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GAO BID PROTEST PROCEDURES UNDER THE COMPETITION IN CONTRACTING ACT: CONSTITUTIONAL IMPLICATIONS AFTER *BUCKLEY AND CHADHA*

The General Accounting Office (GAO), headed by the Comptroller General,¹ is empowered to settle and adjust all claims by or against the United States,² to settle public accounts,³ to audit and investigate the expenditure of public funds,⁴ and to make reports to either House of Congress or to any committee.⁵ These powers would suggest a GAO role in the federal procurement process limited to areas such as contractor claims against the government⁶ or audit of agency records.⁷ These statutory provisions, however,

1. The General Accounting Office and the Office of the Comptroller General were created by the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (1921) (codified as amended at 31 U.S.C. § 701 (1982) and in other scattered sections of 31 U.S.C.). The terms Comptroller General, General Accounting Office, and GAO are used interchangeably; that practice will be followed in this Comment.

2. 31 U.S.C. § 3702 (1982) ("Except as provided . . . the Comptroller General shall settle all claims of or against the United States Government.").

3. 31 U.S.C. § 3526(a) (1982) ("The Comptroller General shall settle all accounts of the United States Government and supervise the recovery of all debts finally certified by the Comptroller General as due the Government.").

4. 31 U.S.C. § 3523(a) (1982) ("Except as specifically provided by law, the Comptroller General shall audit the financial transactions of each agency."). Section 717 of title 31 gives the GAO authority to investigate and to analyze expenditures of public funds and empowers the Comptroller General to evaluate government programs at his own initiative or at the request of Congress.

5. 31 U.S.C. § 719 (1982) (requires the Comptroller General to make periodic reports to Congress and to various congressional committees).

6. For a discussion of the GAO role in claims settlements, see Cibinic & Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, 362-66 (1969); Ganister, *The General Accounting Office as an Independent Agency*, 9 NAT'L CONT. MGT. J. 1, 7-8 (1975), reprinted in 12 Y.B. PROCUREMENT ARTICLES 499, 507-08 (1975); Note, *The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts*, 70 HARV. L. REV. 350 (1956). Cibinic & Lasken, *supra*, at 362, note that the GAO claims settlement function has been diminished by the advent of agency boards of contract appeals and by the Tucker Act, 24 Stat. 505 (codified as amended at 28 U.S.C. §§ 1402, 1491 (1982)), which gives concurrent jurisdiction over claims to federal district courts and to the United States Claims Court.

7. See Cibinic & Lasken, *supra* note 6, at 386-93; Ganister, *supra* note 6, at 512-13; Morgan, *The General Accounting Office: One Hope for Congress to Regain Parity of Power with the President*, 51 N.C.L. REV. 1279, 1283-84 (1973); *supra* note 4.

believe the central role that the GAO plays in the formulation of federal procurement policy and in the routine operations of federal contracting agencies. Through an expansive interpretation of the "settlement" power, the GAO has broadened its authority into the area of contract formation. It has done so primarily by hearing and deciding protests against government contract awards by unsuccessful bidders.⁸ Legal commentators have frequently noted the lack of express statutory authority for the GAO to hear bid protests.⁹ Nonetheless, the GAO has been the primary forum for bid protests for nearly sixty years.¹⁰ Contractors have found the GAO procedures simple and inexpensive.¹¹ Agencies have acquiesced in the GAO's exercise of this authority, both for the sake of administrative convenience,¹² and because the GAO could theoretically later refuse payment on contracts entered into contrary to its advice.¹³ Moreover, for nearly thirty years, the GAO provided the only forum for bid protests.¹⁴

The recently enacted Competition in Contracting Act (CICA) of 1984¹⁵

8. Challenges by potential or unsuccessful offerors to award a contract are termed "bid protests." Frequent grounds for protest include defects or ambiguities in the solicitation or allegations that the source selection or evaluation process was not conducted properly.

9. See, e.g., Cibinic & Lasken, *supra* note 6, at 393 (the GAO role "has not resulted from any clear Congressional mandate"); Schnitzer, *Evolving Contractors' Remedies—The GAO*, 29 FED. B. NEWS & J. 466, 466 (1982) ("no specific statutory authority" for GAO bid protest authority); Tieder & Tracy, *Forums and Remedies for Disappointed Bidders on Federal Government Contracts*, 10 PUB. CONT. L.J. 92, 95 (1978) (the GAO has "no express statutory mandate" to decide bid protests).

10. See *infra* notes 61-75 and accompanying text.

11. Morgan, *supra* note 7, at 1338. The GAO bid protest procedures prior to the Competition in Contracting Act are set forth at 4 C.F.R. § 21 (1984), *repealed by Bid Protest Regulations*, 49 Fed. Reg. 49,417 (1984) (to be codified at 4 C.F.R. pt. 21). See *infra* note 96 and accompanying text. Essentially, under the old procedures, all that a protester was required to do was to send a telegram or letter to the Comptroller General giving the name of the contracting agency, the solicitation number, a brief statement of the grounds for protest, and a request for a ruling from the Comptroller General. 4 C.F.R. § 21.1 (1984) (The ease of filing has caused some critics to refer to the process as "the 20-cent injunction."). The GAO bid protest regulations issued under the Competition in Contracting Act have maintained the ease of filing a protest. See *infra* note 97. While a discussion of the mechanics of the process is beyond the scope of this Comment, for a more extensive treatment of the procedures prior to the Competition in Contracting Act, see generally P. SHNITZER, *GOVERNMENT CONTRACT BIDDING* 562-99 (2d ed. 1982); Rubinstein, *The Anatomy of a Bid Protest*, 33 FED. B.J. 296 (1974); Tieder & Tracy, *supra* note 9, at 94-105; see also 1 FEDERAL CONTRACT MANAGEMENT: A MANUAL FOR THE CONTRACT PROFESSIONAL ¶ 6.05 (1984). The GAO itself has published a guide to filing bid protests under the new rules. See GENERAL ACCOUNTING OFFICE, *BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE* (2d ed. 1985).

12. Cibinic & Lasken, *supra* note 6, at 378.

13. *Id.* at 375.

14. See *infra* notes 61-75 and accompanying text.

15. Pub. L. No. 98-369, title VII, 98 Stat. 1175, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 1175 (to be codified at scattered sections of the U.S.C.).

provides the statutory basis for GAO bid protest authority. CICA supplies specific statutory authority for the GAO to hear and decide bid protests, and essentially codifies prior GAO bid protest procedures.¹⁶

Additionally, CICA establishes procedures for parties to file bid protests before the GAO. In the case of a protest before award of a contract, CICA provides that award may not be made while the protest is pending unless the head of the procuring activity determines that urgent and compelling circumstances require award.¹⁷ In the case of a protest within ten days after award, the agency must immediately direct the contractor to suspend performance pending resolution of the protest, unless a similar determination of urgent and compelling circumstances is made.¹⁸ The Act further gives the Comptroller General the authority to award filing and attorney's fees and cost of bid and proposal preparation to entitled parties if an award has not complied with statute or regulation.¹⁹

While providing the previously missing, express statutory authority for GAO bid protest procedures, CICA has rekindled debate over whether the GAO bid protest function violates the constitutional doctrine of separation of powers.²⁰ This controversy arises because the GAO is considered to be

16. 31 U.S.C.A. §§ 3551-3556 (West Supp. Dec. 1984), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 1175 (to be codified at scattered sections of the U.S.C.). The Act amends 31 U.S.C., ch. 35, adding a new subchapter V entitled "Procurement Protest System."

17. 31 U.S.C.A. § 3553 (West Supp. Dec. 1984).

18. *Id.*

19. 31 U.S.C.A. § 3554 (West Supp. Dec. 1984).

20. Briefly stated, the doctrine of separation of powers holds that there are three functions of government: legislative, executive, and judicial. According to the doctrine, a concentration of these powers in the hands of any individual or group poses a threat to liberty and that these functions should be therefore exercised by distinct bodies in order to prevent a concentration of powers. The first clear expression of the doctrine is generally attributed to Montesquieu. See C. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, Book XI, ch. 6 (1748). The doctrine is reflected in the structure of the Constitution. U.S. CONST. art. I, § 1 ("all legislative Power . . . shall be vested in a Congress"); U.S. CONST. art. II, § 1, cl. 1 ("the executive Power shall be vested in a President"); U.S. CONST. art. III, § 1 ("the judicial Power . . . shall be vested in one supreme Court, and in . . . inferior Courts"). The importance of the doctrine to the Framers of the Constitution is demonstrated by James Madison's comments in three papers of *THE FEDERALIST*. See *THE FEDERALIST* NO. 47 (J. Madison) (defending against the charge that the three branches were not separate enough); *THE FEDERALIST* NO. 48 (J. Madison) (arguing that each branch had to be sufficiently connected to the others so as to exercise some degree of control over them); *THE FEDERALIST* NO. 51 (J. Madison) (arguing that the Constitution would create a system of internal checks by playing the rival interests of each branch against the others). For a discussion of the development of the doctrine in early American political thought, see Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. CHI. L. REV. 385 (1935).

Although the Constitution creates three branches of government, it does not follow that all government functions can be neatly apportioned to one of those three branches, or that the actions of one branch are to be separated absolutely from those of another. As one commenta-

part of the legislative branch,²¹ although the Comptroller General is appointed by the President with the consent of the Senate.²² Contracting for supplies and services, however, is a function of the executive branch.²³ This conflict was underscored by President Reagan in a public statement released on the day he signed the Competition in Contracting Act. The President asserted that the bid protest provisions "would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of the Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the Executive branch."²⁴

The debate over the constitutionality of the GAO role in hearing and de-

tor has noted, the Constitution did not create a government of separated powers, but rather "a government of separated institutions sharing powers." Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 OR. L. REV. 211, 218-19 (1973). Accordingly, there is room within the constitutional framework for overlap and blending of functions between branches. A determination of the exact boundaries of each branch's proper authority rests more on an analysis of the countervailing institutional powers and interests of the three branches than on simple reference to governmental functions in a constitutional text. *Id.* at 219-20. As a result, the doctrine may be viewed more as a political concept than as a rule of law. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 136 (2d ed. 1983). In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson offered a model of potential congressional/presidential relations. Jackson hypothesized a range of potential Presidential actions, from an act taken pursuant to the express or implied will of Congress to an act directly opposed to the will of Congress, noting that in the former instance the authority of the President would be strongest, while in the latter his position would be weakest and sustainable only if Congress could not act on the subject. 343 U.S. at 635-38 (Jackson, J., concurring). Between these extremes, however, Jackson saw a "zone of twilight" in which there may be concurrent powers or an uncertain distribution of powers. Jackson stated that decisions in this zone were likely to depend on events at the time of decision rather than abstract legal theories. *Id.* at 637. See also Frohnmayer, *supra*, at 219-20. One author has proposed that the federal judiciary should not hear cases involving the separation of powers between the legislative and executive branches, but should rule such cases nonjusticiable, thereby forcing the two branches to resolve their dispute and defend their own interests through the national political process. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 263, 275 (1980). Choper states that both the executive and legislative branches have sufficient constitutional powers with which to defend their respective interests without judicial intervention, and reviews a series of incidents in which the two branches have reached accommodation through the political, rather than judicial process. *Id.* at 276-314. The essence of Choper's argument is that the constitutional system of checks and balances, particularly the limits on the legislative power, was intended by the framers to leave the resolution of separation of powers disputes to political interplay between the branches rather than making them the subject of judicial determination. *Id.* at 266-70.

21. THE UNITED STATES GOVERNMENT MANUAL 40 (1984) (identifies the GAO as part of the legislative branch). See *infra* note 47 and accompanying text.

22. 31 U.S.C. § 703(a)(1) (1982).

23. See *infra* notes 51-59 and accompanying text.

24. President's Statement on Signing H.R. 4170 Into Law, 20 WEEKLY COMP. PRES. DOC. 1037 (July 18, 1984).

cluding bid protests has surfaced periodically, but has never been the subject of judicial determination.²⁵ However, with the Supreme Court decisions of *Buckley v. Valeo*,²⁶ and *Immigration and Naturalization Service v. Chadha*,²⁷ a direct challenge to the constitutionality of the bid protest provisions of the Act is likely.

In *Buckley*, the Supreme Court held that Congress had violated the appointments clause by retaining for itself the power to appoint members of the

25. Various federal courts have acknowledged the Comptroller General's bid protest role without addressing the statutory or constitutional questions. In *United States ex rel Brookfield Construction Co. v. Stewart*, 234 F. Supp. 94 (D.D.C. 1964), the District Court stated that the GAO's blend of legislative and executive authority made it similar to a regulatory commission, and that its bid protest decisions were only announcements that future payments would be disallowed, an action taken in its quasi-executive capacity as chief accounting officer. *Id.* at 99-100. In *Reiner v. United States*, 325 F.2d 438 (Ct. Cl. 1963), the United States Court of Claims noted the GAO's "special concern with, and supervision over" bid protests. *Id.* at 442. The court said that an agency that took actions based on a GAO decision was not permitting the Comptroller General to direct the procurement process, but merely "minimizing conflict with another arm of Government properly concerned with the contractual problem." *Id.* at 442-43. The United States Court of Appeals for the District of Columbia Circuit found *Reiner* particularly persuasive. In *Schoonmaker v. Resor*, 445 F.2d 726 (D.C. Cir. 1971), the court cited *Reiner* as authority for the statement that accession by an agency to a reasonable Comptroller General decision serves the public interest by avoiding the uncertainties of a conflict between the GAO and the agency. *Id.* at 728. The court, however, specifically stated that "we do not reach the problem of the authority of the Comptroller to issue decisions in bid protests." *Id.* at 728 n.3.

Subsequently, in two related decisions issued on the same day, the United States Court of Appeals for the District of Columbia Circuit expanded on its concept of the GAO role. In *Steinthal v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971), the court stated that in a suit by a disappointed bidder, a court could consider the opinion of the GAO in reaching a decision, because of that agency's "accumulated experience and expertise." *Id.* at 1305. Again, however, the court specifically stated that it was not addressing the legal authority of the Comptroller General to issue bid protest decisions nor the effect of those decisions on agency policies. *Id.* at 1298. The second case, *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971), involved an appeal from a preliminary injunction restraining the Navy from opening bids or making an award of a contract. The court held that the injunction was improper because the challenged action, choice of procurement strategy, was one properly committed to agency discretion. *Id.* at 1309. The court continued to avoid the issue of GAO legal authority, but noted the GAO's expertise and historical role in hearing bid protests. *Id.* at 1313-16. The court then stated that under the administrative law doctrine of primary jurisdiction, a court may entertain an action for relief and delay consideration of the merits until an agency with expertise in the area has issued a decision. *Id.* at 1316. The court may issue an injunction to maintain the status quo while awaiting the agency decision. *Id.* The court concluded that the issuance of a preliminary injunction by the court pending a GAO decision would provide "a felicitous blending of remedies and mutual reinforcement of forums," although the GAO decision would be advisory, and the court would still retain the authority to make a final decision. *Id.*

26. 424 U.S. 1 (1976).

27. 103 S. Ct. 2764 (1983).

Federal Election Commission (FEC).²⁸ The Court determined that the functions of the FEC were primarily administrative in nature, and therefore had to be exercised by "Officers of the United States."²⁹ The appointments clause, the Court noted, gave no authority to Congress to appoint such officers.³⁰ In *Chadha*, the Supreme Court held that the "legislative veto" provision of the Immigration and Nationality Act was unconstitutional because it violated the presentment clause,³¹ the bicameral requirement for legislation,³² and the doctrine of separation of powers.³³

The Justice Department has publicly questioned the constitutionality of the GAO bid protest procedures of the Competition in Contracting Act.³⁴ The Department has analogized the requirement to postpone award or suspend performance to the legislative veto forbidden by *Chadha*.³⁵ The Department has also contended that the GAO is an arm of the legislature and cannot perform executive or judicial functions without violating the holding of *Buckley*.³⁶

The GAO distinguishes *Chadha* on the grounds that delay under the Act merely provides time for the Comptroller General's views to be expressed to the agency while relief may still be provided.³⁷ The GAO differentiates *Buckley* on the grounds that the Comptroller General is appointed by the President, not by Congress,³⁸ and asserts that the Act merely codifies an authority that it has been exercising, with judicial recognition, for over sixty years.³⁹

This Comment will explore the historical role of the Comptroller General in the bid protest process and the impact of the Competition in Contracting Act on that role. The constitutionality of the Act will then be examined in light of *Buckley* and *Chadha*. The analysis will conclude that if the Comp-

28. 424 U.S. at 141.

29. *Id.* at 138-41.

30. *Id.* at 135.

31. 103 S. Ct. at 2786-87.

32. *Id.* at 2787.

33. *Id.* at 2784-85; *id.* at 2791 (Powell, J., concurring).

34. Letter from Robert A. McConnell, Assistant Attorney General to Congressman Jack Brooks, Chairman, Committee on Government Operations (Apr. 20, 1984), *reprinted in* 42 FED. CONT. REP. (BNA) No. 4, at 122 (July 23, 1984) [hereinafter cited as McConnell Letter]. *See infra* notes 116, 165-77 and accompanying text.

35. *See* McConnell Letter, *supra* note 34.

36. *Id.*

37. Letter from Acting Comptroller General of the United States to Congressman Jack Brooks, Chairman, Committee on Government Operations (May 8, 1984), *reprinted in* 42 FED. CONT. REP. (BNA) No. 4, at 124 (July 23, 1984) [hereinafter cited as Brooks Letter]. *See infra* note 107.

38. *See* Brooks Letter, *supra* note 37, at 124-25.

39. *Id.* at 125 (citing to the cases discussed *supra* note 25).

troller General is viewed as a legislative officer, structurally similar to a congressional committee or a House of Congress, *Buckley* and *Chadha* would indicate that the bid protest function is unconstitutional. The analysis will also suggest, however, that the Comptroller General's status as an officer of the United States, combined with the limits on his removal from office and the statutory history behind the office, make the Comptroller General's office analogous to that of an independent agency head to whom the Congress could properly assign the bid protest function. The Comment will conclude that this independent status, combined with the concept of a bid protest as a "public right" suggests a line of reasoning that would enable a court to avoid the constitutional issue.

I. DEVELOPMENT OF GAO BID PROTEST PROCEDURE AND THE SEPARATION OF POWERS BACKDROP

A. *Historical Development of the GAO Role In Bid Protests: A Process in Search of Statutory Authority*

The General Accounting Office and the position of Comptroller General were created by the Budget and Accounting Act of 1921,⁴⁰ in response to public and congressional concerns that federal spending was beyond control.⁴¹

The creation of the GAO was one part of a three-part congressional plan to bring order and control to the federal budget process.⁴² The first part of the plan, also included in the Budget and Accounting Act, required that the President submit an annual budget to Congress.⁴³ To assist the President in preparation of the annual budget, the Act created the Bureau of the Budget within the Treasury Department.⁴⁴ The second part of the plan centralized congressional appropriation authority within a single committee in the

40. Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (1921) (codified as amended in scattered sections of 31 U.S.C. (1982)).

41. Morgan, *supra* note 7, at 1280-81. See also 58 CONG. REC. 7082-83 (1919) (remarks of Representative Good expressing apprehension and public outcry over the size of the federal budget).

42. See generally 58 CONG. REC. 7084-86 (1919) (remarks of Representative Good summarizing the proposed national budget system).

43. 42 Stat. 20-21 (1921). See also 58 CONG. REC. 7084 (1919) ("the bill fixes responsibility for the budget on the President").

44. 42 Stat. 22-23 (1921). Under the Reorganization Plan No. 1 of 1939, the Bureau of the Budget was transferred from the Treasury Department to the Executive Office of the President. Reorg. Plan No. 1 of 1934, 3 C.F.R. § 1288 (1938-43), reprinted in 53 Stat. 1423 (1939). The Bureau was redesignated as the Office of Management and Budget by Reorg. Plan No. 2 of 1970, 3 C.F.R. § 1070 (1966-70), reprinted in 31 U.S.C.A. 42 (West 1983) and in 84 Stat. 2085 (1970).

House of Representatives.⁴⁵ Congress intended that the GAO, as the third component of the plan, would perform a post appropriation "oversight" function through audit of expenditures by the executive branch.⁴⁶ To permit it to adequately perform this function, Congress established the General Accounting Office, described in the Budget and Accounting Act as an agency independent of the executive branch. In making the GAO independent of the executive, Congress seems to have been most concerned with removing executive influence over the audit function. Despite unclear congressional guidance on the issue, however, the GAO is considered generally to be an agency of the legislative branch.⁴⁷

45. See E. NAYLOR, *THE FEDERAL BUDGET SYSTEM IN OPERATION* 36-37 (1941); 58 CONG. REC. 7088 (1919).

46. What may be called the third step in the consummation of an effective budget system is the audit and control of the expenditures of the Government [Congress] can not have complete control of expenditures without some system whereby the expenditures may be subjected to an examination by independent officers for the purpose of seeing whether or not the wishes of Congress in making the appropriations and any conditions imposed in making the grants were carried out in good faith.

58 CONG. REC. 7088 (1919) (remarks of Representative Byrns).

47. The Budget and Accounting Act of 1921 stated: "There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive department and under the control and direction of the Comptroller General of the United States." 42 Stat. 23 (1921) (codified as amended at 31 U.S.C. § 702 (1982)). The United States Code describes the GAO as "an instrumentality of the United States Government independent of the executive departments." 31 U.S.C. § 702(a) (1982). The Reorganization Act of 1945, which empowered the President to reorganize executive branch agencies, specifically identified the GAO and the Comptroller General as "part of the legislative branch of the Government." Reorganization Act of 1945, ch. 582, § 7, 59 Stat. 613, 616 (1945). The House Report accompanying the Reorganization Act of 1945 stated:

The bill excludes the Comptroller General and the General Accounting Office, which are a part of the legislative branch of the Government. It has been thought wise to include a declaration to that effect, not because of any doubts in the matter on the part of the committee or of Congress, but because doubts have at times been expressed, and it is believed that Congress should take the opportunity to make its position clear.

H.R. REP. NO. 971, 79th Cong., 1st Sess., *reprinted in* 1945 U.S. CODE CONG. & AD. NEWS 918, 922. This language was retained in the Reorganization Act of 1949, ch. 226, § 7, 63 Stat. 203, 205 (codified as amended at 5 U.S.C. ch. 9). The wording identifying the GAO as a legislative branch agency was deleted in 1966, when the Congress enacted the Government Organization and Employees Act, Pub. L. No. 89-554, 80 Stat. 378 (1966) (current version at 5 U.S.C. § 551 (1982)). The 1966 Act defined the General Accounting Office as an "independent establishment." Government Organization and Employees Act, *supra*, § 102, 80 Stat. at 379 (current version at 5 U.S.C. § 104 (1982)). Chapter 9 of the Act gave the President the power to reorganize agencies, and incorporated and revised the Reorganization Act of 1949. For purposes of the chapter, the act defined "agency" as "an executive agency" but stated that this "does not include the General Accounting Office or the Comptroller General"; the language defining the GAO and Comptroller General was not carried forward. 80 Stat. at 394 (codified at 5 U.S.C. § 902 (1982)). The current statutory language clearly maintains the independence

Neither the congressional debates surrounding the Budget and Accounting Act of 1921, nor the Act itself, expressly indicates that the GAO is to

of the General Accounting Office from the executive branch, but provides no statutory expression of congressional intent to designate the GAO as a legislative branch agency. Despite its statutory description as an "independent" agency, however, the GAO is generally assumed to be a part of the legislative branch. See *supra* notes 21-24 and accompanying text. The GAO describes itself as an agency of Congress and claims exemption from the Administrative Procedures Act (APA) by virtue of its position as a legislative branch agency. Comp. Gen. Dec. B-209753.2 (10 Jan. 1983), 83-1 CPD ¶ 24. The APA states that an "agency" does not include "the Congress," while not addressing the GAO at all. 5 U.S.C. § 551 (1982). Congressional debate over the Budget and Accounting Act of 1921 gives conflicting guidance on the issue. The Comptroller General position replaced the audit functions then performed by the Comptroller of the Treasury and the auditors in that office who were executive branch officials. 42 Stat. 23 (1921); see also 58 CONG. REC. 7085 (1919) (remarks of Representative Good, Chairman of the Special Committee on the Budget). The Congress expressed significant concern over the lack of external, independent audit of executive expenditures:

At present, Congress has no power or control over appropriations after they are once made. This control passes to the executive departments, and these departments practically audit their own expenditures, and the legality of expenditures by an executive department is passed on by an official appointed, and who can be removed at any time, by the Executive Our present plan precludes serious criticism of an expenditure by an auditor or the Comptroller of the Treasury. These officials owe their appointment to the President. They can not be expected long to hold their positions if they should criticize wastefulness, extravagance or inefficiency in any of the executive departments.

Id. (remarks of Rep. Good). Representative Good then stated that the Comptroller General would serve as the "independent department" needed to examine and criticize the executive branch. *Id.* See also *id.* at 7093 (Rep. Madden stating that the Comptroller General should be "so independent of the executive branch of the Government that no influence of any kind can be exercised over him in the discharge of his duties"); *supra* note 46 (remarks of Rep. Byrns). Rep. Byrns' remarks indicate that Congress intended to create an agency independent of the executive branch, but not necessarily an arm of the legislature. Other comments, however, indicate that the Comptroller General was to be an agent of the legislature. See, e.g., 58 CONG. REC. 7215 (1919) (Rep. Purnell stating that the Comptroller General "shall be responsible only to Congress, and shall be removable by Congress alone, and then only for cause."); *id.* at 7089 (Rep. Byrns stating "[t]his bill makes the accounting officer subject not only to Congress but to all of its committees").

The author of the primary text on the GAO feels that Congress failed to distinguish between auditing for the purpose of oversight and reporting and audit as a form of direct control of expenditures. H. MANSFIELD, *THE COMPTROLLER GENERAL* 65-67 (1939). This confusion is revealed in the grant of authority to the Comptroller General not only to audit, but to settle accounts and claims. Mansfield states that the primary objective that Congress sought to achieve was to insure that the audit function was independent of executive control, while noting that there was an undercurrent of congressional desire to gain a measure of control over executive authority as well. *Id.* at 68-69. As a result, the distinction between audit and control was ignored. Mansfield attributes the ensuing confusion over the GAO's status to an "almost masterly inattention to draftsmanship." *Id.* at 67-69. Support for this notion can be traced to a statement by Representative Good: "The intention was that this department should be more an arm of the Congress than of the executive department. The President will have his bureau of the budget . . . and there should be on the part of Congress an independent establishment, to whom Congress could go for its information" 58 CONG. REC. at 7131.

function as a forum for bid protests.⁴⁸ Rather, GAO's assumption of this duty has been attributed to a lack of adequate forums for disappointed bidders,⁴⁹ coupled with the GAO's expansive interpretation of its statutory authority.⁵⁰

The capacity of the United States to enter into contracts is inherent in the concept of sovereignty.⁵¹ While every expenditure must be authorized by Congress,⁵² the government may enter into contracts, not prohibited by law, that are necessary to exercise its constitutional powers.⁵³ In appropriating funds, and delegating authority to contract, Congress may place limits or restrictions on the manner of expenditure.⁵⁴ The primary statutes delegating procurement authority to the executive branch are the Armed Services Procurement Act,⁵⁵ which regulates Department of Defense purchases, and the Federal Property and Administrative Services Act,⁵⁶ which regulates purchases by other agencies. These statutes establish a preference for formal advertising,⁵⁷ define when negotiated procurements are authorized,⁵⁸ and establish other procurement procedures.⁵⁹ When a bidder believes that he has been denied an award because an agency failed to follow a required procedure,⁶⁰ it is natural that he would seek a forum in which to air his grievance.

The lack of an adequate forum has been a significant problem for disappointed bidders. As early as 1853, the Attorney General determined that a

48. See *supra* note 9; see also 58 CONG. REC. 7089 (1919) (remarks of Rep. Byrns), *supra* note 46 (stating that the Comptroller General functions only to audit accounts).

49. See *infra* notes 61-75 and accompanying text.

50. See *infra* notes 76-82 and accompanying text.

51. *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850); *United States v. Tingey*, 30 U.S. (5 Pet.) 115, 128 (1831); *Dugan v. United States*, 16 U.S. (3 Wheat.) 172, 178 (1818).

52. U.S. CONST. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .").

53. *Tingey*, 30 U.S. at 128.

54. *Arizona v. California*, 373 U.S. 546, 580 (1963).

55. 10 U.S.C. § 2303 (1982) (delegates contracting authority to the military agencies and the National Aeronautics and Space Administration (NASA)); *id.* § 2308(1) (agency heads may delegate this power within their agencies).

56. 41 U.S.C. 252 (1982) (delegates contracting authority to civilian executive agencies); *id.* § 257 (specifies power that an agency head may delegate).

57. See 10 U.S.C. § 2304 (1982); 41 U.S.C. § 252(c) (1982).

58. See 10 U.S.C. § 2304(a) (1982); 41 U.S.C. § 252(c) (1982).

59. See, e.g., 10 U.S.C. § 2306(a) (1982) (prohibiting cost-plus-a-percentage-of-cost contracts); 41 U.S.C. § 254(b) (1982) (establishing fee limits and requirements for use of cost-type contracts). Contracting agencies are also required to enforce certain "socio-economic" statutes in procurement, in areas such as labor standards (Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1982); Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1982)) and small businesses (Small Business Act, 15 U.S.C. §§ 631-649d (1982)).

60. See *supra* note 8.

protester had no grounds to challenge an award by an executive agency.⁶¹ The protest concerned award of a contract for stationery by the Department of the Interior. The protester alleged that the Department had made an erroneous determination of who was the low bidder.⁶² The Attorney General stated that this decision was a determination of fact and that the power to make that decision was vested in the Secretary of the Interior.⁶³ The Attorney General concluded that the Secretary's decision was final as long as it was made in good faith, and that there was no statutory method by which such a decision could be reviewed.⁶⁴

Bid protesters were similarly frustrated when they turned to the judicial branch. In *Perkins v. Lukens Steel Co.*,⁶⁵ the Supreme Court held that a prospective bidder on a government contract did not have standing to challenge a contract award.⁶⁶ *Perkins* arose out of the application of the Walsh-Healey Public Contracts Act of 1936, which required government contractors to pay employees no less than the prevailing minimum wage for similar industries in a particular locality, as determined by the Secretary of Labor.⁶⁷ Seven iron and steel producers sought an injunction and declaratory judgment against application of the Act in contracts for iron and steel.⁶⁸ Citing the statutory requirement that, except as otherwise provided by law, all purchases by the government shall be made by public advertising, the firms claimed a right to compete for government contracts.⁶⁹ They asserted that application of the Public Contracts Act would put them at a competitive disadvantage from which they would suffer economic harm.⁷⁰

The Supreme Court held that the statutory preference for formal advertising was enacted solely for the benefit of the government, and that it conferred no enforceable rights on prospective bidders. It was the government's interests, not the bidder's, that were protected by the statute.⁷¹ Since the firms could not show injury or threat to a cognizable legal right, the Court denied standing.⁷²

61. 6 Op. Att'y Gen. 226 (1853).

62. *Id.*

63. *Id.* at 226-27.

64. *Id.* at 227.

65. 310 U.S. 113 (1940).

66. *Id.* at 125-26.

67. *Id.* at 116-20.

68. *Id.* at 120.

69. *Id.* at 124-26.

70. *Id.* at 124.

71. *Id.* at 126.

72. *Id.* at 125-26. It was not until the 1970 decision of *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (1970), that a court recognized the standing of an unsuccessful bidder to protest an agency action. In *Scanwell*, the second-lowest bidder challenged award of a con-

It was against this background of executive and judicial branch abstention that the GAO began to hear bid protests. The first GAO bid protest decision was reported in 1925.⁷³ The GAO's bid protest function grew slowly at first, but has expanded rapidly in recent years. In 1968, the GAO received only 450 bid protests,⁷⁴ whereas by 1982, the annual number of protests had increased to 2,639.⁷⁵

Despite its position as the primary, and, for many years, the only bid protest forum, the GAO had no express statutory authority to perform this function.⁷⁶ The GAO based its authority to hear and decide bid protests on its statutory authority to settle and adjust all claims and accounts of the United States⁷⁷ and to render advance decisions to disbursing officials, certifying officials or agency heads regarding payments.⁷⁸ The GAO summa-

tract to the low bidder on the grounds that the latter was not responsive to the solicitation requirements. *Id.* at 860-61. The plaintiff cited regulations providing that nonresponsive bids "shall be rejected." *Id.* at 861. The plaintiff challenged the award to a nonresponsive bidder and sought standing under § 10 of the Administrative Procedure Act (APA), which grants judicial review to persons "adversely affected or aggrieved by agency action." *Id.* The United States Court of Appeals for the District of Columbia Circuit held that an unsuccessful bidder who could make a prima facie showing of arbitrary or capricious abuse of discretion by an agency had standing under § 10 of the APA. *Id.* at 869. Although the *Scanwell* decision was not initially accepted by many courts, it is now followed by nearly all circuits. See Tieder & Tracy, *supra* note 9, at 106. For a discussion of the impact of *Scanwell*, see generally Comment, *The Role of GAO and Courts in Government Contracts "Bid Protests": An Analysis of Post-Scanwell Remedies*, 1972 DUKE L.J. 745.

73. 5 Comp. Gen. 712 (1926) (protest by an automobile dealer that government bid specifications were so narrowly drawn as to describe only Ford trucks). The Commission on Government Procurement cited two earlier, unpublished decisions, the first in 1924. 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 40 (1972).

74. 1973 COMPTROLLER GEN. ANN. REP. 15.

75. Shnitzer, *Bid Protests: Is There an Adequate Forum?*, 31 FED. B. NEWS & J. 112 (1984).

76. See *supra* note 9.

77. The Budget and Accounting Act provided that:

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as a debtor or creditor, shall be settled and adjusted in the General Accounting Office.

The Budget and Accounting Act of 1921, *supra* note 1, at 42 Stat. 24. The Act has been recodified, as amended, in two sections. See 31 U.S.C. § 3526(a) (1982) (providing: "The Comptroller General shall settle all accounts of the United States Government . . ."); *id.* § 3702(a) (providing: "Except as provided in this chapter or another law, the Comptroller General shall settle all claims of or against the United States Government.").

78. 31 U.S.C. § 3529(a) (1982) states:

A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General on a question involving—

- (1) a payment the disbursing official or head of the agency will make; or
- (2) a voucher presented to a certifying official for certification.

ized its authority in the following statement:

Where a bid acceptance is proposed but not yet consummated by a procuring agency, and our Office considers such acceptance undesirable, we may recommend or direct such action as we believe is required by the public policy expressed in applicable statutory enactments to preserve the integrity of the competitive bidding system. However, the sanction for any decision by this Office holding that an accepted bid did not result in a valid contract is our authority under the Budget and Accounting Act, 1921, 31 U.S.C. 1, *et. seq.*, to disallow credit in the accounts of the Government's fiscal officers for any payments out of appropriated funds made pursuant to an illegal contract.⁷⁹

A decision by the Comptroller General does not bind the executive agency, since only the GAO's certification of a balance in settling an account is conclusive on the executive branch.⁸⁰ A GAO decision, however, functions as an announcement that if a certain payment is made in the future, the payment may be disallowed by the GAO, and that this disallowance would be binding on the agency.⁸¹ This asserted power to disallow payments provides the real source of the GAO's authority to enforce its decisions on executive agencies; it would be highly imprudent for a contractor to perform under a contract on which the GAO has announced it will not permit payment.⁸²

Cibinic & Lasken, *supra* note 6, at 376-77, argue that requests from bidders clearly do not fall within the wording of the statute, and that the GAO interpretation of the statute is contrary to the intent of Congress.

79. 44 Comp. Gen. 221, 223 (1964).

80. 31 U.S.C. § 3526(d) (1982) ("On settling an account for the Government, the balance certified by the Comptroller General is conclusive on the executive branch . . ."). Under CICA, the Comptroller General's bid protest decisions are termed "recommendations." 31 U.S.C.A. § 3554(b)(1) (West Supp. Dec. 1984). See *infra* text accompanying notes 108-10, 200.

81. *United States ex rel. Brookfield Constr. Co. v. Stewart*, 234 F. Supp. 94 (D.D.C. 1964). In *Brookfield Constr. Co.*, the court noted that, as a matter of convenience and efficiency, it is appropriate that the GAO render advance decisions on whether a payment, if made, would later be disapproved by the Comptroller General pursuant to his authority to settle and adjust all accounts. *Id.* at 100. See Cibinic & Lasken, *supra* note 6, at 375-78.

82. In *Graybar Elec. Co. v. United States*, 90 Ct. Cl. 232 (1940), the court held that a contractor who did not perform in the face of an adverse Comptroller General decision was entitled to an excusable delay in performance.

In *Brookfield Construction Co.*, the District Court for the District of Columbia Circuit upheld the action of the Architect of the Capitol, who, based on a Comptroller General recommendation, had refused to award a contract to a low bidder who had failed to comply with a material solicitation requirement. The court stated that a Comptroller General's decision acted as an announcement that if a contract were made, the payments would be disallowed and that a government disbursing officer would be justified in refusing to make payments. The court noted that while the contractor could then pursue relief in the Claims Court or a United

While the bid protest procedure at the GAO is simple, the remedies are limited. If defects or ambiguities exist in the solicitation, the GAO may recommend appropriate amendment of the solicitation, or cancellation and resolicitation.⁸³ If a protest is filed after bid opening or receipt of proposals, but prior to award, the remedy will depend on the type of protest. In a formally advertised⁸⁴ procurement, the GAO may recommend that a solicitation be cancelled if found defective, or reinstated if cancelled by the agency.⁸⁵ In a negotiated procurement, the GAO may recommend that defects in the solicitation be cured through discussions and submission of best and final offers.⁸⁶ In the case of protest after award, the GAO may recommend termination.⁸⁷ Because of the expense of termination, this step is rarely taken, particularly where performance of the contract is under way. The more frequent course is for the GAO to issue a ruling applying only to future procurements,⁸⁸ giving the protester only a moral victory.⁸⁹

The debate concerning the legal basis for the GAO's bid protest role has been ended by the Competition in Contracting Act,⁹⁰ which provides specific statutory authority for this GAO function.

B. The Competition In Contracting Act: Congress Codifies the Bid Protest Process

The Competition in Contracting Act was signed into law on July 18, 1984.⁹¹ CICA modifies both the Armed Services Procurement Act⁹² and the

States District Court, such a course of action would tie up government projects in litigation, and the contractor, while winning a contract, would also be "buying a lawsuit." 234 F. Supp. at 100.

83. Tieder & Tracy, *supra* note 9, at 101.

84. A "formally advertised" procurement is one in which sealed bids are submitted by offerors in response to an Invitation for Bids (IFB). At the announced closing time for receipt of proposals, the bids are publicly opened and award made to the responsive, responsible bidder submitting the lowest price. A "negotiated" procurement is any type of source selection method other than formal advertising. Negotiated procurements may be competitive or sole-source. In negotiated procurements, offerors respond to a Request for Proposals (RFP). Source selection in competitive negotiated procurements is based on a combination of both price and technical factors designed to select the offeror "most advantageous to the Government." For a brief introduction to and comparison of the two methods, see J. FOX, *ARMING AMERICA* 250-55 (1974). See also *BASIC TECHNIQUES OF PUBLIC CONTRACTS PRACTICE* 3-52 (1977).

85. Tieder & Tracy, *supra* note 9, at 101-02.

86. *Id.* at 102.

87. *Id.* at 102-03.

88. *Id.*

89. See Morgan, *supra* note 7, at 1328-50.

90. See *supra* note 15.

91. *Id.*

92. 10 U.S.C. §§ 2301-2316 (1982).

Federal Property and Administrative Services Act.⁹³ The changes were intended to promote the greater use of competition in federal procurement.⁹⁴ CICA also amends the Budget and Accounting Act to codify and strengthen the current GAO procurement protest system.⁹⁵

CICA makes only minor changes to the prior GAO bid protest procedures.⁹⁶ CICA defines a "protest" as a written objection by an interested party to a solicitation, a proposed award, or actual award of a contract.⁹⁷ An "interested party" is defined as an actual or prospective offeror with an economic interest that would be affected by the award.⁹⁸ CICA specifies time limits for various procedures⁹⁹ and requires the Comptroller General to

93. 41 U.S.C. §§ 251-260 (1982).

94. See H.R. REP. NO. 861, 98th Cong., 2d Sess., 130 CONG. REC. H6755-59 (daily ed. June 22, 1984). For a discussion of the rationale for these changes and analysis of the Act's competition provisions by a Senate sponsor, see Cohen, *The Competition in Contracting Act*, 14 PUB. CONT. L.J. 1 (1983).

95. See *supra* note 16 and accompanying text.

96. Previous procedures were set forth at 4 C.F.R. § 21 (1984) (repealed Jan. 15, 1984). See *supra* note 11. CICA required the Comptroller General to prescribe bid protest procedures by January 15, 1985. 31 U.S.C.A. § 3555(a) (1982) (West Supp. Dec. 1984). The GAO issued proposed rules amending 4 C.F.R. § 21 in September of 1984. See Bid Protest Regulations, 49 Fed. Reg. 36,386 (1984) (proposed Sept. 17, 1984). The final regulations were published on December 20, 1984 and took effect on January 15, 1985. Bid Protest Regulations, 49 Fed. Reg. 49,417 (1984) (to be codified at 4 C.F.R. pt. 21).

97. 31 U.S.C.A. § 3551 (West Supp. Dec. 1984). The GAO Bid Protest Regulations require a protest to be in writing, and to include the identity of the protester, the identity of the procuring agency, and the solicitation or contract number, detailed statement of the legal and factual grounds for the protest, a specific request for a Comptroller General ruling, and a statement of the form of relief requested. 49 Fed. Reg. at 49,419-20 (to be codified at 4 C.F.R. § 21.1).

98. An "interested party" with respect to a contract or proposed contract is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C.A. § 3551(2) (West Supp. Dec. 1984). The previous GAO procedures did not define "interested party." 4 C.F.R. § 21.1(a) (1984). However, the GAO allowed protests by subcontractors against awards of subcontracts made by prime contractors. The GAO limited this review to cases where the prime contractor acted as a "purchasing agent" for the government or where the government directly participated in the selection of the subcontractor. Comp. Gen. Dec. B-183039, March 19, 1975, 21 Cont. Cas. Fed. (CCH) ¶ 83,816. The new GAO bid protest procedures acknowledge the statutory limit on subcontractor protests in § 21.3(f)(10), which permits review of subcontracts only when they are "by or for" a federal agency. 49 Fed. Reg. at 49,421 (to be codified at 4 C.F.R. § 21.3(f)(10)).

99. The GAO must notify the affected agency within one day of receipt of the protest. The agency has 25 working days to submit a report to the Comptroller General (10 working days if the Comptroller General is acting under the "express option"). 31 U.S.C.A. § 3553(b)(1)-(2) (West Supp. Dec. 1984). The bid protest regulations include a section defining "working days" for purposes of protests. 49 Fed. Reg. at 49,419. Except for the firm express option timetable, these deadlines correspond to the previous GAO procedure. 4 C.F.R. § 21.3 (1984). The previous express option permitted the GAO to establish deadlines

issue a final decision within ninety working days of the date of the protest.¹⁰⁰ The Comptroller General may dismiss a claim that fails on its face to state a valid basis for protest or which the Comptroller General determines to be frivolous.¹⁰¹

In the case of protest before award, CICA specifically states that federal agencies¹⁰² may not award the contract while a protest is pending,¹⁰³ unless the head of the procuring activity makes a written determination that "urgent and compelling circumstances which significantly affect interests of the United States" do not allow time to wait for the Comptroller General's decision. The GAO must be advised of that decision prior to award.¹⁰⁴

If the protest is made within ten days after award, the agency may pursue two courses of action. The preferred course under the statute is immediately to direct the contractor to cease performance during pendency of the protest.¹⁰⁵ The head of the procuring activity may authorize continued per-

on a case-by-case basis. 4 C.F.R. § 21.11 (1984). The various filing times for protests are set forth in § 21.3 of the bid protest regulations. 49 Fed. Reg. at 49,420.

100. CICA also provides that the Comptroller General shall establish an "express option" for protests under which a decision will be made within 45 calendar days, if fast resolution is possible. 31 U.S.C.A. § 3554(a)(2) (West Supp. Dec. 1984). See also Bid Protest Regulations § 21.7-21.8, 49 Fed. Reg. 49,422-23. Prior regular procedures required a decision within 25 days from receipt of all necessary information. 4 C.F.R. § 21.8 (1984). Previous express option decision deadlines were established on a case-by-case basis. 4 C.F.R. § 21.11 (1984).

101. 31 U.S.C. § 3554(a)(3) (West Supp. Dec. 1984); Bid Protest Regulations § 21.1(f), 49 Fed. Reg. 49,421. This authority also existed in the previous procedures. 4 C.F.R. § 21.3(g) (1984).

102. For purposes of CICA, "federal agencies" are "any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction)." 40 U.S.C. § 472(b) (1982). The Bid Protest Regulations contain similar language. 49 Fed. Reg. at 49,419.

103. 31 U.S.C.A. § 3553(c)(1) (West Supp. 1984). This requirement is also set forth in the Bid Protest Regulations "for informational purposes" at § 21.4(a). 49 Fed. Reg. 49,421.

104. 31 U.S.C.A. §§ 3553(c)(2)(A)-(B) (West Supp. 1984). The previous GAO procedures required that award not be made "except as provided in the applicable procurement regulations," and with notification to the GAO. 4 C.F.R. § 21.4 (1984). The Federal Acquisition Regulation (FAR) states that award need not be withheld, but requires that approval to award be made at a level "above the contracting officer," based on a written determination of urgency, undue delay or other factors advantageous to the government. FAR 14.407-8(b)(4), 48 Fed. Reg. 42,184 (1983) (to be codified at 48 C.F.R. § 14.407-8(b)).

105. The agency

shall, upon receipt of that notice, immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under the contract. Performance of the contract may not be resumed while the protest is pending.

31 U.S.C.A. § 3553(d)(1) (West Supp. 1984) (emphasis added). The CICA requirement is noted "for informational purposes" in the Bid Protest Regulations at § 21.4(b), 49 Fed. Reg. at 49,421.

formance of the contract upon a written finding that performance is in the best interest of the United States, or that urgent and compelling circumstances will not permit waiting for the Comptroller General's decision. Prior notification to GAO is required.¹⁰⁶ If, however, the decision to continue performance by the procuring agency head is based on the "best interests of the United States" exception, the Comptroller General, in making recommendations, is expressly directed not to consider any cost or disruption arising from terminating, recompeting, or reawarding the contract.¹⁰⁷

CICA empowers the Comptroller General to determine whether the solicitation, proposed award, or contract, protested pursuant to the Act, complies with the statutes and regulations.¹⁰⁸ If the Comptroller General finds noncompliance, he may recommend that the agency issue a new solicitation, award a contract, terminate the existing contract, recompile the contract, or refrain from exercising any options under the contract.¹⁰⁹ The Comptroller may combine these remedies, or make other recommendations necessary to promote compliance with statutes and regulations.¹¹⁰ In cases where the agency has failed to comply with the statute or regulation, the Comptroller General may also award compensation for the costs of preparing a bid or

106. 31 U.S.C.A. § 3553(d)(2) (West Supp. 1984). The authority to make the determination to award a contract or permit continued performance under a contract during pendency of a protest against that contract may not be delegated by the head of the procuring activity. *Id.* § 3553(e).

107. *Id.* § 3554(b)(2). *See also* Bid Protest Regulations § 21.6(c), 49 Fed. Reg. at 49,422. The intent of Congress in enacting this provision is to prevent the agency from authorizing continued performance with the knowledge that as incurred costs increase, the likelihood of contract termination will decrease, and to insure that the Comptroller General may exercise the full range of available remedies. The conference committee report stated:

Before notifying the Comptroller General that continued performance of a disputed contract is in the government's best interest, however, the head of the procuring activity should consider potential costs to the government from carrying out relief measures as may be recommended by the Comptroller General if the protest is subsequently sustained. This is to insure that if the Comptroller General sustains a protest, such forms of relief as termination, recompetition, or re-award of the contract will be fully considered for recommendation. Agencies in the past have resisted such recommendations on the grounds that the government's best interest would not be served by relief measures of this sort because of the added expenses involved. This provision is designed to preclude that argument in the future, and thus to avoid prejudicing those relief measures in the Comptroller General's review.

H.R. REP. NO. 861, *supra* note 94, at H6759. *See supra* notes 87-89 and accompanying text.

108. 31 U.S.C.A. § 3554(b)(1) (West Supp. 1984).

109. *Id.* §§ 3554(b)(1)(A)-(E). *See also* Bid Protest Regulations § 21.6(a), 49 Fed. Reg. at 49,422.

110. 31 U.S.C.A. §§ 3554(b)(1)(F)-(G) (West Supp. 1984). The Bid Protest Regulations, § 21.6(b), require the Comptroller General to weigh all relevant circumstances in determining a recommended remedy. 49 Fed. Reg. at 49,422.

proposal and of filing and pursuing the protest.¹¹¹

CICA requires the head of the procuring activity responsible for the protested solicitation or award to report to the Comptroller General within sixty days from receipt of the Comptroller General's recommendations if the agency has not fully implemented the recommendations.¹¹² The GAO is to submit an annual report to Congress describing each instance during the previous fiscal year in which an agency failed to implement the Comptroller General's recommendations.¹¹³ CICA also specifies that the Comptroller General is not given exclusive jurisdiction over bid protests, and that an interested party may file a protest with the procuring agency or file an action in a federal district court or the United States Claims Court.¹¹⁴ If a party files both a court action and a protest with the GAO, the Comptroller General's decision regarding the procurement is to be considered part of the agency record subject to review.¹¹⁵

111. 31 U.S.C.A. § 3554(c) (West Supp. 1984). CICA specifically includes reasonable attorneys' fees in the protest costs. *Id.* Monetary awards are to be paid out of appropriated agency funds. *Id.* The Comptroller General has generally awarded such damages only if the government acted arbitrarily or capriciously with respect to a bid (that is, acted in bad faith, failed to show a rational basis for a decision, or violated a statute or regulation). *See, e.g.*, Comptroller Gen. Dec. B-191894 (23 Jan. 1979), 79-1 CPD ¶ 43 (bid preparation costs may be recovered only where government has acted arbitrarily or capriciously); Comptroller Gen. Dec. B-197208 (5 Aug. 1980), 80-2 CPD ¶ 88 (protester not entitled to bid preparation costs where agency decision to cancel solicitation was reasonable). However, the Act permits the Comptroller General to award bid preparation expenses and attorney's fees in any case where the agency has failed to follow statute or regulations, a significantly lower threshold for award of damages. 31 U.S.C.A. § 3554(c)(1) (West Supp. 1984). The GAO reported that during public comment on the proposal regulations, it received many comments regarding recovery of costs of pursuing a protest. 49 Fed. Reg. at 49,419. Therefore, the final bid protest procedures included guidelines stating that costs of filing and pursuing the protest, including attorneys' fees, would be allowed by the GAO only where the contracting agency unreasonably excluded the protester from the procurement except where GAO recommends that the protester receive the award, and the contract is awarded to the protester. Bid Protest Regulations, 49 Fed. Reg. at 49,422 (to be codified at 4 C.F.R. § 216(e)). Bid and proposal expenses will only be awarded where a protester has been unreasonably excluded from the procurement and other remedies that the GAO is empowered to award are inadequate. *Id.* *See infra* note 176.

112. 31 U.S.C.A. § 3554(e)(1) (West Supp. 1984).

113. *Id.* § 3554(e)(2).

114. *Id.* § 3556. The GAO will dismiss any protest that is the subject of litigation before a court, unless that court requests a GAO decision. Bid Protest Regulations § 21.9(a), 49 Fed. Reg. at 49,423. The GAO will also dismiss a protest based on a matter previously decided on the merits by a court. *Id.*

115. 31 U.S.C. § 3554 (West Supp. 1984). When a protest is filed, either before or after award, an agency is required to submit to the Comptroller General a complete report on the protested procurement within 25 working days (10 working days under the express option). *Id.* § 3553(b)(2). This report also becomes part of the agency record subject to review in a later court proceeding. *Id.* § 3556. Agencies must provide copies of relevant procurement documents to interested parties upon request, including those portions of the agency report that would not provide a competitive advantage or that the party would be "otherwise author-

C. Buckley and Chadha: *The Separation of Powers Backdrop*

As noted earlier, the Executive branch has taken the position that the new bid protest procedures are an unconstitutional violation of the separation of powers doctrine,¹¹⁶ citing two major cases in support of this contention.

The first case is *Buckley v. Valeo*.¹¹⁷ The plaintiffs in *Buckley*, including a presidential candidate and a Senator,¹¹⁸ challenged the constitutionality of several sections of the Federal Election Campaign Act.¹¹⁹ Among the provisions challenged was the manner by which members were appointed to the Federal Election Commission. The Act provided for an eight-member Commission consisting of two members appointed by the President, two by the Speaker of the House of Representatives, and two by the President *pro tempore* of the Senate. These six members had to be confirmed by a majority of both Houses of Congress; the Secretary of the Senate and the Clerk of the House were made *ex officio* nonvoting members.¹²⁰

In a *per curiam* opinion, the Supreme Court framed the question as whether, in view of the manner of appointments of the majority of its members, the Commission could, under the Constitution, exercise the powers conferred on it.¹²¹ The Court first reviewed the statutory powers of the Commission. While the Commission was charged with certain recordkeeping, disclosure and investigative powers, the Court noted that the Commission's power extended to rulemaking and adjudication.¹²² The statute empowered the Commission to make rules and regulations necessary to carry out the provisions of the Act¹²³ and further gave the Commission primary jurisdiction in civil enforcement of these rules. To do so, the Commis-

ized by law to receive." *Id.* § 3553(f). See also Bid Protest Regulations § 21.3(c), 49 Fed. Reg. at 49,420. The latter stipulation should most likely be interpreted as a reference to Freedom of Information Act limitations. See 5 U.S.C. § 552 (1982).

116. See *supra* notes 34-36 and accompanying text. On October 17, 1984, the Justice Department disseminated a memorandum to federal agencies expanding on the executive branch opinion that the Act is unconstitutional and directing agencies to ignore the mandatory stay provisions, and not comply with any GAO award of bid protest costs or attorneys' fees. Memorandum for the Attorney General by Larry L. Simms, Acting Assistant Attorney General, *Implementation of the Bid Protest Provisions of the Competition in Contracting Act* (Oct. 17, 1984), reprinted in 42 FED. CONT. REP. (BNA) No. 17, at 755 (Oct. 29, 1984) [hereinafter cited as Memorandum]. See *infra* notes 166-77 and accompanying text.

117. 424 U.S. 1 (1976) (*per curiam*).

118. *Id.* at 7.

119. *Id.* at 6.

120. *Id.* at 113. The president *pro tempore* of the Senate and the Speaker of the House were to receive recommendations from the respective majority and minority leaders of each House. *Id.*

121. *Id.* at 109.

122. *Id.* at 110.

123. *Id.*

sion was authorized directly to institute civil actions seeking injunctive or other relief as necessary to implement various portions of the Act, without the participation of the Attorney General.¹²⁴ The Commission could also, after notice and hearing, disqualify an individual for one year from being a candidate for federal office for failing to file required reports.¹²⁵

The Court next reviewed the constitutional purposes of the separation of powers doctrine. The Framers of the Constitution, the Court stated, did not intend a “hermetic sealing off” of each of the three branches from the others because such an approach would render the government incapable of governing.¹²⁶ The Court reaffirmed the concept that the branches are to have “separateness but interdependence, autonomy but reciprocity.”¹²⁷ While the Court did not offer a clear test to differentiate among these concepts, the Court did offer examples from previous case law of clearly unconstitutional exercises of power by the executive and legislative branches.¹²⁸ The Court also quoted Chief Justice Taft’s statement that it would be unconstitutional for Congress to “invest itself or its members with either executive power or judicial power.”¹²⁹

The Court then examined the history of the appointments clause¹³⁰ in the Constitutional Convention of 1787. Noting the pervasive belief among the

124. *Id.* at 110-11.

125. *Id.* at 112-13.

126. *Id.* at 121. The Court noted that the intent of the Framers was that the three branches be “largely separate from one another.”

127. *Id.* at 122 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). *Youngstown Sheet & Tube*, or the *Steel Seizure Case*, arose out of President Truman’s effort in 1951 to avoid a shutdown of the nation’s steel mills by a threatened nationwide strike by issuing an Executive Order authorizing the Secretary of Commerce to take possession of the mills and keep them operating. The Court held that only Congress, not the President, could authorize a taking of private property for public use, and that the President’s actions, therefore, violated the separation of powers doctrine. *Id.*

128. The Court cited *Youngstown Sheet & Tube* as an example of unconstitutional exercise of legislative power by the executive, and *Springer v. Philippine Islands*, 277 U.S. 189 (1928) as a case of unconstitutional exercise of executive power by the legislature. In *Springer*, the Philippine legislature created several public corporations (including a National Coal Company and a National Bank). *Id.* at 198. The legislation provided that the voting power of the government owned stock was vested in a committee, which included the President of the Senate and the Speaker of the House. The Supreme Court ruled that the committee was exercising executive-type powers and that the legislature of the Philippine Islands could neither make legislative appointments to executive agencies nor append executive duties onto legislative offices. *Id.* at 202-06.

129. 424 U.S. at 121-22 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)). The Court in *Hampton* upheld a congressional delegation of authority to the President to set tariffs, noting that as long as Congress has set out general rules of action, the Congress was not delegating the power to make law, but rather was conferring discretion as to the execution of the law. *Id.* at 407-08.

130. U.S. CONST. art. II, § 2, cl. 2.

Framers that the legislative branch was the one most to be feared, the Court concluded that the appointments clause was intended to be an integral part of the separation of powers doctrine and was meant specifically to deny Congress the power to appoint "Officers of the United States."¹³¹

With these considerations in mind, the Court determined that the investigative and informative functions were within the powers of the Commission as constituted. The Court reasoned that these powers were similar to functions that a congressional committee could perform.¹³² The Court concluded, however, that the rulemaking and adjudicative functions, dealing with the administration and enforcement of public law, were functions to be carried out by "Officers of the United States."¹³³ The Court noted, "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."¹³⁴ Because the rulemaking and adjudicatory functions of the Commission were required to be carried out by "Officers of the United States," the Court held that the members of the Commission must be appointed in accordance with the appointments clause: nominated by the President alone and confirmed by the Senate.¹³⁵

Justice White concurred with this portion of the Court's analysis. White noted the advent of the administrative agency had eroded the separation of powers doctrine in many areas, but an exception to the appointments clause was unwarranted.¹³⁶

Seven years after *Buckley*, the Supreme Court again addressed the issue of separation of powers in the context of the "legislative veto" in *Immigration and Naturalization Service v. Chadha*.¹³⁷ In *Chadha* the Court considered the case of an alien, lawfully in the United States on a student visa, who remained in the country after his visa expired. The Immigration and Naturalization Service (INS) ordered him to show cause why he should not be deported.¹³⁸ Chadha conceded that he was deportable, but filed an application for suspension of deportation pursuant to provisions of the Immigration and Nationality Act permitting the Attorney General to suspend deporta-

131. 424 U.S. at 124-27.

132. *Id.* at 137-38. The Court quoted at length from *McGrain v. Daugherty*, 273 U.S. 135 (1927), in support of the idea that information-gathering is a necessary component of legislative power. 424 U.S. at 138.

133. 424 U.S. at 138-39.

134. *Id.* at 139 (quoting *Springer v. Philippine Islands*, 277 U.S. at 202).

135. *Id.* at 140-41.

136. *Id.* at 280-81.

137. 103 S. Ct. 2764 (1983).

138. *Id.* at 2770.

tion in cases of "extreme hardship." The INS determined that Chadha met the statutory requirements and suspended deportation.¹³⁹ Under the Act, a report of the suspension was transmitted to Congress. The Act provided that either House of Congress could override the Attorney General's suspension by passing a resolution disapproving of the suspension, in which case the alien would be deported.¹⁴⁰ The House of Representatives passed a resolution, without debate or recorded vote, disapproving of the deportation suspension of Chadha and five other persons.¹⁴¹ The INS then ordered Chadha deported.¹⁴² Chadha, after exhausting his administrative remedies, petitioned the United States Court of Appeals for the Ninth Circuit for review.¹⁴³ The Ninth Circuit held that the one-House veto violated the separation of powers doctrine.¹⁴⁴

The Supreme Court affirmed. Chief Justice Burger, writing for the majority, cited *Buckley v. Valeo*¹⁴⁵ as authority for the principle that the separation of powers doctrine is a central tenet of the Constitution.¹⁴⁶ Within the context of separation of powers, the Chief Justice noted the essential role of the presentment clause and the presidential veto as checks on legislative power and stressed the importance of the bicameral requirement as a method for insuring full study and debate of legislation in Congress.¹⁴⁷ The Court concluded that legislation could only be enacted according to this "single, finely wrought and exhaustively considered" process.¹⁴⁸

The Court next determined that the type of action taken by the House was "legislative" in nature. The majority based this finding on two grounds. First, the Court said, the House action had the effect of altering the legal rights and duties of persons outside of the legislative branch, including, Chadha, the INS, and the Attorney General.¹⁴⁹ Second, the Court noted that the deportation suspension procedures in the Act were intended to re-

139. *Id.*

140. *Id.* at 2770-71.

141. *Id.* at 2771.

142. *Id.* at 2772.

143. *Chadha v. Immigration & Naturalization Serv.*, 634 F.2d 408 (9th Cir. 1980).

144. *Id.* at 430-35.

145. 424 U.S. 1 (1976).

146. 103 S. Ct. at 2781.

147. *Id.* at 2782-84. The Court summarized the constitutional requirements of art. I, § 1 (vesting all legislative powers in the Congress, composed of the Senate and House of Representatives), art. I, § 7, cl. 2 (bills passing both Houses must be presented to the President), and art. I, § 7, cl. 3 (providing for presidential signature of bills, or veto and congressional override), as providing the appropriate constitutional method for legislating. *Id.* at 2781.

148. *Id.* at 2784.

149. *Id.* The Court based this determination, in part, on the notion that when one of the three branches acts, it is acting presumptively within its assigned sphere. *Id.* Justice Powell's concurring opinion stated that the House action was judicial and not legislative in nature, since

place the congressional private bill procedure, which required bicameral passage and presentment.¹⁵⁰ The Court emphasized that the Constitution does allow unicameral action, but only in four explicit and unambiguous areas.¹⁵¹ The Court held that since the House action was not within the express unicameral exceptions, and was clearly legislative in nature, it was an unconstitutional abridgement of the presentment clause and the bicameral requirement.¹⁵²

Justice Powell wrote an opinion concurring in the result. Powell remarked on the breadth of the majority opinion, noting that it would make unconstitutional every use of the legislative veto.¹⁵³ Powell suggested a narrower holding: that where Congress determines that a particular individual fails to meet statutory criteria for residence, it is violating the separation of powers by performing a judicial function.¹⁵⁴ Powell stated that the House had not made a general rule, but instead a determination that six specific individuals failed to fulfill specific statutory requirements and that this “adjudicatory” action has traditionally been left to other branches.¹⁵⁵ He analogized the lack of due process in *Chadha*’s case to the fears of “trial by legislature” with inadequate due process that had engendered the constitutional prohibition against bills of attainder.¹⁵⁶

Justice White dissented, concluding that the legislative veto was constitutional.¹⁵⁷ White criticized the majority’s holding as overly broad, and stated that loss of the legislative veto would leave Congress without a means of securing accountability of executive and legislative agencies when delegations of power are made.¹⁵⁸ The dissent characterized the legislative veto as

it determined the rights of specific individuals under specific statutory criteria. *Id.* at 2791 & n.7. (Powell, J., concurring). See *infra* text accompanying notes 154-56.

150. 103 S. Ct. at 2786.

151. *Id.* See art. I, § 2, cl. 6 (House of Representatives alone has the power to initiate impeachments); art. I, § 3, cl. 5 (the Senate tries and convicts impeached parties); art. II, § 2, cl. 2 (the Senate approves Presidential appointees); art. II, § 2, cl. 2 (the Senate ratifies treaties).

152. 103 S. Ct. at 2787.

153. *Id.* at 2788 (Powell, J., concurring in the judgment).

154. *Id.* at 2789.

155. *Id.* at 2791-92.

156. *Id.* at 2789-90, 2792. Justice Powell’s analysis would uphold “adjudicatory” functions by administrative agencies, since those agencies are governed by established procedural rules, as are courts. *Id.* at 2792. According to Justice Powell, Congress is bound by no such rules, and is only constrained by political power. *Id.*

157. *Id.* at 2792 (White, J., dissenting). White’s support of the legislative veto was pre-
saged by his concurring opinion in *Buckley*, 424 U.S. at 283-85. While the legislative veto question was raised in *Buckley*, the Court did not reach the merits of the question. *Id.* at 140 n.176. In his concurring opinion in *Buckley*, White expressed the belief that a one-House legislative veto of independent agency regulations was not unconstitutional. *Id.* at 284.

158. 103 S. Ct. at 2793.

an "important if not indispensable" method of accommodation between Congress and the President.¹⁵⁹ White asserted that the legislative veto has not been a tool of legislative aggrandizement, but a means of defense of its article I role as lawmaker in the face of the delegations of legislative power characteristic of the modern administrative state.¹⁶⁰ The Court's decision, the dissent stated, ignores the "legislation" enacted by agencies that is not subject to presentment and bicameralism.¹⁶¹ If article I allows delegation of legislative power, White reasoned, it should not also be construed as forbidding Congress from reserving a check on that power.¹⁶² White suggested that the separation of powers doctrine should be invoked only where an express constitutional provision is challenged,¹⁶³ or when a branch is prevented from accomplishing its assigned functions.¹⁶⁴

159. *Id.* at 2795.

160. *Id.* at 2796.

161. *Id.* at 2801.

162. *Id.* at 2802.

163. *Id.* at 2809. White cited *Buckley* as an example of an appropriate challenge to abridgement of the express appointment power of the Constitution.

164. *Id.* White posited that the test of *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443 (1977), provided the appropriate separation of powers inquiry:

[I]n 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. . . . 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.

103 S. Ct. at 2809 (citation omitted). *United States v. Nixon*, 418 U.S. 683 (1974) (the "tapes" case) involved a subpoena by a United States District Court directing the President to produce certain tapes and documents relating to conversations with aides who had been indicted for violations of law arising out of the Watergate episode. The President refused to do so on the grounds that the doctrine of separation of powers insulated a president from judicial subpoena and protected confidential presidential communications. *Id.* at 705-06. The Court conceded that the President's claim of privilege was constitutionally based, but stated that the President's claim of generalized privilege would undercut the constitutionally grounded due process requirement for production of evidence in a criminal trial. *Id.* at 712-13. The Court concluded that in balancing the competing constitutional claims, the generalized assertion of privilege had to yield to the specific need for trial evidence. *Id.* at 713. *Nixon v. Administrator of General Servs.*, 433 U.S. 425 (1977) concerned a congressional act requiring the General Services Administration (GSA) to take possession of President Nixon's presidential papers, tapes and documents pursuant to certain guidelines. *Id.* at 429. Nixon challenged the Act on the grounds that it represented coercive congressional control of an internal executive function in violation of the separation of powers. *Id.* at 439-41. The Court rejected this argument, using the "balancing" approach previously set forth. *Id.* at 443. The Court concluded that the provisions of the Act were sufficient to insure that there would be no undue disruption of executive branch action. *Id.* at 445. Applying this same balancing test to the facts of *Chadha*, Justice White concluded that the legislative veto did not prevent the executive from accomplishing its functions, because admission of aliens is a legislative function. 103 S. Ct. at 2809. White also stated that it did not hinder the executive's ability to execute the law, because that

II. THE CONSTITUTIONAL STATUS OF THE GAO BID PROTEST PROCEDURES

As noted above, the Justice Department and the President have claimed that the bid protest procedures are unconstitutional.¹⁶⁵ The Justice Department has promulgated a directive to executive agencies outlining the constitutional issues¹⁶⁶ and concluding that, as a legislative branch agency, the GAO may only perform duties of a type that could be performed by a congressional committee.¹⁶⁷ The Attorney General has specifically challenged the provision requiring the stay of award or performance pending issuance of the Comptroller General's decision.

In support of this view, the Attorney General asserts that because the GAO bid protest function will have "a legal effect on the rights and obligations of persons outside the legislative branch," it is clearly forbidden by the holding of *Chadha*.¹⁶⁸ The Attorney General concedes that there would be nothing constitutionally improper in the statutory requirement of a stay for a specified period of time, noting that such "report and wait" requirements were acknowledged by the Supreme Court in *Chadha* to be a constitutional exercise of legislative power.¹⁶⁹ However, the Attorney General states that the stay provisions of the Competition in Contracting Act are unconstitutional because the statute enables the Comptroller General to lift the stay, either by issuing a decision or by dismissing a frivolous protest. In so doing, the Comptroller General determines when a procurement may proceed. Thus, the Attorney General concludes, the Comptroller General has been given the authority to alter legal rights and duties of persons outside of the legislative branch, a result forbidden by *Chadha*.¹⁷⁰ The Attorney General asserts that this procedure is very similar to the legislative veto power struck

power extends only insofar as Congress delegates, and Congress had here given only a qualified authority to the executive. *Id.* at 2809-10.

165. See McConnell letter, *supra* note 34. See *supra* notes 34-36 and accompanying text.

166. See Memorandum, *supra* note 116.

167. *Id.* at 760.

168. *Id.* The Justice Department emphasizes that it does not question the authority of the Comptroller General to review executive actions in bid protest situations and to issue decisions that would be advisory and not binding on the executive branch. *Id.* at 762.

169. *Id.* at 760 (citing *Chadha*, 103 S. Ct. at 2776 n.9), where the Supreme Court noted that the Federal Rules of Civil Procedure must be reported to the Congress at the beginning of a session and may not take effect until the end of that session. The Court noted, however, that Congress cannot unilaterally veto the Federal Rules, but must pass legislation barring their implementation. It is unlikely that the executive branch would agree with the "business sense" of a procedure requiring a fixed, mandatory, 90-day stay on any protested procurement, or a "report and wait" requirement on all procurements. However, absent constitutional infirmity, the advisability of such a procedure would be a "political question" and not justiciable by a court.

170. Memorandum, *supra* note 116, at 760. The Justice Department notes that the Comp-

down in *Chadha* because it amounts to a grant of legislative-type power to an arm of Congress in a manner that permits its exercise outside of the bicameralism and presentment requirements.¹⁷¹ The Attorney General argues that these allegedly unconstitutional provisions allowing the Comptroller General to lift the stay cannot be severed from the remainder of the bid protest procedures.¹⁷² The Attorney General notes that if the stay could not be lifted by decision or dismissal, the result would be either an indefinite stay, or an automatic stay of ninety working days. Further, the Attorney General stresses that this procedure could be imposed on any procurement in which an interested party filed a bid protest, even if the protest was frivolous, a result clearly not intended by Congress.¹⁷³ Therefore, the Attorney General has concluded that the entire stay provision must be struck down¹⁷⁴ and has recommended that federal agencies proceed with procurements as if no stay provision was included in CICA.¹⁷⁵

The Attorney General has also challenged the authority of the GAO under the Act to award bid and protest costs and attorneys' fees as an unconstitutional vesting of judicial power by the Congress in the Comptroller

troller General could also postpone a procurement indefinitely by delaying issuance of a decision. *Id.*

171. *Id.* The Attorney General cites *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982) as additional authority for this position. At issue in *Pierce* was a provision in the Department of Housing and Urban Development (HUD) Appropriation Act forbidding the use of any appropriated funds to plan or implement any reorganization of HUD without prior approval of the Committee on Appropriations. When HUD attempted to reorganize without such approval, the affected employees challenged the reorganization. The court of appeals held that the provision could be interpreted as a one-house legislative veto and, therefore, would be unconstitutional. *Id.* at 306. Alternatively, the court suggested that the provision could be construed as a grant to the committees of "the power to lift a congressionally imposed restriction on the use of appropriated funds." *Id.* Such a provision, the court stated, would be an exercise of legislative power outside of the bicameralism requirement and therefore would be unconstitutional. *Id.* The court cited as authority its holding in *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Group v. Consumers Energy Council of America*, 103 S. Ct. 3556 (1983). The Attorney General analogizes the ability of the Comptroller General to lift the stay on a procurement to the *Pierce* court's second interpretation of the HUD provision. Memorandum, *supra* note 116, at 760.

172. Memorandum, *supra* note 116, at 760-61.

173. *Id.* at 760-61. The Justice Department notes that simply striking the Comptroller General's authority would result in an indefinite stay. As such the statute does not authorize agencies to proceed until the Comptroller General issues an opinion and there is no other statutory means by which the stay may be lifted. In order to produce a mandatory 90-day stay, a court would have to redraft the statute. *Id.*

174. *Id.* at 761. The Justice Department states that the remaining provisions of the Act dealing with increased use of competition in procurement will operate as Congress intended without the bid protest provisions, supporting the argument for severability. *Id.* at 761 n.7.

175. *Id.* at 762. Agencies may continue to voluntarily stay procurements pending Comptroller General decisions. *See supra* note 104.

General. The Attorney General's rationale for this assertion is based, again, on the holding of *Chadha*. The GAO, according to the Attorney General, will be altering the rights and duties of persons outside of the legislative branch by awarding damages against an executive branch agency.¹⁷⁶ The Attorney General has directed federal agencies not to comply with any awards of damages by the GAO.¹⁷⁷

The General Accounting Office, not surprisingly, takes a different stance.¹⁷⁸ The GAO first notes that it has been performing a bid protest function for sixty years and that the Competition in Contracting Act does not confer any powers beyond what the GAO currently exercises.¹⁷⁹ Additionally, GAO asserts that it is the executive agency, not the GAO, that actually stays award or performance. The GAO, in contrast, will only "declare whether awards or proposed awards comply with law and regulation" and recommend relief, including monetary compensation if appropriate.¹⁸⁰ Consequently, the GAO argues that both *Buckley*¹⁸¹ and *Chadha*¹⁸² are dis-

176. Memorandum, *supra* note 116, at 762. The Act provides that protest costs awarded by GAO must be paid out of agency funds already appropriated to the Agency for procurement purposes. See *supra* note 111. It is likely that the requirement that damages be paid out of previously appropriated funds was intended to circumvent the argument that Congress can only authorize the expenditure of funds through appropriate legislation. See U.S. CONST. art. I, § 9, cl. 7. A discussion of the constitutionality of awards of attorneys' fees in a bid protest is beyond the scope of this Comment. The "American rule," of course, dictates that each litigant bears his own costs of litigation. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). The Equal Access to Justice Act permits a prevailing party to recover attorneys' fees in certain actions against the United States, but establishes parameters concerning both the amount of fees to be recovered and the status of the party eligible to recover fees. The latter restrictions limit eligible parties to charitable organizations, small businesses, sole proprietorships, and individuals with a net worth less than \$1,000,000. The Act forbids award of fees if the actions of the government were "substantially justified." 28 U.S.C. § 2412(d)(1)(A) (1982). See generally Robertson & Fowler, *Recovering Attorney's Fees from the Government Under the Equal Access to Justice Act*, 56 TUL. L. REV. 903 (1982). The Competition in Contracting Act contains no such restraints or guidance regarding award of fees. However, the GAO Bid Protest Regulations have established limits on what parties may receive attorneys' fees and protest costs, and when bid and proposal costs may be awarded. See *supra* note 111.

177. Memorandum, *supra* note 116, at 762.

178. See Brooks Letter, *supra* note 37; see also *supra* notes 38-39 and accompanying text.

179. Brooks Letter, *supra* note 37, at 124.

180. *Id.*

181. *Id.* See *supra* note 38 and accompanying text.

182. Brooks Letter, *supra* note 37, at 125. The GAO states that *Chadha* stands for the principle that Congress may not overrule executive action outside of the legislative process. The GAO asserts that the stay of award or performance of a contract is merely to enable the Comptroller General to provide his views on the procurement while meaningful relief may be afforded. This purpose, the GAO believes is not unconstitutional under *Chadha*. *Id.* The GAO also states that under the Act, the Comptroller General is only empowered to declare whether an award complies with law and regulation, and not to order agencies to take specific actions. *Id.* at 124. But see *infra* note 200.

tinguishable on their facts. The GAO sees no significant constitutional problem with the power to grant protest costs.¹⁸³ In the wake of *Buckley* and *Chadha*, it is clear that the Supreme Court views the separation of powers doctrine as a central principle of the Constitution,¹⁸⁴ and will not hesitate to strike down legislative acts that violate that doctrine.¹⁸⁵

There are some common threads in both *Buckley* and *Chadha*. First, both cases concerned direct involvement by Congress, or members of Congress, in the challenged action. In *Buckley*, congressional leaders were given the power to make appointments to an independent agency.¹⁸⁶ In *Chadha*, the vote of either House of Congress could override an agency action.¹⁸⁷ Second, both cases presented abridgements of express constitutional provisions. The congressional action in *Buckley* violated the appointments clause.¹⁸⁸ The one-House veto in *Chadha*, under the majority view that it was a legislative-type action, violated the article I legislative provisions of bicameral congressional passage and the presentment clause.¹⁸⁹ Third, but closely related

183. Brooks Letter, *supra* note 37, at 124. The GAO notes that in some cases reimbursement of a protestor's costs may be the only remedy possible. *Id.* at 125. The GAO also states that since bid protests protect the integrity of the procurement system, protesters who have highlighted deficiencies should be reimbursed. *Id.*

184. What is unclear is how the Court will respond to Justice White's concerns that the Court is ignoring the realities of the administrative state. *See supra* notes 157-64 and accompanying text. In *Chadha*, the Court's position appears to be that if, having delegated the authority, Congress later finds itself in disagreement with an agency's policies, it can change those policies only through legislation. 103 S. Ct. at 2786. The Court interprets the Constitution as permitting *direct* congressional control of agencies solely by legislation. Once legislation is passed, Congress may only control agencies *indirectly*, through appropriations, investigation, or formal reporting requirements. *Id.* at 2786 n.19. Such information-gathering, of course, could yield future legislation concerning an agency's policies or powers. 103 S. Ct. at 2785 n.16. The Court notes that the power of the Executive is, by definition, limited by the terms of the statute delegating that power. Therefore, the determination of whether congressional intent has been obeyed in a particular instance is a matter for the courts to determine. *Id.* *See also* 103 S. Ct. at 2792 & n.10 (Powell, J., concurring).

185. *Chadha* concerned agency decisionmaking. In the same term, the Court expanded *Chadha* to agency rulemaking. The Court affirmed, without opinion (except for a brief dissent by Justice White) a lower court holding that a provision of the Natural Gas Policy Act of 1978 (NGPA) permitting a one-House veto of certain rules, was unconstitutional. *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd sub nom.* *Process Gas Consumers Group v. Consumers Energy Council of America*, 103 S. Ct. 3556 (1983). Justice White's dissent paralleled his position in *Chadha*, noting that the legislative veto in the NGPA was a compromise reached after months of congressional impasse over how to deregulate natural gas prices while preventing sharp price increases. White stated that by invalidating the legislative veto over agency rulemaking, the Court had placed the agencies out of the direct control of Congress in their lawmaking capacity. *Id.* at 3557-58.

186. *See supra* note 120 and accompanying text.

187. *See supra* note 140 and accompanying text.

188. *See supra* notes 130-35 and accompanying text.

189. *See supra* notes 145-52 and accompanying text. Justice Powell's concurrence would

to the finding of express language, the Court was able in each case to point to constitutional history to demonstrate that the challenged action was of a specific type that the Framers intended to guard against through the separation of powers. In *Buckley*, the Court determined that the appointments clause was worded consciously and specifically as part of the delicate balance between the legislative and executive branches.¹⁹⁰ In *Chadha*, the majority pointed to history demonstrating that the presentment clause and the bicameral requirement were both a result of the Framers' convictions that the legislative power was the power most to be feared and most in need of external control.¹⁹¹ Thus, while *Buckley* and *Chadha* do not define the limits of each branch under the separation of powers doctrine, the cases may be read together to outline the inquiry that the Supreme Court will conduct in a separation of powers case: first, the nature of the challenged action must be determined; second, the action must be found to contravene a specific Constitutional provision or be of a type that the separation of powers historically was meant to prevent.¹⁹²

have found the action violative of the article III delegation of judicial powers to the courts. See *supra* notes 153-55 and accompanying text.

190. 424 U.S. at 128-31. See *supra* notes 130-31 and accompanying text. See also *Buckley*, 424 U.S. at 271-74 (White, J., concurring in part and dissenting in part).

191. See *supra* notes 146-48 and accompanying text; see also 103 S. Ct. at 2782-84. Justice Powell's concurrence found that the Framers were equally fearful of legislative trials. See *supra* note 156 and accompanying text.

192. In the wake of *Chadha*, it appears that the Supreme Court has adopted a rigid, "three-branch" approach to separation of powers cases. The Court takes a particularly restrictive view of legislative branch powers. See *supra* notes 145-52 and accompanying text and note 184. The more flexible balancing test employed in *United States v. Nixon*, 418 U.S. 683 (1974), and *Nixon v. Administrator of General Servs.*, 433 U.S. 425 (1977) is mentioned in *Chadha* only in Justice White's dissent. See *supra* note 164.

Worth noting in this regard is that Chief Justice Burger, author of the *Chadha* majority opinion, wrote a dissent in *Nixon v. Administrator* referring to the balancing test as "ill-defined," and applicable only to the narrow facts of *United States v. Nixon*, where valid competing and constitutionally based claims of two coequal branches were at issue. *Nixon v. Administrator of General Servs.*, 433 U.S. at 511, 515-16. See *supra* note 164. In *Buckley*, the Chief Justice noted that no balancing was necessary because of the clear constitutional provisions involved. 433 U.S. at 512. Burger's opinion in *Chadha* seeks to retain the same clear constitutionally grounded approach, by first interpreting the congressional action as "legislative" in nature, then finding a breach of the bicameralism and presentment requirements of the Constitution. This approach has the benefit of placing the question at one of the poles of the test articulated by Justice Jackson in *Youngstown Sheet & Tube*, where decisions are easiest. See *supra* note 20. The difficulties of this approach are pointed out in Justice White's comments regarding the "legislative" nature of executive agency actions. See *supra* note 184. The majority's weak rejoinder states that while agency rulemaking may resemble lawmaking, it is only "quasi-legislative" in nature. 103 S. Ct. at 2785 n.16. Justice Powell's narrower approach would have avoided this dilemma. See *supra* notes 153-56 and accompanying text. Clearly, the ramifications of this decision, particularly in the area of administrative law, have yet to be explored.

The GAO is correct in its view that the bid protest procedures may be differentiated from both *Buckley* and *Chadha* on the factual basis of their holdings. At issue in *Buckley* was the method of appointment of the members of a commission that performed rulemaking and adjudication functions. The Court held that such officers had to be appointed pursuant to the appointments clause.¹⁹³ The Comptroller General is appointed pursuant to the appointments clause.¹⁹⁴ *Chadha* concerned a constitutional challenge to a one-House legislative veto. The Court held that since the House resolution was legislative in nature, it had to be enacted in a manner constitutionally appropriate for legislation: passage by both Houses of Congress followed by presentment to the President.¹⁹⁵ The bid protest procedure is not an action taken by one House of Congress, but, rather, by the Comptroller General.

While *Buckley* and *Chadha* may be differentiated, the Attorney General has challenged the authority of the Comptroller General, as a legislative branch agent, to hear and decide protests against executive branch procurement actions. This Comment will analyze the bid protest procedures in light of the separation of powers rationale of *Buckley* and *Chadha*, using the approach outlined above.

A. *The Nature of the Action Challenged*

The Court in *Chadha* disagreed over the nature of the one-House veto. The majority felt that by taking an action that altered the rights and duties of individuals outside of the legislative branch, including executive branch officials, the one-House veto was a legislative-type action.¹⁹⁶ The Court relied to some extent in this determination on the presumption that when a branch acts, it acts within its own sphere.¹⁹⁷ Justice Powell's concurrence, on the other hand, viewed the House resolution as a specific determination that an individual failed to meet certain statutory criteria, which he termed a judicial function.¹⁹⁸

Under the bid protest procedures of the Competition in Contracting Act, the GAO is empowered to review solicitations, proposed awards, and contracts to determine if they comply with statutes and regulations.¹⁹⁹ Based

193. See *supra* notes 117-35 and accompanying text.

194. The Comptroller General and Deputy Comptroller General are appointed by the President with the advice and consent of the Senate. 31 U.S.C. § 703(a)(1) (1982). The Court, in *Buckley*, observed this fact. 424 U.S. at 128 n.165.

195. See *supra* notes 145-52 and accompanying text.

196. See *supra* notes 149-52 and accompanying text.

197. See *supra* note 149.

198. See *supra* notes 149, 154-55 and accompanying text.

199. See *supra* note 107 and accompanying text.

on this review, the GAO may recommend²⁰⁰ various remedies, including monetary relief. During pendency of the protest, all but the most urgent procurements must be stayed.²⁰¹ The GAO determination on such a protest will, as the Attorney General contends, certainly affect the rights and duties of those outside the legislative branch, including the successful offeror, the protester and the contracting agency. But, as Justice Powell has argued, a court decision has the same effect.²⁰² More revealing is the exact wording of the statute: “[T]he Comptroller General may *determine* whether the solicitation, proposed award, or award *complies with statute or regulation.*”²⁰³

In *Marbury v. Madison*,²⁰⁴ Justice Marshall declared that the power to say what the law is, and to apply that law to particular cases, belongs to the judiciary.²⁰⁵ Thus, an act giving the GAO authority to determine executive branch compliance with the law and to determine the respective rights of parties in specific bid protest cases may be seen as delegation of judicial authority. This interpretation is buttressed by the Court’s statement in *Chadha* that when a case or controversy arises over whether an executive action exceeds statutory authority, it is the role of the courts to determine whether Congressional intent has been obeyed, and to enforce adherence to statutory standards.²⁰⁶ The Attorney General has analogized the stay provisions to a grant of legislative authority similar to a one-House veto.²⁰⁷ Such provisions may also be analogized to a temporary restraining order or an injunction, another judicial-type action. Bid protest procedures, though, differ from an injunction by granting an automatic stay pending a hearing on the merits.²⁰⁸

200. The use of the word “recommend” in the statute must be viewed in the context of the Conference Report’s statement that the purpose of staying award or performance is to insure that the Comptroller General may consider all available forms of relief and to preclude agency resistance to remedies such as termination. H.R. REP. NO. 861, *supra* note 94, at 1436; *see supra* notes 102-07 and accompanying text. Additionally, CICA requires the head of the procuring agency to report to the Comptroller General within 60 days if the “recommendation” has not been implemented. 31 U.S.C.A. § 3554(e)(1) (West Supp. 1984). Clearly, Congress intends that the agencies will implement the Comptroller General’s “recommendations.” It is likely that the use of the word in the statute was an intentional effort to finesse the question of the Comptroller General’s authority to influence executive action. The use of a word such as “direct” would have strengthened the constitutional challenge to the provisions.

201. *See supra* notes 102-07 and accompanying text.

202. *Chadha*, 103 S. Ct. at 2791. *See supra* notes 154-55 and accompanying text.

203. 31 U.S.C.A. § 3554(b)(1) (West Supp. 1984) (emphasis added).

204. 5 U.S. (1 Cranch) 137 (1803).

205. *Id.* at 177.

206. 103 S. Ct. at 2785 n.16. *See supra* note 184.

207. *See supra* notes 170-71 and accompanying text.

208. *See* FED. R. CIV. P. 65. The grant of an injunction to a plaintiff is a matter of discretion for the court of equity, and not a matter of right even if the plaintiff stands to suffer irreparable harm. *Yakus v. United States*, 321 U.S. 414, 440 (1944). The factors that a court will consider are: (1) probability that petitioner will prevail on the merits; (2) petitioner has

The Attorney General has challenged the stay provisions only on the narrow ground that by permitting the Comptroller General to lift the stay, the Act grants legislative-type authority to an agent of the legislative branch in violation of the separation of powers principle of *Chadha*.²⁰⁹ However, viewed in their broader context, the grant of authority to the Comptroller General to hear specific bid protest cases, to determine compliance with law, to issue recommendations that are virtually impossible for an agency to refuse to implement, and to grant damages, may be viewed as a grant of judicial power to the Comptroller General. Congress has made the Comptroller General a statutory forum for adjudication of bid protest cases. Pursuing the *Buckley/Chadha* approach posited above, this Comment will next consider whether such a grant contravenes specific constitutional provisions.

B. Constitutional Provisions Abridged

The second part of the Supreme Court's *Buckley/Chadha* analysis re-

demonstrated that without such relief he will suffer irreparable harm; (3) extent to which issuance of a stay would harm other parties to the proceedings; and (4) where the public interest lies. *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-45 (D.C. Cir. 1977). In procurement cases, courts will refrain from intervention unless the agency officials' actions on matters committed to their discretion were without rational basis or the procurement process involved a "clear and prejudicial violation" of regulations or statutes. *Aero Corp. v. Department of the Navy*, 493 F. Supp. 558 (D.D.C. 1981); *Kentron Hawaii, Ltd. v. Warner*, 480 F.2d 1166, 1169 (D.C. Cir. 1973). See also *M. Steintal v. Seaman*, 455 F.2d 1289, 1301-03 (D.C. Cir. 1971). The United States Court of Appeals for the District of Columbia Circuit has acknowledged the undesirability of permitting a frustrated bidder "to render uncertain for a prolonged period of time government contracts which are vital to government functions." *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137, 1141 (D.C. Cir. 1970) quoted in *Steintal*, 455 F.2d at 1303. The *Steintal* court concluded that the public interest in an expeditious procurement process, urgent delivery requirements, and the time constraints of an injunction hearing should make a court reluctant to exercise its discretionary injunctive powers. 455 F.2d at 1301-04. In contrast to this judicial reluctance to grant injunctive relief in procurement cases, the automatic stay provisions of the Competition in Contracting Act guarantee some delay on every protested procurement. In a protest determined by the Comptroller General to be frivolous, there will be a delay while that determination is made. See *supra* notes 99-101 and accompanying text. If the agency head determines that it is appropriate to proceed with award or performance, there will be delay while that determination is made and transmitted to the GAO. See *supra* notes 102-07 and accompanying text. In essence, the Act creates an injunctive-type remedy as a matter of right to the protesting party.

209. See *supra* notes 165-75 and accompanying text. The adherence of the Attorney General's memorandum to the language of *Chadha* concerning the altering of rights and duties is likely an effort to bring it more closely in line with that case and to bring it on point with *American Federation of Government Employees v. Pierce*, discussed *supra* note 171. However, a broader challenge is unnecessary, since the acceptance of the Attorney General's argument concerning severability would lead to elimination of the entire bid protest provision. See *supra* notes 172-75 and accompanying text.

quires an abridgement of express constitutional powers and, closely related, the creation of a type of danger that the Framers sought to prevent. The power to contract is not expressly enumerated in the Constitution, but is inherent in the concept of sovereignty.²¹⁰ Congress has, by statute, delegated the authority to contract to various executive agencies.²¹¹ Under the bid protest procedures, however, it has retained in a legislative branch agency the authority to perform the judicial-type function of hearing and deciding bid protests. Thus, the Act raises questions of the separation of powers between the legislative branch and both the executive and the judicial branches.

The authority to execute the laws is given to the President²¹² and appropriate subordinate executive officials.²¹³ In *Buckley*, amici curiae for Congress argued that because Congress had express constitutional authority to regulate elections, it should therefore have the power to appoint those who administer the regulatory statute.²¹⁴ The Court rejected this argument, stating that even express constitutional powers could not be exercised in a manner repugnant to the separation of powers.²¹⁵ Thus, an assertion that the power of a legislative branch agency to hear bid protests stems from Congress' express constitutional appropriations power will fail.

The Court, in *Buckley*, differentiated legislative power from executive power. The former, said the Court, is the power to make laws, while the latter is the power to enforce them.²¹⁶ The Court elaborated on this distinction in *Chadha*, noting that once a law is passed, direct congressional intervention in the execution of the law is unconstitutional.²¹⁷ In the situation of bid protest procedures under the Competition in Contracting Act, there is not direct intervention by one or both Houses of Congress. Rather, the Congress has empowered a legislative branch organization to render judicial-type decisions regarding executive compliance with laws and regulations in the executive's application and execution of delegated powers, and has required executive agencies to delay actions pending issuance of those decisions. The Justice Department's challenge to the bid protest procedures

210. See *supra* note 51 and accompanying text.

211. See *supra* notes 55-56 and accompanying text.

212. U.S. CONST. art. II, § 1, cl. 1.

213. *Myers v. United States*, 272 U.S. 52 (1926) (the President cannot execute the laws alone, but needs assistants).

214. 424 U.S. at 131-32.

215. *Id.* The Court stated that the fact that Congress had explicit authority to regulate a field did not mean that it had the authority to appoint those administering the regulatory statute.

216. See *supra* note 134 and accompanying text.

217. See *supra* note 184.

rests on a reading of *Chadha* that Congress may not alter the rights and duties of persons outside of the legislative branch except through legislation.²¹⁸ However, as a corollary to this, *Chadha* clearly states that Congress may not make a partial delegation of authority. In *Chadha*, the Court held that once the Attorney General had been delegated the authority to make a deportation decision, congressional disagreement with that decision was a determination of policy that Congress could only make legislatively. Thus, once authority is delegated, direct congressional intervention must cease.²¹⁹

In this case, Congress has delegated the authority to contract to the executive branch, but reserved to the Comptroller General the authority to intervene in the execution of that delegated authority by hearing bid protests and recommending remedies if the Comptroller General determines that a statute or regulation has been abridged. If this is interpreted as a reservation of a portion of delegated power to a legislative branch agent, it would clearly overstep the bounds of the legislative oversight functions recognized as constitutionally sound in *Chadha*.²²⁰

If the bid protest procedures are accepted as a delegation of judicial-type power to the Comptroller General, then following Justice Powell's approach in *Chadha*,²²¹ it may also be argued that the GAO bid protest procedures violate the separation of powers between the legislative and judicial branches. There is little doubt that Congress could have passed an act conditioning the authority of each agency to contract on the establishment within each agency of similar bid protest procedures.²²² As Powell notes, the Court has recognized the validity of such agency adjudications.²²³ But, Powell notes, these agency adjudications are subject to the protections, including judicial review, of the Administrative Procedure Act.²²⁴ GAO, as a legislative branch agency, is exempt from the APA.²²⁵ Thus, Powell's concerns over the dangers of legislative courts, which he feels were forbidden by the separation of powers doctrine, are brought into play.²²⁶ If the bid protest provisions are interpreted as a grant of judicial-type authority to a legis-

218. See *supra* notes 168-71, 209 and accompanying text.

219. 103 S. Ct. at 2786 and n.19. See *supra* note 184.

220. See *supra* note 184. This is the interpretation urged by the Attorney General in his analogy of the GAO procedures to the *Pierce* case. See *supra* note 171 and accompanying text.

221. See *supra* notes 153-56 and accompanying text.

222. See *supra* note 54 and accompanying text.

223. 103 S. Ct. at 2792 n.10.

224. *Id.*

225. See *supra* note 47.

226. See *supra* note 156 and accompanying text. However, the GAO decision does become part of the agency record that will be reviewed by the Court if the protestor files a subsequent action. See *supra* note 115 and accompanying text.

lative branch agent, it would again overstep the holding in *Chadha* that determination of executive compliance with a statute is a function for the courts, not the legislature.²²⁷

C. Avoiding the Constitutional Dilemma: An Alternative Analysis

The arguments that the GAO bid protest procedures are unconstitutional rest on the interpretation of the Comptroller General as an arm of the Congress. The pivotal question thus becomes whether, for purposes of the bid protest procedures, the Comptroller General is considered as an agent of the legislative branch and thereby structurally equivalent to a congressional committee, or rather, as the head of an organization independent of the executive branch. While the GAO is structurally a legislative organization, it has many functional characteristics of an independent agency.²²⁸ The Supreme Court has held that it is not the structural identification of an agency (that is, "executive branch") that determines its status, but rather the nature of the function it performs.²²⁹ In assessing the function of the GAO, it is important that it was founded as an "oversight" body, serves a primary function of assisting Congress,²³⁰ and in so doing performs the sort of information functions that the *Buckley* Court recognized were appropriate for congressional committees and congressionally appointed officers.²³¹ How-

227. See *supra* note 184.

228. In *United States ex rel. Brookfield Constr. Co. v. Stewart*, 234 F. Supp. 94 (D.D.C. 1964), the United States District Court for the District of Columbia Circuit examined the role of the Comptroller General, noting a two-fold function. First, because of the authority to investigate and report to Congress on the receipt and expenditure of appropriated funds, the Comptroller General is a legislative branch-type official. *Id.* at 99. Second, by virtue of the position of GAO as the chief accounting organization of the government, with authority to settle accounts and disallow payments, the Comptroller General is an executive officer in nature. *Id.* at 99. The court noted that the combination of such powers was similar to those powers given to regulatory commissions. *Id.* See *Gannister*, *supra* note 6, at 504-06.

229. *Weiner v. United States*, 357 U.S. 349 (1958). *Weiner* involved President Eisenhower's attempt to remove a member of the War Claims Commission. The Commissioners were to have tenure for the life of the Commission and no removal provision was made. The President declared it his intent to place on the Commission personnel of his own choosing. *Id.* at 350. The Court stated that the clearest factor for determining whether the President could remove a Commissioner was to analyze the nature of the function Congress granted to it. *Id.* at 353. The Court concluded that the powers were of a type that required independence from executive influence in order to fairly adjudicate claims. *Id.* at 355-56.

230. See *supra* notes 41-48 and accompanying text.

231. 424 U.S. at 137-38. (The Court discusses the legislative branch's need to investigate and inform itself on legislative issues.) The Attorney General argues that the Comptroller General should be limited by the separation of powers doctrine to performing only those duties that Congress could properly delegate to a congressional committee and that the Comptroller General may not constitutionally take actions that affect the rights or duties of those outside the legislative branch. See *supra* note 167 and accompanying text. This limitation would presumably eliminate not only the Comptroller General's authority to hear bid protests, but also

ever, the GAO also performs executive-type functions and is headed by an official appointed in a manner that has suggested to one court the GAO's potential status as an independent agency.²³²

The Comptroller General is an "Officer of the United States," appointed according to the appointments clause,²³³ who holds office for a fixed term of fifteen years.²³⁴ The Comptroller General may be removed only by impeachment²³⁵ or by joint resolution of Congress,²³⁶ the latter requiring a signature by the President, or by a veto and an override by a congressional super-majority. As originally passed, the Budget and Accounting Act permitted removal of the Comptroller General by a concurrent resolution, which would not require presidential signature.²³⁷ The Act was vetoed by President Wilson because of this removal power.²³⁸ Failing to override the

the power to settle claims and accounts. By statute, the Comptroller General's determinations in settling accounts are binding on executive agencies. See *supra* note 80 and accompanying text.

232. See *supra* note 228. See Ganister, *supra* note 6, for a discussion of the role of the GAO with regard to the legislative, executive, and judicial branches. Ganister concludes that the GAO has assumed an "amorphous" role in which it has assumed both executive and judicial functions while also becoming increasingly independent of the Congress. Further, Ganister notes that no branch of government appears anxious to clearly define the GAO's functions and in what branch it belongs.

233. See *supra* note 194 and accompanying text.

234. 31 U.S.C.A. § 703 (West Supp. 1984). The Comptroller General may not be reappointed. *Id.*

235. As originally drafted, the Budget and Accounting Act did not provide for removal of the Comptroller General by impeachment. In floor debate, it was pointed out that this omission would conflict with the constitutional requirement that all officers of the United States could be removed by impeachment. 58 CONG. REC. 7276 (1919) (remarks of Rep. Stevenson). Therefore, an amendment permitting removal by impeachment was adopted. *Id.* at 7281.

236. 31 U.S.C. § 703 (1982). The Comptroller General may be removed by joint resolution after a hearing only on grounds of disability, inefficiency, neglect, malfeasance, felony, or moral turpitude. *Id.*

237. In the legislative record, it was noted that:

we have provided that he may be removed by concurrent resolution of Congress. A joint resolution has the effect of law and has to be signed by the President. A concurrent resolution of the two Houses goes nowhere after it has passed the two Houses and *if the bill is passed, this would 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) (remarks of Rep. Temple) (emphasis added). The Attorney General has cited the underscored language as authority for the assertion that the Congress' broad removal power gives it control over the Comptroller General. Memorandum, *supra* note 116, at 757. The statement, however, deals with the power to remove by concurrent resolution. In a joint resolution, the removal power is shared with the President.

238. The veto message appears at 59 CONG. REC. 8609-10 (1920). The President expressed the opinion that "the power to appoint officers of this kind carries with it, as an incident, the power to remove." *Id.* at 8609. See also Mansfield, *supra* note 47, at 69-70.

veto, Congress amended the language to require a joint resolution.²³⁹ As a result, the power to remove the Comptroller General does not rest exclusively with the Congress, but is shared with the President. On the basis of appointment and removal, therefore, the Comptroller General is not entirely analogous to a congressional committee, but is comparable to an independent agency.²⁴⁰

As discussed above, the determination of bid protests is a judicial-type function and is the type of function that Congress could properly determine should be performed by an independent agency not under the influence or control of the executive branch.²⁴¹ This reasoning stems from the fact that bid protests involve a determination of the extent of executive agency compliance with statutes and regulations. Moreover, the Supreme Court has held that it is within the power of Congress to create article I or “legislative” courts to adjudicate “public rights”—cases arising “between the Government and persons subject to its authority in connection with the perform-

239. 61 CONG. REC. 1855 (1921) (noting that while removal would still originate with Congress, it would now require presidential approval). Consideration was also given to having the Supreme Court appoint the Comptroller General, but this idea was abandoned. *Id.* at 8626. The fact that Congress considered having the Supreme Court appoint the Comptroller General does not support the notion that Congress clearly intended the Comptroller General to be a “legislative branch agent,” but does support the position that Congress was most concerned with making the Comptroller General wholly independent of the executive branch.

240. Particularly revealing of the congressional intent of the nature of the Comptroller General’s office is this exchange that occurred in the House during discussion of the Presidential veto:

MR. GOODYKOONTZ. Does [Representative Good] not think that the Comptroller General would be rather an agent or a mere arm of Congress, which in itself has the power to select committees or agencies to gather information for it, and does not come within the category of general officers contemplated to be beyond the jurisdiction of Congress itself?

MR. GOOD. It was the opinion of the committee that framed the law that the officer we were creating here was an officer of the United States, and his appointment would have to fall under the provisions of Article II of section 2 of the Constitution.

59 CONG. REC. 8612 (1920). For example, the Interstate Commerce Commission is an “independent establishment” of the Government. 49 U.S.C. § 10301 (1982). Commissioners are appointed by the President and confirmed by the Senate. *Id.* However, the President alone is empowered to remove the Commissioner for inefficiency, neglect, or malfeasance. *Id.* See also *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935), where the Supreme Court described the Federal Trade Commission as quasi-legislative in its rulemaking and investigating and reporting to Congress function, and quasi-judicial in its master in chancery function. *Id.* at 628. The Court concluded that it must be free from executive control to perform these functions, and that Congress could therefore restrict the President’s power to remove for cause. *Id.* at 629.

241. See *Weiner v. United States*, 357 U.S. at 349, discussed *supra* note 229. In *Weiner*, the Supreme Court noted that Congress could have either settled the claims directly, utilized the executive branch, or used adjudication. Having established a Commission to adjudicate the claims, Congress could guarantee the fairness of the adjudication by curbing President’s removal power so as to eliminate any executive control or coercion. 357 U.S. at 355.

ance of the constitutional functions of the executive or legislative departments."²⁴² This congressional authority is based partially on the concept of sovereign immunity, which recognizes that the government may condition its consent to be sued by determining the manner and form in which such suits will be heard.²⁴³ It is also based on the theory that certain matters could be determined conclusively by the legislative or executive branches without judicial intervention and that Congress may therefore commit their determination to an administrative agency or legislative court.²⁴⁴ Thus Congress may choose to decide public rights matters itself, or delegate the power to administrative or judicial officials.²⁴⁵

As the Supreme Court determined in *Perkins v. Lukens Steel*, a disappointed bidder has no standing to sue the government under the procurement regulations.²⁴⁶ By enacting the Competition in Contracting Act, however, Congress has created a statutory public right to protest an executive agency action.²⁴⁷ The Congress has conditioned that public right by establishing the Comptroller General as the required protest forum. The

242. *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-68 (1982) (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). The Court in *Northern Pipeline* held that the restructuring of debtor-creditor relationships by a bankruptcy court was a "private right" of liability of one party to another under the law. 450 U.S. at 71. Public rights do not include matters of common law, equity or admiralty, which are historically matters for the judicial branch. See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856). For a general discussion of public rights doctrine history, see L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 87-93 (1965); Redish, *Legislative Courts, Administrative Agencies and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 204-08; Note, *Federal Magistrates and the Principles of Article III*, 97 HARV. L. REV. 1947, 1955-59 (1984).

243. *Northern Pipeline*, 258 U.S. at 67. Since a claimant does not have a right to sue without congressional consent, "Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them." *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929).

244. *Northern Pipeline*, 458 U.S. at 68 (citing *Ex parte Bakelite Corp.*, 279 U.S. at 458).

245. "The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." *Ex parte Bakelite*, 279 U.S. at 451 (holding that the Court of Customs Appeals was properly an article I court). Similarly, when Congress creates a statutory obligation, it may empower an administrative agency to enforce those rights. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977).

246. See *supra* notes 65-72 and accompanying text.

247. See *supra* notes 242-45 and accompanying text. While the Court in *Northern Pipeline* did not attempt to definitively distinguish between public and private rights, it did observe that, at a minimum, public rights arise "between the government and others," 458 U.S. at 69 (quoting *Ex parte Bakelite*, 279 U.S. at 451), while private rights involve the liabilities of one person to another. 458 U.S. at 69. The Court noted that an article III court must take jurisdiction of private rights cases (suits at common law, in equity or admiralty) and criminal cases. *Id.* at 70 n.25. Bid protests would seem to fall clearly within the public rights area, and remain outside of required article III jurisdiction.

Comptroller General, while a structurally legislative branch office, has many of the attributes of an independent agency to which Congress could confer such a public right determination. The powers given to the Comptroller General to effectively enjoin the award or performance of the contract while a hearing proceeds on the merits, and to grant bid and proposal costs and attorneys' fees, does not differ significantly from the protest jurisdiction given to the Claims Court, an article I court, in the Federal Courts Improvement Act of 1982.²⁴⁸

Thus, an alternative line of reasoning is available to a court seeking to avoid the constitutional issue of separation of powers inherent in the congressional grant of authority to the Comptroller General to hear bid protests. The statutory history surrounding the establishment of the office is ambiguous at best concerning congressional intent to make the GAO an "arm of the legislature." This ambiguous language, coupled with the current statutory status of the GAO as an "independent agency" and the position of the Comptroller General as an officer of the United States, supports a finding that while the GAO and the Comptroller General are, in fact, independent of the executive, they are not arms of the legislature. In hearing bid protests, then, the Comptroller General functions as an independent agency. Further, bid protests are a form of "public right," which need not be heard by an article III court. Congress could commit resolution of bid protests to a forum of its own choice, as it has done with the Claims Court. Given the extensive experience that the GAO has had with bid protests, Congress could reasonably determine that the Comptroller General was an appropriate forum for resolution of these disputes. Congress could also reasonably conclude that the Comptroller General as an agency independent of the executive branch, was more likely to carefully scrutinize executive agency procurement actions.²⁴⁹

248. 28 U.S.C. § 171 (1982). The United States Claims Court "is declared to be a court established under article I of the Constitution" 28 U.S.C. § 171(a) (1982). The Federal Courts Improvement Act gave the Claims Court jurisdiction over bid protests:

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

28 U.S.C. § 1491(a)(3) (1982). See generally Shnitzer, *Bid Protests: Is There an Adequate Forum?*, 31 FED. B. NEWS & J. 112 (1984).

249. The stated congressional intent in enacting the bid protest procedures of CICA was to provide a "strong enforcement mechanism" to "insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief." H.R. REP. NO. 861, *supra* note 94, at H6759. Congress could reasonably conclude that a strong enforcement mechanism had to be independent.

III. CONCLUSION

The resolution of the constitutionality of the GAO bid protest function presents a judicial dilemma. The Attorney General's objections to the bid protest procedures rest on the assumption that the Comptroller General is wholly a legislative officer and is structurally equivalent to a congressional committee or to a single House of Congress. If the GAO bid protest procedure is found unconstitutional based on the Attorney General's theory, the decision must be based in the finding that under the principles of *Chadha*, such post legislative involvement by a legislative branch agent in interpreting or applying the law is prohibited. However, such a decision would render the GAO's other settlement and claims powers equally suspect constitutionally, and effectively reduce the GAO to an oversight reporting body. Such a potentially far reaching holding may prompt a court to uphold the Comptroller General's bid protest authority.

The strict "structural" approach to the separation of powers doctrine posited in *Chadha* would clearly make the GAO bid protest procedures illegal on the sole basis that GAO is a legislative branch agency, regardless of whether its powers are determined to be "executive" or "judicial" in nature. This is particularly true in light of the narrow role that the Supreme Court assigned to Congress in *Chadha*, and the Court's virtual prohibition of legislative involvement in the execution and adjudication of laws, beyond the functions of oversight, reporting, and new legislation. This line of reasoning would rest on the notion that if Congress is itself prohibited from doing an act, it cannot assign that act to a legislative branch agency.

The GAO, however, has the characteristics of an independent agency of the sort that could clearly perform these bid protest functions if the structural allegation of legislative branch affiliation were not present. The legislative history surrounding creation of the GAO does not provide a clear expression of congressional intent to make GAO a legislative branch agency. In addition, a bid protest is in the nature of a public right that Congress could validly refuse to recognize or, if recognized, could settle itself.

The GAO's breadth of bid protest experience may encourage a court to uphold the new bid protest procedures. Additionally, both the prudential considerations of avoiding an interbranch dispute, and the preference for avoiding a constitutional question if other grounds are available for settlement, may compel a court to seek an alternative basis for decision. As this Comment indicates, such an alternative basis does exist.

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* The author is an employee of the Department of Defense. The opinions expressed in this article do not represent the opinions of the Department of Defense or of any other executive agency.