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Congressional Perspective on the Balanced Budget and Emergency Deficit Control Act of 1985

**The Honorable Mike Synar†
with Vincent LoVoit†† &
Donald R. C. Pongrace†††**

Congress enacted the Balanced Budget and Emergency Deficit Control Act (the "Act"),¹ popularly known as "Gramm-Rudman,"² as a response to towering federal budget deficits.³ As enacted, the Gramm-Rudman legislation would have reduced annual federal budget deficits by establishing maximum limits on the size of the budget deficit for each of the succeeding five fiscal years, ending with a balanced budget in fiscal year 1991.⁴ The legislation authorized the General Accounting Office (GAO) to estimate the projected deficit for the upcoming fiscal year, basing its determination on similar estimates by the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO).⁵ If the GAO's estimated deficit exceeded the maxi-

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1. Pub. L. No. 99-177, 99 Stat. 1037 (1985).

2. The legislation is named after two of its primary sponsors in the Senate: Sen. Phil Gramm (R-Tex.) and Sen. Warren Rudman (R-N.H.). Sen. Ernest Hollings (D-S.C.) also sponsored the legislation.

3. *See generally Working Toward a Balanced Budget: Hearing Before the House Comm. on the Budget*, 99th Cong., 1st Sess. (1985) (describing magnitude of federal deficit crisis).

4. *See* Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 201(a), 99 Stat. 1037, 1039 (1985).

5. *See id.* § 251, 99 Stat. 1037, 1063 (1985).

imum permissible level, Gramm-Rudman required the President to make proportional reductions in spending for certain categories of federal programs.⁶

Gramm-Rudman was a highly controversial piece of legislation, which elicited criticism from Members of both Houses of Congress, the press, legal scholars, and the public.⁷ Many individuals voiced their concerns about which federal programs ought to be subject to the automatic cuts that Gramm-Rudman envisioned.⁸ Defense spending, public assistance, health care, and education all had champions fighting to protect them from Gramm-Rudman's automatic cuts.⁹ Few individuals, however, raised the concern that Gramm-Rudman was fundamentally flawed in that it improperly delegated congressional spending power to the executive branch and thus was unconstitutional.

This flaw, however, was apparent to certain Members of Congress, members of the press and others who believed that

6. See *id.* § 252, 99 Stat. 1037, 1072 (1985). See also *Bowsher v. Synar*, 106 S. Ct. 3181 (1986). The Court described the Gramm-Rudman budget cutting mechanism as follows:

If in any fiscal year the budget deficit exceeds the prescribed maximum by more than a specified sum, the Act requires basically across-the-board cuts in Federal spending to reach the targeted deficit level. These reductions are accomplished under the "reporting provisions" spelled out in § 251 of the Act, which requires the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) to submit their deficit estimates and program by program budget reduction calculations to the Comptroller General who, after reviewing the Directors' joint report, then reports his conclusions to the President. The President in turn must issue a "sequestration" order mandating the spending reductions specified by the Comptroller General, and the sequestration order becomes effective unless, within a specified time, Congress legislates reductions to obviate the need for the sequestration order.

Id. at 3182.

7. See, e.g., 131 CONG. REC. H11891-2 (daily ed. Dec. 11, 1985) (remarks of Rep. LaFalce) (not delivered); *id.* at S17441 (remarks of Sen. Byrd).

8. See, e.g., Letter from E. Phillip Rigin, Director, National Legislative Commission for the American Legion to U.S. Representatives (Oct. 25, 1985); Letter from Ray Denison, Director, Department of Legislation, AFL-CIO to U.S. Representatives (Oct. 21, 1985); Letter from Coalition on Block Grants and Human Needs (Jan. 1985); Letter from Lutheran Church of America to U.S. Members of Congress (Oct. 18, 1985); Letter from Consortium for Citizens with Developmental Disabilities (Oct. 18, 1985).

9. See, e.g., 131 CONG. REC. H11889 (daily ed. Dec. 11, 1985) (remarks of Rep. Hartnett); Letter from American Public Welfare Assoc. to Rep. Michael Synar (Oct. 17, 1985); Letter from Charles L. Massey, President of March of Dimes to Conferees (Oct. 22, 1985); Letter from American Council on Education to the Honorable Michael L. Synar (Oct. 18, 1985).

Gramm-Rudman unconstitutionally changed the basic structure of our government. My initial analysis of the bill persuaded me that, if enacted, it would unconstitutionally delegate the congressional spending power to members of the executive branch, thereby violating the doctrine of delegation. In addition, the Act required legislative officers to perform executive functions, thus violating the doctrine of separation of powers. Consequently, in the conference between the House and Senate on the measure,¹⁰ I insisted on the inclusion of a provision that authorized prompt judicial review of the bill's constitutionality.

On December 12, 1985, two hours after President Reagan signed the bill into law, I filed suit in the United States District Court for the District of Columbia, challenging the Act's constitutionality on numerous grounds.¹¹ On February 7, 1986, a special three-judge panel found the Act to be unconstitutional on the ground that it violated the principle of separation of powers.¹² The district court panel rejected the broader argument that the Gramm-Rudman provision establishing automatic spending cuts was an unconstitutional delegation of a "core function" of the legislative branch and could not be delegated to another branch of government.¹³ On July 7, 1986, the United States Supreme Court upheld the district court's judgment on the same narrow ground.¹⁴

Part I of this Commentary provides some perspective on the initial congressional consideration of Gramm-Rudman. Inasmuch as Gramm-Rudman remains the primary method by which Congress is addressing the problem of federal budget deficits, such insight should be helpful in illuminating the advantages and disadvantages of this budget-cutting mechanism. Part II examines the subsequent judicial consideration of the constitution-

10. Conferences are usually requested when differing versions of legislation are approved by the two houses. See JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE § XLVI (1801), reprinted in L. DESCHLER, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES SEVENTY-FIRST CONGRESS, H.R. DOC. No. 629, 70th Cong., 2d Sess. 227-38 (1929). They may, however, be requested in any case of difference of opinion on matters pending between them. *Id.*

11. Complaint for Declaratory Relief, *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.) (No. 85-3945), *aff'd sub nom.* *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

12. See *Synar v. United States*, 626 F. Supp. at 1382-91.

13. *Id.* at 1385.

14. *Bowsher v. Synar*, 106 S. Ct. at 3194 (1986).

ality of Gramm-Rudman. Reviewing the opinions of the district court and United States Supreme Court, this section focuses on what I believe was the mistakenly narrow ground for the Court's declaration of the Act's unconstitutionality. The final section addresses some of the implications that the Court's narrow decision may have on the future of the federal budget process.

I. Congressional Consideration of Gramm-Rudman

Proponents of the Gramm-Rudman legislation first introduced the measure in the closing days of the First Session of the 99th Congress.¹⁵ They offered it on the Senate floor as an amendment to a measure, already passed by the House, which would raise the federal statutory debt ceiling — a “must-pass” bill.¹⁶ Due to the expedited manner in which Gramm-Rudman was offered, there were no hearings nor any committee action on the measure prior to its consideration by the full Senate.¹⁷

After extensive negotiations between opponents and proponents of the debt-ceiling increase measure,¹⁸ the Senate approved the Gramm-Rudman amendment on October 10, 1985.¹⁹ Because the Senate measure was an amendment to a previously passed House bill, following Senate passage, the House requested a House-Senate conference committee.²⁰ The House appointed conferees on Friday, October 11, 1985,²¹ and the Senate appointed conferees the following Tuesday.²²

The House of Representatives selected conferees from five

15. 131 CONG. REC. S12561 (daily ed. Oct. 3, 1985). Proponents offered Gramm-Rudman as a Senate floor amendment to H.R.J. Res. 372. *Id.* House of Representatives Joint Resolution 372 proposed raising the public debt ceiling to \$2,078,700,000,000. H.R.J. Res. 372, 99th Cong., 1st Sess. (1985).

16. Wehr, *Fight Brewing in Senate Over Debt-Limit Hike*, 43 CONG. Q. 1787 (1985) (explaining necessity of congressional action on federal debt limit prior to Oct. 8, 1985).

17. The usual process for Senate consideration of a measure is for a bill, upon introduction, to be referred to the committee of competent jurisdiction. It is then referred to the relevant subcommittee which holds hearings on the measure. The subcommittee then reports the bill to the full committee, which may then hold hearings of its own. The full committee then reports the bill. It is then brought to the Senate floor for full Senate consideration. See F. RIDDICK, *SENATE PROCEDURES, PRECEDENTS & PRACTICES* (1981).

18. See Wehr, *supra*, note 16, at 1787.

19. 131 CONG. REC. S13114 (daily ed. Oct. 10, 1985).

20. *Id.*

21. 131 CONG. REC. H8716-34 (daily ed. Oct. 11, 1985).

22. 131 CONG. REC. §13277 (daily ed. Oct. 15, 1985).

different House committees, as well as "at-large" conferees representing the leadership of the two parties.²³ I was made a member of the conference committee because I sat on the House Committee on Government Operations which has jurisdiction over the Budget Act. Because I also sat on the House Committee on the Judiciary, I decided to focus on the legislation's constitutional problems. Significant as these constitutional problems may have been, they were not the overriding concern of many Members of Congress to whom Gramm-Rudman represented an efficient means of attacking the budget deficit.

Barraged by a growing call from the electorate for deficit reduction and frustrated by Congress' continued inability to meet the call, most Members either supported Gramm-Rudman outright or felt Congress had to respond dramatically in some fashion to the budget deficits. The Members were clear: unless an acceptable alternative were offered, they would support Gramm-Rudman. In searching for such an alternative, the House Democratic leadership realized that the automatic budget cuts proposed in Gramm-Rudman were a political *sine qua non* for many Members.²⁴ At the same time, according to many constitutional analyses, the automatic cuts made Gramm-Rudman unconstitutional.²⁵ To my mind, therefore, the constitutional issues were the crux of the budget impasse and a test of the bill's constitutionality was essential.

On Friday, October 17, 1985, after a week of hurried analysis and internal debate among Members of both Houses, the full conference committee met. To help focus the conferees' attention on the constitutional issues, I asked Professor Laurence Tribe of Harvard Law School, to analyze these issues and I distributed his findings in which he echoed our earlier analysis with regard to the potential constitutional problems in the initial draft of Gramm-Rudman.²⁶ He identified as one of the more sig-

23. 131 CONG. REC. H8733-34 (daily ed. Oct. 11, 1985).

24. See generally 131 CONG. REC. H8716-34 (daily ed. Oct. 11, 1985).

25. See *Statements Presented at the Hearing on "the Balanced Budget and Emergency Deficit Control Act of 1985" Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 25-38* (1985) (statement of Louis Fisher, Congressional Research Service, Library of Congress).

26. See Letter from Laurence H. Tribe to the Honorable Mike Synar (Oct. 22, 1985) [hereinafter Letter from Laurence H. Tribe]. During the first day of the Gramm-Rud-

nificant problems the trigger mechanism for Gramm-Rudman's automatic budget cuts, which he found "almost certainly to be unconstitutional" on separation of powers grounds.²⁷ He explained the constitutional difficulties of the Gramm-Rudman trigger as follows:

Giving such executive duties to a legislative officer is almost certainly unconstitutional. The Supreme Court unanimously ruled nearly a decade ago that, although Congress may designate its own agents to assist in the investigative tasks that support the lawmaking function, no-one who exercises power as an officer of the United States may be appointed by the legislative branch. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). For the Court, the Constitution's appointments clause is no mere matter of "etiquette or protocol," but a vital structural check upon the power of Congress. *Id.* at 125.²⁸

At the time of his analysis, the trigger mechanism in the Senate-passed measure consisted of budget-deficit estimates only from OMB and CBO.²⁹ In this original Senate-passed version, no role was assigned to the GAO in the deficit-cutting process.³⁰ The GAO's role was first introduced after the conference broke down.³¹

man conference, I asked the Chairman whether or not the constitutionality of the legislation had been reviewed by congressional committee staff, the Department of Justice, or any congressional support group, and, deferring to Steve Bell, the Senate Budget Committee staff director, he responded "no." We then asked for a Congressional Research Service (CRS) analysis of Gramm-Rudman vis-a-vis article I, sections 7 and 8.

We were not sure, however, that the CRS memorandum would be finished in time to be of use during our deliberations on Gramm-Rudman. Consequently, we sought some sort of analysis which could quickly bring attention to the constitutional problems as the legislation was rushed through the Congress. Having discussed the issue with Professor Tribe over the past few days, we asked him for a letter pointing out some of Gramm-Rudman's constitutional problems. We sent the draft legislation to Professor Tribe by overnight mail and he prepared his analysis by the next day.

We circulated copies of his letter at the next meeting of the conference committee. The reaction to the letter was remarkable in that no member seemed to care. The Senate members' attitude seemed to be that Gramm-Rudman was inevitable and constitutional questions were merely last ditch efforts to stop it. The House members believed something stronger politically was necessary to stop the legislation.

27. *Id.*

28. *Id.*

29. 131 CONG. REC. S12564 (daily ed. Oct. 3, 1985).

30. *Id.*

31. *Id.* at H9838, S14908.

Although Congress was continually pressured by time constraints for enactment of legislation extending the federal statutory debt ceiling on which Gramm-Rudman was appended, the Department of Treasury consistently "found" sufficient funds to continue operating, giving Congress more time to resolve the Gramm-Rudman crisis.³² Having additional time and recognizing the constitutional problems posed by the original Gramm-Rudman provisions, the House conferees decided to subdivide into smaller, informal task forces to study various aspects of the legislation and report back with recommendations on how best to resolve the problems posed.³³

During the few days given us to develop possible solutions to Gramm-Rudman's constitutional problems, our discussions made clear that the automatic budget cuts were the central issue.³⁴ Consequently, we focused our efforts on a means of incorporating a mechanism that would provide for such automatic cuts, while at the same time, avoid the constitutional infirmities of the original proposal.

As a compromise, the chairman of the task force on constitutional issues proposed a more logical budget process which resembled Gramm-Rudman, but which required an affirmative vote by the Congress before automatic cuts could go into effect.³⁵ In the event that the conference did not adopt the proposal, I suggested that we include a provision allowing for expedited judicial review of Gramm-Rudman's constitutionality.³⁶ I also pro-

32. See Letter from James Baker to Rep. Mike Synar (Oct. 22, 1985); see also Wehr *supra* note 16; N.Y. Times, Nov. 4, 1985 at B9, col. 3; *Treasury Puts Off 'Drop Dead Day' to Nov. 15*, 43 CONG. Q. 2148 (1985).

33. Representative Jack Brooks (D-Tex.) was made chairman of the task force that examined the constitutional issues posed by the original Gramm-Rudman proposal; I served on this task force.

34. See *supra* text accompanying note 24.

35. See Letter from the Honorable Jack Brooks to the Honorable Mike Synar (Oct. 25, 1985).

36. See Draft Amendment on Judicial Review (Oct. 19, 1985). Expedited judicial review of the constitutionality of the bill was requested because, absent a swift review, the courts would never have had the opportunity to consider the constitutional questions raised by Gramm-Rudman. Since the budget process is an annual occurrence, the first Gramm-Rudman cycle would have run before a final court decision would have been handed down in the normal course of review.

As a result, the political process would have either adapted to Gramm-Rudman, or fixed it. In either event, it would have been virtually impossible to unscramble the eggs

posed that we include a nonseverability clause which would have forced a court to strike down the entire Gramm-Rudman Act if the court found that any provision in the proposal was constitutionally flawed.³⁷ The purpose of the nonseverability provision was to ensure that a reviewing court did not alter the legislation in an undesirable manner by selectively declaring only certain portions of the bill unconstitutional. Because support for an automatic budget-cutting mechanism was so strong, the task force chose to retain the original Senate budget-cutting mechanism, and recommend only those changes concerning expedited judicial review and the nonseverability provision. The House conferees included these recommendations in their informal proposal to the Senate. The Senate conferees rejected the House proposal and the first conference on Gramm-Rudman dissolved in disagreement.

Because the debt-ceiling deadline continued to press on Congress, the House immediately began reconsideration on the House floor of the original Senate version of Gramm-Rudman.³⁸ This consideration took the form of an amendment in the nature of a substitute, which became known as the "Democratic alternative."³⁹ The trigger mechanism in this proposal consisted of an estimate by CBO alone.⁴⁰ In response to constitutional critics, the Democratic alternative also contained provisions for expedited judicial review and nonseverability.⁴¹ The House passed this bill on a partisan vote with only three defections.⁴²

The Senate took up the debt-ceiling measure as amended by the House and, after several days of debate and amendments, approved a new version of Gramm-Rudman on November 6, 1985.⁴³ As an amendment to the House Democratic alternative,

politically, and difficult for the courts to strike down Gramm-Rudman, given that at least one and probably several federal budgets would have already been approved and executed prior to a court's decision.

37. See Draft Amendment on Nonseverability (Oct. 19, 1985).

38. See 131 CONG. REC. H9575 (daily ed. Nov. 1, 1985).

39. *Id.* at H9577.

40. *Id.* at H9582.

41. *Id.* at H9614.

42. *Id.* The Republican who voted with the Democrats was Rep. John Paul Hammerschmidt (R-Ark.). The Democrats who voted with the Republicans were Reps. George Crockett (D-Mich.) and Paul Kanjorski (D-Pa.).

43. 131 CONG. REC. S14904-24 (daily ed. Nov. 6, 1985).

the Senate agreed to include an expedited judicial review provision similar in concept to the one that I had previously proposed and which was included in the bill passed by the House.⁴⁴ This was a significant amendment in that for the first time, both Houses had approved a judicial review provision. Thus, it was certain that if the bill were enacted into law, its constitutionality could be tested without undue delay. The Senate version differed from the House Democratic alternative in two significant ways. First, the Senate proposal amended the original Gramm-Rudman trigger mechanism which called for the GAO to develop its own estimate of the annual federal budget deficit, basing their determination on similar estimates by the CBO and the OMB.⁴⁵ At the time, it was believed that the inclusion of GAO in the trigger mechanism would alleviate the constitutional concerns that had been raised in various analyses of the bill's constitutionality.⁴⁶ Congress ultimately adopted this proposal as a suitable compromise.⁴⁷

Second, the Senate rejected the provision in the House Democratic alternative with regard to nonseverability.⁴⁸ In its place, the Senate proposed the so-called "fallback" provision.⁴⁹ This section provided that if a court were to find any portion of the *trigger* mechanism unconstitutional, the trigger mechanism would be replaced with a process whereby an affirmative vote by the Congress and presentment to the President would be necessary before automatic budget cuts could take place.⁵⁰

Once again, due to differences between the bills, the Senate asked for a conference committee to resolve the disparities. On November 6, the House appointed conferees⁵¹ and on November 7, the Senate did the same.⁵² The second conference committee convened on November 10, 1985.

Because the President was soon to leave for a summit meet-

44. See *id.* at H9843, S14910 (daily ed. Nov. 6, 1985).

45. *Id.* at H9838, S14908.

46. *Id.* at S14911 (statement of Sen. Gramm (R-Tex.)).

47. See *infra* notes 55, 56 and accompanying text.

48. 131 CONG. REC. H9843, S14910 (daily ed. Nov. 6, 1985).

49. *Id.* See Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 274(f), 99 Stat. 1037, 1100 (1985).

50. Pub. L. No. 99-177, § 274(f), 99 Stat. 1037, 1100 (1985).

51. 131 CONG. REC. H9868 (daily ed. Nov. 6, 1985).

52. *Id.* at S15042 (daily ed. Nov. 7, 1985).

ing in Geneva and the Treasury was on the threshold of technical default, Congress, on November 14, 1985, approved a short-term debt-ceiling extension that would authorize the Treasury to borrow funds sufficient to meet all obligations until approximately December 12, 1985.⁵³ Fortunately, the conference committee was able to resolve the differences between the two versions of the bill before this deadline was reached, but only just barely. With regard to the constitutional issues raised by Gramm-Rudman's trigger mechanism, the House conferees essentially agreed to the Senate proposal in which the GAO would estimate the trigger. As to judicial review, the Senate conferees also agreed to the House provision. The final conference agreement was silent on the issue of nonseverability; however, it did include the Senate's fallback provision, thereby implying to a reviewing court that the trigger mechanism was severable from the rest of the bill.

Thus, the final conference compromise on the constitutional questions regarding Gramm-Rudman's trigger mechanism involved the following three aspects: 1) a trigger budget deficit estimate by GAO that would be based upon similar previous estimates by both CBO and OMB; 2) an expedited judicial review process for determining the statute's constitutionality before the budget-cutting mechanism was fully implemented; and 3) a fallback provision in the event a reviewing court should determine that any portion of the trigger mechanism was unconstitutional.⁵⁴

Congress finally enacted Gramm-Rudman on December 11, 1985.⁵⁵ President Reagan signed the Act into law shortly thereafter on December 12, 1985.⁵⁶ Still concerned that the new law was an unconstitutional delegation of the congressional spending power, I filed suit two hours later in the United States District Court for the District of Columbia challenging the new law's constitutionality and seeking an injunction on its implementation.⁵⁷

53. *Id.* at H10196 (daily ed. Nov. 14, 1985).

54. *See id.* at H11684 (daily ed. Dec. 10, 1985).

55. *Id.* at H11875, 903 (daily ed. Dec. 11, 1985).

56. *See* Statement on Signing H.J. Res. 372 Into Law, 21 WEEKLY COMP. PRES. DOC. 1490-91 (Dec. 12, 1985).

57. *See* Complaint, *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.) (No. 85-

II. The Court Challenge

A. *The Standing Issue*

During the congressional debate on Gramm-Rudman, it had become increasingly apparent that Congress was determined to delegate its spending powers unconstitutionally. Consequently, I became convinced that a court challenge to the law was the only way to avoid an abrogation of the Constitution.⁵⁸ It was for this reason that I worked to include the expedited judicial review provision in the final version of the Act.⁵⁹ Expedition of the review cycle was crucial to avoid executing a full Gramm-Rudman budget-cutting cycle prior to a final decision as to the constitutionality of that process.⁶⁰

In conjunction with the question of expediting the review process, another troublesome question arose with regard to judicial review — standing. Would we be able to show sufficient injury-in-fact to support judicial action *before* automatic cuts were made? As with the question of expedition, we considered a statutory amendment granting us anticipatory standing. Such an amendment raised constitutional questions of its own. Although Congress clearly has the authority to waive judicial standing doctrines such as ripeness, mootness, and perhaps, political question, we were doubtful that amending the legislation to grant us standing prior to implementation of Gramm-Rudman cuts would, in and of itself, satisfy the article III standing re-

3945), *aff'd sub nom.* Bowsher v. Synar, 106 S. Ct. 3181 (1986). On Dec. 19, 1985, eleven other Representatives added their names as plaintiffs in the case. See Amended Complaint, Synar v. United States, 626 F. Supp. 1374 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 106 S. Ct. 3181 (1986) (adding Reps. Gary L. Ackerman (D-N.Y.), Albert G. Bustemante (D-Tex.), Silvio O. Conte (R-Mass.), Don Edwards (D-Cal.), Vic Fazio (D-Cal.), Robert Garcia (D-N.Y.), John J. LaFalce (D-N.Y.), Jim Moody (D-Wis.), Claude Pepper (D-Fla.), Robert G. Torricelli (D-N.J.), James A. Traficant, Jr. (D-Ohio) as plaintiffs in case).

58. As suggested by Professor Tribe:

Every lawmaker's oath to uphold the Constitution imposes a duty to consider the constitutionality of Gramm-Rudman before voting on it. See U.S. Const., Art. VI. . . . Thus Congress cannot responsibly enact Gramm-Rudman without expressly providing for an immediate judicial test of the bill's validity through a civil suit brought by affected Members of Congress.

Letter from Laurence H. Tribe, *supra* note 26.

59. See *supra* note 54 and accompanying text.

60. See *supra* note 36.

quirement.⁶¹ I came to realize that to fulfill the standing requirement for purposes of a judicial challenge to Gramm-Rudman, more than a simple amendment to the legislation would be required.⁶²

After considerable research, a draft amendment⁶³ was prepared which provided for an expedited review and attempted to cure the problem of standing. The draft language providing for anticipatory judicial review was nearly identical to the language that was ultimately enacted into law on December 12, 1985.⁶⁴ With the standing question resolved as well as possible under the circumstances, we proceeded to file our complaint challenging Gramm-Rudman's constitutionality immediately after the President signed the bill into law.

B. *The District Court Proceedings*

In our complaint, we alleged that the automatic deficit-reduction process was unconstitutional in two respects.⁶⁵ First, and most importantly, we alleged that congressional delegation of control over the spending power to the Comptroller General constituted an unconstitutional delegation of legislative power.⁶⁶ In addition, we alleged that the powers delegated to the GAO and the CBO — both of which we deemed to be legislative rather than executive agencies — could only be constitutionally

61. See U.S. CONST. art. III. The district court's analysis of the standing issue subsequently confirmed our concerns in this regard. See *Synar v. United States*, 626 F. Supp. 1374, 1380-82 (D.D.C.), *aff'd sub nom. Bowsher v. Synar*, 106 S. Ct. 3181 (1986). Interpreting Supreme Court decisions, the district court observed:

[T]he Court has repeatedly recognized that the concept [of art. III standing] entails certain basic requirements. . . . [A] party must allege a "distinct and palpable injury to himself." . . . This injury must be a "particular concrete injury" . . . which must amount to "a claim of specific present objective harm or a threat of specific future harm." . . . "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to [show] . . . that the injury 'fairly can be traced to the challenged action' and 'is likely to be a favorable decision.'"

Id. at 1379-90 (citations omitted).

62. See *infra* text accompanying note 68.

63. Draft Amendment on Judicial Review (Oct. 19, 1985) (copy on file at Pace Law Review).

64. Compare Draft Amendment on Judicial Review (Oct. 19, 1985) with Pub. L. No. 99-177, Title II, § 274(a)(1), 99 Stat. 1037, 1098 (1985).

65. See Complaint, *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.) (No. 85-3945), *aff'd sub nom. Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

66. *Id.*

assigned to executive branch officials.⁶⁷

We sought to fulfill the standing requirement of actual injury-in-fact by alleging in our complaint that the Gramm-Rudman Act: 1) interfered with our constitutional duties to enact laws regarding federal spending; 2) impaired our ability to perform our duties by requiring automatic reductions in our salaries, the salaries of our staff, and our office budgets; and 3) injured our constituents by causing automatic reductions in a variety of programs that benefitted them.⁶⁸ We asked the court to declare that the automatic deficit-reduction process was unconstitutional and therefore, the President was without power to order spending reductions pursuant to the Gramm-Rudman Act.⁶⁹ We also asked the court, upon striking down Gramm-Rudman's automatic budget-cutting mechanism, to declare that the fallback provision contained in the Act would govern the Gramm-Rudman budget process.⁷⁰

The National Treasury Employees Union (NTEU)⁷¹ filed a similar complaint shortly thereafter.⁷² The NTEU sought standing to sue on the ground that its retired members had been injured by the Act's automatic spending provisions, which had already operated to suspend cost-of-living adjustments that had been due to federal retirees on January 1, 1986.⁷³ The two actions were consolidated on January 2, 1986.⁷⁴

Several other parties intervened in the suit to oppose our position. The Senate and the Comptroller General of the GAO both were granted leave to intervene as defendants shortly after our suit against the United States was filed.⁷⁵ Subsequently, the Speaker and the Bipartisan Leadership Group of the United

67. *Id.*

68. *Id.* See also Affidavit of Rep. Mike Synar, *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.) (No. 85-3945), *aff'd sub nom.* Bowsher v. Synar, 106 S. Ct. 3181 (1986).

69. See Complaint, *Synar v. United States*, 626 F. Supp. 1374.

70. *Id.*

71. The National Treasury Employees Union (NTEU) is an unincorporated association which represents the interests of both active and retired federal employees. *Synar v. United States*, 626 F. Supp. 1374, 1378 (D.D.C.) *aff'd sub nom.* Bowsher v. Synar, 106 S. Ct. 3181 (1986).

72. See Complaint, *National Treasury Employee Union v. United States*, 626 F. Supp. 1374 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 106 S. Ct. 3181 (1986).

73. *Id.*

74. See *Synar v. United States*, 626 F. Supp. at 1378.

75. See *id.* at 1378-79.

States House of Representatives were also granted leave to intervene as defendants in the action.⁷⁶

We encountered our first hurdle in the suit on December 30, 1985, when the United States filed a motion to dismiss our action on the ground that we had no standing to sue.⁷⁷ The other defendants joined in this motion.⁷⁸ In essence, the defendants argued that as Members of Congress, we had no more standing to sue than any other citizen because our injury was nothing more than a generalized grievance shared by all other citizens.⁷⁹ They argued that we would not be injured to the extent required by the Constitution for standing until automatic budget cuts actually had occurred.⁸⁰

The three-judge district court panel subsequently rejected the defendants' standing arguments.⁸¹ Noting that the judicial review provisions contained in section 274 of the Act expanded our standing to sue "to the full extent permitted by Article III," the court disregarded any of the so-called "prudential" limitations on standing.⁸² The court held that as Members of Congress, we had a personal interest in the exercise of governmental powers. Gramm-Rudman would usurp these powers and sufficiently injure this interest to confer standing.⁸³ Thus, the court found that we had been and would continue to be injured by the automatic deficit-reduction process because it interfered with our constitutional duty to enact laws regarding federal spending.⁸⁴

76. *Id.*

77. See Motion to Dismiss at 18, *Synar v. United States*, 626 F. Supp. 1374.

78. See *Synar v. United States*, 626 F. Supp. at 1378-79.

79. See Motion to Dismiss at 18, *Synar v. United States*, 626 F. Supp. 1374. The defendants did not contest NTEU's standing to challenge Gramm-Rudman's constitutionality. See *Synar v. United States*, 626 F. Supp. at 1379.

80. See Motion to Dismiss at 19, *Synar v. United States*, 626 F. Supp. 1374. For a discussion of constitutional standing requirements, see *supra* note 61.

81. See *Synar v. United States*, 626 F. Supp. at 1379-82.

82. "Prudential" limitations on standing are limitations on standing which are not strictly required by article III, such as the requirement that the plaintiff be within the "zone of interests" protected by the statutory provision on which he relies. *Id.* at 1380 n.3.

83. *Synar v. United States*, 626 F. Supp. at 1382.

84. *Id.* ("[T]he Act unconstitutionally gives to the Comptroller General and the President formal power to amend or repeal appropriations legislation that was lawfully passed, and thus effectively to nullify plaintiffs' votes on that earlier legislation.").

After disposing of the standing issue, the court considered the merits of our case. Noting that it was "strictly" unnecessary to do so, the court first addressed our arguments with regard to the issue of delegation.⁸⁶ In our memorandum in support of our motion for summary judgment, we argued that the delegation of spending authority to the GAO under Gramm-Rudman was unconstitutional for several reasons. Primarily, the spending power was a core function of the legislature, and therefore, Congress could not delegate that power to another body.⁸⁸ We argued that such delegation under Gramm-Rudman was excessive and unconstitutional. We also argued that Gramm-Rudman gave the GAO the authority to nullify past and future legislation based solely on an administrative determination; therefore, the Act constituted an undue delegation of the congressional power to legislate.⁸⁷ In support of our contentions, we asserted that a broad delegation such as this must be supported by some rigorous principle of necessity which was not present in this instance because the GAO could provide no more expertise on the issue of deficit spending than Congress itself.⁸⁸ Finally, we argued that Gramm-Rudman constituted an undue delegation of congressional power because it failed to provide sufficient standards to confine the exercise of administrative discretion and to provide for judicial review.⁸⁹ The district court panel rejected each of these arguments in turn,⁹⁰ preferring instead to strike down the

85. *Synar v. United States*, 626 F. Supp. at 1382-83. The court explicitly described its findings regarding the delegation doctrine as *obiter dicta*. *Id.* Thus, there is no binding precedent on the issue of unconstitutional delegation in the context of Gramm-Rudman. This will be significant should proponents of new Gramm-Rudman legislation succeed in enacting such legislation and a new constitutional challenge is mounted.

86. See Memorandum of Plaintiffs in Support of Motion for Summary Judgment at 20-21, *Synar v. United States*, 626 F. Supp. 1374.

87. *Id.* at 21-22.

88. *Id.* at 27-31.

89. *Id.* at 32-34.

90. See *Synar v. United States*, 626 F. Supp. at 1382-91. The district court rejected the "core function" argument noting plaintiff's failure to cite a case in which the Supreme Court has held any legislative power to be nondelegable due to its "core function" status. The court held that judicial adoption of a "core function" analysis would be "effectively standardless" as no constitutional provision distinguishes between "core" and "non core" legislative functions. Lastly, the court determined that if indeed there were any nondelegable "core functions," there was no reason to include appropriations functions among them. *Id.* at 1385.

Rejecting the argument that the power to be allocated to administrative officials was

Act on the ground that it conferred upon the Comptroller General powers which are executive in nature and therefore violated the doctrine of separation of powers.⁹¹

C. *The Supreme Court Decision*

The defendant-intervenors appealed this decision to the United States Supreme Court,⁹² arguing that the three-judge panel misconstrued the Constitution as requiring that the duties assigned to the Comptroller General under the Act may be performed only by an officer serving at the President's pleasure.⁹³ On appeal, we argued not only that the district court was correct as to separation of powers, but also that the district court had erred in holding that the Act did not unconstitutionally delegate congressional powers to the GAO.

On July 7, 1986, the Supreme Court affirmed the district court's judgment.⁹⁴ The Court did not consider the question of whether we, as congressional plaintiffs, had standing to bring the action. Instead, the Court found standing to exist on the part of the sole NTEU member who had subsequently become a party to the suit.⁹⁵ On the merits, the Court held that the district court had correctly found that Gramm-Rudman violated the

unconstitutionally excessive, the court noted that the delegation of similar broad authority has been upheld in past cases. The court also rejected the argument that a broad delegation of power such as this must be supported by some rigorous principle of necessity. The court acknowledged that in some delegation cases, the Supreme Court has recognized the necessity for the delegation, but this necessity refers only to "a strong utility and convenience" which the court found to certainly exist in this case. While necessity has been considered by the Supreme Court in upholding a delegation, lack of necessity has never been invoked to strike one down. *Id.* at 1386.

Lastly, the court considered the principal argument that because of the lack of standards and inherent imprecision of the duties conferred upon the administrators, the Act fails adequately to confine the exercise of administrative discretion. In this regard, the court held that the "totality of the Act's standards, definitions, context, and reference to past administrative practice provides an adequate 'intelligible principle' to guide and confine administrative decisionmaking." *Id.* at 1389.

91. *Id.* at 1391-1404.

92. Pursuant to § 274(b) of the Act, the appeal was taken directly to the United States Supreme Court. Pub. L. No. 99-177, tit. II, § 274(b), 99 Stat. 1037, 1098-99 (1985).

93. Brief for Appellant at 12, *Bowsher v. Synar*, 106 S. Ct. 3181 (1986) (Nos. 85-1377, 85-1378, 85-1379).

94. See *Bowsher v. Synar*, 106 S. Ct. 3181, 3194 (1986).

95. *Id.* at 3186 ("It is clear that members of the Union, one of whom is an appellee here, will sustain injury by not receiving a scheduled increase in benefits.").

doctrine of separation of powers by investing executive powers in the GAO, a body that was under congressional control.⁹⁶ Affirming the district court decision on this ground, the Court found it unnecessary to consider any of our arguments with regard to the delegation doctrine.⁹⁷ By focusing so narrowly on the separation of powers issue, the Court left open the possibility that future congresses would attempt to "fix" Gramm-Rudman's constitutional problems by finding a new method for triggering automatic budget cuts that would not violate the principle of separation of powers. Recent developments indicate that this is precisely what Gramm-Rudman proponents propose to do.⁹⁸

III. Prospects

Will Congress ever reduce the deficit now that the automatic trigger mechanism of Gramm-Rudman is gone? Some argue that Congress is too susceptible to pressure from special interest groups which advocate various spending programs. They seem to contend that short of a constitutional amendment to balance the budget, a line-item veto for the President, or some other gimmick, Congress will not act until disaster strikes the United States economy.

I do not agree with this view. The Founding Fathers built in a "check" on congressional activities — spending as well as others; that check is the ballot box. The Congress is responsive to the American people, but constituent pressure on members has not yet been strong enough to force a balanced budget. Pressure on Congress has been strong enough, however, to force substantial changes in congressional habits — changes in the direction of fiscal responsibility.⁹⁹ Although these changes have been

96. *Id.* at 3186-92.

97. *Id.* at 3193 n.10.

98. At this writing, Senator Gramm is expected to offer an amendment to pending debt ceiling legislation which would give the authority for drafting sequestration orders to the Office of Management and Budget, an executive branch agency. In the House, Majority Leader Tom Foley is expected to propose that the President be given the option of signing sequestration orders prepared by the Comptroller General. Neither of these proposals attempts to resolve any delegation problems that existed with the original statute, and the Foley proposal arguably does not cure the problem of separation of powers.

99. More than half of the members of the 100th Congress were first elected with me in 1978 or since. The so-called "big spending" liberals are a thing of the past. Thus,

significant, they are not yet sufficient to resolve the problem of the growing federal deficit.

There are two key reasons why the ballot box system has not yet caused Congress to reduce the deficit. First, the problem has not yet become a pocketbook issue. In many parts of the country, the local economy has remained healthy despite the buildup of huge budget deficits. Consequently, voters have not focused on this abstract economic problem. In areas of the United States where the economy has not been good (e.g., the oil and gas producing states in the Southwest or the rural areas in the Southeast where textiles and agriculture dominate local economies), the voters have been able to attribute the blame for their economic maladies on specific, external causes such as OPEC, increased textile imports, and the national farm policy, rather than on federal budget deficits.

Second, rather than recognizing the reality that we must affirmatively address the problem, President Reagan has convinced many voters that it is possible for the economy to "grow out" of budget deficits. In addition, the President has effectively removed himself from the budget process by sending to the Hill each year a budget which is immediately described by members of both parties as "dead on arrival."¹⁰⁰ Without the President's involvement, and worse, with the President promising economic recovery despite twelve-figure deficits, Congress alone cannot reduce the deficit to a manageable level.

My experience with Gramm-Rudman has taught me that we cannot legislate leadership. Gramm-Rudman was an attempt to insulate Congress from tough political decisions, thus removing accountability from the shoulders of Congress. Through this legislation, unelected, unaccountable bureaucrats would have been empowered to cut the federal budget. The bottom-line issue in

congressional action on proposals providing new spending authority is rare and when Congress does consider such proposals, it is generally careful to identify either new revenues to fund such programs or offsetting budget cuts. A liberal Member of Congress from Philadelphia was elected Chairman of the House Budget Committee in 1984, and the first two budgets in his tenure as Chairman produced deficits *less than* the budgets approved by the Republican-controlled Senate. The dominant economic issue of the 1984 presidential election, and the first proposal made by the new House Speaker in 1987 upon his election, both concerned the need for new taxes to reduce the deficit.

100. In fact, the "dead on arrival" characterization has become so common that the OMB staff recently delivered the budget to Congress dressed in surgical garb.

the whole Gramm-Rudman debate was accountability.

The Supreme Court struck down the automatic Gramm-Rudman trigger on separation of powers grounds. I believe, however, that the true problem with Gramm-Rudman is the delegation of powers. Despite the Court's rejection of our delegation argument, the lower court did look favorably upon our assessment of the problem:

We observe, moreover, that although we have rejected the argument based upon the doctrine of unconstitutional delegation, the more technical separation-of-powers requirements we have relied upon may serve to further the policy of that doctrine more effectively than the doctrine itself. Unconstitutional delegation has been invoked by the federal courts to invalidate legislation only twice in almost 200 years, and the possibility of such invalidation, at least in modern times, is not a credible deterrent against the human propensity to leave difficult questions to somebody else. The instances are probably innumerable, however, in which Congress has chosen to decide a difficult issue itself because of its reluctance to leave the decision — as our holding today reaffirms it must — to an officer within the control of the executive branch.¹⁰¹

Clearly, Gramm-Rudman was an attempt “to leave difficult questions to somebody else.” The structure of our government, as established by the Constitution, serves as both a practical and legal limit on Congress' ability to delegate powers. The Constitution demands that powers be delegated in a certain way, but even within the constitutionally permissible range of delegation, Congress can allow itself to go only so far. The political balance supports the constitutional balance.

Currently, there is discussion in the House of Representatives of possible amendments to Gramm-Rudman which would “cure” its constitutional deficiencies. Such a cure would require that the trigger mechanism be outside congressional control. While I would hope to avoid another challenge in the courts, I will oppose such legislation. Congress should abandon gimmicks and begin making the tough decisions. Since Congress reflects its constituents, the threshold task before us is to convince the

101. *Synar v. United States*, 626 F. Supp. 1374, 1404 (D.D.C.), *aff'd sub nom. Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

American people that federal budget deficits are a real and threatening economic danger. This is a political task which puts Congress in direct conflict with the President's current economic program.

Our system of government is a dynamic system that ebbs and flows with changing politics. To work, it requires that Congress be accountable for its actions and responsive to the views of the American people. Whether Gramm-Rudman represents an unconstitutional delegation of powers or whether it violates the doctrine of separation of powers, Gramm-Rudman is still wrong. With that, Congress must do its job.