

Michigan Law Review

Volume 59 | Issue 8

1961

The Investigatory Powers of the Comptroller General of the United States

Gustave M. Hauser

Legal Adviser and Assistant Secretary, General Telephone & Electronics International, Incorporated

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Accounting Law Commons](#), [Administrative Law Commons](#), [Constitutional Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Gustave M. Hauser, *The Investigatory Powers of the Comptroller General of the United States*, 59 MICH. L. REV. 1191 (1961).

Available at: <https://repository.law.umich.edu/mlr/vol59/iss8/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE INVESTIGATORY POWERS OF THE COMPTROLLER GENERAL OF THE UNITED STATES

Gustave M. Hauser*

IN recent years the Comptroller General of the United States has repeatedly, and often bitterly, complained to the Congress of refusals by government officials to make available to his representatives such information as he may from time to time request in connection with his efforts to uncover, by means of investigation, wasteful, extravagant or inefficient practices in the executive branch of the federal government.¹

It is the contention of the Comptroller General that Congress has provided him with a broad authority to compel the executive departments and agencies to produce for his scrutiny such information and such books, documents or records regarding their powers, duties, activities, organization, financial transactions and methods of business as he may in his discretion from time to time require of them.² The full exercise of this plenitude of power is, according to the Comptroller General, a precondition of the proper discharge of his "statutory responsibility."³

Executive branch refusals to produce the requested information have with near uniformity been based upon the disputed constitutional privilege of the executive branch to withhold certain information from the Congress.⁴ Lengthy, often heated, and always inconclusive debates concerning the existence, the nature and the scope of this executive branch privilege continue to rage on Capitol Hill, and the doctrine has been the object of considerable scholarly comment.⁵ Insofar as they have concerned the

* Legal Adviser and Assistant Secretary, General Telephone & Electronics International, Incorporated. — Ed.

¹ A summary of recent instances in which the withholding of information by executive departments and agencies has been reported by the Comptroller General to the Congress is contained in *Refusals to the General Accounting Office of Access to Records of the Executive Departments and Agencies*, S. Doc. No. 108, 86th Cong., 2d Sess. (1960).

² Memoranda submitted by the General Accounting Office in *Availability of Information from Federal Departments and Agencies, Hearings Before the Subcommittee on Government Operations of the House of Representatives*, 85th Cong., 2d Sess. Exhibit IV-A, at 3753-54 (1958).

³ ANNUAL REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES [hereinafter COMP. GEN. ANN. REP.] H.R. Doc. No. 14, 86th Cong., 1st Sess. 6 (1958).

⁴ See, e.g., *supra* note 1.

⁵ There is no Supreme Court decision dealing with the privilege of the President to refuse information to the Congress. The most thorough study of the doctrine of executive branch privilege is to be found in Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B.J. 103-50, 223-59, 319-50 (1949). As to the congressional

ability of the executive branch to withhold information from the Comptroller General, these debates have been premised on the assumption that the Comptroller General acts for and exercises the powers of Congress, that his authority to request information is equal to that of Congress, and that when he attempts to exercise greater authority the executive branch may ignore his requests as unconstitutional.

Little attention has been paid the proposition that the investigatory powers of the Comptroller General are derived from specific statutes and that such statutory powers may in fact be less than those enjoyed by Congress itself. This article examines the statutory responsibility and authority of the Comptroller General to investigate executive action for the purpose of determining whether the legitimacy of his requests for information may be challenged by the executive branch on statutory as well as on constitutional grounds.

I. DUTIES AND STATUS OF THE COMPTROLLER GENERAL⁶

The office of the Comptroller General and the General Accounting Office which he heads were created in 1921⁷ to stand watch on behalf of Congress over the process of financial administration in the national government from the time an appropriation is passed until all expenditure accounts have been settled. The broad function of the Comptroller General is to audit and settle the public accounts and to advise and assist the Congress in matters relating to public monies.⁸ The activities of the General Accounting Office may be analytically divided into two major categories: control and audit.

power of investigation generally, see *Congressional Power of Investigation*, S. Doc. No. 99, 83d Cong., 2d Sess. (1954); *THE RIGHT OF CONGRESS TO OBTAIN INFORMATION FROM THE EXECUTIVE AND FROM OTHER AGENCIES OF THE FEDERAL GOVERNMENT*, 84th Cong., 2d Sess. (H.R. Comm. Print 1956).

⁶ "Representative Fairfield: . . . [W]hat are the specific functions of the Comptroller General?"

"Representative Clark: To tell the gentleman the truth, nobody knows." 58 CONG. REC. 7277 (1919). This exchange, which took place on the floor of the House of Representatives at the time of the debates on the Budget and Accounting Act of 1921 [42 Stat. 20 (1921), 31 U.S.C. § 1 (1958)], helps to explain the numerous disagreements, past and present, as to the status and powers of this exceptional office in the federal government.

⁷ A proposal to establish budget and accounting offices was considered and passed by the 66th Congress, 59 CONG. REC. 8609 (1920), but it was vetoed by President Wilson. It was similar in all but minor respects to the bill in the 67th Congress which was passed and became the Budget and Accounting Act of 1921.

⁸ *The General Accounting Office, A Study of Its Functions and Operations*, H.R. REP. NO. 1441, 81st Cong., 1st Sess. 6 (1949).

To carry out what is unofficially referred to as his control function, the Comptroller General is, first, responsible for the installation and supervision of an efficient and uniform accounting system.⁹ Second, the Comptroller General settles all money claims and demands against the government.¹⁰ He superintends the recovery of all debts due the United States.¹¹ Finally, the Comptroller General is required to settle and adjust the accounts of public officers.¹² This control function is one distinct from that of audit, which is the procedure normally accompanying settlement and adjustment by which the Comptroller General checks on both the mathematics and legality of any single transaction. Any questions of fact or law raised by audit are resolved on final settlement or adjustment of the account. The Comptroller General, by refusing a claim or rejecting the settlement of an account, determines what is an unlawful use of public funds. The exercise by the General Accounting Office of its authority in the field of claims and accounts frequently involves the issuance by its General Counsel of legal opinions directly interpreting appropriations and indirectly interpreting and applying all federal, state, and even foreign law.¹³

The audit function of the Comptroller General is not necessarily limited to the scope of a normal commercial audit.¹⁴ It is not confined to a mere review of addition and the fairness of a statement of accounts. Because the Comptroller General was given the power to settle and adjust accounts, an additional purpose of his audit is the determination of the propriety, from a legal standpoint, of the expenditures he scrutinizes. Moreover, the Comptroller General may implement by means of audit his special responsibility to inquire on behalf of Congress into waste, extravagance and inefficiency in the expenditure of public funds.¹⁵

⁹ 42 Stat. 25 (1921), 64 Stat. 835 (1950), 31 U.S.C. §§ 49, 50, 66 (1958).

¹⁰ 42 Stat. 24 (1921), 31 U.S.C. § 71 (1958).

¹¹ 42 Stat. 24 (1921), 31 U.S.C. § 93 (1958).

¹² See generally 31 U.S.C. ch. 2 (1958).

¹³ For a general discussion of the control function, see Note, *The Control Powers of the Comptroller General*, 56 COLUM. L. REV. 1199 (1956). Because of the ability it gives to the Comptroller General to interfere with and disrupt executive programs, continual criticism has been made of the arrangement by which the power to control expenditures has been placed outside the executive branch. For sample criticisms, see MANSFIELD, *THE COMPTROLLER GENERAL* 12, 274-88 (1939). This is the most comprehensive work on the subject of the General Accounting Office. See also, HOOVER COMMISSION, *TASK FORCE REPORT OF FISCAL BUDGETING AND ACCOUNTING ACTIVITIES*, Appendix F-10, 81-82 (1949).

¹⁴ For a detailed discussion of the differences between the audit conducted by the Comptroller General and normal commercial audits, see *The General Accounting Office*, H.R. REP. No. 2264, 84th Cong., 2d Sess. 119-20 (1956).

¹⁵ 42 Stat. 25 (1921), 31 U.S.C. § 53 (1958).

The audit function of the Comptroller General is discharged by two very different procedures. The traditional, commercial check on accounts rendered by the executive departments and agencies and the evaluation of accounting systems may be regarded as the basic audit procedure. Such auditing, in addition to turning up errors in mathematics or accounting practice, may reveal extra-legal activities. But it is not calculated to reveal waste, extravagance or inefficiency. The extraordinary duty of the Comptroller General to search for such practices is implemented by investigations which go beyond the ordinary problems of accounting and which are designed to probe into matters not disclosed by routine audit. It is obvious that such investigations may turn up illegal as well as uneconomical practices.

Thus, by means of control, audit and investigation, the Comptroller General carries out his duty to uncover illegal executive expenditures. But it is by investigation alone that he discharges his extraordinary responsibility in the field of executive economy.¹⁶

The Budget and Accounting Act of 1921 left open to dispute the question whether the Comptroller General, in carrying out the above-mentioned duties, acts in the name of and on behalf of the legislative or executive branch of the government.¹⁷ Were the Comptroller General to be considered as a part of the executive branch and thus subject to presidential order, it is obvious that the current disagreement over the scope of his authority could not have arisen.

Ingenious arguments have been advanced in support of the proposition that the Comptroller General is a member of the

¹⁶ Prior to 1957, the investigatory responsibilities of the General Accounting Office were divided between the Division of Audits and the Office of Investigations. The former, in addition to the routine audit of accounts, carried on extensive investigatory activities. The Office of Investigations conducted special investigations and surveys and developed information by the use of particular techniques.

In line with suggestions made by the House Committee on Government Operations (*supra* note 14, at 7-8), the Accounting Systems Division, the Division of Audits and the Office of Investigation were merged to form two integrated offices which, in addition to other functions, are now responsible for investigations. These are the Defense Accounting and Auditing Division and the Civil Accounting and Auditing Division. See COMP. GEN. ANN. REP. (1956).

¹⁷ Despite his quasi-judicial control function of interpreting legislation and mediating between Congress and the executive departments and agencies, the Comptroller General has never been considered an adjunct of the judiciary. But see the remark of Representative Good: "The general accounting office . . . will be to the appropriations made by Congress what the Supreme Court is to the construction of laws that are enacted by Congress." 59 CONG. REC. 7949 (1920).

executive branch and must defer to presidential authority.¹⁸ The crux of these arguments is that the principle of the separation of powers prevents Congress from appointing an agent endowed with executive responsibilities which cannot be constitutionally exercised by any of its committees. On the other hand, it may be argued that the Comptroller General is a unique legislative assistant to Congress in carrying out its responsibilities for the allocation of public funds.¹⁹ Congress has, in the Budget and Accounting Act of 1921 and in subsequent legislation, indicated its belief that the Comptroller General is independent of the executive branch,²⁰ and the Comptroller General has consistently concurred in this view.²¹

The question has never been authoritatively settled, and there is little purpose in discussing here the details of the debate.²² For purposes of this exposition, it will be assumed that in the performance of his official duties the Comptroller General is a part of or acts on behalf of the Congress.²³

With this assumption in mind, it must then be asked whether the Comptroller General exercises the full power of Congress to monitor the execution by the executive branch of congressional appropriations, or only specific and limited powers delineated in the Budget and Accounting Act of 1921 and subsequent legislation. If the former, then there would seem to be no limits to his authority save those imposed generally on the Congress by the constitutional separation of powers, and the executive branch could only challenge the Comptroller General's investigatory activities as it could those of a congressional committee. However, if the position is taken that the legislation sets forth more restricted authority, there exists a question of statutory interpretation con-

¹⁸ See, e.g., Langeluttig, *The Legal Status of the Comptroller General of the United States*, 23 ILL. L. REV. 556, 578-90 (1929).

¹⁹ U.S. CONST. art. I, sec. 9, cl. 7.

²⁰ 42 Stat. 23 (1921), 31 U.S.C. § 41 (1958); and 64 Stat. 834 (1950), 31 U.S.C. § 65 (1958).

²¹ E.g., 14 DECS. COMP. GEN. 648, 651 (1935), and testimony of Lindsay C. Warren, Comptroller General of the United States, *Hearings Before Joint Committee on the Organization of Congress*, 79th Cong., 1st Sess. 532 (1945).

²² See generally MANSFIELD, *op. cit. supra* note 13, at 74-92.

²³ At the present time, this seems to be a predominant viewpoint which follows from the fact that the evidence in favor of such a conclusion is most convincing. See WILLOUGHBY, *LEGAL STATUS AND FUNCTIONS OF THE GENERAL ACCOUNTING OFFICE OF THE NATIONAL GOVERNMENT* ch. 1 (1927).

cerning the scope of the investigatory power given the Comptroller General by the Congress.

The General Accounting Office does not seem to occupy the place of a congressional committee, and, it is submitted, its investigatory powers vis-à-vis the executive branch may not properly be equated to those of a congressional committee. The executive functions of the General Accounting Office are such that no congressional committee could be expected to duplicate them. Had it been anticipated that the General Accounting Office was simply to act like a committee, exercising the full congressional powers of inquiry, Congress need not have spelled out in detail its investigatory powers. The nature of the Budget and Accounting Act of 1921 indicates that the General Accounting Office was intended to act on behalf of Congress according to a specific grant of authority specifying what part of the totality of the congressional power to investigate executive branch activity it is privileged to exercise.

The Attorney General, in two opinions rendered shortly after the enactment of the Budget and Accounting Act of 1921, indicated his concurrence in this position. "The Comptroller General has such authority as is specifically given him by the Budget and Accounting Act of 1921."²⁴ "Notwithstanding the independent position of that office any order which extends beyond the authority given it by Congress is void."²⁵

To determine the proper scope of this statutory investigatory power, attention must first be given to the actual development of the investigatory function and then to two fundamental questions: what is the statutory responsibility to be fulfilled by investigation, and how may the Comptroller General fulfill this responsibility?

II. DEVELOPMENT OF THE INVESTIGATORY FUNCTION OF THE COMPTROLLER GENERAL

The duty and authority of the Comptroller General to investigate executive activities was initially defined in a single section of the Budget and Accounting Act of 1921:

"The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make

²⁴ 34 OPS. ATT'Y GEN. 311, 313 (1924).

²⁵ 33 OPS. ATT'Y GEN. 383, 385 (1922).

to the President when requested by him, and to Congress at the beginning of each regular session, a report . . . of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary. . . . [He] shall make recommendations looking to greater economy or efficiency in public expenditures."²⁶

In order to insure that these reports and recommendations would be uncompromising, and in furtherance of the Comptroller General's function announced by his sobriquet "the watchdog of Congress," the office was made relatively independent of the executive branch and given a broad power to require the cooperation of the executive departments and agencies in its programs.

"All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General . . . shall, for the purpose of securing such information, have access to and the right to examine any books, documents, pages, or records of any such department or establishment."²⁷

The legislative history of the Budget and Accounting Act of 1921 does not readily afford accurate guidance to the meaning of these sections. A hurried reading of the sometimes theatrical denunciations of extravagance, waste and corruption placed on the record by crusading legislators suggests that investigation and reporting were to be given as much or more emphasis by the General Accounting Office as both control and audit.²⁸ In explaining his conception of the main function of the Comptroller General, Chairman Good of the House Select Committee on the Budget said:

²⁶ 42 Stat. 25 (1921), 31 U.S.C. § 53 (1958).

²⁷ 42 Stat. 26 (1921), 31 U.S.C. § 54 (1958). It was the opinion of the Hoover Commission that the control functions of the General Accounting Office made it impossible for the Comptroller General to carry out his investigatory duties in a proper fashion, for having already by way of legislative interpretation interfered with the discharge by the President and the executive branch of their responsibility for the execution of the budget, the Comptroller General may be a party to action already taken rather than an independent critic. HOOVER COMMISSION, *supra* note 13, at 81. Cf. MANSFIELD, *op. cit. supra* note 13, at 13.

²⁸ The legislative history of the Budget and Accounting Act of 1921 shows a tendency on the part of congressmen to confuse the various functions of the Comptroller General. Thus, passing upon the legal phases of an expenditure, auditing and investigation are all discussed in long, undifferentiated colloquies.

"It was the intention of the committee that the comptroller general should be something more than a bookkeeper or accountant; that he should be a real critic, and at all times should come to Congress . . . and point out inefficiency, if he found that money was being misapplied . . . which is another term for inefficiency. . . ." ²⁹

This was, however, quite obviously only one of the purposes for which the General Accounting Office was brought into existence, and in the early years of its operation the investigatory function was relegated to a very minor role. Neither by general nor special investigation did the General Accounting Office carry out what seems to have been an important purpose of the Act of 1921. Writing in 1939, Mansfield reported that the Comptroller General was showing no interest in investigating and reporting to Congress improper or inefficient executive activities.³⁰ Indeed, the Chief of Investigations testified in 1937, "We do very little real investigating."³¹

Currently, the General Accounting Office is extensively involved in investigatory activities which are part of what the Comptroller General refers to as modern techniques characterizing the work of the office.³² There has been a marked shift in administrative emphasis from the concept of controlling expenditures through the authority to settle accounts to a new concept of auditing executive departments and agencies by extended investigation and reporting to the Congress detailed criticisms of their financial administration.³³

Auditing on a so-called "comprehensive" basis was instituted by the Comptroller General in 1949. According to the General Accounting Office, the purpose of the comprehensive audit is "to determine how well the agency or activity under audit has discharged its financial responsibilities. . . ." ³⁴

"Although the term 'audit' is a general term normally applied to the process of examining accounting records and

²⁹ 61 CONG. REC. 1090 (1921).

³⁰ "It seems at first blush a startling fact, nonetheless true, that the Comptroller General has not been responsible for uncovering a single one of the few conspicuous instances of financial knavery in the national government since 1921." MANSFIELD, *op. cit.* *supra* note 13, at 245.

³¹ Testimony of S. B. Tulloss in *Senate Hearings on Reorganization of the Government Agencies*, Select Committee on Government Organization, 75th Cong., 1st Sess. at 316 (1937).

³² COMP. GEN. ANN. REP. 2 (1958).

³³ H.R. REP., *supra* note 14, at 19.

³⁴ *Id.* at 117.

documents, the term 'comprehensive audit' is not restricted to accounting matters or to books, records, and documents. . . . A comprehensive audit is an analytical and critical examination of an agency and its activities . . . the scope of the comprehensive audit extends to all of an agency's operations and activities and to all of their aspects. . . ."³⁵

For his authority to carry out investigations having this objective, the Comptroller General relies basically on the sections of the Budget and Accounting Act of 1921 which have been quoted above, and on certain subsequent legislation.³⁶ The Legislative Reorganization Act of 1946³⁷ authorized and directed the Comptroller General to make expenditure analyses of each agency to "enable Congress to determine whether public funds have been economically and efficiently administered and expended." According to the Comptroller General, his authority and duty were "amplified" by this section.³⁸ This conclusion is supported by the legislative history of the act. A Senate report recommended that:

"[T]he scope of the work of the General Accounting Office be enlarged to include a service audit of the agencies of government. Such a service audit should include reports on the administrative performance and broad operation of the agency, together with information that will enable Congress to determine whether public funds are being carelessly, extravagantly, or loosely administered and spent. In most cases the present detailed audit of items does not reveal the general condition of the agency's operation."³⁹

The Budget and Accounting Procedures Act of 1950⁴⁰ carried out certain recommendations of the Hoover Commission.⁴¹ It directed that the Comptroller General in the performance of his duties give consideration to the "effectiveness of accounting organizations and systems, internal audit and control, and related administrative practices of the respective agencies." This act, according to the Comptroller General, "clarified the existing audit

³⁵ *Id.* at 119.

³⁶ *Id.* at 118.

³⁷ 60 Stat. 837 (1946), 31 U.S.C. § 60 (1958).

³⁸ Memoranda submitted by the General Accounting Office, see note 2 *supra*. And see *id.* Exhibits IV-C at 3761 and IV-D at 3764.

³⁹ S. REP. No. 1011, 79th Cong., 2d Sess. 22 (1946).

⁴⁰ 64 Stat. 837 (1950), 31 U.S.C. § 67 (a) (1958).

⁴¹ See S. REP. No. 2031, 81st Cong., 1st Sess. 3-6 (1949).

authority."⁴² It seems apparent that Congress, dissatisfied with the extent to which the Comptroller General had previously exercised his investigatory power, was now encouraging an annual investigation along prescribed lines, the results of which were to be reported for its attention. It is the Comptroller General's interpretation of this mandate and of his statutory authority which has brought him into conflict with the executive branch.

III. STATUTORY PURPOSE OF INVESTIGATIONS MADE BY THE COMPTROLLER GENERAL

The Comptroller General's duty to search for and bring to the attention of Congress instances of fraud and irregularity in the disbursement of public funds must be carefully distinguished from his duty to uncover waste or inefficiency in the executive branch. While the former purpose is sufficiently clear and requires no further discussion, the latter gives rise to difficult problems. Waste and inefficiency are readily distinguishable from illegality. They are not per se illegal and, indeed, may be a direct or indirect consequence of executive action which carries out both the letter and the spirit of a congressional appropriation. Rather than a quest for instances of unauthorized activity, the search for waste and inefficiency is one involving value judgments concerning the means adopted by the executive branch to achieve the ends set forth by Congress in its appropriations. Questions have arisen with regard to the extent to which the Comptroller General has been authorized to exercise his judgment and to conduct investigations in furtherance of this purpose.

The Comptroller General was directed to investigate "all matters relating to the receipt, disbursement and application of public funds. . . ."⁴³ The word "application" was introduced by Representative Luce⁴⁴ with the intent to make clear the power of the Comptroller General to criticize expenditures made by the executive departments and agencies. Luce said that the Comptroller General should search for methods of economy in Government; he should look for trouble and on his own initiative find ways to save money.⁴⁵ Representative Madden was of the opinion that "the responsibility placed on the comptroller general under

⁴² COMP. GEN. ANN. REP. 2 (1958).

⁴³ 42 Stat. 25 (1921), 31 U.S.C. § 53 (1958).

⁴⁴ 58 CONG. REC. 7293 (1919); 61 CONG. REC. 1090 (1921).

⁴⁵ 61 CONG. REC. 1090 (1921).

this law will enable him to ascertain the wisdom as well as the legality of the expenditures. . . ."⁴⁶ However, this express duty to offer criticism is limited both by the separation of powers and by the underlying legislative intent of the Congress at the time of the enactment of the Budget and Accounting Act of 1921.

In our system of government the powers of the executive and legislative branches of government are both separate and independent. Congress has the exclusive power to appropriate money, but its programs must be executed by the executive branch. Conversely, nearly every function of the executive branch involves financial support from Congress. Just as the executive branch may not authorize the disposition of public funds, Congress may not assume executive responsibilities by limiting executive discretion or otherwise interfering with the exercise by the executive branch of its judgment in carrying out approved programs. To permit the Comptroller General to become directly involved in the operations by which an executive department or agency exercises its discretion is tantamount to permitting the Comptroller General, acting for the Congress, to interfere with the exercise of this discretion.⁴⁷ There is no reason to believe that in endowing the office of the Comptroller General with the power to investigate for the purpose of offering criticism, Congress intended to disturb the existing separation of powers. Indeed, a contrary intent must be presumed.

This presumption is buttressed by the legislative history of the Budget and Accounting Act of 1921, which seems to indicate that the Comptroller General was not considered a "super-executive" capable of interfering with the day-to-day function and discretion of the executive branch by becoming involved in the execution of appropriations.

"Mr. Cooper of Wisconsin: Mr. Chairman, I would like to ask [Mr. Luce] just what the word 'application' means as distinguished from 'disbursement'?"

⁴⁶ 59 CONG. REC. 7948 (1920).

⁴⁷ E.g., see *Hearings Pursuant to Section 4, P.L. 86-89, Special Subcommittee on Procurement Practices of the Department of Defense of the Committee on Armed Services, House of Representatives, 86th Cong., 2d Sess. 733* (1960), quoting the Report of the House Committee on Armed Services regarding H.R. 12299, ". . . [T]he committee regards as desirable the existence in the Comptroller General of a power to examine and question contracts so long as that power is exercised judiciously and with restraint, and does not lead to a substitution of the Comptroller General's judgment for the judgment of the agency head. The latter gives rise to the extremely unhealthy condition of in effect shared authority without shared responsibility. It also gives rise to delays and undesirable

"Mr. Good: The application of the disbursement, how the money was used. . . .

"Mr. Cooper of Wisconsin: It does not mean that he himself can direct the application? He reports how it was applied?

"Mr. Good: No, it does not mean that he can direct the application. He reports whether it was applied efficiently, whether it was wisely spent. He has no power to direct expenditures.⁴⁸

"Representative Byrns: [T]he Comptroller General . . . does not expend appropriations. . . . He audits the expenditures — to see that appropriations made have been expended properly. . . ." ⁴⁹

In reply to an expressed fear that the Comptroller General might become "bigger" than a cabinet member, Representative Madden said: "The comptroller auditor general has no power to take away the discretion of a cabinet officer as to what shall be done in the discharge of his duty. . . ." ⁵⁰

Further expressions of congressional intent need not be marshalled to indicate the basic lines of an often subtle distinction between criticisms of programs and policies developed by the executive branch in carrying out the will of Congress and criticism of specific, day-to-day administrative procedures utilized to implement these programs and policies. Decisions made by executive officers in the exercise of their discretion and pursuant to value judgments which they alone, by application of expertise, are capable of making, are not proper objects of the Comptroller General's scrutiny, and he may not conduct investigations the purpose of which is to criticize such decisions.⁵¹ The wisdom of

uncertainties as to legal status. It is the considered view of the committee that where the agency acting in good faith makes a determination or decision reasonably supported in fact and law, such determination or decision should be final."

⁴⁸ 61 CONG. REC. 1090 (1921).

⁴⁹ *Id.* at 1082.

⁵⁰ 58 CONG. REC. 7277 (1919).

⁵¹ At the present time the General Accounting Office is composed primarily of accounting personnel [As of June 30, 1958, the General Accounting Office had 5,389 employees. Of these, 2,294 were "accountants, auditors and investigators," 393 were Certified Public Accountants, 524 were engaged in legal work. COMP. GEN. ANN. REP. 5 (1958)], and it is not equipped to evaluate executive action taken on the basis of information developed and analyzed through the use of special expertise. Indeed, requests made by the General Accounting Office for access to internal departmental or agency studies, reports of the military inspector generals and the like would seem to indicate that the Office is often incapable of developing and evaluating similar information and must rely for both information and conclusions upon self-examinations which the executive branch may have conducted. The General Accounting Office contends that it seeks such informa-

discretionary policy decisions may, if at all, be called into question by Congress alone, and there is no evidence that Congress envisaged the Comptroller General as its representative in the conduct of such an essentially political review. In the grey area between objective acts of administration which the Comptroller General may properly criticize and discretionary acts of policy-making which are beyond his authority, hard problems are sure to arise.

"If the Comptroller General finds 100 people doing the work of 50 in some department, this is his business."⁶² This statement illustrates the type of administrative conduct with which the Comptroller General is clearly concerned. Although he may investigate for the purpose of criticizing certain aspects of their implementation, the Comptroller General may not test for waste or inefficiency foreign policy and military strategy. He may criticize the office management of the United States Treasury but not its monetary decisions. It may be legitimate for him to investigate the manner in which the Army decides who shall furnish its tanks or guns, but he may not become involved in the process by which the Army decides how many troops it needs to carry out its mission and what supplies are required for them. Similarly, the Comptroller General may interest himself in the calculation of post allowances paid to International Cooperation Administration representatives overseas, but the overall development of economic assistance programs is a matter beyond the scope of his authority. Finally, the Comptroller General may not investigate for the purpose of calling into question the sufficiency and appropriateness of information and documents which an executive may have relied upon in making a policy decision. He may not, in effect, sit in the chair of the executive and review information available to the executive for the purpose of testing whether, as a matter of economy, better decisions might have been made.

In recent times, the General Accounting Office has used its investigatory powers to obtain information for the purpose of offering directly to the executive departments unsolicited remedial advice. There does not seem to be any legislative support for investigations having such a purpose.

tion to avoid a duplication of work. *Availability of Information from Federal Departments and Agencies, Report of the Committee on Government Operations of the House*, H.R. REP. NO. 234, 86th Cong., 1st Sess. 34 (1959).

⁶² See 58 CONG. REC. 7293-94 (1919).

The Comptroller General is directed by the Budget and Accounting Act of 1921 to:

“make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing . . . containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.”⁵³

Furthermore, he is required to make an expenditure analysis of each agency in the executive branch of the government and to report on such executive agencies to the Appropriations Committees and to the Legislative Committees of the two Houses having jurisdiction over legislation relating to the operations of the respective agencies.⁵⁴

In addition to submitting these recommendations and reports to the Congress, the Comptroller General has been developing an informal procedure of offering advice directly to the executive departments and agencies on how they may improve their performance and eliminate what he deems to be waste and inefficiency. The Budget and Accounting Act of 1921 has been read by him to mean that he is “required to make recommendations looking to greater economy. . . .”⁵⁵

Even were such advice strictly limited to matters of objective administrative inefficiency which did not involve questions of managerial expertise and discretion, the tender of it is an unsanctioned and troublesome addition to the functions of the General Accounting Office. Already criticized because the exercise of its control powers may hamper the executive departments, the General Accounting Office by this present device tends to exercise a new form of control far more potent than the first. Not only does

⁵³ 42 Stat. 25 (1921), 31 U.S.C. § 53 (1958).

⁵⁴ 60 Stat. 837 (1946), 31 U.S.C. § 60 (1958).

⁵⁵ COMP. GEN. ANN. REP. 1 (1958). “While General Accounting Office auditors are not empowered to direct changes in policies, procedures, and functions, they do observe opportunities for improving efficiency and for obtaining better results. When warranted, they will make recommendations for simplifying and developing more effective operating procedures. . . .” H.R. REP. No. 2264, *supra* note 14, at 119. “Responsible officers . . . are advised of weaknesses, shortcomings, or irregularities, and proper corrective measures are suggested.” H.R. REP. No. 1441, *supra* note 8, at 21.

the Comptroller General interpret appropriations, but in the name of economy he may recommend to the executive branch the way in which appropriations should be implemented. The penalty for disobedience is the same as that imposed for ignoring an interpretation of legislation made by the Comptroller General — an accusation before Congress and the injection of uncertainty into an executive program. While the interpretation of legislation by the Comptroller General is a formal act, the correctness of which may be contested, the advisory function is wholly informal and opinions cannot be appealed although for practical purposes they may have much the same force as do interpretations of legislation.

IV. HOW MUST THE COMPTROLLER GENERAL EXERCISE HIS POWER OF INVESTIGATION?

Not only is the Comptroller General subject to statutory limitations on the purposes for which he may conduct investigations, but he is also subject to statutory restrictions on the manner in which he may discharge his proper duties. In this connection, two major questions must be answered: at what stage may executive branch activity be investigated by the Comptroller General, and to what extent may he require executive cooperation in his investigatory activities?

A. *At What Stage May Executive Branch Activity Be Investigated by the Comptroller General?*

Current practices of the Comptroller General have made pertinent the question whether he may investigate executive action merely proposed or in the planning stage as well as final executive decisions and implemented programs. For the purpose of furnishing advice to management, or for the purpose of reporting in advance to Congress any unimplemented executive plans deemed by him to harbor the seeds of waste or inefficiency, or for the purpose of exerting informal pressure on the executive departments and agencies to conduct their affairs in compliance with the recommendations of the General Accounting Office, the Comptroller General has sought to move forward the time of certain investigations to precede the *fait accompli* of an executive policy implemented, a final decision made, or a final position taken. This has involved requests by the Comptroller General for information relating to the internal deliberations of officials of the executive branch often at the same time as such deliberations are in progress.

Although there has been substantial debate concerning the question whether Congress has the constitutional power to compel the executive to disclose information concerning its internal, preliminary operations, this question is not reached here, for a review of the legislative history of the Budget and Accounting Act of 1921 leads to the conclusion that Congress did not intend that the Comptroller General should commence the performance of his investigatory duties until final executive decisions had been made or final executive actions had been taken. There is nothing in all of the congressional debates stretching over several years to indicate that the Comptroller General was expected to interest himself in executive activities which have not reached a state of finality and which are evidenced only by internal reports and recommendations made by subordinate employees of the executive departments to their superiors and by the internal deliberations of executive officials leading up to and preceding final decisions. With regard to investigations for illegal conduct such a limitation is, of course, inescapable. Furthermore, investigations are a part of the general *audit* responsibility of the Comptroller General. Although they may be conducted for purposes other than those traditionally attributed to auditing and by procedures going beyond the simple check of accounts, none of the legislation on which the Comptroller General relies suggests that investigations may be conducted at times having no relationship to audit. The audit of expenditures on behalf of Congress, whatever its scope, was to take place, as an audit must, after executive action has been taken. The practice of "pre-audit" — a review of accounts and vouchers preceding the final act of disbursement from the Treasury — does not interfere with this concept.⁵⁶

Said Representative Parrish:

"[T]he accounting department . . . will audit . . . all the expenditures after the money has been appropriated by Congress, and while in its nature it will be a post-mortem examination, yet I feel that it will have a beneficial effect. There will be made by the comptroller general a careful audit of all expenditures in the Government, and the effect will be to advise Congress and the people whether or not those entrusted with the expenditures of public money have carried out the wishes of Congress."⁵⁷

⁵⁶ "The audits conducted by the General Accounting Office are for the most part after the fact, or post audits. . . ." H.R. REP. NO. 1441, *supra* note 8, at 12.

⁵⁷ 58 CONG. REC. 7204 (1919).

He was echoed by Representative Madden who indicated that "the audit is made *after* the expenditure, not before,"⁵⁸ and by Representative Byrns who said, "he acts as the auditor for Congress, to see that the appropriations made *have been* expended properly."⁵⁹

There is no indication that the congressional authors of the Budget and Accounting Act of 1921 gave consideration to the possibility that the Comptroller General might pass judgment upon the wisdom of contemplated executive action or that the executive departments and agencies would have to clear each and every plan with the General Accounting Office before taking a final position or implementing a program. In view of the fear expressed by certain congressmen that the Comptroller General might interfere with executive discretion and the assurances given in this respect, it seems certain that if there had been presented any understanding that the Comptroller General was being empowered to anticipate executive inefficiency and to give advance clearance to executive projects the debates would have been far different. Subsequent legislation has not affected this situation, for none of the provisions of the Legislative Reorganization Act of 1946 or of the Budget and Accounting Procedures Act of 1950 sanction advance investigation. The duties imposed upon the Comptroller General by these acts may be carried out fully without reference to information of a preliminary nature.⁶⁰

Moreover, the hypothesis that the Comptroller General was to limit his search for waste and inefficiency to projects accomplished or in progress is further substantiated by the fact that he has not been given authority to prevent the execution by an executive department or agency of proposed projects deemed uneconomical. When illegal activity is uncovered, the Comptroller General may exercise his jurisdiction to settle and adjust public accounts and command acquiescence in his determinations of the meaning of fiscal legislation by disallowing payments. There is no sanction for instances of potential waste except for congressional action to

⁵⁸ *Id.* at 7278. (Emphasis added.)

⁵⁹ 61 CONG. REC. 1082 (1921). (Emphasis added.)

⁶⁰ Assuming that the Comptroller General may evaluate the efficiency of the administrative procedures by which plans for the expenditure of appropriations are developed (the decision-making process), such evaluation may be based on the planning history of completed executive programs. It seems wholly unwarranted for the Comptroller General, in investigating the decision-making process, to require the revelation of recommendations and staff papers relating to proposed action only and which have not figured and may never figure in actual programs.

prevent the continuation or repetition by the executive branch of particular procedures it believes uneconomical, and there is little if any precedent for congressional interference in executive programs neither finalized nor implemented. Although to avoid the inconvenience of disallowance, the executive departments often seek and receive advance rulings from the Comptroller General regarding the legality of a given disbursement, this does not mean that he has the authority, on his own motion and over protest, to investigate incomplete executive action.

There is no doubt that, although without formal sanction, advance determinations made by the Comptroller General of the wisdom from the point of view of economy of programs contemplated by the executive branch exert a strong pressure in the direction of compliance. The executive departments and agencies, of course, are free to ignore the position taken by the Comptroller General and to answer only to Congress. Nevertheless, they are informally constrained to agree with the Comptroller General on questions open to dispute. By the very fact of investigation, the Comptroller General exerts a type of control; just as the power to interpret legislation has, even without reference to existing sanctions, enabled him to coerce the executive branch, so the practice of advance investigation for waste and inefficiency permits him, as a super-executive, to interfere with executive branch discretion and judgment.

The compelling standards of executive conduct are fixed informally rather than by judicially-enforced rights and duties. Administrative officers have not the time or energy for controversy with the General Accounting Office. No public officer wants to be put on the defensive concerning his financial record. The case against him may be baseless, but in the public eye it is a *prima facie* case.⁶¹ Accusatory reports of the Comptroller General are published and normally receive wide press coverage. The reply of the accused department or agency may be interred with the reputation of its administrators. The mere power of publicity and the threat that a particular course of action, if taken, could involve the executive in a lengthy defense before Congress, enable the Comptroller General to exert influence on every sort of executive action within the purview of his investigation.

Faced with these twin possibilities, executive departments and agencies in the process of formulating plans are likely to avoid the

⁶¹ See MANSFIELD, *op. cit. supra* note 13, at 117.

fray with its attendant uncertainty and accept the suggestions of the Comptroller General. Thus a power to report uneconomical practices to Congress is being turned by the Comptroller General into a power to influence the course of executive decisions without reference to the Congress. There is every reason to doubt that the Congress, zealous to protect the money it appropriates, intended to establish in each executive department and agency a prosecutor-in-residence whose job it is to evaluate every executive project proposed or planned and to give an advance opinion whether the project, carried out, will give rise to a complaint and prosecution before the Congress on grounds of waste and inefficiency. Indeed, a former Comptroller General has himself testified against such a procedure. Testifying in 1945, Lindsay C. Warren said, "It is not our function to go to an agency and sit in it and see how things are going on. That would be an intolerable situation both for the agencies and for us."⁶²

If the Comptroller General is permitted to investigate and criticize executive projects at stages preceding finality, he will soon in the name of economy exercise a *de facto* control over the executive function which Congress did not and, because of the separation of powers, could not, constitutionally have authorized.

B. *What Executive Cooperation May Be Compelled by the Comptroller General?*

A second major question concerning the way in which the Comptroller General may discharge his statutory duty to investigate involves the extent to which he may compel executive cooperation in furtherance of announced programs of investigation. We are concerned here with the scope of the congressional order that information and documents be made available to the Comptroller General by the executive branch. This is the most practical matter to be discussed, for it involves the process by which the Comptroller General comes into direct contact with the executive departments and agencies.

In support of the contention that he is entitled to unrestricted access to the books, documents and records of the executive branch,⁶³ the Comptroller General has chosen to read literally the language of certain statutes. He relies essentially on section 313

⁶² *Hearings Before the Joint Committee on the Organization of Congress*, 79th Cong., 1st Sess. 543 (1945).

⁶³ See text at note 2 *supra*.

of the Budget and Accounting Act of 1921.⁶⁴ He claims, however, that his power to compel cooperation is bolstered and confirmed by the Legislative Reorganization Act of 1946,⁶⁵ by the Government Corporation Control Act directing him to give consideration to administrative reports and controls of the agencies supervising government corporations,⁶⁶ and by the Budget and Accounting Procedures Act of 1950.⁶⁷

Even if it were constitutionally able to do so, there is no reason, however, to believe that Congress has in fact granted to the Comptroller General an anomalous, unlimited power to secure any information or to inspect any executive papers and records for any purpose which he may in his nonreviewable discretion deem appropriate. If the limitations on the purposes for which the Comptroller General may conduct investigations and the time at which he may conduct them are to have any meaning, they must be enforced by a reciprocal limitation on the authority of the Comptroller General to require executive cooperation.

The basic provision of the Budget and Accounting Act of 1921 on which the Comptroller General relies was enacted to assist him in the performance of his statutory duties. Despite its comprehensive language, it must be read in the context of the entire act and taken to have meaning only in relation to the specific purposes for which the Office of the Comptroller General was created. Attempts made by the Comptroller General to exercise the access rights vested in him by the act for purposes unrelated to his statutory duty must be regarded as wholly unauthorized and his demands may be rejected by the executive departments on statutory grounds.⁶⁸

Each request by the Comptroller General that executive information or documents be made available for his scrutiny must be judged by whether or not the material requested is relevant to an investigation undertaken by the Comptroller General for such purposes and at such times as are consistent with the proper discharge of his statutory responsibility. The extent of the statutory authority of the Comptroller General to investigate executive action has already been explored; from this it follows that the Comptroller General may not:

⁶⁴ 42 Stat. 26 (1921), 31 U.S.C. § 54 (1958).

⁶⁵ 60 Stat. 837 (1946), 31 U.S.C. § 60 (1958).

⁶⁶ 59 Stat. 601 (1945), 31 U.S.C. § 866 (a) (1958).

⁶⁷ 64 Stat. 837 (1950), 31 U.S.C. § 67 (a) (1958).

⁶⁸ This reasoning does not seem to be affected by the amendment to the Mutual Security

1. While conducting a proper investigation require access to information and documents which are clearly irrelevant.

2. Require information for the purpose of criticizing executive programs and policies which by their nature must be absolutely discretionary and the wisdom of which may, if at all, be debated by Congress alone. In this connection, he may not require access at any time to reports, opinions or recommendations which have been the basis of policy planning and the exercise by the executive branch of its judgment despite the fact that they may incidentally contain information bearing on the objective administrative aspects of a program with which the General Accounting Office is legitimately concerned.

3. Require, in the course of investigating an appropriate activity, information then being considered by executive officials in connection with final decisions to be made or action to be taken at a future time.

V. ENFORCEMENT OF THE STATUTORY LIMITATIONS ON THE INVESTIGATORY POWERS OF THE COMPTROLLER GENERAL

If any future executive branch challenges to the investigatory

Appropriations Act of 1960 designed to facilitate access to information belonging to the International Cooperation Administration. Section 111 (d) of this act (P.L. 86-383) states:

"None of the funds herein appropriated shall be used to carry out any provision of chapter II, III, or IV of the Mutual Security Act of 1954, as amended, in any country, or with respect to any project or activity, after the expiration of the thirty-five day period which begins on the date the General Accounting Office or any committee of the Congress, or any duly authorized subcommittee thereof, charged with considering legislation or appropriations for, or expenditures of, the International Cooperation Administration, has delivered to the office of the Director of the International Cooperation Administration a written request that it be furnished any document, paper, communication, audit, review, finding, recommendation, report, or other material relating to the administration . . . in such country or with respect to such project or activity, unless and until there has been furnished to the General Accounting Office, or to such committee or subcommittee, as the case may be, (1) the document, paper, communication, audit, review, finding, recommendation, report, or other material so requested, or (2) a certification by the President that he has forbidden its being furnished pursuant to such request, and his reason for so doing."

It is clear that Congress in enacting this section did not seek to increase the basic investigatory powers of the Comptroller General vis-à-vis the International Cooperation Administration. The language of this section merely recapitulates the provision of the Budget and Accounting Act relating to information and provides a sanction to the failure by the International Cooperation Administration, without presidential support, to provide such information. Indeed, upon signing H.R. 7500 on July 24, 1959, President Eisenhower issued the following statement:

"I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine." White House Press Release, July 24, 1959.

powers of the Comptroller General were to be based on an alleged absence of statutory authority, there would arise a difference between two branches of the federal government appropriate for judicial resolution. How may such resolution be obtained?

It is the contention of the Comptroller General that he may determine for himself what investigations are proper and what information he may require from the executive branch to carry them out. In the absence of any judicial decisions construing the statutes granting him access to information, he relies for support in this analysis of his authority to compel cooperation on an opinion of the Attorney General rendered in 1925⁶⁹ and claims that this opinion should be controlling within the executive branch.

In a letter dated January 2, 1925, the Secretary of War indicated to the Attorney General that pursuant to a policy regarding government procurement contracts the Comptroller General had called upon the Quartermaster General of the Army to supply information relative to the awarding of contracts to the "lowest responsible bidder." The Comptroller General had required that contracts submitted for routine audit be accompanied by a showing that the lowest bid had been accepted or a detailed statement of the reason for accepting a different bid. It was the position of the Secretary of War that the statutes then governing the purchase of supplies and the engagement of services reposed powers of judgment and discretion in the contracting officer and the Comptroller General could not review the exercise of such judgment and discretion. In his reply of March 21, 1925,⁷⁰ the Attorney General said, "It will be observed that the Comptroller General states that this requirement is made necessary in order that a satisfactory audit may be made. What papers or data he should have to make such an audit would seem to be a matter solely for his determination."

It may be perceived that the topic of discussion was the routine audit of contracts for the purpose of determining whether the executive agency involved had proceeded according to law. The opinion of the Attorney General relates to the audit and control functions of the Comptroller General rather than to his investigating and reporting activities currently under consideration. It states simply that when engaged in the legitimate audit of contracts for the purpose of determining their compliance with law,

⁶⁹ Memoranda, *supra* note 2, at Exhibit IV-A, pp. 3777-78.

⁷⁰ 34 OPS. ATT'Y GEN. 446-47 (1925).

the Comptroller General may rely on section 313 of the Budget and Accounting Act of 1921 to require any papers or data he deems necessary. The opinion does not apply to or affect the Comptroller General's very different power of investigation for waste and inefficiency. Although the Comptroller General relies upon section 313 to secure executive cooperation in both audits and investigations, these functions are not identical. If the Attorney General has said that in the pro forma business of auditing contracts or accounts the Comptroller General may determine for himself what information he requires, this does not supply a precedent for the proposition that in carrying out the far less routine duty of investigating and reporting the Comptroller General may equally decide at will what he will have from the executive branch. Moreover, no question of the legitimacy of the audit had been raised. It cannot, therefore, be said that the opinion of the Attorney General means that the Comptroller General may determine for himself what information he needs in connection with an investigation alleged to be beyond his statutory authority.

The Attorney General has, in fact, had a good deal to say about the authority of the Comptroller General and has rendered opinions challenging both the right of the Comptroller General to become involved in certain executive activities and his authority to require executive cooperation.⁷¹ The question of the reviewability by the Attorney General of demands for information made by the Comptroller General has arisen mainly in connection with the Comptroller General's exercise of his control powers—his activity as an interpreter of legislation rather than an enforcer of economy.⁷²

The Comptroller General has contended that he has the right to decide questions of law regarding the proper use of funds and to determine the proper scope of his authority in this field.⁷³ However, the Attorney General has not agreed that the Comptroller General may supersede him as legal adviser to the executive departments or that the Comptroller General may decide finally how much discretion lies with the executive departments themselves in determining the import of legislation.⁷⁴ There does not

⁷¹ See, e.g., 34 OPS. ATT'Y GEN. 311 (1924).

⁷² See generally MANSFIELD, *op. cit. supra* note 13, at 93-116.

⁷³ E.g., 14 DECS. COMP. GEN. 648 (1935), disclaiming the authority of courts other than the Supreme Court and of the Attorney General to review decisions of the Comptroller General as to the legal availability of a particular appropriation for a use as made.

⁷⁴ 34 OPS. ATT'Y GEN. 162 (1924).

seem to be any instance in which the Attorney General has challenged an exercise by the Comptroller General of his investigatory power — as opposed to audit or control — on the ground that jurisdiction was lacking. Nevertheless, the executive branch might resort to the self-proclaimed authority of the Attorney General to interpret for them the powers of the Comptroller General⁷⁵ and, relying upon such interpretations, refuse to yield to the Comptroller General's allegedly improper demands for information.

Although there is no precedent for judicial review of the investigatory powers of the Comptroller General, the matter does not seem wholly beyond the purview of the courts, for the authority of the Comptroller General is, by his own admission, statutory, and a certain violence would be done the principle of the separation of powers were it to be settled that the Comptroller General alone may construe the statutes on which he relies.⁷⁶ Such a conclusion may also be regarded as ironic in view of the purpose sought to be achieved by the creation of the Office of the Comptroller General. It was the position of Congress, reiterated throughout the legislative history of the Budget and Accounting Act of 1921, that for reasons which are self-evident the executive branch should not be allowed to execute congressional appropriations and at the same time have the responsibility for interpreting these appropriations and for auditing its own expenditures. Yet the very instrumentality created to check the evil which comes of permitting the actor to judge his own acts now argues that it has precisely the power Congress thought too dangerous for the executive branch.

⁷⁵ 33 OPS. ATT'Y GEN. 383 (1922), and see Letter from the Attorney General to the President, Dec. 22, 1960, in White House Press Release, Dec. 23, 1960. Interpretations of law rendered by the Attorney General are advisory rather than decisive. 9 OPS. ATT'Y GEN. 36 (1857). The Comptroller General does not, therefore, regard himself as affected in any way by such opinions. 14 DECS. COMP. GEN. 648-49 (1935).

⁷⁶ The problem of determining the relevancy of requests by the Comptroller General for information was inconclusively discussed on March 10, 1958 before the Subcommittee of the House Armed Services Committee [*Hearings Before the Special Subcommittee No. 6, 85th Cong., 2d Sess. 19 (1958)*].

"Mr. Dechert: The question of relevancy, I hope, would never arise. If it did arise, it would be a matter of joint determination.

"Mr. Courtney: Is the matter of relevancy, in your opinion, and as you conduct your office now, a matter to be determined within the Department of Defense?

"Mr. Dechert: I think this issue hasn't arisen, Mr. Courtney, and therefore I think I cannot answer it. . . . As I understand it, the question is, Suppose that an issue arose between the General Accounting Office and the Department of Defense as to whether a particular paper was or was not relevant?

"I think if the Department of Defense, after a joint consultation, felt that its view was correct, the only thing it could do would be to refer it to the President."

How, then, may the question of the Comptroller General's lack of authority to investigate be brought before a court? Judicial review of decisions of the Comptroller General made in the exercise of his control powers may be invoked by a suit to recover a disallowed payment, by a suit in the Court of Claims to compel a payment withheld at the behest of the Comptroller General, or by an action in mandamus to compel payment.⁷⁷ Presumably, the question of the investigatory power of the Comptroller General might be raised in a similar fashion upon the cutting off of International Cooperation Administration funds, for example, as a result of a failure by that agency to comply with a General Accounting Office request for information.⁷⁸

It is possible that a particular refusal to comply with a request made by the Comptroller General for information could be brought to the attention of Congress which might then pass a resolution directing the Speaker to issue a warrant directing the Sergeant-at-Arms to take the reluctant executive officer into custody and bring him before Congress.⁷⁹ Upon further refusal to supply the information, the Congress could order him to be locked in the Guard Room of the Capitol Police.⁸⁰ A petition for a writ of habeas corpus would bring the matter before the courts.⁸¹ There is some precedent for such contempt proceedings, but this means of achieving judicial vindication of the position of the executive branch vis-à-vis the General Accounting Office is, of course, impractical.⁸² Pursuant to section 194 of title 2, U.S.C., a refusal to cooperate might be reported to the "district attorney for the District of Columbia" for prosecution.⁸³ However, the unwilling-

⁷⁷ It is the position of the Comptroller General that he must decide for himself whether the decision of any court other than the Supreme Court will serve as a precedent and a guide for his future behavior. 14 DECS. COMP. GEN. 648, 652 (1935).

⁷⁸ See note 68 *supra*. Although the Comptroller General has sought to cut off certain funds, the President has ordered the executive branch to continue payments on the ground that the position of the Comptroller General is based on an "erroneous interpretation of law which would reach an unconstitutional result." Letter from the President to the Secretary Concerning the Office of Inspector General and Comptroller, Mutual Security, Dec. 23, 1960, Department of State Press Release No. 706, Dec. 23, 1960.

⁷⁹ See S. RES. 15, 83d Cong., 1st Sess., 99 CONG. REC. 163 (1953) providing for custody of persons. This resolution was referred to the Committee on Rules and Administration.

⁸⁰ See 3 HINDS, PRECEDENTS OF THE HOUSE §§ 1669, 1672, 1684, 1686, 1690 (1935).

⁸¹ The President may, in any event, have power to pardon him. See *Ex parte Grossman*, 267 U.S. 87 (1925).

⁸² See *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *Stewart v. Blaine*, 1 MacArthur (8 D.C.) 453 (1874).

⁸³ 11 Stat. 155 (1857), 2 U.S.C. § 194 (1958).

ness of the Attorney General to prosecute and the power of the President to pardon in advance⁸⁴ would obviate any such proceeding.

In the absence of an easy method for securing a judicial resolution of the current differences between the executive branch and the Comptroller General, only Congress itself, through clarifying legislation, may finally decide what investigatory powers within constitutional limits it wishes the Comptroller General to exercise. Until such time as additional legislation may be enacted, the foregoing analysis of the statutory powers of investigation of the Comptroller General indicates that the executive branch may successfully challenge his investigations on the basis of statutory as well as constitutional limitations on their scope.

⁸⁴ See TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 121-24 (1925).