

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DOCKET NO: 85-1377; 85-1378; 85-1379

TITLE: CHARLES A. BOWSER, COMPTROLLER GENERAL OF THE UNITED STATES,
APPELLANT v. MIKE SYNAR, MEMBER OF CONGRESS, ET AL.;

UNITED STATES SENATE, Appellant V. MIKE SYNAR, MEMBER
OF CONGRESS, ET AL.; and

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE
OF REPRESENTATIVES, ET AL., Appellants V. MIKE SYNAR,
MEMBER OF CONGRESS, ET AL.

PLACE: Washington, D. C.

DATE: April 23, 1986

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 CHARLES A. BOWSER, COMPTROLLER :
4 GENERAL OF THE UNITED STATES, :
5 Appellant :

6 V. : No. 85-1377

7 MIKE SYNAR, MEMBER OF CONGRESS, :
8 ET AL.:

9 -----x
10 UNITED STATES SENATE, :
11 Appellant :

12 V. : No. 85-1378

13 MIKE SYNAR, MEMBER OF CONGRESS, :
14 ET AL.:

15 -----x
16 THOMAS P. O'NEILL, JR., SPEAKER :
17 OF THE UNITED STATES HOUSE OF :
18 REPRESENTATIVES, ET AL., :
19 Appellants :

20 V. : No. 85-1379

21 MIKE SYNAR, MEMBER OF CONGRESS, :
22 ET AL.:

23 -----x
24 Washington, D.C.

25 Wednesday, April 23, 1986

1 The above-entitled matter came on for oral
2 argument before the Supreme Court of the United States
3 at 9:59 a.m.

4 APPEARANCES:

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6 Appellant Comptroller General.

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9 behalf of Appellants O'Neill, et al.

10 MICHAEL DAVIDSON, ESQ., Senate Legal Counsel,
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12 States Senate.

13 CHARLES FRIED, ESQ., Solicitor General, Department of
14 Justice, Washington, D.C.; on behalf of Appellee
15 United States.

16 ALAN B. MORRISON, ESQ., Washington, D.C., on behalf of
17 Appellees Synar, et al.

18 MS. LOIS G. WILLIAMS, ESQ., Washington, D.C.; on behalf
19 of Appellees National Treasury Employees and Van
20 Riddel.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: The Court will hear arguments first this morning in Bowsher v. Synar and others.

Mr. Cutler, you may proceed whenever you are ready.

ORAL ARGUMENT OF LLOYD N. CUTLER, ESQ.

ON BEHALF OF THE APPELLANT COMPTROLLER GENERAL

MR. CUTLER: Mr. Chief Justice, and may it please the Court:

This case involves the constitutional interplay between two statutes, one passed in 1921 and the other in 1985. In a larger sense, it involves the validity of the concept of the independent officer of the United States first approved by this Court in Humphrey's Executor, and Congress before and since that time has enacted many laws creating officers of the United States duly appointed by the President and confirmed by the Senate who serve for a fixed term, independent of presidential direction, and are not removable by the President at will.

The 1921 Budget and Accounting Act created the Office of the Comptroller General and assigned to him the same functions previously performed by the Comptroller of the Treasury, an officer of the executive

1 branch. He was to serve for a fixed term, and he was to
2 be removable only for cause after hearing by the passage
3 of a law to that effect.

4 The 1985 Balanced Budget and Emergency Deficit
5 Control Act assigned an additional reporting function to
6 the Comptroller General. The Comptroller General's
7 report, under the '85 act, determines whether Congress
8 has met the specified deficit reduction targets, and if
9 not, what reductions under a statutory formula are
10 required in order to meet that target. The report then
11 triggers a presidential order which commands those
12 reductions unless Congress responds by enacting some
13 different law that meets the target by a different mix
14 of tax increases or deficit reductions, or modifies or
15 suspends the law in its entirety.

16 The District Court held that this '85 act
17 function assigned to the Comptroller General was
18 incompatible with the removal power granted to Congress
19 under the 1921 act by the enactment of a removal law
20 because, said the District Court, that removal power,
21 even though never exercised, created a here and now
22 subservience of the Comptroller General to Congress that
23 made it impermissible for him to perform this reporting
24 function under the 1985 act.

25 If the Court permits, since we have three

1 counsel arguing for the appellants, we have tried to
2 organize our argument so that I will deal with the
3 status of the Comptroller General under the 1921 act and
4 the removal clause --

5 QUESTION: Mr. Cutler, if the Comptroller
6 General were removed for any one of the four reasons --
7 I think there are four reasons specified in the
8 statute -- is there any review by anyone of that
9 action?

10 MR. CUTLER: Oh, it is a law. I suppose its
11 constitutionality would be reviewable by the removed
12 person or perhaps on challenge by the President if he
13 had been excluded from his constitutional removal
14 power.

15 QUESTION: Would it be any different from a
16 removal by way of an impeachment?

17 MR. CUTLER: I would suppose, Mr. Chief
18 Justice, that a removal by way of impeachment would -- I
19 don't know whether it would be judicially reviewable by
20 this Court, for example, as to whether it complied with
21 the statutory standards. It would be a difficult point,
22 particularly of the President, since the Chief Justice
23 would have presided in the impeachment, but I believe
24 certainly a removal pursuant to this statute by the
25 passage of a law would be subject to a constitutional

1 due process or other challenge by the removed person or
2 by the President on the ground that he has been
3 excluded.

4 In any event, the power, as you know, has
5 never been exercised in the 65 years since the statute
6 was passed.

7 Mr. Ross is going to deal with the additional
8 function assigned to the Comptroller General under the
9 '85 act, and Mr. Davidson is going to deal with the
10 additional argument rejected below that the delegation
11 of this '85 act function to any officer of the United
12 States, even in the executive branch, would be void for
13 overbreadth under the delegation doctrine.

14 In reaching its decision, the District Court
15 did not consider the legislative history of the 1921 act
16 or the validity of this 1921 removal provision within
17 the context of the '21 act, and we submit that that was
18 a fundamental error. The District Court declined to do
19 that because, it said, courts never choose which of two
20 allegedly incompatible statutes to strike down, that
21 they always act to strike down the statute under which
22 the plaintiff claims that his injury occurred, and in
23 that case, of course, this would be the 1985 statute.

24 But as we have cited in our briefs, in *Glidden*
25 *v. Zdanok*, this Court did precisely the opposite. The

1 Court there was dealing with an assignment statute
2 authorizing the assignment of the Court of Claims and
3 Customs and Patent Appeals judges to regular, other
4 regular Article 3 courts. That was the statute that
5 allegedly injured the plaintiffs in those cases, and the
6 Court, instead of striking down that statute, which was
7 arguably incompatible with earlier statutes giving
8 advisory jurisdiction, advisory opinion jurisdiction to
9 those two courts which would interfere with their
10 Article 3 status, decided that Congress had intended to
11 make them Article 3 courts from the beginning, and that
12 if necessary, the objectionable jurisdiction provisions
13 in the earlier statutes would have to fall.

14 And when the District Court thought it was
15 confronted with a similar problem here, we submit it
16 should have adopted the same reasoning.

17 QUESTION: You feel that the Glidden case is
18 primary authority for your position here.

19 MR. CUTLER: We do, Justice Blackmun.

20 QUESTION: Well, Mr. Cutler, aren't we guided
21 in determining severability if some portion of the
22 statute is found to be unconstitutional by the expressed
23 intent of Congress, which in this case would indicate
24 that Congress had some fallback position which it
25 articulated should be followed?

1 MR. CUTLER: There is no question that in the
2 1985 statute Congress had a fallback provision if any
3 part of the so-called reporting function, using the
4 Comptroller General and acting on the reports of CMB and
5 CBO, were found unconstitutional, but one would never
6 reach that issue if, by examining the 1921 act, one had
7 concluded that the removal provision in the 1921 act was
8 itself unconstitutional and a nullity, particularly
9 since the time of Myers v. the United States --

10 QUESTION: Well, but aren't we reviewing the
11 1985 act?

12 MR. CUTLER: You are reviewing the 1985 act on
13 the ground that a presumptively constitutional provision
14 in the 1921 act is incompatible with the delegation of
15 functions under the '85 act. If that presumptively
16 constitutional provision which has been used as a sword
17 to strike down the 1985 act is found to be
18 unconstitutional on its face, or found on the other hand
19 not to create a here and now subservience to Congress
20 with respect to the many administrative or executive
21 functions being performed by the Comptroller General
22 under the 1921 act, then you would have to conclude that
23 the '21 provision is a nullity and that it should not
24 interfere in any way with the validity of the delegation
25 functions under the '85 act.

1 QUESTION: Well, what if we did follow your
2 suggestion and decide that the removal provision of the
3 1921 act were invalid under the Constitution, how would
4 that leave the position of the Office of Comptroller
5 General as to removability?

6 MR. CUTLER: It would leave it, I would
7 submit, Justice Rehnquist, it would leave the 1921
8 statute silent on removability.

9 QUESTION: And what would be the result?

10 MR. CUTLER: And then under this Court's
11 decision in Wiener, if you concluded that the '21
12 statute had created the Comptroller General as an
13 independent officer of the United States serving for a
14 fixed term of years, you would imply that the President
15 had no right to remove him at will but might have a
16 right to remove him for cause, something this Court has
17 implied in the absence of statutory language but not
18 held.

19 QUESTION: If you concluded that the
20 Comptroller General were more like Myers than Wiener,
21 then you would say that the President could remove him
22 at will.

23 MR. CUTLER: If you concluded that he were a
24 purely executive officer, that would be the case, yes.

25 QUESTION: It seems to me that you really risk

1 interfering with Congress' intent far more when you
2 tamper with the 1921 act than if you adjudicate the 1985
3 act.

4 MR. CUTLER: I would submit not, Justice
5 Rehnquist because Congress clearly intended in the
6 1985 -- the 1921 act to establish the Comptroller
7 General as an independent officer of the United States
8 because he was to receive these administrative
9 functions, like settling the government's account,
10 bringing suits to collect the government's claims, and
11 setting the accounting standards for the government.
12 The whole argument about the 1921 act, President
13 Wilson's veto, the arguments that were made to the Court
14 in Myers about the '21 act were all premised on the
15 assumption that the Comptroller was an independent
16 officer of the United States.

17 During the debate on an attempt to override
18 President Wilson's veto, which asserted the ground,
19 among others, that he had the sole power to remove an
20 officer of the United States when he was given the power
21 to appoint, and that Congress could not take part in the
22 process, the whole argument which was adopted by the
23 Court in Myers is based on the premise that he is an
24 independent officer of the United States and not an
25 officer of Congress as the Solicitor General is urging

1 before you today, in contrast to what the Solicitor
2 General in the Myers case urged. He said the
3 Comptroller General was an executive officer.

4 But when the veto provision was up to be
5 overridden, the question -- and the override failed --
6 the question was asked on the floor of the House, what
7 if we override, and then President Wilson's veto, or his
8 position is upheld by the courts, would the entire act
9 fall, and the answer was that that was a remote
10 possibility and that if any part of the act fell, to
11 that extent, the act would be unconstitutional.

12 So we would read that as indicating that
13 Congress would have preferred to have an independent
14 Comptroller General serving for 15 years even if the
15 President had a right of removal, and as we know later
16 from Wiener, his right of removal in those circumstances
17 would be limited to removal only for cause.

18 QUESTION: Well, Mr. Cutler, the United States
19 argues that the removal power by Congress is beside the
20 point, that this officer may not perform these functions
21 assigned to him unless the President has unrestricted
22 power to remove.

23 MR. CUTLER: That is correct.

24 QUESTION: Now, did the District Court reject
25 that argument?

1 MR. CUTLER: The District Court never reached
2 that argument. The District Court assumed that he was
3 an officer of the United States and that the functions
4 were executive functions --

5 QUESTION: Well, do you think that issue is
6 open here? Would that change --

7 MR. CUTLER: I would think --

8 QUESTION: Would it change the reach of the
9 judgment?

10 MR. CUTLER: I think it would, Justice White.
11 I think the Solicitor General is arguing that should you
12 conclude that a power to remove for cause does not
13 create here and now subservience to the removing
14 authority, which is in effect what was held in Humphrey,
15 but the President had the power to remove for cause, and
16 you still held that the Federal Trade Commission was
17 independent of the President, then the Solicitor
18 General, I take it, would fall back on the argument that
19 these particular functions are within the heart, the
20 core of the executive power.

21 QUESTION: Purely executive, and so that they
22 may not be performed by this officer unless the
23 President has --

24 MR. CUTLER: Yes.

25 QUESTION: -- power to remove at will.

1 MR. CUTLER: On that argument, they could be
2 performed only by a purely executive officer.

3 QUESTION: And that -- is that a broader -- if
4 we affirmed on that ground, would that be a broader
5 relief?

6 MR. CUTLER: On that ground, yes, we think you
7 would then take over the side with you the Federal
8 Reserve Board which itself makes broad, predictive
9 findings of fact and sets policy, the Federal
10 Communications Commission which you have held determines
11 the course of future public policy when it is issuing
12 licenses and deregulating common carriers, and many
13 other commissions.

14 QUESTION: But that's not broader relief on
15 this particular judgment. That's just a more sweeping
16 doctrine.

17 MR. CUTLER: It's a more sweeping doctrine,
18 but should you adopt that doctrine, it would have very
19 serious implications for all of those agencies.

20 QUESTION: Well, it would foreclose, it would
21 foreclose or make beside the point agreeing with you
22 about the validity or invalidity of the 1921 act.

23 MR. CUTLER: I would -- yes, Justice White, if
24 the Solicitor General is correct in that contention,
25 then all the independent agencies except those which are

1 limited to deciding particularized cases based on past
2 facts, what he calls a quasijudicial function, would be
3 over the side, particularly if you adopt his theory that
4 it is not the removal power in those statutes which
5 would have to be invalidated but the function that is to
6 be performed.

7 QUESTION: Mr. Cutler, are there other
8 officers of the United States removable by the
9 Congress?

10 MR. CUTLER: This is the only officer of the
11 United States who by statute, Justice Powell, is
12 removable by the Congress.

13 QUESTION: Yes, by statute, for cause.

14 MR. CUTLER: That is so, for cause, that is
15 right, other than impeachment.

16 QUESTION: Mr. Cutler, what about the Federal
17 Reserve Board members?

18 MR. CUTLER: The Federal Reserve Board members
19 are removable for cause, under their statute, a term
20 that is not defined.

21 We have assembled in an appendix to our reply
22 brief the removal provisions and the statutory
23 characterization of the functions of every important
24 independent agency.

25 QUESTION: Mr. Cutler, do you take the

1 position that the removal power in the '21 act is
2 unconstitutional?

3 MR. CUTLER: We argue that it is not
4 unconstitutional, Justice Stevens, because they never
5 exercise power to remove for cause, which is so
6 difficult to apply and has never happened. Even the
7 President has never removed an independent officer for
8 cause in a hundred years. We argue it doesn't create a
9 here and now subservience on the authority --

10 QUESTION: Well, no, I understand that, but
11 it's a different argument.

12 MR. CUTLER: Right.

13 QUESTION: But I'm just asking independently,
14 would you say the '21 act is constitutional or
15 unconstitutional?

16 MR. CUTLER: If you asked me, I would have
17 great difficulty defending the portion of the '21 act
18 which gives Congress a role in the actual removal
19 process because that seems to fly in the face of the
20 ruling of Myers which was not affected by Humphrey's
21 Executor that Congress cannot participate in the actual
22 process of removal although it may lay down the
23 standards for removal.

24 If that happened, I would say, as I did in
25 response to the other question, that removal provision

1 is a nullity and has been since the beginning. It is
2 perhaps an open question for this Court whether
3 Humphrey's limitation of Myers to independent officers
4 reaches the portion of Myers that relates to
5 participation of the Congress in the removal process,
6 but should you conclude Congress cannot participate in
7 the removal process, that provision is a nullity. It is
8 as if it never existed.

9 And as to severance, Justice O'Connor, if I
10 may return to that for just a moment, in the Myers case
11 itself, the Court was considering a statute that
12 authorized the President to appoint and remove
13 postmasters of various classes by and with the advice and
14 consent of the Senate. It also provided for the
15 salaries of postmasters and assigned them various
16 functions. The Court in Myers struck down the removal
17 provision. It didn't stop the President from appointing
18 postmasters, it didn't stop postmasters from delivering
19 mail, and there was no so-called severance clause in
20 that statute.

21 QUESTION: I take it you are then somewhat at
22 odds with your colleagues with respect to the validity
23 of the 1921 provision?

24 MR. CUTLER: We would defend its validity
25 perhaps with less enthusiasm than our colleagues, but I

1 think we all come to the same place. We all think that
2 the removal provision can be upheld because it does not
3 create a here and now subservience. But we also think
4 if it does create subh a subservience or if Congress per
5 se cannot participate in the removal prcess, this
6 removal provision has been a nullity since 1921, and it
7 shuld nct affect your consideration of the 1985 act.

8 QUESTION: Are you suggesting that the '21
9 provision may be just partly or slightly
10 unconstitutional?

11 MR. CUTLER: I am suggesting, Chief Justice
12 Burger, that the removal provision either creates no
13 subservience, in which case it can have no effect on the
14 '85 act except on the Solicitor General's extreme
15 theory, or that it is unconstitutional and has been a
16 nullity since 1921.

17 CHIEF JUSTICE BURGER: Mr. Ross?

18 ORAL ARGUMENT OF STEVEN R. ROSS, ESQ.

19 ON BEHALF OF APPELLANTS O'NEILL, ET AL.

20 MR. ROSS: Mr. Chief Justice, and may it
21 please the Court:

22 I appear here this morning on behalf of the
23 Speaker and Bipartisan Leadership Group of the United
24 States Hcuse cf Representatives.

25 My argument will proceed in the following

1 fashion: First I will try to describe the functions
2 given to the Comptroller General under the 1985 act.
3 Secondly, I will describe the history and the necessity
4 for his choice to perform those functions. And then
5 finally, I will turn to the question of the
6 constitutional appropriateness of that choice.

7 The 1985 act, Emergency Deficit Control Act,
8 proceeds from a simple proposition. That proposition is
9 to set statutory targets which in a declining basis --
10 which, when met will result in a balanced budget by
11 1991. To meet these deficit target figures a simple
12 process is established. That process calls for certain
13 calculations. Those calculations start with economic
14 projections and then, using those economic projections,
15 a forecast of the projected deficit, and then using that
16 projected deficit, comparing it to the statutory target
17 figure, a determination of the shortfall, and then
18 applying the statutory formula, arriving at how to meet
19 that shortfall from taking money from each account.

20 In making these calculations, the Comptroller
21 General is performing functions similar to the functions
22 that he has always performed. He makes accounting
23 determinations with respect to the federal budget. It
24 is, in essence, a pre-audit, telling federal paymasters
25 and disbursing officers how much money they will have to

1 spend.

2 The District Court accurately described these
3 calculations as the application of law to present and
4 future facts. Equally accurate, but more colorful, was
5 Judge Scalia's description in oral argument that what
6 this job was was something for a man with a green
7 eyeshade, that it was an accountant's job, not power.

8 The District Court correctly concluded that
9 the Comptroller General is not responsible for a single
10 policy judgment under the act.

11 Next let me turn to the necessity for having
12 the Comptroller as the impartial budget scorekeeper, and
13 why he was chosen.

14 When the proposal first originated in the
15 Senate, these calculations which were always part of the
16 proposal were to be performed jointly by the President's
17 office, OMB, and by the Congressional Budget Office.
18 When that proposal reached the House, it was not
19 surprising that the House chose not to entrust these
20 functions to OMB whose director, of course, shares
21 office space with the President. Instead, the House
22 chose to give these functions to the nonpartisan CBO, or
23 Congressional Budget Office.

24 Since the director of the Congressional Budget
25 Office is appointed not by the President but by the

1 Congress, there were those who raised problems with this
2 proposal. The proposal was then made on the floor of
3 the House by leaders of both parties, Representative
4 Gephardt, a member of the Democratic leadership, and
5 Representative Cheney, a member of the Republican
6 leadership, that in order to ensure that these
7 calculations are walled off from any possible
8 manipulation, that they be given to the independent,
9 long-tenured Comptroller General.

10 As the proposal bounced back and forth between
11 the Senate and the eventual conference, this proposal
12 was eventually enacted, and these functions were given
13 to the Comptroller General. Although the bill had many
14 detractors and many concerns were raised about it, at no
15 time did these detractors raise any concerns over the
16 role of the Comptroller General, nor did the President
17 raise any constitutional concerns over the role of the
18 Comptroller General.

19 The choice of the Comptroller was consistent
20 with two recent judicial decisions in which district
21 courts had determined in the face of the challenge by
22 the executive that the Comptroller could be given
23 important administrative tasks because he was an
24 independent officer. The selection was also a
25 recognition of the historic role of the Comptroller,

1 and --

2 QUESTION: Mr. Ross, wouldn't you concede that
3 the historic role of the Comptroller General is really
4 that of an employee of the legislative branch, in
5 effect? Hasn't he been considered an arm of the
6 legislative branch rather than the executive branch,
7 historically?

8 MR. ROSS: He has been called by those in
9 Congress and those in the judiciary many things over the
10 years. He was -- and it is not the nature -- it's the
11 nature of the function rather than the label that is
12 given to him that should apply. His function was
13 historically first performed in the United States by a
14 Comptroller within the Treasury Department. When James
15 Madison urged the first Congress to create such an
16 office, he specifically alluded to the importance that
17 such an office had a unique, independent status, and in
18 fact, urged that the tenure be given would be one which
19 would make him accountable to the public generally, and
20 so that while over the years the Comptroller has, for
21 example, been funded in certain years out of the
22 legislative branch appropriations and in other years out
23 of executive branch appropriations, I don't believe that
24 is the key. The function of the Comptroller, which is
25 checking the expenditures from the public purse, has

1 always been considered one that is necessary to be
2 performed by an independent officer.

3 QUESTION: The Comptroller gives opinions,
4 though, on constitutionality of things, doesn't he?

5 MR. ROSS: To the Congress?

6 QUESTION: Yes.

7 MR. ROSS: The Comptroller, as many people,
8 provides Congress with information. It is well within
9 the purview of Congress' power to require opinions as to
10 constitutionality or as to investigations from many
11 officers throughout the government. Clearly, if the
12 Congress wanted to, it could require that Commissioners
13 of the FTC come up and give opinions.

14 QUESTION: Yes, but based on my three years'
15 experience in the Justice Department, my feeling was,
16 you know, that if the executive branch wanted a
17 favorable opinion, you went to the Attorney General; if
18 Congress wanted a favorable opinion, you went to the
19 Comptroller General.

20 Do you think that is unreasonable?

21 MR. ROSS: I was going to answer that the
22 Congress calls on the Comptroller so often because they
23 respect his competency.

24 QUESTION: May I ask, in that connection, if
25 his task is to review the expenditure of public funds, I

1 take it he will perform that task upon request by either
2 a congressional committee or an individual Congressman
3 or Senator, is that correct?

4 MR. ROSS: He will perform various
5 investigative functions upon request of congressional
6 committees or individual members.

7 QUESTION: Will he do the same thing upon the
8 request of the President?

9 MR. ROSS: Yes, he does. He performs various
10 functions for the executive branch.

11 QUESTION: The same type of investigative
12 checking on disbursements?

13 MR. ROSS: He would not issue the same type of
14 report, but he does do work for the -- for executive
15 agencies.

16 QUESTION: What percentage of his work
17 assignments do you suppose emanate from the legislature
18 and what from the executive?

19 MR. ROSS: I think the figures that I last saw
20 indicate that he does a great deal of his work for the
21 legislative branch, over 50 percent, but I don't think
22 it is --

23 QUESTION: Is it over 90 percent, would you
24 say?

25 MR. ROSS: I don't believe so.

1 QUESTION: What work does he do for the
2 executive branch specifically?

3 MR. ROSS: He performs certain audit functions
4 at the request of executive agencies who want to rely on
5 his expertise.

6 My third point is the constitutional
7 appropriateness of the selection of a Comptroller
8 General. As our brief and as counsel for the
9 Comptroller have pointed out, a long line of cases in
10 this Court uphold the nature of independent agencies
11 performing administrative tasks. We learn from
12 Humphrey's Executor, Wiener and Buckley that these tasks
13 can be given to an independent officer so long as that
14 officer is appointed by the President, as the
15 Comptroller General is.

16 In challenging the independents of the
17 Comptroller, the executive fails to cite specific
18 constitutional provisions which the 1985 act or the 1921
19 act violate. That is because there aren't any.

20 QUESTION: Now, Mr. Ross, you take the
21 position that none of the functions assigned to the
22 Comptroller General in the 1985 act are executive
23 functions in nature?

24 MR. ROSS: We take the position that none of
25 the functions given to the Comptroller in the 1985 act

1 are purely executive as that term has been used by this
2 Court, in, example, in Myers or as that term was
3 understood in the first Congress in respect to --

4 QUESTION: You wouldn't concede that there is
5 anu executive power component involved in the 1985 act
6 powers given to the Comptroller General?

7 MR. ROSS: Well, clearly, the economic
8 projections are a function which are performed by all
9 three branches on a daily basis. It is the finding of
10 future --

11 QUESTION: But the bottom line, of course, is
12 picking a figure or figures that will be binding on all
13 agencies of the federal government for purposes of
14 sequestration, for example.

15 MR. ROSS: Well, of course, the figure is
16 determined by the statutory formula. The fact that the
17 Comptroller's findings will be binding is consistent
18 with the way this Court described the role of the
19 Comptroller General in Skinner & Eddy in 1927 when
20 Justice Brandeis observed that the findings of the
21 Comptroller General were binding on the executive
22 branch. It is not a new function for the Comptroller to
23 do.

24 Instead of relying on specific textual
25 provisions, the Solicitor's attack on the statute calls

1 into question an area which Justice Stevens has recently
2 aptly described as one of those vast open spaces in the
3 text of the Constitution which was left by the framers
4 to be filled in by future generations of lawmakers. In
5 light of this constitutional silence, this Court should
6 be especially wary of overturning an important statute
7 arrived at by important compromise between the political
8 branches. That is particularly true since the President
9 is not without weapons in fighting for these open
10 spaces, namely, his participation in the legislative
11 process and his well-advertised veto pen.

12 The Solicitor also raises a number of specific
13 concerns with regard to the Solicitor General's choice.
14 He says that these --

15 QUESTION: You mean the Comptroller General,
16 sir?

17 MR. ROSS: Excuse me. Yes. With regard to
18 the Comptroller General's performance of these
19 functions. He says that these functions are purely
20 executive, but as I have indicated, these functions,
21 predicting present and future facts and making economic
22 calculations and mathematical determinations, are the
23 type of functions which have traditionally been given to
24 independent agencies.

25 The Solicitor tries to draw support --

1 QUESTION: Isn't there some tension between
2 that suggestion and your earlier suggestion that he's
3 just a guy with a green eyeshade?

4 MR. ROSS: The predictive nature of his task?

5 QUESTION: Yes. It seems to me you ought
6 to -- you have to choose between those two versions of
7 what he is doing.

8 MR. ROSS: Well, I guess it would depend on
9 whether -- and the description was Judge Scalia's --
10 whether Judge Scalia viewed accountants as doing any
11 predictive factfinding. Determining what the economy
12 will look like in three months, six months, nine months
13 or a year is still essentially a finding of fact. It is
14 not a finding of fact which is reliable as finding
15 present day facts, but it is still a finding of fact.

16 As I said, these --

17 QUESTION: How do you compare the Comptroller
18 General's function under the 1985 act with the
19 President's function in preparing the budget?

20 MR. ROSS: The President seeks to articulate
21 his choices for national policy by making political,
22 practical and policy determinations as to how much of
23 the federal purse should be spent in various areas and
24 where that money should be derived from. The
25 Comptroller performs no function even vaguely similar to

1 that.

2 What the Comptroller does is take that budget
3 as it is proposed by the President and enacted by the
4 Congress and then applies the statutory formula to
5 reduce expenditures in the event that the Congress has
6 not met the target.

7 QUESTION: Well, isn't that something like
8 correcting the papers of both?

9 MR. ROSS: No, it does not alter in a single
10 area any policy judgment. I think the District Court
11 correctly concluded that the Comptroller is not given a
12 single policy judgment, and that is the major
13 difference. The purely executive function of proposing
14 the budget or proposing legislation involves policy
15 choices. The Comptroller's function and the
16 administrative task is simply the application of the
17 statutory formula to come up with the bottom line
18 numbers.

19 QUESTION: Well, what is your bottom -- the
20 bottom line in your argument, that he may perform these
21 functions constitutionally?

22 MR. ROSS: Right, that he may perform these
23 functions constitutionally and that the nature of his
24 tenure, being appointed by the President in strict
25 accordance with this Court's decision in Buckley, and

1 the fact that the removal mechanism is for removal by
2 enactment of a statute using the proper statutory
3 enactment process required by this Court's decision in
4 Chadha do not deprive him of the independent status. It
5 does not give the Comptroller either de facto or de jure
6 subservience to the Congress or to the President.

7 In fact, he enjoys a degree of independence
8 which is unique among officers of the United States, but
9 is exactly what both the first Congress had in mind and
10 is exactly what the legislators in 1921 had in mind in
11 creating this --

12 QUESTION: So you defend the provision in the
13 1921 act.

14 MR. ROSS: Yes, I do. I think it is --

15 QUESTION: And you defend assigning these
16 particular functions to him in the '85 act.

17 MR. ROSS: Right. I believe that it is --
18 Congress and the President can choose under the doctrines
19 of the Constitution and this Court to give these types
20 of functions to independent officers. We also believe
21 that the Comptroller General is an independent officer
22 by virtue of both his appointment and the protected
23 nature of his tenure.

24 QUESTION: Would you say that these functions
25 could be given to an executive branch officer, Mr. Ross,

1 under a scheme like this with Congress removal power?

2 MR. ROSS: I'm not sure I follow the
3 question. Could the Congress --

4 QUESTION: Could these -- you say that the
5 Comptroller General is an independent officer, so it's
6 all right to give him the power that has been given.

7 Could Congress give this power to a purely
8 executive branch officer having Congress with the
9 removal power that it has retained for itself with this
10 officer?

11 MR. ROSS: Okay, let me answer that in two
12 ways. I don't believe that the Congress could enact a
13 statutory removal mechanism that provides for removal by
14 public law for a purely executive officer. So that is
15 the second part of your question.

16 As to the first part, Congress and the
17 President in the legislative process could have chosen
18 to give this function to the Secretary of the Treasury.
19 I think that would have been a political impossibility.

20 QUESTION: But you think that somehow the
21 Constitution provides for the creation of these
22 independent officers.

23 MR. ROSS: It's more that the Constitution
24 doesn't prevent it, and that where the Constitution does
25 not specifically prevent the political branches from

1 utilizing a particular mechanism, this Court owes
2 deference to the choices of those political branches.

3 QUESTION: And how do you fit that doctrine
4 into what we think of as the separation of powers
5 concept that the framers of the Constitution had in
6 mind?

7 MR. ROSS: Well, personally I don't believe
8 that each and every function of the government or each
9 and every officer of the government need be neatly
10 pigeonholed into a label of either being executive,
11 judicial or legislative; that I would agree with the
12 description that James Madison gave in Federalist No. 37
13 that there are times that these functions do not permit
14 such easy labeling. And so I think that because the
15 Constitution does not require that the -- that there be
16 an officer labeled as either executive, judicial or
17 legislative, that as long as those requirements which
18 are contained within the Constitution are met, that
19 separation of powers is properly protected.

20 Here, the protection which the Court has
21 clearly defined as recently as the Buckley case, is that
22 the power of appointment which is specifically described
23 in the text of the Constitution, could not be given to
24 the legislative branch, and the legislative branch has
25 not seen fit to try to take that power in this act.

1 QUESTION: Well, I guess the legislative
2 branch has in fact restricted the power of appointment
3 of Comptroller General to a degree, has it not, by
4 limiting the appointment to people suggested?

5 MR. ROSS: The legislative history of the
6 appointment provision clearly suggests that the Congress
7 intended and expected that the President would retain
8 his right to name whoever he so chose, and the President
9 in naming Mr. Bowsher as Comptroller General made his
10 own choice.

11 QUESTION: But he had to choose from just
12 three candidates, didn't he?

13 MR. ROSS: The legislative history indicates --

14 QUESTION: But the statute provides just three
15 candidates, doesn't it?

16 MR. ROSS: It provides that there be
17 suggestions given to the President by the legislative
18 branch.

19 QUESTION: And he must pick one of the three
20 suggested. Am I wrong on that? Maybe I read it wrong.

21 MR. ROSS: That's what the statute provides.

22 QUESTION: Oh, I see. So I am not wrong.

23 But let me just ask you one question. I know
24 the red light is on, but you said that they could
25 constitutionally have given this power to the Secretary

1 of the Treasury, but it would have been, as I understand
2 what you said, a political impossibility, which seems to
3 me again inconsistent with the notion that this is just
4 a factfinding function.

5 Why would it be a political impossibility?

6 MR. ROSS: There are differences between
7 constitutional realities and political realities.

8 QUESTION: Right.

9 MR. ROSS: The fact that it is a factfinding
10 function is enough to justify constitutionally that it
11 be given to an independent officer. The fact that it
12 was a factfinding function would not have been enough
13 politically to have the Congress give it to someone who
14 shares office space with the President.

15 QUESTION: Because there's some area of
16 discretion in finding facts, I guess that's what you are
17 saying.

18 MR. ROSS: Whether it is discretion or not, it
19 need not be discretion for there to be a lack of trust,
20 and the political reality of this bill was that when it
21 came to the House, it was necessary for the House to
22 formulate an officer that all within the House could
23 trust his nonpartisanship. That officer was clearly the
24 Comptroller General.

25 Thank you.

1 CHIEF JUSTICE BURGER: Mr. Davidson?

2 ORAL ARGUMENT OF MICHAEL DAVIDSON, ESQ.

3 ON BEHALF OF APPELLANT UNITED STATES SENATE

4 MR. DAVIDSON: Mr. Chief Justice, and may it
5 please the Court:

6 Before turning to the delegation argument, if
7 I may pick up on several points which have been
8 discussed, in further response to Justice Powell's
9 question whether there is any other agency of the United
10 States for which there is a provision for congressional
11 removal, there is one. There has been since 1933 in the
12 Tennessee Valley Authority Act a provision that the
13 Congress could, by concurrent resolution, not even
14 involving the President of the United States, remove
15 members of the TVA board, and yet no one has thought
16 because of that vestigial provisions, as dormant as the
17 provision in the 1921 Budget and Accounting Act, that the
18 Tennessee Valley Authority is a committee of the
19 Congress. It has functioned in a clearly executive
20 capacity, redeveloped an entire region of the United
21 States, notwithstanding a provision which purports to
22 give to the Congress the power to remove even without
23 the participation of the President.

24 QUESTION: But how was he appointed in the
25 first place?

1 MR. DAVIDSON: By the President with the
2 advice and consent of the Senate, as is the Comptroller
3 General.

4 And in response to the question what does the
5 Comptroller General do for the executive branch, I would
6 add that in each of our libraries there are 60 or more
7 volumes of Comptroller General decisions, decisions
8 which are rendered principally, overwhelmingly at the
9 request of the executive branch, Disbursing and other
10 fiscal offices, asking for the Comptroller General's
11 ruling on proposed expenditures.

1 The Comptroller General is able to undertake
2 that function because in the 1981 Act the Congress made
3 the critical decision that he must be an officer of the
4 United States, appointed by the President under the
5 appointments clause.

6 QUESTION: That isn't entirely a courtesy,
7 though, on the part of the Comptroller General, because
8 the reason the executive branch authorities seek the
9 Comptroller General's ruling is that they run the risk
10 of being surcharged, don't they?

11 MR. DAVIDSON: And the reason that they run
12 the risk of being surcharged is that the Comptroller
13 General inherited under the statute the power of the
14 control of the Treasury, to issue rulings which are
15 binding on the executive branch. When the Congress
16 considered in 1921 how he should be appointed, it was
17 deemed to be indispensable that he be appointed by the
18 President because of that very kind of power.

19 In 1980 when the Congress provided for the
20 recommendation of names to the President on the
21 appointment of the Comptroller General, the statute was
22 deliberated over several Congresses. The point is made
23 by the Department of Justice that, in order for the
24 Comptroller General to continue to exercise his
25 executive function, the President must still retain the

1 power, and complete power, to choose any Comptroller
2 General for nomination to the Congress at his
3 discretion.

4 The statute provides the word "reccmmend"
5 several times. The legislative history is absolutely
6 explicit that the President may ask either for names --
7 that's in the statute -- or to nominate anyone not on
8 the list whom the President deems should be the
9 recipient of his nomination.

10 The power of the President to nominate the
11 Comptroller General, to appoint the person who he deems
12 to be the best suited for that position, subject to the
13 advice and consent of the Senate, has not been infringed
14 upon by the 1980 enactment.

15 If I could turn to the delegation issue, the
16 plaintiffs, Representative Synar and the Treasury
17 Employees Union, ask this Court to affirm the judgment
18 below on the alternative ground that the administrative
19 powers under this Act may not be delegated to any
20 officer, no matter what his or her constitutional
21 qualifications may be.

22 The district court rejected that contention,
23 holding that the Congress has made the policy judgments
24 which constitute the essence of the legislative
25 function. Because the Act's administrative mechanism is

1 a standby procedure which may never be utilized after
2 the present fiscal year, in large part plaintiffs'
3 contention is a theoretical argument against the
4 possible implementation of a statute relating to future
5 facts.

6 But as anticipated, the procedure is being
7 utilized this year to effect a small reduction in this
8 year's estimated \$220 billion deficit. Yet plaintiffs
9 point to no determination of the Comptroller for this
10 fiscal year which is even colorably questionable under
11 the delegation argument, but look ahead, as I will now
12 with my argument, to the fiscal years which will
13 follow.

14 QUESTION: If the Solicitor General -- or, not
15 the Solicitor General, but if the delegation argument
16 were accepted and we didn't agree with you, would the
17 judgment below be expanded or would that give the
18 plaintiffs additional relief?

19 MR. DAVIDSON: It would effect the result in
20 this way. The relief would be the same. Fallback would
21 be required.

22 QUESTION: Right, right.

23 MR. DAVIDSON: This is an appropriate use of
24 the fallback mechanism. If the Congress can't delegate
25 this authority to any official, no matter what his

1 constitutional qualifications may be, then the only way
2 to provide --

3 QUESTION: So the judgment would we really the
4 same?

5 MR. DAVIDSON: The judgment would be the
6 same. Again, the consequences of the judgment would be
7 vastly different because it would affect the very
8 significant law of delegation.

9 QUESTION: Yes.

10 MR. DAVIDSON: And it would, of course, render
11 it insignificant if the Congress attempted to correct
12 the statute by providing for the delegation of this
13 authority to any other officer. Congress would be told
14 that it cannot provide for an administrative mechanism,
15 even on a standby basis.

16 Looking ahead, then, with the plaintiffs to
17 future fiscal years, it is important to note both what
18 the Comptroller General does and when he does it. The
19 annual budget process begins in January or February,
20 when the President submits his message to the Congress,
21 and continues until October 1st, when it is hoped that
22 the Congress has completed action on the budget for the
23 following year.

24 The Comptroller General's formal
25 administrative responsibilities under the Act occur in

1 the latter part of this process, on the eve of its home
2 stretch in September, when the Comptroller reports to
3 the President on August 25th about the extent to which
4 the budget which has been enacted to date or, utilizing
5 various assumptions in the statute which would then
6 apply if it has not been enacted, calculates the amount
7 by which the deficit would exceed the amount prescribed
8 in the statute.

9 The terms of the Act establish that the
10 Congress has fulfilled the essence of the legislative
11 function by establishing policy and prescribing the
12 means of attaining it. First the law, and not the
13 Comptroller General, determines what the maximum
14 permissible deficit is. The Comptroller General is
15 simply given no authority to make economic judgments on
16 his own behalf as to what the desirable level of deficit
17 financing should be.

18 And the law, not the Comptroller General,
19 established the legal rules for the assumptions about
20 what should go into or be excluded from the base of
21 revenues and expenditures.

22 The law, not the Comptroller General,
23 establishes that any required reductions should be
24 spread across the budget. It mandates equal sacrifices
25 on the defense and non-defense sides of the budget. It

1 mandates designated exceptions and limitations. And
2 then it mandates uniform reduction of all other
3 accounts.

4 After examining the Act in great detail, the
5 district court concluded that it was not true, as the
6 plaintiffs allege, that the Congress has declined to
7 make the hard political judgments. It is true that the
8 Act delegates to the Comptroller an important fact
9 finding function.

10 But those facts, the district court correctly
11 concluded, are no more difficult to ascertain than the
12 facts which are calculated in determining the discount
13 rate, functions which other agencies wielding far more
14 economic power have undertaken without question for
15 years.

16 In this Court, in addition to renewing their
17 specific arguments which the district court had
18 rejected, the plaintiffs make the further argument that
19 the Act should fail because it was motivated in their
20 view by the desire of Congress to avoid political
21 responsibility.

22 This new contention founders on the principle
23 that the Court will not inquire into the
24 praiseworthiness of the motives of the Congress. But
25 moreover, objectively, as the Act is structured and as

1 it in intended, it is designed to promote, and not to
2 avoid, political responsibility.

3 If in any of the next five years the
4 Comptroller reports to the President and the Congress,
5 on the basis of the law and facts in August of that
6 year, that there will be an excess deficit, then the
7 President is to issue a deficit reduction order. But
8 the effectiveness of that order is delayed from
9 September 1st to October 1st, for perhaps the 30 most
10 critical days of the entire budget calendar.

11 What that report does is it informs the
12 Congress of the degree to which expenditures must be
13 reduced or revenues increased to provide for deficit
14 reduction in another manner. And literally every
15 appropriation, every revenue decision of the Congress in
16 that month, is done with the full knowledge of the legal
17 consequences of not producing deficit reduction in
18 another way.

19 And then the Act provides that the President
20 shall issue a further order in the month of October,
21 following a subsequent report of the Comptroller. That
22 report of the Comptroller will identify for the
23 President, for the Congress, and for the public the
24 degree to which the Congress has either attained the
25 objectives of the Act in another way or has not attained

1 those objectives.

2 Furthermore, political accountability is
3 ensured by the very nature of the spreading of the
4 deficit reduction across the budget. This is not an Act
5 that singles out individual groups for special
6 treatment. It's an Act that requires that reduction be
7 across the budget and affecting a wide variety of
8 groups.

9 The parties to this lawsuit, whether they be
10 members of Congress, the executive branch, the amici
11 representing very articulate and powerful interests, are
12 all participants in that process. So what we have here
13 is an opportunity through the political process to
14 decide whether the Congress should in some other way
15 achieve objectives which the Congress and the President
16 have legislated into law.

17 If I could pick up a theme on the fallback,
18 this administrative mechanism is a standby mechanism
19 and, as I indicated, it may never be utilized again
20 after this first year. But it is a fundamental part of
21 the statute, because it was perceived by the sponsors of
22 the Act and endorsed by the Congress that a mechanism,
23 reliable and predictable in nature, was necessary to
24 discipline the budget process.

25 If this Court is to strike the administrative

1 mechanism, then it removes from the statute what was
2 perceived to be the statute's unique contribution to
3 deficit reduction. Now, there may be some circumstances
4 in which the fallback is the perfectly appropriate
5 alternative.

6 If, for example, as I indicated, this Court
7 would decide that this power may not be delegated to an
8 administrative officer, then annual deficit reductions
9 through legislation is the only alternative. And if
10 this Court were to conclude, agreeing with the Solicitor
11 General, that this function could only be performed by
12 an officer who serves at the President's pleasure, then
13 it is difficult to say that the Congress would have
14 passed this statute.

15 And the reason why it is difficult to say that
16 is that it is indispensable to the statute that there be
17 a neutral mechanism, not committed to the policy
18 objectives of the Congress or the President, to play the
19 role of scorekeeper.

20 QUESTION: Would you say that that objection
21 was founded on the same objection to the line item
22 vetoes? There's some resemblance there?

23 MR. DAVIDSON: It is a very similar type of
24 concern. Policy decisions are made by the Congress in
25 enacting appropriations. This Act requires that, if

1 there is to be deficit reduction under the Act, no
2 program or project will be singled out with any
3 different treatment except as provided in the statute
4 through an exemption.

5 QUESTION: Well, what if we took the
6 suggestion that Mr. Cutler suggests, that if the problem
7 with the statute is the removal power by Congress, which
8 the district court emphasized, do you think that
9 Congress would have passed this statute if it didn't
10 have removal power?

11 MR. DAVIDSON: I think the evidence is that it
12 probably would have. The reason for that is that in
13 enacting this statute the Congress was only searching
14 for an officer who would be neutral and impartial in
15 those judgments.

16 There is not one shred of evidence in the
17 legislative history that the Congress was seeking an
18 officer over whom it had any control. If the removal
19 provision was stricken and if either the result was that
20 the Comptroller General was removeable only by
21 impeachment, as the only other alternative under the
22 1921 Act, or that there is an implied reservation of
23 presidential authority, constitutional presidential
24 authority to remove for cause, the Comptroller General
25 would remain an independent officers.

1 The reasons for removal do not include
2 disagreement with his policies, but only malfeasance in
3 office or gross inefficiency in office, the failure of
4 the office to operate, but not the determinations of the
5 office.

6 QUESTION: Don't you run the risk, if the
7 removal provision of the 1921 Act is struck down, that
8 you would leave the office simply removeable by the
9 President at will?

10 MR. DAVIDSON: We agree with the Comptroller
11 General that under this Court's decision in Whalen the
12 Court would look to the functions of the Comptroller
13 General in determining whether it is the kind of
14 function which requires presidential removal at will.
15 And we think that it would find in those circumstances,
16 starting from the 1921 Act, that it was the intention of
17 the Congress that the Comptroller General not be subject
18 to the policy pleasure of any official of the United
19 States, whether it be the Congress or the President.

20 The Congress thought in 1921 that, looking at
21 the cases that it then knew, prior to Myers, that it
22 could be the agent to determine whether the Comptroller
23 General had reached such a degree of inefficiency or
24 malfeasance that removal was required. But it
25 specifically eschewed the power to remove for no cause

1 at all.

2 If the Court retains that basic idea, which we
3 think is required by the legislative history of that
4 office, the Comptroller General would remain under the
5 '85 Act an independent officer performing exactly the
6 function which the Congress has asked him to perform
7 under that Act.

8 In those circumstances, it would be
9 unnecessary to radically change the statute from one
10 which contains an administrative mechanism to one which
11 requires an annual deficit reduction legislation,
12 because the objectives of the Congress would still be
13 preserved.

14 Let me add one further thought on the question
15 of the 1921 Act. We have made the further argument, as
16 the Third Circuit decided only last month, that the
17 removal issue is not ripe for adjudication. The Third
18 Circuit emphasized the fact that it had never been used,
19 and I would like to add just one further point to that.

20 The 1921 Act provides for a future enactment
21 of the Congress. That's an enactment which would have
22 to be approved bicamerally and presented to the
23 President. This Court has never anticipated a future
24 enactment of the Congress.

25 And prior to the Congress ever adopting a

1 joint resolution of removal, it would be faced with the
2 serious constitutional questions that this Court's
3 decisions from Myers on have presented. We think that
4 the level of respect from one coordinate branch to
5 another -- that the Congress be given that first
6 opportunity, if ever the removal issue were presented to
7 it.

8 QUESTION: Earlier, Mr. Davidson, you had made
9 -- at least I got an intimation that judges could make
10 some kind of an appraisal of whether Congress would or
11 would not have passed the '21 Act without the removal
12 privilege.

13 Where do we get our authority to try to make
14 judgments of that kind?

15 MR. DAVIDSON: I think it is the judgment that
16 this Court made in Chadha, the legislative veto case,
17 when the contention was placed before the Court that the
18 Congress would not have delegated the authority to the
19 Attorney General to suspend and then cancel deportation
20 without reserving the opportunity to review that
21 decision.

22 QUESTION: Do you think that was a key factor
23 in the Chadha holding?

24 MR. DAVIDSON: Not in its constitutional
25 holding, but in the Court's prior, preliminary ruling

1 that that statute was severable. The same severability
2 analysis applied to the Comptroller General would
3 indicate that Congress has intended to assign to him the
4 administrative functions which he has had since 1921,
5 and that if there is a defect in a potential method of
6 Congressional control over that assignment of powers to
7 an officer of the United States, the defect is cured by
8 striking it and retaining the authority of the officer.

9 Thank you.

10 CHIEF JUSTICE BURGER: Very well.

11 Mr. Solicitor General?

12 CRAL ARGUMENT OF

13 CHARLES FRIED, ESQ.,

14 ON BEHALF OF APPELLEE THE UNITED STATES

15 MR. FRIED: Thank you, Mr. Chief Justice, and
16 may it please the Court.

17 Section 251 of the 1985 Act gives the
18 Comptroller General critical responsibility for the
19 execution of the Act by assigning to him the
20 determination of reductions in outlays throughout the
21 Government.

22 This grant of authority violates the
23 Constitution, first and principally because the grant is
24 to an official removable only on the initiative of the
25 Congress, an official who is for this and because of

1 Congress' intent expressed in many other ways an agent
2 of Congress.

3 And second, because executive functions
4 importantly affecting the whole of the executive branch
5 and directing the President himself may only be
6 performed by an officer who serves at the pleasure of
7 the President.

8 I would like to say at the outset that this
9 second argument does not in our view in any way cast any
10 doubt on the validity of agencies such as the Federal
11 Reserve Board, the Federal Trade Commission, or any such
12 agencies, and that the notion that the second argument
13 in some sense endangers those agencies or would embark
14 this Court on some constitutional adventure is simply a
15 scare which we don't intend to throw into the Court and
16 I don't think need be thrown there.

17 QUESTION: Well, Mr. Fried, I'll confess you
18 scared me with it.

19 (Laughter.)

20 QUESTION: So why don't you explain.

21 MR. FRIED: Well, the principal point, Justice
22 C'Conner, is that the powers which are given to the
23 Comptroller General here are so sweeping they affect
24 every nook and cranny of the executive department. They
25 give orders to the President himself. They affect every

1 one of the executive agencies.

2 And there is no single agency of those that we
3 are perfectly familiar with which has any such sweeping
4 powers. And the argument we make is simply that an
5 officer who can have that pervasive effect on the
6 executive branch must be removable by the President at
7 will.

8 QUESTION: Well, that strikes me as kind of a
9 novel doctrine you're espousing, and I can't quite put a
10 finger on that approach in any of this Court's previous
11 decisions. And I mean, can't it be said that the
12 Federal Reserve Board, for example, through its powers
13 basically affects the financial structure of every
14 agency of the Government?

15 MR. FRIED: The Federal Reserve Board is a
16 good example, because in fact what the Federal Reserve
17 Board does is to determine, as the bank which it is
18 established to be, the interest rate it will charge to
19 its clients. Now, that determination has implications.
20 It has implications which do indeed have effects.

21 It's quite interesting that the statute
22 setting up the Federal Reserve Board specifically said
23 that nothing in it shall in any sense impinge on the
24 powers of the Secretary of the Treasury. Here we have
25 an official who gives orders to the President. I don't

1 think we have that in respect to the Federal Reserve
2 Board or any other of the agencies which we're familiar
3 with.

4 So I think it's really quite a different
5 thing. The reason that the argument that I'm making
6 sounds novel is that these powers are entirely novel.

7 QUESTION: Mr. Fried, you don't challenge the
8 fallback position, do you?

9 MR. FRIED: Not at all.

10 QUESTION: That if this order, instead of
11 being given by the Comptroller General, were based on
12 the recommendation of the Comptroller General and then
13 enacted in a joint resolution of Congress, that then the
14 President would have to obey it.

15 MR. FRIED: Well, the President of course, as
16 this Court has said on numerous occasions, exists to
17 execute the laws.

18 QUESTION: Right.

19 MR. FRIED: And this would be a law, and it
20 would be a law which he would to execute. There's no
21 question of that.

22 QUESTION: And you don't challenge the
23 delegation, do you?

24 MR. FRIED: No, Justice Rehnquist. It would
25 seem to us that between one far pole, where the actions

1 of an officer are merely ministerial -- in our view, the
2 Comptroller General's actions here are very far from
3 being merely ministerial -- and the other far pole,
4 where the officer acts entirely at large, there is a
5 very large terrain.

6 It is the usual terrain of executive action
7 and administration, and it is in that terrain that the
8 Comptroller General is asked to act.

9 QUESTION: So if these functions had been
10 assigned to the Secretary of the Treasury, you would say
11 it was a perfectly good delegation --

12 MR. FRIED: That would have been --

13 QUESTION: -- just like you say it is here?

14 MR. FRIED: -- perfectly proper, if it had
15 been assigned to the Secretary of the Treasury.

16 QUESTION: Or the OBM?

17 MR. FRIED: Or the Director of the OMB, yes,
18 Chief Justice Burger.

19 In our view, the principal purpose of the
20 Office of the Comptroller General established in the
21 1921 Budget and Accounting Act was to serve as the
22 auditor for Congress. To the extent that the
23 Comptroller General has interpreted the 1921 Act as
24 going beyond that conception, the executive has always
25 resisted such accretions to the central function.

1 In 1933, the Solicitor General said to the
2 Court in Miguel against McCall -- and I'll quote it in
3 extenso because it's exactly our position today: "It
4 was the purpose of Congress that the Comptroller General
5 should" -- now quoting from the Act -- "exercise in
6 general a control over all the accounting procedures of
7 the Government." But," said the Solicitor General, "the
8 accounting procedures relate to accounting, and power
9 over accounting is not power to decide how the laws
10 shall be administered."

11 That is precisely our contention today, that
12 power over accounting is not power to decide how the
13 laws shall be administered. And that has been the
14 consistent position of the executive branch.

15 QUESTION: What about the management audits
16 that the Comptroller General conducts? Do you think
17 that's an improper use of that function?

18 MR. FRIED: Those are very useful, but the
19 position of the executive branch has consistently been
20 that those are not final and determinatively binding on
21 the executive. That indeed was the issue in Miguel
22 against McCall, and this Court supported the executive,
23 ordered that a particular pension be paid to a
24 Philippine scout which the Comptroller General general
25 had finally determined should not be so paid.

1 So the position really of the executive has
2 been that way consistently. In 1969, when the
3 Administration instituted the so-called Philadelphia
4 Plan, the Comptroller General purported to say that this
5 was an unauthorized use of appropriations. The
6 executive resisted that determination.

7 In *Stotts v. Lynn*, then the Comptroller
8 General, under the impoundment -- in the Impoundment
9 Control Act, sought to bring suit against the executive,
10 the executive resisted that exercise of power by the
11 Comptroller General.

12 QUESTION: Are you suggesting, Mr. Solicitor
13 General, that when the Comptroller General exercises
14 that kind of a function he is calling attention as an
15 overseer, calling the attention of Congress so that
16 Congress the next time around on the budgets can deal
17 with the problem that the Comptroller General has
18 pointed out?

19 MR. FRIED: That is our view of his principal
20 function, as the auditor for the Congress, on behalf of
21 the Congress; as one of the Congressmen in the debates
22 on the 1921 Act said, a watchdog and a critic on behalf
23 of Congress. And that is the central function which the
24 Comptroller General so admirable has performed
25 throughout the life of that office.

1 QUESTION: Well, if you're correct is he still
2 an officer of the United States who must be appointed by
3 the President?

4 MR. FRIED: We make no point of whether he is
5 an officer of the United States. Because he has been
6 appointed by the President, he is an officer of the
7 United States. We're not at all sure that these very
8 same functions could not as conveniently and as easily
9 have been performed by someone appointed by the Congress
10 itself. But having been appointed by the President, we
11 make no point of the fact that he is or is not an
12 officer of the United States.

13 The constitutional temptation here, as in
14 Miguel against McCall, as in Stotz v. Lynn, and
15 throughout this history, has been on the part of
16 Congress to try to have it both ways. Our
17 constitutional scheme is one in which Congress makes
18 general laws and the executive administers those laws.
19 Congress cuts the pie, the executive chooses. In this
20 case, Congress has sought both to cut the pie and to
21 choose.

22 Congress chooses to legislate in a general way
23 because circumstances make detailed regulation
24 inconvenient. Yet here it has been unwilling to let go
25 of the actual administration of its general will, and so

1 it has cast about for an agent who is at once respected
2 for its competence and integrity, but nonetheless has a
3 close and special relationship to itself. And that is,
4 and from the outset has been, the conception of the
5 Comptroller General.

6 If this assignment of executive power by
7 Congress to its agent the Comptroller General is good,
8 what may Congress not assign to him? The idea has great
9 potential. Indeed, in a provision of the very section
10 before us which has not been brought into action,
11 251(d)(3)(C)(2), it is stated that the President may
12 cancel certain defense contracts, but only if the
13 Comptroller General determines that saving money in this
14 way is reasonable.

15 We wonder, could Congress circumvent the
16 Chadha decision by conditioning the promulgation or
17 repromulgation of agency regulations on some such
18 determination by the Comptroller General of
19 reasonableness or consonance with the public interest?

20 In short, what we have here is a temptation, a
21 potentiality for what the Federalist Papers called
22 aggrandizement by the legislative branch. And like
23 Chadha, we view this potential as particularly
24 menacing.

25 Our first and principal contention is that the

1 Comptroller General is an agent of Congress and so may
2 not perform the significant and pervasive executive
3 functions assigned to him by this Act. It seems quite
4 clear that the functions assigned to the Comptroller
5 General are indeed full of judgment, full of
6 discretion.

7 He must make predictions based on very
8 controversial criteria: What will interest rates be?
9 What will be the level of unemployment?

10 QUESTION: Well, Mr. Solicitor General, would
11 you be satisfied with a judgment that in performing
12 these functions the Comptroller General is a purely
13 executive officer, subject to the removal by the
14 President at will?

15 MR. FRIED: I don't see how this Court,
16 Justice White, could arrive at that conclusion.

17 QUESTION: Well, you're arguing that
18 performing these functions do make him a purely
19 executive officer.

20 MR. FRIED: Justice --

21 QUESTION: Aren't you? Isn't that your
22 argument?

23 MR. FRIED: It is, Justice White. We argue
24 that -- no, actually there's a trap there, I think.

25 (Laughter.)

1 MR. FRIED: It's a trap. It's a trap into
2 which we believe the American court fell, because that is
3 to argue in a rather tight circle, and I'd rather not do
4 that, because that is to ask, is the Comptroller General
5 doing something executive? Yes, he is. Then therefore
6 he's a member of the executive branch, and then
7 therefore it's all right for him to do something
8 executive.

9 QUESTION: I take it you --

10 QUESTION: Then -- excuse me.

11 QUESTION: Then he would be removable by the
12 President at will?

13 MR. FRIED: That would go Mr. Cutler's route
14 as to severability, and we have great doubts about that
15 because severability is a matter of divining the intent
16 of Congress in the event that something Congress has
17 done --

18 QUESTION: So you say that we -- you would be
19 satisfied with that judgment, I suppose, but you think
20 that would be an imperfect judgment because that isn't
21 what Congress would have intended?

22 MR. FRIED: We would not be satisfied with
23 that judgment, with respect, because we think it would
24 be an incorrect judgment.

25 QUESTION: All right, all right.

1 QUESTION: But let me just ask, if I may at
2 this point, if you're right that the assignment of these
3 functions makes him pro tanto an executive officer, it
4 seems to me then one would conclude that the Congress
5 has in effect amended the 1921 Act and said, this is an
6 executive removable by the President; the President
7 could remove him and appoint the Secretary of the
8 Treasury Comptroller General and go about his way.

9 I don't know why that couldn't follow.

10 MR. FRIED: The 1985 Act was passed under the
11 shadow, under the clear shadow, of the doubts which the
12 executive had always raised about giving executive
13 functions to the Comptroller General. Indeed, as the
14 Act was being debated the executive branch had filed
15 objections exactly the same tenor as my argument today
16 in the Amerine case.

17 And in the fact of that fact, the Congress
18 said: If the CBO-OMB-General Accounting Officer trigger
19 fails, then what we want is the fallback provision. And
20 if that is what Congress determined, then surely that is
21 what this Court should do.

22 It's the question whether -- well, it's quite
23 striking, because we have here a central conception of
24 who this officer is. He is, as we say, the auditor for
25 Congress.

1 Now, Congress has come in and given him
2 another inconsistent role. Surely the appropriate thing
3 to do is to remove that later, inappropriate role,
4 rather than to reconstitute a whole office which was
5 very deliberately constituted in that way in 1921.

6 QUESTION: Mr. Solicitor General, if I back up
7 a minute, you paraded quite a few horrible things that
8 could happen if Congress took over the job. Why is it
9 not possible for the President to do the same? I mean,
10 is Congress the only body in Government that does
11 wrong?

12 MR. FRIED: Oh, no. The President in the many
13 years of his history I'm sure has committed as many
14 wrongs as the Congress. But he commits his wrongs in
15 the execution of the law and Congress commits its wrongs
16 in making general laws. It would be a pity if they
17 started committing each other's wrongs.

18 (Laughter.)

19 QUESTION: Does that help me at all?

20 MR. FRIED: I think so, I think so. I think
21 it's very important that the division of powers in the
22 Constitution be kept rather distinct. The Constitution,
23 after all, says that the legislative power, Section 1 of
24 Article I, this legislative power is in the Congress.

25 QUESTION: I learned that in my first year of

1 high school. Now can we get to something else?

2 MR. FRIED: And it is -- well, I think that is
3 what we rely on, that the legislative power is in the
4 Congress, while the executive power is in the
5 President. And for that reason, it is a dangerous
6 confusion to start giving executive powers to Congress
7 or, I suppose, legislative powers to the President.

8 QUESTION: Mr. Fried, do you say that none of
9 the other powers of the Comptroller General prior to
10 this particular Act were executive powers in essence?

11 MR. FRIED: Justice O'Connor, it was the
12 position of the executive in Stotz v. Lynn that the
13 power under the Impoundment Act to bring suit was not
14 valid, and for very similar reasons to those that I'm
15 making here.

16 It was our position in 1969, when the
17 Comptroller General purported to make a definitive,
18 binding ruling that the Philadelphia Plan was
19 unauthorized, that the executive department must look to
20 the Attorney General for binding opinions as to law.
21 And indeed, that was the issue in 1933 in Miguel v.
22 McCall.

23 So there are these expressions on the central
24 role of the Comptroller General, and wherever they have
25 appeared the executive department has been vigilant to

1 make an issue of them, that is correct. But that is an
2 issue, that is a vigilance, we have exercised for over
3 half a century, and in precisely the terms we urge on
4 you today.

5 That the Comptroller General is an agent of
6 Congress is we think shown most dramatically by the mode
7 of his removal. The Congress was very aware of what it
8 was doing when it treated this mode of removal. It
9 chose to do that knowing how to make an agent removeable
10 for cause by the President, and yet did not do so.

11 Subsequently to that legislation, the Congress
12 on a number of occasions has described the Comptroller
13 General as being within the legislative branch. And
14 indeed, the Comptroller General by his own profession is
15 a member of the legislative branch. At the beginning of
16 the red book, the Comptroller General's bible, the
17 principles of federal appropriations law, he states that
18 the GAO is a nonpartisan, independent agency in the
19 legislative branch.

20 And this Court itself has adopted that
21 designation in the very recent case of Bowsher and
22 Merck, adding the phrase that "The Comptroller General
23 exists in large part to serve the needs of Congress."

24 Now, this seems to us to indicate the kind of
25 subservience which is inappropriate in one executing the

1 law. This subservience, of which the district court
2 spoke, if of course not a personal reflection on the
3 Comptroller General. His office has been characterized
4 by integrity and competence.

5 I hope the same thing would be said of the
6 Office of the Solicitor General. Yet there is no
7 question but that that officer is subservient in the
8 constitutional sense to the President, as the provisions
9 for his removal in the statutes clearly show. The point
10 we make about subservience is a structural, not a
11 personal, point.

12 Now, I'd like to return for a moment to our
13 second argument, which is that these powers, whatever
14 other powers may be given to an officer who is not
15 removeable at will by the President, these powers are so
16 far-reaching that they constitute indeed a
17 constitutional novelty, and a novelty of quite
18 remarkable proportions, and that the holding in
19 *Humphrey's Executor*, the practice of the legislature,
20 the whole existence of administrative agencies, in no
21 way provides a precedence for this kind of sweeping
22 power, a power which extends to giving orders to the
23 President himself.

24 Now, as to the severability, I think that a
25 number of the questions --

1 QUESTION: If we agreed with your argument, we
2 would be foreclosed from saying the district court erred
3 in not striking the removal provision of the 1921 Act?

4 MR. FRIED: I believe so, Justice White, yes.

5 QUESTION: And you didn't cross-petition here
6 or cross-appeal?

7 MR. FRIED: We did not, we did not.

8 If one turns to that removal, the severability
9 problem, it is a question, what exactly is this Court to
10 do if they agree with Mr. Cutler's suggestion? Is it to
11 be a simple excision of the offending removal provision,
12 leaving the Comptroller General irremovable? Or does
13 Mr. Cutler propose reconstructive surgery, with some new
14 removal, some new and apt removal provision being
15 substituted?

16 The very question indicates how inappropriate
17 it would be to reach back and refashion an office
18 carefully fashioned in 1921 in order to solve a problem
19 created in 1985, particularly when in 1985 the Congress
20 quite explicitly stated what it wanted done in the event
21 there was a problem.

22 Thank you.

23 CHIEF JUSTICE BURGER: Mr. Morrison.

24 ORAL ARGUMENT OF

25 ALAN B. MORRISON, ESQ.,

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OH BEHALF OF APPELLEES SYNAR ET AL.

MR. MORRISON: Mr. Chief Justice and may it please the Court:

As I was listening to the argument this morning, I tried to put myself in the place of someone in the audience who had not read all the briefs and been through the statutes, and to ask myself, why did Congress create this Gramm-Rudman mechanism? What were they trying to do by putting a new form of governance into place in which we had one part Office of Management and Budget, one part Congressional Budget Office, and added the Comptroller General on top of it?

This surely was not, as Mr. Davidson suggested, a standby mechanism, because we have all the standby mechanisms we need. This is operative unless Congress passes a new law to change it or unless Congress meets the budget targets of the statute.

No, what Congress was trying to do here -- and this is wholly undisputed -- was trying to create an elaborate mechanism under which it could obtain a reduction in the budget deficit without having either to increase taxes or to cut any of the spending programs, because it was unable to muster the votes needed to do that under our law-making provisions of the Constitution.

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And so it set up a new mechanism to do this. It didn't do it, as it has so often done it in delegating authority to administrative agencies, because it had too many decisions to make, because the questions were too technical, because we needed fairness and adjudicative proceedings. It didn't do that for any of these reasons.

1 It did it so it could accomplish through the
2 backdoor that which it could not accomplish through the
3 front door.

4 And indeed, it is not even going to relieve
5 itself of any responsibilities, for under this statute,
6 each year, as it did each year beginning in 1789,
7 including 1985 and already in 1986, it is now passing on
8 the very same appropriations laws that it has always
9 passed on, and it will have to pass on through 1991 but
10 with only one difference, and that is that those laws
11 really won't count because if these three unelected
12 officials under the statute determine that Congress
13 hasn't done its job properly, or they and the President
14 have not been able to reach agreement on a proper target
15 deficit, then the Gramm-Rudman override comes in as a
16 permanent rider affecting future laws by changing what
17 is actually going to be appropriated. That, I suggest
18 to you, is a kind of function never before found in the
19 history of our Republic, where administrative officials
20 are overriding whatever Congress may do in the future
21 insofar as this particular area of the law is
22 concerned.

23 And it is not a minor matter. It is quite
24 properly, as the Solicitor General observed, a sweeping
25 power extending the entire breadth of the federal

1 government. In this year alone, the budget reduction
2 was \$11.7 billion, and it would have been far higher but
3 for the cap put on it in the statute. We simply don't
4 know how much the budget, the deficit reductions are
5 going to be in the future. And all of this is not based
6 on what you would hear today as some kind of a precise
7 formula. The key ingredients in this deficit reduction
8 program are estimates. They are estimates made as to
9 inflation rate, unemployment, the gross national
10 product. They are estimates made on the basis of what
11 someone thinks is going to happen to the economy.

12 QUESTION: But they are at least factual,
13 Mr. -- or essentially in the realm of fact, Mr.
14 Morrison, rather than policy that agencies have been
15 given authority to enforce.

16 MR. MORRISON: Well, I want to turn to that,
17 and I suppose this is as good a time as any, Mr. Justice
18 Rehnquist. I think the best evidence that these
19 judgments being made are political is what happened when
20 Congress reviewed the possibility that these
21 determinations would be made by OMB. The House said we
22 simply cannot accept that because OMB is political, as
23 Justice Stevens remarked earlier. These standards are
24 subject to such manipulation, they could come out with
25 anything. Indeed, Senator Gramm was asked on the floor

1 of the House -- on the floor of the Senate, what is the
2 range of budget deficit cuts we are talking about? He
3 said I couldn't give a worst case scenario. In 1985
4 alone, from August when Congress reached its predictions
5 as to what the budget deficit was going to be, until
6 October when Gramm-Rudman reached the floor of the
7 Senate, the prediction in that narrow timeframe changed
8 \$30 billion, and in 1981 there was a swing of \$60
9 billion in predicted deficits in a matter of 60 days.

10 And it seems to me that the key ingredient in
11 taking this away from --

12 QUESTION: \$30 billion or \$60 billion as a
13 percentage of what?

14 MR. MORRISON: Well, as a percentage of the
15 entire federal budget, it is close to a trillion
16 dollars, and so far as the portion which is not exempt,
17 it is about \$500 billion or \$600 billion.

18 QUESTION: So you are talking about 10
19 percent, 5 percent, something like that?

20 MR. MORRISON: The cuts this year were 4.3
21 percent and 4.9 percent for non-defense and defense, but
22 this is only on a prorated basis. And that was -- those
23 cuts were that small because we had a cap built into the
24 statute. Next year there is no cap. If the revenue
25 projections in the statute, in the -- that were used to

1 form these deficit reduction targets, turn out to be
2 wrong because we have much less income, then we have no
3 limit at all on how much the deficit reductions are
4 going to be.

5 And what happened here in this statute was
6 that the House of Representatives and the Senate said we
7 cannot give these judgments to the Office of Management
8 and Budget because these are subject to such political
9 manipulation, and if you look at the statute, you will
10 understand why. There are lots of provisions in the act
11 dealing with how to allocate the cuts between one branch
12 and -- between one part of the government and another,
13 what to do if Congress doesn't pass appropriation laws,
14 what to do about cost of living increases. But there is
15 not a word in the statute or the legislative history
16 about how one is to go about predicting what the
17 interest rate is going to be, what the gross national
18 product is going to be. No one knows what these figures
19 are going to be because they are raw, discretionary
20 determinations, entirely proper to be made provided that
21 they are made by the lawmakers in this country, that is,
22 the President in conjunction with the Senate and the
23 House of Representatives as envisioned by Article 1 of
24 the Constitution. That is how the laws are being made.

25 We have here a situation in which the hard

1 policy choices have not been made, and I suggest to you
2 that the very reason that Gramm-Rudman was enacted was
3 because the Congress found that it was not making the
4 hard choices. It wanted to have defense, it wanted to
5 have social programs, it wanted to have clean air, it
6 wanted to have transportation, and it couldn't pick and
7 choose among them. So it hoped that by creating this
8 mechanism you would have three unelected officials do
9 the job that Congress was supposed to do.

10 And I suggest to you that that kind of
11 abdication goes to the very heart of our system of
12 government, and it changes all of the dynamics around in
13 our legislative process. These are not the kind of
14 facts that administrators normally find. These are
15 sweeping predictions as to the future, trying to say
16 what is going to happen to the economy. They are the
17 kinds of determinations which need to be made and which
18 Congress will continue to make every year.

19 But that should be done in the legislative
20 process.

21 QUESTION: But Mr. Morrison, it is a fact, is
22 it not, that in this particular -- the experience we
23 have so far, the congressional estimate, the executive
24 estimate, and the Comptroller's estimate are all pretty
25 close to one another?

1 MR. MORRISON: I think in fairness, Justice
2 Stevens, there are two points to make. One is that they
3 were made in the middle of the fiscal year as opposed to
4 three or four months before the year. But much more
5 important, it didn't make any difference because of the
6 \$11.7 billion cap. Indeed, we heard this morning that
7 the budget deficit would actually have been \$220
8 billion. And so while the estimates turned out to be
9 the same, nobody had to spend much time worrying about
10 them because there was no consequences. Indeed, the
11 Comptroller General himself said he did that for that
12 reason.

13 QUESTION: Yes, but the fact that they didn't
14 have any consequences, it seems to me, would be more
15 reason to anticipate wider variation rather than coming
16 close to the target. I don't see how that cuts any ice
17 on the way they went about doing their job. I assume
18 they did it conscientiously, and they did in fact come
19 out pretty much the same.

20 MR. MORRISON: That is correct. I don't think
21 anybody believes that these figures are not subject to
22 wide fluctuation and variation. Indeed, that was the
23 whole premise on which the House of Representatives
24 insisted that the House -- that the Office of Management
25 and Budget be taken out of them, simply because they

1 didn't trust them, and the reason they didn't trust them
2 is because there's nothing in the statute to get your
3 hands on. If you look in the statute, there's not a
4 word about how anybody is to figure out any of these
5 very amorphous figures.

6 Equally important, of course, is the fact that
7 in this statute there is a specific preclusion of
8 judicial review for the very determinations which are at
9 the heart of the deficit cutting mechanism. All of
10 these economic assumptions which underly the how much or
11 in fact the whether of deficit reduction, all of those
12 are specifically made non-reviewable. So the Congress
13 undoubtedly would have been concerned because, for
14 whatever reasons, because of your views about the policy
15 initiatives of the administration, because you were
16 optimistic or pessimistic about the economy, you thought
17 that this year would be a good year and there would be a
18 little bit of a deficit, or because for other reasons
19 you wanted to cut certain programs, and the only way you
20 could cut those programs was to have a large target, a
21 large miss in the target, so you estimated there to be a
22 broad deficit reduction needed.

23 Whatever your reasons, there's nothing in the
24 statute that would prevent any of the judgments being
25 made here with any number that you could think of. Next

1 year we could have an estimate of 20 percent inflation
2 or 2 percent inflation, and nothing could be done about
3 it except Congress could pass a new statute, or Congress
4 could fire the Comptroller General. Neither of those,
5 we suggest to you, are appropriate.

6 QUESTION: Mr. Morrison, you may have noticed
7 as a member of the bar that over the last 15 years on
8 perhaps four or five occasions Congress has created
9 special judicial panels and authorized the designation
10 to those panels of judges already in office.

11 Is your argument with respect to allocation of
12 these duties to the Comptroller General -- put it this
13 way. Would your argument be that what the Congress has
14 undertaken to do here is just as though they had asked
15 that we assign these functions to some presently sitting
16 judges --

17 MR. MORRISON: No, I --

18 QUESTION: -- who have no executive authority
19 and no legislative authority, and who are not removable
20 by the President?

21 MR. MORRISON: Well, I would certainly say
22 that under this Court's decisions that prohibit
23 nonjudicial functions being performed by judges, I would
24 say that a member of this Court or any other court could
25 not perform the functions being performed by the

1 Comptroller General here. If in my primary
2 submission -- my primary submission is that these are
3 basically legislative type functions of the kind that
4 only Congress can be performed because there's no
5 standards and there's no checks or balances, but if they
6 are administrative type functions, then they must be
7 performed by someone at the very least who may not be
8 removed by the legislative branch, that Congress cannot
9 have the power to retain a hand on the execution of a
10 law once it has decided what the law shall be.

11 QUESTION: Well, you say, you say these are
12 legislative functions, so do you disagree with the
13 Solicitor General that they are purely executive
14 functions?

15 MR. MORRISON: No. I believe that the --

16 QUESTION: Well, they can't be both.

17 MR. MORRISON: That is correct, they cannot be
18 both. I believe principally that the functions being
19 performed here are legislative type functions. If the
20 Court disagrees with me and says that the delegation is
21 proper, then I say the delegation must be performed by a
22 person who may not be removed by the Congress.

23 QUESTION: You mean the functions may be --

24 MR. MORRISON: Must be performed by a person
25 who may not be removed by the Congress.

1 QUESTION: I see.

2 QUESTION: That's why I suggested the
3 question, the hypothetical of some of these judges who
4 couldn't be removed if the --

5 MR. MORRISON: They couldn't be removed by the
6 Congress. That objection would be correct, Your Honor.
7 I would also say, though, that I believe that this Court
8 has ruled that judges may perform only judging type
9 functions. They may not perform executive functions
10 under principles of separation of powers, much as the
11 Court ruled that the Congress could not perform
12 executive functions in the Chadha case.

13 QUESTION: But your conclusion would be that
14 if they had made that assignment to these judges
15 selected in that way, it would be just as improper as
16 the one you are now challenging.

17 MR. MORRISON: Precisely, precisely.

18 QUESTION: And for the same reasons.

19 MR. MORRISON: Well --

20 QUESTION: Or similar.

21 MR. MORRISON: Very similar reasons, yes, Your
22 Honor.

23 QUESTION: Similar reasons.

24 MR. MORRISON: Yes, Your Honor.

25 Let me turn to the second argument I made,

1 which is made only in our brief, and that is that -- and
2 this involves the aspect of the statute under which the
3 Office of Congressional Budget is an intimate part of
4 the decisionmaking process here. That is, when the
5 House -- when the Senate passed this bill, there was a
6 joint determination to be made by OMB and CBC that would
7 have become the operative determination. Everybody
8 recognized that that would be plainly unconstitutional
9 under Chadha and other, and Buckley because the
10 control -- the Congressional Budget Office is a pure arm
11 of Congress, no pretense of being appointed by the
12 President.

13 In order to attempt to cure that, what the
14 Congress did was to put an overlay on top of the same
15 report that was going to be issued by OMB and CBC of the
16 Comptroller General, and the question before the Court
17 in our view on point number two is whether the addition
18 of the Comptroller General serves sufficiently to cure
19 the constitutional defect caused by the Congressional
20 Budget Office being an intimate part of the process.

21 The defenders of the statute say that the CBC
22 is purely an advisory official; it does nothing but
23 render advice to the Comptroller General. That, in our
24 view, is an incorrect view of the statute, and indeed,
25 of what has happened under it by the Comptroller

1 General's own affidavit. And I say that principally
2 because when one normally thinks of an advisor, the key
3 element of an advisor is that you can either take their
4 advice or reject it at will. That is not the case with
5 the statute here. The Comptroller General's discretion
6 vis-a-vis the two other officials, including OMB and
7 CBO, is that first -- and this is in the statute
8 itself -- he must give due regard to their findings;
9 second, he must explain fully any deviations that he
10 makes from them; third, the legislative history and the
11 conference report says that the Comptroller General must
12 use his "utmost discretion" before altering any of the
13 findings which they made.

14 In the memorandum to the House and the Senate
15 before the final debate on passage, the report of CBO
16 and OMB was referred to as a "draft order," and as
17 Senator Gramm said in supporting this piece of
18 legislation and the Comptroller General's role, the
19 Comptroller General would be the "final arbiter."

20 Now, that to me does not sound like a pure
21 advisor, and in fact, Congress did one other thing which
22 confirmed the major role they thought that CBO would
23 have, and that is under the fallback mechanism, it
24 doesn't even care what the Comptroller General says
25 about these deficits; it relies solely on the report of

1 OMB and CBO.

2 Now, of course, the Comptroller General has
3 the final say. He is ultimately responsible. That is
4 not our bone of contention. What we dispute is whether
5 anyone can fairly characterize this process as purely
6 advisory, particularly since the Comptroller General has
7 put in an affidavit which is in the Joint Appendix
8 saying that throughout this process he consulted
9 consistently with OMB and CEO in order to make the
10 process work, since indeed he has only five days from
11 the time he gets their report in which he is going to
12 issue his final order, and two of these days in each of
13 the first two cycles come on weekends.

14 So I respectfully suggest to you that what
15 Congress tried to do here was to keep its hand in the
16 process, to have its budget person continue to be part
17 of the process so that it would not get skewed away from
18 it, and it tried to do that in order to assure that
19 these open-ended standards would be met, and it did it
20 this way and through the Comptroller General who, as Ms.
21 Williams will now explain, remains an important arm of
22 Congress in the process.

23 CHIEF JUSTICE BURGER: Very well.

24 Ms. Williams?

25 ORAL ARGUMENT OF MS. LOIS G. WILLIAMS, ESQ.,

1 ON BEHALF OF APPELIEES NATICNAL TREASURY
2 EMPLOYEES AND VAN RIDDELL

3 MS. WILLIAMS: Mr. Chief Justice, and may it
4 please the Court:

5 The role of the Comptroller General is
6 obviously the central question in this case. We have
7 argued in agreement with Mr. Morrison that he is
8 required under this act to make legislative decisions,
9 but I would like to spend most of my time today saying
10 that if these aren't legislative decisions under the act
11 that he is making, then at the very least, they are
12 executive decisions. They can't be nothing. They --

13 QUESTION: Well, why does it -- why does that
14 follow? Are you arguing the delegation point? Is that
15 it?

16 MS. WILLIAMS: No, I would like to spend my
17 time on the separation of powers, Comptroller General
18 role, Your Honor, but, but I say --

19 QUESTION: But they could be -- they still
20 could be at least quasi-legislative functions and be
21 delegated.

22 MS. WILLIAMS: Yes, indeed.

23 QUESTION: And they wouldn't necessarily
24 follow that they are executive functions.

25 MS. WILLIAMS: Yes, indeed. It is -- it seems

1 to me that no one disputes that there are significant
2 decisions made here --

3 QUESTION: So just because they are delegated
4 doesn't mean that they cease being legislative.

5 MS. WILLIAMS: That's true. If it were
6 performed strictly in aid of the legislative function.

7 QUESTION: Then why do you say that they have
8 to be either.

9 MS. WILLIAMS: Well, I don't understand -- I
10 beg your pardon. I don't understand the Appellants to
11 be making the argument that these are strictly in aid of
12 the legislative function, but rather, that they are
13 functions that may be performed by an independent
14 officer, and that they rely on that notion.

15 QUESTION: Well, why are you saying --

16 MS. WILLIAMS: But I would say that they
17 are -- pardon me, Mr. Chief Justice. I would say that
18 they are executive in nature for the same reason that
19 the Solicitor General does, because what is left to the
20 Comptroller General, if he is not legislating when he is
21 doing this, is the full implementation of this law.
22 That's what's left to him. That you wouldn't do with a
23 congressional committee. That you couldn't do with an
24 arm of the Congress. He is taking over the role of the
25 executive in the function.

1 QUESTION: Well, that's what I was going to
2 get at.

3 Are you saying that he's impinging, he is not
4 performing an executive function in the sense that the
5 true executive does, but he is impinging upon the
6 executive role?

7 MS. WILLIAMS: He is indeed, Your Honor, but
8 he is doing it in large measure by, as I say, fully
9 implementing the law himself. The President has
10 virtually no role but to sign the order once his work is
11 done. So every significant decision, every decision
12 that is made after the legislature finishes its work is
13 made by this officer, and the only thing that's at issue
14 here in this case is whether Congress' power to remove
15 that officer disables him from administering this law.
16 That's the only question. And there is no decision of
17 this Court that suggests that Congress may assume for
18 itself the right to remove an officer who administers
19 the law.

20 QUESTION: Well, then, absent the removal
21 power by Congress, you would say this 1985 act is all
22 right?

23 MS. WILLIAMS: Yes, if this were -- if we're
24 talking strictly about the separation of powers
25 question, forgetting the delegation argument, I would

1 say there is no violation of the separation of powers if
2 this power is deemed executive and it were given to the
3 executive branch, that's correct.

4 QUESTION: Well, I know, but absent, absent --
5 if there was no provision for congressional removal of
6 the Solicitor General -- of the Comptroller General,
7 then this act would be all right?

8 MS. WILLIAMS: I would like to see what the
9 Office of Comptroller General would be like without
10 removal, but if he were indeed functioning like a truly
11 independent officer, although that's not at issue here,
12 I certainly am not prepared to argue that that would be
13 unconstitutional, Your Honor.

14 QUESTION: Well, the Solicitor General is, as
15 you know.

16 MS. WILLIAMS: Yes, and let me just say about
17 that that I think the question of what kind of an
18 officer could perform these duties is really not at all
19 before this Court, and the reason is that to decide that
20 the President must remove this officer in some way is by
21 definition to decide that he may not be removed by
22 Congress, which is now the fact, and if that is true,
23 then the fallback mechanism that the statute provides
24 should take place because the congressional removal
25 would render the Comptroller General unable to perform

1 these functions.

2 It would simply be advised to the Congress,
3 should it decide to pass another law, what kind of an
4 officer it might then choose to delegate this
5 responsibility to. That is not, not necessarily, not at
6 all at issue here. The question here is really quite
7 narrow because of the uniqueness of the Comptroller
8 General's role and his position, his status. He is the,
9 as Mr. Davidson points out, not othe only one but
10 virtually the only officer who is so removable.

11 I would like to discuss --

12 QUESTION: Let me just ask one question about
13 the removal power which you regard as critical, as I
14 understand it.

15 Must we not presume that if Congress were to
16 exercise its removable power, removal power, it would
17 only do so for a reason specified in the statute, which
18 would mean that it could not remove the Comptroller
19 General because they didn't like the way he performed
20 his functions under this statute?

21 MS. WILLIAMS: Yes, Your Honor, I do assume,
22 but the causes here are very broad: inefficiency and
23 neglect of duty. It's true that those are among the
24 specified causes. They are virtually open-ended, and I
25 am not at all sure how a Solicitor --

1 QUESTION: But surely they could not remove
2 him for, because they disagreed with his policy
3 judgments on estimating rates of inflation or
4 unemployment.

5 MS. WILLIAMS: I take it they would never
6 characterize it in that fashion, Your Honor. And I
7 think --

8 QUESTION: Are you suggesting they might
9 regard that as inefficiency or neglect of duty?

10 MS. WILLIAMS: I think the causes are broad
11 enough to include practically anything. But I don't --
12 I don't say that because the removal power exists -- and
13 it is narrower, certainly, than removal at will. I
14 don't say that that is something that the Comptroller
15 General has any reason to live in fear of, as no good
16 employee does, I think. The power of removal is the
17 symbol of the ultimate power over this office. It is
18 one of many symbols --

19 QUESTION: Would you make the same argument if
20 he could only be removed for committing a felony, say?

21 MS. WILLIAMS: Well, it would depend a little
22 bit on how reviewable that decision would be, Your
23 Honor.

24 QUESTION: Well, is this decision reviewable?
25 Nobody's told us that.

1 MS. WILLIAMS: That's right, and I'm sorry, I
2 don't know the answer to that. I think certainly the
3 constitutionality would be reviewable.

4 QUESTION: Of the statute would be, but the --
5 but I'm concerned about the exercise of it. Say they
6 said we now determine he is inefficient or something.

7 MS. WILLIAMS: I have no reason to think that
8 it would be reviewable, Your Honor, and given the fact
9 that it is extremely broad, that is obviously a danger.

10 But as I say, I think that the notion that
11 removal is somewhat remote, that possibility, doesn't
12 mean that it's not relevant, and I think to hear the
13 Appellants' arguments suggests that it simply doesn't
14 matter that that removal provision is on the books, and
15 indeed, they are willing to abandon it altogether, even
16 knowing that there is a risk, a Mr. Cutler has conceded,
17 that that might make removal by the President possible.

18 They -- the assumption must be on their part
19 that it has no impact on this office, and I think that
20 that assumption defies both history and common sense.
21 And this is an officer whom the President does appoint.
22 But then, all influence ends. And as members of the
23 Court have indicated this morning, the Comptroller
24 General certainly does do his work for the Congress.
25 The office exists to serve the needs of the Congress, as

1 this Court has said, to help it legislate.

2 And even in those functions which have been
3 spoken of as aid to the executive, it has been quite
4 properly pointed out that those are helpful probably at
5 least as much in aid of the congressional interest.
6 They are designed to assist the Congress in watching
7 over the President's stewardship. That is why the
8 office exists, and everything he does really exists in
9 that position between the legislative and the executive
10 branch, and in that position, he is the Congress'
11 partisan; he must be in order to perform his functions
12 properly.

13 No doubt he does function in a largely
14 nonpolitical, apolitical I should say, nonpartisan way,
15 in a thoroughly professional way, but he cannot remain
16 neutral as to the fact that Congress -- it's Congress'
17 interests he exists to serve.

18 The Comptroller General therefore is only as
19 independent as Congress allows him to be, and it might
20 suit Congress' interests that he be quite so most of the
21 time.

22 QUESTION: This is true although Congress has
23 never made an effort to exert the authority?

24 MS. WILLIAMS: I believe so, Justice
25 Marshall.

1 QUESTION: It's still true?

2 MS. WILLIAMS: Yes, and I would say that
3 whether -- the fact that no removal has been attempted
4 is at least as strong an argument that this -- that this
5 person knows to whom he is accountable as it is that he
6 is not really accountable to Congress. It doesn't
7 really prove anything, that no one has ever tried to
8 remove a Comptroller General, but it may very well
9 demonstrate that everyone understands the relationship
10 that exists.

11 QUESTION: We have been told in briefs and in
12 the oral argument that the Comptroller General has
13 described himself in effect as an arm, an agent of the
14 Congress.

15 Has that been true with all the Comptrollers
16 General since 1921, if you knowe?

17 MS. WILLIAMS: So far as I know, Your Honor,
18 and no one has pointed to the contrary, although his
19 functions have been variously described, certainly. In
20 1921 it was very, very clear that that was the -- I
21 invite the Court's attention to that legislative
22 history. That was the intent of the Congress, to remove
23 it from the executive branch, to make him independent,
24 yes, but to make him answerable to Congress, and it is
25 very clear that Congress thought about this matter

1 carefully and considered all types of removal. It
2 passed the statute that exists -- existed in spite of a
3 presidential veto, and they didn't override the veto,
4 but the new version provides for -- the one that now
5 exists provides for joint resolution removal. President
6 Wilson certainly could not have tolerated that,
7 according to his veto message on the first bill.

8 The one that became law is, has, must be the
9 view of the Congress, and it was very clear that their
10 primary goal was independence from the President. It is
11 also very clear that independence from the President was
12 achieved by retaining the removal power, and that that
13 was the critical way in which the Congress could
14 guarantee this independence. It made, it made this
15 officer answerable to itself, and of course, it existed
16 in order to serve those interests.

17 QUESTION: Do you think in that analysis, do
18 you think it's a more important element of the
19 Comptroller General's independence from Congress' point
20 of view that the President cannot remove him than that
21 Congress can remove him?

22 MS. WILLIAMS: I absolutely do, Your Honor,
23 and I think they are opposite sides of the same coin,
24 that independence, total independence from the
25 President, in fact, on the spectrum, would be total

1 dependence on Congress, and that the truest
2 independence, as we have argued in our brief, is
3 somewhere between those branches, where each branch has
4 some influence.

5 In this situation, the Congress has all the
6 influence, and the President, once appointment is over,
7 remembering he cannot even reappoint this officer, his
8 influence over that officer ends. And therefore, he
9 cannot -- removal is part of the context in which he
10 lives, and the fact that the President has then no
11 control makes it quite a credible statement that the
12 Comptroller General works for the Congress.

13 QUESTION: It sounds to me like you're
14 adopting the Solicitor General's argument that the
15 officer must be removable by the President in order to
16 perform this function.

17 MS. WILLIAMS: I beg your pardon, Your Honor.
18 I didn't --

19 QUESTION: It sounds to me as though you have
20 adopted the Solicitor General's position that this
21 officer must be removable by the President in order for
22 the powers to be delegated to him.

23 Do you adopt that?

24 MS. WILLIAMS: Indeed yes, Your Honor. Indeed
25 yes. I would dispute -- I mean, there may be a large

1 dispute about whether he should be removed at will, but
2 that certainly is not at issue in this case.

3 QUESTION: But in any event, he must not be
4 removable by the Congress alone, is that your point?

5 MS. WILLIAMS: Absolutely, Your Honor,
6 absolutely.

7 I think that the congressional intent
8 throughout, both the original Congress, the '85
9 Congress, and, although I haven't researched this
10 thoroughly -- remember, there are a number of
11 intervening Congresses who have given power to this
12 Comptroller General as well, and in order to simply drop
13 the removal provision, we would have to assume that each
14 of those Congresses, in giving power to this officer,
15 regarded the removal as incidental and that the critical
16 question for each Congress was the power given no matter
17 who could remove.

18 Now, in the few moments I have left, I would
19 like to turn to the delegation argument, just to --
20 before I do that, let me say one other thing about the
21 1985 act. In this act, Congress quite naturally turned
22 again to the Comptroller General, again thinking it
23 needed independence, but most emphatically again, what
24 they wanted in this act was independence from the
25 President, as a number of counsel this morning have

1 shown. Congress said, Mr. President, you get no voice
2 in this matter. It would not tolerate giving the
3 functions to an executive branch officer, it made that
4 quite clear. So we do know what the intent of this
5 Congress is. The intent was to keep it out of the hands
6 of the executive. So it made clear that OMB could not
7 do this job. It also carefully excised the only
8 discretion that the President had in the earlier
9 versions of the bill so that now he has no discretion in
10 the implementation of this law. He makes virtually no
11 choices.

12 But this is political distrust, this is
13 political distrust, not the institutional concern that
14 we saw in the original act. The Comptroller General
15 isn't performing his watchdog function here. He's
16 taking over the executive branch function. He's doing
17 the President's job. He's administering the law.

18 Because Congress didn't trust the President to
19 administer the law, it gave it to the officer it could
20 trust, and we submit that that decision was fatal to the
21 act.

22 Now, just a few points about the delegation
23 arguments, Your Honor. It is important to see precisely
24 which infirmity in this law we complain of when we talk
25 about undue delegation. The delegate decides whether to

1 cut spending at all. This is the effect of the
2 decision, whether to cut spending at all across the
3 board, and how much. This is the heart of the act. The
4 act further makes those decisions automatic, and it's
5 the automatic effect, without any approval by elected
6 officials, that make -- that creates the problem here.
7 The forecasting itself is not alone a problem.

8 And as we have argued, there are differences
9 in kind and degree, but degree is really the central
10 question here, whether Congress has done enough before
11 handing this job off to others. Did they succeed --

12 QUESTION: Done enough with its legislative
13 task.

14 MS. WILLIAMS: Yes. They succeed in avoiding
15 the hard choices --

16 QUESTION: So you are arguing that there's an
17 undue of legislative authority.

18 MS. WILLIAMS: Absolutely, absolutely, Your
19 Honor. That's our -- that was our first argument in our
20 brief.

21 QUESTION: Yes.

22 MS. WILLIAMS: This is an alternative ground
23 for upholding the lower court.

24 QUESTION: And so it is either -- again, it is
25 either -- if it isn't legislative, it's executive. If

1 it isn't executive, it's legislative.

2 MS. WILLIAMS: Yes, that's my argument, Your
3 Honor.

4 Now, I would like to just spend a moment
5 saying that the Comptroller General's decisions are
6 obviously --

7 QUESTION: I take it there, Ms. Williams, I
8 take it there you are relying on the fact that
9 historically, for 199 years, these functions have been
10 performed by the Congress.

11 MS. WILLIAMS: To the -- yes, absolutely,
12 yes.

13 QUESTION: With the cooperation of the
14 President.

15 MS. WILLIAMS: Yes, by statute. The spending
16 policies and the budget levels of this nation have
17 always been -- that has always been accomplished by
18 Congress, and the question is here did they do enough of
19 that to allow them to give the rest to someone else.
20 And the decisions, though they are not couched as policy
21 decisions, they are certainly not -- I don't suggest
22 that the Comptroller General is deliberately choosing
23 among programs that he would like, but makes a great
24 many decisions. A policy vacuum is created by this law,
25 and the decisions made by the Comptroller General which

1 are not guided in the slightest by Congress -- these
2 decisions are not guided at all -- jump into that
3 vacuum. They fill that policy vacuum. They become the
4 law. And what policy does the law establish? The law
5 says we'll reduce the deficit. Does it tell the
6 Comptroller General when he has these many choices to
7 make whether he should estimate the deficit in a
8 conservative way, in an extravagant way? Does he decide
9 on the low side or the high side when he's predicting
10 interest rates?

11 We know that it isn't just cynical
12 manipulation that can take place. It's honest
13 difference of opinion. And Mr. Justice Stevens, if they
14 all agree, they can all be wrong, and they could be
15 quite consistently wrong. And it might be for the
16 reasons that something nobody thought of will happen in
17 the intervening months.

18 And that happens all the time. And the
19 difficulty is that there is no policymaker here who is
20 covertly making policy and examining these deficit
21 forecasts.

22 Thank you, Your Honor.

23 CHIEF JUSTICE BURGER: Very well.

24 Mr. Cutler?

25 ORAL ARGUMENT OF LLOYD N. CUTLER, ESQ.

1 ON BEHALF OF APPELLANT

2 COMPTROLLER GENERAL -- Rebuttal

3 MR. CUTLER: With respect to what the
4 Solicitor General has said about the Comptroller General
5 being an officer of Congress, I do not believe that has
6 been the consistent position of the executive or
7 Congress. If the Comptroller were a mere officer or
8 agent of Congress, Congress could have appointed him
9 himself -- itself. Congress decided that it had to be
10 an appointment by the President with the advice and
11 consent of the Senate because the Comptroller was to
12 perform some executive or administrative functions.
13 There would have been no point to President Wilson's
14 veto, what could he have vetoed, in the Congress
15 reserving to itself the power to remove an officer or
16 agent of the Congress.

17 Solicitor General Beck argued in the Myers
18 case that the -- this very removal provision was
19 unconstitutional because the Solicitor General was an
20 officer of the executive branch.

21 QUESTION: The Solicitor General?

22 QUESTION: Postmaster.

23 MR. CUTLER: The Comptroller General. We are
24 all making that mistake, sir.

25 The present Solicitor General is arguing to

1 you that this removal provision is constitutionally
2 objectionable in its own right. How could that be so if
3 the Comptroller General were a mere officer or agent of
4 Congress?

5 In the mid-seventies, Congress considered
6 reserving the appointment of the Comptroller General to
7 itself, and the representative of the Office of Legal
8 Counsel went to Congress and testified you can't do
9 that. Congress is -- the Comptroller General is
10 performing executive functions, and he must be appointed
11 by the President. And in 1979, the Office of Legal
12 Counsel published an opinion to the effect that the
13 conflict of interest laws apply to the Comptroller
14 General and the GAO as an independent agency.

15 In the Buckley case, this Court in a footnote
16 noted that the Comptroller General, despite his
17 appellations, could, as an arm of Congress that
18 occasionally happened, he could perform administrative
19 functions which he was allowed to perform under an
20 earlier version of the Campaign Act, Campaign Financing
21 Act. And if you will remember, in Springer, which is
22 twice quoted by this Court in Buckley, even if the
23 Comptroller, let us say, were an independent agency
24 within the legislative branch, as you once characterized
25 him in passing, Justice O'Connor, Springer says that an

1 officer appointed by the legislature cannot perform an
2 executive function, but the case might be different if
3 that officer were appointed by the President, by the
4 executive, the President of the United States.

5 The Solicitor General has made much of the
6 fact that the order, the report the Comptroller issues
7 under the '85 act is to be binding on the President.
8 You will recall that in Nixon v. Fitzgerald, the Civil
9 Service Commission had ordered the reinstatement of Mr.
10 Fitzgerald, even though the President himself was
11 involved in removing him from office, and Mr. Fitzgerald
12 brought a lawsuit to enforce his right to reinstatement,
13 and that lawsuit was finally settled by the executive
14 branch, and he was given back his old job.

15 Moreover, I would submit that if the President
16 has a constitutional objection to issuing the order
17 after the Comptroller General issues his report, he has
18 recourse under the judicial review provisions set forth
19 in Section 274(d)(2) of the act which speaks of the
20 President issuing a different report, order, than the
21 one that is supposedly required by the Comptroller
22 General's report on the claim or defense that it
23 infringes on his constitutional prerogatives. And that
24 issue is then resolved by the courts.

25 Severance of the removal provision seems to

1 have become a critical issue in the case, and I would
2 submit that Myers is the square precedent. Myers
3 severed the removal part of a statute relating to the
4 appointment and removal of postmasters. The President
5 was allowed to go right on appointing the postmasters,
6 and their functions were not changed in any respect.

7 QUESTION: But there's no doubt that Congress
8 wanted postmasters and that it had no choice but to
9 allow the President to appoint them. I don't see that
10 it is quite the square precedent that you say.

11 MR. CUTLER: Well, we would submit, Justice
12 Rehnquist, that Congress considered in the debates about
13 the override in 1920 whether if they overrode and then
14 the removal provisions were later held invalid by this
15 Court, would the rest of the statute fall, and the floor
16 leader in the House said he thought not. He said that
17 it would fall only to the extent that the statute might
18 be held invalid.

19 In Senator Howard Baker's brief, he suggested
20 to the Court that this may be the last chance for a
21 statutory solution of this terrible budget deficit
22 problem which is a growing cancer and may soon become
23 inoperable. It's an example of how Congress, dealing
24 with a problem that arguably belonged to both branches,
25 chose this, to repeat again this experiment of using the

1 independent officer of the United States. It is very
2 important in the history of this country and its
3 development of being able to deal with the complexities
4 of modern government that this Court has not struck down
5 the notion of the independent officer duly appointed by
6 the President.

7 CHIEF JUSTICE BURGER: Thank you, Counsel.

8 The case is submitted.

9 (Whereupon, at 12:06 o'clock p.m., the case in
10 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1377-CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, Appellant V. MIKE SYNAR, MEMBER OF CONGRESS, ET AL.; #85-1378-UNITED STATES, Appellant V. MIKE SYNAR, MEMBER OF CONGRESS, ET AL.; and #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.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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