Constitutional Law

The Gramm-Rudman travesty goes to the Supreme Court

by Sanford Roberts

On April 23, 1986, the United States Supreme Court will hear oral argument in the consolidated cases brought by Rep. Mike Synar (D-Okla.) and a dozen of his colleagues and by the National Treasury Employees Union (NTEU) which challenge the constitutionality of the Gramm-Rudman Act. This infamous law, passed in December of last year, prescribes a six-year plan for reducing the federal deficit to zero by fiscal year 1991 through a series of targeted reductions in government spending. If the deficit target for any given fiscal year is not met by the Congress, Gramm-Rudman transfers the power to cut the budget to a bureaucratic triumvirate composed of the Director of the Office of Managment and Budget (OMB), the Director of Congressional Budget Office (CBO), and the Comptroller General.

Earlier this month, a special three judge panel overturned Gramm-Rudman because the legislation violated the constitutional principle of separation of powers. While the three judge panel, U.S. Circuit Court Judge Antonin Scalia and two U.S. District Court judges, Oliver Gasch and Norma Holloway Johnson, repudiated the budget-cutting statute, the reasoning behind the decision misdirects the essential political and constitutional issues involved. The panel stayed its own order pending appelate review by the Supreme Court.

The Synar/NTEU plaintiffs attacked Gramm-Rudman on two basic constitutional points. First, the plaintiffs argued that the legislation impermissibly delegates away power which, under the constitution, the Congress is obliged to retain and exercise. This delegation argument is rooted in an 1825 decision by the great federalist Chief Justice John Marshall. In the case of *Wayman v. Southard,* Marshall declared that certain "core functions" which the Constitution gives to Congress could not be delegated to some other agency to perform. The delegation argument was adopted in 1935 by the Supreme Court when it invalidated a key section of the National Industrial Recovery Act (NRA), a decision which sparked the famous confrontation between the Court and President Franklin Roosevelt.

There is no question that the power to appropriate money is one of the central powers of Congress. In fact, the *Federalist Papers,* known for two centuries as one of the most authoritative sources of constitutional law, specifically identifies the legislative branch with "the power of the purse," i.e., the ultimate power of Congress is the power to raise and spend money.

Lois Williams, the lawyer for NTEU, called the Gramm-Rudman Act a "patent abdication of congressional duty" when she argued the delegation issue before the three-judge panel on January 10, 1986. The attorney for the Synar plaintiffs, Alan Morrison, put it more eloquently. "Never before in our history," asserted Mr. Morrison, "has Congress said that it will not make the decisions that it is supposed to make and put the budget on automatic pilot. This is not what the Founding Fathers had in mind."

The second argument advanced by the plaintiffs concerned the so-called automatic pilot mechanism. Even if Gramm-Rudman's delegation of power was constitutionally appropriate, the OMB-CBO-Comptroller triumvirate could not exercise the delegated power because they represented an unconstitutional mixture of executive and legislative functions. Under Gramm-Rudman, the proposed cuts are initially prepared by the CBO, a legislative agency, and OMB, an office of the executive branch. Any discrepancy between the two sets of figures is resolved by the Comptroller General, who directs the President to issue "sequestration" orders which impound funds already appropriated by Congress. The challengers before the three judges contended that the Comptroller General was a legislative officer performing executive functions under the statute.

One of the ironies of the Synar case was the role of the Justice Department, the erstwhile defenders of the law. The DOJ simultaneously defended the statute against the constitutional attacks of the plaintiffs and advanced its own argument that the law was unconstitutional. Justice offered a variation on the anti-Comptroller argument. The role of the

Comptroller, according to the DOJ's Richard Willard, is constitutionally infirm because he was permitted to exercise executive power superior to the President. The Comptroller, under constitutional attack from all sides, added his own irony to the proceedings by hiring Lloyd Cutler to argue his case
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cherished document in favor of the British parliamentary model.

Judge Scalia, Humphrey's Executor, and Alexander Hamilton

On Feb. 7, the court handed down their decision. The opinion was signed by all three judges, but all observers agree it is the work of Scalia, a Reagan appointee who is frequently mentioned as a candidate for nomination to the U.S. Supreme Court whenever the next vacancy occurs. The Circuit judge is a University of Chicago specialist in the area of administrative law. He was brought by the Reagan administration from Chicago to the D.C. Circuit Court of Appeals, the court which oversees most litigation involving agencies of the federal government, for the purpose of completely changing the administrative agenda. His Synar decision is a giant step in that direction.

The ruling of the panel, i.e., Scalia, emphatically rejected the plaintiff's delegation arguments, but invalidated the statute because the Comptroller General, an official subject to removal by the Congress and therefore considered to be a legislative functionary, performed executive functions within the Gramm-Rudman schema. Beyond the immediate question of the Comptroller, the Scalia opinion called into question the entire constitutional underpinning of the administrative or so-called fourth branch of government, the collection of federal agencies who inhabit a nether world of quasi-legislative, quasi-judicial, and/or quasi-executive powers, and defy categorization within any of the three branches established by the U.S. Constitution. He did this by attacking the continued precedential value of a 1935 Supreme Court ruling in the case of *Humphrey's Executor v. United States,* the case which gave the Court's constitutional blessing to the existence of independent regulatory agencies.

Fifty years ago, the Humphrey's Executor Court decided that these independent regulatory agencies were not part of the executive branch and, as such, did not serve at the pleasure of the President. On Feb. 7, 1986, Judge Scalia consigned Humphrey's Executor to the dustbin of history. "Justice Sutherland's decision in Humphrey's Executor," declared the Synar panel, "is stamped with some of the political science preconceptions characteristic of its era and not of the present day—if not stamped as well, as President Roosevelt thought, with hostility towards the architect of the New Deal. It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely 'independent' regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process." before the w

While those who believe in constitutional orthodoxy and republican government might applaud these sentiments, a strong caveat is in order. Scalia and his co-thinkers in the administration are ardent proponents of deregulation. The purpose of their attack upon Humphrey's Executor is not a desire to make regulatory agencies more responsive to an elected Chief Executive, but to eliminate, or at least emasculate, the regulatory powers of these agencies. Scalia & Co. are fundamentally Jeffersonians who view the Constitution as a prescription for limited government.

However, the basic political and constitutional question at issue in Gramm-Rudman is not the existence of regulatory agencies, but the power and responsibility of Congress. Under Article I, Section 8 of the Constitution, Congress is entrusted with power to "provide for the General Welfare and Common Defense," "regulate commerce among the several states" and other plenipotentiary powers. These powers were, in effect, a mandate from the Founding Fathers to successive generations of congressmen to develop the United States as a commercial and industrial republic, a vision of this nation espoused by Alexander Hamilton, and not by Thomas Jefferson or his latter-day admirers.

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The Scalia opinion is a jesuitical attempt to transform the Gramm-Rudman debate, shifting the focus away from the responsibility of Congress and toward the political agenda proposed by the deregulators. The basic flaw in the Scalia analysis of Gramm-Rudman is contained in the concluding paragraph of his opinion. "We observe, moreover, that although we have rejected the argument based upon the doctrine of unconstitutional delegation, the more technical sep-

aration-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."

Contrary to the logic of Scalia, the inspiration for Gramm-Rudman was not congressional fear of executive usurpation. If this were true, the legislation would never have been passed in the first place since Congress would simply have cut the budget on their own without any executive interference whatsoever. The real fear motivating congressmen who voted aye on Gramm-Rudman concerns their constituencies who, by and large, do not accept the balanced budget propaganda and will quickly remove from office any congressmen, regardless of the purity of his Jeffersonian principles, who votes for cuts rather than proposes and passes real solutions to the economic problems underlying this entire debate. Gramm-Rudman is an escape hatch for pusillanimous legislators. The actual decision to make budget cuts (and more significantly, the blame for these cuts) is pawned off on a troika of bureacrats who do not have to face the electorate and answer for their actions.

The fallacy of Scalia's assertion that Gramm-Rudman was motivated by traditional legislative apprehension regarding an overreaching executive was made clear before the ink was dry on his opinion. On the same day the three judge panel delivered its ruling, the press corps picked up rumors that key Republican senators, including Majority Leader Robert Dole (Kan.), Budget Committee Chairman Peter Domenici (N.M.), and Phil Gramm (Tex.), would remedy the statute by passing legislation making the Comptroller General an executive officer. These senators obviously displayed no "reluctance" whatsoever to "leave the decision [to meat-axe the budget] to an officer within the control of the executive branch."

The challenge to the fallback provision

Beside Synar and NTEU, there were several other unions which filed suit against Gramm-Rudman within a month after the passage of the law. For most of these actions, the Synar decision is dispositive of the issues raised. However, an action filed by the American Federation of Government Employees (AFGE) on Jan. 17 promises to add a new dimension to the present legal challenges.

All of the pending cases, Synar and NTEU included, concede the constitutionality of the "fallback" (another word in the Gramm-Rudman vocabularly) mechanism. The fallback mechanism provides that if a court declares the the CBO-OMB-Comptroller schema to be unconstitutional, another provision would become operant. Rather than employing the Comptroller as the arbiter between the CBO and OMB reports, these reports would be submitted to Congress who could only vote the reports up or down in the form of a joint resolution. If the U.S. Supreme Court simply affirmed the decision of the Synar panel, the fallback provision would become the law of the land.

The AFGE action calls the fallback provision a "sham" and seeks a declaration from the court that the provision is unconstitutional. In a memorandum submitted with their original pleadings, AFGE contends "[t]he fallback provision does not cure the constitutional infirmity for the very reason that Congress's role is still denigrated to that of adopting *in toto* the report on the budget. As previously explained, under [Gramm-Rudman], Congress cannot amend the Joint Resolution. Its role is to set forth the report of the Directors in a Joint Resolution and then upon adoption, submit it to the President. The mere process of setting forth the report in a Joint Resolution does not result in making the Act constitutional. This is simply window dressing."

Interestingly, the AFGE memorandum relies upon the same 1983 landmark Supreme Court decision, *INS v. Chadha,* which Judge Scalia used to support his opinion. The Chadha case invalidated the use of the legislative veto because it violated the strict requirements of Article I, Section 7 of the Constitution. This section specifies that legislation is passed by the bicameral enactment of Congress and signed into law by the Chief Executive, and no other process is constitutionally viable, except that Congress by a two-thirds majority vote can override the veto power of the President. As the Court stated in Chadha, the process may be time-consuming and cumbersome, but it is meant to be "step by step, deliberate, and deliberative."

While Scalia cites Chadha as evidence for his view that a strict constructionist Supreme Court should rule the administrative branch constitutionally out of existence, AFGE uses the Chadha case to demonstrate that the fallback provision prescribes a sham legislative process. Their memorandum claims "[t]he substance of the [fallback] provision is purely ministerial and an absolute denial of the full legislative process necessary for a valid exercise of legislative power. It denies to the American public the opportunity to express their opinions through the Congressional hearing process or through Congressional amendment on the floor at the time the matter is considered. It is a means whereby Congress evades the strictures of the Constitution and enacts Executive proposals into law by rote."

The same panel which decided Synar will hear the AFGE case on March 19. The key question is not what the panel's decision will be, but whether the three judges will rule soon enough for the losing side to file an expedited appeal in time for inclusion in the April 23 hearing on the Snyar/NTEU cases. If not, the AFGE appeal could delay the ultimate ruling by the Supreme Court beyond the targeted July decision date.