No. 85-1377

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES,
Appellant,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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February 18, 1986

QUESTION PRESENTED

Whether it is unconstitutional for the Comptroller General, an independent officer of the United States duly appointed for a statutory term of years by the President by and with the advice and consent of the Senate, to perform administrative functions of a factfinding nature assigned to him by a 1985 law, merely because the 1921 law creating his office contains a provision for his removal for cause after hearing by enactment of a joint resolution presented to the President for approval or veto, when neither the President nor Congress has ever attempted to remove a Comptroller General for cause or otherwise and there has been no determination of their respective constitutional powers to do so.

PARTIES IN THE COURT BELOW

This appeal is from two cases that were consolidated in the court below and involve largely identical questions. The parties in Civil Action No. 85-3945 were Representatives Mike Synar, Garry L. Ackerman, Albert G. Bustamente, Silvio O. Conte, Don Edwards, Vic Fazio, Robert Garcia, John J. LaFalce, Jim Moody, Claude D. Pepper, Robert G. Torricelli, and James A. Trafficant, Jr. as plaintiffs; the United States as defendant; and the Comptroller General of the United States, the United States Senate, and the Speaker and Bipartisan Leadership Group of the United States House of Representatives (Speaker Thomas P. O'Neill, Jr., Majority Leader Jim Wright, Minority Leader Robert H. Michel, Majority Whip Thomas S. Foley, and Minority Whip Trent Lott) as intervening defendants. The parties in Civil Action No. 85-4106 were the National Treasury Employees Union as plaintiff and the same defendant and intervening defendants as No. 85-3945.

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OPINION BELOW

The opinion of the district court is not yet reported. It is reproduced as Appendix A in the Appendices accompanying this Jurisdictional Statement.

JURISDICTION

These suits were brought under section 274(a) of the Balanced Budget and Emergency Deficit Control Act of 1985 (the "Act"),[1] for a declaratory judgment that portions of the Act are unconstitutional. Section 274(a)(1) authorizes any Member of Congress to bring an action in the United States District Court for the District of Columbia for "declaratory judgment and injunctive relief on the ground that any order that might be issued pursuant to

[1] Pub. L. No. 99-177, 99 Stat. 1037, App. 55a.

section 252 [of the Act] violates the constitution." Section 274(a)(2) authorizes any "person adversely affected by any action taken under [the Act]" to bring an action in the same court "for declaratory judgment and injunctive relief concerning the constitutionality of [the Act]." Section 274(a)(5) requires that any action brought under those subsections be heard and determined by a three-judge court in accordance with 28 U.S.C. § 2284. Section 274(c) of the Act further provides:

> "It shall be the duty of the District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a)."

The cases were consolidated and heard by a three-judge court, which entered its judgment in both cases on February 7, 1986 (Appendix B). Appellant Charles A. Bowsher, the Comptroller General of the United States, filed his notice of appeal with respect to both cases in the district court that day (Appendix C).

This Court has jurisdiction pursuant to section 274(b) of the Act, which authorizes a direct appeal to this Court from any order issued by the district court in an action brought under paragraph (1), (2), or (3) of section 274(a). Jurisdiction exists also under 28 U.S.C. § 1252 (1982).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Act is set forth in Appendix D hereto. The Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (1921), which established the office of the Comptroller General and prescribed the manner of his appointment and removal, is set forth in Appendix E. Section 703 of Title 31 U.S. Code, which currently codifies the provisions relating to the appointment and removal of the Comptroller General, is set forth in Appendix F. Article II, sec-

tion 2, clause 2 of the Constitution, dealing with the appointment of officers of the United States, is set forth in Appendix G.

STATEMENT

This case involves the constitutionality of the Balanced Budget and Emergency Deficit Control Act (the "Act" or "1985 Act"),[2] a statute creating a new governmental mechanism designed to reduce the massive federal budget deficits the United States has experienced in recent years. The Act delegates administrative functions of a factfinding nature to the Comptroller General, as part of a process designed to achieve deficit reduction targets fixed by the Act through across-the-board cuts in specified categories of government spending. That process will come into play each year from fiscal 1986 through fiscal 1991 and will result in automatic cuts unless the deficit target for the relevant year is achieved through the normal annual budget and appropriation process. Over the six-year period, the deficit targets in the Act shrink successively to zero.

The Comptroller General's Responsibilities Under The Act.

The deficit reduction mechanism in the Act requires the Comptroller General to make two administrative determinations: (1) the amount, if any, by which the projected deficit will exceed the statutory target for the coming fiscal year; and (2) what reduction, if any, the Act requires to be made in each nonexempt category of federal spending in order to achieve the target. In order to project the size of the deficit, the Comptroller General must estimate the levels of federal budget outlays and receipts on the basis of detailed assumptions set forth in the Act.[3] If the projected

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[2] Pub.L. No. 99-177, 99 Stat. 1037, App. 55a.

[3] *See* Act § § 251(a)(1), (2), (6), 251(b), App. 81a-82a, 85a-86a.

deficit exceeds by $10 billion or more (or $0 in fiscal years 1986 and 1991) the target deficit fixed in the Act for that year, the Comptroller General is to specify the amounts and percentages by which spending must be reduced in each federal spending account to eliminate the "deficit excess" for that year.[4]

The Act prescribes detailed rules for determining the amounts of spending reductions in each account. The necessary reduction is split evenly between defense and nondefense programs, with certain nondefense programs exempted.[5] The reduction is then allocated among specific accounts.[6]

In order to assist the Comptroller General in making his determinations, the Act requires the Directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO") to make a report to him in which they give their judgments as to the facts he must determine.[7] If the Directors fail to reach agreement on their estimates of the total budget deficit or on the proper allocation of the reductions among accounts under the Act, they must report the average of their differing figures as well as the figures each Director separately proposes for the items in question.[8]

The Directors' report is advisory to the Comptroller General, who then makes his own report to the President and Congress. The Comptroller General is to make an "independent analysis," which is to begin before he receives the Directors' report and is to include monitoring "all

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[4] *See* Act § § 251(a)(2), 251(b), App. 82a, 86a. The Act establishes a maximum deficit reduction of $11.7 billion for fiscal 1986. Act § 251(a)(3), App. 82a-84a.

[5] Act § 251(a)(3)(B), App. 82a.

[6] Act § 251(a)(3)(C), (D), (E), (F), App. 83a-84a.

[7] Act § 251(a)(1), App. 81a-82a.

[8] Act § 251(a)(5), App. 85a.

relevant data on an on-going basis."[9] He is directed to give "due regard" to the Directors' report and follow the same statutory guidelines they are required to follow.[10] He must "explain fully any differences between the contents of [his] report and the report of the Directors."[11]

The Comptroller General's report, unlike that of the Directors, has operative consequences. If his report projects a deficit excess for the fiscal year, it "triggers" a statutory requirement that the President issue a sequestration order eliminating the excess by reducing automatic spending increases and sequestering funds.[12] The President is required to act on the basis of the Comptroller General's report.[13] The President's order becomes effective thirty days later, unless Congress meanwhile enacts a joint resolution meeting the Act's deficit target in some different way.[14] The Comptroller General must submit a report to Congress and the President each year detailing the compliance of the President's sequestration order with the requirements of the Act.[15]

The statutory process is well under way for fiscal 1986. The Directors issued their joint report on January 15, 1986; the Comptroller General issued his report on

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[9] Conference Report, H.R. Rep. No. 433, 99th Cong., 1st Sess. 84 (1985) ("Conf. Report").

[10] Act § 251(b)(1), (2), App. 86a; Conf. Report at 74.

[11] Act § 251(b)(2), App. 86a.

[12] Act § 252(a)(1), App. 90a; Conf. Report at 76.

[13] Act § § 252(a)(1), (3), 252(b)(1), App. 90a, 92a, 94-95a; Conf. Report at 74, 76, 78. The President has limited discretion to allocate funds for defense spending in fiscal year 1986. Act § 252(a)(2), App. 91a.

[14] Act § § 252(a)(1), 254(b), App. 90a, 98a-100a. In fiscal years after 1986, the reporting procedure will be followed a second time later in the fiscal year, to account for changes in laws and regulations since the first report cycle. Act § 251(c), App. 86a-87a.

[15] Act § 253, App. 96a.

January 21, 1986; and the President issued his sequestration order on February 1, 1986. That order becomes effective under the terms of the Act on March 1, 1986.[16]

The Proceedings Below.

Plaintiffs in these cases invoked the judicial review provision in the Act by filing suits against the United States to challenge the Act's constitutionality. The district court granted motions to intervene as defendants filed by the Comptroller General, the Senate, and the Speaker and Bipartisan Leadership Group of the House of Representatives. That court expedited the proceedings as required by section 274(c) of the Act and heard the cases on motions to dismiss and for summary judgment. Those motions framed a number of constitutional issues, including the issue the Comptroller General raises on these appeals. The United States, although a defendant in the actions, moved for summary judgment that the Act is unconstitutional on some of the grounds asserted by the plaintiffs, including the ground adopted by the district court.

The district court issued its opinion and judgment on February 7, 1986. It declared the Act unconstitutional insofar as it delegates administrative functions to the Comptroller General, but rejected or found no need to consider all other constitutional challenges to the Act.

The district court based its ruling of unconstitutionality on its view that "executive power" may not be conferred on the Comptroller General because he is an officer "removable by Congress."[17] The court assumed, without deciding, that the Comptroller General, who is duly appointed by the President by and with the advice and consent of the Senate, is an "officer of the United States" within the meaning of the Appointments Clause of the

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[16] Act § 252(a)(6)(A), App. 93a.

[17] Order at 2, App. 52a.

Constitution.[18] However, it regarded the Comptroller General as "removable by Congress" because a provision of the Budget and Accounting Act of 1921 ("1921 Act"),[19] which established his office with a 15-year nonrenewable term, states that he may be removed by impeachment or, after hearing, for cause by joint resolution of Congress.[20] Although a joint resolution, like a bill, must be presented to the President for his signature or veto,[21] the court treated the Comptroller General as removable unilaterally by Congress because of the possibility that a veto might be overridden by a two-thirds vote of both Houses.[22]

The district court found that this removal provision gives the Comptroller General a "presumed desire to avoid removal by pleasing Congress," creating a "here-and-now subservience to another branch" that is impermissible in an officer performing administrative duties.[23] The district court rejected the Comptroller General's argument that removability for cause does not make an officer of the United States subservient to the removing authority. The court recognized that this Court in *Humphrey's Executor v. United States*[24] upheld the power of Congress to enact laws establishing independent officers of the United States and to bar the President from removing them at will even

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[18] U.S. Const. art. II, § 2, cl. 2, App. 131a; *see* Opinion at 34 & n.23, App. 34a.

[19] App. 120a, *codified at* 31 U.S.C. § 701 *et seq.*

[20] *See* 31 U.S.C. § 703(e) (1982), App. 129a. The 1921 Act included the phrase "and for no other cause and in no other manner." 1921 Act § 303, App. 123a-24a. The Code revision enacted in 1982 deleted that phrase as "surplus." 31 U.S.C.A. § 703 (1983), note at 63, App. 130a.

[21] *See* U.S. Const. art. I, § 7, cl. 3.

[22] Opinion at 31 & n.21, App. 31a.

[23] *Id.* at 30, App. 30a.

[24] 295 U.S. 602 (1935), *discussed in* Opinion at 37-48, App. 37a-48a.

though he appoints them by and with the advice and consent of the Senate as prescribed in the Appointments Clause. However, the district court found this case controlled not by *Humphrey's Executor* but by the earlier holding in *Myers v. United States,*[25] in which this Court, with Justices Holmes, McReynolds, and Brandeis dissenting, struck down an 1876 statutory provision reserving to Congress the power to advise and consent to the removal as well as the appointment of a postmaster.[26] The Constitution, the district court ruled, forbids Congress to have any role (except through impeachment) in the removal of officers of the United States who exercise "executive powers."[27] Because the 1921 Act provides a congressional role in the removal of the Comptroller General for cause, the court found him constitutionally incapable of exercising the "executive powers" given him by the 1985 Act.

The district court also rejected the Comptroller General's contention that any constitutional infirmity in the 1921 removal provision should be cured by striking that provision, not by invalidating the administrative duties conferred on the Comptroller General by the 1921 Act and by subsequent laws including the 1985 Act. The court did not consider or decide whether the removal provision created an issue of constitutional incompatibility within the terms of the 1921 Act itself. Instead, it presumed that, if the delegation of administrative duties in the 1985 Act were found to be inconsistent with the removal provision in the 1921 Act, Congress would have

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[25] 272 U.S. 52 (1926).

[26] *See* Opinion at 36-37, 45-46, App. 36a-37a, 45a-46a. In *Humphrey's Executor*, however, the Court unanimously confined the *Myers* holding to "purely executive officers." 295 U.S. at 631-32. A majority of the *Myers* Court joined in the *Humphrey's Executor* ruling.

[27] *Id.* at 46, 48, App. 46a, 48a.

chosen to preserve the removal provision rather than the 1985 delegation of additional administrative duties. It cited no legislative history of either Act to support that presumption.[28]

THE QUESTION IS SUBSTANTIAL

This case presents important and substantial issues that require resolution by this Court. Congress recognized this when it passed the Act and provided for expedited judicial review. The President did the same when he signed the Act into law.

The mounting federal budget deficit and how to deal with it are matters of great public concern. The decision below invalidates a key provision fashioned by Congress for dealing with this crisis, namely, the role it assigns to the Nation's chief accounting officer, the Comptroller General, in allocating budget cuts as directed by the Act. This key provision is the "forcing mechanism" generally regarded as the central feature of the Act.

In striking down this provision, the district court has decided a constitutional issue of first impression, incorrectly in our submission, with repercussions that go far beyond even the important circumstances of this case. The decision below affects the Comptroller General's capacity to perform not only the new administrative duties delegated to him under this critical 1985 Act. It also calls into question his ability to perform other important administrative duties delegated to him by other statutes beginning with the 1921 Act. The 1921 Act abolished the office of the Comptroller in the Treasury Department, transferred its powers to the new Comptroller General, declared his office to be independent of the executive

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[28] *Id.* at 32-34, App. 32a-34a. In other portions of its opinion, the district court rejected the United States' argument that the congressional plaintiffs lack standing and plaintiffs' argument that the Act impermissibly delegates legislative power. *Id.* at 12, 27-28, App. 12a, 27a-28a.

departments, and thus established him as an independent fiscal watchdog over the administration of federal spending laws and the settlement of the Government's accounts. The constitutional issue decided below and its ramifications are substantial, and require plenary consideration by this Court.

No prior case in this Court has reached the issue decided below. Beginning with *Humphrey's Executor*, this Court has consistently affirmed that Congress may enact laws delegating administrative and other functions to officers of the United States who are duly appointed for a term of years by the President by and with the advice and consent of the Senate, but who are to perform their functions independently of presidential or congressional supervision, and who therefore are not removable *at the pleasure* of the President.[29] This Court has not had occasion to pass on whether the President's constitutional power to appoint an independent officer of the United States carries with it the power to remove the appointee *for cause*, or whether Congress can constitutionally participate in the removal for cause of such an officer through enactment of a law presented to the President. In *Humphrey's Executor*, the statute itself authorized the President to remove Federal Trade Commissioners for cause, and the Court held only that the President had no constitutional power to remove a Commissioner at pleasure. In *Wiener v. United States,*[30] where the statute was silent about removal, the Court again held only that the President had no constitutional power to remove an independent officer (a War Claims Commissioner) at pleasure.

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[29] *See Buckley v. Valeo*, 424 U.S. 1, 128 n.165, 141 (1976). Footnote 165 in *Buckley* refers to the Comptroller General as an officer properly appointed under the Appointments Clause to whom the administrative functions involved in that case could be delegated. "Administrative" is the term used in *Buckley, id.* at 141, although the court below used the term "executive."

[30] 357 U.S. 349 (1958).

Moreover, this Court has not passed on whether a power of removal for cause, whether by the President alone or by Congress through the enactment of a joint resolution, makes an independent officer of the United States subservient to the removing authority, or otherwise impairs the officer's capacity to perform his administrative functions independently of presidential or congressional direction. *Humphrey's Executor*, of course, suggests the contrary. The Court there found that the intent of the Federal Trade Commission Act was to make the Commission "free to exercise its judgment without the leave or hindrance of any other official or any department of the government."[31] The Court in *Humphrey's Executor* did not appear to believe that the President's right under the statute to remove Commissioners *for cause* impaired their freedom "from executive control."[32] It is equally difficult to believe that a reserved congressional power to remove an officer for cause by joint resolution after hearing—never exercised in the 65 years of its existence—impairs the Comptroller General's freedom from congressional control.

The ruling below presents another novel issue. The district court found an impermissible conjunction between an otherwise valid provision of the 1985 Act—delegating administrative functions to the Comptroller General—and the removal-for-cause provision of the 1921 Act. It therefore elected to hold the 1985 provision unconstitutional. But it could, and in our submission should, have elected to consider and decide whether the 1921 removal provision was itself unconstitutional, a holding that its own reasoning would have justified.[33] The problem of in-

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[31] 295 U.S. at 625-26.

[32] *Id.* at 628.

[33] *See* Opinion at 45-48, App. 45a-48a, where the district court embraces the view that, impeachment aside, the President has the sole constitutional power to remove any officer whom he appoints by and

compatibility the district court found between the 1921 and 1985 provisions existed within the 1921 Act itself, which also assigned administrative functions of a factfinding nature to the Comptroller General. But the court below did not consider or refer to this incompatibility or to the legislative history of the 1921 Act. In our submission, that history shows that Congress intended to make the Comptroller General an independent officer of the United States capable of performing the administrative functions assigned to him under the 1921 Act, that Congress was aware of the constitutional question raised by the removal provision (which was a modified version of what President Wilson had vetoed as unconstitutional a year earlier), and that even if the removal provision were struck down, Congress wanted to preserve the balance of the statute creating the Comptroller General as an independent officer performing his assigned functions.

The court's rationale for its holding—its presumption that Congress would not have selected the Comptroller General to perform the additional administrative functions assigned under the 1985 Act but for the reserved congressional power to remove him and the "subservience" this induced[34]—has no support in the legislative history of the 1985 Act, and the court cited none. To the contrary, the legislative history established that Congress wanted the Comptroller General to perform these functions independently of both the President and Congress. By choosing to brand unconstitutional the 1985 delegation instead of the 1921 reservation of power to remove for cause, the Court below arrived at the result that most clearly frustrated the will of Congress in enacting both these laws.

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with the advice and consent of the Senate and who performs an administrative or "executive" function.

[34] Opinion at 33, App. 33a; *see id.* at 30, App. 30a.

The district court also found a precedent for its ruling in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[35] It analogized the removal clause of the 1921 Act to the 14-year term of the bankruptcy judge, which creates the possibility of nonrenewal. "It is his presumed desire to avoid that possibility by pleasing the appointing power, just as in the present case it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems."[36] That theory proves far too much. It would invalidate all fixed terms for independent officers of the United States performing administrative duties, because fixed terms would create subservience to the Senate as well as to the President with whom it shares the reappointment power. In carrying *Northern Pipeline* to such an extreme, the district court ignored the special constitutional status of Article III judges, whose tenure "during good Behaviour" is obviously inconsistent with a 14-year term.[37]

Moreover, *Northern Pipeline* was very different in another critical respect. There, Congress had made absolutely clear its intent that bankruptcy judges *not* be Article III judges. Congress created their offices with characteristics it *knew* to be facially inconsistent with Article III status. The question debated in Congress and ultimately decided by this Court was whether some of the functions delegated by the Bankruptcy Act could be lodged in non-Article III judges.[38] When this Court answered in the

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[35] 458 U.S. 50 (1982), *discussed in* Opinion at 29-34, App. 29a-34a.

[36] Opinion at 30, App. 30a.

[37] U.S. Const. art. III, § 1.

[38] *See* 458 U.S. at 57-62. In *Northern Pipeline*, the Court was dealing with a removal-for-cause provision, a 14-year term, *and* salaries subject to diminution, all of which are plainly incompatible with Arti-

negative, the only result consistent with the clear congressional intent as to the non-Article III status of the bankruptcy judges was to invalidate the delegation of those functions.

The situation here is the opposite. Congress made plain its intent in the 1921 Act that the Comptroller General be an independent officer of the United States, capable of performing the administrative and other functions delegated under that Act. Congress had the same intent when it assigned additional administrative duties to the Comptroller General in 1985. The remedy for any invalidity in the 1921 Act's removal provision should therefore be to strike that provision so as to effectuate this continuing congressional intent.

CONCLUSION

For these reasons, this Court should note probable jurisdiction and expedite its review of the judgment below in accordance with the joint motion of the parties accompanying this Jurisdictional Statement.

Respectfully submitted,

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cle III status. Other officers of the United States of course have no constitutional guarantee of tenure during good behavior. Moreover, the power to remove for cause in *Northern Pipeline* was vested in the Judicial Branch, and raised no separation-of-powers issue between the Legislative and Executive Branches.

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