

The Burger Court Opinion Writing Database

Bowsher v. Synar

478 U.S. 714 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



85-1377
85-1378

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 6, 1986

MEMORANDUM TO THE CONFERENCE:

RE: National Treasury Employees Union v. United States (Civ. Action No. 85-4106, D.D.C.)
Synar v. United States (Civil Action No. 85-3945, D.D.C.)

A three-judge panel of the District Court for the District of Columbia (Scalia, J.; Gasch, J.; N. Johnson, J.) is currently considering a challenge to the Balanced Budget and Emergency Deficit Control Act of 1985 (commonly referred to as the Gramm-Rudman Act). The Clerk's Office has informed me that a decision will be released tomorrow at noon. I have directed the Clerk's Office to circulate copies of the court's opinion and any related papers as soon as possible.

The timing is important in this case in part because President has already issued a sequestration order pursuant to the Act. That order is to become effective on March 1, 1986. Moreover, the Act itself provides that "[i]t shall be the duty of the District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any" suit challenging the procedures under the Act. Section 274(c). Also, even if the District Court concludes that the sequestration provisions of the Act are unconstitutional, it apparently will not be able to issue an injunction against their enforcement until this Court completes review of the matter. Section 274(e).

The Act provides for a 30-day period for filing a jurisdictional statement. It is conceivable, however, that the losing parties will file a jurisdictional statement much sooner than that in the hope that we will decide the case before the President's order becomes effective on March 1.

I assume the Court will note jurisdiction over any appeal. If a jurisdictional statement is filed promptly (e.g., by the end of next week), I suggest we order that any response be filed within a very brief period. We will then need to consider to what extent we wish to order expedited briefing and argument. Our consideration of that question, however, can await the three-judge panel's decision and the filing of the jurisdictional statement.

For the benefit of the Conference, I have attached to this memorandum a copy of the Act.

Regards,

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FEB 20 1963
U.S. SUPREME COURT

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1986

RE: No. 85-1377, 85-1378, 85-1379 - Bowsher v. Synar

MEMORANDUM TO THE CONFERENCE:

Enclosed is a draft of the above. I anticipate that I will have some "honing" to do. There was some expression by those voting to affirm as to the importance of a single opinion. Accordingly, I will do my best to accommodate suggestions so that we can speak with a one voice.

Regards,



To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: MAY 31 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

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

CHARLES A. BOWSER, COMPTROLLER GENERAL
OF THE UNITED STATES, APPELLANT

85-1377

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

85-1378

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

85-1379

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

[June —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the
Court.

The question presented on this appeal is whether the
assignment by Congress to the Comptroller General of the
United States of certain functions under the Balanced Budget
and Emergency Deficit Control Act of 1985 violates the doc-
trine of separation of powers.

b/c
Jim
7/2

Supreme Court of the United States
Washington, D. C. 20543

Juen 3, 1986

CHAMBERS OF
THE CHIEF JUSTICE

RE: 85-1377) - Bowsher v. Synar
 85-1378) - U.S. Senate v. Synar
 85-1379) - O'Neill v. Synar

MEMORANDUM TO THE CONFERENCE:

You have all received memos now commenting on my first draft in the above case. As I think you are aware, this was a "rush job" but one on which I had been giving a good deal of thought before the writing began.

Indeed, I find nothing to disagree with in any of the four memos I have received, and I will have a second draft out as soon as I clear the decks from my two-day meeting with the Federal Judicial Center.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 4, 1986

Re: 85-1377;1378;1379 - Bowsher v. Synar, etc.

MEMORANDUM TO THE CONFERENCE:

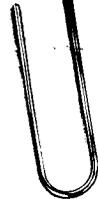
After reviewing carefully the various comments and memos, I conclude the essence of the problem is whether we skin the tiger from the neck to the tail or vice versa. Either way suits me, and the printer is now turning the tiger around. The hide, however, will look the same - at least as I see it.

Regards,

CSB

Let's try to have it around before
your second martini!

10. Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor



SUBSTANTIAL CHANGES THROUGHOUT

esp PP 6-11

From: The Chief Justice

Circulated: _____

Recirculated: JUN 5 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

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

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

85-1377

v.

MIKE SYNAR, MEMBER OF
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and Emergency Deficit Control Act of 1985 violates the doc-
trine of separation of powers.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1986

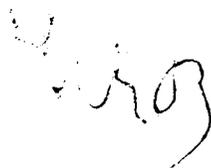
Re: Nos. 85-1377, 85-1378, 85-1379, Bowsher v. Synar, etc.

Dear Bill:

You memo of June 6 strikes me as trying to decide some cases not here -- something I hope I generally avoid. At page 10 n.4, I think I've made it clear we are casting no doubt on the SEC, FTC, EPA, etc. In short, I can't escape a feeling you want an opinion for another case.

However, I'll go over your memo closely, see to what extent I can accommodate your thoughts, and get back to you.

Regards,



Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1986

Re: Nos. 85-1377, 85-1378, 85-1379, Bowsher v. Synar, etc.

Dear John:

Thank you for your memo dated June 9. I agree we should first determine the basic rationale of the opinion in this case. But I am not sure that we are as far apart as your memo suggests.

What may seem to be a different view between us may result from a misreading of the second draft. That draft makes clear that the central point is not your "proposition three" -- "the Comptroller General is not removable by the President, and therefore may not be entrusted with executive powers." On the contrary, the central point is that the Comptroller General is removable by Congress, and therefore may not be entrusted with executive powers. Part III states: "In light of these precedents, we conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." Op. at 10. Part IV states: "Against this background, we see no escape from the conclusion that, because Congress has retained removal authority over the Comptroller General, he is not an officer of the Executive Branch." Op. at 14. Part V states: "It is apparent then, that Congress has placed executive powers in the hands of an officer who is subject to removal by Congress. ... The Constitution does not permit breaching the boundaries of separated powers in this fashion." Op. at 16.

There is additional misunderstanding concerning the effect of the second draft on the fall-back provisions of the Act and on a variety of other actual and potential legislative schemes. The opinion would not invalidate the fall-back provisions of §274 which essentially involve nothing more than superceding legislation. Those provisions require that Congress adopt, and the President sign, a new joint resolution setting budget figures. I see nothing in the current draft that would suggest that such a procedure is unconstitutional.

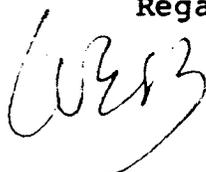
The ability of the Federal Reserve Board to undertake the functions assigned to the Comptroller General under the Act is, of course, not before us. Even if it were, I confess that I do not understand your suggestion that the second draft would cast doubt on that ability, since, unlike the Comptroller General, the members of the Federal Reserve Board are removable by Congress only by way of impeachment. Moreover, the opinion specifically distinguishes questions relating to the status of independent agencies. See Op. at 9-10 & n.4. Because of this distinguishing language, the opinion would not, as you suggest, invalidate "a newly created executive agency whose officers have civil service status," if such an agency were ever created.

I am also not sure that I can accept your characterization of your suggested approach as "the narrow rationale." To be sure, your approach might reserve some questions that my approach would answer. However, it is also clear that your "narrow rationale" would pronounce on issues that the currently circulating draft does not. For example, your "proposition two" is that the "functions [assigned the Comptroller General] may properly be characterized as 'legislative'" merely because "they are assigned to the Congress of the United States or to

an agent of the Congress." This strikes me as a fairly sweeping proposition that might unsettle a lot of law in this area.

Some of the changes I am working on in response to Bill Brennan's memo will reemphasize that the opinion speaks in terms of Congressional removal. Those changes may eliminate or at least narrow the area of disagreement between us. Perhaps after these changes have been made, we can determine whether we have any remaining points of disagreement.

Regards,



Justice Stevens

Copies to Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 12 1986

*Changes marked
pp. 7-17*

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

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

**CHARLES A. BOWSHER, COMPTROLLER GENERAL
OF THE UNITED STATES, APPELLANT**

85-1377

v.

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

UNITED STATES SENATE, APPELLANT

85-1378

v.

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

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

85-1379

v.

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

**ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

[June —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented on these appeals is whether the assignment by Congress to the Comptroller General of the United States of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 violates the doctrine of separation of powers.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

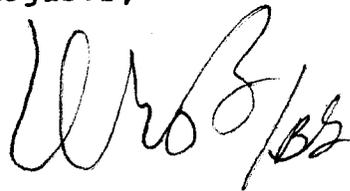
June 27, 1986

RE: No. 85-1377, Bowsher v. Synar, etc.

Dear Bill,

Your memo of today has been read to me over the phone. As of now, I see no need for these changes. Indeed, your suggestion number 2 is covered almost verbatim in the carry-over paragraph on pages 17 and 18. Perhaps we could discuss your suggestions further on Monday.

Regards,

A handwritten signature in dark ink, appearing to read 'WB/B', is written over the typed name 'Justice Brennan'. The signature is fluid and cursive.

Justice Brennan

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: _____

changes marked
pp 8, 9, 11, 12-14, 16, 18, 20

4th DRAFT

SUPREME COURT OF THE UNITED STATES

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

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

85-1377

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

85-1378

v.

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

85-1379

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

[June —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the
Court.

The question presented on these appeals is whether the
assignment by Congress to the Comptroller General of the
United States of certain functions under the Balanced Budget
and Emergency Deficit Control Act of 1985 violates the doc-
trine of separation of powers.

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

pp 17, 18

From: **The Chief Justice**

Circulated: _____

Recirculated: _____

5th DRAFT

SUPREME COURT OF THE UNITED STATES

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

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

85-1377

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

85-1378

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

85-1379

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

[July —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the
Court.

The question presented on these appeals is whether the
assignment by Congress to the Comptroller General of the
United States of certain functions under the Balanced Budget
and Emergency Deficit Control Act of 1985 violates the doc-
trine of separation of powers.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 1, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Nos. 85-1377, 85-1378, 85-1379, Bowsher v. Synar, etc.

R/K
No. 85-1693 -- Bowsher v. American Postal Workers Union

The American Postal Workers Union and three individuals filed suit challenging the constitutionality of the reporting provisions of the Balanced Budget and Emergency Deficit Control Act of 1985 ("Gramm-Rudman Act"). A three judge District Court (Scalia, Johnson, Gasch) found that the plaintiffs had requested relief identical to that granted by the court in Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986), prob. juris. noted, Nos. 85-1377, 85-1378, and 85-1379 (Feb. 24, 1986). Accordingly, the court granted the plaintiffs' request for declaratory relief identical to that granted in Synar.

The Comptroller General, the United States Senate, and the Speaker of the House then filed a jurisdictional statement with this Court, seeking review under 28 U.S.C. §1252 and §274(b) of the Gramm-Rudman Act. They noted that the appeal presented identical constitutional questions to those presented by the Synar appeals.

As the District Court recognized, this appeal presents issues identical to Bowsher v. Synar, Nos. 85-1377, 85-1378, and 85-1379. Our decision in that case affirms the District Court. I will vote to affirm the decision of the District Court in this appeal as well.

Regards,

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUL 2 1986

PP 9, 12, 13, 14, 17, 18, 19, 20

6th DRAFT

SUPREME COURT OF THE UNITED STATES

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

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

85-1377

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

85-1378

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

85-1379

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

[July 7, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the
Court.

The question presented by these appeals is whether the
assignment by Congress to the Comptroller General of the
United States of certain functions under the Balanced Budget
and Emergency Deficit Control Act of 1985 violates the doc-
trine of separation of powers.

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES ONLY
v p 20

From: **The Chief Justice**

Circulated: _____

Recirculated: JUL 3 1986

7th DRAFT

SUPREME COURT OF THE UNITED STATES

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

CHARLES A. BOWSHER, COMPTROLLER GENERAL
OF THE UNITED STATES, APPELLANT
85-1377 *v.*

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT
85-1378 *v.*

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED
STATES HOUSE OF REPRESENTATIVES,
ET AL., APPELLANTS
85-1379 *v.*

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

[July 7, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the
Court.

The question presented by these appeals is whether the
assignment by Congress to the Comptroller General of the
United States of certain functions under the Balanced Budget
and Emergency Deficit Control Act of 1985 violates the doc-
trine of separation of powers.

Supreme Court of the United States
Washington, D. C. 20543

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CHAMBERS OF
THE CHIEF JUSTICE

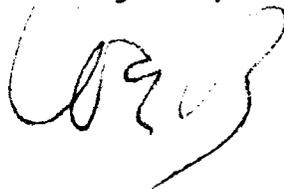
August 1, 1986

RE: No. 85-1377 - Bowsher v. Synar, etc.

MEMORANDUM TO THE CONFERENCE:

You will recall that our opinion in this case stayed the judgment for a period not to exceed sixty days to allow the Congress and the President to put into the effect the fallback provisions of the Gramm-Rudman Act. The Clerk's Office now informs me that the Congress has enacted and the President has signed Pub. L. 99-366 putting into effect the fallback provisions. Accordingly, our judgment should issue. Absent dissent, I will instruct the Clerk to issue the judgment.

Regards,



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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 15, 1986

Dear Chief

I have read the copy of the letter addressed to you by the various media organizations asking reconsideration of Mutual Broadcasting System's request for radio coverage of the Gramm/Rudman arguments. May I ask that the letter be considered at Friday's Conference?

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 3, 1986

Bowsher v. Synar
Nos. 85-1377, -1378, -1379

Dear Chief,

I agree with what has been said by Sandra, John and Thurgood that the reasoning of the opinion in this case must be that Congress cannot retain the power to remove an officer charged with executing the law, and that the opinion should not rely on the rationale that the President must have power to remove such officers. Moreover, I think it very important that the opinion explain the basis and importance of this distinction, since it is only by doing so that we shall make clear that we are not questioning the viability of independent agencies.

The phrase "separation of powers" broadly describes a number of distinct concerns that are embodied in the framework of our Government. The most basic and important of these is expressed by Montesquieu's famous maxim: that the power to legislate, the power to execute, and the power to adjudicate be controlled by separate entities. Whether this separation has been observed does not depend upon the formal designation of an officer as being within one or another branch of Government. Rather, it depends upon which branch holds the power actually to control that officer. Congress cannot retain the power directly to control an officer to whom it has delegated the task of executing a law whether that officer is formally designated an officer of the legislature or of the executive branch. Moreover, as the Framers correctly understood (and we have elevated this understanding to the status of constitutional presumption), the power to control is conferred by the power to remove. Thus, to the extent that Congress retains the power to remove a particular officer, it possesses the power to control that officer's performance. It is for this reason, and not because the power to remove is somehow "inherently executive" that the power to remove is entangled in separation of powers questions.

A distinct "separation of powers" issue concerns the Framers' choice to place execution of the law under the control of a single President accountable to the entire nation. However, while the decision to have a unitary executive is generally included under the "separation of powers" rubric, it reflects concerns that are different from those that motivated the Framers to separate the powers of legislation, execution and adjudication: the Framers created three independent branches primarily because they feared that tyranny would result if too

much political control became concentrated in a single entity; the Framers established a unitary executive primarily to ensure more efficient and accountable government. Thus, while a law qualifying the President's power to remove implicates constitutional concerns, the concerns implicated are different from those implicated if Congress retains removal power itself.

Myers and Humphrey's Executors can be understood in light of this distinction. In Myers, Congress retained power to participate in the removal process by requiring Senate approval for the removal of an officer performing executive functions. This gave Congress direct control over an officer executing the law and thus violated the fundamental precept that Congress not control execution in addition to legislation. In Humphrey's Executors, on the other hand, Congress did not itself participate in the removal process, but simply limited the President's power to remove at will. In upholding the provisions for removal of FTC Commissioners, Humphrey's Executors made clear that the dictum in Myers suggesting that the President's removal power must remain unfettered was incorrect.

My concern is that by not making the distinction between Myers and Humphrey's Executors express, the opinion will give credence to the view--strongly suggested by the District Court--that Humphrey's Executors was wrong and that the Myers dictum was correct. I think that the opinion in this case must expressly draw the distinction between Congress having the power to remove and the President not having that power, and must clearly explain that our decision is based solely on the fact that Congress has removal power (and thus control over) the officer charged with executing the Budget Deficit Act.

I think that the opinion also should reaffirm the holding in Humphrey's Executors that Congress can create independent agencies (i.e., agencies staffed by officers not removable at the President's pleasure). The District Court opinion includes a lot of dictum that questions the continuing validity of Humphrey's Executors. This dictum is simply wrong. The notion that Congress can to some extent limit the President's power to remove as long as Congress does not itself participate in the removal process is no longer open to question. Indeed, the First Congress limited the President's power to remove the Comptroller two weeks after the so-called "Decision of 1789." In addition, the ICC, the United States Shipping Board (now the Federal Maritime Commission), the FTC, and perhaps other independent agencies, were created by the Congress long before our decision in Humphrey's Executors. Finally, even were there some reason to doubt the strength of the conclusion in Humphrey's Executors, a very large part of Government has been developed in reliance on that decision, and so the force of stare decisis is very powerful.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 6, 1986

Bowsher v. Synar

Nos. 85-1377, -1378, -1379

Dear Chief,

Your second draft does indeed accommodate many of my concerns. However, I still have problems with sections of the opinion that, I am afraid, still may cast doubt upon the continuing viability of many--if not all--independent administrative agencies. I refer in particular to: (1) the description of agency functions as "quasi-legislative" or "quasi-judicial" in contradistinction to "executive" functions that only the President or officers removable at his pleasure may perform, and (2) the emphasis on whether an officer or agency is within the Executive Branch.

With respect to the first of these concerns, as you explained in Chadha, although we have referred to agency activity as "quasi-legislative" or "quasi-judicial" in nature, it is still executive activity. 462 U.S. 919, 953, n. 16 (1983). The importance of this insight is its recognition that the executive function consists of what Congress leaves to be done in order to implement the laws it passes. If Congress establishes standards for clean air in a law, establishing such standards is legislative; however, if Congress delegates the establishment of standards to an agency (within the broad limits imposed by the nondelegation doctrine), this same task becomes executive. This is, it seems to me, one reason why overreaching by Congress is potentially more problematic than overreaching by the other branches of Government--Congress' power to choose how much to include in a law and how much to leave to administrators gives the legislative branch the power to control to a large extent the duties and functions that will be left to the other branches.

My concern is that reintroducing such notions as whether some function is "quasi-legislative" or "quasi-judicial" will encourage claims that all sorts of independent agency activity is neither, and that it must therefore be under the President's control. In other words, I am afraid that reintroducing this analysis will cast doubt upon the legality of much of the work of independent administrative agencies despite disclaimers that the question is presented. This problem can easily be avoided simply by not using this terminology in the discussion.

With respect to my second concern, I continue to believe that whether there is a separation of powers problem is a functional question, which depends upon which branch actually controls an officer charged with particular responsibilities. However, while labels such as "Legislative Officer" or "Executive

Good

Officer" are themselves of no functional significance, they may be misleading. Passages in the opinion--particularly in Part V--appear to suggest that an officer is an "Executive Officer" if he serves at the pleasure of the President and that officers performing tasks such as interpreting a law must be "Executive Officers." The important point is simply that the Constitution prohibits Congress from having power to control any officer who has been delegated executive responsibilities whether or not that officer is called an "Executive Officer" or a "Legislative Officer." I would prefer avoiding the use of such labels and instead discuss the issues in terms of whether Congress has removal power over an officer with executive responsibilities.

These are general concerns, and, as such, are not much help to you in writing this difficult opinion. I add the following specific suggestions in the hope that you will find them more useful:

First, rather than quoting the language from Humphrey's Executors, I would simply describe the result in that case. Thus, I suggest deleting the third through fifth sentences of the first full paragraph on page 9 and substituting something like the following:

The Court upheld the statute, holding that "illimitable power of removal is not possessed by the President" with respect to certain kinds of administrative bodies that, like the FTC, were "created by Congress to carry into effect legislative policies" embodied in statutory enactments. 295 U.S., at 628-629. The Court distinguished Myers, reaffirming its holding that congressional participation in the removal process of executive officers is unconstitutional, but "disapprov[ing]" expressions in that opinion "beyond the point involved." Id., at 626.

In addition, I would delete the quoted language "wholly disconnected from the executive department" in the second line on page 10. If you think that some kind of clause is required at the end of the sentence, how about something like "with administrative responsibilities granted by Congress"?

Second, after discussing the statutory provisions for congressional removal of the Comptroller General, Part IV concludes (at page 14): "Against this background, we see no escape from the conclusion that, because Congress has retained removal authority over the Comptroller General, he is not an officer of the Executive Branch. Every authority examined demonstrates that the Comptroller General may not be entrusted with executive powers." I suggest compressing these two sentences into one: "Against this background, we see no escape from the conclusion that, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers." Also, rather than "executive powers," it

might be better to say something like "responsibility for executing legislative enactments."

Similarly, six lines from the top of page 17, you refer to "Recasting the Comptroller General as an officer of the Executive Branch" Would you consider deleting this phrase and simply beginning the sentence with "This"?

Third, as it is written, Part V strongly implies that only the President could execute functions such as those committed to the Comptroller General in Gramm-Rudman-Hollings. This section may thus be read to imply that the Act would be unconstitutional even if it was committed to a truly independent agency (i.e., an agency whose officers were removable by neither Congress nor the President or whose officers were removable by the President only for cause). While it is not necessary to hold that the Act could be administered by an independent agency, it seems to me that there is a way to structure Part V that avoids any implications one way or the other: shifting the emphasis of the discussion from the fact that administrative duties such as those delegated in the Act must be entrusted to an officer controlled by the President to the fact that they may not be entrusted to an officer removable by Congress. Thus, I would retain the first two paragraphs of Part V, but would frame the rest of that section along the following lines:

Petitioners suggest that the duties assigned to the Comptroller General in the Act are so mechanical that their performance does not constitute "execution of the law" in a meaningful sense. On the contrary, we think that these functions plainly entail execution of the law for constitutional purposes, and that therefore they cannot be performed by an officer removable by Congress. Interpreting and implementing a law enacted by Congress to carry out the legislative mandate is the very essence of "execution" of the law. Of course, Congress may define the scope of executive responsibility by making legislation more or less specific, i.e., by choosing how much to incorporate into the specific terms of a law and how much to leave to those responsible for that law's proper administration. However, as Chadha makes clear, having made its choice in drafting legislation, Congress' participation must end. Having chosen to leave certain tasks to be carried out by administrators, Congress cannot control the execution of its enactment by these administrators except by enacting a new law.

By placing the responsibility for administration in the hands of an officer who is subject to removal only by itself, Congress has done exactly that in the Balanced Budget and Emergency Deficit Control Act of 1985. The plain language of §251 of the Act requires the Comptroller General to perform functions and to make binding decisions with respect to duties which the

Constitution requires be entrusted to an officer independent of congressional control. The Constitution does not permit breaching the boundaries of separated powers in this fashion. [footnote 7]

Finally, I have several small points that I thought worth calling to your attention.

(1) The paragraph in the middle of page 7 discusses Congress' role in the removal process of "Officers of the United States." However, if the Comptroller General were stripped of all his executive capacities might he not still be deemed an "Officer of the United States"? Yet, if he had no executive responsibilities, Congress might well be able to play a role in his removal. At the beginning of the paragraph and again later in the opinion, you use the phrase "officers charged with the execution of the laws." Is not this phrase preferable?

(2) Rather than citing Schechter Poultry in footnote 7, I suggest citing a later case that more accurately reflects the law of nondelegation, such as Yakus v. United States, 321 U.S. 414 (1944).

(3) You state on page 16 that the effect of striking down the 1921 Act would be to make the Comptroller General removable by the President. I am somewhat hesitant to make this claim. There are many independent agencies whose heads are appointed for fixed terms and who are not removable by anyone. Given the intent of the 1921 Congress, a strong argument could be made that if the congressional removal provision is struck down, the Comptroller General should simply serve a term. Could you not simply delete this sentence? Along the same lines, I suggest changing the sentence at the beginning of the first full paragraph on page 17 to read: "Severance at this late date ... would significantly alter the role of the Comptroller General by making him entirely independent of the Congress, possibly enhancing the ability of the Executive Branch to influence his performance."

I apologize for the length of these suggestions. You have done a fine job with a difficult opinion under great time pressures. Given the importance of this case, however, I thought it best to place all my suggestions before you.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 27, 1986

Bowsher v. Synar

Nos. 85-1377, -1378, -1379

Dear Chief,

I believe that we are finally approaching the end of this case. Because of its importance, I have withheld my vote in order to reread the opinions and think about the issues some more. I am almost prepared to join your fine opinion. I wonder if you would consider just a few more suggestions, however. These would set my mind at ease about several points.

(1) At page 17, line 2, would you delete the citation to Art. II, §3?

(2) At the end of that sentence, after the word law, would you consider adding the following footnote (this would seem to me to be all the response John's separate writing requires):

Request

Congress may define the scope of executive responsibility by making its legislation more or less specific, i.e., by choosing how much to incorporate into the specific terms of a law and how much to leave to those responsible for that law's administration. However, as Chadha makes clear, having made its choice in drafting legislation, Congress' participation must end. Having chosen to leave certain tasks to be carried out by administrators, Congress cannot control the execution of its enactment by these administrators except by enacting a new law through the procedures set forth in Article I, §§1 and 7.

(3) I do not think that it is necessary even to mention that we leave open the argument that the Comptroller General must serve at the pleasure of the President. Therefore, I would prefer it if you would restore footnote 8 to the way it was in the last draft.

Once again, I think you have done an excellent job with a most difficult assignment. If you make these few changes, you will have my vote.

Sincerely,

Bill

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

June 30, 1986

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

Bowsher v. Synar

Nos. 85-1377, -1378, -1379

Dear Chief,

Here is my join. Thanks very much for your consideration in taking my suggestions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 30, 1986

Bowsher v. Synar

Nos. 85-1377, -1378, -1379

Dear Chief,

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 2, 1986

85-1377, 85-1378 and 85-1379 -
Bowsher v. Synar; United States Senate v.
Synar; and O'Neill v. Synar

Dear Chief,

In due course, I shall file a dissent in
this case.

Sincerely yours,



The Chief Justice

Copies to the Conference

To: The Chief Justice
 Justice Brennan
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

Circulated: **JUN 16 1986**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

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

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

85-1377

v.

MIKE SYNAR, MEMBER OF
 CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

85-1378

v.

MIKE SYNAR, MEMBER OF
 CONGRESS, ET AL.

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

85-1379

ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF
 CONGRESS, ET AL.

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

[June —, 1986]

JUSTICE WHITE,, dissenting.

The Court, acting in the name of separation of powers, takes upon itself to strike down the Gramm-Rudman-Hollings Act, one of the most novel and far-reaching legislative responses to a national crisis since the New Deal. The basis of the Court's action is a solitary provision of another statute that was passed over sixty years ago and has lain dormant since that time. I cannot concur in the Court's action. Like the Court, I will not purport to speak to the wisdom of the policies incorporated in the legislation the Court invalidates;

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: _____

Recirculated: JUL 1 1986

pp. 7, 10, 14-18

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

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

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

85-1377

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

85-1378

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

85-1379

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

[July —, 1986]

JUSTICE WHITE, dissenting.

The Court, acting in the name of separation of powers, takes upon itself to strike down the Gramm-Rudman-Hollings Act, one of the most novel and far-reaching legislative responses to a national crisis since the New Deal. The basis of the Court's action is a solitary provision of another statute that was passed over sixty years ago and has lain dormant since that time. I cannot concur in the Court's action. Like the Court, I will not purport to speak to the wisdom of the policies incorporated in the legislation the Court invalidates;

JUL 8 1986

14-15

SUPREME COURT OF THE UNITED STATES

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

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

85-1377

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

85-1378

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

85-1379

ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

[July 7, 1986]

JUSTICE WHITE, dissenting.

The Court, acting in the name of separation of powers, takes upon itself to strike down the Gramm-Rudman-Hollings Act, one of the most novel and far-reaching legislative responses to a national crisis since the New Deal. The basis of the Court's action is a solitary provision of another statute that was passed over sixty years ago and has lain dormant since that time. I cannot concur in the Court's action. Like the Court, I will not purport to speak to the wisdom of the policies incorporated in the legislation the Court invalidates;

Pages 3-4, 9
and changes in page references-

7/1 Comp Room for 3 proofs

HAB

FILE COPY



pp 344

11:15 AM

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice Souter

From: Justice Blackmun

Circulated: _____

Recirculated: JUL 3 1986

SUPREME COURT OF THE UNITED STATES

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

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

85-1377

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

85-1378

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

85-1379

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

[July 7, 1986]

JUSTICE BLACKMUN, dissenting.

The Court may be correct when it says that Congress cannot constitutionally exercise removal authority over an official vested with the budget-reduction powers that § 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 gives to the Comptroller General. This, however, is not because "[t]he removal powers over the Comptroller General's office dictate that he will be subservient to Congress," ante, at 14; I agree with JUSTICE WHITE that any such claim is unrealistic. Furthermore, I think it is clear under *Humphrey's*

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 3, 1986

85-1377 Bowsher v. Synar

Dear Chief:

On the basis of a preliminary reading of your opinion, I share generally the views expressed by other Justices who have written you.

I could not join an opinion that casts substantial doubt on the constitutionality of the independent agencies, and do not think the vote at Conference supports such a view.

It is nevertheless helpful to have a draft of this important opinion early in June, and I fully agree as to the desirability of our speaking "with one voice."

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference



CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

Supreme Court of the United States
Washington, D. C. 20543

June 12, 1986

85-1377 Bowsher v. Synar

Dear Chief:

Please join me in your second draft of an opinion for the Court.

I have reread your opinion with some care, and it is in accord with my understanding of our Conference vote. I would have no objection, however, to some of the changes suggested by other Justices so long as the basic framework of your analysis remains the same.

I certainly do not want to undercut the type of independence the great administrative agencies have enjoyed, and I do not think your opinion - as now drafted - does this.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

Pages 3-4, 9
and changes in page references

From: Justice Blackmun

Circulated: _____

Recirculated: JUL 9 1986

SUPREME COURT OF THE UNITED STATES

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

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

85-1377

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

85-1378

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

85-1379

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

[July 7, 1986]

JUSTICE BLACKMUN, dissenting.

The Court may be correct when it says that Congress cannot constitutionally exercise removal authority over an official vested with the budget-reduction powers that § 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 gives to the Comptroller General. This, however, is not because "[t]he removal powers over the Comptroller General's office dictate that he will be subservient to Congress," ante, at 14; I agree with JUSTICE WHITE that any such claim is unrealistic. Furthermore, I think it is clear under *Humphrey's*

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1986

Re: No. 85-1377) Bowsher v. Synar
85-1378) United States Senate v. Synar
85-1379) O'Neill v. Synar

Dear Chief,

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to be "WR", written in dark ink.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1986

Re: 85-1377 - Bowsher v. Synar
85-1378 - United States Senate v. Synar
85-1379 - O'Neill v. Synar

Dear Chief:

As I read your opinion, you propose to hold that the functions assigned to the Comptroller General must be assigned to an officer removable by the President of the United States. I do not agree with this rationale and will not be able to join your opinion unless it is substantially revised.

It was my understanding of the consensus at Conference that the rationale of the decision was that the function performed by the Comptroller General could not be performed by an arm of the Legislature unless Congress itself performed that function by the normal process of legislating described in Chadha. In other words, the central rationale should rest on Chadha rather than Myers. I think your opinion casts substantial doubt on the legal status of independent agencies and that it would be a serious mistake for the Court to adopt this approach.

If others do not agree, I shall of course be writing separately.

Respectfully,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1986

Re: 85-1377 - Bowsher v. Synar
85-1378 - United States Senate v.
Synar
85-1379 - O'Neill v. Synar

Dear Chief:

Affirmance of the judgment in this case can be supported on either a broad rationale or a narrow one. I think we should decide on which rationale to adopt before we address specific drafting problems. Let me briefly summarize the alternative rationales.

The Broad Rationale

Proposition 1 - Executive power can only be entrusted to the President, or to an officer removable by the President.

Proposition 2 - The powers entrusted to the Comptroller General are executive powers.

Proposition 3 - The Comptroller General is not removable by the President, and therefore may not be entrusted with executive powers.

Conclusion - The statute is unconstitutional.

The reason this rationale is too broad is that it would also invalidate (a) the fall-back provision in Sec. 274 which authorizes Congress itself to perform the same function as the Comptroller General; (b) a statute which authorized the functions to be performed by an independent agency such as the Federal Reserve Board; and (c) perhaps a statute which delegated the functions to a newly created

- 2 -

executive agency whose officers have civil service status.

The Narrow Rationale

Proposition 1 - The lawmaking process is too complex to enable us to characterize every step in the process as exclusively "legislative" or "executive."

Proposition 2 - The functions performed by the Comptroller General under this statute could properly be characterized as "executive" if they were assigned to the President, the Secretary of the Treasury, or some other officer removable by the President. The same functions may properly be characterized as "legislative" if they are assigned to the Congress of the United States or to an agent of the Congress.

Proposition 3 - In the statute before us Congress has characterized the Comptroller General's lawmaking activities as "legislative" because (a) it has assigned them to an officer of the Legislative Branch (both because Congress retains removal power and because the Comptroller General has long functioned primarily as a congressional agent); and (b) if that assignment is invalidated, Congress has decided to perform the functions itself.

Proposition 4 - If a lawmaking function of this importance is to be performed by the Legislative Branch, it must observe the constitutionally mandated procedures detailed in Chadha. 462 U.S. at 956-958. Neither one House nor an agent such as the Speaker or the Comptroller General can issue commands to the President of the United States.

Conclusion - The statute is unconstitutional.

Your circulating draft opinion adopts the broad rationale. In a case of this importance, I think it is always wise to adopt a narrow rationale if possible. I agree with the view that we should speak with "one voice" if possible, but I am afraid I will not be able to join an opinion that adopts the broad

- 3 -

rationale that is set forth in your present circulating draft. If you can substitute the Chadha rationale, I shall be happy to make specific suggestions for change. If not, it would probably save time for me to write separately.

Respectfully,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 16, 1986

Re: 85-1377 - Bowsher v. Synar
85-1378 - United States Senate v. Synar
85-1379 - O'Neill v. Synar

Dear Chief:

Although I agree with Parts I and II of your circulating opinion, and with much of what you have written in Part IV, I think Byron has the better of the argument on the issue as you have framed it concerning the removal power. I will therefore write out my own view of the case, which is patterned after the rationale that I set forth in my letter June 9th. I have almost finished with the first draft and trust that I will not hold you up too long.

Respectfully,



The Chief Justice

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: 6/26/86

Recirculated: _____

LPS
Please join me in your opinion
concurring in the judgment
JS

1st DRAFT

SUPREME COURT OF THE UNITED STATES

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

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

85-1377

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

85-1378

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

85-1379

ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

[June —, 1986]

JUSTICE STEVENS, concurring in the judgment.

When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons. I agree with the Court that the "Gramm-Rudman-Hollings" Act contains a constitutional infirmity so severe that the flawed provision may not stand. I disagree with the Court, however, on the reasons why the Constitution prohibits the

6/27
Join

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: _____

Recirculated: JUL 2 1986

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

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

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

85-1377

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

85-1378

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

85-1379

v.

MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

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

[July —, 1986]

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins,
concurring in the judgment.

When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons. I agree with the Court that the "Gramm-Rudman-Hollings" Act contains a constitutional infirmity so severe that the flawed provision may not stand. I disagree with the Court,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 2, 1986

Re: 85-1377 - Bowsher v. Synar
85-1388 - United States Senate v. Synar
85-1379 - O'Neil v. Synar

Dear Chief,

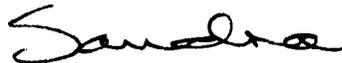
I share your view that the Court should "speak with one voice" in this case. I do, however, have some substantial concerns with the present draft of the opinion. In the hope that the Court will be able to forge a consensus in a case of such grave importance to the Nation, I submit these concerns to you for your consideration.

My review of the Conference notes indicates that, with the possible exception of Bill Rehnquist, those who voted to affirm hoped to make sure that the opinion not cast doubt on the constitutionality of independent agencies. I fear that the opinion as now written, especially Part III, does just that. For example, the draft discusses Myers extensively, and suggests that it stands for the general proposition that the power to appoint carries with it the general power to remove. Yet, with the exception of quoting some general language about separation of powers, the draft disregards Humphrey's Executor almost entirely. As I read Humphrey's, it limits Myers considerably by suggesting that Congress can impose significant limitations on the President's removal power over executive officers even if they perform "executive functions."

As I read your draft, it suggests that the constitutional infirmity of the Act lies in the fact that the President does not have the power to remove the Comptroller General. In my view, precisely the obverse is the problem: The infirmity lies in the fact the Congress does have the power to remove, not in the fact that the President does not. Although the Court has never read the Constitution to require that each branch of Government be "hermetically sealed" from the others, it has consistently condemned any effort by

one branch to assume the duties of another. This was the message of Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), as well as of Buckley v. Valeo, 424 U.S. 1, 121 (1976), both of which expressed a deep suspicion of any coalescence of executive and legislative functions in the same branch. The point was made most recently in your opinion for the Court in INS v. Chadha, 462 U.S. 919 (1983), a case that I find central to any consideration of the validity of the Deficit Control Act. Once again, the Court made clear that Congress may not both create laws and implement them. As you put it in the opinion, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.*, at 955. In my view, Gramm-Rudman is unconstitutional for precisely the same reasons: By giving itself the sole power to remove the Comptroller General, Congress has retained so much control over the office that it is, in effect, participating in the execution of the law it created. In your words, by not "abid[ing] by its delegation," Congress has gone beyond its constitutionally allocated function as a lawmaker. This kind of aggrandizement, our cases make clear, is impermissible.

Sincerely,



The Chief Justice

Copies to the Conference

2

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 12, 1986

Nos. 85-1377, 85-1378 & 85-1379 Bowsher
v. Synar, U. S. Senate v. Synar &
O'Neill v. Synar

Dear Chief,

Please join me.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference