitimacy of the removal provision, for that provision allows Congress to effect removal only through action that constitutes legislation as defined in *Chadha*.

ⁿ⁶ The legislative history indicates that the inclusion of the President in the removal process was a deliberate choice on the part of the Congress that enacted the Budget and Accounting Act. The previous year, legislation establishing the position of Comptroller General and providing for removal by *concurrent* resolution -- that is, by a resolution not presented to the President -

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- had been vetoed by President Wilson on the ground that granting the sole power of removal to the Congress would be unconstitutional. See 59 Cong. Rec. 8609-8610 (1920). That Congress responded by providing for removal through joint resolution clearly evinces congressional intent that removal take place only through the legislative process, with Presidential participation.

To the extent that it has any bearing on the problem now before us, [***623] *Chadha* would seem to suggest the legitimacy of the statutory provision making the Comptroller removable through joint resolution, for the Court's opinion in *Chadha* reflects the view that the bicameralism and presentment requirements of Art. I represent the principal assurances that Congress will remain within its legislative role in the constitutionally prescribed scheme of separated powers. Action taken in accordance with the "single, finely wrought, and exhaustively considered, procedure" established by Art. I, *Chadha, supra, at 951*, should be presumptively viewed as a legitimate exercise of legislative power. That such action may represent a more or less successful attempt by Congress to "control" the actions of an officer of the United States surely does not in itself indicate that it is unconstitutional, for no one would dispute that Congress has the power to "control" administration through legislation imposing duties or substantive restraints on executive officers, through legislation increasing or decreasing the funds made available to such officers, or through [**3210] legislation actually abolishing a particular office. Indeed, *Chadha* expressly recognizes that while congressional meddling with administration of the laws outside of the legislative process is impermissible, congressional control over executive officers exercised through the legislative process is valid. 462 U.S., at 955, n. 19. Thus, if the existence of a statute permitting removal of the Comptroller through joint resolution (that is, through the legislative process) renders his exercise of executive powers unconstitutional, it is for reasons having virtually nothing to do with *Chadha*. n7

n7 Because a joint resolution passed by both Houses of Congress and signed by the President (or repassed over the President's veto) is legislation having the same force as any other Act of Congress, it is somewhat mysterious why the Court focuses on the Budget and Accounting Act's authorization of removal of the Comptroller through such a resolution as an indicator that the Comptroller may not be vested with executive powers. After all, even without such prior statutory authorization, Congress could pass, and the President sign, a joint resolution purporting to

remove the Comptroller, and the validity of such legislation would seem in no way dependent on previous legislation contemplating it. Surely the fact that Congress might at any time pass and the President sign legislation purporting to remove some officer of the United States does not make the exercise of executive power by all such officers unconstitutional. Since the effect of the Budget and Accounting Act is merely to recognize the possibility of legislation that Congress might at any time attempt to enact with respect to any executive officer, it should not make the exercise of "executive" power by the Comptroller any more problematic than the exercise of such power by any other officer. A joint resolution purporting to remove the Comptroller, or any other executive officer, might be constitutionally infirm, but Congress' advance assertion of the power to enact such legislation seems irrelevant to the question whether exercise of authority by an officer who might in the future be subject to such a possibly valid and possibly invalid resolution is permissible, since the provision contemplating a resolution of removal obviously cannot in any way add to Congress' power to enact such a resolution.

Of course, the foregoing analysis does not imply that the removal provision of the Budget and Accounting Act is meaningless; for although that provision cannot *add* to any power Congress might have to pass legislation (that is, a joint resolution) removing the Comptroller, it can *limit* its power to do so to the circumstances specified. The reason for this is that any joint resolution purporting to remove the Comptroller in the absence of a hearing or one of the specified grounds for removal would not be deemed an implied repeal of the limits on removal in the 1921 Act (for such implied repeals are disfavored), and thus the joint resolution would only be given effect to the extent consistent with the pre-existing law (that is, to the extent that there was actually cause for removal).

[*769] [***624] That a joint resolution removing the Comptroller General would satisfy the requirements for legitimate legislative action laid down in *Chadha* does not fully answer the separation-of-powers argument, for it is apparent that even the results of the constitutional legislative process may be unconstitutional if those results are in fact destructive of the scheme of separation of powers. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). The question to be answered is whether the threat of removal of the

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Comptroller General for cause through joint resolution as authorized by the Budget and Accounting Act renders the Comptroller sufficiently subservient to Congress that investing him with "executive" power can be realistically equated with the unlawful retention of such power by Congress itself; more generally, the question is whether there is a genuine threat of "encroachment or aggrandizement of one branch at the expense of the other," *Buckley v. Valeo*, 424 U.S., at 122. Common sense indicates that the existence of the removal provision poses no such threat to the principle of separation of powers.

The statute does not permit anyone to remove the Comptroller at will; removal is permitted only for specified cause, with the existence of cause to be determined by Congress following a hearing. Any removal under the statute would presumably be subject to post-termination judicial review to ensure that a hearing had in fact been held and that the finding of cause for removal was not arbitrary. See *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d, at 895 (Becker, J., concurring in part). n8 These procedural and substantive limitations on the removal power militate strongly against the characterization of the Comptroller as a mere agent of Congress by virtue of the removal authority. Indeed, similarly qualified grants of removal power are generally deemed to protect the officers to whom they apply and to establish their independence from the domination of the possessor of the removal power. See *Humphrey's Executor v. United States*, 295 U.S., at 625-626, 629-630. Removal authority limited in such a manner is more properly viewed as motivating adherence to a substantive standard established by law than as inducing subservience to the particular [*771] institution that enforces that standard. That the agent enforcing the standard is Congress may be of some significance to the Comptroller, but Congress' substantively limited removal power will undoubtedly be less of a spur to subservience than Congress' unquestionable and unqualified power to enact legislation reducing the Comptroller's salary, cutting the funds available to his department, reducing his personnel, limiting or expanding his duties, or even abolishing his position altogether.

n8 Cf. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), in which the Court entertained a challenge to Presidential removal under a statute that similarly limited removals to specified cause.

More importantly, the substantial role played by the President in the process of removal through joint resolution [***625] reduces to utter insignificance the possibility that the threat of removal will induce subservience

to the Congress. As I have pointed out above, a joint resolution must be presented to the President and is ineffective if it is vetoed by him, unless the veto is overridden by the constitutionally prescribed two-thirds majority of both Houses of Congress. The requirement of Presidential approval obviates the possibility that the Comptroller will perceive himself as so completely at the mercy of Congress that he will function as its tool. n9 If the Comptroller's conduct in office is not so unsatisfactory to the President as to convince the latter that removal is required under the statutory standard, Congress will have no independent power to coerce the Comptroller unless it can muster a two-thirds majority in both Houses -- a feat of bipartisanship more difficult than that required to impeach and convict. The incremental *in terrorem* effect of the possibility of congressional removal in the face of a Presidential [*772] veto is therefore exceedingly unlikely to have any discernible impact on the extent of congressional influence over the Comptroller. n10

n9 The Court cites statements made by supporters of the Budget and Accounting Act indicating their belief that the Act's removal provisions would render the Comptroller subservient to Congress by giving Congress "absolute control of the man's destiny in office." *Ante*, at 728. The Court's scholarship, however, is faulty: at the time all of these statements were made -- including Representative Sisson's statement of May 3, 1921 -- the proposed legislation provided for removal by concurrent resolution, with no Presidential role. See 61 Cong. Rec. 983, 989-992, 1079-1085 (1921).

n10 Concededly, the substantive grounds for removal under the statute are broader than the grounds for impeachment specified by the Constitution, see *ante*, at 729-730, although given that it is unclear whether the limits on the impeachment power may be policed by any body other than Congress itself, the practical significance of the difference is hard to gauge. It seems to me most likely that the difficulty of obtaining a two-thirds vote for removal in both Houses would more than offset any increased likelihood of removal that might result from the greater liberality of the substantive grounds for removal under the statute. And even if removal by Congress alone through joint resolution passed over Presidential veto is marginally more likely than impeachment, whatever additional influence over the Comptrol-

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ler Congress may thereby possess seems likely to be minimal in relation to that which Congress already possesses by virtue of its general legislative powers and its power to impeach. Of course, if it were demonstrable that the Constitution specifically limited Congress' role in removal to the impeachment process, the insignificance of the marginal increase in congressional influence resulting from the provision authorizing removal through joint resolution would be no answer to a claim of unconstitutionality. But no such limit appears in the Constitution: the Constitution merely provides that all officers of the United States may be impeached for high crimes and misdemeanors, and nowhere suggests that impeachment is the sole means of removing such officers.

As for the Court's observation that "no one would seriously suggest that judicial independence would be strengthened by allowing removal of federal judges only by a joint resolution finding 'inefficiency,' 'neglect of duty,' or 'malfeasance,'" *ante*, at 730, it can only be described as a non sequitur. The issue is not whether the removal provision makes the Comptroller *more* independent than he would be if he were removable only through impeachment, but whether the provision so weakens the Comptroller that he may not exercise executive authority. Moreover, the Court's reference to standards applicable to removal of Art. III judges is a red herring, for Art. III judges -- unlike other officers of the United States -- are specifically protected against removal for other than constitutionally specified cause. Thus, the infirmity of a statute purporting to allow removal of judges for some other reason would be that it violated the specific command of Art. III. In the absence of a similar textual limit on the removal of nonjudicial officers, the test for a violation of separation of powers should be whether an asserted congressional power to remove would constitute a real and substantial aggrandizement of congressional authority at the expense of executive power, not whether a similar removal provision would appear problematic if applied to federal judges.

[*773] [**3212] [***626] 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 practi-

cally impossible. As one scholar put it nearly 50 years ago: "Under the statute the Comptroller General, once confirmed, is safe so long as he avoids a public exhibition of personal immorality, dishonesty, or failing mentality." H. Mansfield, *The Comptroller General* 75-76 (1939). n11 The passage of time has done little to cast doubt on this view: of the six Comptrollers who have served since 1921, none has been threatened with, much less subjected to, removal. Recent students of the office concur that "[barring] resignation, death, physical or mental incapacity, or extremely bad behavior, the Comptroller General is assured his tenure if he wants it, and not a day more." F. Mosher, *The GAO* 242 (1979). n12 The threat of "here-and-now subservience," *ante*, at 720, is obviously remote indeed. n13

n11 The author of this statement was no apologist for the Comptroller; rather, his study of the office is premised on the desirability of Presidential control over many of the Comptroller's functions. Nonetheless, he apparently found no reason to accuse the Comptroller of subservience to Congress, and he conceded that "[the] political independence of the office has in fact been one of its outstanding characteristics." H. Mansfield, *The Comptroller General* 75 (1939).

n12 Professor Mosher's reference to the fact that the Comptroller is limited to a single term highlights an additional source of independence: unlike an officer with a fixed term who may be reappointed to office, the Comptroller need not concern himself with currying favor with the Senate in order to secure its consent to his reappointment.

n13 The majority responds to the facts indicating the practical independence of the Comptroller from congressional control by cataloging a series of statements and materials categorizing the Comptroller as a part of the "Legislative Branch." *Ante*, at 730-732. Such meaningless labels are quite obviously irrelevant to the question whether in actuality the Comptroller is so subject to congressional domination that he may not participate in the execution of the laws.

JUSTICE STEVENS, for his part, finds that the Comptroller is an "agent" of Congress, and thus incapable of wielding the authority granted him by the Act, because his responsibilities under a variety of statutes include making reports to the Congress. JUSTICE STEVENS' position is puzzling, to say the least. It seems to rest on the view that an officer required to perform certain duties for the benefit of Congress somehow be-

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comes a part of Congress for all purposes. But it is by no means true that an officer who must perform specified duties for some other body is under that body's control or acts as its agent when carrying out other, unrelated duties. As JUSTICE BLACKMUN points out, see *post*, at 778-779, n. 1, duties toward Congress are imposed on a variety of agencies, including the Federal Trade Commission; and certainly it cannot credibly be maintained that by virtue of those duties the agencies become branches of Congress, incapable of wielding governmental power except through the legislative process. Indeed, the President himself is under numerous obligations, both statutory and constitutional, to provide information to Congress, see, e. g., Art. II, § 3, cl. 1; surely the President is not thereby transformed into an arm or agency of the Congress. If, therefore, as JUSTICE STEVENS concedes, see *ante*, at 737-741, the provision authorizing removal of the Comptroller by joint resolution does not suffice to establish that he may not exercise the authority granted him under Gramm-Rudman-Hollings, I see no substantial basis for concluding that his various duties toward Congress render him incapable of receiving such power.

[*774] [**3213] [***627] Realistic consideration of the nature of the Comptroller General's relation to Congress thus reveals that the threat to separation of powers conjured up by the majority is wholly chimerical. The power over removal retained by the Congress is not a power that is exercised outside the legislative process as established by the Constitution, nor does it appear likely that it is a power that adds significantly to the influence Congress may exert over executive officers through other, undoubtedly constitutional exercises of legislative power and through the constitutionally guaranteed impeachment power. Indeed, the removal power is so constrained by its own substantive limits and by the requirement of Presidential approval [*775] "that, as a practical matter, Congress has not exercised, and probably will never exercise, such control over the Comptroller General that his non-legislative powers will threaten the goal of dispersion of power, and hence the goal of individual liberty, that separation of powers serves." *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d, at 895 (Becker, J., concurring in part). n14

n14 Even if I were to concede that the exercise of executive authority by the Comptroller is inconsistent with the removal provision, I would agree with JUSTICE BLACKMUN that striking down the provisions of the Gramm-Rudman-

Hollings Act vesting the Comptroller with such duties is a grossly inappropriate remedy for the supposed constitutional infirmity, and that if one of the features of the statutory scheme must go, it should be the removal provision. As JUSTICE BLACKMUN points out, the mere fact that the parties before the Court have standing only to seek invalidation of the Gramm-Rudman-Hollings spending limits cannot dictate that the Court resolve any constitutional incompatibility by striking down Gramm-Rudman-Hollings. Nor does the existence of the fallback provisions in Gramm-Rudman-Hollings indicate the appropriateness of the Court's choice, for those provisions, by their terms, go into effect only if the Court finds that the primary budget-cutting mechanism established by the Act must be invalidated; they by no means answer the antecedent question whether the Court should take that step.

Given the majority's constitutional premises, it is clear to me that the decision whether to strike down Gramm-Rudman-Hollings must depend on whether such a choice would be more or less disruptive of congressional objectives than declaring the removal provision invalid (with the result that the Comptroller would still be protected against removal at will by the President, but could also not be removed through joint resolution). When the choice is put in these terms, it is evident that it is the never-used removal provision that is far less central to the overall statutory scheme. That this is so is underscored by the fact that under the majority's theory, the removal provision was *never* constitutional, as the Comptroller's primary duties under the 1921 Act were clearly executive under the Court's definition: the Comptroller's most important tasks under that legislation were to dictate accounting techniques for all executive agencies, to audit all federal expenditures, and to approve or disapprove disbursement of funds. See F. Mosher, *The GAO* (1979). Surely the Congress in 1921 would have sacrificed its own role in removal rather than allow such duties to go unfulfilled by a Comptroller independent of the President. See 59 Cong. Rec. 8611 (1920).

[*776] 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." *Ante*, at 723. Reliance on such an unyielding principle to strike down a statute posing no real danger of aggrandizement of con-

gressional power is extremely [***628] misguided and insensitive to our constitutional role. The wisdom of vesting "executive [**3214] " powers in an officer removable by joint resolution may indeed be debatable -- as may be the wisdom of the entire scheme of permitting an unelected official to revise the budget enacted by Congress -- but such matters are for the most part to be worked out between the Congress and the President through the legislative process, which affords each branch ample opportunity to defend its interests. 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. Cf. *Nixon v. Administrator of General Services*, 433 U.S., at 441. 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 their 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.

The Court may be correct when it says that Congress cannot constitutionally exercise removal authority over an official vested with the budget-reduction powers that § 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 [*777] gives to the Comptroller General. This, however, is not because "the removal powers over the Comptroller General's office dictate that he will be subservient to Congress," *ante*, at 730; I agree with JUSTICE WHITE that any such claim is unrealistic. Furthermore, I think it is clear under *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), that "executive" powers of the kind delegated to the Comptroller General under the Deficit Control Act need not be exercised by an officer who serves at the President's pleasure; Congress certainly could prescribe the standards and procedures for removing the Comptroller General. But it seems to me that an attempt by Congress to participate *directly* in the removal of an executive officer -- other than through the constitutionally prescribed procedure of impeachment -- might well violate the principle of separation of powers by assuming for Congress part of the President's constitutional responsibility to carry out the laws.

In my view, however, that important and difficult question need not be decided in this litigation, because no matter how it is resolved the plaintiffs, now appellees,

are not entitled to the relief they have requested. Appellees have not sought invalidation of the 1921 provision that authorizes Congress to remove the Comptroller General by joint resolution; indeed, it is far from clear they would have standing to request such a judgment. 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 [***629] 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 [*778] 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 [**3215] appears to have been all but forgotten until this litigation. n1

n1 For the reasons identified by the District Court, I agree that the Deficit Control Act does not violate the nondelegation doctrine. See *Synar v. United States*, 626 F.Supp. 1374, 1382-1391 (DC 1986).

JUSTICE STEVENS concludes that the delegation effected under § 251 contravenes the holding of *INS v. Chadha*, 462 U.S. 919 (1983), that Congress may make law only "in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." *Id.*, at 958. I do not agree. We made clear in *Chadha* that the bicameralism and presentment requirements prevented Congress from *itself* exercising legislative power through some kind of procedural shortcut, such as the one-House veto challenged in that case. But we also made clear that our holding in no way questioned "Congress' authority to delegate portions of its power to administrative agencies." *Id.*, at 953-954, n. 16. We explained: "Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial

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review as well as the power of Congress to modify or revoke the authority entirely." *Ibid.*

Although JUSTICE STEVENS seems to agree that the duties delegated to the Comptroller General under § 251 could be assigned constitutionally to an independent administrative agency, he argues that Congress may not give these duties "to one of its own agents." *Ante*, at 752-753. He explains that the Comptroller General fits this description because "most" of his statutory responsibilities require him to provide services to Congress, and because Congress has repeatedly referred to the Comptroller General as part of the Legislative Branch. See *ante*, at 741-746. "If Congress were free to delegate its policymaking authority" to such an officer, JUSTICE STEVENS contends that "it would be able to evade 'the carefully crafted restraints spelled out in the Constitution.'" *Ante*, at 755, quoting *Chadha*, 462 U.S., at 959. In his view, "[that] danger -- congressional action that evades constitutional restraints -- is not present when Congress delegates lawmaking power to the executive or to an independent agency." *Ante*, at 755.

I do not think that danger is present here, either. The Comptroller General is not Congress, nor is he a part of Congress; "irrespective of Congress' designation," he is an officer of the United States, appointed by the President. *Buckley v. Valeo*, 424 U.S. 1, 128, n. 165 (1976). In this respect the Comptroller General differs critically from, for example, the Director of the Congressional Budget Office, who is appointed by Congress, see 2 U. S. C. § 601(a)(2), and hence may not "[exercise] significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, *supra*, at 126; see U.S. Const., Art. II, § 2, cl. 2. The exercise of rulemaking authority by an independent agency such as the Federal Trade Commission does not offend *Chadha*, even though the Commission could be described as an "agent" of Congress because it "[carries] into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed." *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). I do not see why the danger of "congressional action that evades constitutional restraints" becomes any more pronounced when a statute delegates power to a Presidentially appointed agent whose primary duties require him to provide services to Congress. The impermissibility of such a delegation surely is not rendered "obvious" by the fact that some officers who perform services for Con-

gress have titles such as "librarian," "architect," or "printer." See *ante*, at 758, n. 25 (STEVENS, J., concurring in judgment). Furthermore, in sustaining the constitutionality of the Federal Trade Commission's independent status, this Court noted specifically that the Commission "acts as a legislative agency" in "making investigations and reports thereon for the information of Congress . . . in aid of the legislative power." 295 U.S., at 628. JUSTICE STEVENS' approach might make some sense if Congress had delegated legislative responsibility to an officer over whom Congress could hope to exercise tight control, but even JUSTICE STEVENS does not claim that the Comptroller General is such an officer.

[*779] [***630] I

The District Court believed it had no choice in this matter. Once it concluded that the Comptroller General's functions under the Deficit Control Act were constitutionally incompatible with the 1921 removal provision, the District Court considered itself bound as a matter of orderly judicial procedure to set aside the statute challenged by the plaintiffs. See *Synar v. United States*, 626 F.Supp. 1374, 1393 (DC [**3216] 1986). The majority today does not take this view, and I believe it is untenable.

Under the District Court's approach, everything depends on who first files suit. Because Representative Synar and [*780] the plaintiffs who later joined him in this case objected to budget cuts made pursuant to the Deficit Control Act, the District Court struck down that statute, while retaining the 1921 removal provision. But if the Comptroller General had filed suit 15 minutes before the Congressman did, seeking a declaratory judgment that the 1921 removal power could not constitutionally be exercised in light of the duties delegated to the Comptroller General in 1985, the removal provision presumably would have been invalidated, and the Deficit Control Act would have survived intact. Momentous issues of public law should not be decided in so arbitrary a fashion. In my view, the only sensible way to choose between two conjunctively unconstitutional statutory provisions is to determine which provision can be invalidated with the least disruption of congressional objectives.

The District Court apparently thought differently in large part because it believed this Court had never undertaken such analysis in the past; instead, according to the District Court, this Court has "set aside that statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff." 626 F.Supp., at 1393. But none of the four cases the District

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Court cited for this proposition discussed the problem of choice of remedy, and in none of them could a strong argument have been made that invalidating the other of the inconsistent statutory provisions would have interfered less substantially with legislative goals or have been less disruptive of governmental operations. n2

n2 In *Myers v. United States*, 272 U.S. 52 (1926), the Court refused to enforce a statute requiring congressional approval for removal of postmasters. The Court's analysis suggested that there was no practical way the duties of the office could have been reformulated to render congressional participation in the removal process permissible. In *Springer v. Philippine Islands*, 277 U.S. 189 (1928), the Court removed from office several Philippine officials exercising executive powers but appointed by officers of the Philippine Legislature. As in *Myers*, the Court concluded that the offices by their very nature were executive, so the appointments could not have been rendered legal simply by trimming the delegated duties. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court set aside Federal Election Campaign Act provisions granting certain powers to officials appointed by Congress, but it structured its remedy so as to interfere as little as possible with the orderly conduct of business by the Federal Election Commission. Past acts of the improperly constituted Commission were deemed valid, and the Court's mandate was stayed for 30 days to allow time for the Commission to be reconstituted through Presidential appointment. See *id.*, at 142-143. Finally, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court set aside an exercise of judicial power by a bankruptcy judge, because his tenure was not protected in the manner required by Article III of the Constitution. To give Article III protections to bankruptcy judges, the federal bankruptcy statute would have had to be rewritten completely.

[*781] [***631] More importantly, the District Court ignored what appears to be the only separation-of-powers case in which this Court *did* expressly consider the question as to which of two incompatible statutes to invalidate: *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). The petitioners in that case had received unfavorable rulings from judges assigned to temporary duty in the District Court or Court of Appeals from the Court of Claims or the Court of Customs and Patent Appeals; they argued that those rulings should be set aside because the judges from the specialized courts did not enjoy the ten-

ure and compensation guaranteed by Article III of the Constitution. Before the assignments, Congress had pronounced the Court of Claims and the Court of Customs and Patent Appeals to be Article III courts, implying that judges on those courts were entitled to Article III benefits. Older statutes, however, gave both courts [**3217] authority to issue advisory opinions, an authority incompatible with Article III status. *Glidden* held that the Court of Claims and the Court of Customs and Patent Appeals were indeed Article III tribunals. With respect to the advisory-opinion jurisdiction, Justice Harlan's opinion for the plurality noted: "The overwhelming majority of the Court of Claims' business is composed of cases and controversies." 370 U.S., at 583. Since [*782] "it would be . . . perverse to make the status of these courts turn upon so minuscule a portion of their purported functions," Justice Harlan reasoned that, "if necessary, the particular offensive jurisdiction, and not the courts, would fall." *Ibid.* Justice Clark's opinion concurring in the result for himself and the Chief Justice similarly concluded that the "minuscule" advisory-opinion jurisdiction of the courts in question would have to bow to the Article III status clearly proclaimed by Congress, and not vice versa. *Id.*, at 587-589.

The Court thus recognized in *Glidden* that it makes no sense to resolve the constitutional incompatibility between two statutory provisions simply by striking down whichever provision happens to be challenged first. A similar recognition has underlain the Court's approach in equal protection cases concerning statutes that create unconstitutionally circumscribed groups of beneficiaries. The Court has noted repeatedly that such a defect may be remedied in either of two ways: the statute may be nullified, or its benefits may be extended to the excluded class. See, e.g., *Heckler v. Mathews*, [***632] 465 U.S. 728, 738 (1984); *Califano v. Westcott*, 443 U.S. 76, 89 (1979). Although extension is generally the preferred alternative, we have instructed lower courts choosing between the two remedies to "measure the intensity of [legislative] commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Heckler v. Mathews*, *supra*, at 739, n. 5, quoting *Welsh v. United States*, 398 U.S. 333, 365 (1970) (Harlan, J., concurring in result). Calculations of this kind are obviously more complicated when a court is faced with two different statutes, enacted decades apart, but *Glidden* indicates that even then the task is judicially manageable. No matter how difficult it is to determine which remedy would less obstruct congressional objectives, surely we should make that determination as best we can instead of leaving the selection to the litigants.

[*783] II

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Assuming that the Comptroller General's functions under § 251 of the Deficit Control Act cannot be exercised by an official removable by joint resolution of Congress, we must determine whether legislative goals would be frustrated more by striking down § 251 or by invalidating the 1921 removal provision. That question is not answered by the "fallback" provisions of the 1985 Act, which take effect "[in] the event that any of the reporting procedures described in section 251 [of the Act] are invalidated." § 274(f)(1), 99 Stat. 1100. The question is whether the reporting procedures should be invalidated in the first place. The fallback provisions simply make clear that Congress would prefer a watered-down version of the Deficit Control Act to none at all; they provide no evidence that Congress would rather settle for the watered-down version than surrender its statutory authority to remove the Comptroller General. The legislative history of the Deficit Control Act contains no mention of the 1921 statute, and both Houses of Congress have argued in this Court that, if necessary, the removal provision should be invalidated rather than § 251. See Brief for Appellant United [**3218] States Senate 31-43; Brief for Appellants Speaker and Bipartisan Leadership Group of United States House of Representatives 49; accord, Brief for Appellant Comptroller General 33-47. To the extent that the absence of express fallback provisions in the 1921 statute signifies anything, it appears to signify only that, if the removal provision were invalidated, Congress preferred simply that the remainder of the statute should remain in effect without alteration. n3

n3 Although the legislative history on this point is sparse, it seems reasonably clear that Congress intended the removal provision to be severable from the remainder of the 1921 statute. An earlier bill, providing for removal of the Comptroller General only by impeachment or concurrent resolution of Congress, was vetoed by President Wilson on the grounds that Congress could not constitutionally limit the President's removal power or exercise such power on its own. See 59 Cong. Rec. 8609-8610 (1920). In the course of an unsuccessful attempt to override the veto, Representative Pell inquired: "If we pass this over the President's veto and then the Supreme Court should uphold the contention of the President, this bill would not fail, would it? The bill would continue." Representative Blanton answered, "Certainly." *Id.*, at 8611.

[*784] [***633] In the absence of express statutory direction, I think it is plain that, as both Houses urge, invalidating the Comptroller General's functions

under the Deficit Control Act would frustrate congressional objectives far more seriously than would refusing to allow Congress to exercise its removal authority under the 1921 law. The majority suggests that the removal authority plays an important role in furthering Congress' desire to keep the Comptroller General under its control. But as JUSTICE WHITE demonstrates, see *ante*, at 770-773, the removal provision serves feebly for such purposes, especially in comparison to other, more effective means of supervision at Congress' disposal. Unless Congress institutes impeachment proceedings -- a course all agree the Constitution would permit -- the 1921 law authorizes Congress to remove the Comptroller General only for specified cause, only after a hearing, and only by passing the procedural equivalent of a new public law. Congress has never attempted to use this cumbersome procedure, and the Comptroller General has shown few signs of subservience. n4 If Congress in 1921 [*785] wished to make the Comptroller General its lackey, it did a remarkably poor job.

n4 "All of the comptrollers general have treasured and defended the independence of their office, not alone from the president but also from the Congress itself. . . . Like the other institutions in the government, GAO depends upon Congress for its powers, its resources, and its general oversight. But it also possesses continuing legal powers, of both long and recent standing, that Congress has granted it and that it can exercise in a quite independent fashion. And the comptroller general, realistically speaking, is immune from removal during his fifteen-year term for anything short of a capital crime, a crippling illness, or insanity." F. Mosher, *A Tale of Two Agencies* 158 (1984). See also, *e. g.*, *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875, 885-887 (CA3 1986); F. Mosher, *The GAO* 2, 240-244 (1979); H. Mansfield, *The Comptroller General* 75-76 (1939).

Indeed, there is little evidence that Congress as a whole was very concerned in 1921 -- much less in 1985 or during the intervening decades -- with its own ability to control the Comptroller General. The Committee Reports on the 1921 Act and its predecessor bills strongly suggest that what was critical to the legislators was not the Comptroller General's subservience to Congress, but rather his independence from the President. See, *e. g.*, H. R. Rep. No. 14, 67th Cong., 1st Sess., 7-8 (1921); H. R. Conf. Rep. No. 1044, 66th Cong., 2d Sess., 13 (1920); S. Rep. No. 524, 66th Cong., 2d Sess., 6-7 (1920); H. R. Rep. No. 362, 66th Cong., 1st Sess., 8-9 (1919). The debates over the Deficit Control Act contain no sugges-

tion that the Comptroller General was chosen for the tasks outlined in § 251 because Congress thought it could count on him to do its will; instead, the Comptroller General appears to have been selected precisely because of his independence from both the Legislature and the [**3219] Executive. By assigning the reporting functions to the Comptroller General, rather than to the Congressional Budget Office or to the Office of Management and Budget, Congress sought to create "a wall . . . that takes these decisions out of the hands of the President *and the Congress*." 131 Cong. Rec. 30865 (1985) (remarks of Rep. Gephardt) (emphasis added); see also, *e. g., id.*, at 36089 (1985) (remarks [***634] of Rep. Weiss); *id.*, at 36367 (1985) (remarks of Rep. Bedell).

Of course, the Deficit Control Act was hardly the first statute to assign new functions to the Comptroller General; a good number of other duties have been delegated to the Comptroller General over the years. But there is no reason to believe that, in effecting these earlier delegations, Congress relied any more heavily on the availability of the removal [*786] provision than it did in passing the Deficit Control Act. In the past, as in 1985, it is far more likely that Congress was concerned mainly with the Comptroller General's demonstrated political independence, and perhaps to a lesser extent with his long tradition of service to the Legislative Branch; neither of these characteristics depends to any significant extent on the ability of Congress to remove the Comptroller General without instituting impeachment proceedings. Striking down the congressional-removal provision might marginally frustrate the legislative expectations underlying some grants of authority to the Comptroller General, but surely to a lesser extent than would invalidation of § 251 of Gramm-Rudman-Hollings -- along with all other "executive" powers delegated to the Comptroller General over the years. n5

n5 Many of the Comptroller General's other duties, including those listed by the majority, see *ante*, at 734, n. 9, appear to meet the majority's test for plainly "executive" functions -- *i. e.*, they require the Comptroller General to "[interpret] a law enacted by Congress to implement the legislative mandate," and to "exercise judgment concerning facts that affect the application of the [law]." *Ante*, at 733. Indeed, the majority's approach would appear to classify as "executive" some of the most traditional duties of the Comptroller General, such as approving expenditure warrants, rendering conclusive decisions on the legality of proposed agency disbursements, and settling financial claims by and against the Government. See 31 U. S. C. § § 3323, 3526-3529,

3702; F. Mosher, *A Tale of Two Agencies* 159-160 (1984). All three of these functions were given to the Comptroller General when the position was created in 1921. See 42 Stat. 20, 24-25.

I do not understand the majority's assertion that invalidating the 1921 removal provision might make the Comptroller General "subservient to the Executive Branch." *Ante*, at 734. The majority does not suggest that an official who exercises the functions that the Deficit Control Act vests in the Comptroller General must be removable by the President at will. Perhaps the President possesses inherent constitutional authority to remove "executive" officials for such politically neutral grounds as inefficiency or neglect of duty, but if so -- and I am not convinced of it -- I do not see how that power would be enhanced by nullification of a statutory provision giving similar authority to Congress. In any event, I agree with JUSTICE WHITE and JUSTICE STEVENS that the power to remove an officer for reasons of this kind cannot realistically be expected to make an officer "subservient" in any meaningful sense to the removing authority. Cf. *Humphrey's Executor v. United States*, 295 U.S., at 629.

[*787] I do not claim that the 1921 removal provision is a piece of statutory deadwood utterly without contemporary significance. But it comes close. Rarely if ever invoked even for symbolic purposes, the removal provision certainly pales in importance beside the legislative scheme the Court strikes down today -- an extraordinarily far-reaching response to a deficit problem of unprecedented proportions. Because I believe that the constitutional defect found by the Court cannot justify the remedy it has imposed, I respectfully dissent.

REFERENCES: Return To Full Text Opinion Go To Oral Argument Transcript Go To Supreme Court Brief(s) Go To Supreme Court Brief(s) Go To Supreme Court Brief(s)

1 Am Jur 2d, Administrative Law 76, 79; *16 Am Jur 2d, Constitutional Law* 323; *63A Am Jur 2d, Public Funds* 50, 55

2 USCS 901 et seq.; 31 USCS 703

US L Ed Digest, *Administrative Law* 7, 15, 18; *Appropriations* 1; *Constitutional Law* 72

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Index to Annotations, Administrative Law; Congress;
Public Moneys; Public Officers and Employees; Separation of Powers

Annotation References:

Supreme Court's views as to party's standing to assert rights of third persons (*jus tertii*) in challenging constitutionality of legislation. *50 L Ed 2d 902*.

Executive impoundment of funds appropriated by Congress. *27 ALR Fed 214*.





IMMIGRATION AND NATURALIZATION SERVICE v. CHADHA ET AL.

No. 80-1832

SUPREME COURT OF THE UNITED STATES

462 U.S. 919; 103 S. Ct. 2764; 77 L. Ed. 2d 317; 1983 U.S. LEXIS 80; 51 U.S.L.W. 4907; 13 ELR 20663

February 22, 1982, Argued
June 23, 1983, Decided *

* Together with No. 80-2170, United States House of Representatives v. Immigration and Naturalization Service et al., and No. 80-2171, United States Senate v. Immigration and Naturalization Service et al., on certiorari to the same court.

SUBSEQUENT HISTORY:

Reargued December 7, 1982.

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION:

634 F.2d 408, affirmed.

LexisNexis(R) Headnotes

SYLLABUS:

Section 244(c)(2) of the Immigration and Nationality Act (Act) authorizes either House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General, to allow a particular deportable alien to remain in the United States. Appellee-respondent Chadha, an alien who had been lawfully admitted to the United States on a nonimmigrant student visa, remained in the United States after his visa had expired and was ordered by the Immigration and Naturalization Service (INS) to show cause why he should not be deported. He then applied for suspension of the deportation, and, after a hearing, an Immigration Judge, acting pursuant to § 244(a)(1) of the Act, which authorizes the Attorney General, in his discretion, to suspend deportation, ordered the suspension, and reported the suspension to Congress as required by § 244(c)(1). Thereafter, the House of Representatives passed a resolution pursuant to

§ 244(c)(2) vetoing the suspension, and the Immigration Judge reopened the deportation proceedings. Chadha moved to terminate the proceedings on the ground that § 244(c)(2) is unconstitutional, but the judge held that he had no authority to rule on its constitutionality and ordered Chadha deported pursuant to the House Resolution. Chadha's appeal to the Board of Immigration Appeals was dismissed, the Board also holding that it had no power to declare § 244(c)(2) unconstitutional. Chadha then filed a petition for review of the deportation order in the Court of Appeals, and the INS joined him in arguing that § 244(c)(2) is unconstitutional. The Court of Appeals held that § 244(c)(2) violates the constitutional doctrine of separation of powers, and accordingly directed the Attorney General to cease taking any steps to deport Chadha based upon the House Resolution.

Held:

1. This Court has jurisdiction to entertain the INS's appeal in No. 80-1832 under 28 U. S. C. § 1252, which provides that "[any] party" may appeal to the Supreme Court from a judgment of "any court of the United States" holding an Act of Congress unconstitutional in "any civil action, suit, or proceeding" to which the United States or any of its agencies is a party. A court of appeals is "a court of the United States" for purposes of § 1252, the proceeding below was a "civil action, suit, or proceeding," the INS is an agency of the United States and was a party to the proceeding below, and the judgment below held an Act of Congress unconstitutional. Moreover, for purposes of deciding whether the INS was "any party" within the grant of appellate jurisdiction in § 1252, the INS was sufficiently aggrieved by the Court of Appeals' decision prohibiting it from taking action it

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would otherwise take. An agency's status as an aggrieved party under § 1252 is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional. Pp. 929-931.

2. Section 244(c)(2) is severable from the remainder of § 244. Section 406 of the Act provides that if any particular provision of the Act is held invalid, the remainder of the Act shall not be affected. This gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or any part thereof, to depend upon whether the veto clause of § 244(c)(2) was invalid. This presumption is supported by § 244's legislative history. Moreover, a provision is further presumed severable if what remains after severance is fully operative as a law. Here, § 244 can survive as a "fully operative" and workable administrative mechanism without the one-House veto. Pp. 931-935.

3. Chadha has standing to challenge the constitutionality of § 244(c)(2) since he has demonstrated "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79. Pp. 935-936.

4. The fact that Chadha may have other statutory relief available to him does not preclude him from challenging the constitutionality of § 244(c)(2), especially where the other avenues of relief are at most speculative. Pp. 936-937.

5. The Court of Appeals had jurisdiction under § 106(a) of the Act, which provides that a petition for review in a court of appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation . . . made against aliens within the United States pursuant to administrative proceedings" under § 242(b) of the Act. Section 106(a) includes all matters on which the final deportation order is contingent, rather than only those determinations made at the deportation hearing. Here, Chadha's deportation stands or falls on the validity of the challenged veto, the final deportation order having been entered only to implement that veto. Pp. 937-939.

6. A case or controversy is presented by these cases. From the time of the House's formal intervention, there was concrete adverseness, and prior to such intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha. The INS's agreement with Chadha's position does not alter the fact that the INS would have deported him absent the Court of Appeals' judgment. Moreover, Congress is the proper party to defend the validity of a statute when a Government agency, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is unconstitutional. Pp. 939-940.

7. These cases do not present a nonjusticiable political question on the asserted ground that Chadha is merely challenging Congress' authority under the Naturalization and Necessary and Proper Clauses of the Constitution. The presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by the courts simply because the issues have political implications. Pp. 940-943.

8. The congressional veto provision in § 244(c)(2) is unconstitutional. Pp. 944-959.

(a) The prescription for legislative action in Art. I, § 1 -- requiring all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives -- and § 7 -- requiring every bill passed by the House and Senate, before becoming law, to be presented to the President, and, if he disapproves, to be repassed by two-thirds of the Senate and House -- represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure. This procedure is an integral part of the constitutional design for the separation of powers. Pp. 944-951.

(b) Here, the action taken by the House pursuant to § 244(c)(2) was essentially legislative in purpose and effect and thus was subject to the procedural requirements of Art. I, § 7, for *legislative* action: passage by a majority of both Houses and presentation to the President. The one-House veto operated to overrule the Attorney General and mandate Chadha's deportation. The veto's legislative character is confirmed by the character of the congressional action it supplants; *i. e.*, absent the veto provision of § 244(c)(2), neither the House nor the Senate, or both acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined that the alien should remain in the United States. Without the veto provision, this could have been achieved only by legislation requiring deportation. A veto by one House under § 244(c)(2) cannot be justified as an attempt at amending the standards set out in § 244(a)(1), or as a repeal of § 244 as applied to Chadha. The nature of the decision implemented by the one-House veto further manifests its legislative character. Congress must abide by its delegation of authority to the Attorney General until that delegation is legislatively altered or revoked. Finally, the veto's legislative character is confirmed by the fact that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action in the Constitution. Pp. 951-959.

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COUNSEL:

Eugene Gressman reargued the cause for petitioner in No. 80-2170. With him on the briefs was Stanley M. Brand.

Michael Davidson reargued the cause for petitioner in No. 80-2171. With him on the briefs were M. Elizabeth Culbreth and Charles Tiefer.

Solicitor General Lee reargued the cause for the Immigration and Naturalization Service in all cases. With him on the briefs were Assistant Attorney General Olson, Deputy Solicitor General Geller, Deputy Assistant Attorney General Simms, Edwin S. Kneedler, David A. Strauss, and Thomas O. Sargentich.

Alan B. Morrison reargued the cause for Jagdish Rai Chadha in all cases. With him on the brief was John Cary Sims. +

+ Antonin Scalia, Richard B. Smith, and David Ryrie Brink filed a brief for the American Bar Association as amicus curiae urging affirmation.

Briefs of amici curiae were filed by Robert C. Eckhardt for Certain Members of the United States House of Representatives; and by Paul C. Rosenthal for the Counsel on Administrative Law of the Federal Bar Association.

JUDGES:

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, post, p. 959. WHITE, J., filed a dissenting opinion, post, p. 967. REHNQUIST, J., filed a dissenting opinion, in which WHITE, J., joined, post, p. 1013.

OPINIONBY:

BURGER

OPINION:

[*923] [***326] [**2769] CHIEF JUSTICE BURGER delivered the opinion of the Court.

[***LEdHR1A] [1A]We granted certiorari in Nos. 80-2170 and 80-2171, and postponed consideration of the question of jurisdiction in No. 80-1832. Each presents a challenge to the constitutionality of the provision in § 244(c)(2) of the Immigration and Nationality Act, 66 Stat. 216, as amended, 8 [**2770] U. S. C. §

1254(c)(2), authorizing one House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow a particular deportable alien to remain in the United States.

[***327] I

Chadha is an East Indian who was born in Kenya and holds a British passport. He was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. His visa expired on June 30, 1972. On October 11, 1973, the District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported for having "remained in the United States for a longer time than permitted." App. 6. Pursuant to § 242(b) of the Immigration and Nationality Act (Act), 8 U. S. C. § 1252(b), a deportation hearing was held before an Immigration Judge on January 11, 1974. Chadha conceded that he was deportable for overstaying his visa and the hearing was adjourned to enable him to file an application for suspension of deportation under § 244(a)(1) of the Act, 8 U. S. C. § 1254(a)(1). Section 244(a)(1), at the time in question, provided:

"As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and --

"(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United [*924] States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." n1

n1 Congress delegated the major responsibilities for enforcement of the Immigration and Nationality Act to the Attorney General. 8 U. S. C. § 1103(a). The Attorney General discharges his responsibilities through the Immigration and Naturalization Service, a division of the Department of Justice. *Ibid.*

After Chadha submitted his application for suspension of deportation, the deportation hearing was resumed on February 7, 1974. On the basis of evidence adduced

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at the hearing, affidavits submitted with the application, and the results of a character investigation conducted by the INS, the Immigration Judge, on June 25, 1974, ordered that Chadha's deportation be suspended. The Immigration Judge found that Chadha met the requirements of § 244(a)(1): he had resided continuously in the United States for over seven years, was of good moral character, and would suffer "extreme hardship" if deported.

Pursuant to § 244(c)(1) of the Act, 8 U. S. C. § 1254(c)(1), the Immigration Judge suspended Chadha's deportation and a report of the suspension was transmitted to Congress. Section 244(c)(1) provides:

"Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section [***328] the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the [*925] facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session."

Once the Attorney General's recommendation for suspension of Chadha's deportation was conveyed to Congress, Congress [**2771] had the power under § 244(c)(2) of the Act, 8 U. S. C. § 1254(c)(2), to veto n2 the Attorney General's determination that Chadha should not be deported. Section 244(c)(2) provides:

"(2) In the case of an alien specified in paragraph (1) of subsection (a) of this subsection --

"if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings."

n2 In constitutional terms, "veto" is used to describe the President's power under Art. I, § 7, of the Constitution. See Black's Law Dictionary 1403 (5th ed. 1979). It appears, however, that congressional devices of the type authorized by §

244(c)(2) have come to be commonly referred to as a "veto." See, e. g., Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 *Va. L. Rev.* 253 (1982); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 *Ind. L. J.* 367 (1977). We refer to the congressional "resolution" authorized by § 244(c)(2) as a "one-House veto" of the Attorney General's decision to allow a particular deportable alien to remain in the United States.

[*926] The June 25, 1974, order of the Immigration Judge suspending Chadha's deportation remained outstanding as a valid order for a year and a half. For reasons not disclosed by the record, Congress did not exercise the veto authority reserved to it under § 244(c)(2) until the first session of the 94th Congress. This was the final session in which Congress, pursuant to § 244(c)(2), could act to veto the Attorney General's determination that Chadha should not be deported. The session ended on December 19, 1975. 121 Cong. Rec. 42014, 42277 (1975). Absent congressional action, Chadha's deportation proceedings would have been canceled after this date and his status adjusted to that of a permanent resident alien. See 8 U. S. C. § 1254(d).

On December 12, 1975, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution opposing "the granting of permanent residence in the United States to [six] aliens," including Chadha. H. Res. 926, 94th Cong., 1st Sess.; 121 Cong. Rec. 40247 (1975). The resolution was [***329] referred to the House Committee on the Judiciary. On December 16, 1975, the resolution was discharged from further consideration by the House Committee on the Judiciary and submitted to the House of Representatives for a vote. 121 Cong. Rec. 40800. The resolution had not been printed and was not made available to other Members of the House prior to or at the time it was voted on. *Ibid.* So far as the record before us shows, the House consideration of the resolution was based on Representative Eilberg's statement from the floor that

"[it] was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution [Chadha and five others] did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended." *Ibid.*

[*927] The resolution was passed without debate or recorded vote. n3 Since the House action [**2772] was pursuant to § 244(c)(2), the resolution was not treated as

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an Art. I legislative act; it was not [*928] submitted to the Senate or presented to the President for his action.

n3 It is not at all clear whether the House generally, or Subcommittee Chairman Eilberg in particular, correctly understood the relationship between H. Res. 926 and the Attorney General's decision to suspend Chadha's deportation. Exactly one year previous to the House veto of the Attorney General's decision in this case, Representative Eilberg introduced a similar resolution disapproving the Attorney General's suspension of deportation in the case of six other aliens. H. Res. 1518, 93d Cong., 2d Sess. (1974). The following colloquy occurred on the floor of the House:

"Mr. WYLIE. Mr. Speaker, further reserving the right to object, is this procedure to expedite the ongoing operations of the Department of Justice, as far as these people are concerned. Is it in any way contrary to whatever action the Attorney General has taken on the question of deportation; does the gentleman know?"

"Mr. EILBERG. Mr. Speaker, the answer is no to the gentleman's final question. These aliens have been found to be deportable and the Special Inquiry Officer's decision denying suspension of deportation has been reversed by the Board of Immigration Appeals. We are complying with the law since all of these decisions have been referred to us for approval or disapproval, and there are hundreds of cases in this category. In these six cases however, we believe it would be grossly improper to allow these people to acquire the status of permanent resident aliens.

"Mr. WYLIE. In other words, the gentleman has been working with the Attorney General's office?"

"Mr. EILBERG. Yes.

"Mr. WYLIE. This bill then is in fact a confirmation of what the Attorney General intends to do?"

"Mr. EILBERG. The gentleman is correct insofar as it relates to the determination of deportability which has been made by the Department of Justice in each of these cases.

"Mr. WYLIE. Mr. Speaker, I withdraw my reservation of objection." 120 Cong. Rec. 41412 (1974).

Clearly, this was an obfuscation of the effect of a veto under § 244(c)(2). Such a veto in no way constitutes "a confirmation of what the Attorney General intends to do." To the contrary, such a resolution was meant to overrule and set aside, or "veto," the Attorney General's determination that, in a particular case, cancellation of deportation would be appropriate under the standards set forth in § 244(a)(1).

After the House veto of the Attorney General's decision to allow Chadha to remain in the United States, the Immigration Judge reopened the deportation proceedings to implement the House order deporting Chadha. Chadha moved to terminate the proceedings on the ground that § 244(c)(2) is unconstitutional. The Immigration Judge held that he had no authority to rule on the constitutional validity of § 244(c)(2). On November [***330] 8, 1976, Chadha was ordered deported pursuant to the House action.

Chadha appealed the deportation order to the Board of Immigration Appeals, again contending that § 244(c)(2) is unconstitutional. The Board held that it had "no power to declare unconstitutional an act of Congress" and Chadha's appeal was dismissed. App. 55-56.

Pursuant to § 106(a) of the Act, 8 U. S. C. § 1105a(a), Chadha filed a petition for review of the deportation order in the United States Court of Appeals for the Ninth Circuit. The Immigration and Naturalization Service agreed with Chadha's position before the Court of Appeals and joined him in arguing that § 244(c)(2) is unconstitutional. In light of the importance of the question, the Court of Appeals invited both the Senate and the House of Representatives to file briefs *amici curiae*.

After full briefing and oral argument, the Court of Appeals held that the House was without constitutional authority to order Chadha's deportation; accordingly it directed the Attorney General "to cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives." 634 F.2d 408, 436 (1980). The essence of its holding was that § 244(c)(2) violates the constitutional doctrine of separation of powers.

We granted certiorari in Nos. 80-2170 and 80-2171, and postponed consideration of our jurisdiction over the appeal in *No. 80-1832, 454 U.S. 812 (1981)*, and we now affirm.

[*929] II

Before we address the important question of the constitutionality of the one-House veto provision of § 244(c)(2), we first consider several challenges to the authority of this Court to resolve the issue raised.

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[**2773] A

Appellate Jurisdiction

Both Houses of Congress n4 contend that we are without jurisdiction under 28 U. S. C. § 1252 to entertain the INS appeal in No. 80-1832. Section 1252 provides:

"Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

n4 Nine Members of the House of Representatives disagree with the position taken in the briefs filed by the Senate and the House of Representatives and have filed a brief *amici curiae* urging that the decision of the Court of Appeals be affirmed in this case.

[**LEdHR2] [2] [**LEdHR3] [3] *Parker v. Levy*, 417 U.S. 733, 742, n. 10 [**331] (1974), makes clear that a court of appeals is a "court of the United States" for purposes of § 1252. It is likewise clear that the proceeding below was a "civil action, suit, or proceeding," that the INS is an agency of the United States and was a party to the proceeding below, and that that proceeding held an Act of Congress -- namely, the one-House veto provision in § 244(c)(2) -- unconstitutional. The express requisites for an appeal under § 1252, therefore, have been met.

[*930]

[**LEdHR4A] [4A] In motions to dismiss the INS appeal, the congressional parties n5 direct attention, however, to our statement that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333 (1980). Here, the INS sought the invalidation of § 244(c)(2), and the Court of Appeals granted that relief. Both Houses contend that the INS has already received what it sought from the Court of Appeals, is not an aggrieved party, and therefore cannot appeal from the decision of the Court of Appeals. We cannot agree.

n5 The Senate and House authorized intervention in this case, S. Res. 40 and H. R. Res. 49, 97th Cong., 1st Sess. (1981), and, on February 3, 1981, filed motions to intervene and petitioned for rehearing. The Court of Appeals granted the motions to intervene. Both Houses are therefore proper "parties" within the meaning of that term in 28 U. S. C. § 1254(1). See *Batterton v. Francis*, 432 U.S. 416, 424, n. 7 (1977).

The INS was ordered by one House of Congress to deport Chadha. As we have set out more fully, *supra*, at 928, the INS concluded that it had no power to rule on the constitutionality of that order and accordingly proceeded to implement it. Chadha's appeal challenged that decision and the INS presented the Executive's views on the constitutionality of the House action to the Court of Appeals. But the INS brief to the Court of Appeals did not alter the agency's decision to comply with the House action ordering deportation of Chadha. The Court of Appeals set aside the deportation proceedings and ordered the Attorney General to cease and desist from taking any steps to deport Chadha; steps that the Attorney General would have taken were it not for that decision.

[**LEdHR5] [5] [**LEdHR6] [6] [**LEdHR7] [7] [**LEdHR8A] [8A] [**LEdHR9A] [9A] At least for purposes of deciding whether the INS is "any party" within the grant of appellate jurisdiction in § 1252, we hold that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take. It is apparent that Congress intended that [*931] this Court take notice of cases that meet the technical prerequisites of § 1252; in other cases where an Act of Congress is held unconstitutional by a federal court, review in this Court is available only by writ of certiorari. When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional, it is an aggrieved [**2774] party for purposes of taking an appeal under § 1252. The agency's status as an aggrieved party under § 1252 is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional. The appeal in No. 80-1832 [**332] is therefore properly before us. n6

n6

[**LEdHR8B] [8B] [**LEdHR9B] [9B] In addition to meeting the statutory requisites of § 1252, of course, an appeal must present a justiciable case or controversy under Art. III. Such a controversy clearly exists in No. 80-1832, as in the other two cases, because of the presence of

the two Houses of Congress as adverse parties. See *infra*, at 939; see also *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 302-305 (1982).

B

Severability

Congress also contends that the provision for the one-House veto in § 244(c)(2) cannot be severed from § 244. Congress argues that if the provision for the one-House veto is held unconstitutional, all of § 244 must fall. If § 244 in its entirety is violative of the Constitution, it follows that the Attorney General has no authority to suspend Chadha's deportation under § 244(a)(1) and Chadha would be deported. From this, Congress argues that Chadha lacks standing to challenge the constitutionality of the one-House veto provision because he could receive no relief even if his constitutional challenge proves successful. n7

n7 In this case we deem it appropriate to address questions of severability first. But see *Buckley v. Valeo*, 424 U.S. 1, 108-109 (1976); *United States v. Jackson*, 390 U.S. 570, 585 (1968).

[***LEdHR10A] [10A] [***LEdHR11] [11] Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "[unless] it is evident that [*932] the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932). Here, however, we need not embark on that elusive inquiry since Congress itself has provided the answer to the question of severability in § 406 of the Immigration and Nationality Act, note following 8 U. S. C. § 1101, which provides:

"If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." (Emphasis added.)

This language is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the veto clause of § 244(c)(2) was invalid. The one-House veto provision in § 244(c)(2) is clearly a

"particular provision" of the Act as that language is used in the severability clause. Congress clearly intended "the remainder of the Act" to stand if "any particular provision" were held invalid. Congress could not have more plainly authorized the presumption that the provision for a one-House veto in § 244(c)(2) is severable from the remainder of § 244 and the Act of which it is a part. See *Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 434 (1938).

The presumption as to the severability of the one-House veto provision in § 244(c)(2) is supported by the legislative history of § 244. That section [***333] and its precursors supplanted the long-established pattern of dealing with deportations like Chadha's on a case-by-case basis through private bills. Although it may be that Congress was reluctant to delegate final authority over cancellation of deportations, such reluctance is not sufficient to overcome the presumption of severability raised by § 406.

[*933] The Immigration Act of 1924, ch. 190, § 14, 43 Stat. 162, required the Secretary of Labor to deport any alien who entered or remained in the United States unlawfully. The only means by which a deportable alien [**2775] could lawfully remain in the United States was to have his status altered by a private bill enacted by both Houses and presented to the President pursuant to the procedures set out in Art. I, § 7, of the Constitution. These private bills were found intolerable by Congress. In the debate on a 1937 bill introduced by Representative Dies to authorize the Secretary to grant permanent residence in "meritorious" cases, Dies stated:

"It was my original thought that the way to handle all these meritorious cases was through special bills. I am absolutely convinced as a result of what has occurred in this House that it is impossible to deal with this situation through special bills. We had a demonstration of that fact not long ago when 15 special bills were before this House. The House consumed 5 1/2 hours considering four bills and made no disposition of any of the bills." 81 Cong. Rec. 5542 (1937).

Representative Dies' bill passed the House, *id.*, at 5574, but did not come to a vote in the Senate. 83 Cong. Rec. 8992-8996 (1938).

Congress first authorized the Attorney General to suspend the deportation of certain aliens in the Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 671. That Act provided that an alien was to be deported, despite the Attorney General's decision to the contrary, if both Houses, by concurrent resolution, disapproved the suspension.

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In 1948, Congress amended the Act to broaden the category of aliens eligible for suspension of deportation. In addition, however, Congress limited the authority of the Attorney General to suspend deportations by providing that the Attorney General could not cancel a deportation unless both Houses affirmatively voted by concurrent resolution to *approve* the Attorney General's action. Act of July 1, 1948, [*934] ch. 783, 62 Stat. 1206. The provision for approval by concurrent resolution in the 1948 Act proved almost as burdensome as private bills. Just one year later, the House Judiciary Committee, in support of the predecessor to § 244(c)(2), stated in a Report:

"In the light of experience of the last several months, the committee came to the conclusion that the requirement of affirmative action by both Houses of the Congress in many thousands of individual cases which are submitted by the Attorney General every year, is not workable and places upon the Congress and particularly on the Committee on the Judiciary responsibilities which it cannot assume. The new responsibilities placed upon the Committee on the Judiciary [by the concurrent resolution mechanism] are of purely administrative nature [***334] and they seriously interfere with the legislative work of the Committee on the Judiciary and would, in time, interfere with the legislative work of the House." H. R. Rep. No. 362, 81st Cong., 1st Sess., 2 (1949).

The proposal to permit one House of Congress to veto the Attorney General's suspension of an alien's deportation was incorporated in the Immigration and Nationality Act of 1952, Pub. L. 414, § 244(a), 66 Stat. 214. Plainly, Congress' desire to retain a veto in this area cannot be considered in isolation but must be viewed in the context of Congress' irritation with the burden of private immigration bills. This legislative history is not sufficient to rebut the presumption of severability raised by § 406 because there is insufficient evidence that Congress would have continued to subject itself to the onerous burdens of private bills had it known that § 244(c)(2) would be held unconstitutional.

[***LEdHR10B] [10B] [***LEdHR12] [12]A provision is further presumed severable if what remains after severance "is fully operative as a law." *Champlin Refining Co. v. Corporation Comm'n*, *supra*, at 234. There can be no doubt that § 244 is "fully operative" and workable administrative machinery without the veto provision in § 244(c)(2). Entirely independent of the one-House veto, the [*935] administrative process enacted by Congress authorizes the Attorney [**2776] General to suspend an alien's deportation under § 244(a). Congress' oversight of the exercise of this delegated authority is preserved since all such suspensions will continue to be reported to it under § 244(c)(1). Absent the passage

of a bill to the contrary, n8 deportation proceedings will be canceled when the period specified in § 244(c)(2) has expired. n9 Clearly, § 244 survives as a workable administrative mechanism without the one-House veto.

n8 Without the provision for one-House veto, Congress would presumably retain the power, during the time allotted in § 244(c)(2), to enact a law, in accordance with the requirements of Art. I of the Constitution, mandating a particular alien's deportation, unless, of course, other constitutional principles place substantive limitations on such action. Cf. Attorney General Jackson's attack on H. R. 9766, 76th Cong., 3d Sess. (1940), a bill to require the Attorney General to deport an individual alien. The Attorney General called the bill "an historical departure from an unbroken American practice and tradition. It would be the first time that an act of Congress singled out a named individual for deportation." S. Rep. No. 2031, 76th Cong., 3d Sess., pt. 1, p. 9 (1940) (reprinting Jackson's letter of June 18, 1940). See n. 17, *infra*.

n9 Without the one-House veto, § 244 resembles the "report and wait" provision approved by the Court in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). The statute examined in *Sibbach* provided that the newly promulgated Federal Rules of Civil Procedure "shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." Act of June 19, 1934, ch. 651, § 2, 48 Stat. 1064. This statute did *not* provide that Congress could unilaterally veto the Federal Rules. Rather, it gave Congress the opportunity to review the Rules before they became effective and to pass legislation barring their effectiveness if the Rules were found objectionable. This technique was used by Congress when it acted in 1973 to stay, and ultimately to revise, the proposed Rules of Evidence. Compare Act of Mar. 30, 1973, Pub. L. 93-12, 87 Stat. 9, with Act of Jan. 2, 1975, Pub. L. 93-595, 88 Stat. 1926.

C

Standing

[***LEdHR13] [13]We must also reject the contention [***335] that Chadha lacks standing because a consequence of his prevailing will advance [*936] the interests of the Executive Branch in a separation-of-powers

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dispute with Congress, rather than simply Chadha's private interests. Chadha has demonstrated "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury . . ." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79 (1978). If the veto provision violates the Constitution, and is severable, the deportation order against Chadha will be canceled. Chadha therefore has standing to challenge the order of the Executive mandated by the House veto.

D

Alternative Relief

It is contended that the Court should decline to decide the constitutional question presented by these cases because Chadha may have other statutory relief available to him. It is argued that since Chadha married a United States citizen on August 10, 1980, it is possible that other avenues of relief may be open under §§ 201(b), 204, and 245 of the Act, 8 U. S. C. §§ 1151(b), 1154, and 1255. It is true that Chadha may be eligible for classification as an "immediate relative" and, as such, could lawfully be accorded permanent residence. Moreover, in March 1980, just prior to the decision of the Court of Appeals in these cases, Congress enacted the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102, under which the Attorney General is authorized to grant asylum, and then permanent residence, to any alien who is unable to return to his country of nationality because of "a well-founded fear of persecution on account of race."

[***LEdHR14] [14] [***LEdHR15] [15] It is urged that these two intervening factors constitute a prudential bar to our consideration of the constitutional question presented in these cases. See *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). If we could perceive merit in this contention we might well seek to avoid [*2777] deciding the constitutional claim advanced. But at most [*937] these other avenues of relief are speculative. It is by no means certain, for example, that Chadha's classification as an immediate relative would result in the adjustment of Chadha's status from nonimmigrant to permanent resident. See *Menezes v. INS*, 601 F.2d 1028 (CA9 1979). If Chadha is successful in his present challenge he will not be deported and will automatically become eligible to apply for citizenship. n10 A person threatened with deportation cannot be denied the right to challenge the constitutional validity of the process which led to his status merely on the basis of speculation over the availability of other forms of relief.

n10 Depending on how the INS interprets its statutory duty under § 244 apart from the challenged portion of § 244(c)(2), Chadha's status

may be retroactively adjusted to that of a permanent resident as of December 19, 1975 -- the last session in which Congress could have attempted to stop the suspension of Chadha's deportation from ripening into cancellation of deportation. See 8 U. S. C. § 1254(d). In that event, Chadha's 5-year waiting period to become a citizen under § 316(a) of the Act, 8 U. S. C. § 1427(a), would have elapsed.

[***336] E

Jurisdiction

It is contended that the Court of Appeals lacked jurisdiction under § 106(a) of the Act, 8 U. S. C. § 1105a(a). That section provides that a petition for review in the Court of Appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation . . . made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act." Congress argues that the one-House veto authorized by § 244(c)(2) takes place outside the administrative proceedings conducted under § 242(b), and that the jurisdictional grant contained in § 106(a) does not encompass Chadha's constitutional challenge.

[***LEdHR16] [16] In *Cheng Fan Kwok v. INS*, 392 U.S. 206, 216 (1968), this Court held that "§ 106(a) [embraces] only those determinations [*938] made during a proceeding conducted under § 242(b), including those determinations made incident to a motion to reopen such proceedings. " It is true that one court has read *Cheng Fan Kwok* to preclude appeals similar to Chadha's. See *Dastmalchi v. INS*, 660 F.2d 880 (CA3 1981). n11 However, we agree with the Court of Appeals in these cases that the term "final orders" in § 106(a) "includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing." 634 F.2d, at 412. Here, Chadha's deportation stands or falls on the validity of the challenged veto; the final order of deportation was entered against Chadha only to implement the action of the House of Representatives. Although the Attorney General was satisfied that the House action was invalid and that it should not have any effect on his decision to suspend deportation, he appropriately let the controversy take its course through the courts.

n11 Under the Third Circuit's reasoning, judicial review under § 106(a) would not extend to the constitutionality of § 244(c)(2) because that issue could not have been tested during the administrative deportation proceedings conducted

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under § 242(b). The facts in *Dastmalchi* are distinguishable, however. In *Dastmalchi*, Iranian aliens who had entered the United States on non-immigrant student visas challenged a regulation that required them to report to the District Director of the INS during the Iranian hostage crisis. The aliens reported and were ordered deported after a § 242(b) proceeding. The aliens in *Dastmalchi* could have been deported irrespective of the challenged regulation. Here, in contrast, Chadha's deportation would have been canceled but for § 244(c)(2).

verseness even though the only parties were the INS and Chadha. We have already held that the INS's agreement with the Court of Appeals' decision that § 244(c)(2) is unconstitutional does not affect that agency's "aggrieved" status for purposes of appealing that decision under 28 U. S. C. § 1252, see *supra*, at 929-931. For similar reasons, the INS's agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment. We agree with the Court of Appeals that "Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), [*940] the INS will execute its order and deport him." 634 F.2d, at 419. n12

[***LEdHR17] [17]This Court's decision in *Cheng Fan Kwok, supra*, does not bar Chadha's appeal. There, after an order of deportation had been entered, the affected alien requested the INS to stay the execution of that order. When that request was denied, the alien sought review in the Court of Appeals under § 106(a). This Court's holding that the Court of Appeals lacked jurisdiction was based on the fact that the alien "did not 'attack the deportation order itself [*2778] but instead [sought] relief not inconsistent with it.'" 392 U.S., at 213, quoting [*939] *Mui v. Esperdy*, 371 F.2d 772, 777 (CA2 1966). Here, in contrast, Chadha directly attacks the deportation order itself, and the relief he seeks -- cancellation of deportation -- is plainly inconsistent with the deportation order. [***337] Accordingly, the Court of Appeals had jurisdiction under § 106(a) to decide these cases.

F

Case or Controversy

It is also contended that this is not a genuine controversy but "a friendly, non-adversary, proceeding," *Ashwander v. TVA*, 297 U.S., at 346 (Brandeis, J., concurring), upon which the Court should not pass. This argument rests on the fact that Chadha and the INS take the same position on the constitutionality of the one-House veto. But it would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual.

[***LEdHR18] [18]A case or controversy is presented by these cases. First, from the time of Congress' formal intervention, see n. 5, *supra*, the concrete adverseness is beyond doubt. Congress is both a proper party to defend the constitutionality of § 244(c)(2) and a proper petitioner under 28 U. S. C. § 1254(1). Second, prior to Congress' intervention, there was adequate Art. III ad-

n12 A relevant parallel can be found in our recent decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983). There, the United States agreed with Bob Jones University and Goldsboro Christian Schools that certain Revenue Rulings denying tax-exempt status to schools that discriminated on the basis of race were invalid. Despite its agreement with the schools, however, the United States was complying with a court order enjoining it from granting tax-exempt status to any school that discriminated on the basis of race. Even though the Government largely agreed with the opposing party on the merits of the controversy, we found an adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party. See *id.*, at 585, n. 9.

[***LEdHR19] [19]Of course, there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of these cases in the absence of any participant supporting the validity of § 244(c)(2). The Court of Appeals properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress. We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional. See *Cheng Fan Kwok v. INS*, 392 U.S., at 210, n. 9; [***338] *United States v. Lovett*, 328 U.S. 303 (1946).

G

Political Question

[***LEdHR20] [20] [***LEdHR21] [21]It is also argued that these cases present a nonjusticiable political

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question because Chadha is merely challenging Congress' authority under the Naturalization Clause, U.S. Const., Art. I, § 8, cl. 4, and the Necessary and Proper Clause, U.S. Const., Art. I, § 8, cl. 18. It is argued that Congress' [**2779] Art. I power "To establish an uniform Rule of Naturalization," combined with the Necessary and Proper Clause, grants it unreviewable authority over the regulation of aliens. The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, but what is [*941] challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power. As we made clear in *Buckley v. Valeo*, 424 U.S. 1 (1976): "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, *McCulloch v. Maryland*, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction." *Id.*, at 132.

[***LEdHR22] [22]A brief review of those factors which may indicate the presence of a nonjusticiable political question satisfies us that our assertion of jurisdiction over these cases does no violence to the political question doctrine. As identified in *Baker v. Carr*, 369 U.S. 186, 217 (1962), a political question may arise when any one of the following circumstances is present:

"a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

[***LEdHR23A] [23A] [***LEdHR24A] [24A] Congress apparently directs its assertion of nonjusticiability to the first of the *Baker* factors by asserting that Chadha's claim is "an assault on the legislative authority to enact Section 244(c)(2)." Brief for Petitioner in No. 80-2170, p. 48. But if this turns the question into a political question virtually every challenge to the constitutionality of a statute would be a political question. Chadha indeed argues that one House of Congress cannot constitutionally veto the Attorney General's decision to allow him to remain in this country. No policy underlying the political question doctrine [*942] suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality

[***339] of a statute; that is a decision for the courts.
n13

n13

[***LEdHR23B] [23B] [***LEdHR24B] [24B]The suggestion is made that § 244(c)(2) is somehow immunized from constitutional scrutiny because the Act containing § 244(c)(2) was passed by Congress and approved by the President. *Marbury v. Madison*, 1 Cranch 137 (1803), resolved that question. The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review. See *Smith v. Maryland*, 442 U.S. 735, 740, n. 5 (1979); *National League of Cities v. Usery*, 426 U.S. 833, 841, n. 12 (1976); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Myers v. United States*, 272 U.S. 52 (1926). See also n. 22, *infra*. In any event, 11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional. See Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 *Harv. J. Legis.* 735, 737-738, n. 7 (1979) (collecting citations to Presidential statements). Perhaps the earliest Executive expression on the constitutionality of the congressional veto is found in Attorney General William D. Mitchell's opinion of January 24, 1933, to President Hoover. 37 *Op. Atty. Gen.* 56. Furthermore, it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds. For example, after President Roosevelt signed the Lend-Lease Act of 1941, Attorney General Jackson released a memorandum explaining the President's view that the provision allowing the Act's authorization to be terminated by concurrent resolution was unconstitutional. Jackson, *A Presidential Legal Opinion*, 66 *Harv. L. Rev.* 1353 (1953).

Other *Baker* factors are likewise inapplicable to this case. As we discuss more fully below, Art. I provides the "judicially [**2780] discoverable and manageable standards" of *Baker* for resolving the question presented by these cases. Those standards forestall reliance by this Court on nonjudicial "policy determinations" or any showing of disrespect for a coordinate branch. Similarly, if Chadha's arguments are accepted, § 244(c)(2) cannot stand, and, since the constitutionality of that statute is for this Court to resolve, there is no possibility of "multifarious pronouncements" on this question.

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[**LEdHR25] [25] [**LEdHR26] [26]It is correct that this controversy may, in a sense, be termed "political." But the presence of constitutional issues with significant political overtones does not automatically invoke [*943] the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged by Congress. *Marbury v. Madison*, 1 Cranch 137 (1803), was also a "political" case, involving as it did claims under a judicial commission alleged to have been duly signed by the President but not delivered. But "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker v. Carr*, *supra*, at 217.

In *Field v. Clark*, 143 U.S. 649 (1892), this Court addressed and resolved the question whether

"a bill signed by the Speaker of the House of Representatives and by the President of the Senate, presented to and approved by the President of the United States, and delivered by the latter to the Secretary of State, as an act passed by Congress, does not become a law of the United States if it had not in fact been passed by Congress. . . .

[**340] ". . . We recognize, on one hand, the duty of this court, from the performance of which it may not shrink, to give full effect to the provisions of the Constitution relating to the enactment of laws that are to operate wherever the authority and jurisdiction of the United States extend. On the other hand, we cannot be unmindful of the consequences that must result if this court should feel obliged, in fidelity to the Constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been . . . deposited in the public archives, as an act of Congress, . . . did not become a law." *Id.*, at 669-670 (emphasis in original).

H

The contentions on standing and justiciability have been fully examined, and we are satisfied the parties are properly before us. The important issues have been fully briefed and [*944] twice argued, see 458 U.S. 1120 (1982). The Court's duty in these cases, as Chief Justice Marshall declared in *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821), is clear:

"Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

III

A

[**LEdHR27] [27] [**LEdHR28] [28]
[**LEdHR29] [29] [**LEdHR30] [30]We turn now to the question whether action of one House of Congress under § 244(c)(2) violates strictures of the Constitution. We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained:

"Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto." *TVA v. Hill*, 437 U.S. 153, 194-195 (1978).

[**2781]

[**LEdHR31] [31]By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies:

"Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940-49, nineteen statutes; between 1950-59, thirty-four statutes; and from 1960-69, forty-nine. From the year 1970 through 1975, at least one hundred sixty-three such provisions [*945] were included in eighty-nine laws." Abourezk, *The Congressional [**341] Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 *Ind. L. Rev.* 323, 324 (1977).

See also Appendix to JUSTICE WHITE's dissent, *post*, at 1003.

JUSTICE WHITE undertakes to make a case for the proposition that the one-House veto is a useful "political invention," *post*, at 972, and we need not challenge that assertion. We can even concede this utilitarian argument although the long-range political wisdom of this "invention" is arguable. It has been vigorously debated, and it is instructive to compare the views of the protagonists. See, e. g., Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 *N. Y. U. L. Rev.* 455 (1977), and Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*,

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68 *Va. L. Rev.* 253 (1982). But policy arguments supporting even useful "political inventions" are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. Since the precise terms of those familiar provisions are critical to the resolution of these cases, we set them out verbatim. Article I provides:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* House of Representatives." Art. I, § 1. (Emphasis added.)

"Every Bill which shall have passed the House of Representatives *and* the Senate, *shall*, before it becomes a law, be presented to the President of the United States . . ." Art. I, § 7, cl. 2. (Emphasis added.)

"*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) [*946] *shall be* presented to the President of the United States; and before the Same shall take Effect, *shall be* repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill." Art. I, § 7, cl. 3. (Emphasis added.)

These provisions of Art. I are integral parts of the constitutional design for the separation of powers. We have recently noted that "[the] principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S., at 124. Just as we relied on the textual provision of Art. II, § 2, cl. 2, to vindicate the principle of separation of powers in *Buckley*, we see that the purposes underlying the Presentment Clauses, Art. I, § 7, cls. 2, 3, and the bicameral requirement of Art. I, § 1, and § 7, cl. 2, guide our resolution of the important question presented in these cases. The very structure of the [**2782] Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of [***342] separation of powers, and we now turn to Art. I.

B

The Presentment Clauses

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly ac-

cepted by the Framers. n14 Presentment to the President and the Presidential [*947] veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern that it might easily be evaded by the simple expedient of calling a proposed law a "resolution" or "vote" rather than a "bill." 2 Farrand 301-302. As a consequence, Art. I, § 7, cl. 3, *supra*, at 945-946, was added. 2 Farrand 304-305.

n14 The widespread approval of the delegates was commented on by Joseph Story:

"In the convention there does not seem to have been much diversity of opinion on the subject of the propriety of giving to the president a negative on the laws. The principal points of discussion seem to have been, whether the negative should be absolute, or qualified; and if the latter, by what number of each house the bill should subsequently be passed, in order to become a law; and whether the negative should in either case be exclusively vested in the president alone, or in him jointly with some other department of the government." 1 J. Story, *Commentaries on the Constitution of the United States* 611 (3d ed. 1858).

See 1 M. Farrand, *The Records of the Federal Convention of 1787*, pp. 21, 97-104, 138-140 (1911) (hereinafter Farrand); *id.*, at 73-80, 181, 298, 301-305.

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President. In *The Federalist* No. 73 (H. Lodge ed. 1888), Hamilton focused on the President's role in making laws:

"If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defence." *Id.*, at 458.

See also *The Federalist* No. 51. In his *Commentaries on the Constitution*, Joseph Story makes the same point. 1 J. Story, *Commentaries on the Constitution of the United States* 614-615 (3d ed. 1858).

The President's role in the lawmaking process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, [*948] or ill-considered measures. The President's veto role in the legislative process was described later during public debate on ratification:

"It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.

[**343] ". . . The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design." *The Federalist No. 73, supra*, at 458 (A. Hamilton).

See also *The Pocket Veto Case*, 279 U.S. 655, 678 (1929); *Myers v. United States*, 272 U.S. 52, 123 (1926). The Court also has observed that the Presentment Clauses serve the important purpose of assuring that a "national" perspective is grafted on the legislative process:

[**2783] "The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide . . ." *Myers v. United States, supra*, at 123.

C

Bicameralism

The bicameral requirement of Art. I, § 1, 7, was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked [*949] upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials. In the Constitutional Convention debates on the need for a bicameral legislature, James Wilson, later to become a Justice of this Court, commented:

"Despotism comes on mankind in different shapes. sometimes in an Executive, sometimes in a military, one. Is there danger of a Legislative despotism? Theory & practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it." 1 Farrand 254.

Hamilton argued that a Congress comprised of a single House was antithetical to the very purposes of the Constitution. Were the Nation to adopt a Constitution providing for only one legislative organ, he warned:

"[We] shall finally accumulate, in a single body, all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived. Thus we should create in reality that very tyranny which the adversaries of the new Constitution either are, or affect to be, solicitous to avert." *The Federalist No. 22*, p. 135 (H. Lodge ed. 1888).

This view was rooted in a general skepticism regarding the fallibility [***344] of human nature later commented on by Joseph Story:

"Public bodies, like private persons, are occasionally under the dominion of strong passions and excitements; impatient, irritable, and impetuous. . . . If [a legislature] [*950] feels no check but its own will, it rarely has the firmness to insist upon holding a question long enough under its own view, to see and mark it in all its bearings and relations on society." 1 Story, *supra*, at 383-384.

These observations are consistent with what many of the Framers expressed, none more cogently than Madison in pointing up the need to divide and disperse power in order to protect liberty:

"In republican government, the legislative authority necessarily predominates. The remedy for this inconvenience is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit." *The Federalist No. 51*, p. 324 (H. Lodge ed. 1888) (sometimes attributed to "Hamilton or Madison" but now generally attributed to Madison).

See also *The Federalist No. 62*.

However familiar, it is useful to recall that apart from their fear that special interests could be favored at the expense of public needs, the Framers were also con-

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cerned, although not of one mind, over the apprehensions of the smaller states. Those [**2784] states feared a commonality of interest among the larger states would work to their disadvantage; representatives of the larger states, on the other hand, were skeptical of a legislature that could pass laws favoring a minority of the people. See 1 Farrand 176-177, 484-491. It need hardly be repeated here that the Great Compromise, under which one House was viewed as representing the people and the other the states, allayed the fears of both the large and small states. n15

n15 The Great Compromise was considered so important by the Framers that they inserted a special provision to ensure that it could not be altered, even by constitutional amendment, except with the consent of the states affected. See U.S. Const., Art V.

[*951] We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. See *id.*, at 99-104. It emerges clearly that the prescription for legislative action in Art. I, § 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

[***345] IV

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

[***LEdHR32] [32] [***LEdHR33] [33]
[***LEdHR34] [34] Although not "hermetically" sealed from one another, *Buckley v. Valeo*, 424 U.S., at 121, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively

exercising the power the Constitution has delegated to it. See *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928). When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II. And when, as here, [*952] one House of Congress purports to act, it is presumptively acting within its assigned sphere.

[***LEdHR35] [35] [***LEdHR36] [36] Beginning with this presumption, we must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7, apply. Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. See *infra*, at 955, and nn. 20, 21. Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect." S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897).

Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, § 8, cl. 4, to "establish a uniform Rule of Naturalization," the House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would [**2785] be canceled under § 244. The one-House veto operated in these cases to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has *acted* and its action has altered Chadha's status.

[***LEdHR37A] [37A] [***LEdHR38A] [38A]
[***LEdHR39A] [39A] [***LEdHR40] [40] The legislative character of the one-House veto in these cases is confirmed by the character of the congressional action it supplants. Neither the House of Representatives nor the Senate contends that, absent the veto provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively [*953] [***346] delegated authority, n16 had determined the alien should remain in the United States. Without the challenged provision in § 244(c)(2), this could have been achieved, if at all, only [*954] by legislation requiring deportation. n17 Similarly, a veto by one House of Congress under § 244(c)(2) cannot be justified as an attempt at amending the standards set out in § 244(a)(1), or as a repeal of §

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244 as applied to Chadha. Amendment and repeal of statutes, no less than enactment, must conform with Art. I. n18

n16

[**LEdHR37B] [37B] [**LEdHR38B] [38B] [**LEdHR39B] [39B] Congress protests that affirming the Court of Appeals in these cases will sanction "lawmaking by the Attorney General. . . . Why is the Attorney General exempt from submitting his proposed changes in the law to the full bicameral process?" Brief for Petitioner in No. 80-2170, p. 40. To be sure, some administrative agency action -- rulemaking, for example -- may resemble "lawmaking." See 5 U. S. C. § 551(4), which defines an agency's "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" This Court has referred to agency activity as being "quasi-legislative" in character. *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). Clearly, however, "[in] the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). See *Buckley v. Valeo*, 424 U.S., at 123. When the Attorney General performs his duties pursuant to § 244, he does not exercise "legislative" power. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214 (1976). The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it -- a statute duly enacted pursuant to Art. I, § 1, 7. The constitutionality of the Attorney General's execution of the authority delegated to him by § 244 involves only a question of delegation doctrine. The courts, when a case or controversy arises, can always "ascertain whether the will of Congress has been obeyed," *Yakus v. United States*, 321 U.S. 414, 425 (1944), and can enforce adherence to statutory standards. See *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*, at 585; *Ethyl Corp. v. EPA*, 176 U. S. App. D. C. 373, 440, 541 F.2d 1, 68 (en banc) (separate statement of Leventhal, J.), cert. denied, 426 U.S. 941 (1976); L. Jaffe, *Judicial Control of Administrative Action* 320 (1965). It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act. Executive action un-

der legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely. A one-House veto is clearly legislative in both character and effect and is not so checked; the need for the check provided by Art. I, § 1, 7, is therefore clear. Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto.

n17 We express no opinion as to whether such legislation would violate any constitutional provision. See n. 8, *supra*.

n18 During the Convention of 1787, the application of the President's veto to repeals of statutes was addressed, and the Framers were apparently content with Madison's comment that "[as] to the difficulty of repeals, it was probable that in doubtful cases the policy would soon take place of limiting the duration of laws as to require renewal instead of repeal." 2 Farrand 587. See Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 *Harv. L. Rev.* 569, 587-599 (1953). There is no provision allowing Congress to repeal or amend laws by other than legislative means pursuant to Art. I.

[**347] [**2786]

[**LEdHR1B] [1B] [**LEdHR41] [41] [**LEdHR42A] [42A] The nature of the decision implemented by the one-House veto in these cases further manifests its legislative character. After long experience with the clumsy, time-consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation -- that is, Congress' decision to

deport Chadha -- no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the [*955] President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked. n19

n19

[***LEdHR42B] [42B]This does not mean that Congress is required to capitulate to "the accretion of policy control by forces outside its chambers." Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 *N. Y. U. L. Rev.* 455, 462 (1977). The Constitution provides Congress with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power. See *id.*, at 460-461; Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto"*, 32 *Ad. L. Rev.* 667 (1980). See also n. 9, *supra*.

Finally, we see that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action. There are four provisions in the Constitution, n20 explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto:

(a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 5;

(b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 6;

(c) The Senate alone was given final unreviewable power to approve or to disapprove Presidential appointments. Art. II, § 2, cl. 2;

(d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

n20 See also U.S. Const., Art. II, § 1, and Amdt. 12.

[***LEdHR43A] [43A]Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms. n21 [*956] [***348] These carefully defined exceptions [**2787] 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. These exceptions are narrow, explicit, and separately justified; none of them authorize the action challenged here. On the contrary, they provide further support for the conclusion that congressional authority is not to be implied and for the conclusion that the veto provided for in § 244(c)(2) is not authorized by the constitutional design of the powers of the Legislative Branch.

n21 An exception from the Presentment Clauses was ratified in *Hollingsworth v. Virginia*, 3 *Dall.* 378 (1798). There the Court held Presidential approval was unnecessary for a proposed constitutional amendment which had passed both Houses of Congress by the requisite two-thirds majority. See U.S. Const., Art. V.

[***LEdHR43B] [43B]One might also include another "exception" to the rule that congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each House has the power to act alone in determining specified internal matters. Art. I, § 7, cls. 2, 3, and § 5, cl. 2. However, this "exception" only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.

Although the bicameral check was not provided for in any of these provisions for independent congressional action, precautionary alternative checks are evident. For example, Art. II, § 2, requires that two-thirds of the Senators present concur in the Senate's consent to a treaty, rather than the simple majority required for passage of legislation. See *The Federalist* No. 64 (J. Jay); *The Federalist* No. 66 (A. Hamilton); *The Federalist* No. 75 (A. Hamilton). Similarly, the Framers adopted an alternative protection, in the stead

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of Presidential veto and bicameralism, by requiring the concurrence of two-thirds of the Senators present for a conviction of impeachment. Art. I, § 3. We also note that the Court's holding in *Hollingsworth, supra*, that a resolution proposing an amendment to the Constitution need not be presented to the President, is subject to two alternative protections. First, a constitutional amendment must command the votes of two-thirds of each House. Second, three-fourths of the states must ratify any amendment.

[***LEdHR1C] [1C] [***LEdHR44A] [44A]
[***LEdHR45A] [45A] [***LEdHR46A] [46A]
[***LEdHR47A] [47A] [***LEdHR48A] [48A] Since
it is clear that the action by the House under § 244(c)(2)
was not within any of the express constitutional excep-
tions authorizing one House to act alone, and equally
[*957] clear that it was an exercise of legislative power,
that action was subject to the standards prescribed in Art.
I. n22 The bicameral [***349] requirement, the Pre-
sentment Clauses, the President's veto, and Congress'
power to override a veto were intended to erect enduring
checks on each Branch and to protect the people from the
improvident exercise of power by mandating certain pre-
scribed steps. To preserve those [*958] checks, and
maintain the separation of powers, the carefully defined
limits on the power of each Branch must not be eroded.
To accomplish what has been attempted by one House of
Congress in this case requires action in conformity with
the express procedures of the Constitution's prescription
for legislative action: passage by a majority of both
Houses and presentment to the President. n23

n22

[***LEdHR44B] [44B] [***LEdHR45B]
[45B] [***LEdHR46B] [46B] JUSTICE POW-
ELL's position is that the one-House veto in this
case is a *judicial* act and therefore unconstitu-
tional as beyond the authority vested in Congress
by the Constitution. We agree that there is a
sense in which one-House action pursuant to §
244(c)(2) has a judicial cast, since it purports to
"review" Executive action. In this case, for ex-
ample, the sponsor of the resolution vetoing the
suspension of Chadha's deportation argued that
Chadha "did not meet [the] statutory require-
ments" for suspension of deportation. *Supra*, at
926. To be sure, it is normally up to the courts to
decide whether an agency has complied with its
statutory mandate. See n. 16, *supra*. But the at-

tempted analogy between judicial action and the
one-House veto is less than perfect. Federal
courts do not enjoy a roving mandate to correct
alleged excesses of administrative agencies; we
are limited by Art. III to hearing cases and con-
troversies and no justiciable case or controversy
was presented by the Attorney General's decision
to allow Chadha to remain in this country. We
are aware of no decision, and JUSTICE
POWELL has cited none, where a federal court
has reviewed a decision of the Attorney General
suspending deportation of an alien pursuant to the
standards set out in § 244(a)(1). This is not sur-
prising, given that no party to such action has ei-
ther the motivation or the right to appeal from it.
As JUSTICE WHITE correctly notes, *post*, at
1001-1002, "the courts have not been given the
authority to review whether an alien should be
given permanent status; review is limited to
whether the Attorney General has properly ap-
plied the statutory standards for" *denying* a re-
quest for suspension of deportation. *Foti v. INS*,
375 U.S. 217 (1963), relied on by JUSTICE
POWELL, addressed only "whether a refusal by
the Attorney General to grant a suspension of de-
portation is one of those 'final orders of deporta-
tion' of which direct review by Courts of Appeals
is authorized under § 106(a) of the Act." *Id.*, at
221. Thus, JUSTICE POWELL's statement that
the one-House veto in this case is "clearly adjudi-
catory," *post*, at 964, simply is not supported by
his accompanying assertion that the House has
"assumed a function ordinarily entrusted to the
federal courts." *Post*, at 965. We are satisfied
that the one-House veto is legislative in purpose
and effect and subject to the procedures set out in
Art. I.

n23

[***LEdHR47B] [47B] Neither can we accept
the suggestion that the one-House veto provision
in § 244(c)(2) either removes or modifies the bi-
cameralism and presentation requirements for the
enactment of future legislation affecting aliens.
See *Atkins v. United States*, 214 Ct. Cl. 186, 250-
251, 556 F.2d 1028, 1063-1064 (1977), cert. de-
nied, 434 U.S. 1009 (1978); Brief for Petitioner
in No. 80-2170, p. 40. The explicit prescription
for legislative action contained in Art. I cannot be
amended by legislation. See n. 13, *supra*.

[***LEdHR48B] [48B] JUSTICE WHITE sug-
gests that the Attorney General's action under §

244(c)(1) suspending deportation is equivalent to a *proposal* for legislation and that because congressional approval is indicated "by the failure to veto, the one-House veto satisfies the requirement of bicameral approval." *Post*, at 997. However, as the Court of Appeals noted, that approach "would analogize the effect of the one house disapproval to the failure of one house to vote affirmatively on a private bill." 634 F.2d 408, 435 (1980). Even if it were clear that Congress entertained such an arcane theory when it enacted § 244(c)(2), which JUSTICE WHITE does not suggest, this would amount to nothing less than an amending of Art. I. The legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority. This does not mean that legislation must always be preceded by debate; on the contrary, we have said that it is not necessary for a legislative body to "articulate its reasons for enacting a statute." *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). But the steps required by Art. I, § 1, 7, make certain that there is an opportunity for deliberation and debate. To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I.

[**2788] The veto authorized by § 244(c)(2) doubtless has been in many respects a convenient shortcut; the "sharing" with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal [*959] clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. The records of the Convention and debates in the States preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people. There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem [***350] clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or

decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

V

[***LEdHR10C] [10C] [***LEdHR1D] [1D] We hold that the congressional veto provision in § 244(c)(2) is severable from the Act and that it is unconstitutional. Accordingly, the judgment of the Court of Appeals is

Affirmed.

CONCURBY:

POWELL

CONCUR:

JUSTICE POWELL, concurring in the judgment.

The Court's decision, based on the Presentment Clauses, Art. I, § 7, cls. 2 and 3, apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause. Congress has included the veto in literally hundreds [*960] of statutes, dating back to the 1930's. Congress clearly views this procedure as essential to controlling the delegation of power to administrative agencies. n1 One reasonably may disagree with Congress' assessment [**2789] of the veto's utility, n2 but the respect due its judgment as a coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide these cases. In my view, the cases may be decided on a narrower ground. When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers. Accordingly, I concur only in the judgment.

n1 As JUSTICE WHITE's dissenting opinion explains, the legislative veto has been included in a wide variety of statutes, ranging from bills for executive reorganization to the War Powers Resolution. See *post*, at 968-972. Whether the veto complies with the Presentment Clauses may well turn on the particular context in which it is exercised, and I would be hesitant to conclude that every veto is unconstitutional on the basis of the unusual example presented by this litigation.

n2 See Martin, *The Legislative Veto and The Responsible Exercise of Congressional Power*, 68 *Va. L. Rev.* 253 (1982); *Consumer Energy Council of America v. FERC*, 218 *U. S. App. D. C.* 34, 84, 673 *F.2d* 425, 475 (1982).

I

A

The Framers perceived that "[the] accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison). [***351] Theirs was not a baseless fear. Under British rule, the Colonies suffered the abuses of unchecked executive power that were attributed, at least popularly, to a hereditary monarchy. See Levi, *Some Aspects of Separation of Powers*, 76 *Colum. L. Rev.* 369, 374 (1976); *The Federalist* No. 48. During the Confederation, [*961] the States reacted by removing power from the executive and placing it in the hands of elected legislators. But many legislators proved to be little better than the Crown. "The supremacy of legislatures came to be recognized as the supremacy of faction and the tyranny of shifting majorities. The legislatures confiscated property, erected paper money schemes, [and] suspended the ordinary means of collecting debts." Levi, *supra*, at 374-375.

One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures. The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the "tyranny of shifting majorities." Jefferson observed that members of the General Assembly in his native Virginia had not been prevented from assuming judicial power, and "[they] have accordingly in many instances decided rights which should have been left to judiciary controversy." n3 *The Federalist* No. 48, *supra*, at 336 (emphasis in original) (quoting T. Jefferson, *Notes on the State of Virginia* 196 (London ed. 1787)). The same concern also was evident in the reports of the Council of the Censors, a body that was charged with determining whether the Pennsylvania Legislature had complied with the State Constitution. The Council found that during this period "[the] constitutional trial by jury had been violated; and powers assumed, which had not been delegated by the Constitution. . . . [Cases] belonging [*962] to the judiciary department, frequently [had been] drawn within legislative cognizance and determination." *The Federalist* No. 48, at 336-337.

n3 Jefferson later questioned the degree to which the Constitution insulates the judiciary. See D. Malone, *Jefferson the President: Second Term, 1805-1809*, pp. 304-305 (1974). In response to Chief Justice Marshall's rulings during Aaron Burr's trial, Jefferson stated that the judiciary had favored Burr -- whom Jefferson viewed as clearly guilty of treason -- at the expense of the country. He predicted that the people "will see then and amend the error in our Constitution, which makes any branch independent of the nation." *Id.*, at 305 (quoting Jefferson's letter to William Giles). The very controversy that attended Burr's trial, however, demonstrates the wisdom in providing a neutral forum, removed from political pressure, for the determination of one person's rights.

It was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches. Their concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person was expressed not only in this general allocation of power, but also in more specific provisions, such as the Bill of Attainder Clause, Art. I, § 9, cl. 3. As the [**2790] Court recognized in *United States v. Brown*, 381 *U.S.* 437, 442 (1965), "the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply -- trial by legislature." This Clause, and the separation-of-powers doctrine [***352] generally, reflect the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power.

B

The Constitution does not establish three branches with precisely defined boundaries. See *Buckley v. Valeo*, 424 *U.S.* 1, 121 (1976) (*per curiam*). Rather, as Justice Jackson wrote: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 *U.S.* 579, 635 (1952) (concurring in judgment). The Court thus has been mindful that the boundaries between each branch should be fixed "according to common sense and the inherent necessities of the governmental coordination." *J.W. Hampton & Co. v. United States*, 276 *U.S.* 394, 406 (1928). But where one branch has impaired or sought to assume a power central to another branch, the [*963]

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Court has not hesitated to enforce the doctrine. See *Buckley v. Valeo, supra*, at 123.

Functionally, the doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. See *Nixon v. Administrator of General Services*, 433 U.S. 425, 433 (1977); *United States v. Nixon*, 418 U.S. 683 (1974). Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. See *Youngstown Sheet & Tube Co. v. Sawyer, supra*, at 587; *Springer v. Philippine Islands*, 277 U.S. 189, 203 (1928). These cases present the latter situation. n4

n4 The House and the Senate argue that the legislative veto does not prevent the executive from exercising its constitutionally assigned function. Even assuming this argument is correct, it does not address the concern that the Congress is exercising unchecked judicial power at the expense of individual liberties. It was precisely to prevent such arbitrary action that the Framers adopted the doctrine of separation of powers. See, e. g., *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

II

Before considering whether Congress impermissibly assumed a judicial function, it is helpful to recount briefly Congress' actions. Jagdish Rai Chadha, a citizen of Kenya, stayed in this country after his student visa expired. Although he was scheduled to be deported, he requested the Immigration and Naturalization Service to suspend his deportation because he met the statutory criteria for permanent residence in this country. After a hearing, n5 the Service granted Chadha's request and [***353] sent -- as required by [*964] the reservation of the veto right -- a report of its action to Congress.

n5 The Immigration and Naturalization Service, a division of the Department of Justice, administers the Immigration and Nationality Act on behalf of the Attorney General, who has primary responsibility for the Act's enforcement. See 8 U. S. C. § 1103. The Act establishes a detailed administrative procedure for determining when a specific person is to be deported, see § 1252(b), and provides for judicial review of this decision, see § 1105a; *Foti v. INS*, 375 U.S. 217 (1963).

In addition to the report on Chadha, Congress had before it the names of 339 other persons whose deportations also had been suspended by the Service. The House [**2791] Committee on the Judiciary decided that six of these persons, including Chadha, should not be allowed to remain in this country. Accordingly, it submitted a resolution to the House, which stated simply that "the House of Representatives does not approve the granting of permanent residence in the United States to the aliens hereinafter named." 121 Cong. Rec. 40800 (1975). The resolution was not distributed prior to the vote, n6 but the Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law explained to the House:

"It was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet [the] statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended." *Ibid.* (remarks of Rep. Eilberg).

Without further explanation and without a recorded vote, the House rejected the Service's determination that these six people met the statutory criteria.

n6 Normally the House would have distributed the resolution before acting on it, see 121 Cong. Rec. 40800 (1975), but the statute providing for the legislative veto limits the time in which Congress may veto the Service's determination that deportation should be suspended. See 8 U. S. C. § 1254(c)(2). In this case Congress had Chadha's report before it for approximately a year and a half, but failed to act on it until three days before the end of the limitations period. Accordingly, it was required to abandon its normal procedures for considering resolutions, thereby increasing the danger of arbitrary and ill-considered action.

On its face, the House's action appears clearly adjudicatory. n7 The House did not enact a general rule; rather it [*965] made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches. Even if the House did not make a *de novo* determination, but simply reviewed the Immigration and Naturalization Service's findings, it still assumed a function ordinarily entrusted to the federal courts. n8 See 5 [***354] U. S. C. § 704 (providing generally for judicial review of final agency action); cf. *Foti v. INS*, 375 U.S. 217 (1963) (holding that courts of appeals have jurisdiction to review INS decisions denying suspension of deportation). Where, as

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here, Congress has exercised a power "that cannot possibly be regarded as merely in aid of the legislative function of Congress," [*966] *Buckley v. Valeo*, 424 U.S., at 138, [**2792] the decisions of this Court have held that Congress impermissibly assumed a function that the Constitution entrusted to another branch, see *id.*, at 138-141; cf. *Springer v. Philippine Islands*, 277 U.S., at 202.

n7 The Court concludes that Congress' action was legislative in character because each branch "presumptively [acts] within its assigned sphere." *Ante*, at 952. The Court's presumption provides a useful starting point, but does not conclude the inquiry. Nor does the fact that the House's action alters an individual's legal status indicate, as the Court reasons, see *ante*, at 952-954, that the action is legislative rather than adjudicative in nature. In determining whether one branch unconstitutionally has assumed a power central to another branch, the traditional characterization of the assumed power as legislative, executive, or judicial may provide some guidance. See *Springer v. Philippine Islands*, 277 U.S. 189, 203 (1928). But reasonable minds may disagree over the character of an act, and the more helpful inquiry, in my view, is whether the act in question raises the dangers the Framers sought to avoid.

n8 The Court reasons in response to this argument that the one-House veto exercised in this case was not judicial in nature because the decision of the Immigration and Naturalization Service did not present a justiciable issue that could have been reviewed by a court on appeal. See *ante*, at 957, n. 22. The Court notes that since the administrative agency decided the case in favor of Chadha, there was no aggrieved party who could appeal. Reliance by the Court on this fact misses the point. Even if review of the particular decision to suspend deportation is not committed to the courts, the House of Representatives assumed a function that generally is entrusted to an impartial tribunal. In my view, the Legislative Branch in effect acted as an appellate court by overruling the Service's application of established law to Chadha. And unlike a court or an administrative agency, it did not provide Chadha with the right to counsel or a hearing before acting. Although the parallel is not entirely complete, the effect on Chadha's personal rights would not have been different in principle had he been acquitted of a federal crime and thereafter found by one House of Congress to have been guilty.

The impropriety of the House's assumption of this function is confirmed by the fact that its action raises the very danger the Framers sought to avoid -- the exercise of unchecked power. In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country. n9 Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency n10 adjudicates individual rights. The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority."

n9 When Congress grants particular individuals relief or benefits under its spending power, the danger of oppressive action that the separation of powers was designed to avoid is not implicated. Similarly, Congress may authorize the admission of individual aliens by special Acts, but it does not follow that Congress unilaterally may make a judgment that a particular alien has no legal right to remain in this country. See Memorandum Concerning H. R. 9766 Entitled "An Act to Direct the Deportation of Harry Renton Bridges," reprinted in S. Rep. No. 2031, 76th Cong., 3d Sess., pt. 1, p. 8 (1940). As Attorney General Robert Jackson remarked, such a practice "would be an historical departure from an unbroken American practice and tradition." *Id.*, at 9.

n10 We have recognized that independent regulatory agencies and departments of the Executive Branch often exercise authority that is "judicial in nature." *Buckley v. Valeo*, 424 U.S. 1, 140-141 (1976). This function, however, forms part of the agencies' execution of public law and is subject to the procedural safeguards, including judicial review, provided by the Administrative Procedure Act, see 5 U. S. C. § 551 *et seq.* See also n. 5, *supra*.

[*967] Chief Justice Marshall observed: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to [***355] be the duty of other departments." *Fletcher v.*

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Peck, 6 Cranch 87, 136 (1810). In my view, when Congress undertook to apply its rules to Chadha, it exceeded the scope of its constitutionally prescribed authority. I would not reach the broader question whether legislative vetoes are invalid under the Presentment Clauses.

DISSENTBY:

WHITE; REHNQUIST

DISSENT:

JUSTICE WHITE, dissenting.

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance. And it is for this reason that the Court would have been well advised to decide the cases, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies. n1

n1 As JUSTICE POWELL observes in his separate opinion, "the respect due [Congress] judgment as a coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide these cases." *Ante*, at 960. The Court of Appeals for the Ninth Circuit also recognized that "we are not here faced with a situation in which the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device." 634 F.2d 408, 433 (1980) (footnote omitted).

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can [*2793] hardly be overstated. It has become a central [*968] means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy

landscape, or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes. n2 The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment, and the economy.

n2 A selected list and brief description of these provisions is appended to this opinion.

I

The legislative veto developed initially in response to the problems of reorganizing the sprawling Government structure created in response to the Depression. The Reorganization Acts established the chief model for the legislative veto. When President Hoover requested authority to reorganize the Government in 1929, he coupled his request that the [***356] "Congress be willing to delegate its authority over the problem (subject to defined principles) to the Executive" with a proposal for legislative review. He proposed that the Executive "should act upon approval of a joint committee of Congress or with the reservation of power of revision by Congress within some limited period adequate for its consideration." Public Papers of the Presidents, Herbert Hoover, 1929, p. 432 (1974). Congress followed President Hoover's suggestion and authorized reorganization subject to legislative [*969] review. Act of June 30, 1932, § 407, 47 Stat. 414. Although the reorganization authority reenacted in 1933 did not contain a legislative veto provision, the provision returned during the Roosevelt administration and has since been renewed numerous times. Over the years, the provision was used extensively. Presidents submitted 115 Reorganization Plans to Congress of which 23 were disapproved by Congress pursuant to legislative veto provisions. See App. A to Brief for United States Senate on Reargument.

Shortly after adoption of the Reorganization Act of 1939, 53 Stat. 561, Congress and the President applied the legislative veto procedure to resolve the delegation problem for national security and foreign affairs. World War II occasioned the need to transfer greater authority to the President in these areas. The legislative veto offered the means by which Congress could confer additional authority while preserving its own constitutional role. During World War II, Congress enacted over 30 statutes conferring powers on the Executive with legislative veto provisions. n3 President Roosevelt accepted the

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veto as the necessary price for obtaining exceptional authority. n4

n3 Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 *Calif. L. Rev.* 983, 1089-1090 (1975) (listing statutes).

n4 The Roosevelt administration submitted proposed legislation containing veto provisions and defended their constitutionality. See, e. g., General Counsel to the Office of Price Administration, *Statement on Constitutionality of Concurrent Resolution Provision of Proposed Price Control Bill* (H. R. 5479), reprinted in *Price-Control Bill: Hearings on H. R. 5479 before the House Committee on Banking and Currency*, 77th Cong., 1st Sess., pt. 1, p. 983 (1941).

Over the quarter century following World War II, Presidents continued to accept legislative vetoes by one or both Houses as constitutional, while regularly denouncing provisions by which congressional Committees reviewed Executive activity. n5 [**2794] The legislative veto balanced delegations [***357] of [*970] statutory authority in new areas of governmental involvement: the space program, international agreements on nuclear energy, tariff arrangements, and adjustment of federal pay rates. n6

n5 Presidential objections to the veto, until the veto by President Nixon of the War Powers Resolution, principally concerned bills authorizing Committee vetoes. As the Senate Subcommittee on Separation of Powers found in 1969, "an accommodation was reached years ago on legislative vetoes exercised by the entire Congress or by one House, [while] disputes have continued to arise over the committee form of the veto." S. Rep. No. 91-549, p. 14 (1969). Presidents Kennedy and Johnson proposed enactment of statutes with legislative veto provisions. See *National Wilderness Preservation Act: Hearings on S. 4 before the Senate Committee on Interior and Insular Affairs*, 88th Cong., 1st Sess., 4 (1963) (President Kennedy's proposals for withdrawal of wilderness areas); *President's Message to the Congress Transmitting the Budget for Fiscal Year 1970*, 5 *Weekly Comp. Pres. Doc.* 70, 73 (1969) (President Johnson's proposals allowing legislative veto of tax surcharge). The administration of President Kennedy submitted a memorandum supporting the constitutionality of the legislative veto. See General Counsel of the

Department of Agriculture, *Constitutionality of Title I of H. R. 6400*, 87th Cong., 1st Session (1961), reprinted in *Legislative Policy of the Bureau of the Budget: Hearing before the Subcommittee on Conservation and Credit of the House Committee on Agriculture*, 89th Cong., 2d Sess., 27, 31-32 (1966). During the administration of President Johnson, the Department of Justice again defended the constitutionality of the legislative veto provision of the Reorganization Act, as contrasted with provisions for a Committee veto. See *Separation of Powers: Hearings before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess., 206 (1967) (testimony of Frank M. Wozencraft, Assistant Attorney General for the Office of Legal Counsel).

n6 *National Aeronautics and Space Act of 1958*, Pub. L. 85-568, § 302, 72 Stat. 433 (space program); *Atomic Energy Act Amendments of 1958*, Pub. L. 85-479, § 4, 72 Stat. 277 (cooperative nuclear agreements); *Trade Expansion Act of 1962*, Pub. L. 87-794, § 351, 76 Stat. 899, 19 *U. S. C. § 1981* (tariff recommended by International Trade Commission may be imposed by concurrent resolution of approval); *Postal Revenue and Federal Salary Act of 1967*, Pub. L. 90-206, § 255(i)(1), 81 Stat. 644.

During the 1970's the legislative veto was important in resolving a series of major constitutional disputes between the President and Congress over claims of the President to broad impoundment, war, and national emergency powers. The [*971] key provision of the War Powers Resolution, 50 *U. S. C. § 1544(c)*, authorizes the termination by concurrent resolution of the use of armed forces in hostilities. A similar measure resolved the problem posed by Presidential claims of inherent power to impound appropriations. *Congressional Budget and Impoundment Control Act of 1974*, 31 *U. S. C. § 1403*. In conference, a compromise was achieved under which permanent impoundments, termed "reëscissions," would require approval through enactment of legislation. In contrast, temporary impoundments, or "deferrals," would become effective unless disapproved by one House. This compromise provided the President with flexibility, while preserving ultimate congressional control over the budget. n7 Although the War Powers Resolution was enacted over President Nixon's veto, the Impoundment Control Act was enacted with the President's approval. These statutes were followed by others resolving similar problems: the National Emergencies

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Act, § 202, 90 Stat. 1255, 50 U. S. C. § 1622, resolving the longstanding problems with unchecked Executive emergency power; the International Security Assistance and Arms Export Control Act, § 211, 90 Stat. 740, 22 U. S. C. § 2776(b), resolving the problem of foreign arms sales; and the Nuclear Non-Proliferation Act of 1978, § § 303(a), 304(a), 306, 307, 401, 92 Stat. 130, 134, 137, 138, 144-145, 42 U. S. C. § § 2160(f), 2155(b), 2157(b), 2158, 2153(d) (1976 ed., Supp. V), resolving the problem of exports of nuclear technology.

n7 The Impoundment Control Act's provision for legislative review has been used extensively. Presidents have submitted hundreds of proposed budget deferrals, of which 65 have been disapproved by resolutions of the House or Senate with no protest by the Executive. See App. B to Brief for United States Senate on Reargument.

In the energy field, the legislative veto served to balance broad delegations in legislation emerging from the energy crisis of [**2795] the 1970's. n8 In [***358] the educational field, it was found [*972] that fragmented and narrow grant programs "inevitably lead to Executive-Legislative confrontations" because they inaptly limited the Commissioner of Education's authority. S. Rep. No. 93-763, p. 69 (1974). The response was to grant the Commissioner of Education rulemaking authority, subject to a legislative veto. In the trade regulation area, the veto preserved congressional authority over the Federal Trade Commission's broad mandate to make rules to prevent businesses from engaging in "unfair or deceptive acts or practices in commerce." n9

n8 The veto appears in a host of broad statutory delegations concerning energy rationing, contingency plans, strategic oil reserves, allocation of energy production materials, oil exports, and naval petroleum reserve production. Naval Petroleum Reserves Production Act of 1976, Pub. L. 94-258, § 201(3), 90 Stat. 309, 10 U. S. C. § 7422(c)(2)(C); Energy Policy and Conservation Act, Pub. L. 94-163, § § 159, 201, 401(a), and 455, 89 Stat. 886, 890, 941, and 950, 42 U. S. C. § § 6239 and 6261, 15 U. S. C. § § 757 and 760a (strategic oil reserves, rationing and contingency plans, oil price controls and product allocation); Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. 93-577, § 12, 88 Stat. 1892-1893, 42 U. S. C. § 5911 (allocation of energy production materials); Act of Nov. 16, 1973, Pub. L. 93-153, § 101, 87 Stat. 582, 30 U. S. C. § 185(u) (oil exports).

n9 Congress found that under the agency's

"very broad authority to prohibit conduct which is 'unfair or deceptive' . . . the FTC can regulate virtually every aspect of America's commercial life. . . . The FTC's rules are not merely narrow interpretations of a tightly drawn statute; instead, they are broad policy pronouncements which Congress has an obligation to study and review." 124 Cong. Rec. 5012 (1978) (statement by Rep. Broyhill).

A two-House legislative veto was added to constrain that broad delegation. Federal Trade Commission Improvements Act of 1980, § 21(a), 94 Stat. 393, 15 U. S. C. § 57a-1(a) (1976 ed., Supp. V). The constitutionality of that provision is presently pending before us. *United States Senate v. Federal Trade Commission*, No. 82-935; *United States House of Representatives v. Federal Trade Commission*, No. 82-1044.

Even this brief review suffices to demonstrate that the legislative veto is more than "efficient, convenient, and useful." *Ante*, at 944. It is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves [*973] Congress' control over lawmaking. Perhaps there are other means of accommodation and accountability, but the increasing reliance of Congress upon the legislative veto suggests that the alternatives to which Congress must now turn are not entirely satisfactory. n10

n10 While Congress could write certain statutes with greater specificity, it is unlikely that this is a realistic or even desirable substitute for the legislative veto. The controversial nature of many issues would prevent Congress from reaching agreement on many major problems if specificity were required in their enactments. Fuchs, *Administrative Agencies and the Energy Problem*, 47 *Ind. L. J.* 606, 608 (1972); Stewart, *Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1695-1696 (1975). For example, in the deportation context, the solution is not for Congress to create more refined categorizations of the deportable aliens whose status should be subject to change. In 1979, the Immigration and Naturalization Service proposed regulations set-

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ting forth factors to be considered in the exercise of discretion under numerous provisions of the Act, but not including § 244, to ensure "fair and uniform" adjudication "under appropriate discretionary criteria." 44 Fed. Reg. 36187 (1979). The proposed rule was canceled in 1981, because "[there] is an inherent failure in any attempt to list those factors which should be considered in the exercise of discretion. It is impossible to list or foresee all of the adverse or favorable factors which may be present in a given set of circumstances." 46 Fed. Reg. 9119 (1981).

Oversight hearings and congressional investigations have their purpose, but unless Congress is to be rendered a think tank or debating society, they are no substitute for the exercise of actual authority. The "delaying" procedure approved in *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15 (1941), while satisfactory for certain measures, has its own shortcomings. Because a new law must be passed to restrain administrative action, Congress must delegate authority without the certain ability of being able to check its exercise.

Finally, the passage of corrective legislation after agency regulations take effect or Executive Branch officials have acted entails the drawbacks endemic to a retroactive response. "Post hoc substantive revision of legislation, the only available corrective mechanism in the absence of post-enactment review could have serious prejudicial consequences; if Congress retroactively tampered with a price control system after prices have been set, the economy could be damaged and private rights seriously impaired; if Congress rescinded the sale of arms to a foreign country, our relations with that country would be severely strained; and if Congress reshuffled the bureaucracy after a President's reorganization proposal had taken effect, the results could be chaotic." Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N. Y. U. L. Rev. 455, 464 (1977) (footnote omitted).

[*974] [***359] [**2796] The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches -- the concerns of Madison and Hamilton. Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Art. I as the Nation's lawmaker. While the President has often objected to particular legislative vetoes, generally those left in the hands of congressional Committees, the Executive has more often agreed to legislative review

as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority.

II

For all these reasons, the apparent sweep of the Court's decision today is regrettable. The Court's Art. I analysis appears to invalidate all legislative vetoes irrespective of form or subject. Because the legislative veto is commonly found as a check upon rulemaking by administrative agencies and upon broad-based policy decisions of the Executive Branch, it is particularly unfortunate that the Court reaches its decision in cases involving the exercise of a veto over deportation decisions regarding particular individuals. Courts should always be wary of striking statutes as unconstitutional; to strike an entire class of statutes based on consideration of a somewhat atypical and more readily indictable exemplar of the class is irresponsible. It was for cases such as these that Justice Brandeis wrote:

"The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress

[*975] "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N. Y. & P.S.S. Co. v. Emigration Commissioners*, [113 U.S. 33, 39 (1885)]." *Ashwander v. TVA*, 297 U.S. 288, 345, 347 (1936) (concurring opinion).

[***360] Unfortunately, today's holding is not so limited. n11

n11 Perhaps I am wrong and the Court remains open to consider whether certain forms of the legislative veto are reconcilable with the Art. I requirements. One possibility for the Court and Congress is to accept that a resolution of disapproval cannot be given legal effect in its own right, but may serve as a guide in the interpretation of a delegation of lawmaking authority. The exercise of the veto could be read as a manifestation of legislative intent, which, unless itself contrary to the authorizing statute, serves as the definitive construction of the statute. Therefore, an agency rule vetoed by Congress would not be enforced in the courts because the veto indicates that the agency action departs from the congressional intent.

This limited role for a redefined legislative veto follows in the steps of the longstanding prac-

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tice of giving some weight to subsequent legislative reaction to administrative rulemaking. The silence of Congress after consideration of a practice by the Executive may be equivalent to acquiescence and consent that the practice be continued until the power exercised be revoked. *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473 (1915). See also *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965) (relying on congressional failure to repeal administration interpretation); *Haig v. Agee*, 453 U.S. 280 (1981) (same); *Bob Jones University v. United States*, 461 U.S. 574 (1983) (same); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 384 (1982) (relying on failure to disturb judicial decision in later revision of law).

Reliance on subsequent legislative reaction has been limited by the fear of overturning the intent of the original Congress and the unreliability of discerning the views of a subsequent Congress. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 (1980); *United States v. Price*, 361 U.S. 304, 313 (1960). These concerns are not forceful when the original statute authorizes subsequent legislative review. The presence of the review provision constitutes an express authorization for a subsequent Congress to participate in defining the meaning of the law. Second, the disapproval resolution allows for a reliable determination of congressional intent. Without the review mechanism, uncertainty over the inferences to draw from subsequent congressional action is understandable. The refusal to pass an amendment, for example, may indicate opposition to that position but could mean that Congress believes the amendment is redundant with the statute as written. By contrast, the exercise of a legislative veto is an unmistakable indication that the agency or Executive decision at issue is disfavored. This is not to suggest that the failure to pass a veto resolution should be given any weight whatever.

[*976] [**2797] If the legislative veto were as plainly unconstitutional as the Court strives to suggest, its broad ruling today would be more comprehensible. But, the constitutionality of the legislative veto is anything but clear-cut. The issue divides scholars, n12 [***361] courts, n13 Attorneys General, n14 and the two other [*977] branches of the National Government. If the veto devices so flagrantly disregarded the requirements of Art. I as the Court today suggests, I find it incomprehensible that Congress, whose Members [**2798] are bound by oath to uphold the Constitution,

would have placed these mechanisms in nearly 200 separate laws over a period of 50 years.

n12 For commentary generally favorable to the legislative veto, see Abourezk, *Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 *Ind. L. J.* 323 (1977); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 *Geo. Wash. L. Rev.* 467 (1962); Dry, *The Congressional Veto and the Constitutional Separation of Powers*, in *The Presidency in the Constitutional Order* 195 (J. Bessette & J. Tulis eds. 1981); Javits & Klein, *supra* n. 10, at 455; Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 *Ind. L. J.* 367 (1977); Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 *Nw. U. L. Rev.* 1064 (1981); Newman & Keaton, *Congress and the Faithful Execution of Laws -- Should Legislators Supervise Administrators?*, 41 *Calif. L. Rev.* 565 (1953); Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 *Kan. L. Rev.* 277 (1975); Rodino, *Congressional Review of Executive Action*, 5 *Seton Hall L. Rev.* 489 (1974); Schwartz, *Legislative Veto and the Constitution -- A Reexamination*, 46 *Geo. Wash. L. Rev.* 351 (1978); Schwartz, *Legislative Control of Administrative Rules and Regulations: I. The American Experience*, 30 *N. Y. U. L. Rev.* 1031 (1955); Stewart, *Constitutionality of the Legislative Veto*, 13 *Harv. J. Legis.* 593 (1976).

For commentary generally unfavorable to the legislative veto, see J. Bolton, *The Legislative Veto: Unseparating the Powers* (1977); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 *Harv. L. Rev.* 1369 (1977); Dixon, *The Congressional Veto and Separation of Powers: The Executive On a Leash?*, 56 *N. C. L. Rev.* 423 (1978); FitzGerald, *Congressional Oversight or Congressional Foresight: Guidelines From the Founding Fathers*, 28 *Ad. L. Rev.* 429 (1976); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 *Harv. L. Rev.* 569 (1953); Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 *Harv. J. Legis.* 735 (1979); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 *Va. L. Rev.* 253 (1982); Scalia, *The Legislative Veto: A False Remedy For System Overload*, 3 *Regulation* 19 (Nov.-Dec. 1979); Watson, *supra* n. 3, at 983; Com-

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ment, Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto, 26 *Am. U. L. Rev.* 1018 (1977); Note, Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge, 1976 *Duke L. J.* 285; Recent Developments, The Legislative Veto in the Arms Export Control Act of 1976, 9 *Law & Pol'y Int'l Bus.* 1029 (1977).

n13 Compare *Atkins v. United States*, 214 Ct. Cl. 186, 556 F.2d 1028 (1977) (upholding legislative veto provision in Federal Salary Act, 2 U.S.C. § 351 et seq.), cert. denied, 434 U.S. 1009 (1978), with *Consumer Energy Council of America v. FERC*, 218 U.S. App. D. C. 34, 673 F.2d 425 (1982) (holding unconstitutional the legislative veto provision in the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3342 (1976 ed., Supp. V)), appeals docketed, Nos. 81-2008, 81-2020, 81-2151, and 81-2171, and cert. pending, Nos. 82-177 and 82-209.

n14 See, e. g., 6 *Op. Atty. Gen.* 680, 683 (1854); Dept. of Justice, Memorandum re Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress, reprinted in S. Rep. No. 232, 81st Cong., 1st Sess., 19-20 (1949); Jackson, A Presidential Legal Opinion, 66 *Harv. L. Rev.* 1353 (1953); 43 *Op. Atty. Gen.* No. 10, p. 2 (1977).

The reality of the situation is that the constitutional question posed today is one of immense difficulty over which the Executive and Legislative Branches -- as well as scholars and judges -- have understandably disagreed. That disagreement stems from the silence of the Constitution on the precise question: The Constitution does not directly authorize or prohibit the legislative veto. Thus, our task should be to determine whether the legislative veto is consistent with the purposes of Art. I and the principles of separation of powers which are reflected in that Article and throughout the Constitution. n15 [*978] We should not find the lack of a specific constitutional authorization for the legislative veto surprising, and I would not infer disapproval of the mechanism from its absence. From the summer of 1787 to the present the Government of the United States has become an endeavor far beyond the contemplation of the Framers. Only within the last half century has the complexity and size of the Federal Government's responsibilities grown so greatly that the Congress must rely on the legislative veto as the most effective if not the only means to insure

its role as the Nation's lawmaker. But the wisdom of the Framers was to [***362] anticipate that the Nation would grow and new problems of governance would require different solutions. Accordingly, our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles. This was the spirit in which Justice Jackson penned his influential concurrence in the *Steel Seizure Case*:

"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).

n15 I limit my concern here to those legislative vetoes which require either one or both Houses of Congress to pass resolutions of approval or disapproval, and leave aside the questions arising from the exercise of such powers by Committees of Congress.

This is the perspective from which we should approach the novel constitutional questions presented by the legislative veto. In my view, neither Art. I of the Constitution nor the doctrine of separation of powers is violated by this mechanism [*979] by which our elected Representatives preserve their voice in the governance of the Nation.

III

The Court holds that the disapproval of a suspension of deportation by the resolution of one House of Congress is an exercise of legislative power without compliance with the prerequisites for lawmaking set forth in Art. I of the Constitution. Specifically, the Court maintains that the provisions of § 244(c)(2) are inconsistent with the requirement of bicameral approval, implicit in Art. I, § 1, and the requirement that all bills and resolutions that require the concurrence of both Houses be presented to the President, Art. I, § 7, cls. 2 and 3. n16

n16 I agree with JUSTICE REHNQUIST that Congress did not intend the one-House veto provision of § 244(c)(2) to be severable. Although the general rule is that the presence of a saving clause creates a presumption of divisibility, *Champlin Refining Co. v. Corporation Com-*

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m'n of Oklahoma, 286 U.S. 210, 235 (1932), I read the saving clause contained in § 406 of the Immigration and Nationality Act as primarily pertaining to the severability of major parts of the Act from one another, not the divisibility of different provisions within a single section. Surely, Congress would want the naturalization provisions of the Act to be severable from the deportation sections. But this does not support preserving § 244 without the legislative veto any more than a saving provision would justify preserving immigration authority without quota limits.

More relevant is the fact that for 40 years Congress has insisted on retaining a voice on individual suspension cases -- it has frequently rejected bills which would place final authority in the Executive Branch. It is clear that Congress believed its retention crucial. Given this history, the Court's rewriting of the Act flouts the will of Congress.

[**2799] I do not dispute the Court's truismatic exposition of these Clauses. There is no question that a bill does not become a law until it is approved by both the House and the Senate, and presented to the President. Similarly, I would not hesitate to strike an action of Congress in the form of a concurrent resolution which constituted an exercise of original lawmaking authority. I agree with the Court that the President's [*980] qualified veto power is a critical element in the distribution of [***363] powers under the Constitution, widely endorsed among the Framers, and intended to serve the President as a defense against legislative encroachment and to check the "passing of bad laws, through haste, inadvertence, or design." *The Federalist* No. 73, p. 458 (H. Lodge ed. 1888) (A. Hamilton). The records of the Convention reveal that it is the first purpose which figured most prominently but I acknowledge the vitality of the second. *Id.*, at 443. I also agree that the bicameral approval required by Art. I, § 1, 7, "was of scarcely less concern to the Framers than was the Presidential veto," *ante*, at 948, and that the need to divide and disperse legislative power figures significantly in our scheme of Government. All of this, Part III of the Court's opinion, is entirely unexceptionable.

It does not, however, answer the constitutional question before us. The power to exercise a legislative veto is not the power to write new law without bicameral approval or Presidential consideration. The veto must be authorized by statute and may only negative what an Executive department or independent agency has proposed. On its face, the legislative veto no more allows one House of Congress to make law than does the Presidential veto confer such power upon the President. Ac-

cordingly, the Court properly recognizes that it "must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7, apply" and admits that "[not] every action taken by either House is subject to the bicameralism and presentation requirements of Art. I." *Ante*, at 952.

A

The terms of the Presentment Clauses suggest only that bills and their equivalent are subject to the requirements of bicameral passage and presentment to the President. Article I, § 7, cl. 2, stipulates only that "Every Bill which shall have passed the House of Representatives and the Senate, [*981] shall, before it becomes a law, be presented to the President" for approval or disapproval, his disapproval then subject to being overridden by a two-thirds vote of both Houses. Section 7, cl. 3, goes further:

"Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

Although the Clause does not specify the actions for which the concurrence of both Houses is "necessary," the proceedings at the Philadelphia Convention suggest its purpose was to prevent Congress from circumventing the presentation requirement in the making of new legislation. James Madison observed that if the President's veto was confined to bills, it could be evaded by calling a proposed law a "resolution" or "vote" rather than a "bill." Accordingly, he proposed that "or resolve" should be added after "bill" in what is now Clause 2 of § 7. 2 M. Farrand, *The Records of the Federal Convention of 1787*, pp. 301-302 (1911). [***364] After a short discussion on the subject, the amendment was rejected. On the following day, however, Randolph renewed [**2800] the proposal in the substantial form as it now appears, and the motion passed. *Id.*, at 304-305; 5 J. Elliot, *Debates on the Federal Constitution* 431 (1845). The chosen language, Madison's comment, and the brevity of the Convention's consideration, all suggest a modest role was intended for the Clause and no broad restraint on congressional authority was contemplated. See Stewart, *Constitutionality of the Legislative Veto*, 13 *Harv. J. Legis.* 593, 609-611 (1976). This reading is consistent with the historical background of the Presentment Clause itself which reveals only that the Framers were concerned [*982] with limiting the methods for enacting

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new legislation. The Framers were aware of the experience in Pennsylvania where the legislature had evaded the requirements attached to the passing of legislation by the use of "resolves, " and the criticisms directed at this practice by the Council of Censors. n17 There is no record that the Convention contemplated, let alone intended, that these Art. I requirements would someday be invoked to restrain the scope of congressional authority pursuant to duly enacted law. n18

n17 The Pennsylvania Constitution required that all "bills of [a] public nature" had to be printed after being introduced and had to lie over until the following session of the legislature before adoption. Pa. Const., § 15 (1776). These printing and layover requirements applied only to "bills." At the time, measures could also be enacted as a resolve, which was allowed by the Constitution as "urgent temporary legislation" without such requirements. A Nevins, *The American States During and After the Revolution* 152 (1969). Using this method, the Pennsylvania Legislature routinely evaded printing and layover requirements through adoption of resolves. *Ibid.*

A 1784 report of a committee of the Council of Censors, a state body responsible for periodically reviewing the state government's adherence to its Constitution, charged that the procedures for enacting legislation had been evaded though the adoption of resolves instead of bills. Report of the Committee of the Council of Censors 13 (1784). See Nevins, *supra*, at 190. When three years later the federal Constitutional Convention assembled in Philadelphia, the delegates were reminded, in the course of discussing the President's veto, of the dangers pointed out by the Council of Censors Report. 5 J. Elliot, *Debates on the Federal Constitution* 430 (1845). Furthermore, Madison, who made the motion that led to the Presentment Clause, knew of the Council of Censors Report, *The Federalist* No. 50, p. 319 (H. Lodge ed. 1888), and was aware of the Pennsylvania experience. See *The Federalist* No. 48, *supra*, at 311-312. We have previously recognized the relevance of the Council of Censors Report in interpreting the Constitution. See *Powell v. McCormack*, 395 U.S. 486, 529-530 (1969).

n18 Although the legislative veto was not a feature of congressional enactments until the 20th century, the practices of the first Congresses demonstrate that the constraints of Art. I were not

envisioned as a constitutional straitjacket. The First Congress, for example, began the practice of arming its Committees with broad investigatory powers without the passage of legislation. See A. Josephy, *On the Hill: A History of the American Congress* 81-83 (1979). More directly pertinent is the First Congress' treatment of the Northwest Territories Ordinance of 1787. The Ordinance, initially drafted under the Articles of Confederation on July 13, 1787, was the document which governed the territory of the United States northwest of the Ohio River. The Ordinance authorized the Territories to adopt laws, subject to disapproval in Congress.

"The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district, *and report them to Congress*, from time to time; which laws shall be in force in the district until the organization of the general assembly therein, *unless disapproved of by Congress*; but afterwards the legislature shall have authority to alter them as they shall think fit" (emphasis added).

After the Constitution was ratified, the Ordinance was reenacted to conform to the requirements of the Constitution. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50-51. Certain provisions, such as one relating to appointment of officials by Congress, were changed because of constitutional concerns, but the language allowing disapproval by Congress was retained. Subsequent provisions for territorial laws contained similar language. See, e. g., 48 U. S. C. § 1478.

Although at times Congress disapproved of territorial actions by passing legislation, see, e. g., Act of Mar. 3, 1807, ch. 44, 2 Stat. 444, on at least two occasions one House of Congress passed resolutions to disapprove territorial laws, only to have the other House fail to pass the measure for reasons pertaining to the subject matter of the bills. First, on February 16, 1795, the House of Representatives passed a concurrent resolution disapproving in one sweep all but one of the laws that the Governors and judges of the Northwest Territory had passed at a legislative session on August 1, 1792. 4 *Annals of Cong.* 1227. The Senate, however, refused to concur. *Id.*, at 830. See B. Bond, *The Civilization of the Old Northwest* 70-71 (1934). Second, on May 9, 1800, the House passed a resolution to disapprove of a Mississippi territorial law imposing a license fee on taverns. H. R. Jour., 6th Cong., 1st

Sess., 706 (1826 ed.). The Senate unsuccessfully attempted to amend the resolution to strike down all laws of the Mississippi Territory enacted since June 30, 1799. 5 C. Carter, *Territorial Papers of the United States -- Mississippi 94-95* (1937). The histories of the Territories, the correspondence of the era, and the congressional Reports contain no indication that such resolutions disapproving of territorial laws were to be presented to the President or that the authorization for such a "congressional veto" in the Act of Aug. 7, 1789, was of doubtful constitutionality.

The practices of the First Congress are not so clear as to be dispositive of the constitutional question now before us. But it is surely significant that this body, largely composed of the same men who authored Art. I and secured ratification of the Constitution, did not view the Constitution as forbidding a precursor of the modern day legislative veto. See *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 412 (1928) ("In this first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions").

[*983] [***365] [**2801] When the Convention did turn its attention to the scope of Congress' lawmaking power, the Framers were expansive. The Necessary and Proper Clause, Art. I, § 8, cl. 18, vests [*984] Congress with the power "[to] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [the enumerated powers of § 8] and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." It is long settled that Congress may "exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government," and "avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *McCulloch v. Maryland*, 4 *Wheat.* 316, 415-416, 420 (1819).

B

The Court heeded this counsel in approving the modern administrative state. The Court's holding today that all legislative-type action must be enacted through the lawmaking process ignores that legislative authority is routinely delegated to the Executive Branch, to the

independent regulatory agencies, and to private individuals and groups.

"The rise of administrative bodies probably has been the most significant legal trend of the last century. . . . They have become a veritable fourth branch of the Government, [***366] which has deranged our three-branch legal theories . . ." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J. dissenting).

[*985] This Court's decisions sanctioning such delegations make clear that Art. I does not require all action with the effect of legislation to be passed as a law.

Theoretically, agencies and officials were asked only to "fill up the details," and the rule was that "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard." *United States v. Chicago, M., St. P. & P.R. Co.*, 282 U.S. 311, 324 (1931). Chief Justice Taft elaborated the standard in *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928): "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." In practice, however, restrictions on the scope of the power that could be delegated diminished and all but disappeared. In only two instances did the Court find an unconstitutional delegation. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In other [**2802] cases, the "intelligible principle" through which agencies have attained enormous control over the economic affairs of the country was held to include such formulations as "just and reasonable," *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930); "public interest," *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932); "public convenience, interest, or necessity," *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933); and "unfair methods of competition." *FTC v. Gratz*, 253 U.S. 421 (1920).

The wisdom and the constitutionality of these broad delegations are matters that still have not been put to rest. But for present purposes, these cases establish that by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation. For some time, the sheer amount of law -- the substantive rules that regulate private conduct and direct the operation of government -- made by [*986] the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. The Administrative Procedure Act, 5 U. S. C. § 551(4), provides that a "rule" is an

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agency statement "designed to implement, interpret, or prescribe law or policy." When agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded "legislative effect." See, e. g., *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981); *Batterton v. Francis*, 432 U.S. 416 [***367] (1977). n19 These regulations bind courts and officers of the Federal Government, may pre-empt state law, see, e. g., *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141 (1982), and grant rights to and impose obligations on the public. In sum, they have the force of law.

n19 "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission Such rules have the force and effect of law.' U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 30, n. 3 (1947)." *Batterton v. Francis*, 432 U.S., at 425, n. 9.

Substantive agency regulations are clearly exercises of lawmaking authority; agency interpretations of their statutes are only arguably so. But as Henry Monaghan has observed: "Judicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of lawmaking authority to an agency." Monaghan, *Marbury and the Administrative State*, 83 *Colum. L. Rev.* 1, 26 (1983) (emphasis deleted). See, e. g., *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981).

If Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral [*987] approval and without the President's signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test. In both cases, it is enough that the initial statutory authorizations comply with the Art. I requirements.

Nor are there strict limits on the agents that may receive such delegations of legislative authority so that it might be said that the Legislature can delegate authority to others but not to itself. While most authority to issue rules and regulations is given to the Executive Branch and the independent regulatory agencies, statutory dele-

gations to private persons have also passed this Court's scrutiny. In *Currin v. Wallace*, 306 U.S. 1 [**2803] (1939), the statute provided that restrictions upon the production or marketing of agricultural commodities was to become effective only upon the favorable vote by a prescribed majority of the affected farmers. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 577 (1939), upheld an Act which gave producers of specified commodities the right to veto marketing orders issued by the Secretary of Agriculture. Assuming *Currin* and *Rock Royal Cooperative* remain sound law, the Court's decision today suggests that Congress may place a "veto" power over suspensions of deportation in private hands or in the hands of an independent agency, but is forbidden to reserve such authority for itself. Perhaps this odd result could be justified on other constitutional grounds, such as the separation of powers, but certainly it cannot be defended as consistent with the Court's view of the Art. I presentment and bicameralism commands. n20

n20 As the Court acknowledges, the "provisions of Art. I are integral parts of the constitutional design for the separation of powers." *Ante*, at 946. But these separation-of-powers concerns are that legislative power be exercised by Congress, executive power by the President, and judicial power by the Courts. A scheme which allows delegation of legislative power to the President and the departments under his control, but forbids a check on its exercise by Congress itself obviously denigrates the separation-of-powers concerns underlying Art. I. To be sure, the doctrine of separation of powers is also concerned with checking each branch's exercise of its characteristic authority. Section 244(c)(2) is fully consistent with the need for checks upon congressional authority, *infra*, at 994-996, and the legislative veto mechanism, more generally is an important check upon Executive authority, *supra*, at 967-974.

[*988] [***368] The Court's opinion in the present cases comes closest to facing the reality of administrative lawmaking in considering the contention that the Attorney General's action in suspending deportation under § 244 is itself a legislative act. The Court posits that the Attorney General is acting in an Art. II enforcement capacity under § 244. This characterization is at odds with *Mahler v. Eby*, 264 U.S. 32, 40 (1924), where the power conferred on the Executive to deport aliens was considered a delegation of legislative power. The Court suggests, however, that the Attorney General acts in an Art. II capacity because "[the] courts, when a case or controversy arises, can always 'ascertain whether the will

of Congress has been obeyed,' *Yakus v. United States*, 321 U.S. 414, 425 (1944), and can enforce adherence to statutory standards." *Ante*, at 953, n. 16. This assumption is simply wrong, as the Court itself points out: "We are aware of no decision . . . where a federal court has reviewed a decision of the Attorney General suspending deportation of an alien pursuant to the standards set out in § 244(a)(1). This is not surprising, given that no party to such action has either the motivation or the right to appeal from it." *Ante*, at 957, n. 22. It is perhaps on the erroneous premise that judicial review may check abuses of the § 244 power that the Court also submits that "[the] bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it -- a statute duly enacted pursuant to Art. I, § 1, 7." *Ante*, at 953, n. 16. On the other hand, the Court's reasoning does persuasively explain why a resolution of disapproval [*989] under § 244(c)(2) need not again be subject to the bicameral process. Because it serves only to check the Attorney General's exercise of the suspension authority granted by § 244, the disapproval resolution -- unlike the Attorney General's action -- "cannot reach beyond the limits of the statute that created it -- a statute duly enacted pursuant to Art. I."

More fundamentally, even if the Court correctly characterizes the Attorney General's authority under § 244 as an Art. II Executive power, the Court concedes that certain administrative agency action, such as rule-making, "may resemble lawmaking" and recognizes that "[this] Court has referred to agency activity as being 'quasi-legislative' [**2804] in character. *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935)." *Ante*, at 953, n. 16. Such rules and adjudications by the agencies meet the Court's own definition of legislative action for they "[alter] [***369] the legal rights, duties, and relations of persons . . . outside the Legislative Branch," *ante*, at 952, and involve "determinations of policy," *ante*, at 954. Under the Court's analysis, the Executive Branch and the independent agencies may make rules with the effect of law while Congress, in whom the Framers confided the legislative power, Art. I, § 1, may not exercise a veto which precludes such rules from having operative force. If the effective functioning of a complex modern government requires the delegation of vast authority which, by virtue of its breadth, is legislative or "quasi-legislative" in character, I cannot accept that Art. I -- which is, after all, the source of the non-delegation doctrine -- should forbid Congress to qualify that grant with a legislative veto. n21

n21 The Court's other reasons for holding the legislative veto subject to the presentment and bi-

cameral passage requirements require but brief discussion. First, the Court posits that the resolution of disapproval should be considered equivalent to new legislation because absent the veto authority of § 244(c)(2) neither House could, short of legislation, effectively require the Attorney General to deport an alien once the Attorney General has determined that the alien should remain in the United States. *Ante*, at 952-954. The statement is neither accurate nor meaningful. The Attorney General's power under the Act is only to "suspend" the order of deportation; the "suspension" does not cancel the deportation or adjust the alien's status to that of a permanent resident alien. Cancellation of deportation and adjustment of status must await favorable action by Congress. More important, the question is whether § 244(c)(2) as written is constitutional, and no law is amended or repealed by the resolution of disapproval which is, of course, expressly authorized by that section.

The Court also argues that the legislative character of the challenged action of one House is confirmed by the fact that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." *Ante*, at 955. Leaving aside again the above-refuted premise that all action with a legislative character requires passage in a law, the short answer is that all of these carefully defined exceptions to the presentment and bicameralism strictures do not involve action of the Congress pursuant to a duly enacted statute. Indeed, for the most part these powers -- those of impeachment, review of appointments, and treaty ratification -- are not legislative powers at all. The fact that it was essential for the Constitution to stipulate that Congress has the power to impeach and try the President hardly demonstrates a limit upon Congress' authority to reserve itself a legislative veto, through statutes, over subjects within its lawmaking authority.

[*990] C

The Court also takes no account of perhaps the most relevant consideration: However resolutions of disapproval under § 244(c)(2) are formally characterized, in reality, a departure from the status quo occurs only upon the concurrence of opinion among the House, Senate, and President. Reservations of legislative authority to be exercised by Congress should be upheld if the exercise of such reserved authority is consistent with the distribution of and limits upon legislative power that Art. I provides.

1

As its history reveals, § 244(c)(2) withstands this analysis. Until 1917, Congress had not broadly provided for the deportation of aliens. Act of Feb. 5, 1917, § 19, 39 Stat. 889. The Immigration Act of 1924 enlarged the categories of [*991] aliens subject to mandatory deportation, and substantially increased the likelihood of hardships to individuals by abolishing in most cases the previous [***370] time limitation of three years within which deportation proceedings had to be commenced. Immigration Act of 1924, ch. 190, 43 Stat. 153. Thousands of persons, who either had entered the country in more lenient times or had been smuggled in as children, or had overstayed their permits, faced the prospect of deportation. Enforcement of the Act grew more rigorous over the years with the deportation of thousands of aliens without regard to the mitigating circumstances of particular [**2805] cases. See Mansfield, *The Legislative Veto and the Deportation of Aliens*, 1 Public Administration Review 281 (1941). Congress provided relief in certain cases through the passage of private bills.

In 1933, when deportations reached their zenith, the Secretary of Labor temporarily suspended numerous deportations on grounds of hardship, 78 Cong. Rec. 11783 (1934), and proposed legislation to allow certain deportable aliens to remain in the country. H. R. 9725, 73d Cong., 2d Sess. (1934). The Labor Department bill was opposed, however, as "[granting] too much discretionary authority," 78 Cong. Rec. 11790 (1934) (remarks of Rep. Dirksen), and it failed decisively. *Id.*, at 11791.

The following year, the administration proposed bills to authorize an interdepartmental committee to grant permanent residence to deportable aliens who had lived in the United States for 10 years or who had close relatives here. S. 2969 and H. R. 8163, 74th Cong., 1st Sess. (1935). These bills were also attacked as an "abandonment of congressional control over the deportation of undesirable aliens," H. R. Rep. No. 1110, 74th Cong., 1st Sess., pt. 2, p. 2 (1935), and were not enacted. A similar fate awaited a bill introduced in the 75th Congress that would have authorized the Secretary to grant permanent residence to up to 8,000 deportable aliens. The measure passed the House, but did not come to a vote in the Senate. H. R. 6391, 75th Cong., 1st Sess., 83 Cong. Rec. 8992-8996 (1938).

[*992] The succeeding Congress again attempted to find a legislative solution to the deportation problem. The initial House bill required congressional action to cancel individual deportations, 84 Cong. Rec. 10455 (1939), but the Senate amended the legislation to provide that deportable aliens should not be deported unless the Congress by Act or resolution rejected the recommendation of the Secretary. H. R. 5138, § 10, as reported with

amendments by S. Rep. No. 1721, 76th Cong., 3d Sess., 2 (1940). The compromise solution, the immediate predecessor to § 244(c), allowed the Attorney General to suspend the deportation of qualified aliens. Their deportation would be canceled and permanent residence granted if the House and Senate did not adopt a concurrent resolution of disapproval. S. Rep. No. 1796, 76th Cong., 3d Sess., 5-6 (1940). The Executive Branch played a major role in fashioning this compromise, see 86 Cong. Rec. 8345 (1940), and President Roosevelt approved the legislation, which became the Alien Registration Act of 1940, ch. 439, 54 Stat. 670.

In 1947, the Department of Justice requested legislation authorizing the Attorney General to cancel deportations without congressional review. H. R. 2933, 80th Cong., 1st Sess. (1947). The purpose of the proposal was to "save time and energy of everyone concerned . . ." *Regulating Powers [***371] of the Attorney General to Suspend Deportation of Aliens: Hearings on H. R. 245, H. R. 674, H. R. 1115, and H. R. 2933 before the Subcommittee on Immigration of the House Committee on the Judiciary, 80th Cong., 1st Sess., 34 (1947).* The Senate Judiciary Committee objected, stating that "affirmative action by the Congress in all suspension cases should be required before deportation proceedings may be canceled." S. Rep. No. 1204, 80th Cong., 2d Sess., 4 (1948). See also H. R. Rep. No. 647, 80th Cong., 1st Sess., 2 (1947). Congress not only rejected the Department's request for final authority but also amended the Immigration Act to require that cancellation of deportation be approved [*993] by a concurrent resolution of the Congress. P

Practice over the ensuing several years convinced Congress that the requirement of affirmative approval was "not workable . . . and would, in time, interfere with the legislative work of the House." House Judiciary Committee, H. R. Rep. No. 362, 81st Cong., 1st Sess., 2 (1949). In preparing the comprehensive Immigration and Nationality Act of 1952, the Senate Judiciary Committee recommended that for certain classes of aliens the adjustment of status [**2806] be subject to the disapproval of either House; but deportation of an alien "who is of the criminal, subversive, or immoral classes or who overstays his period of admission," would be canceled only upon a concurrent resolution disapproving the deportation. S. Rep. No. 1515, 81st Cong., 2d Sess., 610 (1950). Legislation reflecting this change was passed by both Houses, and enacted into law as part of the Immigration and Nationality Act of 1952 over President Truman's veto, which was not predicated on the presence of a legislative veto. Pub. L. 414, § 244(a), 66 Stat. 214. In subsequent years, the Congress refused further requests that the Attorney General be given final authority to

grant discretionary relief for specified categories of aliens, and § 244 remained intact to the present.

Section 244(a)(1) authorizes the Attorney General, in his discretion, to suspend the deportation of certain aliens who are otherwise deportable and, upon Congress' approval, to adjust their status to that of aliens lawfully admitted for permanent residence. In order to be eligible for this relief, an alien must have been physically present in the United States for a continuous period of not less than seven years, must prove he is of good moral character, and must prove that he or his immediate family would suffer "extreme hardship" if he is deported. Judicial review of a denial of relief may be sought. Thus, the suspension proceeding "has two phases: a [*994] determination whether the statutory conditions have been met, which generally involves a question of law, and a determination whether relief shall be granted, which [ultimately] is confided to the sound discretion of the Attorney General [and his delegates]." 2 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 7.9a(5), p. 7-134 (rev. ed. 1983).

There is also a third phase to the process. Under § 244(c)(1) the Attorney General must report all such suspensions, with a detailed statement of facts and reasons, to the Congress. Either House may then act, in that session or the next, to block the suspension of deportation by passing a resolution of disapproval. § 244(c)(2). Upon congressional approval of the suspension -- by [***372] its silence -- the alien's permanent status is adjusted to that of a lawful resident alien.

The history of the Immigration and Nationality Act makes clear that § 244(c)(2) did not alter the division of actual authority between Congress and the Executive. At all times, whether through private bills, or through affirmative concurrent resolutions, or through the present one-House veto, a permanent change in a deportable alien's status could be accomplished only with the agreement of the Attorney General, the House, and the Senate.

2

The central concern of the presentment and bicameralism requirements of Art. I is that when a departure from the legal status quo is undertaken, it is done with the approval of the President and both Houses of Congress -- or, in the event of a Presidential veto, a two-thirds majority in both Houses. This interest is fully satisfied by the operation of § 244(c)(2). The President's approval is found in the Attorney General's action in recommending to Congress that the deportation order for a given alien be suspended. The House and the Senate indicate their approval of the Executive's action by not passing a resolution of disapproval within the statutory period. Thus, a change in the legal status quo -- the

deportability of the alien -- is consummated only with the approval [*995] of each of the three relevant actors. The disagreement of any one of the three maintains the alien's pre-existing status: the Executive may choose not to recommend suspension; the House and Senate may each veto the recommendation. The effect on the rights and obligations of the affected individuals and upon the legislative system is precisely the same as if a private bill were introduced but failed to receive the necessary approval. "The President and the two Houses enjoy exactly the same say in what the law is to be as would have been true for each without the presence of the one-House [**2807] veto, and nothing in the law is changed absent the concurrence of the President and a majority in each House." *Atkins v. United States*, 214 Ct. Cl. 186, 250, 556 F.2d 1028, 1064 (1977), cert. denied, 434 U.S. 1009 (1978).

This very construction of the Presentment Clauses which the Executive Branch now rejects was the basis upon which the Executive Branch defended the constitutionality of the Reorganization Act, 5 U. S. C. § 906(a) (1982 ed.), which provides that the President's proposed reorganization plans take effect only if not vetoed by either House. When the Department of Justice advised the Senate on the constitutionality of congressional review in reorganization legislation in 1949, it stated: "In this procedure there is no question involved of the Congress taking legislative action beyond its initial passage of the Reorganization Act." S. Rep. No. 232, 81st Cong., 1st Sess., 20 (1949) (Dept. of Justice Memorandum). This also represents the position of the Attorney General more recently. n22

n22 In his opinion on the constitutionality of the legislative review provisions of the most recent reorganization statute, 5 U. S. C. § 906(a) (1982 ed.), Attorney General Bell stated that "the statement in Article I, § 7, of the procedural steps to be followed in the enactment of legislation does not exclude other forms of action by Congress. . . . The procedures prescribed in Article I § 7, for congressional action are not exclusive." 43 Op. Atty. Gen. No. 10, pp. 2-3 (1977). "[I]f the procedures provided in a given statute have no effect on the constitutional distribution of power between the legislature and the executive," then the statute is constitutional. *Id.*, at 3. In the case of the reorganization statute, the power of the President to refuse to submit a plan, combined with the power of either House of Congress to reject a submitted plan, suffices under the standard to make the statute constitutional. Although the Attorney General sought to limit his opinion to the reorganization statute, and the Executive op-

poses the instant statute, I see no Art. I basis to distinguish between the two.

[*996] [***373] Thus understood, § 244(c)(2) fully effectuates the purposes of the bicameralism and presentment requirements. I now briefly consider possible objections to the analysis.

First, it may be asserted that Chadha's status before legislative disapproval is one of nondeportation and that the exercise of the veto, unlike the failure of a private bill, works a change in the status quo. This position plainly ignores the statutory language. At no place in § 244 has Congress delegated to the Attorney General any final power to determine which aliens shall be allowed to remain in the United States. Congress has retained the ultimate power to pass on such changes in deportable status. By its own terms, § 244(a) states that whatever power the Attorney General has been delegated to suspend deportation and adjust status is to be exercisable only "[as] hereinafter prescribed in this section." Subsection (c) is part of that section. A grant of "suspension" does not cancel the alien's deportation or adjust the alien's status to that of a permanent resident alien. A suspension order is merely a "deferment of deportation," *McGrath v. Kristensen*, 340 U.S. 162, 168 (1950), which can mature into a cancellation of deportation and adjustment of status only upon the approval of Congress -- by way of silence -- under § 244(c)(2). Only then does the statute authorize the Attorney General to "cancel deportation proceedings," § 244(c)(2), and "record the alien's lawful admission for permanent residence . . ." § 244(d). The Immigration and Naturalization Service's action, on behalf of the Attorney General, "cannot become effective without ratification by Congress." 2 C. Gordon & H. Rosenfield, *Immigration Law* [*997] and *Procedure* § 8.14, p. 8-121 (rev. ed. 1983). Until that ratification occurs, the Executive's action is simply a recommendation that Congress finalize the suspension -- in itself, it works no legal change.

Second, it may be said that this approach leads to the incongruity that the two-House veto is more suspect than its one-House brother. Although the idea may be initially counterintuitive, on close analysis, it is not at all unusual that the one-House veto is of more certain constitutionality than the two-House version. If the Attorney General's [**2808] action is a proposal for legislation, then the disapproval of but a single House is all that is required to prevent its passage. Because approval is indicated by the failure to veto, the one-House veto satisfies the requirement of bicameral approval. The two-House version may present a different question. The concept that "neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body," *Kil-*

born v. Thompson, 103 U.S. 168, 182 [***374] (1881), is fully observed. n23

n23 Of course, when the authorizing legislation requires approval to be expressed by a positive vote, then the two-House veto would clearly comply with the bicameralism requirement under any analysis.

Third, it may be objected that Congress cannot indicate its approval of legislative change by inaction. In the Court of Appeals' view, inaction by Congress "could equally imply endorsement, acquiescence, passivity, indecision, or indifference," 634 F.2d 408, 435 (1980), and the Court appears to echo this concern, *ante*, at 958, n. 23. This objection appears more properly directed at the wisdom of the legislative veto than its constitutionality. The Constitution does not and cannot guarantee that legislators will carefully scrutinize legislation and deliberate before acting. In a democracy it is the electorate that holds the legislators accountable for the wisdom of their choices. It is hard to maintain that a private bill receives any greater individualized scrutiny than a resolution [*998] of disapproval under § 244(c)(2). Certainly the legislative veto is no more susceptible to this attack than the Court's increasingly common practice of according weight to the failure of Congress to disturb an Executive or independent agency's action. See n. 11, *supra*. Earlier this Term, the Court found it important that Congress failed to act on bills proposed to overturn the Internal Revenue Service's interpretation of the requirements for tax-exempt status under § 501(c)(3) of the *Internal Revenue Code*. *Bob Jones University v. United States*, 461 U.S. 574, 600-601 (1983). If Congress may be said to have ratified the Internal Revenue Service's interpretation without passing new legislation, Congress may also be said to approve a suspension of deportation by the Attorney General when it fails to exercise its veto authority. n24 The requirements of Art. I are not compromised by the congressional scheme.

n24 The Court's doubts that Congress entertained this "arcane" theory when it enacted § 244(c)(2) disregards the fact that this is the historical basis upon which the legislative vetoes contained in the Reorganization Acts have been defended, n. 22, *supra*, and that the Reorganization Acts then provided the precedent articulated in support of other legislative veto provisions. See, e. g., 87 Cong. Rec. 735 (1941) (Rep. Dirksen) (citing Reorganization Act in support of proposal to include a legislative veto in Lend-Lease Act); H. R. Rep. No. 93-658, p. 42 (1973) (citing

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Reorganization Act as "sufficient precedent" for legislative veto provision for Impoundment Control Act).

IV

The Court of Appeals struck § 244(c)(2) as violative of the constitutional principle of separation of powers. It is true that the purpose of separating the authority of Government is to prevent unnecessary and dangerous concentration of power in one branch. For that reason, the Framers saw fit to divide and balance the powers of Government so that each branch would be checked by the others. Virtually every part of our constitutional system bears the mark of this judgment.

[*999] But the history of the separation-of-powers doctrine is also a history of accommodation and practicality. Apprehensions of an overly powerful branch have not led to undue prophylactic measures that handicap the effective working of the National [***375] Government as a whole. The Constitution does not contemplate total separation of the three branches of Government. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). "[A] hermetic sealing off of the three branches of Government from one another would preclude [**2809] the establishment of a Nation capable of governing itself effectively." *Ibid.* n25

n25 Madison emphasized that the principle of separation of powers is primarily violated "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department." The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961). Madison noted that the oracle of the separation doctrine, Montesquieu, in writing that the legislative, executive, and judicial powers should not be united "in the same person or body of magistrates," did not mean "that these departments ought to have no *partial agency* in, or *control* over the acts of each other." *Id.*, at 325 (emphasis in original). Indeed, according to Montesquieu, the legislature is uniquely fit to exercise an additional function: "to examine in what manner the laws that it has made have been executed." W. Gwyn, *The Meaning of Separation of Powers* 102 (1965).

Our decisions reflect this judgment. As already noted, the Court, recognizing that modern government must address a formidable agenda of complex policy issues, countenanced the delegation of extensive legislative authority to Executive and independent agencies. *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406

(1928). The separation-of-powers doctrine has heretofore led to the invalidation of Government action only when the challenged action violated some express provision in the Constitution. In *Buckley v. Valeo*, *supra*, at 118-124 (*per curiam*), and *Myers v. United States*, 272 U.S. 52 (1926), congressional action compromised the appointment power of the President. See also *Springer v. Philippine Islands*, 277 U.S. 189, 200-201 (1928). In *United States v. Klein*, 13 Wall. 128 (1872), an Act of Congress was struck for encroaching upon judicial [*1000] power, but the Court found that the Act also impinged upon the Executive's exclusive pardon power. Art. II, § 2. Because we must have a workable efficient Government, this is as it should be.

This is the teaching of *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), which, in rejecting a separation-of-powers objection to a law requiring that the Administrator take custody of certain Presidential papers, set forth a framework for evaluating such claims:

"[In] determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S., at 711-712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.*, at 443.

Section 244(c)(2) survives this test. The legislative veto provision does not "[prevent] the Executive Branch from accomplishing its constitutionally assigned functions." First, it is [***376] clear that the Executive Branch has no "constitutionally assigned" function of suspending the deportation of aliens. "[Over] no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). Nor can it be said that the inherent function of the Executive Branch in executing the law is involved. The *Steel Seizure Case* resolved that the Art. II mandate for the President to execute the law is a directive to enforce the law which Congress has written. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). "The duty of the President to see that the laws be executed is a [*1001] duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Myers v. United States*, 272 U.S., at 177 (Holmes, J., dissenting); [**2810] *id.*, at 247 (Brandeis, J., dissenting). Here, § 244 grants the Executive only a qualified suspension authority, and it is

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only that authority which the President is constitutionally authorized to execute.

Moreover, the Court believes that the legislative veto we consider today is best characterized as an exercise of legislative or quasi-legislative authority. Under this characterization, the practice does not, even on the surface, constitute an infringement of executive or judicial prerogative. The Attorney General's suspension of deportation is equivalent to a proposal for legislation. The nature of the Attorney General's role as recommendatory is not altered because § 244 provides for congressional action through disapproval rather than by ratification. In comparison to private bills, which must be initiated in the Congress and which allow a Presidential veto to be overridden by a two-thirds majority in both Houses of Congress, § 244 augments rather than reduces the Executive Branch's authority. So understood, congressional review does not undermine, as the Court of Appeals thought, the "weight and dignity" that attends the decisions of the Executive Branch.

Nor does § 244 infringe on the judicial power, as JUSTICE POWELL would hold. Section 244 makes clear that Congress has reserved its own judgment as part of the statutory process. Congressional action does not substitute for judicial review of the Attorney General's decisions. The Act provides for judicial review of the refusal of the Attorney General to suspend a deportation and to transmit a recommendation to Congress. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (*per curiam*). But the courts have not been given the authority to review whether an alien should be given permanent status; review is limited to whether the Attorney General has properly [*1002] applied the statutory standards for essentially denying the alien a recommendation that his deportable status be changed by the Congress. Moreover, there is no constitutional obligation to provide any judicial review whatever for a failure to suspend deportation. "The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from [***377] the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend." *Fong Yue Ting v. United States*, 149 U.S. 698, 713-714 (1893). See also *Tutun v. United States*, 270 U.S. 568, 576 (1926); *Ludecke v. Watkins*, 335 U.S. 160, 171-172 (1948); *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952).

I do not suggest that all legislative vetoes are necessarily consistent with separation-of-powers principles. A legislative check on an inherently executive function, for example, that of initiating prosecutions, poses an entirely different question. But the legislative veto device here -- and in many other settings -- is far from an instance of

legislative tyranny over the Executive. It is a necessary check on the unavoidably expanding power of the agencies, both Executive and independent, as they engage in exercising authority delegated by Congress.

V

I regret that I am in disagreement with my colleagues on the fundamental questions that these cases present. But even more I regret the destructive scope of the Court's holding. It reflects a profoundly different conception of the Constitution than that held by the courts which sanctioned the modern administrative state. Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history. I fear it will now be more difficult to "[insure] that the fundamental policy decisions in our society will be made not [*1003] by an appointed official but [**2811] by the body immediately responsible to the people," *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part). I must dissent.

APPENDIX TO OPINION OF WHITE, J., DISSENTING

STATUTES WITH PROVISIONS AUTHORIZING CONGRESSIONAL REVIEW

This compilation, reprinted from the Brief for the United States Senate, identifies and describes briefly current statutory provisions for a legislative veto by one or both Houses of Congress. Statutory provisions for a veto by Committees of the Congress and provisions which require legislation (*i. e.*, passage of a joint resolution) are not included. The 55 statutes in the compilation (some of which contain more than one provision for legislative review) are divided into six broad categories: foreign affairs and national security, budget, international trade, energy, rulemaking and miscellaneous.

"A.

"FOREIGN AFFAIRS AND NATIONAL SECURITY

"1. Act for International Development of 1961, Pub. L. No. 87-195, § 617, 75 Stat. 424, 444, [as amended,] 22 U. S. C. 2367 [(1976 ed., Supp. V)] (Funds made available for foreign assistance under the Act may be terminated by concurrent resolution).

"2. War Powers Resolution, Pub. L. No. 93-148, § 5, 87 Stat. 555, 556-557 [***378] (1973), [as amended,] 50 U. S. C. 1544 [(1976 ed. and Supp. V)] (Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.)

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"3. Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93-155, § 807, 87 Stat. 605, 615 (1973), *50 U. S. C. 1431* (National defense contracts obligating the United States for any amount in excess of \$ 25,000,000 may be disapproved by resolution of either House).

[*1004] "4. Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93-365, § 709(c), 88 Stat. 399, 408 (1974), [as amended,] *50 U. S. C. app. 2403-1(c)* [(1976 ed., Supp. V)] (Applications for export of defense goods, technology or techniques may be disapproved by concurrent resolution).

"5. H. R. J. Res. 683, Pub. L. No. 94-110, § 1, 89 Stat. 572 (1975), *22 U. S. C. 2441* note (Assignment of civilian personnel to Sinai may be disapproved by concurrent resolution).

"6. International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 310, 89 Stat. 849, 860, [as amended,] *22 U. S. C. 2151n* [(1976 ed., Supp. V)] (Foreign assistance to countries not meeting human rights standards may be terminated by concurrent resolution).

"7. International Security Assistance and Arms [Export] Control Act of 1976, Pub. L. No. 94-329, § [211(a)], 90 Stat. 729, 743, [as amended,] *22 U. S. C. 2776(b)* [(1976 ed. and Supp. V)] (President's letter of offer to sell major defense equipment may be disapproved by concurrent resolution).

"8. National Emergencies Act, Pub. L. No. 94-412, § 202, 90 Stat. 1255 (1976), *50 U. S. C. 1622* (Presidentially declared national emergency may be terminated by concurrent resolution).

"9. International Navigational Rules Act of 1977, Pub. L. No. 95-75, § 3(d), 91 Stat. 308, *33 U. S. C. § 1602(d)* [(1976 ed., Supp. V)] (Presidential proclamation of International Regulations for Preventing Collisions at Sea may be disapproved by concurrent resolution).

"10. International Security Assistance Act of 1977, Pub. L. No. 95-92, § 16, 91 Stat. 614, 622, *22 U. S. C. § 2753(d)(2)* (President's proposed transfer of arms to a third country may be disapproved by concurrent resolution).

"11. Act of December [28], 1977, Pub. L. No. 95-223, § [207(b)], 91 Stat. 1625, 1628, *50 U. S. C. 1706(b)* [(1976 ed., [**2812] Supp. V)] (Presidentially declared national emergency and exercise of conditional powers may be terminated by concurrent resolution).

[*1005] "12. Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, § § [303(a), 304(a)], 306, 307, 401, 92 Stat. 120, 130, 134, 137-38, 139, 144, *42 U. S. C. § § 2160(f), 2155(b), 2157(b), [2158] 2153(d)*

[(1976 ed., Supp. V)] (Cooperative agreements concerning storage and disposition of spent nuclear fuel, proposed export of nuclear facilities, materials or technology and proposed agreements for international cooperation in nuclear reactor development may be disapproved by concurrent resolution).

" [***379] B.

"BUDGET

"13. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1013, 88 Stat. 297, 334-35, *31 U. S. C. 1403* (The proposed deferral of budget authority provided for a specific project or purpose may be disapproved by an impoundment resolution by either House).

"C.

"INTERNATIONAL TRADE

"14. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 351, 76 Stat. 872, 899, *19 U. S. C. 1981(a)* (Tariff or duty recommended by Tariff Commission may be imposed by concurrent resolution of approval).

"15. Trade Act of 1974, Pub. L. No. 93-618, § § 203(c), 302(b), 402(d), 407, 88 Stat. 1978, 2016, 2043, 2057-60, 2063-64, [as amended,] *19 U. S. C. 2253(c), 2412(b), 2432, [2437 (1976 ed. and Supp. V)]* (Proposed Presidential actions on import relief and actions concerning certain countries may be disapproved by concurrent resolution; various Presidential proposals for waiver extensions and for extension of nondiscriminatory treatment to products of foreign countries may be disapproved by simple (either House) or concurrent resolutions).

"16. Export-Import Bank Amendments of 1974, Pub. L. No. 93-646, § 8, 88 Stat. 2333, 2336, *12 U. S. C. [635e(b)]* (Presidentially proposed limitation for exports to USSR in [*1006] excess of \$ 300,000,000 must be approved by concurrent resolution).

"D.

"ENERGY

"17. Act of November 16, 1973, Pub. L. No. 93-153, § 101, 87 Stat. 576, 582, *30 U. S. C. 185(u)* (Continuation of oil exports being made pursuant to President's finding that such exports are in the national interest may be disapproved by concurrent resolution).

"18. Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93-577, § 12, 88 Stat. 1878, 1892-1893, *42 U. S. C. 5911* (Rules or orders proposed by the President concerning allocation or acquisition of essential materials may be disapproved by resolution of either House).

"19. Energy Policy and Conservation Act, Pub. L. No. 94-163, § 551, 89 Stat. 871, 965 (1975), 42 U. S. C. 6421(c) (Certain Presidentially proposed 'energy actions' involving fuel economy and pricing may be disapproved by resolution of either House).

"20. Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, § [201(3)], 90 Stat. 303, 309, 10 U. S. C. 7422(c)(2)(C) (President's extension of production period for naval petroleum reserves may be disapproved by resolution of either House).

....

"22. Department of Energy Act of [***380] 1978 -- Civilian Applications, Pub. L. No. 95-238, § § 107, 207(b), 92 Stat. 47, 55, 70, 22 U. S. C. 3224a, 42 U. S. C. 5919(m) [(1976 ed., Supp. V)] (International agreements and expenditures by Secretary of Energy of appropriations for foreign spent nuclear fuel storage must be approved by concurrent resolution, if not consented to by legislation;) (plans for such use of appropriated funds may be disapproved by either House;) (financing in [**2813] excess of \$ 50,000,000 for demonstration facilities must be approved by resolution in both Houses).

[*1007] "23. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § § 205(a), 208, 92 Stat. 629, 641, 668, 43 U. S. C. § § 1337(a), 1354(c) [(1976 ed., Supp. V)] (Establishment by Secretary of Energy of oil and gas lease bidding system may be disapproved by resolution of either House;) (export of oil and gas may be disapproved by concurrent resolution).

"24. Natural Gas Policy Act of 1978, Pub. L. No. 95-621, § § 122(c)(1) and (2), 202(c), 206(d)(2), 507, 92 Stat. 3350, 3370, 3371, 3372, 3380, 3406, 15 U. S. C. 3332, 3342(c), 3346(d)(2), 3417 [(1976 ed., Supp. V)] (Presidential reimposition of natural gas price controls may be disapproved by concurrent resolution;) (Congress may reimpose natural gas price controls by concurrent resolution;) (Federal Energy Regulatory Commission (FERC) amendment to pass through incremental costs of natural gas, and exemptions therefrom, may be disapproved by resolution of either House;) (procedure for congressional review established).

"25. Export Administration Act of 1979, Pub. L. No. 96-72, § [7(d)(2)(B)] 7(g)(3), 93 Stat. 503, 518, 520, 50 U. S. C. app. 2406(d)(2)(B), 2406(g)(3) [(1976 ed., Supp. V)] (President's proposal to [export] domestically [produced] crude oil must be approved by concurrent resolution;) (action by Secretary of Commerce to prohibit or curtail export of agricultural commodities may be disapproved by concurrent resolution).

"26. Energy Security Act, Pub. L. No. 96-294, § § 104(b)(3), 104(e), 126(d)(2), 126(d)(3), 128, 129,

132(a)(3), 133(a)(3), 137(b)(5), 141(d), 179(a), 803, 94 Stat. 611, 618, 619, 620, 623-26, 628-29, 649, 650-52, 659, 660, 664, 666, 679, 776 (1980) 50 U. S. C. app. 2091 -93, 2095, 2096, 2097, 42 U. S. C. 8722, 8724, 8725, 8732, 8733, 8737, 8741, 8779, 6240 [(1976 ed., Supp. V)] (Loan guarantees by Departments of Defense, Energy and Commerce in excess of specified amounts may be disapproved by resolution of either House;) (President's proposal to provide loans or guarantees in excess [*1008] of established amounts may be disapproved by resolution of either House;) (proposed award by President of individual contracts for purchase of more than 75,000 barrels per day of crude oil may be disapproved by resolution of either House;) (President's proposals to overcome energy shortage through synthetic fuels development, and individual contracts to purchase more than 75,000 barrels per day, including use of loans or guarantees, may be disapproved by resolution of either House;) (procedures for either House to disapprove proposals made under Act are established;) (request [***381] by Synthetic Fuels Corporation (SFC) for additional time to submit its comprehensive strategy may be disapproved by resolution of either House;) (proposed amendment to comprehensive strategy by SFC Board of Directors may be disapproved by concurrent resolution of either House or by failure of both Houses to pass concurrent resolution of approval;) (procedure for either House to disapprove certain proposed actions of SFC is established;) (procedure for both Houses to approve by concurrent resolution or either House to reject concurrent resolution for proposed amendments to comprehensive strategy of SFC is established;) (proposed loans and loan guarantees by SFC may be disapproved by resolution of either House;) (acquisition by SFC of a synthetic fuels project which is receiving financial assistance may be disapproved by resolution of either House;) (SFC contract renegotiations exceeding initial cost estimates by 175% may be disapproved by resolution of either House;) (proposed financial assistance to synthetic fuel projects in Western Hemisphere outside United States may be disapproved by resolution of either House;) (President's request to suspend provisions requiring build up of reserves and limiting sale or disposal of certain crude oil reserves must be approved by resolution of both Houses).

[**2814] "E.

"RULEMAKING

"27. Education Amendments of 1974, Pub. L. No. 93-380, § [509(a)], 88 Stat. 484, 567, 20 U. S. C. 1232 (d)(1) [(1976 ed., [*1009] Supp. V)] (Department of Education regulations may be disapproved by concurrent resolution).

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"28. Federal Education Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 109, 93 Stat. 1339, 1364, 2 U. S. C. 438(d)(2) [(1976 ed., Supp. V)] (Proposed rules and regulations of the Federal Election Commission may be disapproved by resolution of either House).

"29. Act of January 2, 1975, Pub. L. No. 93-595, § [2(a)(1)], 88 Stat. 1926, 1948, 28 U. S. C. 2076 (Proposed amendments by Supreme Court of Federal Rules of Evidence may be disapproved by resolution of either House).

"30. Act of August 9, 1975, Pub. L. No. 94-88, § 208, 89 Stat. 433, 436-37, 42 U. S. C. 602 note (Social Security standards proposed by Secretary of Health and Human Services may be disapproved by either House).

"31. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 43(f)(3), 92 Stat. 1705, 1752, 49 U. S. C. 1552(f) [(1976 ed., Supp. V)] (Rules or regulations governing employee protection program may be disapproved by resolution of either House).

"32. Education Amendments of 1978, Pub. L. No. 95-561, § § 1138, [212(b)], 1409, 92 Stat. 2143, 2327, 2341, 2369, 25 U. S. C. 2018, 20 U. S. C. [927], 1221-3(e) [(1976 ed., Supp. V)] (Rules and regulations proposed under the Act may be disapproved by concurrent resolution).

"33. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7(b)(1), 94 Stat. 349, 352-353 (1980) 42 U. S. C. 1997e [(1976 ed., Supp. V)] (Attorney General's proposed standards for resolution of grievances of adults confined in correctional facilities may be disapproved [***382] by resolution of either House).

"34. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21(a), 94 Stat. 374, 393, 15 U. S. C. 57a-1 [(1976 ed., Supp. V)] (Federal Trade Commission rules may be disapproved by concurrent resolution).

"35. Department of Education Organization Act, Pub. L. No. 96-88, § 414(b), 93 Stat. 668, 685 (1979), 20 U. S. C. 3474 [*1010] [(1976 ed., Supp. V)] (Rules and regulations promulgated with respect to the various functions, programs and responsibilities transferred by this Act, may be disapproved by concurrent resolution).

"36. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 102, 94 Stat. 1208, 1213, 29 U. S. C. 1322a [(1976 ed., Supp. V)] (Schedules proposed by Pension Benefit Guaranty Corporation (PBGC) which requires an increase in premiums must be approved by concurrent resolution;) (revised premium schedules for voluntary supplemental coverage proposed by PBGC may be disapproved by concurrent resolution).

"37. Farm Credit Act Amendments of 1980, Pub. L. No. 96-592, § 508, 94 Stat. 3437, 3450, 12 U. S. C. [2252 (1976 ed., Supp. V)] (Certain Farm Credit Administration regulations may be disapproved by concurrent resolution or delayed by resolution of either House).

"38. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 305, 94 Stat. 2767, 2809, 42 U. S. C. 9655 [(1976 ed., Supp. V)] (Environmental Protection Agency regulations concerning hazardous substances releases, liability and compensation may be disapproved by concurrent resolution or by the adoption of either House of a concurrent resolution which is not disapproved by the other House).

"39. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, § 501, 94 Stat. 2987, 3004, 16 U. S. C. 470w-6 [(1976 ed., Supp. V)] (Regulation proposed by the Secretary of the Interior may be disapproved by concurrent resolution).

" [***2815] 40. Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, § 12, 94 Stat. 2060, 2067, 16 U. S. C. 1463a [(1976 ed., Supp. V)] (Rules proposed by the Secretary of Commerce may be disapproved by concurrent resolution).

"41. Act of December 17, 1980, Pub. L. No. 96-539, § 4, 94 Stat. 3194, 3195, 7 U. S. C. 136w [(1976 ed., Supp. V)] (Rules or regulations promulgated by the Administrator of the Environmental [*1011] Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act may be disapproved by concurrent resolution).

"42. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § § 533(a)(2), 1107(d), 1142, 1183(a)(2), 1207, 95 Stat. 357, 453, 626, 654, 659, 695, 718-20, 20 U. S. C. 1089, 23 U. S. C. 402(j), 45 U. S. C. 761, 767, 564(c)(3), 15 U. S. C. 2083, 1276, 1204 [(1976 ed., Supp. V)] (Secretary of Education's schedule of expected family contributions for Pell Grant recipients [***383] may be disapproved by resolution of either House;) (rules promulgated by Secretary of Transportation for programs to reduce accidents, injuries and deaths may be disapproved by resolution of either House;) (Secretary of Transportation's plan for the sale of government's common stock in rail system may be disapproved by concurrent resolution;) (Secretary of Transportation's approval of freight transfer agreements may be disapproved by resolution of either House;) (amendments to Amtrak's Route and Service Criteria may be disapproved by resolution of either House;) (Consumer Product Safety Commission regulations may be disapproved by concurrent resolution of both Houses, or by concurrent resolution of disapproved by either House if such resolution is not disapproved by the other House).

"F.

"MISCELLANEOUS

"43. Federal Civil Defense Act of 1950, Pub. L. No. 81-920, § 201, 64 Stat. 1245, 1248, [as amended,] 50 app. U. S. C. 2281(g) [(1976 ed., Supp. V)] (Interstate civil defense compacts may be disapproved by concurrent resolution).

"44. National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, § [302(c)], 72 Stat. 426, 433, 42 U. S. C. 2453 (President's transfer to National Air and Space Administration of functions of other departments and agencies may be disapproved by concurrent resolution).

[*1012] "45. Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, § 3, 84 Stat. 1946, 1949, 5 U. S. C. 5305 (President's alternative pay plan may be disapproved by resolution of either House).

"46. Act of October 19, 1973, Pub. L. No. 93-134, § 5, 87 Stat. 466, 468, 25 U. S. C. 1405 (Plan for use and distribution of funds paid in satisfaction of judgment of Indian Claims Commission or Court of Claims may be disapproved by resolution of either House).

"47. Menominee Restoration Act, Pub. L. No. 93-197, § 6, 87 Stat. 770, 773 (1973), 25 U. S. C. 903d(b) (Plan by Secretary of the Interior for assumption of the assets [of] the Menominee Indian corporation may be disapproved by resolution of either House).

"48. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 303, 602(c)(1) and (2), 87 Stat. 774, 784, 814 (1973) (District of Columbia Charter amendments ratified by electors must be approved by concurrent resolution;) (acts of District of Columbia Council may be disapproved by concurrent resolution;) (acts of District of Columbia Council under certain titles of D. C. Code may be disapproved by resolution of either House).

"49. Act of December 31, 1975, Pub. L. No. 94-200, § 102, 89 Stat. 1124, 12 U. S. C. 461 note (Federal Reserve System Board of Governors may not eliminate or reduce interest rate differentials between banks insured by Federal Deposit Insurance Corporation and associations insured by Federal Savings and Loan Insurance Corporations without concurrent resolution of approval).

"50. Veterans' Education and Employment Assistance Act of 1976, Pub. L. No. [**2816] 94-502, § 408, 90 Stat. 2383, 2397-98, 38 U. S. C. 1621 note (President's recommendation [***384] for continued enrollment period in Armed Forces educational assistance program may be disapproved by resolution of either House).

[*1013] "51. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § § 203(c),

204(c)(1), 90 Stat. 2743, 2750, 2752, 43 U. S. C. 1713(c), 1714 (Sale of public lands in excess of two thousand five hundred acres and withdrawal of public lands aggregating five thousand acres or more may be disapproved by concurrent resolution).

"52. Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95-19, § [401(a)] 91 Stat. 39, 45, 2 U. S. C. 359 [(1976 ed., Supp. V)] (President's recommendations regarding rates of salary payment may be disapproved by resolution of either House).

"53. Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 415, 92 Stat. 1111, 1179, 5 U. S. C. 3131 note [(1976 ed., Supp. V)] (Continuation of Senior Executive Service may be disapproved by concurrent resolution).

"54. Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-523, § 304(b), 92 Stat. 1887, 1906, 31 U. S. C. 1322 [(1976 ed., Supp. V)] (Presidential timetable for reducing unemployment may be superseded by concurrent resolution).

"55. District of Columbia Retirement Reform Act, Pub. L. No. 96-122, § 164, 93 Stat. 866, 891-92 (1979) (Required reports to Congress on the District of Columbia retirement program may be rejected by resolution of either House).

"56. Act of August 29, 1980, Pub. L. No. 96-332, § 2, 94 Stat. 1057, 1058, 16 U. S. C. 1432 [(1976 ed., Supp. V)] (Designation of marine sanctuary by the Secretary of Commerce may be disapproved by concurrent resolution)."

JUSTICE REHNQUIST, with whom JUSTICE WHITE joins, dissenting.

A severability clause creates a presumption that Congress intended the valid portion of the statute to remain in force when one part is found to be invalid. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936); *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 235 [*1014] (1932). A severability clause does not, however, conclusively resolve the issue. "[The] determination, in the end, is reached by" asking "[what] was the intent of the lawmakers," *Carter, supra*, at 312, and "will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585, n. 27 (1968). Because I believe that Congress did not intend the one-House veto provision of § 244(c)(2) to be severable, I dissent.

Section 244(c)(2) is an exception to the general rule that an alien's deportation shall be suspended when the Attorney General finds that statutory criteria are met. It is severable only if Congress would have intended to permit the Attorney General to suspend deportations without it. This Court has held several times over the

years that exceptions such as this are not severable because

"by rejecting the exceptions intended by the legislature . . . the [***385] statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions." *Sprague v. Thompson*, 118 U.S. 90, 95 (1886).

By severing § 244(c)(2), the Court permits suspension of deportation in a class of cases where Congress never stated that suspension was appropriate. I do not believe we should expand the statute in this way without some clear indication that Congress intended such an expansion. As the Court said in *Davis v. Wallace*, 257 U.S. 478, 484-485 (1922):

" [**2817] Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which was intended to qualify or restrain. The reasoning on which the decisions proceed is illustrated in *State ex rel. McNeal v. Dombaugh*, 20 Ohio St. 167, 174. In dealing with a contention that a statute [*1015] containing an unconstitutional provision should be construed as if the remainder stood alone, the court there said: 'This would be to mutilate the section and garble its meaning. The legislative intention must not be confounded with their power to carry that intention into effect. To refuse to give force and vitality to a provision of law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional provision of a statute is "stricken out." For all the purposes of construction it is to be regarded as part of the act. The meaning of the legislature must be gathered from all that they have said, as well from that which is ineffectual for want of power, as from that which is authorized by law.'

"Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the State; and no other authority is competent to give them a larger application."

See also *Frost v. Corporation Comm'n of Oklahoma*, 278 U.S. 515, 525 (1929).

The Court finds that the legislative history of § 244 shows that Congress intended § 244(c)(2) to be severable because Congress wanted to relieve itself of the

burden of private bills. But the history elucidated by the Court shows that Congress was unwilling to give the Executive Branch permission to suspend deportation on its own. Over the years, Congress consistently rejected requests from the Executive for complete discretion in this area. Congress always insisted on retaining ultimate control, whether by concurrent resolution, as in the 1948 Act, or by one-House veto, as in the present Act. Congress has never indicated that it would be willing to permit suspensions of deportation [***386] unless it could retain some sort of veto.

[*1016] It is doubtless true that Congress has the power to provide for suspensions of deportation without a one-House veto. But the Court has failed to identify any evidence that Congress intended to exercise that power. On the contrary, Congress' continued insistence on retaining control of the suspension process indicates that it has never been disposed to give the Executive Branch a free hand. By severing § 244(c)(2) the Court has "confounded" Congress' "intention" to permit suspensions of deportation "with their power to carry that intention into effect." *Davis, supra*, at 484, quoting *State ex rel. McNeal v. Dombaugh*, 20 Ohio St. 167, 174 (1870).

Because I do not believe that § 244(c)(2) is severable, I would reverse the judgment of the Court of Appeals.

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3 Am Jur 2d, *Aliens and Citizens* 96; 16 Am Jur 2d, *Constitutional Law* 318 et seq.; 77 Am Jur 2d, *United States* 26 et seq.

11 Federal Procedural Forms, L Ed, *Immigration, Naturalization, and Nationality* 40:54

1 Am Jur Pl & Pr Forms (Rev), *Aliens and Citizens*, Forms 1 et seq.

26 Am Jur Trials 327, *Representation of an Alien in Exclusion, Rescission and Deportation Hearings*

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8 *USCS 1254*; Constitution, Article I, Section 1 and Article I, Section 7, Clause 2, and Article I, Section 7, Clause 3

US L Ed Digest, Aliens 23; Statutes 8

L Ed Index to Annos, Aliens; Congress; Constitutional Law; Separation of Powers; Statutes

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Federal Quick Index, Aliens; Congress; Separation of Governmental Powers; Statutes

Annotation References:

Supreme Court's views as to construction and application of 28 *USCS 1252* permitting direct appeals to Supreme Court from federal court decisions invalidating acts of Congress in civil actions to which government is party. 63 *L Ed 2d 832*.

Suspension of deportation and adjustment of status for permanent residence of alien under 244(a)(1) of Immigration and Nationality Act (8 *USCS 1254(a)(1)*). 45 *ALR Fed 185*.



IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

FILED

JUL 21 2005

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ROD BLAGOJEVICH, Governor of the State of Illinois,)

Plaintiff,)

-vs-)

DONALD RUMSFELD, Secretary of Defense of the United States; ANTHONY J. PRINCIPI, Chairman of the Defense Base Closure and Realignment Commission; JAMES H. BILBRAY; PHILLIP E. COYLE; HAROLD W. GEHMAN, JR.; JAMES V. HANSEN; JAMES T. HILL; LLOYD W. NEWTON; SAMUEL K. SKINNER; and SUE ELLEN TURNER, members of the Defense Base Closure and Realignment Commission,)

Defendants.)

No. 05-3190

COMPLAINT

Plaintiff, ROD BLAGOJEVICH, Governor of the State of Illinois, by his attorney, Lisa Madigan, Attorney General of the State of Illinois, and for his complaint against defendants, DONALD RUMSFELD, Secretary of Defense of the United States; ANTHONY J. PRINCIPI, Chairman of the Defense Base Closure and Realignment Commission; JAMES H. BILBRAY; PHILLIP E. COYLE; HAROLD W. GEHMAN, JR.; JAMES V. HANSEN; JAMES T. HILL; LLOYD W. NEWTON; SAMUEL K. SKINNER; and SUE ELLEN TURNER, members of the Defense Base Closure and Realignment Commission, states as follows:

1. Plaintiff, Rod Blagojevich, is the Governor of the State of Illinois.
2. Pursuant to the Constitution and laws of the State of Illinois, plaintiff is the Commander in Chief of the military forces of the State of Illinois, except for those persons who are actively in the service of the United States. Illinois Constitution of 1970 art. XII,

§4.

3. Defendant Donald Rumsfeld is the Secretary of Defense of the United States.

4. Pursuant to the Defense Base Closure and Realignment Act of 1990, as amended, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of federal military bases in the United States to the Defense Base Closure and Realignment Commission.

5. Defendant Anthony J. Principi has been named by the President of the United States to be Chairman of the Defense Base Closure and Realignment Commission.

6. Defendants James H. Bilbray; Phillip E. Coyle; Harold W. Gehman, Jr.; James V. Hansen; James T. Hill; Lloyd W. Newton; Samuel K. Skinner; and Sue Ellen Turner have been named by the President of the United States to be members of the Defense Base Closure and Realignment Commission.

7. Pursuant to Sections 2903 and 2914 of the Defense Base Closure and Realignment Act of 1990 as amended, the Defense Base Closure and Realignment Commission is empowered to consider the recommendations of the Secretary of Defense and make recommendations to the President of the United States for the closure and realignment of military bases.

8. Pursuant to Sections 2903 and 2904 of the Defense Base Closure and Realignment Act of 1990 as amended, the Secretary of Defense of the United States shall close the bases recommended for closure by the Commission and realign the bases recommended for realignment, unless the recommendation of the Defense Base Closure and Realignment Commission is rejected by the President of the United States or disapproved by a joint resolution of Congress.

9. The Air National Guard base at the Abraham Lincoln Capital Airport is used for the administering and training of the reserve components of the armed forces.

10. Defendant Rumsfeld has recommended to the Base Closure and Reassignment Commission that the 183rd Fighter Wing be realigned.

11. The 183rd Fighter Wing of the Illinois Air National Guard is presently located at the Abraham Lincoln Capital Airport in Springfield, Illinois.

12. A "wing" is defined by Air Force Instruction 38-101 as a level of command with approximately 1,000-5,000 persons which has a distinct mission with a significant scope and is responsible for monitoring the installation or has several squadrons in more than one dependent group. AFI 38-101 §2.2.6.

13. The 183rd Fighter Wing is composed of Headquarters Staff, the 183rd Operations Group, the 183rd Maintenance Group, the 183rd Medical Group, and the 183rd Mission Support Group.

14. The 183rd Operations Group includes the 170th Fighter Squadron.

15. A "group" is a level of command consisting of approximately 500-2,000 persons usually comprising two or more subordinate units. AFI 38-101 §2.2.7.

16. The Groups which make up the 183rd Fighter Wing are composed of various squadrons and flights.

17. A "squadron" is the "basic unit of the Air Force." AFI-38-101 §2.2.8.

18. A "numbered/named flight" is the lowest level unit in the Air Force. AFI 38-101 §2.2.9.1.

19. The wing, groups, squadrons, and flights at the Abraham Lincoln Capital Airport are "units" as the term is defined by AFI 38-101.

20. The proposed realignment would result in the withdrawal or relocation of the fifteen F16 fighter planes currently assigned to the 183rd Fighter Wing and the relocation

or removal of the positions of 185 full time and 452 part time personnel.

21. Plaintiff has information and believes that the proposed realignment will result in the withdrawal or relocation of various units of the Illinois Air National Guard, including the 170th Fighter Squadron, the 183rd Operational Support Flight, and large portions of the 183rd Maintenance Group.

22. The result of the withdrawal or relocation of these units is that the 183rd Fighter Wing will cease to exist, because the units remaining will be insufficient to meet the definition of a "wing."

23. The Illinois National Guard constitutes a portion of the reserve component of the armed forces of the United States.

24. Defendant Rumsfeld has recommended that units of the Illinois Air National Guard be relocated or withdrawn.

25. Pursuant to 10 U.S.C. §18238, "A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the Governor of the State."

26. Plaintiff has not consented to withdrawal or relocation of units of the Illinois Air National Guard.

27. Plaintiff has informed defendants that he did not consent to withdrawal or relocation of Air National Guard units and stated that:

The Springfield Air National Guard Base is a highly strategic location for homeland security missions for both Illinois and the entire Midwest. Illinois is also home to 11 nuclear power plants that provide 50 percent of our power generation. Further, Illinois has 28 locks and dams on the Illinois, Mississippi and Ohio rivers. If these recommendations are adopted, these vital assets and many others will be at greater risk without the F-16s in Springfield. On top of all that, this move will cost the taxpayers \$10 million. These are the wrong recommendations, at the wrong time and for the wrong reasons.

See Exhibits A, B.

28. Pursuant to 32 U.S.C. §104(a) each State may fix the locations of the units and headquarters of its National Guard.

29. Pursuant to 32 U.S.C. §104(c) "no change in the branch, organization, or allocation of a unit located entirely within a state may be made without the approval of its Governor."

30. The units of the 183rd Fighter Wing are presently located entirely within the State of Illinois.

31. Federal law prohibits defendant Rumsfeld from taking action to realign the 183rd Fighter Wing without the consent of the Governor of the State of Illinois.

32. Pursuant to 10 U.S.C. §18235(b)(1) the Secretary of Defense may not permit any use or disposition of a facility for a reserve component of the armed forces that would interfere with the facilities' use for administering and training the reserve components of the armed forces.

33. The realignment of the 183rd Fighter Wing as proposed by defendant Rumsfeld would interfere with the use of the Abraham Lincoln Capital Airport for the training and administering of reserve components of the armed forces and is barred by 10 U.S.C. §18235(b)(1).

34. By virtue of defendant Rumsfeld's proposal to realign the 183rd Fighter Wing without the consent of the Governor of the State of Illinois an actual controversy exists between the parties.

35. The members of the Base Closure and Realignment Commission have interests which could be affected by the outcome of this litigation and are made defendants

pursuant to Rule 19(a) of the Federal Rules of Civil Procedure.

36. This Court has jurisdiction pursuant to 28 U.S.C. §1331 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

37. Venue is proper in the Central District of Illinois by virtue of the fact that the Abraham Lincoln Capital Airport where the 183rd Fighter Wing is based is in the Central District of Illinois and by virtue of the fact that the official residence of the Governor of the State of Illinois is in the Central District of Illinois.

WHEREFORE, plaintiff prays that this honorable Court grant the following relief:

- A. Enter a declaratory judgment declaring the realignment of the 183rd Fighter Wing as proposed by defendant Rumsfeld without the consent of the Governor of the State of Illinois is prohibited by federal law; and
- B. Granting such other relief as is warranted in the circumstances.

ROD BLAGOJEVICH, Governor of the State of Illinois,

Plaintiff,

LISA MADIGAN, Attorney General,
State of Illinois,

Attorney for Plaintiff,

BY: /s/Terence J. Corrigan

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Assistant Attorney General
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Springfield, IL 62706
Telephone: 217/782-5819
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E-mail: tcorrigan@atg.state.il.us



OFFICE OF THE GOVERNOR

Rod R. Blagojevich
JRTC, 100 WEST RANDOLPH, SUITE 16-100
CHICAGO, ILLINOIS 60601

July 11, 2005

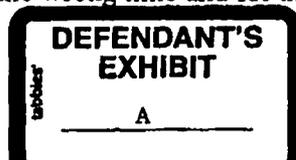
The Honorable Donald H. Rumsfeld
Secretary of Defense
U.S. Department of Defense
The Pentagon
Room 3E800
Washington D.C. 20301

Dear Secretary Rumsfeld:

According to the recent BRAC recommendations issued by the Department of Defense, the fighter mission of 183rd Fighter Wing at Abraham Lincoln Capitol Airport in Springfield, Illinois would be realigned to another state. If this recommendation is upheld by the Defense Base Closure and Realignment Commission, the 183rd Fighter Wing will no longer have a flying mission.

The Department of Defense did not coordinate this recommendation with either my office or the Illinois Adjutant General. This lack of consultation compromises the integrity of the process used to develop the BRAC recommendations and completely disregards my role as Commander-in-Chief of the Illinois National Guard. Further, pursuant to 10 U.S.C. §18238 and 32 U.S.C. §104(c), my consent is necessary for the actions contemplated by the Department of Defense with regard to the 183rd Fighter Wing.

Chairman Principi recently wrote you expressing his concern about the impact realigning Air National Guard facilities would have on homeland and national security. The Springfield Air National Guard Base is a highly strategic location for homeland security missions for both Illinois and the entire Midwest. Illinois is also home to 11 nuclear power plants that provide 50 percent of our power generation. Further, Illinois has 28 locks and dams on the Illinois, Mississippi and Ohio rivers. If these recommendations are adopted, these vital assets and many others will be at greater risk without the F-16s in Springfield. On top of all that, this move will cost the taxpayers \$10 million. These are the wrong recommendations, at the wrong time and for the wrong reasons.



By this letter I wish to formally notify you that I do not consent to the proposed realignment of the 183rd Fighter Wing. Accordingly, pursuant to the above reference statutory citations, the actions proposed by your Department cannot proceed.

Sincerely,

Signature redacted pursuant to
USDC-CDIL Adm.Proc. Rule II(I)(1)(f)

Rod Blagojevich
Governor of Illinois



OFFICE OF THE GOVERNOR

Rod R. Blagojevich
JRTC, 100 WEST RANDOLPH, SUITE 16-100
CHICAGO, ILLINOIS 60601

July 11, 2005

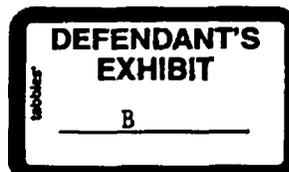
Anthony J. Principi
Chairman of the Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600
Arlington, Virginia 22202

Dear Chairman Principi:

As you are aware, Secretary of Defense Donald Rumsfeld has recommended that the fighter mission of 183rd Fighter Wing at Abraham Lincoln Capitol Airport in Springfield, Illinois be realigned to another state. If this recommendation is upheld by the Defense Base Closure and Realignment Commission, the 183rd Fighter Wing will no longer have a flying mission.

The Department of Defense did not coordinate this recommendation with either my office or the Illinois Adjutant General. This lack of consultation compromises the integrity of the process used to develop the BRAC recommendations and disregards my role as Commander-in-Chief of the Illinois National Guard. Further, pursuant to 10 U.S.C. §18238 and 32 U.S.C. §104(c), my consent is necessary for the actions contemplated by Secretary of Defense Rumsfeld with regard to the 183rd Fighter Wing.

In your recent letter to Secretary Rumsfeld, in addition to asking whether we were consulted about this recommendation, you expressed concern about the impact realigning Air National Guard facilities would have on homeland and national security. The Springfield Air National Guard Base is a highly strategic location for homeland security missions for both Illinois and the entire Midwest. Illinois is also home to 11 nuclear power plants that provide 50 percent of our power generation. Further, Illinois has 28 locks and dams on the Illinois, Mississippi and Ohio rivers. If these



recommendations are adopted, these vital assets and many others will be at greater risk without the F-16s in Springfield. On top of all that, this move will cost the taxpayers \$10 million. These are the wrong recommendations, at the wrong time and for the wrong reasons.

By this letter, I wish to formally notify the Commission that I do not consent to the proposed realignment of the 183rd Fighter Wing. Accordingly, pursuant to the statutory citations referenced above, the actions proposed by Secretary Rumsfeld cannot proceed. I expressed similar sentiments to your fellow commissioners on June 20, 2005, at the BRAC Regional Hearings in St. Louis via both oral and written testimony.

Thank you for your time and consideration.

Sincerely,

Signature redacted pursuant to
USDC-CDIL Adm.Proc. Rule II(I)(1)(f)

Rod Blagojevich
Governor of Illinois



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR
HARRISBURG

BRAC Commission

THE GOVERNOR

July 18, 2005

JUL 19 2005

Received

The Honorable Anthony J. Principi
Chairman
Defense Base Closure and Realignment Commission
2521 S. Clark St., Ste. 600
Arlington, VA 22202

Re: Rendell et al. v. Rumsfeld, Case 2:05-cv-03563-JP (E.D. Pa. 2005)

Dear Chairman Principi:

On July 11, 2005, Senators Arlen Specter and Rick Santorum and I filed a lawsuit against Secretary of Defense Donald Rumsfeld to challenge the failure of the Department of Defense (DoD) to obtain my consent or approval to the proposed deactivation of the 111th Fighter Wing, Pennsylvania Air National Guard, NAS JRB Willow Grove. Secretary Rumsfeld did not seek or obtain my consent; nor did anyone from DoD ever consult with me, my staff, my adjutant general, or her staff about this action. I have attached a copy of the complaint filed by Attorney General Tom Corbett and our legal team.

The National Guard is a unique example of federalism in action where both the state and federal governments are full partners with clear statutory and constitutional responsibilities. As Governor, I am the commander-in-chief of the Guard when it is not in active federal service. The 111th Fighter Wing provides about one-fourth of the Air Guard's strength in Pennsylvania. This Pennsylvania National Guard unit is an essential military asset available to me to address state emergencies (floods, blizzards, and other disasters), and more importantly in today's environment, homeland security missions.

As you know, provisions of both Title 10 and Title 32 of the United States Code require the consent or approval of the Governors with regard to major changes in National Guard organizations in their states. Congress was clearly right when it established a balanced approach requiring the DoD to obtain the consent of the Governors before eliminating National Guard units in their states, just as I would have to obtain the President's consent in the event that I wished to disband Pennsylvania Guard units. DoD was clearly wrong to ignore this mandate.

The Honorable Anthony J. Principi
July 18, 2005
Page 2

Pennsylvania is not seeking judicial review of the BRAC process or of BRAC decisions. We filed suit not to challenge your Commission or the BRAC process but to preserve the careful balance between the states and the federal government in managing the National Guard.

I firmly believe there is ample justification for the BRAC Commission to overturn in their entirety DoD's recommendations for closure of Naval Air Station Joint Reserve Base Willow Grove and the 911th Airlift Wing at Pittsburgh International Airport. I also believe that the presentations from both Willow Grove and Pittsburgh were compelling, and I urge you to reject DoD's recommended actions for these installations because of the substantial deviations from BRAC criteria. Our lawsuit in no way detracts from Pennsylvania's case on the merits with regard to these installations.

Based on my interactions with Commissioners and staff during base visits and the Washington hearing, as well as from watching Commission proceedings on C-SPAN, I understand the fiscal and operational realities which mandate that the BRAC process occur. I also believe that the Commission is doing a fair and thorough job in wrestling with these complex issues.

Thank you again for your courtesy and attentiveness when Pennsylvania made its presentation on July 7, 2005. We are committed to continuing to work with the Commission and hope to be in Washington soon to meet with your staff and reinforce the points we made at our regional hearing.

Sincerely,



Edward G. Rendell
Governor

cc: The Honorable James H. Bilbray
The Honorable Philip Coyle
Admiral Harold W. Gehman, Jr. (USN, Ret)
The Honorable James V. Hansen
General James T. Hill (USA, Ret)
General Lloyd W. Newton (USAF, Ret)
The Honorable Samuel K. Skinner
Brigadier General Sue E. Turner (USAF, Ret)
The Honorable Arlen Specter
The Honorable Rick Santorum
The Honorable Thomas Corbett
Adjutant General Jessica Wright

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD G. RENDELL, in his official	:	
capacity as Governor of the Commonwealth	:	
of Pennsylvania, ARLEN SPECTER, in his	:	
official capacity as United States Senator,	:	
and RICK SANTORUM, in his official	:	CIVIL ACTION
capacity as United States Senator,	:	
	:	No. 05-
Plaintiffs,	:	
	:	
v.	:	
	:	
DONALD H. RUMSFELD, in his official	:	
capacity as Secretary of Defense of	:	
the United States,	:	
	:	
Defendant.	:	

COMPLAINT

Plaintiffs Edward G. Rendell, in his official capacity as the Governor of the Commonwealth of Pennsylvania, Arlen Specter, in his official capacity as United States Senator for the Commonwealth of Pennsylvania, and Rick Santorum, in his official capacity as United States Senator for the Commonwealth of Pennsylvania, by and through their counsel, file the following Complaint against Donald H. Rumsfeld, in his official capacity as the Secretary of Defense of the United States, as follows:

Nature of This Action

1. This action arises out of the Department of Defense's (the "Department") attempt, unilaterally and without seeking or obtaining the approval of the Governor of the Commonwealth of Pennsylvania, to deactivate the 111th Fighter Wing of the Pennsylvania Air National Guard stationed at Naval Air Station Joint Reserve Base, Willow Grove, Pennsylvania (the "111th Fighter Wing"). The Department's attempt to deactivate the 111th Fighter Wing without first obtaining Governor Rendell's approval violates federal law, which expressly grants

rights to the Commonwealth of Pennsylvania and its Governor, as commander-in-chief of the Pennsylvania National Guard. While this action arises in the context of the 2005 Base Realignment and Closing process, Plaintiffs do not challenge The Defense Base Closure and Realignment Act of 1990, as amended, codified at 10 U.S.C. § 2687 note (the "BRAC Act") or allege that Secretary Rumsfeld has violated any provision of the BRAC Act. To the extent that Plaintiffs object to the Department's procedure and substantive judgments in the current Base Realignment and Closing process, they have raised those objections in other, appropriate forums. Instead, the gist of the instant action is that the Department of Defense derogated rights granted by Congress to Governor Rendell independent of the BRAC Act.

The Parties, Jurisdiction and Venue

2. Plaintiff Edward G. Rendell ("Governor Rendell") is a resident of Harrisburg, Pennsylvania and the duly elected Governor of the Commonwealth of Pennsylvania.
3. Governor Rendell is the commander-in-chief of the Pennsylvania National Guard.
4. Plaintiff Arlen Specter is a resident of Philadelphia, Pennsylvania and a duly elected United States Senator for the Commonwealth of Pennsylvania.
5. Plaintiff Rick Santorum is a resident of Penn Hills, Pennsylvania and a duly elected United States Senator for the Commonwealth of Pennsylvania.
6. Defendant Donald H. Rumsfeld ("Secretary Rumsfeld") is the Secretary of Defense of the United States of America.
7. This action arises under the "militia clause" of the United States Constitution, art. I, sec. 8, cl. 16, 10 U.S.C. § 18238 and 32 U.S.C. § 104. This Court has jurisdiction over this action based on 28 U.S.C. § 1331 because it arises under the laws of the United States.

8. Venue is proper in this judicial district under 28 U.S.C. §1391(a)(2), because a substantial part of the acts on which this action is based occurred within this district and a substantial part of the property that is the subject of the action is situated within this judicial district.

Factual Background

9. On May 13, 2005, Secretary Rumsfeld transmitted to the Defense Base Closure and Realignment Commission ("BRAC Commission") the Department of Defense Base Closure and Realignment Report ("BRAC Report").

10. The BRAC Report was prepared by the Department pursuant to the BRAC Act.

11. The BRAC Report contains the Department's recommendations to realign or close military installations within the United States and its territories.

12. While preparing the BRAC Report, the Department considered, *inter alia*, the installation needs of the Reserve Components of the armed forces, including the Air National Guard of the United States and the Air Force Reserve.

13. The BRAC Report recommends deactivation of the Pennsylvania Air National Guard's 111th Fighter Wing at the Naval Air Station Joint Reserve Base at Willow Grove, Pennsylvania and relocation of assigned A-10 aircraft to different Air National Guard units based in Boise, Idaho, Baltimore, Maryland, and Mount Clemens, Michigan.

14. The 111th Fighter Wing is an operational flying National Guard unit located entirely within the Commonwealth of Pennsylvania.

15. One thousand twenty-three (1,023) military positions are allotted to the 111th Fighter Wing.

16. The 111th Fighter Wing's strength currently stands at about 99% of the authorized positions.

17. 111th Fighter Wing personnel consist of two hundred seventy-four (274) full-time support personnel (205 military technicians and 69 Active Guard and Reserve) and seven hundred forty-nine (749) traditional (part-time) Guard members.

18. The more than 1,000 men and women assigned to the 111th Fighter Wing constitute a well-trained, mission-ready state military force available to Governor Rendell to perform state active duty missions dealing with homeland security, natural disasters and other state missions.

19. Over 75% of the members of the 111th Fighter Wing have combat experience.

20. The 111th Fighter Wing was the first unit in the Air National Guard to deploy to Kuwait and Afghanistan.

21. The 111th Fighter Wing has been intensely involved in combat operations since September 11, 2001. While deployed to Afghanistan for Operation Enduring Freedom, A-10 aircraft from the 111th flew nearly 225 combat missions. In Operation Iraqi Freedom, the 111th has flown 450 missions, dropped 125 tons of explosives and expended more than 42,000 rounds of 30mm ammunition.

22. Deactivation of the 111th Fighter Wing will deprive the Governor of nearly one-fourth of the total strength of the Pennsylvania Air National Guard and will reduce the strength of Pennsylvania military forces in the Southeastern Pennsylvania region.

23. Deactivation of the 111th Fighter Wing and accompanying action to cease flying operations at the Naval Air Station Joint Reserve Base at Willow Grove will deprive the Governor and the Commonwealth of a key unit and joint base of operations possessing current

and future military capabilities to address homeland security missions in the Southeastern Pennsylvania region.

24. The 111th Fighter Wing is organized as a unit of the Pennsylvania Air National Guard (state) and Air Combat Command (federal). Deactivation of the 111th Fighter Wing is a change in the branch, organization or allotment of the unit.

25. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC Report to the BRAC Commission, an overwhelming majority of the 111th Fighter Wing was not and currently is not in active federal service.

26. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the approval of Governor Rendell or his authorized representatives to change the branch, organization or allotment of the 111th Fighter Wing.

27. At no time during the 2005 BRAC process did any authorized representative of the Department request or obtain the approval of Governor Rendell or his authorized representatives to change the branch, organization or allotment of the 111th Fighter Wing.

28. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the consent of Governor Rendell or his authorized representatives to relocate or withdraw the 111th Fighter Wing.

29. At no time during the 2005 BRAC process did any authorized representative of the Department request or obtain the consent of Governor Rendell or his authorized representatives to relocate or withdraw the 111th Fighter Wing.

30. If requested, Governor Rendell would not give his approval to relocate, withdraw, deactivate or change the branch, organization or allotment of the 111th Fighter Wing.

31. By letter dated May 26, 2005, Governor Rendell wrote to Secretary Rumsfeld in pertinent part: "I am writing to advise you officially that, as Governor of the Commonwealth of Pennsylvania, I do not consent to the deactivation, relocation, or withdrawal of the 111th Fighter Wing."

32. To date, neither Secretary Rumsfeld nor any authorized representative of the Department has responded to Governor Rendell's letter dated May 26, 2005.

Ripeness for Judicial Review

33. Pursuant to the military base closure and realignment process set forth in the BRAC Act, Secretary Rumsfeld has finally and completely fulfilled his reporting requirements with respect to the 2005 round of realignments and closures of military installations, and no further actions are required of the Department before the 111th Fighter Wing is deactivated.

First Claim for Relief

(Declaratory Relief Regarding the Secretary's Failure to Obtain the Governor's Consent)

34. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 33, inclusive, as though fully set forth herein.

35. Pursuant to 32 U.S.C. § 104, no change in the branch, organization or allotment of a National Guard unit located entirely within a State may be made without the approval of that State's governor.

36. Pursuant to 28 U.S.C. § 2201 and Fed.R.Civ.P. 57, Plaintiffs request a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Rendell's approval, deactivate the 111th Fighter Wing .

37. Pursuant to 28 U.S.C. § 2202, Plaintiffs request such further relief as necessary to protect and enforce Governor Rendell's rights as governor of the Commonwealth of Pennsylvania and as commander-in-chief of the Pennsylvania National Guard.

Second Claim for Relief

(Declaratory Relief Regarding the Secretary's Failure to Obtain the Governor's Consent)

38. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 37, inclusive, as though fully set forth herein.

39. Pursuant to 10 U.S.C. § 18238, a unit of the Army National Guard or the Air National Guard of the United States may not be relocated or withdrawn without the consent of the governor of the State in which the National Guard unit is located.

40. Pursuant to 28 U.S.C. § 2201 and Fed.R.Civ.P. 57, Plaintiffs request a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Rendell's consent, deactivate the 111th Fighter Wing.

41. Pursuant to 28 U.S.C. § 2202, Plaintiffs request such further relief as necessary to protect and enforce Governor Rendell's rights as governor of the Commonwealth of Pennsylvania and as commander-in-chief of the Pennsylvania National Guard.

WHEREFORE, Plaintiffs pray that judgment be entered in their favor and against Secretary Rumsfeld and that the Court grant the following relief:

a. An Order declaring that Secretary Rumsfeld, by designating the 111th Fighter Wing for deactivation without first obtaining the approval of Governor Rendell, has violated the "militia clause" of the United States Constitution, art I, sec. 8, cl. 16, 32 U.S.C. § 104 and/or 10 U.S.C. § 18238;

b. An Order declaring that Secretary Rumsfeld did not and does not now have the power, without first obtaining Governor Rendell's approval, to deactivate or recommend deactivation of the 111th Fighter Wing;

c. An Order declaring that the portion of the BRAC Report that recommends deactivation of the 111th Fighter Wing of the Pennsylvania Air National Guard is null and void; and

d. Such other and further relief as the Court deems appropriate.

Dated: July 11, 2005

Respectfully submitted,

By: Thomas W. Corbett, Jr. (ARS)

Thomas W. Corbett, Jr.
Attorney General of Pennsylvania
Daniel J. Doyle
Senior Deputy Attorney General
PA ID No. 54855
Susan J. Forney
Chief Deputy Attorney General
Office of Attorney General
Commonwealth of Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 787-2944
Facsimile: (717) 772-4526

By: Barbara Adams (ARS)

Barbara Adams
PA ID No. 27226
General Counsel
Governor's Office of General Counsel
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By: Antoinette R. Stone

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Attorneys for Plaintiffs,
Edward G. Rendell, Arlen Specter and
Rick Santorum, in their official capacities

Attorneys for Plaintiff, Edward G. Rendell

**Office of General Counsel
Defense Base Closure and Realignment Commission**

Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations

**Dan Cowhig¹
Deputy General Counsel**

July 14, 2005

This memorandum describes legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not describe the limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),² such as the final selection criteria,³ but rather will focus on other less

¹ Major, Judge Advocate General's Corps, U.S. Army. Major Cowhig is detailed to the Defense Base Closure and Realignment Commission under § 2902 of the Defense Base Closure and Realignment Act of 1990, as amended.

² Pub. L. No. 101-510, Div B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. No. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523,

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obvious constraints on Commission action.⁴ This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,⁵ as an illustration. The text of AF 33 follows:

Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR⁶) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG⁷) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.⁸

1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

³ Base Closure Act § 2913.

⁴ Although the Commission has requested the views of the Department of Defense (DoD) on these matters, as of this writing DoD has refused to provide their analysis to the Commission. See Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (June 24, 2005) (with email request for information (RFI)) (Enclosure 1) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005) (with email RFI) (Enclosure 2). These documents are available in the electronic library on the Commission website, www.brac.gov, filed as a clearinghouse question reply under document control number (DCN) 3686.

⁵ DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

⁶ Air Force Reserve

⁷ Air National Guard

⁸ The justification, payback, and other segments of AF 33 read:

Justification: This recommendation distributes C-130 force structure to Little Rock (17-airlift), a base with higher military value. These transfers move C-130 force structure from the Air Force Reserve to the active duty — addressing a documented imbalance in the active/reserve manning mix for C-130s. Additionally, this recommendation distributes more capable KC-135R aircraft to Bangor (123), replacing the older, less

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This recommendation, AF 33, includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the Commission:

- the creation of a statutory requirement to base certain aircraft in specific locations;

capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 1 OF 2: RESULTS AND PROCESS].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today. See GAO, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS (GAO-05-785) (July 1, 2005).

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- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard⁹ unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

The legal and policy considerations related to Commission action on each of these elements are discussed below. While several of these issues are unique to the recommendations impacting units of the Air National Guard, several of the issues are also present in recommendations not involving the Air National Guard.

The Creation of a Statutory Requirement to Base Certain Aircraft in Specified Locations

In AF 33, the Air Force proposes to “distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station,” Maine. The eight tankers are currently based at Niagara Falls, New York. Many other Air Force recommendations also include language that would direct the relocation of individual aircraft to specific sites.

⁹ These units have a dual status. Although often referred to as units of the “Air National Guard” or “Army National Guard,” these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

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Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.¹⁰

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.¹¹

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute. Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the undivided responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.¹²

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft

¹⁰ Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater operational impediments from statutory directions on the basing of specific airframes today than under the conditions that prevailed in the early 1990s.

¹¹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

¹² Although both § 2904(c)(2) of the Base Closure Act and 10 USC § 2687(c) permit the realignment or closure of a military installation regardless of the restrictions contained in each "if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency," 10 USC § 2687(c), this language does not relieve the armed forces from the statutory provisions that result from the Base Closure Act process.

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at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In instances where the recommendation would move aircraft without any associated units, functions or substantial infrastructure, the Commission should strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft in accordance with the requirements of the service.¹³

¹³ For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's F-16s to the 115th Fighter Wing, Dane County Regional Airport, Truax Field Air Guard Station, WI (three aircraft); 114th Fighter Wing, Joe Foss Field Air Guard Station, SD (three aircraft); 150th Fighter Wing, Kirtland Air Force Base, NM (three aircraft); 113th Wing, Andrews Air Force Base, MD (nine aircraft); 57th Fighter Wing, Nellis Air Force Base, NV (seven aircraft), the 388th Wing at Hill Air Force Base, UT (six aircraft), and backup inventory (29 aircraft).

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit's aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it would be appropriate for the Commission to amend the recommendation to read "Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's aircraft as directed by the Secretary of the Air Force, in accordance with law." Such an amendment would be appropriate under the Base Closure Act because the language directing the "distribution" of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act and, depending upon the other issues involved in the particular recommendation, may otherwise violate existing law. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized. Such an amendment would also have the benefit of preserving the Air Force Secretary's flexibility to react to future needs and missions. Further, if legal bars associated with aspects of recommendations impacting the Air National Guard are removed, for example, by obtaining the consent of the governor concerned, such an amendment could in some instances preserve the Air Force Secretary's access to Base Closure Act statutory authority and funding where the distributions are otherwise consistent with law. This could occur where the Secretary of the Air Force associates infrastructure changes with those distributions.

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**The Use of the Base Closure Act to Effect Changes that do not Require the
Authority of the Act**

The authority of the Base Closure Act is required only where the Department closes “any military installation at which at least 300 civilian personnel are authorized to be employed,”¹⁴ or realigns a military installation resulting in “a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed” at that installation.¹⁵ The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.¹⁶

The Department of Defense does require the authority of the Base Closure Act to carry out the recommendation to “close Niagara Falls Air Reserve Station” because the station employs more than 300 civilian personnel. However, in AF 33, the Air Force would also direct the following actions:

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force
Base, AR. The 914ths headquarters moves to Langley Air Force Base,
VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ...
Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,¹⁷ or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small

¹⁴ 10 USC § 2687(a)(2).

¹⁵ 10 USC § 2687(a)(3).

¹⁶ By definition, the Base Closure Act does not apply to “closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section.” Base Closure Act § 2909(c)(2).

¹⁷ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

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numbers of aircraft, often without moving the associated personnel.¹⁸ Several of the Air Force recommendations do not contain a single element that would require the authority of the Base Closure Act.¹⁹

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,²⁰ the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.²¹

¹⁸ For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel

¹⁹ For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

²⁰ See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized, page 9; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, page 11, and; the retirement of aircraft whose retirement has been barred by statute, page 15.

²¹ Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, page 9.

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In order to protect the Base Closure Act process, where a recommendation to close or realign and installation falls below the threshold set by Section 2687 of Title 10, United States Code, but does not otherwise conflict with existing legal restrictions, it would be appropriate for the Commission to consider even a minor deviation from the force-structure report or the final selection criteria to be a substantial deviation under the meaning of the Base Closure Act. Where a recommendation to close or realign and installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.²²

The Use of the Base Closure Act to Effect Changes in How a Unit is Equipped or Organized

In AF 33, the Air Force would direct the following actions:

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"²³ Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,²⁴ the transfer or retirement of specific

²² See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, page 7, to effect changes in how a unit is equipped or organized, page 9, to relocate, withdraw, disband or change the organization of an Air National Guard unit, page 11, to retire aircraft whose retirement has been barred by statute, page 15, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, page 17.

²³ Emphasis added.

²⁴ See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in

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aircraft without movement of the associated personnel,²⁵ or the movement of headquarters without the associated units.

The purpose of the Base Closure Act “is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States.”²⁶ Under the Base Closure Act, “the term ‘military installation’ means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility.”²⁷ The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, “the term ‘realignment’ includes any action which both reduces and relocates functions and civilian personnel positions *but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.*”²⁸ A “realignment,” under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix²⁹ are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

²⁵ See notes 18 and 19 above.

²⁶ Base Closure Act § 2901(b) (emphasis added).

²⁷ Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

²⁸ Base Closure Act, §2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

²⁹ For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, “*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*” by closing “Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH,” distributing “the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft).” Emphasis added.

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**The Use of the Base Closure Act to Relocate, Withdraw, Disband or Change the
Organization of an Air National Guard Unit**

In AF 33, the Air Force proposes to “distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station,” Maine. Under the recommendation, “no Air Force aircraft remain at Niagara.” The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.³⁰

Many other Air Force recommendations would have similar effects, relocating, withdrawing, disbanding or changing the organization of Air National Guard units. In most instances, where the Air Force recommends that an Air Guard flying unit be stripped of its aircraft, the Air Force explicitly provides that the unit assume an expeditionary combat support (ECS) role. For example, in AF 28, Key Field Air Guard Station, MS, the Air Force would

Realign Key Field Air Guard Station, MS. Distribute the 186th Air Refueling Wing’s KC-135R aircraft to the 128th Air Refueling Wing (ANG), General Mitchell Air Guard Station, WI (three aircraft); the 134th Air Refueling Wing (ANG), McGhee-Tyson Airport Air Guard Station, TN (three aircraft); and 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME (two aircraft). One aircraft will revert to backup aircraft inventory. The 186th Air Refueling Wing’s fire fighter positions move to the 172^d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN³¹ 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

³⁰ If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.

³¹ Department of the Navy

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Johnstown, PA, the Navy proposes to “close Naval Air Station Joint Reserve Base Willow Grove ... deactivate the 111th Fighter Wing (Air National Guard).” In AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission “realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing’s F-16s (15 aircraft) retire. The wing’s expeditionary combat support elements remain in place.” As justification, the Air Force indicates “the reduction in F-16 force structure and the need to align common versions of the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill*.”³²

Clearly, these and similar recommendations contemplate an action whose direct or practical effect will be a change in the organization, or a withdrawal, or a disbandment of an Air National Guard unit. There are specific statutory provisions that limit the authority of any single element of the Federal Government to carry out such actions.

By statute, “each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard.”³³ This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, “may designate the units of the National Guard ... to be maintained in each State and Territory” in order “to secure a force the units of which when combined will form complete higher tactical units ... no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor.”³⁴ The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.³⁵

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Commission. It could be argued that since the

³² Emphasis added.

³³ 32 USC § 104(a).

³⁴ 32 USC § 104(c).

³⁵ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (“The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.”) (June 16, 2005) (Enclosure 3).

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recommendations of the Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.³⁶ It could also be argued that since the Commission would merely recommend, but does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.³⁷ Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁸ without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."³⁹ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,⁴⁰ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that "unless the President consents ... an organization of the National Guard whose

³⁶ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."

³⁷ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁸ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁹ 10 USC § 18238.

⁴⁰ 10 USC § 2687.

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members have received compensation from the United States as members of the National Guard may not be disbanded.”⁴¹ While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an “organization of the National Guard whose members have received compensation from the United States as members of the National Guard,” the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act, the President would be required to weigh the detrimental effects of setting aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission’s recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that “in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times.”⁴² This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,⁴³ they

⁴¹ 32 USC § 104(f)(1).

⁴² 32 USC § 102.

⁴³ See Perpich v. Department of Defense, 496 U.S. 334 (1990); see generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Steel Seizures).

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also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.⁴⁴ Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core Constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization of an Air National Guard unit, the Commission may not approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.⁴⁵

The Use of the Base Closure Act to Retire Aircraft whose Retirement Has Been Barred by Statute

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard “retire its eight KC-135E aircraft.” As discussed above, the

⁴⁴ See Steel Seizures; W. Winthrop, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the “natural law of war.” See note 45, below.

⁴⁵ Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

Any corps of artillery, cavalry, or infantry existing in any of the States on the passage of the Act of May 8, 1792, which by the laws, customs, or usages of those States has been in continuous existence since the passage of that Act [May 8, 1792], shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That those organizations may be a part of the National Guard and entitled to all the privileges thereof, and shall conform in all respects to the organization, discipline, and training to the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Section 32(a) of Act of August 10, 1956, Ch. 1041, 70A Stat. 633. Although this statute has relevance only to the militia of the 13 original states, and perhaps to the militia of Vermont, Maine and West Virginia, neither the Department of Defense nor the Commission has engaged in the research necessary to determine whether any of the units impacted by these recommendations enjoys this protection.

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Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

It is well-settled law that Congress' power under the Constitution to equip the armed forces includes the authority to place limitations on the disposal of that equipment. For a variety of reasons, Congress has exercised that authority extensively in recent years with regard to two aircraft types that are prominent in the Air Force recommendations to retire aircraft.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.⁴⁶ Under the Ronald W. Reagan NDAA for FY 2005, "the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005."⁴⁷ It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.⁴⁸

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also have statutory authority. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.⁴⁹ Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain

⁴⁶ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).

⁴⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).

⁴⁸ See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 ("The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006") and § 135 ("The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.") (May 17, 2005).

⁴⁹ See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC §104(c), Flynn, Aaron M. (July 6, 2005).

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types of aircraft are deleted from the Commission's recommendations in order to avoid a potential conflict of laws.

The Use of the Base Closure Act to Transfer Aircraft from a Unit of the Air Guard of One State or Territory to that of Another

In AF 33, the Air Force recommends:

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME.

This recommendation would effectively transfer the entire complement of aircraft from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations include similar language directing the transfer of aircraft from the Air Guard of one state or territory to that of another.⁵⁰

The effect of such a recommendation would be to combine the issues raised by a change in the organization, withdrawal, or disbandment of an Air National Guard unit with those raised by the use of the Base Closure Act to effect changes in how a unit is equipped or organized, and those raised by use of the Act to effect changes in how a unit is equipped or organized. The legal impediments and policy concerns of each issue are compounded, not reduced, by their combination.

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air

⁵⁰ See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the 109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky.

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Guard of a particular state or territory,⁵¹ the Commission may not approve any recommendation action that would contravene the intent of Congress.

Conclusion and Recommendation

Each of the areas of concern discussed above

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.⁵²

⁵¹ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005) (Enclosure 4).

⁵² The final selection criteria are:

- (a) Final selection criteria. The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 shall be the military value and other criteria specified in subsections (b) and (c).

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The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with

(b) Military value criteria. The military value criteria are as follows:

(1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.

(2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.

(3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.

(4) The cost of operations and the manpower implications.

(c) Other criteria. The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 are as follows:

(1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

(2) The economic impact on existing communities in the vicinity of military installations.

(3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.

(4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.

(d) Priority given to military value. The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.

(e) Effect on Department and other agency costs. The selection criteria relating to the cost savings or return on investment from the proposed closure or realignment of military installations shall take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations.

(f) Relation to other materials. The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

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the force-structure plan and the final selection criteria, or whether there is a substantial deviation from the force-structure plan or the final selection criteria.

Where the Commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible, to correct the substantial deviation or overcome the legal bar. Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the Commission must act to strike the recommendation from the list.

Author: Dan Cowhig, Deputy General Counsel *DJC 14 Jul 05*
Approved: David Hague, General Counsel

DH 14 Jul 05

4 Enclosures

1. Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (with email request for information (RFI)) (June 24, 2005).
2. Letter from DoD OGC to Commission Deputy General Counsel Cowhig (with email RFI) (July 5, 2005).
3. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
4. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600



June 24, 2005

The Honorable Anthony J. Principi
Chairman
Defense Base Closure and Realignment Commission
2521 South Clark Street, Suite 600
Arlington, Virginia 22202-3920

Dear Chairman Principi:

The Department of Defense is pleased to respond to Commission inquiries concerning the 2005 Base Realignment and Closure (BRAC) recommendations. The Deputy General Counsel of the Commission, Mr. Dan Cowhig, by e-mail dated June 10, 2005, requested detailed legal analyses regarding the authority of the Department of Defense to make and implement certain recommendations affecting the Air National Guard. Mr. Cowhig also requested a description of any consultation or coordination that may have occurred between the Department of Defense and the Governors and Adjutants General regarding the proposed realignments of Air National Guard units. Information regarding Air Force consultation with Governors and Adjutants General is being provided under separate cover; you may expect to receive that information in the next few days.

The remaining four questions requested a series of legal opinions addressing the Department's authority to make and implement the recommendations forwarded to the Commission concerning Air National Guard units and equipment. We recently received word from the Department of Justice that on May 23, 2005, you requested similar legal advice from the Attorney General. In keeping with its common practice, the Office of Legal Counsel (OLC) has asked us to provide our views concerning these issues, and we will do so soon. As a consequence, we believe it would be premature and inappropriate for the Department to provide its views on these issues to the Commission in advance of OLC's opinion for the Commission.

I certify that the information contained herein is accurate and complete to the best of my knowledge and belief. If you have any questions concerning this response, please feel free to contact me at 703-693-4842 or nicole.bayert@osd.pentagon.mil.

Nicole D. Bayert
Associate General Counsel
Environment & Installations



ENCLOSURE 1

Cowhig, Dan, CIV, WSO-BRAC

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 24, 2005 9:06 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Flood, Glenn, CIV, OASD-PA; Hoggard, Jack, CTR, WSO-OSD_DST JCSG
Subject: OSD BRAC Clearing House Tasker C0285 ANG realignments in conflict with USC law

Attachments: BRAC Subpoena.pdf

Attached is the updated response to your inquiry, OSD Clearinghouse Tasker C0285 (PDF file is provided).



BRAC
jbpoena.pdf (136 KI)

OSD BRAC Clearinghouse

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 17, 2005 10:57 AM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL
Subject: RE: OSD BRAC Clearing House Tasker #C0285 ANG realignments in conflict with USC law

Clearinghouse -

Thank you. The memorandum indicates that a further response is pending. Please keep the tasker open until the answer is complete.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil
www.brac.gov

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 17, 2005 10:18 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: FW: OSD BRAC Clearing House Tasker #C0285 ANG realignments in conflict with USC law

Attached is the response to your inquiry, OSD Clearinghouse Tasker # C0285.
(PDF file is provided.)

OSD BRAC Clearinghouse

Subject: RE: OSD BRAC Clearing House Tasker #0285 ANG realignments in conflict with USC law

Attached is the answer to subject tasker. << File: BI-0056,CT0285, Dan Cowhig, 16 Jun 05.pdf >>

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC

Sent: Friday, June 10, 2005 5:09 PM

To: RSS dd - WSO BRAC Clearinghouse

Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Hague, David, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL

Subject: BRAC Commission RFI

Clearinghouse -

Please respond to the following:

The Governors and Adjutants General of various states have indicated they believe some or all of the realignments of Air National Guard units recommended by the Department of Defense violate 10 USC 18238 and 32 USC 104, as well as the authority of the various states to raise, maintain and command their respective militias under the state and Federal statutory law and constitutions. Please provide a detailed analysis of application of these statutes to the proposed realignment actions involving the Air National Guard. Please include an analysis of the underlying issues of the division of powers between the state and Federal governments. The analysis should specifically address whether and why the proposed realignments would or would not violate existing law.

The Governors and Adjutants General of various states have indicated that in their view the Department of Defense did not adequately consult or coordinate with the Governors and Adjutants General regarding the impact of the proposed realignments of Air National Guard units recommended by the Department of Defense on their homeland security missions. Please describe in detail the consultation or coordination that occurred between the Department of Defense and the Governors and Adjutants General regarding the proposed realignments of Air National Guard units.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to relocate specified aircraft from one state's Air National Guard to the Air National Guard of another state fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to relocate aircraft from one state's Air National Guard to the Air National Guard of another state is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to retire certain numbers of specified aircraft fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to retire aircraft is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe some of the realignments of Air National Guard units recommended by the Department of Defense may violate the Constitutional separation of powers between the executive and legislative branches of the Federal Government. Some of the aircraft the Department of Defense has recommended for removal from specific states were purchased by Congress for the express purpose of equipping those states' militias. The Governors and Adjutants General of various states have suggested that removal of those aircraft from the designated state's militia and the transfer of the aircraft to another state's militia at the direction of the Department of Defense would employ the President's power as Commander-in-Chief to contravene Congress' exercise of its power to authorize, equip and fund that designated state's militia. Please provide a detailed analysis of that position as it applies to the proposed realignment actions involving the Air National Guard.

Thank you.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer

2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
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DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600



July 5, 2005

Mr. Dan Cowhig
Deputy General Counsel
Defense Base Closure and Realignment Commission
2521 South Clark Street, Suite 600
Arlington, Virginia 22202-3920

Dear Mr. Cowhig:

This letter responds to your e-mail to the BRAC Clearinghouse, dated June 24, 2005. You asked for the legal advice the Department of Defense received regarding the authority of the Department to make and implement certain recommendations affecting the Air National Guard. You also requested copies of any pertinent documents.

Those involved in developing BRAC recommendations for the Secretary's consideration were advised by counsel regarding the authority of the Department of Defense to make and implement certain recommendations affecting the Air National Guard. The substance of this advice is protected from disclosure by the attorney-client privilege.

If you have any questions concerning this response, please contact Mrs. Nicole D. Bayert, Associate General Counsel for Environment & Installations, at 703-693-4842 or nicole.bayert@osd.pentagon.mil.

Sincerely,

Frank R. Jimenez
Acting Deputy General Counsel
(Legal Counsel)



ENCLOSURE 2

Cowhig, Dan, CIV, WSO-BRAC

From: RSS dd - WSO BRAC Clearinghouse
Sent: Tuesday, July 05, 2005 12:29 PM
To: Cowhig, Dan, CIV, WSO-BRAC
Subject: FW: Response to Clearinghouse Tasker 418 or 419 - question from Dan Cowhig via June 24 email

Attachments: Response to Commission request for legal advice on guard signed.pdf

Attached is the response to your query OSD BRAC Clearinghouse # 0418, in PDF format.

OSD BRAC Clearinghouse

-----Original Message-----

From: Rice, Ginger, Mrs, OSD-ATL
Sent: Tuesday, July 05, 2005 12:16 PM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Yellin, Alex, CTR, OSD-ATL; Casey, James, CTR, OSD-ATL; Alford, Ralph, CTR, OSD-ATL; Meyer, Robert, CTR, OSD-ATL; Buzzell, Brian, CTR, OSD-ATL; Harvey, Marian, CTR, OSD-ATL
Subject: FW: Response to Clearinghouse Tasker 418 or 419 - question from Dan Cowhig via June 24 email

Attached is the response to Clearinghouse tasker 418 or 419 - please process appropriately.

Ginger B Rice
OSD BRAC Office
(703) 690-6101

-----Original Message-----

From: Bayert, Nicole, Ms, DoD OGC
Sent: Tuesday, July 05, 2005 11:54 AM
To: Rice, Ginger, Mrs, OSD-ATL
Cc: Potochney, Peter, Mr, OSD-ATL; Yellin, Alex, CTR, OSD-ATL
Subject: Response to Clearinghouse Tasker 418 or 419 - question from Dan Cowhig via June 24 email

Please ensure attached gets to clearinghouse for appropriate action - including provision to Congress w/in 48 hours. Thanks.

Nicole D. Bayert
Department of Defense
Associate General Counsel
(Environment & Installations)
703-693-4842; fax 693-4507

CAUTION: This message may contain information protected by the attorney-client, attorney work product, deliberative process, or other privilege. Do not disseminate without the approval of the Office of the DoD General Counsel.

Cowhig, Dan, CIV, WSO-BRAC

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Tuesday, July 05, 2005 11:05 AM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Hague, David, CIV, WSO-BRAC; Sillin, Nathaniel, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL; Cirillo, Frank, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: RE: OSD BRAC Clearinghouse Tasker #0418 - BRAC Commission RFI

Clearinghouse -

Request update on status of RFI. No response to date.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil
www.brac.gov

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 24, 2005 5:11 PM
To: Alford, Ralph, CTR, OSD-ATL; Yellin, Alex, CTR, OSD-ATL; Buzzell, Brian, CTR, OSD-ATL; Casey, James, CTR, OSD-ATL; Meyer, Robert, CTR, OSD-ATL
Cc: Cowhig, Dan, CIV, WSO-BRAC
Subject: OSD BRAC Clearinghouse Tasker #0418 - BRAC Commission RFI

Please provide a response to the inquiry below and return to OSD BRAC Clearinghouse NLT noon on Wednesday 29 June 2005, with the designated signature authority, in PDF format.

Thank you for your cooperation and timeliness in this matter.

OSD BRAC Clearinghouse

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 24, 2005 4:47 PM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Hague, David, CIV, WSO-BRAC; Sillin, Nathaniel, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL; Cirillo, Frank, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: BRAC Commission RFI

Clearinghouse -

Please respond to the following:

What legal advice did the Department of Defense receive on the questions given below during the formulation of the base closure and realignment recommendations? Please provide copies of any pertinent documents.

The Governors and Adjutants General of various states have indicated they believe some or all of the realignments of Air National Guard units recommended by the Department of Defense violate 10 USC 18238 and 32 USC 104, as well as the authority of the various states to raise, maintain and command their respective militias under the state and Federal statutory law and constitutions. Please provide a detailed analysis of application of these statutes to the proposed realignment actions involving the Air National Guard.

Please include an analysis of the underlying issues of the division of powers between the state and Federal governments. The analysis should specifically address whether and why the proposed realignments would or would not violate existing law.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to relocate specified aircraft from one state's Air National Guard to the Air National Guard of another state fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to relocate aircraft from one state's Air National Guard to the Air National Guard of another state is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to retire certain numbers of specified aircraft fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to retire aircraft is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe some of the realignments of Air National Guard units recommended by the Department of Defense may violate the Constitutional separation of powers between the executive and legislative branches of the Federal Government. Some of the aircraft the Department of Defense has recommended for removal from specific states were purchased by Congress for the express purpose of equipping those states' militias. The Governors and Adjutants General of various states have suggested that removal of those aircraft from the designated state's militia and the transfer of the aircraft to another state's militia at the direction of the Department of Defense would employ the President's power as Commander-in-Chief to contravene Congress' exercise of its power to authorize, equip and fund that designated state's militia. Please provide a detailed analysis of that position as it applies to the proposed realignment actions involving the Air National Guard.

If they exist, legal opinions on these matters fall within the ambit of "all information used by the Secretary to prepare the recommendations."

Please expedite your response to this request.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil
www.brac.gov

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 24, 2005 9:06 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Flood, Glenn, CIV, OASD-PA; Hoggard, Jack, CTR, WSO-OSD_DST JCSG
Subject: OSD BRAC Clearing House Tasker C0285 ANG realignments in conflict with USC law

Attached is the updated response to your inquiry, OSD Clearinghouse Tasker C0285 (PDF file is provided).

<< File: BRAC Subpoena.pdf >>

OSD BRAC Clearinghouse

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 17, 2005 10:57 AM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL
Subject: RE: OSD BRAC Clearing House Tasker #C0285 ANG realignments in conflict with USC law

Clearinghouse -

Thank you. The memorandum indicates that a further response is pending. Please keep the tasker open until the answer is complete.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil
www.brac.gov

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 17, 2005 10:18 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: FW: OSD BRAC Clearing House Tasker #C0285 ANG realignments in conflict with USC law

Attached is the response to your inquiry, OSD Clearinghouse Tasker # C0285.
(PDF file is provided.)

OSD BRAC Clearinghouse

Subject: RE: OSD BRAC Clearing House Tasker #0285 ANG realignments in conflict with USC law

Attached is the answer to subject tasker. << File: BI-0056,CT0285, Dan Cowhig, 16 Jun 05.pdf >>

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 10, 2005 5:09 PM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Hague, David, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL
Subject: BRAC Commission RFI

Clearinghouse -

Please respond to the following:

The Governors and Adjutants General of various states have indicated they believe some or all of the realignments of Air National Guard units recommended by the Department of Defense violate 10 USC 18238 and 32 USC 104, as well as the authority of the various states to raise, maintain and command their respective militias under the state and Federal statutory law and constitutions. Please provide a detailed analysis of application of these statutes to the proposed realignment actions involving the Air National Guard. Please include an analysis of the underlying issues of the division of powers between the state and Federal governments. The analysis should specifically address whether and why the proposed realignments would or

would not violate existing law.

The Governors and Adjutants General of various states have indicated that in their view the Department of Defense did not adequately consult or coordinate with the Governors and Adjutants General regarding the impact of the proposed realignments of Air National Guard units recommended by the Department of Defense on their homeland security missions. Please describe in detail the consultation or coordination that occurred between the Department of Defense and the Governors and Adjutants General regarding the proposed realignments of Air National Guard units.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to relocate specified aircraft from one state's Air National Guard to the Air National Guard of another state fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to relocate aircraft from one state's Air National Guard to the Air National Guard of another state is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

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The Governors and Adjutants General of various states have indicated they believe some of the realignments of Air National Guard units recommended by the Department of Defense may violate the Constitutional separation of powers between the executive and legislative branches of the Federal Government. Some of the aircraft the Department of Defense has recommended for removal from specific states were purchased by Congress for the express purpose of equipping those states' militias. The Governors and Adjutants General of various states have suggested that removal of those aircraft from the designated state's militia and the transfer of the aircraft to another state's militia at the direction of the Department of Defense would employ the President's power as Commander-in-Chief to contravene Congress' exercise of its power to authorize, equip and fund that designated state's militia. Please provide a detailed analysis of that position as it applies to the proposed realignment actions involving the Air National Guard.

Thank you.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
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www.brac.gov

16 June 2005

Inquiry Response

Re: BI-0068

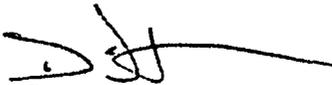
Requester: OSD Clearinghouse

Question: Identify whether or not the respective Governor consents to each proposed realignment or closure impacting an Air Guard installation.

Answer: The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states. There are no letters from any Governor, addressed to the Air Force, withholding consent to realignment or closure of Air National Guard installations in their respective states. However, there is one letter, (attached) from Pennsylvania Governor Rendell to Secretary Rumsfeld, non-consenting to the Navy closure impacting the 111th Fighter Wing, Pennsylvania Air National Guard (ANG), at Naval Air Station Joint Reserve Base (NAS JRB) Willow Grove.

I certify that the information contained herein is accurate and complete to the best of my knowledge and belief. If you have any questions, feel free to contact me.

Approved



DAVID L. JOHANSEN, Lt Col, USAF
Chief, Base Realignment and Closure Division



Willow Grove -
Rendell ltr.pdf...

ENCLOSURE 3



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR
HARRISBURG

THE GOVERNOR

May 26, 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
1155 Defense Pentagon
Arlington, VA 20301

Dear Secretary Rumsfeld:

The Department of Defense recommendations for the 2005 Base Realignment and Closure (BRAC) process included a recommendation to deactivate the 111th Fighter Wing, Pennsylvania Air National Guard, Willow Grove Air Reserve Station.

I am writing to advise you officially that, as Governor of the Commonwealth of Pennsylvania, I do not consent to the deactivation, relocation, or withdrawal of the 111th Fighter Wing.

The recommended deactivation of the 111th Fighter Wing has not been coordinated with me, my Adjutant General, or members of her staff. No one in authority in the Pennsylvania Air National Guard was consulted or even briefed about this recommended action before it was announced publicly.

The recommended deactivation of the 111th Fighter Wing appears to be the result of a seriously flawed process that has completely overlooked the important role of the states with regard to their Air National Guard units.

Sincerely,

A handwritten signature in black ink that reads "Edward G. Rendell".

Edward G. Rendell
Governor

Cc: The Honorable Anthony J. Principi
The Honorable Arlen Specter
The Honorable Rick Santorum
The Honorable Allyson Schwartz
The Honorable Michael Fitzpatrick

30 June 2005

Inquiry Response

Re: BI-0099 - ANG aircraft acquired through congressional add

Requester: BRAC Commission

Question:

Request the following information with respect to Air National Guard aircraft that were purchased over the past 20 years with congressional add money. Specifically, we need the type aircraft, tail number, location, date received by gaining unit, source of funding (FY, appropriation, etc). Please forward this information NLT than 31 Jun 05 as it supports a commission event.

Answer:

The requested information is provided in the attachment (4 pages). This information was provided by the National Guard Bureau.

Approved



DAVID L. JOHANSEN, Lt Col, USAF
Chief, Base Realignment and Closure Division

ENCLOSURE 4

**ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005**

Type Aircraft	Unit Received	Date Received	Tail #	Total
F-16 Blk 52	166 FW, McEntire ANGB, SC	1995	92003902	16
		1995	92003903	
		1995	92003905	
		1995	92003909	
		1995	92003911	
		1995	92003914	
		1995	92003916	
		1995	92003917	
		1995	92003922	
		1995	93000531	
		1995	93000533	
		1995	93000535	
		1995	93000537	
		1995	93000539	
		1995	93000543	
		1995	93000549	
C-17A: 8 aircraft,	172 AW, Jackson, MS	18-Dec-03	2001112	8
		12-Jan-04	3003113	
		30-Jan-04	3003114	
		17-Feb-04	3003115	
		9-Mar-04	3003116	
		31-Mar-04	3003117	
		18-Apr-04	3003118	
		12-May-04	3003119	
C-21A <i>note. Historian shows 4 acquired, however only 2 currently in inventory</i>	200 ALF SQ, Peterson, CO	Dec 86 to Aug 87	85000374	2
			85000377	

**ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005**

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-130H <i>note: Historian shows 14 to Nashville, but programatically can only account for 12</i>	118 TAW, Nashville, TN	FY90	89001051	12
			89001052	
			89001053	
			89001054	
			89001181	
			89001182	
			89001183	
			89001184	
			89001185	
			89001186	
			89001187	
			89001188	
			123 AW, Louisville, KY	
91001232				
91001233				
91001234				
91001235				
91001236				
91001237				
91001238				
91001239				
91001651				
91001652				
91001653				
145 AW, Charolette NC	FY94-95	92001451		12
		92001452		
		92001453		
		92001454		
		93001455		
		93001456		
		93001457		
		93001458		
		93001459		
		93001561		
		93001562		
		93001563		

**ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005**

Type Aircraft	Unit Received	Date Received	Tail #	Total				
C-130H	153 AW, Cheyenne, WY	FY94-95	92001531	8				
			92001532					
			92001533					
			92001534					
			92001535					
			92001536					
			92001537					
			92001538					
	167 AW, EWVRA Shepherd, WV	FY94-95	94006701	12				
			94006702					
			94006703					
			94006704					
			94006705					
			94006706					
94006707								
94006708								
95006709								
95006710								
95006711								
95006712								
C-26A	124WG, Boise ID	FY90		11				
			147FW Ellington AFB TX					
			144FW, Fresno CA					
			186ARW, Meridian MS (KEY FIELD)					
			182AW, Peoria, IL					
			111FW, Willow Grove NAS PA					
			122FW, Ft Wayne, IN					
			192FW, Richmond VA (BYRD FLD)					
			131FW, St Louis, MO (LAMBERT)					
			142FW, Portland OR					
			121ARW, Rickenbacker OH					
			HH-60G		176ARW, Kulis ANGB, AK	FY90	92026466	6
							92026467	
							92026469	
92026470								
92026471								
92026472								
106 RSQ WG, Suffolk, NY	FY90	88026108		6				
		88026111						
		88026112						
		88026113						
		88026114						
		92026468						
129 RSQ WG, Moffett Fld, CA	FY90	88026106		6				
		88026107						
		88026115						
		88026118						
		88026119						
		88026120						

note: C-26As are no longer
in the ANG inventory

note: Historian shows 4:
programmatically shows 6

**ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005**

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-26B	187 FW, Dannelly Fld, AL	FY92	91000504	
			94000265	
			94000260	
			94000262	
			90000529	
			92000369	
			92000373	
			92000372	
			94000261	
			94000264	
			94000263	11
C-38A	201 ALF SQ, Andrews AFB, MD		94001569	
			94001570	2
C-130J	175 WGH WG, Baltimore, MD		97001351	
			97001352	
			97001353	
			97001354	
			98001355	
			98001356	
			98001357	
			98001358	
			98001932	9
	146 ALF WG, Channel Islands, CA		1001461	
			1001462	
			2001483	
			2001484	4
	143 ALF WG, Quonset State, RI		2001434	
			99001431	
			99001432	
			99001433	4
EC-130J	193 SOP WG, Harrisburg, PA		1934	
			96008154	
			97001931	
			98001932	
			99001933	4
TOTAL AIRCRAFT:				45

Note: C-12J: - acquired 6 from 87 to 88, (no longer in inventory)

