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The Evolution of Quasi-Judicial Activism in the Legislative Branch: Canadian Commercial Corp./Heroux, Inc.

John M. Holloway III
University of Richmond

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CASENOTE

THE EVOLUTION OF QUASI-JUDICIAL ACTIVISM IN THE LEGISLATIVE BRANCH: *CANADIAN COMMERCIAL CORP./HEROUX, INC.**

I. INTRODUCTION

During the First Congress' debate over the bill to establish the Treasury Department, James Madison described the principal responsibility of the Comptroller of the Treasury as "deciding upon the lawfulness and justice of claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive Branch of Government."¹

* The citation format for this article generally conforms to A UNIFORM SYSTEM OF CITATION (15th ed. 1991) except for citations to General Accounting Office and United States Claims Court decisions. These decisions are cited according to the format followed by the PUBLIC CONTRACTS LAW JOURNAL, printed on the first pages of each issue. This paper will be entered in the 1995 George Hutchinson Writing Competition sponsored by the Federal Circuit Bar Association.

1. 1 ANNALS OF CONG. 611-12 (Joseph Gales ed., 1789) (statement of Rep. Madison). Madison continued to describe the quasi-judicial role of the office which became that of the Comptroller General:

I am inclined to think that we ought to consider him something in the light of an arbitrator between the public and individuals, and that he ought to hold his office by such a tenure as will make him responsible to the public generally; then again it may be thought, on the other side, that some persons ought to be authorized on behalf of the individual, with the usual liberty of referring to a third person, in case of disagreement, which may throw some embarrassment in the way of the first idea.

Id. at 612. In response, members argued that "the Executive Magistrate had Consti-

With the passage of the Budget and Accounting Act of 1921,² the General Accounting Office (GAO) was created and the responsibility to settle the accounts and supervise the recovery of certified debts passed from the Comptroller of the Treasury to GAO's newly created agency chief, the Comptroller General.³ In the interest of independent and accurate accounting,⁴ Congress

tutionally a right to remove subordinate officers at pleasure" since "these officers were merely to assist him in the performance of duties, which, from the nature of man he could not execute without them . . ." Madison replied:

I question very much whether he can or ought to have any interferences in the settling and adjusting the [sic] legal claims of individuals against the United States. The necessary examination and decision in such cases partake too much of the Judicial capacity to be blended with the Executive. I do not say the office is either Executive or Judicial; I think it rather distinct from both, though it partakes of each, and therefore some modification, accommodated to those circumstances, ought to take place. I would, therefore, make the officer responsible to every part of the Government.

Id. at 614. Thus, Madison sought to vest in the Comptroller of the Treasury the "blend" of constitutional authority that he described "as essential to a free government" grounded in separate departments. THE FEDERALIST NO. 48, at 252 (James Madison) (Basil Blackwell ed., 2d ed. 1987); see also Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 70-76 (1983) (discussing Congress' long history of investigation and oversight of the Executive Branch beginning with the creation of the Treasury Department, in general, and the Comptroller of the Treasury, specifically, in the Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (1789) (codified at 31 U.S.C. § 301 (1988)).

2. Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (codified at 31 U.S.C. § 701 (1982) and other scattered sections of 31 U.S.C.).

3. 31 U.S.C. § 3526 (1988).

4. 58 Cong. Rec. 7085 (1919) (remarks of Rep. Good, Chairman, Special Committee on the Budget.)

By creating this department, Congress will have applied a practical business policy to the administration of the Government's fiscal affairs. Men will be employed as auditors who owe their positions to their training and ability and who do not secure their positions as a reward for political service. They will be fearless in their examinations, and can criticize, without fear of removal, executives who misuse appropriations or whose offices are conducted in an inefficient manner. Congress and its committees will at all times be able to consult with officials of this department regarding expenditures and from it will be able to obtain the most reliable information regarding the use to which any appropriation has been put or the efficiency of any department of the Government. This independent department will necessarily serve as a check against extravagance in the preparation of the budget. Those appointed by the president and charged with the duty of assisting him in collecting data and in preparing the budget will realize that their every act and decision will come under the close scrutiny of the accounting department. If duplications, inefficiency, waste, and extravagance exist as the result of any expenditure, the President will be held responsible therefor if he continues to

removed this important function from the Executive Branch and vested it in an officer removable only by congressional action.⁵ From its creation, GAO has provided a forum for the resolution of protests arising from government contract actions.⁶ Until the passage of the Competition in Contracting Act of 1984⁷ (CICA), GAO founded its authority to decide these matters through an admittedly expansive interpretation of the traditional authority

ask for appropriations to continue such practices. The knowledge on the part of every executive and bureau chief that such an independent and fearless department exists, and that every act and deed they will perform will come under the closest scrutiny of this department, will in itself force a much higher degree of efficiency in every department of the Government.

Id.; see also *id.* at 7093 (statement of Rep. Madden).

It is proposed to create this auditor and comptroller general so that he may be able to pass on all of the legal phases of every expenditure and at the same time audit the accounts and to make him so independent of the executive branch of the Government that no influence of any kind can be exercised over him in the discharge of his duties.

Id.

5. 61 CONG. REC. 982 (1921) (statement of Rep. Good). The Comptroller General is appointed by the President for a 15-year non-renewable term and can be removed "only for inefficiency, neglect of duty, malfeasance in office or conduct involving moral turpitude" upon a concurrent resolution of Congress or by impeachment. *Id.* at 991; 31 U.S.C. § 703(e)(1) (1988) (reflecting the compromise required for passage of the Budget and Accounting Act of 1921 that modified the concurrent resolution discussed *supra* to a joint resolution requiring the President's signature). President Wilson vetoed the measure in 1920 because of the removal provisions. 61 CONG. REC. 982 (statement of Rep. Good). See FREDERICK C. MOSHER, A TALE OF TWO AGENCIES 13-32 (1984), for a detailed history of the passage of the Budget and Accounting Act of 1921. See also 31 U.S.C. § 703(a) (1988). When a vacancy occurs, the President may appoint a new Comptroller General from a list of at least three candidates recommended by a commission comprised of the Speaker of the House, the President *pro tempore* of the Senate, the minority and majority leaders of the House and Senate, and the chairmen and ranking minority members of the Senate Committee on Governmental Affairs and the House Committee on Government Operations. *Id.*

6. See 1 Comp. Gen. 21 (1921) (regarding a contract for insuring registered mail). The first reported case, 4 Comp. Gen. 880 (1925), required the Department of the Interior to make a complete award to the lowest bidder for a surveying contract instead of splitting the work between the low bidder and the next lowest bidder. See 4 Comp. Gen. 1035 (1925); 4 Comp. Gen. 429 (1924); 4 Comp. Gen. 191 (1924); 3 Comp. Gen. 862 (1924); 3 Comp. Gen. 304 (1923); 2 Comp. Gen. 739 (1923); 2 Comp. Gen. 544 (1923); 1 Comp. Gen. 232 (1921) for other advanced decisions on procurement questions. See also W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION, § 33.2(a) (1986); James M. Weitzel, Jr., *GAO Bid Protest Procedures Under the Competition in Contracting Act: Constitutional Implications After Buckley and Chadha*, 34 CATH. U. L. REV. 485, 496 (1985).

7. Pub. L. No. 98-369, §§ 2701-2753, 98 Stat. 495, 1175-1203 (1984) (codified at 31 U.S.C. §§ 3551-3556 (1988)).

to settle accounts of the Treasury inherited by the Comptroller General.⁸ CICA formally authorized GAO's bid protest function,⁹ began the development of GAO's current bid protest process,¹⁰ and placed the agency firmly in the middle of a clash between congressional contract reform and an Executive Branch "contracting out" movement that demanded deference to contracting agencies.¹¹

At the signing ceremony for the Deficit Reduction Act of 1984 (which contained CICA), President Reagan declared war on GAO's new statutory authority, stating: "I must vigorously object to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the Executive Branch."¹² The President directed Attorney General Meese to formulate a policy for Executive Branch compliance with CICA "consistent with the Constitution."¹³ As a result of this directive, the Department of Justice issued a memorandum that was subsequently formalized in an Office of Management and Budget (OMB) Bulletin instructing Executive agencies not to comply with certain provisions of CICA that it considered unconstitutional.¹⁴

This open hostility to GAO's quasi-judicial role under CICA resulted in Justice Department challenges in the Third¹⁵ and

8. 36 Comp. Gen. 513, 514 (1957). See John Cibinic, Jr. & Jesse E. Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349 (1970) for a detailed analysis of the history of GAO's authority to decide government contract cases before CICA.

9. 31 U.S.C. §§ 3551-3556 (1988).

10. *Id.*; Eldon H. Crowell & David T. Ralston, Jr., *The New Government Contracts Bid Protest Law*, 15 PUB. CONT. L.J. 177 (1985) (detailing the provisions of and controversy surrounding CICA); see also 4 C.F.R. § 21.0-21.12 (1993) (current GAO bid protest regulations developed under CICA).

11. Alex D. Tomaszczuk & John E. Jensen, *The Adjudicatory Arm of Congress—The GAO's Sixty-Year Role in Deciding Government Contract Bid Protests Comes under Renewed Attack by the Department of Justice*, 29 HARV. J. ON LEGIS. 399, 400 (1992) ("GAO has in essence become the battleground in a rather unique struggle between the Executive and Legislative Branches of our government over who has the power to monitor the billions of dollars of federal contracts awarded each fiscal year."); OMB Circ. A-76 (Aug. 1983).

12. Crowell & Ralston, *supra* note 10, at 206 app. C.

13. *Id.* at 183, 206 app. C.

14. OMB Bull. No. 85-8 (Dec. 17, 1984).

15. *Ameron, Inc. v. United States Army Corps of Engineers*, 607 F. Supp. 962

Ninth¹⁶ Circuits as well as the United States Claims Court (Court of Federal Claims).¹⁷ Despite these tests, GAO has matured into a powerful independent administrative forum safeguarding the rights of government contract bidders to fair competition under all relevant laws and regulations. The *Canadian Commercial Corp./Heroux, Inc. (Heroux)*¹⁸ case not only provides an excellent example of the independence and quasi-judicial activism with which GAO now resolves bid protest matters, but it also illustrates the tension between the ends of competitive government contracting and deference to Executive Branch contracting initiatives. In sustaining Heroux's protest against the Air Force, GAO recommended the reversal of the Air Force's decision to award the contract to one of its own depot maintenance divisions on the sole basis that the Defense Contracting Audit Agency (DCAA) failed to certify the division's bid as required under the 1993 Department of Defense Appropriations Act¹⁹ (Appropriations Act). Finding DCAA's action to be an unreasonable interpretation of the Appropriations Act, GAO applied its own unique hybrid of the *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²⁰ test. GAO allowed the protester to successfully challenge action taken by a non-contracting agency that was attempting to effect a "permissible construction" of a statute it was authorized to administer.²¹ GAO synthesized its own case law with federal common law to find Heroux to be the low bidder, a decision that furthered its independent goal at the expense of Executive Branch discretion.²²

(D.N.J. 1985), *modified and aff'd*, 787 F.2d 875 (3rd Cir. 1986), *aff'd on reh'g*, 809 F.2d 979 (1986), *cert. granted*, 485 U.S. 958 (1988), *cert. dismissed*, 488 U.S. 918 (1988).

16. *Lear Siegler, Inc., v. Lehman*, 842 F.2d 1102 (9th Cir. 1988).

17. 441 4th St. Ltd. Partnership v. United States, Cl. Ct. No. 91-1692, Sept. 22, 1992, 38 CCF ¶ 76,408.

18. 72 Comp. Gen. 312, 93-2 CPD ¶ 144 (1994), *aff'd on recon.*, Comp. Gen. B-253278.3, April 7, 1994, 94-1 CPD ¶ 247.

19. Pub. L. No. 102-396, § 9095, 106 Stat. 1876, 1924 (1992); *see also* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 381, 106 Stat. 2315, 2392 (1992); 40 U.S.C. § 759(h) (1988) (codifying CICA's expansion of the General Services Administration Board of Contract Appeals to allow review of bid protests involving automatic data processing).

20. 467 U.S. 837 (1984).

21. *Id.* at 842-45.

22. 72 Comp. Gen. 312, 93-2 CPD ¶ 144 (1994) (citing *Hoboken Shipyards, Inc.*,

Parts II and III of this casenote will analyze the remarkable evolution of GAO's bid protest function to near independent regulatory agency status with Part III examining the *Heroux* decision in detail. Under the Supreme Court's holding in *Bowsher v. Synar*,²³ however, President Reagan's view of GAO prevailed—the Comptroller General was held to be an agent of Congress.²⁴ After determining whether GAO's application of the *Chevron* test could withstand judicial review, Part IV will explore the constitutional implications of a Legislative branch agency applying federal case law to challenge Executive Branch agency action.

II. THE REMARKABLE EVOLUTION OF GAO'S BID PROTEST FUNCTION

A. *The Authority to Settle Claims*

The Comptroller of the Treasury was one of six offices created within the Department of the Treasury by the Act of September 2, 1789.²⁵ The Comptroller was to "certify the balances" of public accounts and countersign all Treasury warrants collecting the debts of the United States.²⁶ The original Treasury scheme soon proved unworkable and was substantially modified decentralizing the settlement of accounts.²⁷ As a result, GAO was created with "[a]ll powers and duties which on June 30, 1921, were conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department"²⁸ Principal among these powers were the certification of balances "as final and conclusive upon the executive branch of the government"²⁹ and the subjection of personal liability upon a disbursing officer after finding that a payment

Comp. Gen. B-224184.2, Jan. 20, 1987, 87-1 CPD ¶ 70 and Newport News Shipbuilding and Dry Dock Co., Comp. Gen. B-221888, July 2, 1986, 86-2 CPD ¶ 23, *aff'd on recon.*, Comp. Gen. B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428, to analogize the contract under protest to a cost reimbursement contract).

23. 478 U.S. 714 (1986).

24. *Id.* at 731-32.

25. *Cibinic & Lasken*, *supra* note 8, at 352.

26. *Id.*

27. *Id.* at 353-54.

28. *Id.* at 355 (emphasis added) (citing 31 U.S.C. § 44 (1964)).

29. *Id.* (citing Act of Mar. 30, 1868, 15 Stat. 4).

was not made "in pursuance of the law."³⁰ Despite a 68-year old Executive Branch position that disappointed bidders for government contracts had no grounds to challenge awards,³¹ GAO interpreted these powers as providing the authority to hear bid protests; it reported its first decision in 1925.³² This interpretation was questioned by many, including GAO itself.³³ Yet, GAO remained the only bid protest forum until protesters were granted federal court standing in 1970.³⁴

No Comptroller General has ever taken the position that GAO's bid protest decisions are binding upon Executive Branch agencies.³⁵ However, the possibility that GAO could disallow a payment contrary to a bid protest decision and impose personal liability on the contracting officer for the illegal payment explains much of the long history of agency compliance with these decisions.³⁶ A second explanation for agency acquiescence is the substantial deference afforded the government in these actions.³⁷ Before 1972, GAO adjudicated protests with informal

30. *Id.* at 358-59 (footnotes omitted); KEYES, *supra* note 6, § 33.2.

31. Weitzel, *supra* note 6, at 494-95.

32. *Id.* at 496; *see also* 4 Comp. Gen. 880 (1925).

33. 36 Comp. Gen. 513, 514 (1957).

34. Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) (granting standing and reversing a line of cases beginning with Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) which denied standing in federal court to disappointed bidders).

35. 31 U.S.C. § 74 (1988); 4 C.F.R. § 21.6 (1993).

36. Cibnic & Lasken, *supra* note 8, at 359-60; *See* 44 Comp. Gen. 221 (1964) (recognizing GAO's authority to take such action); Tomaszczuk & Jensen, *supra* note 11, at 405; *e.g.* United States *ex. rel.* Brookfield Constr. Co. v. Stewart, 234 F. Supp. 94 (D.D.C. 1964).

Applying these principles to the case at bar, the decision of the Comptroller General in this instance is equivalent to an announcement that if the contract were made with the plaintiffs, he would disallow any payments that might be made by any disbursing officer thereunder. As a practical matter, no disbursing officer would make any such payments in the face of this ruling. To be sure, it would still be open to the plaintiffs to bring suit against the United States in the Court of Claims for any amount claimed to be due under the agreement. It was proper and prudent, however, for the Architect of the Capitol, acting under the direction and supervision of the House Office Building Commission, to decline to enter into a contract under such circumstances, because it would be undesirable and inexpedient to take a step that might tie up a large Government building project in litigation.

Stewart, 234 F. Supp. at 100.

37. Tomaszczuk & Jensen, *supra* note 11, at 403. This deference continues even today. For example, from 1984 to 1993 GAO has closed about 2600 cases per year with approximately 800 decided on the merits. Of those 800, GAO's sustain rate has

procedures that afforded protesters limited procedural rights.³⁸ There were no hearings, only informal conferences in which all interested parties could present their positions.³⁹ Frequent factual disputes arose as a result of the lack of a fact finding structure.⁴⁰ GAO uniformly decided issues of fact in favor of the agency: "We have consistently held that where there are disputed questions of fact, in the absence of evidence sufficiently convincing to overcome the presumption of the correctness of the administrative report, this Office will accept the administrative report as accurately reflecting the disputed facts."⁴¹

A third reason that Executive Branch agencies have historically followed GAO decisions is the nature of agency participation in the bid protest process. Although decisions on procurement policy often affect the Executive as a whole, each case

remained between ten and sixteen percent. 61 Fed. Cont. Rep. (BNA) 4 (Jan. 31, 1994). See *infra* note 44, for pre-CICA statistics.

38. Cibinic & Lasken, *supra* note 8, at 374-75; John B. Tieder, Jr. & John H. Tracy, *Forums and Remedies for Disappointed Bidders on Federal Government Contracts*, 10 PUB. CONT. L.J. 92, 95 (1978). In 1975, GAO revised temporary bid protest regulations promulgated in 1972. *Id.*; see also Alexander J. Brittin, *The Comptroller General's Dual Statutory Authority to Decide Bid Protests*, 12 PUB. CONT. L.J. 636, 638-39 (1993) (discussing the reasons behind the enactment of the 1972 and 1975 regulations).

39. Tomaszczuk & Jensen, *supra* note 11, at 405.

40. Report of the Bid Protest Committee, *The Protest Experience Under the Competition in Contracting Act*, 1989 A.B.A. SEC. PUB. CONT. L. REP. 81-82. Even under CICA an effective fact finding structure did not exist before the 1991 regulations. *Id.* GAO bid protest regulations now provide for adversarial hearings and protective orders that allow protesters access to all relevant documents. 4 C.F.R. §§ 21.3, 21.5 (1993). After the filing of a timely protest, GAO notifies the agency which in turn has 25 working days to file a report including all solicitation and bid documents (particularly those requested to be produced in the protest) used to make the challenged award and respond to the protester's claims. The awardee is also allowed to comment on the protest. The protester receives copies of the agency report as well as the comments of interested parties and is given ten days to comment. Failure to file timely comments results in dismissal of the protest. The protester may request additional production of documents after reviewing the agency report. GAO may ask for further submissions, and either party may request a hearing. 4 C.F.R. §§ 21.1 to .5 (1993); see OFFICE OF GENERAL COUNSEL, UNITED STATES GENERAL ACCOUNTING OFFICE, *BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE* (1991) (a protester's guide to GAO (call (202) 275-6241 to obtain a copy)). GAO may, however, conduct a hearing solely on its own initiative. TRI-COR Indus., Comp. Gen. B-252366, Aug. 25, 1993, 93-2 CPD ¶ 137 (denying the protester's argument that the hearing call by GAO was *ultra vires*).

41. 42 Comp. Gen. 124, 134 (1962).

generally only involves one agency.⁴² The agency representatives who award contracts and defend bid protests are not agency heads but contracting officers interested in completing the award process and having a qualified contractor begin work.⁴³ If GAO's decisions routinely required the participation of more than one agency or involved functions of the agency head, the Comptroller General's authority would certainly have been challenged. *Heroux*, an excellent example of the difficulty and congressional pressure that can accompany this type of case, involved both the Air Force and DCAA. Its holding invalidated DCAA's interpretation of appropriation language, which was a classic agency-head function.⁴⁴

B. The "Contracting Out" Initiative

In the 1970's GAO promulgated regulations under which a much more neutral forum for protesters developed,⁴⁵ and the number of protests began to rise markedly.⁴⁶ This trend ex-

42. Cibinic & Lasken, *supra* note 8, at 378-79.

43. *Id.*

44. In the wake of the *Heroux* decision, Congress has promulgated legislation which disputes the decision, *infra* note 130 and accompanying text, as well as revising the section of the Appropriations Act in question, *infra* notes 139-40 and accompanying text.

45. 4 C.F.R. § 20 (1975); *see also* Thomas D. Morgan, *The General Accounting Office: One Hope for Congress to Regain Parity of Power with the President*, 51 N.C. L. Rev. 1279, 1367 (1973) (arguing for the creation of a new division in GAO to resolve bid protests and the development of procedures to address the lack of due process in the current system); Tieder & Tracy, *supra* note 38, at 95; Tomaszczuk & Jensen, *supra* note 11, at 403. *But see* Cibinic & Lasken, *supra* note 8, at 394 (proposing that procurement law be revised so that decisions made in good faith by contracting officers would be "final and binding" on government, thereby precluding GAO review).

46. *Wheelabrator Corp. v Chafee*, 455 F.2d. 1306, 1314 n.10 (D.C. Cir. 1971). GAO decided only 206 cases on their merits in 1967 with 169 protests denied and seventeen sustained. In 1968, however, these numbers rose to 569 cases decided on the merits, 539 of which were denied and thirty sustained. *Id.* This increase is directly attributable to the promulgation of GAO's first bid protest regulations in 1967. Tomaszczuk & Jensen, *supra* note 11, at 403. In 1971, a year before GAO issued temporary revised regulations, 715 protests were decided on the merits with 641 denied and seventy-four sustained, 455 F.2d at 1314 n.10, compared with 887 filed, 24 sustained in 1973, Morgan, *supra* note 45, at 1338 n.204 (citing Fed. Cont. Rep. (BNA) No. 483, at A-4 (June 4, 1973)). In 1979, 1577 protests were filed reflecting the effect of the 1975 regulations. Tomaszczuk & Jensen, *supra* note 11, at 403 n.24 (citing 41 Fed. Cont. Rep. (BNA) 239, 239-40 (Feb. 13, 1984)).

ploded in the 1980's as the Reagan administration implemented the recommendations of the Grace Commission.⁴⁷ In 1983, the commission reported that the government could save \$474 million a year by 1986 if it aggressively contracted for the multitude of support services provided by in-house resources.⁴⁸ This report led to the revision of OMB Circular A-76 (A-76) which was originally published in 1966.⁴⁹ A prior revision had created the Cost Comparison Handbook and provided a method for conducting comparisons of government cost estimates and bids by private contractors.⁵⁰ However, the revised 1983 A-76 and supplement required agencies to perform cost comparison studies for all activities to which more than ten full-time employees were assigned and for which over \$100,000 was budgeted. If an agency determined that private commercial sources capable of replacing the activity in question existed, a cost estimate of the in-house performance of the activity was prepared using the Cost Comparison Handbook and submitted along with the private bids opened by the contracting officer.⁵¹

This process began the competition between government entities and private bidders. Agencies acting under A-76 utilized the procurement process to ensure that the in-house activity was more cost efficient than any private contractor by issuing a solicitation for the activity and canceling it upon a finding that the government cost estimate was the lowest bid.⁵² GAO initially found that "agencies may perform work in-house. Such

47. KEYES, *supra* note 6, at § 7.2(a)-(b). GAO resolved a record 2425 cases in 1983. 45 Fed. Cont. Rep. (BNA) 309 (Feb. 24, 1986). This mark was not topped until 1985 when CICA took effect and GAO resolved 2626. *Id.*

48. A Congressional Budget Office report estimated a \$335,000,000 first-year savings eventually reaching \$870,000,000 yearly. KEYES, *supra* note 6, § 7.2(a)-(b).

49. *Id.*

50. *Id.*

51. *Id.* at § 7.2(b)-(c).

The key to a make or buy decision is a comparison of the government's costs with a supplier's prices. An agency's decision to continue work in-house will be upheld where the agency accurately makes a cost comparison showing that contracting out is less costly. The Office of Management and Budget "Cost Comparison Handbook" prescribes the overall policies and detailed procedures required of all agencies in making cost comparisons between contractor and Government performance.

Id. at § 7.2(b) (footnotes omitted).

52. *Id.* § 7.2(b). The cost of contracting must be at least ten percent less than the government cost estimate. *Id.*

decisions are matters of Executive policy and not within the decisionmaking functions of the General Accounting Office,"⁵³ even when it was clear that the government cost estimate was erroneous and the decision to cancel the solicitation was detrimental to the procurement system.⁵⁴ However, this deference was not long-lived. In 1979, GAO reversed its position by holding that:

[w]hen, . . . an agency utilizes the procurement system to aid in its decisionmaking, spelling out in a solicitation the circumstances under which the government will award/not award a contract, we believe it would be detrimental to the system if, after the agency induces the submission of bids, there is a faulty or misleading cost comparison which materially affects the decision as to whether a contract will be awarded.⁵⁵

Some four years before the Grace Commission revision to A-76 and five years before the passage of CICA, GAO intervened in a process its own case law considered to involve issues of pure agency discretion in order to protect the integrity of the procurement system.⁵⁶ GAO's review of A-76 protests was limited to the question of whether the agency's cost comparison was

53. Kahoe Enter. Inc., Comp. Gen. B-183866, June 17, 1976, 76-1 CPD ¶ 389; accord To the Ass'n of Cinema Labs, Inc., Comp. Gen. B-170079, Sept. 15, 1970, 1970 WL 4349 (letter from Comptroller General); To Krause, Lindsay and Nahstoll, Comp. Gen. B-161862, Sept. 14, 1967, 1967 WL 2685 (letter from Comptroller General).

54. Kahoe Enter., 76-1 CPD ¶ 389; Service is Basic, Inc., Comp. Gen. B-186332, Oct. 1, 1976, 76-2 CPD ¶ 302.

55. Crown Laundry and Dry Cleaners, Inc., Comp. Gen. B-194505, July 18, 1979, 79-2 CPD ¶ 38.

56. The GAO intervened when the protester was an "interested party" as defined under 4 C.F.R. 21.0 (1975) ("an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by a failure to award a contract") Comp. Gen. B-210188, Jan. 17, 1983, 83-1 CPD ¶ 52 (declining to review A-76 procurement challenge raised on behalf of the federal employees of Fort Eustis and taxpayers generally). *E.g.*, Am. Fed'n of Gov't Employees, Local 1954, Comp. Gen. B-207359, Oct. 7, 1982, 82-2 CPD ¶ 315 (finding union protest of a decision to contract for services instead of using government employees not reviewable). *But see* Robert F. Catania, *Contracting Out: Management and Labor at War under Section 7106 of the Civil Service Reform Act*, 16 PUB. CONT. L.J. 287, 296 (1986) (urging GAO to reverse its position because it "is uniquely qualified to make determinations regarding contracting out protests"). The GAO also intervened when the protester had exhausted all available agency appeals. Urban Enter., Comp. Gen. B-201619, Feb. 17, 1981, 81-1 CPD ¶ 101; Direct Delivery Sys., 59 Comp. Gen. 465, 80-1 CPD ¶ 343 (1980).

correct and prepared in good faith, but these cases clearly shifted the focus of GAO's bid protest function from the protection of the public fisc to the protection of bidders' rights to fair competition.⁵⁷ In *Heroux*, GAO continued this shift by concentrating its analysis on the accuracy of the government cost estimate and DCAA's audit. Competition between government cost estimates and private bids uniquely illustrated the contention forwarded by congressional contract reformers under CICA—that waste and inefficiency should be addressed through the promotion of fair competition. Fair competition was promoted by GAO's activist review of these cases but the administration of A-76 was unquestionably burdened.⁵⁸

C. CICA—GAO as an Agent of Congressional Contract Reform

CICA's passage was the direct result of over a decade of congressional investigation of waste in the federal procurement system.⁵⁹ Its sponsors observed that "competition has become the exception rather than the rule," with the government awarding over \$100 billion in noncompetitive contracts in 1983 alone.⁶⁰ The insertion of the CICA bid protest provisions in the Deficit Reduction Act of 1984, however, only codified the existing process and purpose of GAO's bid protest function.⁶¹ Proclaiming as its purpose the establishment of advocates for the enhancement of accountability and the strengthening of the bid protest process,⁶² CICA hardly thrust GAO into a new role.⁶³

57. Integrity Management Int'l, Inc., Comp. Gen. B-207700, Nov. 4, 1982, 82-2 CPD ¶ 407; Dynetaria, Inc., Comp. Gen. B-205487, June 1, 1982, 82-1 CPD ¶ 506.

58. RCA Serv. Co., Comp. Gen. B-208204, Apr. 22, 1983, 83-1 CPD ¶ 435 (holding that the agency must re-analyze the government estimate and private offers in light of an amendment to the original Request For Proposals (RFP) before it can properly cancel the solicitation and perform the work in-house).

59. Tomaszczuk & Jensen, *supra* note 11, at 407 n.28 (citing COMMISSION ON GOVERNMENT PROCUREMENT, 93D CONG., 2D SESS., REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT (1972) and H.R. REP. NO. 1157, 98th Cong., 2d Sess. 10-17 (1984)).

60. H.R. REP. NO. 138, 99th Cong., 1st Sess. 3 (1985). See JOHN D. HANRAHAN, GOVERNMENT BY CONTRACT 226-72 (1983) for an insider's view of the Reagan Administration's extensive use of noncompetitive contracting.

61. Crowell & Ralston, *supra* note 10, at 178-79. The conference committee inserted the CICA provisions without any prior House or Senate consideration. *Id.*

62. H.R. CONF. REP. No. 861, 98th Cong., 2d Sess. 1445 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2123.

63. The Armed Services Procurement Act, 10 U.S.C. § 2301 (1988) and the Feder-

Recognizing this, the conference report noted that CICA merely provided GAO with a "statutory base"⁶⁴ by adding "a new subchapter to Chapter 35 of Title 31, United States Code, which codifies and strengthens the bid protest function currently in operation at the General Accounting Office (GAO)."⁶⁵ This strengthening was in the form of additional pre- and post-decision mechanisms. The pre-decision mechanism was the provision of an automatic stay of contract performance where protests were filed and the agency notified within ten days of the award.⁶⁶ This stay could only be circumvented by the head of the procuring agency upon a finding that the continued performance of the awarded contract was either in the best interests of the United States or that urgent and compelling circumstances did not permit the agency to wait for the decision.⁶⁷ The additional post-decision mechanism under CICA was the authority to award attorney's fees and the requirement that agencies report to GAO within sixty days any noncompliance with the recommendations of a GAO decision.⁶⁸ This noncompliance would then be transmitted to Congress in an annual report detailing all Executive Branch defiance.⁶⁹

D. Caught in the Crossfire

In 1985, GAO reported only two instances of agency noncompliance with its recommendations, but compliance with CICA's stay provision was another matter.⁷⁰ In an April 20, 1984, let-

al Property and Administrative Services Act, 41 U.S.C. § 251 (1988) were also modified. 31 U.S.C. §§ 3551-3556; see also JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 287-97 (2d ed. 1986).

64. H.R. CONF. REP. No. 861.

65. *Id.*

66. 31 U.S.C. § 3553(c)(1), (d)(1) (1988).

67. 31 U.S.C. § 3553(c)(2)-(d)(2) (1988). GAO has no recourse to enforce a stay in the face of such a finding communicated in writing. 4 C.F.R. § 21.4(b)(1)-(2) (1993).

68. GAO may also award bid preparation costs. 4 C.F.R. § 21.6(d) (1993).

69. 31 U.S.C. § 3554(e) (1988).

70. 45 Fed. Cont. Rep. (BNA) 309 (Feb. 24, 1986); see also 61 Fed. Cont. Rep. (BNA) 5 (Feb. 7, 1994) (reporting only one instance of noncompliance in 1993); 59 Fed. Cont. Rep. (BNA) 5 (Feb. 8, 1993) (two instances in 1992); 57 Fed. Cont. Rep. (BNA) 6 (Feb. 10, 1992) (no instances reported in 1991); accord Tomaszczuk & Jensen, *supra* note 11, at 410 n.49 (citing a Letter from the Comptroller General to the Honorable Dan Quayle (R-Ind.), President of the Senate, B-158766 (Jan. 31, 1992)).

ter to the Chairman of the House Government Operations Committee, Jack Brooks, Assistant Attorney General Robert A. McConnell communicated the Justice Department's position that certain CICA provisions, as proposed, violated the separation of powers doctrine under *Buckley v. Valeo*⁷¹ and "intended to create an even greater limit on the traditional broad discretion of executive agencies to conduct procurement activities than is now in existence."⁷² The Justice Department's objections centered around the automatic stay and award of attorney's fees provisions.⁷³ The automatic stay, the letter argued, allowed the Comptroller General to suspend indefinitely agency action and constituted a form of constitutionally prohibited committee approval of Executive action.⁷⁴ The authority to award fees was challenged as violative of the American rule⁷⁵ and an improper exercise of Legislative branch authority.

Whether this authority is analyzed as GAO's performing a judicial function which is binding on an executive agency,

71. 424 U.S. 1 (1976).

72. 42 Fed. Cont. Rep. (BNA) 122-124, *reprinted in* Crowell & Ralston, *supra* note 10, at 200 app. A.

73. *Id.* The McConnell letter also challenged the federal judiciary's authority to refer cases to GAO as outside the authority of Articles I or III of the U.S. Constitution:

First, § 204(b)(1) authorizes referrals from federal courts, in apparent violation of both Article I and Article III of the Constitution. It is not clear at what stage in a judicial proceeding the court would make the referral or whether GAO's recommendation would be an advisory opinion to the court or a final opinion to the parties. In either case, it would appear that GAO would be operating as some kind of adjunct to the judiciary. We are not aware of any authority in the Constitution that permits the Legislative Branch to provide advisory opinions to the Judicial Branch regarding pending cases. Article I authorizes the Legislative Branch to make laws, not to interpret them after they have been enacted. That task is given, under Article III, to the Judicial Branch. Thus, even if judges were inclined to ask for assistance, we believe that it would be unconstitutional for the Legislative Branch to provide it. It would raise equally serious problems under Article III if this section were read to permit GAO to render a final opinion to the parties, thereby usurping the judiciary's function. We therefore oppose the references to 'any court of the United States' in § 204(b)(1), and urge its deletion.

Id. at 198-99. See Crowell & Ralston, *supra* note 10, at 194-97, for a discussion of the proposed rules for the award of attorney's fees and bid preparation costs under CICA.

74. *INS v. Chadha*, 462 U.S. 919 (1983).

75. 42 Fed. Cont. Rep. at 124.

or as GAO's rendering an administrative decision for the Executive Branch, it is clearly unconstitutional. *Buckley v. Valeo*, 424 U.S. 1 (1976). The doctrine of separation of powers does not, except in certain very limited circumstances, permit the legislature or any of its parts to bind the Executive Branch except by passage of a law. Nor does it permit the Legislative Branch to execute the law by determining how contracts should be awarded or to adjudicate claims against the Executive Branch.⁷⁶

This letter spawned President Reagan's statement at the signing ceremony challenging the stay and attorney's fees provisions, an Office of Legal Counsel's memorandum determining these provisions to be unconstitutional, and an OMB Bulletin directing Executive agencies not to comply with GAO action under either provision.⁷⁷ A judicial challenge quickly followed these policy actions. *Ameron, Inc. v. United States Army Corps of Engineers*⁷⁸ involved a protester, Ameron, seeking a preliminary injunction to enforce a CICA stay of a pipe-cleaning contract pending GAO's decision.⁷⁹ The Justice Department defended the Army Corps, asserting the unconstitutionality of CICA's stay authority, and both the House and Senate intervened in support of CICA and Ameron.⁸⁰ The district court upheld the constitutionality of the stay authority and granted the injunction, finding GAO's bid protest function to be analogous to that of an independent agency.⁸¹ The court noted that the Comptroller General is appointed by the President and therefore may properly exercise Executive authority.⁸² Applying the analysis used by the Supreme Court in *Humphrey's Executor v. United States*,⁸³ which upheld the constitutionality of the Federal Trade Commission (FTC), the court found GAO's role under CICA to be that of an agency—independent of Executive or Legislative control—constitutionally exercising Executive

76. *Id.* (footnotes omitted).

77. Tomaszczuk & Jensen, *supra* note 11, at 415-16.

78. 607 F. Supp. 962 (D.N.J. 1985).

79. *Id.*

80. *Id.* at 963.

81. *Id.* at 970-74.

82. *Id.* at 972.

83. 295 U.S. 602 (1935).

authority.⁸⁴ In support of this conclusion, the court observed that the Comptroller General is removable by joint resolution of Congress only for good cause, that GAO exercises quasi-judicial and quasi-legislative authority in resolving its bid protest matters, and that the bid protest function is insulated from congressional interference.⁸⁵

On appeal, the Third Circuit upheld the district court's reasoning and found the Comptroller General, who is appointed for a fifteen-year non-renewable term, "to be one of the most independent officers in the whole of the federal government . . . whose functions are drawn from each of the branches."⁸⁶ Identifying GAO's bid protest function as falling within the "headless 'fourth branch' of government," the court stressed GAO's historical independence.⁸⁷ The court speculated (accurately) that the Justice Department's true motivation for the present challenge was Attorney General Meese's position that in a proper constitutional scheme the independent agencies that comprise this "fourth branch" would fall under Executive Branch control.⁸⁸ In affirming the district court, the Third Circuit not only disagreed with the Attorney General's view of the Constitution, but also the recent decision of a three-judge panel of the United States District Court for the District of Columbia in *Synar v. United States*.⁸⁹ *Synar* struck down portions of the Gramm-Rudman-Hollings Act vesting the authority to mandate certain budget cuts in the Comptroller General, an officer removable by joint resolution of Congress. Applying *Humphrey's Executor*, the Third Circuit noted its disagreement with *Synar's* holding, concluded that the possible congressional removal of the Comptroller General precluded any grant of Executive authority to GAO, and upheld Congress' power to create independent agencies with functions drawn from all three branches.⁹⁰

In testimony before the House Committee on the Judiciary,

84. 607 F. Supp. at 972-74.

85. *Id.*

86. *Ameron, Inc. v. United States Army Corps. of Engineers*, 787 F.2d 875, 885 (3d Cir. 1986).

87. *Id.* at 886.

88. *Id.* at 887 n.6.

89. 626 F. Supp. 1374 (D.D.C. 1986).

90. 787 F.2d at 885-87.

Mr. Meese threatened not to follow any adverse resolution of *Ameron* until "the Supreme Court finally laid the matter to rest."⁹¹ *Synar* reached the Supreme Court as *Bowsher v. Synar*⁹² and seemed to provide the result for which Mr. Meese had hoped. The Court held that "because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers."⁹³ The Comptroller General's duties under Gramm-Rudman-Hollings were viewed "as plainly entailing execution of the law in constitutional terms."⁹⁴ In the wake of *Bowsher*, *Ameron* was reargued with the Justice Department adding a challenge to CICA's fee provision.⁹⁵ The *Bowsher* Court observed that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."⁹⁶ The Justice Department seized on this language in framing its *Ameron II* reargument contending that: (1) the Comptroller General's ability to shorten or lengthen a stay constituted the authority to execute CICA; (2) the control of the procurement process afforded the Comptroller General by CICA was an improper authorization to execute procurement law; and (3) that CICA authorizes "excessive legislative interference in a domain the Constitution assigns to the executive [sic]."⁹⁷

The Third Circuit refused to consider the newly added fee challenge on ripeness grounds since *Ameron* never had a claim for attorney's fees.⁹⁸ On the question of the stay provision, CICA once again prevailed. Limiting *Bowsher's* application to grants of authority to "direct the exercise of Presidential authority" to the Comptroller General as was the case with Gramm-Rudman-Hollings' budget cutting authority, the court concluded that "the mere fact that a non-executive government official interprets the law, however, does not in and of itself

91. *Id.* at 890.

92. 478 U.S. 714 (1986).

93. *Id.* at 732.

94. *Id.* at 733.

95. *Ameron, Inc. v. United States Army Corps. of Engineers*, 809 F.2d 979 (3d Cir. 1986) [hereinafter *Ameron II*].

96. 478 U.S. at 733.

97. 809 F.2d at 989.

98. *Id.* at 988. *Ameron's* protest was denied by GAO. *Ameron, Inc., Comp. Gen. B-218262*, April 29, 1985, 85-1 CPD ¶ 485.

mean that this official infringes on the President's authority to execute the law.⁹⁹ The *Ameron II* decision, reflecting *Bowsher's* holding that GAO is an agent of the Legislative branch examined the challenge in terms of pure congressional authority.¹⁰⁰ The court held CICA to be a proper exercise of congressional power which neither improperly delegated power previously given to the Executive, nor granted GAO the authority to execute procurement law.¹⁰¹ The contract reform that motivated the passage of CICA, the court continued, was a purpose that clearly outweighed the "limited potential disruption" of the procurement process.¹⁰²

Mr. Meese's victory in *Bowsher* may not have convinced the Third Circuit to reverse itself, but it did transform GAO's bid protest function under *Ameron* from that of a constitutional, independent agency to "meaningful oversight by an agent of Congress."¹⁰³ The Supreme Court granted certiorari, but Congress compromised by amending CICA to require that GAO issue decisions at least ninety working days from receipt, and the Justice Department withdrew its petition.¹⁰⁴

The constitutionality of CICA's fee provision was challenged again in a 1992 suit seeking declaratory relief. The defendants in *United States v. Instruments, S.A., Inc.*¹⁰⁵ prevailed on summary judgment with the court holding that the challenge was "not ripe for decision and [that] prudential concerns counsel[ed] against declaratory relief."¹⁰⁶ The court's ripeness determination hinged upon a similar challenge in the Court of Federal Claims that had not been renewed after GAO amended its regulations under CICA in 1991.¹⁰⁷

99. *Id.* at 990; see also *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (upholding the appointment procedures for independent counsels under the Ethics and Government Act of 1978 which involve all three branches).

100. 809 F.2d at 988-99.

101. *Id.*

102. *Id.* at 997-98.

103. *Id.* at 998.

104. Tomaszczuk & Jensen, *supra* note 11, at 419 n.95.

105. 807 F. Supp. 811 (D.D.C. 1992).

106. *Id.* at 815; Tomaszczuk & Jensen, *supra* note 11, at 400 (discussing the threat that *Instruments, S.A.* could hold for GAO's bid protest function).

107. 807 F. Supp. at 814-15.

Despite the Justice Department's assault, GAO's statutory authority under CICA emerged virtually unscathed.¹⁰⁸ The Executive tried to affect a judicial line item veto and failed. Notwithstanding *Bowsher* and *Ameron II*, GAO's 1991 bid protest regulations reasserted a role for the bid protest function analogous to that of an independent agency.¹⁰⁹ Under these regulations, GAO can issue protective orders and hold hearings allowing protesters access to more information and ensuring the development of an adequate record.¹¹⁰ The *Heroux* case involved both a protective order and a hearing, and it is questionable whether the protest could have been sustained without them.¹¹¹

III. CANADIAN COMMERCIAL CORPORATION/HEROUX, INC.

A. *The Protest*

Heroux, Inc. held the contract for the repair and overhaul of aircraft landing gear at Ogden Air Force base for twenty years prior to the passage of the 1993 Department of Defense Appropriations Act¹¹² (Appropriations Act). Section 9095 of the Appropriations Act authorized competition between Department of Defense (DOD) maintenance activities and private contractors.¹¹³ The resulting competition was substantially similar to that under A-76 in that the government estimate was prepared using a cost comparability handbook,¹¹⁴ and once the compara-

108. In the Ninth Circuit, CICA was not only found to be constitutional, but the government's refusal to comply was found to constitute bad faith. *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1110-12, 1119 (9th Cir. 1988).

109. 4 C.F.R. § 21.0-21.12 (1993); Tomaszczuk & Jensen, *supra* note 11, at 412-13. "In contrast to the minimal impact of the 1987 amendments, changes to the GAO bid protest regulations adopted in 1991 radically transformed bid protest procedures at the GAO for the first time since CICA." *Id.* at 412.

110. *See supra* note 40.

111. *Heroux* centered around the DCAA audit of the government's cost estimate. The protester utilized a protective order to compel full production of DCAA's audit documentation. In addition, all parties participated in a hearing that further developed the record. *Canadian Commercial Corp./Heroux, Inc.*, 72 Comp. Gen. 312, 93-2 CPD ¶ 144 (1994).

112. Pub. L. No. 102-396, 106 Stat. 1876 (1992).

113. 106 Stat. at 1924.

114. The government cost estimate was prepared and audited under the Cost Comparability Handbook developed by the Defense Depot Maintenance Council Cost Com-

ble costs were added to the estimate, the DOD entity competed with all other bidders.¹¹⁵ The Appropriations Act, however, excluded the application of A-76 and required that DCAA "certify that the successful bids include comparable estimates of all direct and indirect costs for both public and private bids."¹¹⁶

The Air Force issued a solicitation to compete with Heroux's landing gear maintenance contract and the Department of the Air Force, Ogden Air Logistics Center, Financial Management Plans and Program Division (FMP) submitted a proposal along with Heroux and several other private bidders. The Air Force determined that the FMP and Heroux proposals held the higher technical merit and that technically, the two proposals were "essentially" equal.¹¹⁷ The deciding factor was cost, and FMP's cost proposal was referred to DCAA for audit in compliance with the Cost Comparability Handbook.¹¹⁸ DCAA's audit found FMP's proposal to have understated its labor costs by \$1,059,569, but reported that FMP's proposal "was acceptable for evaluation."¹¹⁹ The Air Force subsequently met with DCAA to determine the reason for these apparently contradictory findings. DCAA explained that the "acceptable for evaluation" language certified FMP's bid at \$14,139,712, which did not reflect any adjustment for the understated labor costs. DCAA interpreted section 9095 of the Appropriations Act as requiring the certification of all reasonable bids. Since the understated costs amounted to under nine percent of DCAA's \$15,426,575 cost estimate, DCAA found FMP's costs to be "fairly represented."

parability Committee. 72 Comp. Gen. 312, 93-2 CPD ¶ 144 (1994).

115. *Id.* In DWS, Inc., Comp. Gen. B-211950, Feb. 10, 1984, 84-1 CPD ¶ 164, GAO found that the "supplement to A-76 (August 1983) permits the conversion of a contracted commercial activity after a contractor's performance becomes unsatisfactory only if (1) recompetition with other sources fails to result in a reasonable price and (2) a cost comparison of the activity indicates that it would be more economical to perform the activity in-house."

116. Section 9095 stated "[n]otwithstanding any other provision of law, during the current fiscal year, the Secretary of Defense may acquire the modification, depot maintenance and repair of aircraft . . . through competition between Department of Defense maintenance activities and private firms . . ." 106 Stat. at 1924. *See* RJO Enter., Comp. Gen. B-252232, 93-1 CPD ¶ 446 (1993) (finding "notwithstanding any other provision of law" to override the Small Business Act).

117. 72 Comp. Gen. 312, 93-2 CPD ¶ 144 (1994) (FMP scored 74 compared with Heroux's 76).

118. *Id.*

119. *Id.*

After this explanation, the Air Force awarded the work assignment to FMP without any cost adjustment.¹²⁰

Heroux bid a firm fixed price of \$15,237,394, and argued in its protest that DCAA's construction of section 9095 was arbitrary and capricious in light of the findings of its own audit.¹²¹ DCAA responded that its audits are opinions and that "auditors [have] substantial discretion to determine when, in their professional opinion, a bid includes comparable costs."¹²²

B. GAO's Application of Chevron

GAO found DCAA's certification of FMP's proposal at \$14,139,712 to be "unreasonable" given the section 9095 requirement that all costs—direct and indirect—were to be included in certified cost estimates.¹²³ Although GAO did not refer to either the Administrative Procedure Act (APA) or the *Chevron*¹²⁴ test (formulated to govern judicial review of agency action under the APA), their decision was clearly based upon the application of this law. The application of *Chevron* is a two step process:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹²⁵

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

125. 467 U.S. at 842-43.

Section 9095's legislative history consisted of one line in the House Report—"Amends House provision to require DCAA to certify that winning bids under public/private competitions have included all labor and nonlabor costs."¹²⁶ The *Heroux* decision does not indicate that GAO examined this history and found that Congress had not directly addressed this issue, but there can be no question but that it must have. GAO's non-bid protest legal functions require its lawyers to be experts in researching and interpreting legislative history, and GAO is the repository of what may be the most complete collection of legislative histories.

In finding DCAA's action arbitrary and capricious, the *Heroux* decision analogized the FMP proposal to that of a cost reimbursement type contract "because the government is not legally obligated to pay a private firm more than the offered price, while the government will pay for any cost overruns by a DOD entity from public funds."¹²⁷ Recognizing the danger of substantial waste, GAO case law applies a strict level of accountability to agencies making cost reimbursement contract awards. *Heroux*, in turn, applied this strict accountability to DCAA's certification role holding "that FMP's proposal can only be certified by DCAA as including comparable estimates of all direct and indirect costs at the upward adjusted price of \$15,426,575."¹²⁸ GAO ignored the traditional deference afforded an Executive agency's construction of a statute in which it is authorized to administer in furtherance of its independent goal of increased competition for public contracts.¹²⁹ The *Ameron II* court considered GAO's CICA authority as a proper extension of congressional authority promoting a purpose that justified any disruption of the Executive Branch.¹³⁰ *Heroux* relies on the importance of this purpose to invalidate DCAA's execution of the law.

126. S. REP. No. 408, 102d Cong. 2d Sess. § 9095 (1992), *reprinted in* 1992 WL 373417, at *514 (Leg. Hist.).

127. 72 Comp. Gen. 312, 93-2 CPD ¶ 144 (1994) (citing *Hoboken Shipyards, Inc.*, Comp. Gen. B-224184.2, Jan. 20, 1987, 87-1 CPD ¶ 70 and *Newport News Shipbuilding and Dry Dock Co.*, Comp. Gen. B-221888, July 2, 1986, 86-2 CPD ¶ 23, *aff'd on recon.*, B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428).

128. *Id.*

129. See *Chevron*, 467 U.S. at 844.

130. *Ameron*, 809 F.2d at 997-98 (*Ameron II*).

IV. JUDICIAL REVIEW

A. *Federal Appeal*

Heroux could be appealed to either the Court of Federal Claims or federal district court assuming that DCAA loses its pending reconsideration.¹³¹ Given the nature of GAO reconsiderations, this seems a certainty.¹³² However, the reconsideration must answer the question of what should be the proper treatment of post-decision legislative history in a case decided under *Chevron*. With the reconsideration of *Heroux* pending, Congress has attempted to fill the void in section 9095's legislative history.

The conferees wish to clarify their intent that, for competitions carried out under this provision, DCAA audit reports containing an opinion that a bid was prepared in accordance with the DOD Cost Comparability Handbook and is acceptable for evaluation shall be considered a valid certification. The inclusion of findings questioning costs as either understated or overstated are to be considered of an advisory nature only, unless specifically stated by DCAA.¹³³

Traditionally, post-enactment legislative history has received little weight, but the inclusion of this language in the 1994 DOD Appropriations Act Conference Report¹³⁴ further marks GAO's independence under *Heroux*.¹³⁵ GAO's certain denial of

131. *Scanwell Lab. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1969). *Canadian Commercial Corp./Heroux, Inc.—Reconsideration*, Comp. Gen. B-2532.78.3, Apr. 7, 1994, 94-1 CPO ¶ 247, released well after the submission of this casenote, affirmed the original decision.

132. In 1988, GAO did not reverse a single decision despite the filing of 291 reconsiderations. 51 Fed. Cont. Rep. (BNA) 305 (Feb. 13, 1989). Out of 324 reconsiderations handled in 1987, one that was initially dismissed was sustained, two dismissals were reinstated only to be denied on the merits, and four cases were affirmed with modification to the recommended remedy. 49 Fed Cont. Rep (BNA) 299 (Feb. 22, 1988).

133. 139 CONG. REC. 8978, 8991 (1993) (debating the DOD Appropriations Act of 1994).

134. H.R. CONF. REP. NO. 339, 103d Cong., 1st Sess. (1993) (Conference Report on H.R. 3116, Department of Defense Appropriations Act of 1994).

135. In its reconsideration decision, GAO found the post-decision legislative history to provide "no basis" for a reversal of a decision that "the Defense Contract Audit Agency improperly certified the proposal of a DOD depot pursuant to section 9095 of the 1993 DOD Appropriations Act, where the 1993 Appropriations Act language was

the pending reconsideration will advance its independent authority to promote fair competition over both that of DCAA and Congress. The conference report's "Depot Maintenance" subsection also "urge[d] the Department to improve its programs for depot maintenance competition"¹³⁶ Only through true independence can GAO ignore what is plainly direct congressional influence designed to improve competition for depot maintenance contracts.¹³⁷

In participating in the reconsideration, DCAA has no doubt also taken the opportunity to frame a deference argument for appeal.¹³⁸ Such an appeal would be received much more favor-

clear." Comp. Gen. B-253278.3, Apr. 7, 1994, 94-1 CPD ¶ 247.

We see no way to give effect to the contrary approach suggested by the Conference Report accompanying the 1994 DOD Appropriations Act. As stated above, we agree with DCAA's interpretation that in order for it to comply with the requirement that it "certify that the successful bids include comparable estimates of all direct and indirect costs," DCAA was required to determine whether the successful offeror's costs were fairly stated and reasonable.

Id.

136. H.R. CONF. REP. NO. 339.

137. *Id.* The *Heroux* reconsideration addressed GAO's authority under CICA in the following manner:

CICA provides that the Comptroller General shall decide protests "concerning an alleged violation of a procurement statute or regulation." The 1993 Appropriations Act is the statute that authorizes DOD to procure the repair of aircraft components through competition between DOD depot maintenance activities and private firms and is therefore a "procurement statute." Thus, CICA grants our Office authority to consider protests that the 1993 Appropriations Act's certification requirements were not followed.

Comp. Gen. B-253278.3 94-1 CPD ¶ 247 (citations omitted).

138. DCAA did in fact argue for deference on reconsideration and met this result:

DCAA's argument that we did not properly defer to its interpretation of section 9095 of the 1993 Appropriations Act is predicated on DCAA's misunderstanding of our decision [O]ur determination that DCAA did not act reasonably in certifying FMP's proposal was not based on an interpretation of section 9095 of the 1993 Appropriations Act contrary to that of DCAA's. Rather, we agreed with DCAA's position that under section 9095 it was required to determine whether FMP's costs were fairly stated or reasonable in order to certify FMP's proposal, but found that DCAA's certification of FMP's proposal costs was contradicted by DCAA's own findings, presented in its audit report, that showed FMP's costs were not fairly stated or reasonable.

Id.

This attempt to clarify the issue of deference to DCAA's interpretation of section 9095 is a clear retreat from its application of *Chevron* in *Heroux*, but is illustrative of the difficult position of GAO in an APA review of agency statutory interpreta-

ably in a federal district court than the Court of Federal Claims. The Court of Federal Claims has retained a deferential position toward review of GAO decisions,¹³⁹ but the majority of federal district courts and the District of Columbia Circuit have retreated from GAO deference viewing its decisions as only advisory opinions.¹⁴⁰ A federal district court appeal of *Heroux* will present the question: what weight if any should GAO's expert opinion on DCAA's interpretation of section 9095 be given under *Chevron*? GAO will no doubt argue for deference from the reviewing court—perhaps using *Chevron* as well.¹⁴¹ Deference to the *Heroux* decision will require the reviewing court to follow the decision unless it lacks a rational basis—clearly, an impossibility. A federal court cannot be bound by an agency's application of Supreme Court law. Deference to GAO, it would seem, is not possible in a *Heroux* appeal regardless of the forum.

Federal court review will reapply *Chevron* to the facts of the protest, but it is doubtful whether GAO's cost reimbursement contract analysis would convince the reviewing court.¹⁴² The

tion. GAO now holds that DCAA's interpretation of its own audit data is unreasonable given GAO's caselaw concerning the certification required of bids by DOD entities and the cost reimbursement nature of these estimates. *Id.* (citing *Hoboken Shipyards, Inc.*, Comp. Gen. B-224184.2, Jan. 20, 1987, 87-1 CPD ¶ 70 and *Newport News Shipbuilding & Dry Dock Co.*, Comp. Gen. B-221888, July 2, 1986, 86-2 CPD ¶ 23, *aff'd on recon.*, B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428). On Appeal, DCAA can now challenge GAO's lack of deference to DCAA's authority to interpret its own audit findings as well as lack of deference to DCAA's construction of section 9095's certification requirement.

139. *Commercial Energies, Inc. v. United States*, Cl. Ct. No. 90-300, Apr. 16, 1990, 36 CCF ¶ 75,846 (requiring that GAO's decisions be upheld unless irrational); *accord Heath Sys. Mktg. & Dev. Corp. v. United States*, Cl. Ct. No. 91-1116, Sept. 30, 1992, 26 Cl. Ct. 1322.

140. See *Rapides Regional Medical Ctr. v. Secretary Dept. of Veteran Affairs*, 974 F.2d 565 (5th Cir. 1992); *Irvin Industries Canada, Ltd. v. United States Air Force*, 924 F.2d 1068 (D.C. Cir. 1990); *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197 (D.C. Cir. 1984); and *Technology for Communications Int'l, Inc. v. Garrett*, 783 F. Supp. 1446 (D.D.C. 1992) for cases abandoning the deference forwarded in *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971) and *M. Steinthal & Co. v. Seaman*, 455 F.2d 1289 (D.C. Cir. 1971).

141. GAO does not consider the APA to apply to its bid protest decisions. *Polaroid Corp.—Reconsideration*, Comp. Gen. B-209753.2, Jan. 10, 1983, 83-1 CPD ¶ 24. "The simple answer to this assertion is that the General Accounting Office, as a legislative branch organization, is not subject to the APA. Moreover, the APA generally does not apply to matters involving public contracts." *Id.* (citations omitted).

142. *Blue Cross & Blue Shield of Md., Inc. v. HHS*, 718 F. Supp. 80 (D.D.C. 1989)

court will defer to DCAA's attempted construction of section 9095.¹⁴³ The possibility of waste that controlled GAO's *Chevron* analysis will certainly receive consideration, but the court could easily place the burden of cost reimbursement accountability on the contracting officer's determination not to adjust FMP's cost proposal upward and uphold DCAA's action.¹⁴⁴ The post-decision legislative history clearly suggested this result.

B. *Constitutional Implications*

The 1994 DOD Appropriations Act¹⁴⁵ rendered moot any constitutional challenge to GAO's authority to declare DCAA's section 9095 construction unreasonable. Under the 1994 Appropriations Act, DCAA's certification role is filled by the Senior Acquisition Executive or a delegate.¹⁴⁶ Any separation of powers challenge must wait for GAO to apply *Heroux*, but if it continues to provide a forum for APA review of agency action related to government contracting,¹⁴⁷ GAO may be vulnerable to two distinct separation of powers challenges.¹⁴⁸ One of the Department of Justice's challenges in *Ameron II* was that CICA

(applying a strict standard of review to a contracting officer's decision when awarding a cost-reimbursement contract).

143. See Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. Rev. 757 (1991), for an analysis of the Supreme Court's application of *Chevron* which has been marked by substantial deference.

144. GAO has consistently placed the responsibility for conducting and acting on an accurate cost realism analysis upon the contracting officer even when a DCAA's audit has proved inaccurate. *Purvis Sys. Inc.*, 71 Comp. Gen. 203, 92-1 CPD ¶ 132 (1992); *Marine Animal Prod. Int'l, Inc.*, Comp. Gen. B-247150.2, July 13, 1992, 92-2 CPD ¶ 16; *American Management Sys., Inc.*, 70 Comp. Gen. 510, 91-1 CPD ¶ 492 (1991); *General Research Corp.*, 70 Comp. Gen. 279, 91-1 CPD ¶ 183 (1991).

145. Pub. L. No. 103-139, 107 Stat. 1418 (1993).

146. *Id.* at 1455 § 8068.

147. *E.g.*, *Sargent Controls & Aerospace*, Comp. Gen. B-254976, Feb. 2, 1994, 94-1 CPD ¶ ___ (sustaining protest of section 9095 procurement where DCAA certified the proposal as "acceptable for evaluation" without conducting a cost realism analysis).

148. *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2310 (1991) [hereinafter *Metropolitan*]. "Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches." *Id.*; see also *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (citing *Morrison v. Olson*, 487 U.S. 654, 693 (1988); *Bowsher v. Synor*, 478 U.S. 714, 725 (1986); *Buckley v. Valeo*, 424 U.S. 1 96 (1976); *Humphrey's Ex'r*, 295 U.S. 602, 629-30 (1935)); THE FEDERALIST No. 47 (James Madison).

granted GAO the authority to execute federal procurement law. This challenge never reached the Supreme Court and more recent separation of powers cases in no way preclude its renewal. The second possible challenge is to the activist role GAO took in deciding *Heroux*. APA challenges are a form of Article III judicial review of agency action, and by continuing to provide the relief granted *Heroux*, GAO could face claims that its bid protest function is an Article I judicial entity improperly exercising Article III authority.

1. Article II Execution?

Turning first to the question of GAO's execution of federal procurement laws under CICA, *INS v. Chadha* limited Congress' exercise of Legislative authority to the "single, finely wrought and exhaustively considered, procedure[s]" of Article I.¹⁴⁹ Considerations of efficiency and efficacy were held to be secondary to the preservation of the inherent checks and balances of our tripartite government.¹⁵⁰ Under *Bowsher v. Synar*, "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment,"¹⁵¹ and as an officer removable by joint resolution of Congress, the Comptroller General cannot constitutionally be vested with "executive power."¹⁵² The Court's decision in *Metropolitan Washington Airports Authority v. Citizens for the*

149. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

150. *Id.* at 959.

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary acts to go unchecked. There is no support . . . for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by Congress or by the President.

Id.

151. *Bowsher*, 478 U.S. at 726.

152. *Id.* at 730; *Morrison*, 487 U.S. at 686 (distinguishing *Bowsher* from the challenge to independent counsel provisions of the Ethics in Government Act of 1978 since an independent counsel is removable by the President (not Congress) for good cause); *Myers v. United States*, 272 U.S. 52 (1926) (striking as unconstitutional a statute that required the advice and consent of the Senate prior to the removal of certain postmasters).

Abatement of Aircraft Noise, Inc. (Metropolitan) combined the *Chadha* and *Bowsher* holdings to create a strict test of possible separation of powers violations by the Legislative Branch:

If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I § 7. In short, when Congress "[takes] action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," it must take that action by the procedures authorized by the Constitution.¹⁵³

This test seriously questions the *Ameron II* court's vision of GAO's bid protest function as a proper extension of congressional authority, but would not fully resolve the questions presented by a CICA challenge. Despite apparently constructing a bright line standard, the Court continues to recognize the necessity of some overlap among the three branches as each works to perform effectively its constitutional role.¹⁵⁴ The framers' intent to create an integrated government with power spread among three overlapping branches thereby preventing tyranny has long been applied to separation of powers issues.¹⁵⁵ One of the earliest of these cases, *Humphrey's Executor v. United States*, concerned the constitutionality of congressional restrictions on presidential power to remove members of the FTC.¹⁵⁶

Created by the Federal Trade Commission Act, the Commission's members were removable by the President only for "inefficiency, neglect of duty, or malfeasance in office."¹⁵⁷

153. *Metropolitan*, 111 S. Ct. at 2312 (quoting *Chadha*, 462 U.S. at 952-55).

154. *Mistretta*, 488 U.S. at 380. The Court has rejected a strict interpretation of separation of powers in favor of Madisonian flexibility. See, e.g., *Nixon v. Adm'r of General Services*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. 683 (1974).

155. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 635 (1952). "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed power into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Id.* at 635 (Jackson, J., concurring).

156. 295 U.S. 602 (1935).

157. *Id.* at 620 (citing Act of Sept. 26, 1914, ch. 311, §, 38 Stat. 717, 718 (codified

The Court found the Commission authorized to act “in part quasi-legislatively and in part quasi-judicially”¹⁵⁸ and that “[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted.”¹⁵⁹ The separation of powers analysis applied today no longer “turn[s] on the labeling of an activity.”¹⁶⁰ Instead, challenged statutes are examined for possible impact on the function of a particular branch or the tripartite structure as a whole.¹⁶¹ The Court’s focus is on “encroachment or aggrandizement of one branch at the expense of the other.”¹⁶²

A successful Article II challenge to GAO’s “execution” of federal procurement law under CICA must demonstrate that GAO’s bid protest function impedes Executive Branch performance of its constitutional duty.¹⁶³ Factors that the Supreme Court has considered in evaluating possible Executive Branch interference are whether the statute presents a “dange[r] of congressional usurpation, . . . impermissibly undermine[s]’ the powers of the Executive Branch, . . . [or] . . . disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.”¹⁶⁴ Where Congress has only reserved response and reporting requirements in a particular provision,

at 15 U.S.C. §§ 41-42 (1988)).

158. *Id.* at 628.

159. *Id.* at 629.

160. *Mistretta v. United States*, 488 U.S. 361, 393 (1989);

We undoubtedly did rely on the terms “quasi-legislative” and quasi-judicial” to distinguish the officials involved in *Humphrey’s Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a “good cause”-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as “purely executive.” The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President’s exercise of the “executive power” and his constitutionally appointed duty to “take care that the laws be faithfully executed” under Article II.

Morrison v. Olson, 487 U.S. 654, 689-90 (1988) (footnotes omitted).

161. *Mistretta*, 488 U.S. at 382; *Morrison*, 487 U.S. at 685-96.

162. *Buckley v. Valeo*, 424 U.S. 1, 35 (1976).

163. *Morrison*, 487 U.S. at 691.

164. *Id.* at 694-96 (citations omitted).

there is no unconstitutional interference with Executive Branch functions.¹⁶⁵

Although Congress' removal authority over the Comptroller General is not limited only to impeachment power, it is limited to grounds of "permanent disability; inefficiency; neglect of duty; malfeasance; or a felony or conduct involving moral turpitude."¹⁶⁶ This power is almost identical to that given the President under the Federal Trade Commission Act, and it follows that GAO enjoys substantial independence as a result. Further, GAO's bid protest function enjoys more independence than the rest of the agency which investigates, audits, and evaluates agencies and issues for Congress.¹⁶⁷ CICA merely codified authority that GAO has exercised since 1921.¹⁶⁸ The seventy-three year evolution of GAO's bid protest forum has been controlled not by Congress but by the growth of the Executive Branch with its resulting contract needs and problems.

During this long history, the Executive Branch has turned to GAO for a final resolution of bid protests and as a result achieved its procurement needs. Each GAO bid protest decision provides recommendations that the agency may follow to complete its contracting effort.¹⁶⁹ GAO's bid protest forum has evolved with the Executive Branch and in the process has become an integral part of federal contracting. Certainly, the small success rate of protesters at GAO is direct evidence of GAO's utility for contracting agencies.¹⁷⁰ While CICA did shift GAO's focus from protecting public accounts to promoting fair competition, it provides no basis upon which to ignore history

165. *Id.* at 694.

166. 31 U.S.C. § 703(e)(1) (1988).

167. One interesting example of the independence of the Procurement Law Division of the Office of General Counsel which performs GAO's bid protest work is that in the thirteen years Comptroller General Charles A. Bowsher has served, he has never signed a bid protest decision. Although his name appears on many decisions and all where the protest is sustained, his Special Assistant or the General Counsel has always signed for him. MOSHER, *supra* note 5, at 136-163 (describing the development of the audit and evaluation work done by GAO since 1950). In addition to the preparation of reports and testimony resulting from issue area work, GAO has statutory audit and reporting requirements. 31 U.S.C. §§ 712-20 (1988).

168. *See supra* notes 2-10 and accompanying text.

169. Unless the protest is dismissed or denied not on the merits. *See* 4 C.F.R. § 21.3 (1993).

170. *See supra* note 37.

and declare that GAO review of bid protests impedes the constitutional function of the Executive.¹⁷¹ This argument is particularly implausible in light of the ninety-day statutory deadline imposed on GAO decisionmakers. Fair competition for government contracts can only impede the policies and practices that led to the waste that motivated congressional contract reform. CICA threatens only to usurp wasteful federal spending and provide Congress with information vital to the continued refining of public contract law, not to encroach on Executive authority.

2. Improper Article III Power?

Congress not only has the authority to regulate the jurisdiction¹⁷² and procedure¹⁷³ of Article III courts, but it may also create courts under Article I.¹⁷⁴ This authority ends, however, where Congress seeks to remove any matter that is traditionally the subject of suit "at the common law, or in equity, or admiralty" from Article III decision and place it within the purview of an Article I court.¹⁷⁵ Where the matter removed from Article III review is a private, common law right, Article I judicial delegations are even more suspect.¹⁷⁶ Montesquieu's maxim,

171. Again, CICA merely codified a shift which began with GAO review of A-76 protests. See *supra* notes 55-64 and accompanying text.

172. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) (upholding the establishment of procedures outside Article III for the collection of a customs debt).

173. *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (upholding rules promulgated under the Rules Enabling Act of 1934).

174. *E.g. Atlas Roofing Co. v Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977) (upholding Article I judicial assignment under the Occupational Health and Safety Act); *Palmore v. United States*, 411 U.S. 389, 397 (1973) (Congress has authority to "exercise exclusive Legislation in all Cases whatsoever" in the District of Columbia); *Wiener v. United States*, 357 U.S. 349, 356 (1958) (upholding the creation of the War Claims Commission to adjudicate claims of World War II veterans); *Williams v. United States*, 289 U.S. 553 (1933) (finding the Court of Claims to be a legislative court); *Crowell v. Benson*, 285 U.S. 22, 50 (1932) (defining the public-rights doctrine which establishes Legislative authority over matters arising between government and individuals granted a public right); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828) (observing complete congressional authority to create territorial courts not in conformity with Article III).

175. *Murray's Lessee*, 59 U.S. (18 How.) at 284.

176. *Northern Pipeline Constr. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (striking the Bankruptcy Reform Act's designation of bankruptcy courts as Article I

“[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*,” aptly describes the basis for these Article III concerns.¹⁷⁷ CICA provided the statutory authority and judicial framework for GAO’s activism in *Heroux* and if GAO continues to provide APA review of agency interpretations of statutory authority as it did in *Heroux*, clearly it will adjudicate traditional Article III claims.

Under CICA, GAO is required to determine whether the “protested procurement action has involved government non-compliance with statutes or regulations,” but neither the statute nor the legislative history mention statutory interpretation or the application of federal case law.¹⁷⁸ GAO’s activism may constitute the improper exercise of Article III power, but there has been no express congressional assignment of this power. A successful challenge to this activism, therefore, must either establish that GAO’s bid protest function is under the supervision and control of Congress or that CICA was an overly broad grant of judicial authority.

Although the Comptroller General is an agent of Congress, he does not serve at the will of the Congress. As a result, GAO is an independent agency within the Legislative Branch. Within this independent agency, the bid protest function operates as an independent regulatory agency resolving disputes and developing case law for the government procurement industry.¹⁷⁹ The history of Executive agency reliance on this independence and compliance with this regulation cast grave doubt on the success of any challenge alleging congressional control of bid protest decisions.¹⁸⁰

adjuncts of federal district courts).

177. THE FEDERALIST No. 47, at 248 (James Madison) (Basil Blackwell ed., 2d ed. 1987).

178. H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1435 (1984), reprinted in 1984 U.S.C.A.N. 697, 2123. GAO has recognized *res judicata* in decisions from the D.C. Circuit. 62 Comp. Gen. 399 (1983). GAO extends the same deference to the Court of Federal Claims. 47 Comp. Gen. 573 (1968). In deciding protests, GAO will defer to federal court rulings where they concern procurement. Tieder & Tracy, *supra* note 38, at 100.

179. *Steinthal & Co. v. Seaman*, 455 F.2d 1289, 1313-15 (1971), 455 F.2d at 1313-15 (recognizing GAO’s long history and extensive case law); see also Fed. Cont. Rep. (BNA) 5 (Feb. 8, 1993) (GAO received a record 3,258 protests in 1992 and closed 3,167).

180. “Once the procedures outlined in CICA are enacted, however, Congress has no

On the issue of an overly broad grant of judicial authority, Supreme Court case law specifically upholds the creation of forums of the type authorized under CICA. Where the assignment involves claims of public right in a "particularized area of law," the Court has consistently denied Article III separation of powers challenges.¹⁸¹ These assignments are governed by the public-rights doctrine which "extends only to matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,' and only to matters that historically could have been determined exclusively by those departments."¹⁸² CICA's codification of GAO's sixty-four year old judicial authority and the denial of Article III review for protesters before 1970 unquestionably place GAO's bid protest authority under the public-rights doctrine.¹⁸³ GAO's particularized area of law was also defined well before

involvement whatsoever in the procurement process. Congressional influence is completely excluded from the bid protest process, unlike the legislative veto procedure struck down in *Chadha*.¹⁸¹ *Ameron, Inc. v. United States Army Corps of Engineers*, 607 F. Supp. 962, 973 (D.N.J. 1985).

181. *Northern Pipeline Constr. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982). See also *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851-53 (1986); *Northern Pipeline*, 458 U.S. at 67-70; *Crowell v. Benson*, 285 U.S. 22, 50 (1932). Compare Kevin T. Abikoff, Note, *The Role of the Comptroller General in Light of Bowsher v. Synar*, 87 COLUM. L. REV. 1539, 1548 n.71 (1987), which concludes that GAO's bid protest function is constitutional based on *Schor's* divergence from *Northern Pipeline* and *Crowell*. Abikoff argues that the constitutionality of GAO's bid protest function can be established by meeting a two-step analysis. "First, it must be established if the function being delegated is quasi-judicial. Second, if the function is quasi-judicial, the extent of the tribunal's power and the nature of the claim to be adjudicated must pass the *Schor* balancing test." *Id.* at 1551 (footnote omitted). The commentator defines the test as follows:

The *Schor* balancing test is two pronged, as it examines the extent of the tribunal's power and the nature of the claim to be adjudicated. A non-article III tribunal is more likely to be constitutional where it exercises powers of a limited scope and in a narrow subject area. Moreover, it is less offensive to article III where the claim has historically been heard by other than an article III court, the suit is not to vindicate a constitutional right, and it is impracticable for Congress to vest the particular power in an article III court.

Id. at 1548.

182. *Northern Pipeline*, 458 U.S. at 67-68 (quoting *Crowell*, 285 U.S. at 50).

183. In granting APA standing to disappointed bidders, the *Scanwell* Court found these protesters to be acting as "private attorney general[s]." *Scanwell Lab. v. Shaffer*, 424 F.2d 859, 864 (D.D.C. 1970).

CICA's passage. GAO's activism is strictly limited to procurement matters.

Other factors that the Court has considered in upholding Article I judicial functions that are relevant to GAO's CICA role are the fact GAO bid protest decisions are only recommendations¹⁸⁴ and the fact that the parties involved in a bid protest choose to submit the matter to GAO.¹⁸⁵ If protest is filed with GAO and then subsequently one of the parties files in a federal district court, GAO will dismiss the protest unless the federal court requests that it make a decision.¹⁸⁶

V. CONCLUSION

Heroux illustrates GAO's evolutionary paradox—increased activism results in increased congressional pressure. GAO relies on the possibility of future congressional action to enforce its recommendations. This dependency and GAO's non-bid protest role as the investigative arm of Congress preclude the total independence that the bid protest function deserves and preserve separation of powers questions for possible Executive challenge. It is ironic that under the contract initiative at issue in *Heroux*, bureaucrats were considered independent enough to review impartially a bid prepared by an adjacent office, yet questions remain about GAO's bid protest function despite seventy-three years of independent decisionmaking.

Heroux's significance may simply lie in the type of jurisprudence used to decide it, yet it also typifies the likely form that an increasing number of future protests will take. These protests and the A-76 protests before them are the clear result of government contract reform—Executive and Legislative. Thus, the overlap Madison envisioned between branches is redefined. In its dual role as an independent Legislative Branch agency and an Executive Branch utility, GAO strives to serve the best

184. *Schor*, 478 U.S. at 853.

185. *Id.* at 855.

186. 4 C.F.R. §§ 21.3 (m)(11), 21.9 (1993).

interests of government while walking a precarious middle ground.

John M. Holloway III

