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# JUDICIAL REVIEW OF THE COMPTROLLER GENERAL

HARVEY C. MANSFIELD

The finality of the decisions of the Comptroller General of the United States on questions involving the interpretation of appropriation acts of Congress presents one of the major unsolved problems in American administrative law. It is, indeed, one aspect of the larger and equally unsolved governmental problem in this country, too large to be treated here, of the control of fiscal policy. In view of the scale of federal expenditures now being undertaken, and of the increases in taxation which they promise for the none too distant future, it is reasonable to suppose that the whole question of what governmental arrangements, of structure and of power, will be needed to provide a satisfactory system of control, will soon engage national attention.<sup>1</sup> The literature of fiscal control, though recent, is already voluminous and the time is ripening for a reconsideration of the problem. While students of it are by no means in agreement on the most desirable remedy, enough has been done, and our national experience makes it clear, that a really adequate reconsideration must go back of present practices and present statutes and call into question the continued usefulness, in that field, of such a sacred cow as the constitutional doctrine of the separation of powers. This paper is not so ambitious. Accepting our present constitutional arrangements as given, it will attempt to point out the present status of the Comptroller General's powers, for the light that that may cast on the general problem.<sup>2</sup>

That status at present is ambiguous. If we look at the acts of Congress defining his powers, especially in the light of their history, there

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<sup>1</sup>A recent monograph, short but suggestive, on the organization of auditing control is G. C. S. BENSON, *FINANCIAL CONTROL AND INTEGRATION* (1934); and see bibliography there given, pp. 60-65.

<sup>2</sup>*Cf.* BENSON, *op. cit. supra* note 1, c. 3, 4; W. E. HOTCHKISS, *THE JUDICIAL WORK OF THE COMPTROLLER OF THE TREASURY* (1911); W. F. WILLOUGHBY, *THE LEGAL STATUS AND FUNCTIONS OF THE GENERAL ACCOUNTING OFFICE* (1927); D. H. SMITH, *THE GENERAL ACCOUNTING OFFICE* (Institute for Government Research, Service Monograph No. 46, 1927); A. G. LANGELUTTIG, *THE DEPARTMENT OF JUSTICE OF THE UNITED STATES* (1927), ch. 13; ANN. REPS. COMP. GEN., for fiscal years 1922 to 1932 (none published since 1932); O. R. McGUIRE, *The Accounting Officers of the United States and Judicial Precedents*, (1925) 19 ILL. L. REV. 523, and *Legislative or Executive Control over Accounting for Federal Funds*, (1926) 20 ILL. L. REV. 455; A. G. Langeluttig, *Legal Status of the Comptroller General of the United States*, (1929) 23 ILL. L. REV. 556. Mr. McGuire's conclusions reflect the fact that he is a counsel in the General Accounting Office.

is an apparently clear answer as to what these powers ought to be; and the present Comptroller General has labored zealously to make that picture correspond with reality.<sup>3</sup> If we review the practice of the administrative officers, however, we find a picture that, though less clear, does not in important ways correspond to the statutory conception. And if we review the judicial review of the subject, the picture becomes still less clear but the tendency is not in the direction of confirming the lines of the statutory grant to the Comptroller General. The Supreme Court has not as yet spoken directly to the issue, but in a case decided last year, *Miguel v. McCarl*,<sup>4</sup> it came measurably nearer doing so. It now appears that, despite the statutes, payments may be made which he thinks are unauthorized, and the executive departments will undoubtedly take advantage of that situation to increase their freedom of action. If experience is any guide they will use it to liberalize their expenditures, and the integrity of the present system of control may be jeopardized. A breakdown is not necessarily imminent, particularly in view of the attitude of President Roosevelt,<sup>5</sup> but the logical extension of the doctrine of the *Miguel* case will produce an unworkable result if carried through.

The difficulty lies in the inherent conflict between the separation of powers which theoretically gives control of spending to Congress, and the felt need of the executive, with the mounting responsibility for spending that it has, for a freer hand in determining questions of detail in the use of appropriations. Under the separation of powers implied in our existing constitutional arrangements, it is supposedly Congress that holds the purse strings,<sup>6</sup> while the executive performs the actual disbursing and the courts stand in the background, armed with John Marshall's potent phrase, that "it is, emphatically, the province and duty of the judicial department, to say what the law is." If the responsibility for spending lies entirely with Congress, it seems altogether proper that that body should insist, through an agent answerable to it alone, upon limiting expenditures strictly to

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<sup>3</sup>J. R. McCarl, a former secretary to Senator Norris, is the only incumbent the office has had. For some description of his activities see SMITH, *op. cit. supra* note 2, at 66-72 and c.2, and ANN. REFS. COMP. GEN.

<sup>4</sup>291 U. S. 442 (1934), discussed *infra*; see note, (1934) 22 GEO. L. J. 654.

<sup>5</sup>Despite the Comptroller General's refusal last year to release funds for establishing forest belts in drought areas, practical cooperation between him and the President is reliably reported to be greater than during any previous administration since 1921. See *infra* note 38.

<sup>6</sup>Art I, § 8 (1): "The Congress shall have power to lay and collect taxes . . . to pay the debts . . . of the United States." Art. I, § 9 (7): "No money shall be drawn from the Treasury, but in consequence of appropriations made by law . . ." But who "shall take care that the laws be faithfully executed"?

objects designated in its appropriations.<sup>7</sup> To be effective this must be accomplished not merely by a paper audit which reviews and publishes the details of income and outgo (wholesome though that might be in default of anything more), but by a power of disallowing all items not found by that agent to be authorized. If injustice or hardship results, the matter can be brought by the claimant directly, or through that other Congressional agent, the Court of Claims, or by the executive through the budget, to the attention of Congress, whose power is plenary and whose intentions are benevolent. In this way, honest spending can proceed, and frugality will be encouraged.

On the other hand, we do not need the testimony of veterans' legislation or the restoration of the pay cuts provided in the Economy Act of 1933 to know that Congress is not always moved primarily by a desire for economical use of public moneys, and frequently seems anxious to be told how more money might be spent.<sup>8</sup> And within the executive, a similar conflict of motives is apparent, where economy or the letter of appropriation acts stands in the way of what is deemed to be an effective administrative policy.<sup>9</sup> Although recourse to Con-

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<sup>7</sup>Not, of course, to objects desired by taxpayers. There is no cure in the General Accounting Office for logrolling, and no complete cure for ambiguous legislative drafting, though the technique of the latter has improved markedly.

<sup>8</sup>One index of this is the relative importance attached by Congressmen to membership on the committees on Appropriations and on Expenditures in the Executive Establishments.

<sup>9</sup>One form of executive escape from accounting control, which is excluded from detailed discussion by the scope of this article, may be noted here. During the World War a number of government-owned corporations were established to further various war activities—notably the U. S. Shipping Board Merchant Fleet Corp., the U. S. Grain Corp., and the War Finance Corp.—whose operations were not made subject to the Comptroller of the Treasury in order “to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States.” *United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1 (1927). ANN. REP. COMP. GEN., 1928, 9-18. This precedent was followed in the establishment of the R. F. C., (Act of Jan. 22, 1932, §§ 4, 14; 47 STAT. 5, 6, 11 (1932); see ANN. REP. COMP. GEN., 1932, 13-18), and of a number of other corporations set up under the Roosevelt administration. As to the latter, the situation was cured by Executive Order 6549, Jan. 3, 1934, which provided that “. . . all receipts and expenditures by governmental agencies, including corporations, created after March 3, 1933, the accounting procedure for which is not otherwise prescribed by law, shall be rendered to the General Accounting Office in such manner, to such extent, and at such times as the Comptroller General of the United States may prescribe, for settlement and adjustment . . .” The R. F. C., created before March 3, 1933, was not included in this order and remains in control of its own accounting.

gress may be open (it often is not), and whether the motive is legitimate or not, the temptation is usually irresistible to secure the result more swiftly and surely by interpretation of an existing appropriation. The temptation is increased by the knowledge that, despite the separation of powers, the executive in fact is largely instrumental in making as well as carrying out policies, fiscal and otherwise, and is held responsible by the country for doing so.<sup>10</sup> The greatest hope for prudent spending in the future lies evidently in the further development of executive control over Congress through the budget, and the more nearly appropriations conform to proposals of the Budget Bureau, the more apparent this becomes. Since it would be too much to expect that two independent branches of the government should see eye to eye, it is inevitable that a zealous Comptroller General acting upon a strict application of the theory of the separation of powers and of the letter of the law should do many things that to the departments concerned seem an unwarranted interference with their powers and responsibilities for efficient administration. And so he has. Although the Comptroller General's grip is strong through his hold on the mechanics of disbursements, it is possible in some situations to appeal to the courts instead of to Congress, and thus to present to them various aspects of the clash of public policies. Inevitably, it is seldom possible to present to them the picture entire, so that the decisions received reflect the emphasis of the particular elements involved and little consistent policy results. Like the munitions makers, the decisions supply ammunition to both sides.

Turning first to the statutes, the legislative history of the General Accounting Office is well known and need be sketched only briefly.<sup>11</sup> After some early efforts with a more decentralized scheme that proved inadequate to meet the strain imposed by the War of 1812, Congress in 1817 established a central control in the Treasury, exercised by two Comptrollers and several Auditors, and provided<sup>12</sup>

“that . . . all claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned . . . shall be settled and adjusted in the Treasury Department.”

Since every voucher paid had to be reviewed in the department

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<sup>10</sup>Increasingly, Congressional candidates campaign for office on a platform of “supporting the President”, while a President running for re-election points to the legislation he has already had enacted, and promises more if re-elected. Cf. D. W. BROGAN, *GOVERNMENT OF THE PEOPLE* (1933).

<sup>11</sup>See esp. SMITH, *op. cit. supra* note 2, c. 1; McGuire, *Legislative or Executive Control*, etc. (1926) 20 ILL. L. REV. 455 ff.

<sup>12</sup>3 STAT. 366 (1817).

where it originated as well as in the Treasury, often three or four times, the steadily increasing volume of business placed such a burden of mechanical calculations upon the Comptrollers and their staff that the audit lagged years behind current transactions and became ineffective,<sup>13</sup> as the famous Swartwout defalcation demonstrated.<sup>14</sup> In the meantime, as will be noted, conflicting interpretations by Attorneys General and by the courts, together with the possibility of executive pressure from the President, left it doubtful whether the settlement in the Treasury contemplated by the 1817 Act was conclusively in the hands of the Comptroller, or whether he was obliged to follow opinions of the Attorney General. Congress adhered to its view of its constitutional powers by enacting in 1868 that the Act of 1817<sup>15</sup>

“shall not be construed to authorize the heads of departments to change or modify the balances that may be certified to them by the . . . Comptroller of the Treasury, but that such balances, when stated by the auditor and properly certified by the comptroller as provided by that act, shall be taken and considered as final and conclusive upon the executive branch of the government, and be subject to review only by Congress or the proper courts . . .”

Furthermore, when in 1870 the Department of Justice was established, the general provision that “each head of any Department of

<sup>13</sup>HOTCHKISS, *op. cit. supra* note 2, at 17-18; *cf.* McKnight v. United States, 13 Ct. Cl. 292, 299 ff. (1877).

<sup>14</sup>*Cf.* VON HOLST, CONST. HIST. OF THE U. S. (1888) II, 349 ff., and House Doc. No. 13, 25th. Cong., 3d. sess., p. 6.

<sup>15</sup>15 STAT. 54 (1868). The Committee on the Revision of Laws of the House of Representatives at the next session considered and rejected a letter from the Secretary of War suggesting the repeal of this law, and in a report to the House on Feb. 16, 1869 [reprinted 26 CONG. REC. 4341-4342, in connection with the consideration of the Dockery Act, 28 STAT. 205 (1894)], reviewed the Comptroller's experience under the previous legislation. An excerpt gives the gist:

“It appears to the committee that this assumption of power in the head of the War or any other Department to set aside and change the findings of the accounting officers of the Government is at war with the whole principle upon which the system is based; that the allowance and settlement of the disbursement of all public funds should be vested wholly in a set of officers other and different from those who made the expenditure. If their allowances and settlements can be set aside and changed by the head of the Departments under whose direction the money was paid, or the claim accrued, then the whole system of checks to improper expenditure, which it was supposed had been established, falls to the ground.

“Aside from this consideration, the committee believe that the just rights of the Government itself, as well as the rights of claimants against the Government, are much more likely to be preserved, by being subject to the examination and adjudication of experienced men accustomed to examining accounts and weighing evidence, than they would be if subject to revisal and reversal by the subordinates in another Department, selected with no view to qualifications of this character.”

the Government may require the opinion of the Attorney-General on all question of law arising in the administration of their respective Departments", was accompanied by the specific statement,<sup>16</sup>

"That whenever a question of law arises in the administration, either of the War or Navy Department, the cognizance of which is not given by statute to some other officer from whom the head of either of these Departments may require advice, the same shall be sent to the Attorney-General . . ."

—a limitation on the Attorney General apparently designed to recognize the finality of the Comptroller's decisions on legal points involved in settling accounts in those departments.<sup>17</sup> Although the present Comptroller General asserts that<sup>18</sup>

"it has been the practice . . . of the Comptrollers followed without interruption, at least since the act of March 30, 1868 . . . , to decide every question of law and of fact necessary to be decided in determining whether a payment on a claim is authorized to be made under appropriated moneys of the United States, except in those rare cases where the Congress, by specific language, has made the finding or decision of some other official conclusive in that respect",

it seems also to be clear that Comptrollers continued to acquiesce in, and sometimes to join in requests for, opinions of the Attorneys General. Not until 1894 was there a thorough-going reorganization by the Dockery Act,<sup>19</sup> which devolved the administrative work upon

<sup>16</sup>Act of June 22, 1870, 16 STAT. 162. The office of Attorney General, without the Department under him, had been in existence since the Judiciary Act of 1789.

<sup>17</sup>A limitation, however, that was soon forgotten, perhaps in part because of the rearrangement of these provisions in the Revised Statutes. Whereas in Section 6 of the Act of 1870 the specific provision regarding the rendering of advice to the War and Navy departments had come first, followed by the more general one regarding the head of "any Department", the order of sentences was reversed in the revision and the two clauses became separate sections, 356 and 357 of the Revised Statutes, so that the more general one seemed to make the other nugatory.

<sup>18</sup>Miguel v. McCarl, *supra* note 4, Brief for Comptroller General, on writ of certiorari, p. 7.

<sup>19</sup>28 STAT. 205 (1894). To clarify the independence of the Comptroller, section 8 provided:

"The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, . . . shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or the board, commission, or establishment . . . to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government: *Provided*, That the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the reexamination of any account."

Auditors and left a single Comptroller with an appellate review, thus freeing him to devote his time to legal interpretations mainly. The Act reiterated that the decisions of the Comptroller "shall be final and conclusive upon the Executive branch of the Government", and legalized what had become the practice in order to avoid hardship upon disbursing officers, that the latter might ask the Comptroller for an advance decision on the legality of a payment, which opinion should thereafter bind the Comptroller.<sup>20</sup>

Since the Attorneys General, after a short lapse, resumed the practice of rendering opinions on accounting matters, Congress in the Budget and Accounting Act of 1921<sup>21</sup> attempted a more far-reaching remedy by pushing the doctrine of the separation of powers to its logical conclusion. The offices of Comptroller and Auditors of the Treasury were abolished and their duties transferred to a new independent establishment, the General Accounting Office, headed by a Comptroller General, not subject to the control of any department head and answerable only to Congress. To protect him against the President he was given a fifteen year term,<sup>22</sup> and made irremovable except by a joint resolution (which requires the President's signature) and for specified causes only.<sup>23</sup> Significant provisions of the Act include the statement that the powers of the Comptroller General<sup>24</sup>

"shall . . . be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government."

And by Section 305,

" . . . All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which

<sup>20</sup>*Ibid.*

<sup>21</sup>Act of June 10, 1921, 42 STAT. 24; 31 U. S. C. A. 44.

<sup>22</sup>Section 303, a compromise between the views of those who, like the present Vice-President, then Congressman Garner, favored a life term comparable to that of the judiciary, and others who wanted it much shorter.

<sup>23</sup>President Wilson vetoed a similar act the previous year which provided for removal only by concurrent resolution (which does not require the President's signature), on the ground that it was an unconstitutional limitation on the President's removal power. *Cf. infra* note 37. Obviously the Act, as passed and signed by President Harding, by no means meets this objection: the initiative in removal remains with Congress according to the statute.

<sup>24</sup>Section 304. A weakness in the drafting of the Act, however, which was done by a subordinate of the Comptroller of the Treasury, will be seen in the use of language quoted from previous statutes and a general provision in Sec. 304 that

"All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury . . . shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office . . ."

Disputed interpretations of authority and finality under the earlier acts could thus be carried over to the new regime instead of being explicitly clarified.

the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

As clearly, then, as Congress knew how to say it, this Act provided for the finality of the Comptroller General's decisions except for review in Congress itself, or in the courts.

Nevertheless, the experience of administrative practice does not bear out this statutory design. Although Attorney General Wirt interpreted the Act of 1817 to require the accounting officers to act without direction from any other executive officer,<sup>25</sup> he was reversed by his successors,<sup>26</sup> who were apparently impressed by the superior rank and dignity of the Attorney General's office, and declined to be bound by the interpretation of a subordinate in another department. From these conflicting doctrines subsequent department heads might choose, and did. Even after the Act of 1868, Attorneys General continued to render opinions on matters within the Comptroller's jurisdiction,<sup>27</sup> though they sometimes declined<sup>28</sup> to do so unless the Comptroller joined in the request for the opinion, as he occasionally did.<sup>29</sup> It must be remembered that the Comptrollers and Auditors had indefinite terms of office, and were therefore a part of the party patronage to be changed after each election. An occasional Comptroller might assert his independence and refuse to be bound by opinions of the Attorney General or decisions of the Court of Claims;<sup>30</sup> and an occasional President might decline to interfere with a Comptroller's decision on the ground that by the law that decision was final.<sup>31</sup> But the threat once used by President Cleveland was always present in the background, that if the President could not change the Comptroller's opinion, he could change the Comptroller.<sup>32</sup> On the

<sup>25</sup>1 OPS. ATTY. GEN. 624, 636, 705, 706 (1823-24-25). Taney and Crittenden shared his view, 2 OPS. ATTY. GEN. 508 (1832); 3 *id.* 635 (1841).

<sup>26</sup>By Atty. Gen. Berrien first, 2 OPS. ATTY. GEN. 302 (1829); later by Butler, 2 *id.* 652 (1834); and by Black, 9 *id.* 32 (1857).

<sup>27</sup>17 OPS. ATTY. GEN. 41, 43, 390 (1881-82); 19 *id.* 567 (1890).

<sup>28</sup>21 OPS. ATTY. GEN. 178, 188, 530 (1895-97); 22 *id.* 581 (1899); 23 *id.* 1, 468 (1899, 1901); 24 *id.* 553 (1902); 25 *id.* 81 (1903).

<sup>29</sup>17 OPS. ATTY. GEN. 152, 425, 461, 603 (1881-82-83); 21 *id.* 181, 224, 402 (1895-96). Cf. LANGELUTTIG, *op. cit. supra* note 2, at 159-160; HOTCHKISS, *op. cit. supra* note 2, at 24-29.

<sup>30</sup>Cf. HOTCHKISS, *op. cit. supra* note 2, at 32.

<sup>31</sup>As Andrew Jackson did in response to protest on the part of War Department contractors. Brief for Comptroller General in Miguel v. McCarl (*supra* note 4) pp. 47-49, n. 10.

<sup>32</sup>WILLOUGHBY, LEGAL STATUS AND FUNCTIONS OF THE GENERAL ACCOUNTING OFFICE (1927), 4. Cf. ANN. REP. COMP. OF THE TREAS., 1911, p. 9.

other hand, it should also be remembered, as a partial offset, that the bulk of the work was so great and so detailed that only in exceptional instances could the Comptroller be directly interfered with; his office became in fact a separate branch of the Treasury.<sup>33</sup>

The language of the Dockery Act in 1894 seemed so unequivocal that for a time Attorneys General refused to give opinions on matters in the Comptroller's province, unless on "matters of great importance".<sup>34</sup> The notion of what was included in this reservation gradually expanded, however, so that during the World War, the Comptroller again found his authority impaired.<sup>35</sup> No neater commentary on a "government of laws and not of men" could be provided than this century of effort by Congress to vest legal finality, so far as the executive branch was concerned, in the decisions of a subordinate in one department as against the heads of other departments.

The changes made by the Budget and Accounting Act have undoubtedly strengthened enormously the Comptroller General's supervision of the spending habits of the executive officers, as is attested by the nearly universal resentment expressed against him in the departments<sup>36</sup>—possibly a wholesome result. And for the present at least, the constitutionality of the provisions of the Act designed to withdraw him from the President's removal power, in the light of *Myers v. United States*,<sup>37</sup> is a matter of academic interest

<sup>33</sup>HOTCHKISS, *op. cit. supra* note 2, at 24.

<sup>34</sup>21 OPS. ATTY. GEN. 178, 182, 188, 405 (1895-96); 22 *id.* 581 (1899); 23 *id.* 468, 586 (1901); 24 *id.* 85, 553, 614 (1902-03); 26 *id.* 431 (1907). It was this period of a dozen years following the Dockery Act when the Comptroller's independence was at a peak that Hotchkiss chiefly dealt with, which explains his tendency to magnify that independence.

<sup>35</sup>See 31 OPS. ATTY. GEN. 173 (1917), where the decision of the Comptroller regarding a naval officer's pay in 24 COMP. DEC. 163 (1917) was reviewed and a different conclusion reached. On the basis of this, large sums were improperly paid out until decisions of the Court of Claims, 59 Ct. Cl. 224, 919 (1924); 60 *id.* 1030 (1925), upheld the Comptroller's interpretation. The matter is reviewed in detail in 4 COMP. GEN. 636 (1925).

<sup>36</sup>*Cf.* BENSON, *op. cit. supra* note 1, at 36.

<sup>37</sup>272 U. S. 52 (1926). The legal issue seems to turn upon whether the Comptroller General is to be regarded as an "executive officer", as contended by Solicitor General Beck, or solely an "agent of Congress," as Willoughby argues, *op. cit. supra* note 2 at 12-16. The broad conclusions of the Myers case have just been sharply restricted by the somewhat surprising decision in Rathbun v. United States, 55 Sup. Ct. 869 (1935), denying the President's power to remove a Federal Trade Commissioner except in accordance with the statutory provisions. This seems to cover the Comptroller General's status as well. *Id.* at 875. Langeluttig, contradicting McGuire, Willoughby and Smith, had asserted that the Comptroller General is an administrative officer, removable by the President. *Legal Status of the Comptroller General*, (1929) 23 ILL. L. REV. 556 at 578.

mainly; it is most unlikely that such a removal will be attempted.<sup>38</sup> But the Act did not settle the question of jurisdiction between the Comptroller General and the Attorney General.<sup>39</sup> For several years now this question has remained in hopeless deadlock. The effect has spread to the departments, some of which have entirely refused to follow certain orders of the Comptroller General regarding accounting procedure, while others have acquiesced. The latest incident of the kind to attract public attention is the refusal of the Secretary of the Navy to be bound by a decision of the Comptroller General that appropriations are not available to pay the travel expenses of dependents of naval officers ordered home from a foreign station to await retirement orders, and the Secretary's announced intention of ordering such payments, in reliance on opinions of the Attorney General and decisions of the Court of Claims, the Comptroller General to the contrary notwithstanding.<sup>40</sup> Notoriously, the War and Navy Departments have been least cooperative with the government's accounting officers.

The position of the Comptroller General in relation to the federal courts presents somewhat different considerations, but with respect to the problem of the control of fiscal policy, the chief desideratum, as in the case of the executive, is essentially the same, *i. e.*, to provide a single centralized channel of authority through which claims against the United States, and the legal extent of the authority of executive officers to spend, can be determined. The present system does not afford that centralization.

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<sup>38</sup>Despite some loose newspaper talk there is no reason to suppose anything of the sort is imminent now. The present incumbent's term expires next year, and under the law he is ineligible for reappointment. An attempted removal would surely solidify opposition in Congress to the granting of lump sum appropriations in the future, and would be a vulnerable target for political attack. See *supra* note 5.

<sup>39</sup>In 33 OPS. ATTY. GEN. 265 (1922), Attorney General Daugherty declined to intervene, but in 33 *id.* 383 (1922) he upheld the War Department's protest against regulations requiring the payment of transportation accounts directly in the General Accounting Office. The Comptroller General, disregarding this, put the regulations in force anyhow. Some departments obeyed, others refused, and there the matter rests. Similarly, Attorney General Stone sided with the Navy Department in Bullard, Adm. v. United States, 34 OPS. ATTY. GEN. 346 (1924); 66 Ct. Cl. 264 (1928); cf. LANGELUTTIG, *op. cit. supra* note 2, at 162-172.

<sup>40</sup>See letter of Comptroller General to Secretary of the Navy, Feb. 27, 1935. N. Y. Sun, March 6, 1935; Washington Star, and Washington Post, March 5, 1935; N. Y. Times, March 9, 1935. A lively discussion illustrating Congressional viewpoints, together with the documents, will be found in the House Hearings before the Subcommittee on Naval Appropriations, 74th. Cong., 1st. sess., 838-880 (1935).

Prior to 1855 when the Court of Claims was established<sup>41</sup> (or really, to 1863, when its powers were strengthened),<sup>42</sup> unsuccessful claimants before the Comptrollers had no other regular recourse than to Congress. Since that time, a direct legal remedy has been available, both as to contract and as to pay claims. The remedy was improved by the Tucker Act in 1887,<sup>43</sup> which also gave concurrent jurisdiction to the District Courts on amounts less than \$10,000. The jurisdiction of these courts as to decisions of the Comptrollers, however, as Hotchkiss has remarked, "is not so much appellate as it is parallel and independent."<sup>44</sup> They have felt free to reverse his decisions,<sup>45</sup> and Congress has almost without exception<sup>45a</sup> appropriated for their judgments. The Comptrollers, for their part, though they are bound to certify payments on such judgments, have shown themselves equally free to ignore these same judgments as precedents—with a good deal of practical justification.<sup>46</sup> Particularly is this true of the Comptroller General. The concurrent jurisdiction granted led to a contrariety of interpretations; the Court of Claims often reversed itself, and has been often reversed by the Supreme Court. More important, the conduct of the government's defense in all federal courts is committed to the Attorney General, a task for which, in these cases, the Comptroller not unnaturally conceives himself to be better fitted; and the decision whether to prosecute appeals from adverse rulings

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<sup>41</sup>10 STAT. 612.

<sup>42</sup>12 STAT. 765.

<sup>43</sup>24 STAT. 505.

<sup>44</sup>*Op. cit. supra* note 2, at 32.

<sup>45</sup>The Bullard case, *supra* note 39, is one of the conspicuous recent instances. The Comptroller General felt that the judgment against the Government in this case (travel expenses of the wife of Admiral Bullard when he was ordered home from China to await retirement) resulted from the failure of the Attorney General to allow him to appear before the Court of Claims to defend the suit. Although he was obliged to certify payment under an appropriation following the judgment, he has declined to regard the case as a binding precedent, in the light of *United States v. Phisterer*, 94 U. S. 219 (1876). ". . . It is such things that sometimes render judgments given by the Court of Claims of little assistance in the solving of questions for decision by this office and relating not to matters still to be considered by the Congress but to actual use of an existing appropriation, and in view of its responsibility to check unlawful uses of appropriations this office must, of course, determine for itself when decisions of inferior courts are safe as guides in determining similar questions coming before this office for decision . . ." Letter of Comp. Gen. to Secy. of the Navy, Feb. 27, 1935.

<sup>45a</sup>Two recent exceptions are *Pocono Pines Assembly Hotels Co. v. United States*, 69 Ct. Cl. 91 (1930); 73 *id.* 447 (1932); 76 *id.* 334 (1932); and *Dalton v. United States*, 71 Ct. Cl. 421 (1931).

<sup>46</sup>3 FIRST COMP. DEC., *Introd.*, p. xxxix (1882); *cf. In re Sugar Bounty*, 2 COMP. DEC. 98 (1895); *United States v. Realty Co.*, 163 U. S. 427, 16 Sup. Ct. 1120 (1896), discussed in HOTCHKISS, *op. cit. supra* note 2, at 34; and the Bullard case, *Supra* note 45.

lies also with the Attorney General. The Comptroller has seldom been permitted to appear in the Court of Claims and has frequently been overruled when he has urged an appeal.<sup>47</sup> This is an acute source of grievance to the Comptroller General and he has therefore used decisions of the Court, in matters within his competence, as any litigant would: to be cited when they support him, and to be distinguished or ignored when they do not. Only decisions of the Supreme Court of the United States are treated as binding precedents in his office.

Another source of confusion lies in Section 148 of the Judicial Code, which authorizes department heads to refer claims pending in their departments to the Court of Claims for opinion or adjudication.<sup>48</sup> This form of appeal from his decisions by department heads to the Court of Claims instead of to Congress is a peculiar irritation to the Comptroller General, inviting direct conflict between him and the Court. It is the more aggravating because if the matter is brought to the Court by the claimant himself, as is his right also,<sup>49</sup> the Criminal Code forbids any officer in the government from aiding the prosecution of the claim in any way.<sup>50</sup> By the device of departmental reference the claimant and the department may join forces and the Comptroller General may not be heard in opposition to justify his own adverse decision. This situation seems indefensible.

In addition to these legal remedies, there is equitable relief against the Comptroller General by mandamus<sup>50a</sup> and injunction. The development and scope of mandamus as applied to the Comptroller General is not to be understood without reference to the powers and practices of his predecessors, the Comptrollers of the Treasury. In this as in other fields, the law has not been constructed in a vacuum, nor

<sup>47</sup>LANGELUTTIG, *op. cit. supra* note 2, at 172-174, and (1929) 23 ILL. L. REV. 556 at 563. For the Comptroller General's activities in collecting debts by means short of suits see *infra* note 62, and BENSON, *op. cit. supra* note 1 at 25.

<sup>48</sup>22 STAT. 485 (1883); 24 STAT. 507 (1887); 36 STAT. 1137 (1911). The Court of Claims has held that this does not give it jurisdiction of questions within the jurisdiction of the accounting officers. In re Proposed Reference by the Secretary of the Navy, 53 Ct. Cl. 370 (1918); In re Departmental Reference No. 167, 59 Ct. Cl. 813 (1924). But it is not clear that the two see eye to eye on what that jurisdiction is. A departmental reference was pending in the Miguel v. McCarl case when the mandamus proceedings were brought. See *infra*.

<sup>49</sup>Oregon-Washington R. R. & N. Co. v. United States, 54 Ct. Cl. 131, 138, 139 (1919); St. Louis, B. & M. Ry. Co. v. United States, 268 U. S. 169, 174 (1925).

<sup>50</sup>§§ 109, 113 Criminal Code (1909), 18 U. S. C. A. §§ 198, 203 (1926); § 190, Rev. Stat. (1878), 5 U. S. C. A. § 99 (1926); Burton v. United States, 202 U. S. 344 (1906); Tyler's Motion, 18 Ct. Cl. 25 (1883); *In re* Winthrop, 31 Ct. Cl. 35 (1895); Case v. Helwig, 65 F. (2d) 186 (App. D. C. 1933).

<sup>50a</sup>Little distinction has been made in this field between mandamus and mandatory injunction. Cf. LANGELUTTIG, *op. cit. supra* note 37, at 564-577.

evolved by pure reason. For a generation after the unsuccessful attempt in *Marbury v. Madison*<sup>51</sup> to secure mandamus against a federal official to compel performance of an alleged duty, the question was in abeyance. But in *Kendall v. Stokes*<sup>52</sup> in 1838, the Court after careful consideration held that the Circuit Court for the District of Columbia, alone among federal courts, could order the Postmaster General to perform a ministerial duty. This seemed to point the way to a new approach by claimants against the government who got no satisfaction from department heads. But in the leading case of *Decatur v. Paulding*<sup>53</sup> in 1840, and in *Brashear v. Mason*<sup>54</sup> and *U. S. ex rel. Goodrich v. Guthrie*,<sup>55</sup> the denial of writs of mandamus to collect claims against Secretaries of the Navy and of the Treasury was affirmed. *Kendall v. Stokes* was distinguished by calling the construction of the statutes involved in the later cases not ministerial but discretionary. It is significant that in all these cases the executive spoke with undivided voice, nor was there any "agent of Congress" to interpose. In practice the accounting officers were not independent of executive control on matters of general policy and the courts were

<sup>51</sup>1 Cranch 137 (1803).

<sup>52</sup>12 Pet. 524 (1838). On the ground that the courts of the District not only had the statutory powers given by Congress but also inherited the general jurisdiction of the Maryland courts of that area, which included mandamus.

<sup>53</sup>The widow of Commodore Stephen Decatur claimed two pensions under a general and a special act of Congress, both passed the same day. Offered her choice, but not both, by the Secretary of the Navy, who acted upon the advice of the Attorney General, she took the larger under protest and sought mandamus against the Secretary to get the other too, alleging a ministerial duty to carry out both acts. This was denied, and on appeal the Supreme Court, sharply divided in reasoning though not in conclusion, upheld the Circuit Court. Chief Justice Taney in the prevailing opinion, without passing on the merits, said that the construction of the statutes here was not ministerial but involved discretion "of a high order".

<sup>54</sup>6 How. 92 (1848). Mandamus to collect pay of an officer of the navy (sic) of the Republic of Texas who claimed to have been covered into the United States navy by the joint resolution annexing Texas. Mr. Justice Nelson stated the issue clearly and with prophetic insight:

"It will not do to say, that the result of the proceeding by mandamus would show the title of the relator to his pay, the amount and whether there were any moneys in the treasury applicable to the demand; for, upon this ground, any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and the proceeding by mandamus would become as common, in the enforcement of demands upon the government, as the action of assumpsit to enforce like demands against individuals." (p. 102)

<sup>55</sup>17 How. 284 (1854). Suit to recover salary, refused by the Comptroller, for the remainder of the term of a judge of the territorial court of Minnesota who had been removed by the President. In argument and in the dissent of McLean, J., the removal power was elaborately discussed.

not prepared to intervene in the spending mechanism. A hint that this might not always be so, however, where executive judgment was divided, may be seen in *United States v. Jones*.<sup>56</sup>

"The secretary of the navy represents the President, and exercises his power on the subjects confided to his department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. The accounting officers of the treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments."

It was in response to this that the Act of 1868 made the certifications of the Comptroller "conclusive upon the executive branch".<sup>57</sup> In 1890 for the first time, a mandamus case against the accounting officers directly was carried to the Supreme Court, which again denied relief in *United States ex rel. Lisle v. Lynch*.<sup>58</sup>

"The contention of the relator is that the interpretation he puts upon the Act is too obviously correct to admit of dispute and that this court has so decided; but it does not follow, because the decision of the Comptroller and Auditor may have been erroneous, that the assertion of relator to that effect raises a cognizable controversy as to their authority to proceed at all. What the relator sought was an order coercing these officers to proceed in a particular way, and this order the Supreme Court of the District declined to grant . . . Why the relator did not bring suit in the Court of Claims does not appear . . ."

Such was the situation before the Dockery Act gave the accounting officers a considerable degree of independence.

The turning point in the development came with *Smith v. Jackson*.<sup>59</sup> A Treasury Auditor for the Canal Zone, backed by the Comptroller

<sup>56</sup>18 How. 92, 95 (1855). This was a suit by the Government (not a mandamus proceeding) to recover money sent by order of the Secretary of the Navy to a naval officer abroad, which was disallowed by the accounting officer despite an opinion of the Attorney General. Denial of recovery was affirmed. The quotation is given for its tone of voice. It completely begs the question of the "subjects submitted to his jurisdiction by the constitution and laws."

<sup>57</sup>*Supra* note 15.

<sup>58</sup>137 U. S. 280 (1890).

<sup>59</sup>246 U. S. 388 (1918), affirming 241 Fed. 747 (1917) where the opinion of the District Court is printed and adopted by the Circuit Court of Appeals. On its facts this was evidently the worst possible case that could have been chosen for an appeal to test the Comptroller's powers. The remarks here quoted from Chief Justice White are the only known expression of the Court's views as to the binding character of opinions of the Attorney General. LANGELUTTIG, *op. cit. supra* note 2, at 155.

but in disregard of an opinion of the Attorney General,<sup>60</sup> deducted from the salary of the District Judge for the Canal Zone the estimated value of government living quarters previously furnished free. The judge sued for mandamus in his own court to compel the payment of his salary undiminished. A District Judge had to be sent from Alabama to hear the case, and in an exhaustively lengthy decision, he granted the writ. Not content, the Auditor carried the case through the Circuit Court of Appeals to the Supreme Court, and there received a stinging rebuke. Chief Justice White called the appeal "a plain abuse of administrative discretion" and said that the Auditor

"had no power to refuse to carry out the law and that any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney General and, second, beyond all possible question to the judgments of the courts below."<sup>60a</sup>

It was shortly after this that the Comptroller General's office was created and fortified by the Congressional direction that his powers "shall . . . be exercised without direction from any other officer."<sup>61</sup> With his crusading determination to sweep clean the corners of executive expenditure, the stage was set for increased resort to the courts. It came. When the Comptroller General attempted to recover allowances paid unlawfully, as he thought, to naval and military officers for dependents by docking their pay, a series of District Court decisions granting mandamus against him followed,<sup>62</sup> on the authority of *Smith v. Jackson*. It is a curious fact that the jurisdiction of district courts outside the District of Columbia to issue mandamus to a federal officer was apparently not even raised in any of these cases, although it lay at the threshold of the action taken in all of them.<sup>63</sup> However, the Attorney General declined to prosecute appeals

<sup>60</sup>34 OPS. ATTY. GEN. 517 (1925).

<sup>60a</sup>246 U. S. at 390-391.

<sup>61</sup>*Supra* note 24.

<sup>62</sup>*Dillon v. Groos*, 299 Fed. 851 (1924); *Howe v. Elliott*, 300 Fed. 243 (1924); *Ware v. Alexander*, 2 F. (2d) 895 (1924); *Wylly v. McCarl*, 2 F. (2d) 897 (1924). *Contra*: *Barber v. Hetfield*, 4 F. (2d) 245 (1925), *rev'g.* *Hetfield v. Barber*, 2 F. (2d) 723 (1924). The *Ware* and *Wylly* cases, in which the opinions by Judge Lowell, though most readable, display an entire want of understanding or sympathy for the Comptroller General's position, were affirmed, 5 F. (2d) 964 (1925). No consideration was given to the administrative advantages of set-offs in collecting debts due the Government, the Court saying, as in *Smith v. Jackson*, *supra* note 59, that they could only be recovered by suit in the absence of further statutory authority.

<sup>63</sup>Since *Kendall v. Stokes*, 12 Pet. 524 (1838), it had been and still is assumed by text writers and courts that such power did not exist. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928), 245; 18 R. C. L. (1929) *Mandamus*, §§ 6-8, p. 92; concurring opinion of Catron, J., in *Decatur v. Paulding*, 14 Pet. 497, 520 (1840); *Barber v. Hetfield*, 4 F. (2d) 245 (1925), *rev'g.* *Hetfield v. Barber*, 2 F. (2d)

from these decisions, since he had disagreed with the Comptroller General on the merits, and perhaps was not displeased with the result. Similar action followed in two cases in the District of Columbia courts, whose power to act is not disputed.<sup>64</sup> On the other hand, the Comptroller General has been supported or protected in these same courts where he was not in conflict with the Department of Justice,<sup>65</sup> with the exception of one unique case where the outcome was inconclusive.<sup>66</sup> But as has been indicated, claims which he had disallowed have been allowed in the Court of Claims,<sup>67</sup> where he is helpless, and department heads have defied him on various matters. Even Congress, whose agent he purports to be, has displayed something less than enthusiasm for his work, by passing relief acts,<sup>68</sup> by making the de-

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723 (1924); *United States ex rel. Margulies & Sons v. McCarl*, 10 F. (2d) 1012 (1926); *James Howden & Co. v. Standard Shipbuilding Corp.*, 17 F. (2d) 530 (1927); *Brunback v. Denman*, Mem. (N. D., West. Div., Ohio, decided June 5, 1933); and even Judge Lowell seems to have changed his mind, see *Scanlan v. Hurley and McCarl* (Dist. Mass., original petition for mandamus dismissed by District Judge Lowell, Feb. 7, 1933; amended petition dismissed, April 14, 1933). And *Smith v. Jackson*, *supra* note 59, afforded no precedent, for there the District Court had specifically found statutory authority to issue the writ in the act governing the Canal Zone, Act of August 24, 1912, c. 390, § 8; 37 STAT. 565. *Cf. Wright v. Ynchausti*, 272 U. S. 640 (1926); *Posados v. Manila*, 274 U. S. 410 (1926).

<sup>64</sup>*McCarl v. Cox*, 8 F. (2d) 669 (1925); *McCarl v. Pence*, 18 F. (2d) 809 (1927). In view of the Attorney General's statement that he could not certify that he thought the lower court was in error, and, indeed, thought the Comptroller General's position not maintainable, certiorari was denied, 270 U. S. 652 (1926). *Accord: Baker v. McCarl*, 24 F. (2d) 897 (1928); *McCarl v. Loud*, 38 F. (2d) 943 (1930); *McCarl v. Emerson*, 38 F. (2d) 944 (1930); *McCarl v. Orcutt*, *ibid.*

<sup>65</sup>*United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1 (1927); *St. Louis, B. & M. Ry. Co. v. United States*, 268 U. S. 169, 174 (1925); *United States ex rel. L. Margulies & Sons v. McCarl*, 10 F. (2d) 1012 (1926), *cert. denied*, 273 U. S. 696 (1926); *McCarl v. Walters*, 38 F. (2d) 942 (1930); *McCarl v. United States ex rel. Leland*, 42 F. (2d) 346 (1930), *cert. denied*, 282 U. S. 839 (1930); *McCarl v. Rogers*, 48 F. (2d) 1023 (1931); *McCarl v. Hoepfel*, 68 F. (2d) 440 (1933).

<sup>66</sup>*Richmond, F. & P. R. Co. v. McCarl*, 62 F. (2d) 203 (1932), where at the request of the Interstate Commerce Commission, the Comptroller General set off mail pay admittedly due the carrier against a sum fixed by the Commission as due the United States under the "recapture" clause of the Transportation Act of 1920. The Supreme Court of the District upheld the Comptroller General, saying the railroad had an adequate remedy in a three-judge court to set aside the Commission's order, or in the Court of Claims. The Court of Appeals ruled that the order was not final and must be sued upon, but since such a suit had been begun while the present case was pending, an injunction was denied without prejudice. At this stage the "recapture" clause was repealed by the Emergency Transportation Act, 1933, and refunds of amounts already paid in were ordered.

<sup>67</sup>*Supra* note 45.

<sup>68</sup>For instances, see BENSON, *op. cit. supra* note 1, at 29.

termination of other officers conclusive upon him in special cases,<sup>69</sup> and by generally failing to act on his recommendations for legislation.<sup>70</sup>

We come now to *Miguel v. McCarl*,<sup>70a</sup> and what it may hold for the future. The petitioner here, having served thirty years as an enlisted Philippine Scout, was retired by a War Department order under statutes generally applicable to the army. The army disbursing officer in the Philippines having some doubt as to the legality of the retirement allowances to him, forwarded a voucher with a request (authorized by the Dockery Act) for an advance opinion from the Comptroller General, who replied that payment was "not authorized even by the remotest implication of the laws" and kept the voucher<sup>70b</sup>. By this action a series of previous decisions respecting the status of Philippine Scouts was in effect reversed<sup>70c</sup>. The War Department then made a departmental reference of the matter to the Court of Claims, and while this was pending, Miguel in 1932 brought suit in the Supreme Court of the District for mandatory injunction to compel the Comptroller General to return the voucher, to compel the Chief of Finance in the War Department (who is not bonded) to order his subordinate disbursing officer (who is) to pay it, and to restrain the Comptroller General from interfering in any way with the payment of that or any similar future vouchers. The then Attorney General, Mr. Mitchell, learning that the Judge Advocate General, acting for the Chief of Finance, contemplated supporting the petitioner, asserted his department's right to control the defense of a suit against the United States for the withdrawal of public money from the Treasury.<sup>71</sup> The Supreme Court of the District decided in favor of the petitioner as to both officials,<sup>72</sup> and was reversed as to both by the Court of Appeals,<sup>73</sup> which sustained the Comptroller General's position that injunction should not issue since the act was discretionary, the petitioner's right doubtful under the law, and his remedy

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<sup>69</sup>Such as the determining of veterans' service records under the Adjusted Compensation Acts, the award and interpretation of air mail contracts, and contracts for military and naval aircraft. Brief for Comptroller General in *Miguel v. McCarl*, pp. 15-17. Similarly as to veterans' payments under the Economy Act of March 20, 1933, c. 5; 48 STAT. 9.

<sup>70</sup>ANN. REP. COMP. GEN., 1928, p. 1.

<sup>70a</sup>*Supra* note 4.

<sup>70b</sup>II COMP. GEN. 275 (1932).

<sup>70c</sup>See 4 COMP. GEN. 82 (1924) and 3 COMP. GEN. 132 (1923) and cases there cited.

<sup>71</sup>Brief for Comp. Gen., *Miguel v. McCarl*, p. 9.

<sup>72</sup>Memorandum opinions, unreported, June 10 and July 16, 1932.

<sup>73</sup>66 F. (2d) 564 (1933).

clear in the Court of Claims.<sup>74</sup> By the time the case reached the Supreme Court, a new administration was in office. Solicitor General Biggs, reversing his department's position, transferred his allegiance to the petitioner and the War Department. Mr. Justice Sutherland, writing the Court's decision, reviewed the merits and sustained the decision as to the Chief of Finance:<sup>75</sup>

"... the duty of the disbursing officer to pay the voucher in question 'is so plainly prescribed as to be free from doubt and equivalent to a positive command', and, therefore, is 'so far ministerial that its performance may be compelled by mandamus' ... It seems unnecessary to add that this duty cannot be affected by a contrary decision of the Comptroller General."

It seems unnecessary to add that this last sentence entirely begs the principal issue in the whole case.

As to the Comptroller General, since his was an advance decision given by request and not on his own initiative, and negative in form,<sup>76</sup> the conclusion was reached that<sup>77</sup>

"The view ... that a mandatory injunction will lie to compel a return of that voucher ... and to enjoin the Comptroller General from any interference ... has not, in the light of the case now made, met with the concurrence of a majority of this court ... But it is not to be supposed that, upon having his attention called to our decision, the Comptroller General will care to retain possession of the voucher or that he will interfere in any way with its payment".

Whether this be "monitory or minatory",<sup>78</sup> the result is clear. A new remedy by mandamus is available in the courts of the District of Columbia to any claimant for money against the government who

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<sup>74</sup>It has been familiar doctrine, moreover, that extraordinary writs should not be granted where the effect is merely to give a money judgment. See *Parkersburg v. Brown*, 106 U. S. 487, 500 (1882).

<sup>75</sup>291 U. S. 442, 454, citing and quoting *Wilbur v. United States*, 281 U. S. 206, 218-219 (1931).

<sup>76</sup>Compare the rule in railroad regulation that the courts will not review purely negative orders denying relief or permission. Chief Justice White's generalization in *Procter & Gamble v. United States*, 225 U. S. 282, 293 (1912), that the court has "jurisdiction only to entertain complaints as to affirmative orders of the Commission", was elaborated into an argument that to do otherwise would be to render a declaratory judgment, in *Piedmont & Northern Ry. v. United States*, 280 U. S. 469 (1930). Cf. *I. C. C. v. Humboldt S. S. Co.*, 224 U. S. 474 (1912); *United States v. New River Co.*, 265 U. S. 533 (1924); *United States v. Los Angeles R. R.*, 273 U. S. 299 (1927); *Alton Ry. v. United States*, 287 U. S. 229 (1932).

<sup>77</sup>291 U. S. 442 at 456.

<sup>78</sup>The phrase is Commissioner Hall's, dissenting from a decision of the Interstate Commerce Commission which similarly attempted to persuade without commanding, *Lake Cargo Coal Rates*, 1925, 126 I. C. C. 309, 390 (1927).

can allege, first, that his right is so clear that the duty to pay is ministerial, and second, that an appropriation is available to pay it. There is thus added another way of proceeding against the United States in a court, without its consent,<sup>79</sup> by the device of compelling an officer to perform his statutory duty in a particular manner.<sup>80</sup> This remedy has two important advantages from the claimant's point of view. If he wins the case he gets the cash immediately without waiting for Congress to appropriate for judgments of the Court of Claims.<sup>81</sup> And it short-circuits the Comptroller General completely, enabling department heads with the concurrence of the Attorney General and the courts to decide for themselves whether payments should be made. It may confidently be predicted, as Mr. Justice Nelson foresaw, that resort to mandamus for this purpose will become increasingly common. Of course, the Comptroller General has still a theoretical recourse; he can disallow such payments as those of Miguel when they come to him for final settlement, and can refuse to honor further requisitions for advances of funds to the disbursing officers who made them. But the recourse is illusory. In the first case, he might be compelled by mandamus to grant the disbursing officer credit for the payment unless he could convince the courts on the merits of his position in each instance; whereas the very core of his contention at present is that, so far as the executive is concerned, the Comptroller General has the last word. And in the second case,

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<sup>79</sup>In other fields it has been said that although the United States is not a named party, an action is one against it where the individual respondents have no personal interest, and where the United States is "the only real party against which alone, in fact, the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers*, 123 U. S. 443, 506 (1887); *Minnesota v. Hitchcock*, 185 U. S. 373, 386-387 (1902).

<sup>80</sup>It seems clear that where the duty is the construction of statutes, the distinction between "discretionary" acts which will not be compelled by mandamus to be exercised in a particular way, U. S. *ex rel. Lisle v. Lynch*, 137 U. S. 280, 287 (1890); U. S. *ex rel. Chicago G. W. R. Co. v. I. C. C.*, 294 U. S. 50 (1935); and "ministerial" acts which may be coerced, *Wilbur v. United States*, 281 U. S. 206, 218-219 (1931); *Roberts v. United States*, 170 U. S. 221, 231 (1900); *Lane v. Hoglund*, 244 U. S. 174, 181 (1917); *Wilbur v. Krushnic*, 280 U. S. 306, 318 (1930), all of which were relied upon by Mr. Justice Sutherland, is a distinction resting mainly upon "an inarticulate major premise".

<sup>81</sup>This advantage was urged by counsel for Miguel, together with the supposed uncertainty of the Congressional appropriation, *supra* note 44a, as a reason why the legal remedy afforded by the Tucker Act was not adequate and so justified equitable jurisdiction. This was accepted by the Court, citing *Smith v. Jackson*, *supra* note 59, although in *Williams v. United States*, 289 U. S. 553, 560 (1933), a judge of the Court of Claims, suing for salary diminished by the Economy Act of 1932, was excused for bringing the suit in the Court of Claims of which he was a member on the ground that "no other court or remedy was open to him".

he could not venture by withholding funds to bring the functioning of an entire bureau or establishment to a standstill as a means of coercing a recalcitrant department head.<sup>82</sup> To do so would be the likeliest way to test the validity of the President's removal power, and would put the principal burden of suffering on innocent bystanders, lesser government employees and the public they serve.

To summarize this review of the Comptroller General's position, he has, it is true, under the procedure laid out in the Budget and Accounting Act a far stronger grip on the audit and control of routine governmental expenditures than has ever been exercised before, and this has resulted both directly and indirectly in considerable savings of public funds. By a variety of devices not foreseen or appreciated when the Act was passed, the essential principle upon which the Act was designed, to wit, complete and exclusive Congressional control of all withdrawals of public money from the Treasury through the two agencies of the General Accounting Office and the Court of Claims, has in practice been substantially endangered.

If it be desired to reassert that control, which is, surely, the logical conclusion to be drawn from our constitutional separation of powers, new legislation will be needed.<sup>83</sup> Such legislation to be adequate to the purpose, would need to include at least the following provisions: (1) withdraw, or at least greatly restrict, the jurisdiction of any federal court to issue mandamus or injunction to any federal officer in any case involving any claim for the payment of public moneys out of the Treasury;<sup>84</sup> (2) prohibit the Attorney General specifically from rendering any opinion for the guidance of any department head or disbursing officer on any question involving a similar claim; (3) repeal Section 148 of the Judicial Code, which gives the Court of Claims jurisdiction over questions involving claims by reference from department heads; and (4) permit the Comptroller General to defend, or at least to intervene as of right in all cases involving claims for

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<sup>82</sup>In granting this power to the Comptroller, the Dockery Act lodged in the Secretary of the Treasury a power to overrule him, Act of July 31, 1894, c. 174, § 12; 28 STAT. 209. There seems to be some doubt whether the Comptroller General would be subject to the same review.

<sup>83</sup>Unless the courts should be more sparing in their exercise of the power of mandamus against the spending officers than the Miguel case promises.

<sup>84</sup>Under the provisions of the Economy Act of June 30, 1932, c. 314, § 111; 47 STAT. 382, 401,

"No court of the United States shall have jurisdiction of any suit against the United States or (unless brought by the United States) against any officer, agency, or instrumentality of the United States arising out of the application of any provision of this title, unless such suit involves the Constitution of the United States."

Cf. *Lynch v. United States*, 292 U. S. 571 (1934).

money against the United States and based upon an existing appropriation act, whether in the Court of Claims or in the lower federal courts in the exercise of their concurrent jurisdiction. And it is not unlikely that experience with such a system might develop further leaks, as the tax laws do, which would have to be plugged at some later time. This much at least seems essential<sup>85</sup>.

A lurking skepticism remains in the mind of this writer, however, whether experience with such a system (assuming it to have been adopted) might not also develop further doubts as to the desirability of the system itself. It may be that all this administrative resistance to a completely independent control of expenditures, all this burst of activity in the courts when the accounting officers disagree with the executive, does not spring entirely from devilry or a reckless desire to waste public funds. It may be partly the expression of the felt necessities of efficient administration in a society where administration assumes an importance beyond the dreams of the separators of powers,<sup>86</sup> of a desire in the courts to keep the peace by playing umpire or by asserting their own superior authority as a preferable alternative to a deadlock that might result from a conflict between "executive" and "legislative" agents. But if that is the case, a recasting of the accounting system would be only part and parcel of a wider reorganization, possibly along lines suggested by British experience, that would emphasize the growing centralization of executive power and the dependence of the legislature upon it. Constitutional as well as statutory changes would be needed. It would seem prudent before accepting that alternative, with its revolutionary implications, to test the efficacy of Congressional control further by giving it the benefit of a fairer trial than it now has. The present division of authority and responsibility among the Comptroller General, the Attorney General, the other department heads, the Court of Claims, and the courts of the District of Columbia, obstructs Congressional control without pointing to anything better and promotes neither economy nor efficiency.

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<sup>85</sup>It may also be found that instead of a definition of the Comptroller General's powers in terms of those of his predecessors', as was done in the Budget and Accounting Act, it would be more satisfactory to enact a complete restatement of his powers and repeal the previous acts. See *supra* note 24.

<sup>86</sup>But as a partial answer to this, it must be at once conceded that the chief sources of this "administrative resistance" are, as they always have been, the War and Navy departments, the scope of whose functions has expanded less than most of the other departments.