No. 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

Appellants,

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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QUESTION PRESENTED

The Balanced Budget and Emergency Deficit Control Act of 1985 requires the Comptroller General, an independent officer appointed by the President with the advice and consent of the Senate to a fixed term of office, to perform certain factfinding functions. Does the separation of powers doctrine require a declaration that the Act is unconstitutional in light of the fact that the 1921 statute creating the office of Comptroller General included language which would permit the removal of the Comptroller General by the adoption, through the regular and complete statutory enactment process, of a joint resolution?

PARTIES IN THE CASE BELOW

This appeal is taken from two cases which were consolidated in the United States District Court for the District of Columbia. The cases involve virtually identical issues and this jurisdictional statement encompasses both cases as permitted by Rule 10.6 of the Rules of the Supreme Court.

The plaintiffs in Civil Action No. 85-3945 are Mike Synar, Gary Ackerman, Albert Bustamante, Silvio Conte, Don Edwards, Vic Fazio, Robert Garcia, John LaFalce, Jim Moody, Claude Pepper, Robert Torricelli, and James Traficant, Jr., all members of the Ninety-Ninth Congress. The plaintiff in Civil Action No. 85-4106 is the National Treasury Employees Union.

The United States was named as the defendant. Also intervening as defendants were Thomas P. O'Neill, Jr., Speaker of the United States House of Representatives and the Bipartisan Leadership Group of the House, Jim Wright, Majority Leader; Robert Michel, Republican Leader; Thomas Foley, Majority Whip; and, Trent Lott, Republican Whip. The United States Senate and the Comptroller General also intervened as defendants.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1379

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS,

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

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

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the District of Columbia, dated February 7, 1986, is not yet reported. A copy of the opinion is included in an appendix being filed by the appellant in the related appeal of *Charles G. Bowsher, Comptroller General of the United States* v. *Mike Synar, Member of Congress, et al.*

JURISDICTION

The judgment of the three-judge panel of the District Court, declaring the automatic deficit reduction process established by the Balanced Budget and Deficit Control Act of 1985 to be unconstitutional and the presidential sequestration order of February 1, 1986, issued pursuant to that statute to be without force and effect, was entered on February 7, 1986. That judgment constituted the final judgment in the two consolidated cases brought before the District Court pursuant to the specific jurisdictional grant provided by Section 274 of the Act. Appellants Speaker and Bipartisan Leadership Group of the House of Representatives filed their notice of appeal on February 10, 1986. This appeal is being docketed with this Court eight days later, well within the applicable time constraints. A copy of the notice of appeal is appended to this jurisdictional statement. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1252. As intervening defendants, the Speaker and Bipartisan Leadership Group were parties to the civil suit below, the final judgment entered by the District Court held an Act of Congress unconstitutional, and the United States was a defendant below.[1]

This Court also has jurisdiction pursuant to section 274 of the Act which specifically provides that orders such as that entered by the District Court in this case shall be reviewable by appeal directly to the Supreme Court of the United States. App. 116a-117a.

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[1] The Department of Justice, although representing the United States in the District Court, declined to defend, and in fact joined in the attack on, the disputed provision of the statute. This Court has recently held that active participation by the House and Senate, in advocating an official defense of a statute in cases before this Court, is sufficient to supply the necessary adverseness to present an Article III "case or controversy." *Immigration and Naturalization Service* v. *Chadha,* 462 U.S. 919, 931 n.6 (1983) (participation by the House and Senate in briefing and oral argument in case where the Department of Justice elected to challenge the constitutionality of a duly enacted statute).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The District Court did not denominate a specific constitutional provision which it determined the challenged statutory enactment offended. Rather, it relied on the doctrine of separation of powers as it perceived that doctrine to be explicated by the Framers of our Constitution and by this Court. The District Court did refer to the impeachment clauses as "[t]he only portions of the Constitution explicitly addressing the power to remove officers of the United States" App. 34a, and to the appointments clause, which it said, "is universally agreed [to] ha[ve] some bearing upon removal powers." App. 35a. Those Constitutional provisions provide as follows:

ARTICLE II, SECTION 4

> The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE I, SECTION 2, CLAUSE 5

> The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

ARTICLE I, SECTION 3, CLAUSE 6

> The Senate shall have the sole Power to try all Impeachments. While sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

ARTICLE II, SECTION 2, CLAUSE 2

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provide two thirds of the Senators present concur; and he shall nominate, and by and with the

> Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Balanced Budget and Emergency Deficit Control Act, Pub. L. No. 99-177, is not yet available in either slip law or the Statutes-at-Large. The complete text of the statute is being furnished to the Court as part of the appendix field in conjunction with the jurisdictional statements. App. 56a-119a. The key aspects of the Act, for the purposes of this appeal, are Sections 251 and 252. App. 81a-96a.

The statutory removal provision for the Comptroller General appears at 31 U.S.C. § 703(e). It provides:

"(e)(1) A Comptroller General or Deputy Comptroller General retires on becoming 70 years of age. Either may be removed at any time by—

(A) impeachment; or

(B) joint resolution of Congress, after notice, and an opportunity for a hearing, only for:

(i) permanent disability;

(ii) inefficiency;

(iii) neglect of duty;

(iv) malfeasance; or

(v) a felony or conduct involving moral turpitude."

STATEMENT

In response to growing concern over the federal deficit, the Congress and the President last year enacted an extraordinary piece of legislation. That legislation, the Balanced Budget and Emergency Deficit Control Act of 1985 ("the Act"), provides a complex mechanism by which

automatic reductions in federal expenditures are triggered by the existence of a deficit which exceeds certain target figures. The deficit target figures are a regularly decreasing series of yearly deficit amounts which are not to be exceeded, and the goal is the elimination of the deficit by 1991.

The relevant portions of the Act provide that the Comptroller General is to receive reports compiled by the Directors of the Office of Management and Budget and the Congressional Budget Office which make and apply various economic assumptions in order to project a deficit figure for the particular fiscal year. The Directors are then required, in years when they project the deficit to exceed the target figure contained in the Act, to calculate a "saving" of the amount necessary to bring the deficit within the Act's acceptable limits, by applying a comprehensive mathematical formula to designate certain amounts to be "sequestered," or withheld, from expenditure within each federal budget account or activity. Each account or activity is to be affected in accordance with the formula contained within the Act which represents the legislative determination, forged by the Congress and the President, with regard to the availability of funds for sequestration.

The reports of the Directors are to be reviewed by the Comptroller General, an independent officer of the United States appointed by the President to a term of fifteen years with the advice and consent of the Senate. After reviewing the reports of the Directors, and applying his own expertise, the Comptroller General is to issue his report to the President and the Congress. Like the report of the Directors the Comptroller General's report is to contain the determination of the amount of federal funds needed to be sequestered in order to reach the deficit target and an account-by-account listing of the amounts to be sequestered to obtain the total withholding necessary.

Upon receipt of the Comptroller General's report, the President is required by the Act to issue a presidential order requiring the implementation of the sequestration. The actual effect of the President's order is delayed for a specified period of time to allow for possible legislative action which would obviate the need for the sequestration.

The Plaintiffs, joined in this respect by the Department of Justice, challenged the constitutionality, on its face, of this aspect of the statute. Exercising litigative rights specifically provided for by the Act, the Congressional Plaintiffs and the Plaintiff National Treasury Employees Union each filed actions alleging that the statute was unconstitutional. Both suits claimed that the Act violated principles of separation of powers in improperly delegating legislative authority and in providing for the specific functions to be performed by the Comptroller General. The Department of Justice, while generally defending against the suits in the name of the United States, elected to join the plaintiffs in challenging the constitutionality of the Comptroller General's role.

As specifically provided for by the Act [2], and consistent with recently developed and judicially accepted practice,

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[2] The participation by the Speaker and the Bipartisan Leadership Group of the House is the regular mechanism for the House of Representatives to present its institutional interest in litigation. As the conference report on the Act explains, section 274(a)(4) also provides for intervention by the Senate and the House in such actions. It is intended that each body may employ what have developed to be the regular procedures to initiate participation in cases of institutional interest as they have in litigation concerning the 1984 Bankruptcy Act Amendments and the Competition in Contracting Act Amendments. *See Increasing the Statutory Limit on the Public Debt,* H.R. Rep. No. 433, 99th Cong. 1st Sess. 100 (1985). *See also, In re Benny,* 44 Bankr. 581 (N.D. Cal. 1984) (upholding the constitutionality of the 1984 Bankruptcy Act Amendments from a challenge joined in by the Department of Justice, Speaker and Bipartisan Leadership Group intervened to provide an official defense of the statute); *appeal argued,* No. 84-2805 (9th Cir. July 9, 1985); *Ameron, Inc.* v. *U.S. Army Corps of Engineers,* 607 F.

Continued

the appropriate legal representatives of the United States House of Representatives and the United States Senate intervened as defendants to offer an official defense of the Act's constitutionality. The Comptroller General also intervened as a defendant.

Section 274(a)(5) of the Act mandated that these challenges be heard by a three-judge panel and by order dated December 19, 1985, the Chief Judge of the District Court convened a three-judge court pursuant to the procedures outlined in 28 U.S.C. § 2284. The intervenor-defendants, the Senate, the Speaker and Bipartisan Leadership of the House, and the Comptroller General moved for dismissal. The plaintiffs moved for summary judgment. After expedited briefing and argument the District Court entered the judgment appealed from herein.

The District Court found that both the Congressional and the union plaintiffs had standing to bring suit and that the powers in question could be lawfully delegated. The District Court also found that the "delegation to the Comptroller General violates the constitutionally requisite separation of powers." App. 3a. It is from this aspect of the district court's judgment that the Speaker and Bipartisan Leadership Group of the House appeal.

THE QUESTION IS SUBSTANTIAL

This Court should accept jurisdiction and afford plenary review for three sound reasons discussed below in detail. First, the legislation and its history state unmistakably that the Congress which adopted the Act and the

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Supp. 962 and 610 F. Supp. 750 (D.N.J. 1985) (upholding the constitutionality of the Competition in Contracting Act in a challenge joined in by the Department of Justice, Speaker and Bipartisan Leadership Group intervened to provide an official defense of the statute), *appeals argued,* Nos. 85-5226, 85-5377 (3d Cir. Oct. 29, 1985).

The Speaker of the House has also represented the institutional interests of the body in various litigation in this Court. *See, e.g., United States* v. *Helstoski,* 442 U.S. 477 (1979) and *Helstoski* v. *Meanor,* 442 U.S. 500 (1979) (Briefed and argued by the Speaker as *amicus*); *Hutchinson* v. *Proxmire,* 443 U.S. 111 (1979) (Speaker and bipartisan leadership appeared as *amici*).

President who signed it into law desired the prompt attention of this Court to questions raised as to the Act's constitutionality. While such a request may not be binding upon this Court in its determination of whether full plenary review should be granted, it is a factor that should receive the most careful consideration by the Court. Second, the emergency nature of this legislation and the budget crisis which gave rise to it are a sound reason for this Court to accept jurisdiction. Wisely, it has long been the practice of the Court to provide prompt constitutional review for legislative enactments attempting to deal with national concerns of great moment. Finally, the underlying constitutional question presented, involving the respective powers and obligations of the legislative and executive branches raises previously unresolved fundamental propositions relating to the structure of our national government. The attention, and determination, of this Court is particularly warranted in resolving disputes between the political branches on such basic and important interpretations of the Constitution. Each reason standing alone should warrant this Court to note its jurisdiction and to proceed with briefing, argument, and decision on the merits. Taken together these three considerations leave no room for doubt that this case is appropriate for full review by this Court.

The Congressional consideration of the Act was marked by concerns expressed by some Members as to the constitutionality of the evolving legislative proposal. The original Senate amendment ran a gauntlet of repeated consideration by each House, and an historic series of conference committee sessions which developed the eventual language that was signed into law. During this process, these constitutional concerns gave rise to a highly unusual and specific judicial review provision. This judicial review provision, Section 274 of the Act, App. 116a–118a, is the vehicle for the present challenges before the Court. Not only did it provide a specific mechanism for various plaintiffs, Congressional and others, to initiate suits but it

also clearly evinces the intent of the Act for prompt Supreme Court review. Subsection (b) provides a specific, and expedited, procedure for bringing the case before this Court. To reemphasize its desire for Supreme Court review, the Congress included in the Act an automatic stay provision, adhered to by the District Court in this case, which mandated that any relief which was to be granted would not become effective until the appropriate opportunity for Supreme Court review had been afforded.

On rare occasions the Congress, normally motivated by unique concerns relating to constitutionality, will include in legislation specific provisions for expedited judicial review with particular references to Supreme Court consideration. It is entirely appropriate for the Court to recognize and accommodate these requests, in a fashion consistent with the Court's obligations pursuant to Article III. To do so is an appropriate accommodation among the three branches working together in the interests of constitutional government. *See Buckley* v. *Valeo,* 424 U.S. 1 (1976).

This case is also appropriate for full plenary review in light of the extraordinary consequences of the lower court's action. The District Court recognized this in stating that "We do not minimize the effect of our invalidation of one small section of the Act upon the entire statutory scheme. Our holding today eliminates the automatic deficit reduction process . . . an important and hard-fought legislative program . . ." App. 49a. This Court has recognized that it is appropriate for it to adjudicate, with the legal and publicly perceived finality that only plenary review by the Supreme Court can provide, important constitutional disputes relating to the basic powers and duties of the coordinate branches. *See United States* v. *Nixon,* 418 U.S. 683 (1974). To leave the questions presented by this dispute unsettled could immobilize the constitutional process by which the political branches of the government are expected to set national policy. Such an outcome would be unseemly and can be avoided by this

Court's determination of the issues presented by this appeal.

Finally, this appeal presents an important constitutional question which this Court has not previously resolved. While this Court has previously addressed the limited role of the Congress in the appointment of independent officers, *Buckley* v. *Valeo, supra,* it has not spoken with the same clarity regarding removal of independent officers by Act of Congress. The Court has recognized the President's inherent right to remove, without the restriction of obtaining the advice and consent of the Senate, some officers that he is empowered to appoint. *See Myers* v. *United States,* 272 U.S. 52 (1926). A Congressional prerogative to establish, through the statutory process, limitations on the President's right to remove independent officers has also been recognized. *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935). Whether these decisions foreclosed a statutory removal provision of the nature contained in the 1921 Act establishing the modern Comptroller General, and the effect of these rulings on that pre-existing statute are questions of first impression to be resolved in this case.

Furthermore, while this Court has in recent years eloquently spoken to the need for unswerving adherence to the "explicit constitutional standards . . . [and] carefully crafted restraints spelled out in the Constitution," *INS* v. *Chadha,* 462 U.S. 919, 959 (1983), and how congressional authority with respect to independent officers "is inevitably bounded by the express language of Art. II, § 2, cl. 2 . . ." *Buckley* v. *Valeo, supra,* at 139, the Court has not specified whether aspects of separation of powers which are found not in the text of the Constitution but rather in its interpretive application are to be applied with the same mechanistic rigidity. That fundamental question is deserving of Supreme Court attention.

CONCLUSION

For the reasons presented above probable jurisdiction should be noted and the Court should set the matter for plenary consideration.

Respectfully submitted,

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