

No. 85-1378

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In the Supreme Court of the United States

OCTOBER TERM, 1985

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UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

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JURISDICTIONAL STATEMENT

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**QUESTION PRESENTED**

Whether it violates the principle of separation of powers for the Comptroller General, an independent officer of the United States appointed by the President for a statutory term of years by and with the advice and consent of the Senate, to perform the administrative tasks assigned to him by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, because a provision (now 31 U.S.C. 703(e)) of the Budget and Accounting Act of 1921 establishes a procedure for his removal for cause by an enactment in conformity with the Presentation Clause, particularly when that provision has never been used or tested and could be severed if necessary.

## PARTIES IN THE DISTRICT COURT

Pursuant to Rule 10.6 of this Court, this jurisdictional statement requests that the Court note probable jurisdiction over the identical question presented in two cases which were consolidated by the district court.

The plaintiffs in Civil Action No. 85-3945, in addition to Representative Mike Synar, are Representatives Gary L. Ackerman, Albert G. Bustamante, Silvio O. Conte, Don Edwards, Vic Fazio, Robert Garcia, John J. LaFalce, Jim Moody, Claude D. Pepper, Robert G. Torricelli, and James A. Traficant, Jr. The plaintiff in Civil Action No. 85-4106 is the National Treasury Employees Union.

The United States is the defendant, and the Senate, the Speaker and Bipartisan Leadership Group of the House of Representatives, and the Comptroller General are intervenors, in both actions. The individual House intervenors are 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.

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### OPINION BELOW

The opinion of the district court is not yet reported and is set forth in the Appendix to Jurisdictional Statement ("App."), at 1a-52a, that is being filed by the appellant in the related case of *Charles G. Bowsher, Comptroller General of the United States v. Mike Synar, Member of Congress, et al.*

#### JURISDICTION

The jurisdiction of the district court was based on sections 274(a) (1) and (2) of the Balanced Budget and Emergency Deficit Control Act of 1985 (the "Deficit Control Act" or the "Act"), 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, and the Senate filed identical notices of appeal later that day in each of the consolidated cases. The Senate's notice of appeal is appended to this jurisdictional statement.

This Court has jurisdiction 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."

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this appeal are the Appointments Clause, Article II, section 2, clause 2, of the Constitution, App. 131a, sections 302 and 303 of the Budget and Accounting Act of 1921, App. 123a-124a, now 31 U.S.C. 703, App. 128a-129a, and the provisions of the Deficit Control Act, App. 56a-119a.

#### STATEMENT

The Deficit Control Act, which was signed into law by the President on December 12, 1985, provides for a phased reduction in the annual federal deficit to zero in fiscal year 1991. For the present fiscal year, 1986, and for the next fiscal year, 1987, which begins on October 1, 1986, the maximum deficit amounts are fixed at \$171.9

and \$144 billion respectively. Act, § 201(a)(7); App. 57a. Parts A and B of the Act, App. 57a-81a, extensively amend the Congressional Budget Act of 1974 to enhance the ability of the Congress and the President to meet these and succeeding deficit limitations in the course of enacting annual appropriations. Part C of the Act, App. 81a-111a, which is the subject of these appeals, enacts, in accordance with the title of that part, "Emergency Powers to Eliminate Deficits in Excess of Maximum Deficit Amount."

Under these standby emergency powers, the Comptroller General receives a report from the Directors of the Office of Management and Budget and of the Congressional Budget Office, and then issues a report to the President on August 25 of this year and for the following five years. Act, § 251(b); App. 86a. In this report the Comptroller General estimates the amount by which federal outlays will exceed federal revenues in the coming fiscal year and the amount by which that deficit will exceed the maximum established by the Act. Then, after applying detailed rules for automatic spending increases, and for exemptions and limitations applicable to particular accounts, the Comptroller General equally divides the required reductions between the remaining defense and non-defense accounts and calculates the uniform percentage by which those accounts shall be reduced to avoid exceeding the maximum deficit. On September 1 the President is to issue an order sequestering funds based on the report of the Comptroller General. Act, § 252(a); App. 90a. The order is to become effective on October 1 but is to be modified on October 15 to take into account any expenditure and revenue legislation enacted by the Congress during the month of September to reduce or to eliminate the excess deficit. Act, § 252(b); App. 94a-95a.

For fiscal year 1986, the Act provides that the President's sequestration order shall be issued on February 1 and shall be effective March 1. Act, § 252(a)(1), (6)(A); App. 90a, 93a. The Act includes a number of other special



provisions for fiscal year 1986, including a limitation of the maximum sequestration to \$11.7 billion, a reduction which is required only if the estimated deficit as of January 10, 1986 reached or exceeded \$191.7 billion. Act, § 251(a)(3)(A)(ii); App. 82a.

On the day the President signed the Act, Representative Synar brought an action for a declaratory judgment that the Act unconstitutionally delegates the appropriation power of the Congress. Eleven other members of the House of Representatives joined him as plaintiffs. In a second action, the National Treasury Employees Union presented a similar challenge to the Act on behalf of their members who are retired federal employees and whose pension cost of living adjustments are subject to sequestration. The plaintiffs in both actions, which were consolidated by the district court, also claimed that the Act violates the separation of powers by vesting executive power in the Comptroller General, who the plaintiffs contend is an official of the legislative branch. The plaintiffs additionally alleged that the role of the Director of the Congressional Budget Office in reporting to the Comptroller General violates the separation of powers.

The United States, the nominal defendant, moved to invalidate the automatic deficit reduction provisions of the Act because the Act assigns authority to the Comptroller General. The United States also moved to dismiss Representative Synar's complaint for lack of standing. The Senate, the Speaker and Bipartisan Leadership Group of the House of Representatives, and the Comptroller General intervened to defend the Act. The district court ordered expedited briefing and heard argument on January 10, 1986.

In accordance with the Act the Directors of the Office of Management and Budget and of the Congressional Budget Office reported to the Comptroller General on January 15, 51 Fed. Reg. 1919 (1986), the Comptroller General reported to the President on January 21, 51 Fed. Reg. 2813 (1986), and the President issued the fiscal year

1986 sequestration order on February 1, 132 Cong. Rec. S847 (daily ed. Feb. 3, 1986). In their report the Office of Management and Budget estimated that the deficit for the current fiscal year will be \$220.1 billion, and the Congressional Budget Office estimated that the deficit will be \$220.9 billion. 51 Fed. Reg. 1923 (1986). The Comptroller General examined those estimates and concluded that “[n]o alternative assumptions which we might adopt would result in a deficit of less than \$191.9 billion, and any deficit exceeding this amount requires sequestering the maximum amount of \$11.7 billion for fiscal year 1986.” 51 Fed. Reg. 2814 (1986). Consequently, the Comptroller General’s report, and the presidential sequestration order, provide for the maximum \$11.7 billion reduction in federal outlays during the present fiscal year. The Act provides that the President may accompany a sequestration order with a message to the Congress proposing alternative ways to reduce the deficit, Act, § 252(c), App. 95a, but the President did not recommend to the Congress alternatives to the February 1 sequestration order, 132 Cong. Rec. S847 (daily ed. Feb. 3, 1986).

On February 7, the three-judge district court issued its opinion and order. After holding that the plaintiffs in each of the consolidated actions have standing, App. at 7a-13a, the district court rejected the plaintiffs’ contention that the Act unconstitutionally delegates the appropriation power of the Congress. The court stated that “[t]hrough specification of maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function.” *Id.* at 28a. The district court also found “unconvincing,” *id.* at 28a n.18, the plaintiffs’ claim that the involvement of the Congressional Budget Office in preparing a report for the Comptroller General violates the separation of powers. In dismissing that contention, the district court apparently agreed with the United States and the inter-

venors that the role of the Congressional Budget Office under the Act is only advisory.

The district court based its invalidation of the automatic deficit reduction provision of the Act solely on a never-used statutory provision that states that the Comptroller General, who is appointed to a fixed term of service by the President by and with the advice and consent of the Senate, may be removed for cause by a joint resolution of the Congress. This joint resolution of removal could be enacted only after notice and hearing and would require presentation to the President. Budget and Accounting Act of 1921, § 303, Pub. L. No. 67-13, ch. 18, 42 Stat. 20, 24 (now codified at 31 U.S.C. 703(e)).

The district court overrode appellants' contention that sound principles of judicial restraint counsel against presently adjudicating the constitutional impact of the unused removal provision. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 61 (1982) (plurality opinion), this Court referred to the authority of the judicial councils to remove bankruptcy judges in its enumeration of the ways in which bankruptcy judges lacked the protection constitutionally afforded to Article III judges. Relying on that reference, the district court held that the mere existence of sixty-five-year-old statutory authority for removal of a Comptroller General suffices to invalidate the Comptroller General's functions under the Deficit Control Act. In the opinion of the district court, "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." App. at 30a (footnote omitted).

Accordingly, the court rejected the contention that, because the Budget and Accounting Act of 1921 established only a procedure for consideration of a possible future enactment of the Congress, it would be only the future enactment of a removal resolution, and not the previously established procedures, that would create a controversy

requiring adjudication of the removal provision. The district court decided that “[i]t is the prior assertion of authority to remove embodied in the tenure statute that has the immediate effect, and presumably the immediate purpose, of causing the Comptroller General to look to the legislative branch rather than the President for guidance.” App. at 31a.

The district court consequently reached the constitutional question whether an officer who performs administrative tasks may be removed by statute. First, the court held that the Deficit Control Act assigns the Comptroller General executive functions. *Id.* at 43a–44a. Then, interpolating between this Court’s decisions in *Myers v. United States*, 272 U.S. 52 (1926), and *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), the district court held that “congressional removal power cannot be approved with regard to an officer who actually participates in the execution of the laws.” App. at 46a. Accordingly, the court concluded that, because the Deficit Control Act confers executive duties upon the Comptroller General, which could not be performed by an officer subject to removal by an act of Congress, “those powers cannot be exercised and therefore the automatic deficit reduction process to which they are central cannot be implemented.” *Id.* at 48a.

In the order accompanying its opinion, the district court declared the automatic deficit reduction process established by the Deficit Control Act “unconstitutional on the ground that it vests executive power in the Comptroller General, an officer removable by Congress.” *Id.* at 52a. The court further declared that the President’s February 1 sequestration order is “without legal force and effect.” *Ibid.* Finally, the court ordered that its judgment is “without prejudice to implementation of the alternative deficit reduction process specifically set forth in section 274(f) of the Act to cover the eventuality of the invalidation,” and it stayed the effect of its judgment pend-

ing the resolution of appeals, in accord with section 274(e) of the Act. *Ibid.*

THE QUESTION IS SUBSTANTIAL

These appeals present a substantial question that merits plenary review for the following reasons.

1. The Congress determined in the Deficit Control Act that the economic welfare of the nation required the establishment of an administrative mechanism to promote steady progress to reach a balanced budget by fiscal year 1991. The Congress also determined that the appropriate officer of the United States to make the estimates and calculations that are required in implementing this mechanism is the Comptroller General, who is appointed by the President by and with the advice and consent of the Senate. The Comptroller General's knowledge of and experience with the financial accounts of the federal government and independence from the political control of the President and the Congress make him ideally suited to implement neutrally the hard political choices that the Congress and the President agreed to in enacting and approving the legislation.

The district court sustained the constitutionality of the Act's administrative mechanism against a challenge that the Congress had unconstitutionally delegated its legislative authority. Nevertheless, the district court rendered the central administrative mechanism of the Act inoperable by holding that the Congress may not delegate responsibility to the appointee of the President who it had concluded is the most suitable recipient of those responsibilities. Although the Congress has provided for an alternative means to effectuate the objectives of the Act, the existence of the alternative does not diminish the gravity or the delicacy, *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.), of the district court's decision to hold unconstitutional the means that the Congress concluded would be the most effective to achieve the objectives of this important enactment.

2. Plenary review is necessary also to consider the impact of the district court's decision on the critical role of the Comptroller General in preserving the integrity of the federal government's financial accounts. Since 1921 the Comptroller General has had the statutory duty to "settle all accounts of the United States Government and supervise the recovery of all debts finally certified by the Comptroller General as due the Government. . . . On settling an account of the Government, the balance certified by the Comptroller General is conclusive on the executive branch of the Government." 31 U.S.C. 3526(a), (d). This responsibility for assuring compliance by the executive departments with statutory restrictions on public expenditures derives from the Budget and Accounting Act of 1921, which created the General Accounting Office and included the removal provision that is the subject of these appeals. The breadth of the district court's ruling places in question the basic historical responsibilities of the Comptroller General and thereby intensifies the need for plenary review.

To the extent that the final adjudication of this appeal requires a choice between the removal provision of the Budget and Accounting Act and the executive functions of the Comptroller General, this Court will be presented with a question of severability, which "is largely a question of legislative intent." *Regan v. Time, Inc.*, 104 S.Ct. 3262, 3269 (1984) (plurality opinion). Plenary review will provide an opportunity to consider Congress' intent in the Deficit Control Act in the context of, rather than in isolation from, its purpose in creating the Comptroller General's office in 1921. In concluding that the removal provision in the 1921 Act cannot be reconciled with the executive nature of the duties delegated to the Comptroller General in the Deficit Control Act, the opinion of the district court gives no consideration to the legislative history and purpose of the 1921 Act, which both created the Comptroller General's office and gave it executive functions. As a result, the court effectively eviscerated the

Comptroller General's executive functions, without even considering Congress' original intent in establishing the office, which had been precisely to enable the Comptroller General to perform executive functions independently of the control of any other officer.

3. Plenary review would also promote adherence to the fundamental principles that have guided this Court's understanding of the Appointments Clause. In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), this Court explicitly recognized that the manner of the Comptroller General's appointment renders him an "Officer of the United States," pointing out that the Comptroller General is "appointed by the President in conformity with the Appointments Clause." *Id.* at 128 n.165. The district court gave little weight to the constitutional method of the Comptroller General's appointment and instead placed overriding importance on the existence of an unused, untested, and, if necessary, severable provision of the Budget and Accounting Act of 1921.

The removal provision of the Budget and Accounting Act of 1921 establishes procedures by which a future Congress may consider the removal of a Comptroller General. Congress enacted the removal provision in the 1921 Act several years before this Court decided the cases—*Myers v. United States*, 272 U.S. 52 (1926), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)—that the district court relied upon to invalidate the Comptroller General's duties under the Deficit Control Act. If there ever were a proposal in Congress to use the procedures in the 1921 Act to remove a Comptroller General, the vitality of the removal provision assuredly would be scrutinized within the Congress in the light of this Court's decisions subsequent to the 1921 Act. As a coordinate branch with its own responsibility to act consistently with the Constitution, the Congress would then be required to address the question whether the 1921 removal provision survived this Court's subsequent removal decisions. Nevertheless, the district court held that the mere existence of the

unused sixty-five-year-old provision demonstrates by itself Congress' intent so to control the Comptroller General's performance of his duties as to disable him from performing the important function that the Congress has assigned to him in the Deficit Control Act. The district court's holding ignored this Court's admonition that questions over the propriety and effect of a removal statute are premature until "the question . . . should be inevitably presented" by the use of the statute to remove an officer. *Myers v. United States*, 272 U.S. at 173. Plenary review should be granted to review the district court's novel departure from the Appointments Clause jurisprudence of this Court and from sound principles of judicial restraint.

## CONCLUSION

Probably jurisdiction should be noted.

Respectfully submitted,

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