Nos. 85-1377, 85-1378, and 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL, ET AL.,

Appellants,

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

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

MEMORANDUM OF THE NATIONAL TREASURY EMPLOYEES UNION IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENTS

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QUESTIONS PRESENTED

Whether the automatic spending reduction mechanism created by the Balanced Budget and Emergency Deficit Control Act of 1985 violates the separation of powers doctrine because:

1. It grants unelected administrative officials discretion to determine whether and to what extent spending levels for a broad range of legislative programs should be altered, without providing an intelligible principle to confine their discretion, and without permitting judicial review of their method of exercising that discretion; and

2. It requires the Comptroller General, an official who is removable by Congress, to make determinations that automatically trigger changes in spending levels authorized under enacted legislation.

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OPINION BELOW

The opinion of the district court is not yet reported. It is set forth in the Appendix to the Jurisdictional Statement filed by the appellant Charles G. Bowsher, Comptroller General, at 1a-52a.

JURISDICTION

The jurisdiction of the district court was based on section 274(a)(1) and (2) of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, and the consolidated cases below were heard and determined by a three-judge court pursuant to section 274(a)(5) of the Act, App. 116a. The district court entered its final order on February 7, 1986. App. 51a.

This Court has jurisdiction over these appeals under 28 U.S.C. 1252 because the order of the district court holds that provisions of an Act of Congress are unconstitutional. The jurisdiction of this Court is also founded on section 274(b) of the Act, App. 116a-117a, which provides in part: "Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States."

INTRODUCTION AND STATEMENT

1. This case arose out of consolidated challenges to the automatic spending reduction mechanism of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1037, brought by the National Treasury Employees Union and a group of Congressmen. Under the Act, the economic forecasts made by certain administrative officials result in automatic reductions in, and elimination of, appropriated funds for a broad range of legislative enactments.

The goal of the Act is to reduce the size of the federal deficit to zero by fiscal year 1991. To do so, the Act establishes a maximum deficit amount for each fiscal year between 1986 and 1991. Section 201(a)(1), App. 57a. Under the Act, the Office of Management and the Budget (OMB) and the Congressional Budget Office (CBO) are to issue a report each year, on August 20th, that determines anticipated revenues and outlays for the coming year, forecasts economic conditions, and then predicts whether and by how much the projected deficit will exceed the target deficit for the year. Section 251 (a)(1), (a)(2), App. 81a-82a. If the projected deficit exceeds the target by over 10 billion dollars, then OMB and CBO must specify the spending cuts in existing programs that must be made, in accordance with the for-

mula Congress has established, in order to meet the target deficit amount. Section 251(a)(2), App. 82a. Within five days, the Comptroller General reviews the report and issues his own. Section 251(b), App. 86a. Thereafter, on September 1st, the President must issue a sequestration order, implementing the cuts specified by the Comptroller General. Section 252(a)(1), App. 90a.[1]

Thus, under the Act, the CBO, OMB, and Comptroller General have the authority to make economic estimates and projections that will trigger automatic spending cuts in existing legislation without further review by Congress or the President. Significantly, the economic data, assumptions, and methodology used by the Comptroller General to arrive at his determination of the projected deficit are not subject to judicial review. Section 274(h), App. 118a.

2. Plaintiff-appellee, the National Treasury Employees Union (NTEU), is a federal sector labor organization that represents the interests of both active and retired federal employees by acting as their representative in collective bargaining, by lobbying Congress for favorable working conditions and benefits, and by litigating their individual and collective rights in court. NTEU's 9,000 retiree members are amongst the very first persons who have been immediately and adversely affected by the au-

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[1] In general, the Act establishes that the first cuts are effectuated by eliminating all automatic cost of living adjustments mandated by statute. Thereafter, the Act would cut other items in the budget that are not otherwise exempted, by a uniform percentage, until the target deficit is met. The Act leaves it to the Comptroller General to predict what the deficit will be and thereby whether and in what degree cuts will be necessary.

For fiscal year 1986, the Act provides that the President's sequestration order shall be issued February 1, and effective March 1. Section 252(a)(1), (6)(A), App. 90a, 93a. It includes several other special provisions for 1986, including a limit on the maximum amount of the sequestration order. Section 251(a)(3)(A)(ii), App. 82a.

tomatic spending reduction mechanism contained in the Balanced Budget Act. In accordance with the Act, the cost of living adjustments due these individuals under the Civil Service Retirement Act were temporarily suspended on January 1, 1986. Section 252(a)(6)(C), App. 90a. Thereafter, the COLAs were permanently eliminated for 1986 by virtue of the Comptroller General's report and resulting Presidential sequestration order issued February 1, 1986, and effective March 1.

3. NTEU filed this suit on December 31, 1985, to challenge the constitutionality of the mechanism that suspended the COLAs due its retiree/members under the Retirement Act. NTEU's action was consolidated with a suit filed by Representative Mike Synar and a group of Congressmen. The Congressmen's right to maintain that suit had been assailed on standing grounds by the United States, the nominal defendant in the case. All parties agreed, however, (and the court held), that NTEU had standing to assert the rights of its undeniably injured retiree/members, in accordance with *Warth* v. *Seldin*, 422 U.S. 490 (1975). App. 9a-11a.[2]

In the district court, on the merits, plaintiffs argued that the Act's automatic spending reduction mechanism violates the Constitutional provision vesting all legislative power in Congress. NTEU explained that in this Act, Congress and the President have conspired to abdicate their constitutional duty to legislate the nation's spending priorities, and that the Act impermissibly and in unprecedented fashion delegates legislative authority

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[2] The court ultimately rejected defendant and intervenors' arguments that the Congressional plaintiffs had suffered no injury in fact as a result of the Act. Applying the law of the D.C. Circuit, which "recognizes a personal interest by members of Congress in the exercise of their governmental powers, limited by an equitable discretion in the courts to withhold specific relief," the district court ruled that the Congressional plaintiffs also have standing. App. 11a-13a.

to various unelected administrative officials, whose decisions and methods are explicitly insulated from judicial review. Secondly, plaintiffs contended (and defendant United States agreed), that to the extent Congress could delegate any authority here, it may not delegate it to the CBO, a Congressional agency, or the Comptroller General, an official who is removable by the Congress.

4. The three-judge district court ruled that the automatic spending reduction mechanism violates the separation of powers doctrine. App. 1a-50a. The court rejected plaintiffs' arguments that the enormous and unguided authority the Act gives to OMB, the CBO and the Comptroller General to alter existing legislation, on the basis of determinations and methodologies that are not subject to judicial review, violates the constitutional provision that vests all legislative powers in Congress. After reviewing the recent history of the "delegation" doctrine, and comparing the Act to other legislation that has been upheld against a challenge of unconstitutional delegation, the court concluded that Congress' delegation of authority to the CBO, OMB, and Comptroller General contained sufficient standards to confine their discretion, and was therefore valid. App. 13a-28a.

However, the court ruled that the role of the Comptroller General in the spending reduction mechanism violated separation of powers principles, a ground both plaintiffs and the United States had advanced. The court concluded that the powers the Act confers upon the Comptroller General are executive in nature. Citing this Court's decisions in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *INS* v. *Chadha*, 462 U.S. 919 (1983), the court concluded that the Comptroller General cannot exercise powers that are executive in nature, because he is removable by Congress, and because he lacks the necessary independence from Congress. App. 28a-50a. Giving such power over executive functions to Congress, the

court concluded, "violates the fundamental principle . . . upon which the theory of separated power rests . . .," namely, the division of authority to avert tyranny of one branch over the others. App. 46a.

The court thus invalidated the Act based on the unconstitutional role of the Comptroller General. Pursuant to the Act, the district court stayed the Order implementing its judgment, pending the outcome on appeal to this Court. App. 52a.

DISCUSSION

This case concerns the constitutionality of legislation over a subject of immediate and paramount national importance—the federal budget deficit. Moreover, the constitutional questions raised are substantial, as recognized by the court below and in the terms of the Act itself, providing for both expedited review and a "fallback" procedure to take effect should a portion of the Act be struck down. NTEU agrees with the result the district court reached—that the automatic spending reduction mechanism created by the Balanced Budget and Emergency Deficit Control Act is unconstitutional. Nevertheless, in view of the overriding public interest in final resolution (by this Court) of the Act's constitutionality, NTEU agrees with all parties that the case warrants plenary review by this Court.

1. NTEU intends to argue that the Act's automatic mechanism is unconstitutional not only for the reasons relied upon by the district court, but for the broader reason that it represents an unprecedented abdication of legislative power by Congress, to unelected administrative officials. The separation of powers doctrine lies "at the heart of the Constitution," (*Buckley* v. *Valeo*, 424 U.S. 1, 119 (1976)) and is manifested in "[t]he very structure of the articles delegating and separating powers under Articles I, II and III." *INS v. Chadha*, 462 U.S. 919, 946 (1983). Recently, in *Chadha*, this Court re-confirmed and re-emphasized that the Constitution

divides the delegated powers of each branch into three defined categories "to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." 462 U.S. at 951.

Article I, Section 1 of the Constitution vests "all legislative powers" in the Congress. Of course, the legislative branch is not " 'hermetically' sealed" from the other branches. *Chadha, supra,* 462 U.S. at 951, quoting *Buckley, supra,* 424 U.S. at 121. It has long been recognized that Congress may, as a practical matter require, and therefore call upon the other branches of government to assist it in exercising its powers effectively. And as Chief Justice Taft explained in *J. W. Hampton and Company* v. *United States,* 276 U.S. 394, 406 (1928), "[i]n determining what it my do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of governmental coordination."

Following these cardinal principles, this Court has upheld Congressional delegations of authority to agencies in the executive branch to "fill in the blanks" in the daily administration of the law, in accordance with general policies and standards set down by Congress. At the same time, however, the Court has remained vigilant against the potential for excessive delegations of legislative authority which could upset the balance of functions among the three branches of government. *See, Industrial Union Department, AFL-CIO* v. *American Petroleum Institute,* 448 U.S. 607, 646 (1980); *National Cable Television Association* v. *United States,* 415 U.S. 336, 342 (1974); *Zemel* v. *Rusk,* 381 U.S. 1, 17, 18 (1965); *Kent* v. *Dulles,* 357 U.S. 116, 129 (1958). In that connection, various Members of this Court have emphasized that it is Congress, and not unelected administrative officials that must make the fundamental policy decisions or "hard choices" confronting the nation, because Congress is the branch of government most responsive, and therefore ac-

countable, to the public will. *Industrial Union Department, supra*, 448 U.S. at 671-688 (Rehnquist, J., concurring); *Arizona* v. *California*, 373 U.S. 546, 626 (1963) (Harlan, J., with Stewart, J., and Douglas, J., dissenting).

To assure that Congress and not some other body has been, and will continue to be the maker of the "hard choices," the Court has searched for the presence of safeguards in legislation that will prevent a necessary delegation, from becoming an abdication of legislative power. The Court has examined the nature and breadth of the power delegated, whether Congress has articulated an intelligible principle to cabin the exercise of administrative discretion, and whether the delegation is necessary to the effective exercise of legislative power or merely expedient. In particular, the Court has recognized that the availability of judicial review to determine whether administrative officials are exercising Congressional will, or their own, is an important safeguard against the abuses that may otherwise attend legislative delegation. All of these safeguards have one goal: to assure that all lawmaking decisions are made by Congress, with the concurrence or over the veto of the President, and that those elected officials are therefore accountable for their effects.

2. We shall argue that the Balanced Budget Act's automatic spending reduction mechanism plainly implicates the foregoing principles, and crosses the line between permissible receipt of assistance from another branch of government, and unconstitutional abdication of legislative power. At issue here is a Congressional attempt to delegate—for reasons of political expedience and not necessity—one of its most essential and overarching powers, the power to set spending levels, not in one program, but across the entire federal spectrum. Congress has given unelected administrative officials discretion to make judgments that set and change the level of resources allocated

to a broad range of programs whose appropriations had already been fixed by duly enacted law. The economic predictions of these officials (which form the basis for the spending cuts) will not be governed by intelligible principles set forth by Congress, because Congress was unable to set meaningful standards for predicting such critical matters as the future of the economy for the years ahead. In fact, in recognizing that it could not establish a guiding principle to confine administrative discretion under the Act, Congress went one step further, and precluded judicial review of the economic data, assumptions and methodology underlying the predictions of OMB, the CBO, and the Comptroller General. These predictions, of course, will result directly in the amendment or effective repeal of existing legislation.

It may well be that the kinds of decisions Congress has delegated to OMB, the CBO and the Comptroller General can never be susceptible to an articulated intelligible principle. If that is so, then given the enormous consequences of those decisions they must, like other subjective choices of social policy, be made by Congress, an accountable body, and not left to politically unresponsive administrators. Because of the unique nature and impact of the authority Congress has delegated to OMB, the CBO, and the Comptroller General, we believe that the Act represents an unconstitutional abdication of legislative power.

3. Finally, NTEU believes that the automatic spending reduction mechanism is also unconstitutional on the alternative narrower grounds articulated by the district court. As the court's decision thoroughly outlines, principles of separation of powers, set forth in *Buckley* v. *Valeo*, *Chadha*, and *Humphrey's Executor* make it clear that executive powers may not be assigned to officials or agencies that are not independent of the legislative branch. Whether the Act delegates "executive" powers, as the court below held, or excessive legislative powers,

as we argued herein, its delegation of authority to the CBO and Comptroller General (who is removable from office by Congress) violates the doctrine of separation of powers.

CONCLUSION

This Court should note probable jurisdiction, grant plenary review, and affirm the result reached by the district court for the reasons set forth above.

Respectfully submitted,

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