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BALANCING ACTS: *BOWSHER v. SYNAR*, GRAMM-RUDMAN-HOLLINGS, AND BEYOND

L. Harold Levinson†

The Supreme Court performed a judicial balancing act in *Bowsher v. Synar*.¹ It upheld some, but not all, types of congressional experiments with macrobudgeting. In reaching this conclusion the Court failed to decide some issues that would have provided sorely needed guidance on potential budgetary problems.

In addition, the *Bowsher* litigation² required a balancing of competing contentions made by various factions within the government. On one side, the Comptroller General and the leadership of each House of Congress³ urged validation of the entire Gramm-Rudman-Hollings Act;⁴ on the other side, the executive branch of the United States and some individual members of Congress, together with unions representing affected citizens, urged invalidation of that part of the Act which empowers the Comptroller General to trigger automatic spending cuts.⁵ The Court held that this triggering provision unconstitutionally conferred executive power upon the Comptroller General, a nonexecutive officer. The Court then invited Congress to reduce spending by adopting a joint resolution pursuant to the Act's fallback provision.⁶ While not expressly ruling on the fallback provision's validity, the Court's invitation to use this provision suggests

† Professor of Law, Vanderbilt University. B.B.A. 1957, LL.B. 1962, University of Miami; LL.M. 1964, New York University; J.S.D. 1974, Columbia University.

¹ 106 S. Ct. 3181 (1986).

² A three-judge district court, exercising jurisdiction conferred by the Act itself, 2 U.S.C. § 922(a) (Supp. III 1985), held part of the statute invalid. *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986). The appellants then appealed directly to the Supreme Court, invoking the Act's direct appeal provision. 2 U.S.C. § 922(b) (Supp. III 1985).

³ Ex-Senator Howard Baker and the National Tax Limitation Committee, as amici curiae, filed additional briefs in support of the appellants' position.

⁴ See *Arguments Before the Court*, 54 U.S.L.W. 3709 (U.S. Apr. 29, 1986). The popular title, "Gramm-Rudman-Hollings Act," refers to the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 1037. *Bowsher* addressed §§ 251-275 of the Act (codified at 2 U.S.C. §§ 901-922 (Supp. III 1985)).

⁵ See *Arguments Before the Court*, *supra* note 4, at 3710. The appellees in the Supreme Court were the United States (represented by the Solicitor General), Congressman Mike Synar (represented by Alan Morrison of Public Citizen Litigation Group) and the National Treasury Employees Union. Six amici curiae filed additional briefs in support of the appellees' position.

⁶ 106 S. Ct. at 3193-94. Congress quickly adopted the joint resolution. See *infra* text accompanying notes 8-10.

its approval.⁷

Congress and the President quickly responded to *Bowsher* by performing their own budget balancing acts. Less than a month after the Supreme Court's decision, Congress passed, and the President approved, a joint resolution⁸ in accordance with the fallback provision of the Gramm-Rudman-Hollings Act, ratifying the President's sequestration order⁹ for fiscal year (FY) 1986.¹⁰

Meanwhile, Congress worked on the budget for FY 1987. When the Congressional Budget Office (CBO) and the Office of Management and Budget (OMB) warned that the first congressional version of the FY 1987 budget would necessitate an across-the-board cut,¹¹ Congress in October 1986 revised its budget to avoid such a cut.¹² During the same month, Congress enacted a revised income tax law which, among other things, may make it easier to predict revenues for future budget projections.¹³

⁷ 106 S. Ct. at 3193-94. In *American Federation of Government Employees v. United States*, 634 F. Supp. 336 (D.D.C. 1986), government employees and their union challenged the validity of the fallback provision. Noting that Congress had not yet exercised the fallback provision, and could exercise it only by a joint resolution, the district court refused to rule on the validity of the provision, because such a ruling would constitute an advisory opinion on the validity of future legislation. The Supreme Court affirmed this decision a few weeks after *Bowsher*, although in the meantime Congress had enacted a joint resolution to exercise the fallback provision. 107 S. Ct. 43 (1986); see also *National Ass'n of Retired Fed. Employees v. Horner*, 633 F. Supp. 511 (D.D.C.) (pensioners not deprived of "property" when spending cuts eliminated cost of living adjustments (COLAs) to which pensioners had statutory entitlement), *aff'd*, 107 S. Ct. 261 (1986).

⁸ Act of July 31, 1986, Pub. L. No. 99-366, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 773.

⁹ 51 Fed. Reg. 4291 (1986) [hereinafter *Sequestration Order*]; see also OMB & CBO, SEQUESTRATION REPORT FOR FISCAL YEAR 1986 (providing underlying details of joint resolution and sequestration order), reprinted in 51 Fed. Reg. 1918 (1986); COMPTROLLER GENERAL, BUDGET REDUCTIONS FOR FISCAL YEAR 1986 (commenting on OMB/CBO Report), reprinted in 51 Fed. Reg. 2813 (1986).

¹⁰ The term "fiscal year 1986" or "FY 1986" means the fiscal year ending on Sept. 30, 1986.

¹¹ OMB & CBO, INITIAL SEQUESTRATION REPORT FOR FY 1987, at 11 (table 6) (suggesting sequestration percentages for FY 1987 of 5.6% for defense and 7.6% for nondefense), reprinted in 51 Fed. Reg. 29,829, 29,841 (1986) (table 6). The Comptroller General projected higher sequestration percentages of 6.7% and 9.4% respectively. GENERAL ACCOUNTING OFFICE, BUDGET REDUCTIONS FOR FY 1987: REVIEW OF INITIAL OMB/CBO REPORT UNDER THE DEFICIT CONTROL ACT 2 (1986) (on file at *Cornell Law Review*).

¹² Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) —; see also *Major Provisions of the Fiscal 1987 Reconciliation Bill*, 44 CONG. Q. WEEKLY REP. 2790 (1986) (summarizing Act). Near that time, Congress enacted a joint resolution providing continuing appropriations for FY 1987. Act of Oct. 18, 1986, Pub. L. No. 99-500, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1783; see also Wehr, *Congress Clears \$576 Billion Spending Measure*, 44 CONG. Q. WEEKLY REP. 2584 (1986) (summarizing resolution); *infra* note 82 (difficulties preceding resolution's enactment).

¹³ Tax Reform Act of 1986, Pub. L. No. 99-514, 1986 U.S. CODE CONG. & ADMIN.

Bowsher apparently defused pressures for more drastic deficit control measures, such as a constitutional amendment or a statutory line-item veto,¹⁴ but the budget war is likely to flare up again, especially after FY 1987. The first two years of the Gramm-Rudman-Hollings budget cycle present less risk of crisis than do later years. For example, after complete elimination of pensioners' cost of living adjustments (COLAs), the across-the-board spending reductions required in FY 1986 to meet the deficit reduction target were only 4.9% for defense accounts and 4.3% for nondefense accounts.¹⁵ Because of the unique timetable for FY 1986 as the transitional year, the affected governmental agencies had already reduced spending to comply with the President's sequestration order¹⁶ before Congress voted to exercise the fallback provision.¹⁷ Thus, the congressional vote merely ratified the agencies' past cuts in spending.

Furthermore, the budget reconciliation for FY 1987 reflects some nonrecurring savings achieved through questionable accounting procedures and the projected sale of governmental assets.¹⁸

NEWS (100 Stat.) —. Although revenues may become easier to predict after the Act takes effect, its transitional features are likely to produce fluctuations in revenue during the next three years. See *infra* note 18.

¹⁴ For recent commentary on these issues, see Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077; Gressman, *Is the Item Veto Constitutional?*, 64 N.C.L. REV. 819 (1986); Note, *The Balanced Budget Amendment: An Inquiry into Appropriateness*, 96 HARV. L. REV. 1600 (1983); Comment, *A Constitutional Convention: Scouting Article Five's Undiscovered Country*, 134 U. PA. L. REV. 939 (1986). See also *infra* notes 84-86 and accompanying text.

¹⁵ OMB & CBO, *supra* note 9, at 9 (table 5), reprinted in 51 Fed. Reg. at 1930; COMPTROLLER GENERAL, *supra* note 9, app. C at 50-51, reprinted in 51 Fed. Reg. at 2862-63. The COLAs may be reduced by less than 100% in certain circumstances, 2 U.S.C. § 901(a)(3)(C)(ii)(I) (Supp. III 1985), but these circumstances did not arise in the computations for FY 1986 or 1987. The Act contains some exceptions, completely exempting some accounts from reduction and providing special calculations for others. *Id.* §§ 905-906.

¹⁶ See Statement by the President on the Supreme Court Decision, 22 WEEKLY COMP. PRES. DOC. 915 (July 7, 1986) (noting spending reductions authorized by sequestration order had "already been absorbed").

¹⁷ Act of July 31, 1986, Pub. L. No. 99-366, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 773.

¹⁸ The Budget Reconciliation Act, the Continuing Appropriations Resolution, and the Tax Reform Act produced, inter alia, the following combined effects: (a) the Budget Reconciliation Act accelerated certain revenue collections into FY 1987 from FY 1988, provided for "revenue" in FY 1987 from the sale of Conrail and certain government-owned loans, and moved a payment under the expired revenue-sharing plan from FY 1987 back into FY 1986; (b) the Continuing Appropriations Resolution changed the date of a military payday from Sept. 30, 1987 to Oct. 1, 1987, thereby transferring \$2.9 billion of spending from FY 1987 to FY 1988; and (c) the Tax Reform Act's phase-in provisions are projected to cause wide swings in revenue for the next three fiscal years. The Budget Reconciliation Act also raised the debt ceiling by \$189 billion to \$2.3 trillion. Pub. L. No. 99-509, § 8201, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) —, —. The debt ceiling does not figure in the computation of the deficit, but is significant because a debt increase enables the government to engage in deficit spending by using

Achieving the Act's deficit reduction targets in future years will become increasingly difficult and will require deeper cuts by the Gramm-Rudman-Hollings ax.¹⁹

If the budget war heats up again, what guidance will *Bowsher* provide? Did the Court withhold useful guidance on potential budget issues in order to serve other judicial goals and values? In discussing these questions, this article explores not only the issues addressed by *Bowsher*, but also other issues that the Court could, and arguably should, have addressed.

I

THE "EXECUTIVE" NATURE OF THE COMPTROLLER GENERAL'S FUNCTIONS

The Court characterized the Comptroller General's functions under the primary triggering mechanism of Gramm-Rudman-Hollings as "executive."²⁰ The Court apparently assumed that the Comptroller General's report compels the President to issue a sequestration order. Such an assumption is highly questionable, under two alternative theories outlined below. If indeed the Comp-

newly borrowed money. See Statement on Signing H.R. 5300 into Law, 22 WEEKLY COMP. PRES. DOC. 1421 (Oct. 21, 1986); Remarks on Signing H.R. 3838 into Law, 22 WEEKLY COMP. PRES. DOC. 1423 (Oct. 22, 1986); Statement by the President, 22 WEEKLY COMP. PRES. DOC. 1496 (Oct. 30, 1986); Wehr, *Gramm-Rudman Both Disappoints and Succeeds*, 44 CONG. Q. WEEKLY REP. 2879 (1986).

¹⁹ The deficit targets under Gramm-Rudman-Hollings are \$171.9 billion for FY 1986, \$144 billion for FY 1987, \$108 billion for FY 1988, \$72 billion for FY 1989, \$36 billion for FY 1990, and zero for FY 1991. 2 U.S.C. § 622(a)(7) (Supp. III 1985). Automatic spending cuts are triggered only if the projected deficit for a year is more than \$10 billion above the targeted deficit amount for that year. *Id.* § 901(a).

According to former OMB Director David Stockman:

Gramm-Rudman will never reduce the nation's giant and dangerous budget deficit by any significant amount. After one or two years, its mechanical formula for across-the-board expenditure reductions in the 50 percent of the budget not exempted or protected would produce havoc. The defense cuts would be so draconian as to amount to unilateral disarmament; a large portion of the IRS staff would be fired and we would collect no revenue at all; life-saving new drug applications would pile up at the Food and Drug Administration unreviewed; our airports would become a parking lot for cars, people, and planes because the FAA would be too short handed to manage even a fraction of a normal traffic.

All of this chaos and much, much more is inherent in the arithmetic of Gramm-Rudman, and is the reason it will be eventually repealed or drastically amended. Hopefully, the Supreme Court will spare us much trouble by ruling it unconstitutional.

D. STOCKMAN, *THE TRIUMPH OF POLITICS: HOW THE REAGAN REVOLUTION FAILED* 392-93 (1986). Stockman proposes to "[t]rim a little more spending where the democratic consensus will permit it, and raise a lot of new taxes to pay for the government the nation has decided it wants." *Id.* at 394. On past budgetary conflicts between the legislative and executive branches, see L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 221-51 (1985).

²⁰ *Bowsher*, 106 S. Ct. at 3191-92.

troller General's report does not bind the President, the Comptroller General's residual functions under the Act may not be "executive" in nature. Further, even if these functions are "executive," they may pass constitutional scrutiny if they do not interfere excessively with the President's performance of his duties.

A. Does the Comptroller General's Report Compel the President to Issue a Sequestration Order?

Under either of two alternative interpretations of the Gramm-Rudman-Hollings Act, the Comptroller General's report does not force the President to issue a sequestration order. First, the Act can be construed as authorizing the Comptroller General to direct, rather than compel, the President to issue an order. Second, although Congress may have intended that the Comptroller General's report bind the President, such a scheme is constitutionally impermissible and therefore any order is the product of presidential discretion.

1. *Statute Is Directory, Not Mandatory*

According to a basic principle of constitutional interpretation, courts should preserve the constitutionality of a statute whenever possible, even if this requires a strained interpretation of the statute.²¹ One could thus read the statute as addressing the President in directory, rather than mandatory, terms.²² The text of Gramm-Rudman-Hollings supports this interpretation in that the Act contains no enforcement mechanism to compel the President to issue a sequestration order implementing the Comptroller General's report.²³

²¹ *Blitz v. Donovan*, 740 F.2d 1241, 1244-46 (D.C. Cir. 1984); 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 45.11 (4th ed. 1984).

²² 2A C. SANDS, *supra* note 21, § 57.24; *see* *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1871); *Doe v. Brookline School Comm.*, 722 F.2d 910, 918 (1st Cir. 1983); *Sierra Club v. Train*, 557 F.2d 485, 488-91 (5th Cir. 1977); *cf.* *Train v. City of New York*, 420 U.S. 35 (1975); *infra* note 83 and accompanying text (distinction between mandatory and permissive appropriations).

²³ The Act contains elaborate provisions for judicial review. 2 U.S.C. § 922 (Supp. III 1985). Any member of Congress may seek declaratory and injunctive relief on the ground that a presidential order of sequestration violates the Constitution or the Act. *Id.* § 922(a)(1), (3). Any member of Congress or any other adversely affected person may seek declaratory and injunctive relief concerning the constitutionality of the Act. *Id.* § 922(a)(2).

If a court determines finally that a presidential sequestration order incorrectly makes spending reductions, the President must revise the order within 20 days. *Id.* § 922(d)(1). If a final sequestration order does not make the reductions required by the Act, and a court upholds finally the President on the basis of his constitutional powers, the court must nullify the entire sequestration order for that year. *Id.* § 922(d)(2). Finally, if a court invalidates any of the procedures pertaining to the CBO, OMB, or Comptroller General's reports, the OMB/CBO reports must be transmitted to a joint

Interpreting the Act as directory, rather than mandatory, means that the President upon receipt of the Comptroller General's report has a choice: the President could issue a sequestration order according to the tenor of the Comptroller General's report, making the order immediately effective without triggering the procedures of the Impoundment Act of 1974;²⁴ or the President could refuse to issue a sequestration order while still carrying out deficit reduction by sending a rescission message to Congress in accordance with the Impoundment Act.²⁵

2. *President May Sever and Disregard Mandatory Provision*

Alternatively, one might agree with the Court that Congress unconstitutionally attempted to make the Comptroller General's report binding on the President but nevertheless conclude that the President can disregard this unconstitutional feature of the Act. Under this approach, the President, subject to judicial review, may implement that portion of a statute he regards as constitutional, while disregarding those provisions he regards as unconstitutional and severable. President Reagan recently exemplified such an approach when he refused to conform to the Comptroller General's actions under the Competition in Contracting Act of 1984²⁶ because the President regarded the Act as unconstitutionally conferring executive powers upon the Comptroller General.²⁷ The President persisted in his position until the courts validated the statute in

congressional committee which must report a joint resolution. *Id.* § 922(f). This final provision is the "fallback" procedure implemented after the Supreme Court's decision in *Bowsher*.

None of the above provisions deals with the possibility that the President will issue no sequestration order at all. Section 922(d)(2) only anticipates the possibility that a court may hold the Act unconstitutional as an encroachment on the President's powers.

²⁴ The Gramm-Rudman-Hollings Act exempts presidential sequestration orders from the Impoundment Act. *Id.* § 902(a)(1). The Impoundment Act of 1974 authorizes the President to propose rescissions of budget authority for prior approval by Congress, *id.* § 683 (1982), and to make deferrals, subject to disapproval by either House of Congress. *Id.* § 684. The deferral provision was held invalid in *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987). The *New Haven* court, relying on *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), noted the unconstitutionality of the one-house veto contained in the deferral provision. 809 F.2d at 905. The court then held the deferral provision invalid because the unconstitutional legislative veto could not be severed from it. *Id.* at 905-09.

²⁵ 2 U.S.C. § 683 (1982).

²⁶ 31 U.S.C. §§ 3551-3556 (Supp. III 1985).

²⁷ The President, asserting that the Act unconstitutionally authorized the Comptroller General to order a stay of the governmental procurement process, ordered federal agencies not to comply with certain actions taken by the Comptroller General under the Act. See Statement on Signing H.R. 4170 into Law, 20 WEEKLY COMP. PRES. DOC. 1037 (July 18, 1984). A congressional committee stated, in response, that the President violated the Constitution by ordering agencies not to comply with an Act of Congress. See H.R. REP. NO. 138, 99th Cong., 1st Sess. 39 (1985).

*Ameron, Inc. v. United States Army Corps of Engineers.*²⁸ Thus, the President could sever and disregard the provisions of the Gramm-Rudman-Hollings Act making the Comptroller General's report mandatory, and treat the remainder of the Act as directory. Issuing a sequestration order then becomes an exercise of presidential discretion in response to the nonbinding advice of the Comptroller General.

B. Are the Comptroller General's Residual Functions "Executive"?

If the Comptroller General's report is not binding, the question still remains whether his residual functions under Gramm-Rudman-Hollings properly can be characterized as "executive." These functions consist, in essence, of supplying the President with a draft sequestration order which, in the Comptroller General's opinion, represents a valid implementation of the Gramm-Rudman-Hollings Act, and which therefore becomes effective when promulgated by the President without the need to invoke the rescission procedures of the Impoundment Act. Before preparing this draft, the Comptroller General must receive preliminary drafts from OMB and CBO.²⁹ The Comptroller General must finalize his draft within a tight timetable³⁰ and must submit this draft to Congress before the President can implement it.³¹

This residual function of the Comptroller General may indeed be "executive" in nature. If it is, however, many other functions

²⁸ 787 F.2d 875, *aff'd on other grounds on rehearing*, 809 F.2d 979 (3d Cir. 1986). In its original decision, the Third Circuit concluded that the Comptroller General was not an agent of the legislative branch and therefore no delegation problem existed. 787 F.2d at 885-87. On rehearing after *Bowsher*, the Third Circuit acknowledged the legislative branch status of the Comptroller General and found no impermissible delegation or interference in the executive branch's functions. 809 F.2d at 988-99.

²⁹ The OMB and CBO reports to the Comptroller General are due August 20 for the fiscal year that will start on October 1 of the same calendar year (but January 15, 1986 for FY 1986). 2 U.S.C. § 901(a)(2) (Supp. III 1985). The OMB and CBO revised reports to the Comptroller General are due October 5 (but none for FY 1986). *Id.* § 901(c)(1).

³⁰ The Comptroller General's report to Congress is due August 25 (but January 20, 1986 for FY 1986). *Id.* § 901(b)(1). The Comptroller General's revised report to Congress is due October 10 (but none for FY 1986). *Id.* § 901(c)(2).

³¹ The President's initial sequestration order is due September 1 (but February 1, 1986 for FY 1986). *Id.* § 902(a)(1). The President's final sequestration order is due October 15 (but none for FY 1986), *id.* § 902(b)(1), and becomes effective immediately. *Id.* § 902(a)(6). (For FY 1986, the Act does not provide for a final order, and the initial order becomes effective on March 1. *Id.* § 902(a)(6)(A).)

Congress may enact its own alternative measures to meet the deficit target. *Id.* § 904(b). The revised reports by CBO, OMB, and the Comptroller General must take any such measures into account, *id.* § 901(c), as must the President's final order of sequestration. *Id.* § 902(b)(2).

performed by nonexecutive officers are also executive.³² Although the Court's guidance on this issue would have been quite instructive, it regrettably offered little such guidance.

If the Court had concluded that the Comptroller General's functions were not "executive," the Court would have had to explore other constitutional arguments asserted by the parties, particularly those focusing on the delegation doctrine. The Court preferred, however, to render an express disclaimer of any opinion on delegation.³³

C. Do the Comptroller General's Functions Interfere Excessively with the President's Functions?

Even if the Comptroller General's functions are characterized as "executive," his performance of them may pass constitutional scrutiny if it does not interfere excessively with the President's performance of his duties. Two post-*Bowsher* decisions rendered by courts of appeals support this position.

In its post-*Bowsher* rehearing of *Ameron*,³⁴ the Third Circuit upheld the powers conferred upon the Comptroller General by the Competition in Contracting Act, including the power to order a temporary stay in the procurement process. Even more recently, in *FTC v. American National Cellular, Inc.*,³⁵ the Ninth Circuit upheld the statutory power of the Federal Trade Commission to bring suit to enjoin false and deceptive trade practices. The court rejected the challenger's argument that such suits may not be prosecuted by an independent agency, but only by an agency within the executive branch of government. *Ameron* and *Cellular* both support the view that Congress may assign executive functions to officials not within the executive branch, so long as performing these functions does not interfere excessively with the exercise of presidential powers.

³² The Comptroller General has numerous other statutory functions, including the power to stay the procurement process after receipt of bid protests. 31 U.S.C. § 3553 (Supp. III 1985); see also *Ameron v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986) (examining constitutionality of § 3553). The Comptroller General also has power to settle all accounts of the United States, 31 U.S.C. § 3526 (1982), and to settle all claims of or against the United States. *Id.* §§ 3702, 3711; see also *Bowsher*, 106 S. Ct. at 3196-98 (Stevens, J., concurring) (listing other duties of Comptroller General).

Other governmental officials perform numerous types of functions that could be characterized as "executive." See *infra* notes 43 & 45 (discussing issues that Supreme Court chose not to address in *Bowsher* and their potential relevance to other agencies and functions).

³³ *Bowsher*, 106 S. Ct. at 3193 n.10.

³⁴ 809 F.2d 979 (3d Cir. 1986); see *supra* note 28.

³⁵ 810 F.2d 1511 (9th Cir. 1987); see also *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987) (challenge to constitutionality of FTC's law enforcement powers dismissed; each judge of panel uses different rationale—exhaustion, ripeness, or lack of final agency action).

The *Ameron-Cellular* approach contributes to the analysis of the Comptroller General's functions under the Gramm-Rudman-Hollings Act. If the Comptroller General's report does not bind the President but is merely advisory, the Comptroller General interferes only minimally with the President's duties. Consequently, the Comptroller General's function of issuing the report may pass constitutional scrutiny, even if this function is characterized as "executive" and the Comptroller General is characterized as a "non-executive" official.

By assuming that the Comptroller General's report binds the President, the *Bowsher* Court failed to provide any guidance for lower courts regarding the permissible limits of "executive" action by "nonexecutive" officials. The Court's guidance would have gone far to clarify the status and powers of the "independent" agencies, matters that the Court chose instead to leave in a state of continuing uncertainty.

II

REMOVABILITY OF THE COMPTROLLER GENERAL

Having characterized the Comptroller General's function as "executive" under the primary triggering mechanism, the Court concluded that Congress cannot properly assign this function to the Comptroller General because he is subject to removal by Congress.³⁶ Even assuming that the Comptroller General has executive duties under Gramm-Rudman-Hollings, the Court's analysis of the Comptroller General's removability is troublesome.

A. Does the Risk of Removal Affect Performance of Official Duties?

The *Bowsher* Court assumed that public officials likely perform their duties in a manner that minimizes the risk of removal from office.³⁷ Although this may be a reasonable generalization, many public officials prefer to stand by their professional judgments even

³⁶ *Bowsher*, 106 S. Ct. at 3191-92. The Court observed that the Comptroller General "may be removed not only by impeachment but also by Joint Resolution of Congress 'at any time' resting on any one of the following bases: '(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude.'" *Id.* at 3189 (quoting 31 U.S.C. § 703(e)(1) (1982)). A footnote adds:

Although the President could veto such a joint resolution, the veto could be overridden by a two-thirds vote of both Houses of Congress. Thus, the Comptroller General could be removed in the face of Presidential opposition. Like the District Court, 626 F. Supp., at 1393 n.21, we therefore read the removal provision as authorizing removal by Congress alone.

Id. at 3189 n.7.

³⁷ *Id.* at 3188.

though they risk removal from office.³⁸ Any generalization about public officials' trying to keep their jobs is, in any event, a flimsy foundation on which to invalidate a statute.

The Court should have inquired instead whether the removal provision will significantly influence the Comptroller General when he drafts the report required by the Gramm-Rudman-Hollings Act. The issue would be whether the percentage of spending cuts proposed in the Comptroller General's report would likely change if the removal provision were different.

One way to address the removal issue is to ask the Comptroller General and the people who wield the power of removal. In their *Bowsher* briefs and oral argument, the Comptroller General and the congressional leadership insisted that the Comptroller General was not subservient to Congress and would exercise his professional judgment regardless of the risk of removal from office.³⁹ The Solicitor General, on behalf of the executive departments of the United States, urged the contrary as did a small number of members of Congress and the private parties.⁴⁰

Notably, no Congress has even so much as threatened removal of the Comptroller General since the enactment of the removal provision in 1921.⁴¹ Furthermore, any attempt by Congress to remove

³⁸ Indeed, some officials may even invite removal, hoping to reap rewards in subsequent private-sector employment or in the literary arena.

³⁹ Brief for Appellant Comptroller General of the United States at 22-33, *Bowsher*, 106 S. Ct. 3181 (1986) (No. 85-1377); Brief of Appellant United States Senate at 18-25, *Bowsher*, 106 S. Ct. 3181 (1986) (No. 85-1377); Brief of the Speaker and Bipartisan Leadership Group at 43-49, *Bowsher*, 106 S. Ct. 3181 (1986) (No. 85-1377) (noting that "the Comptroller General submitted to the district court a thorough affidavit describing how he performed his function which amply demonstrated the absence of Congressional influence"); see also *Arguments Before the Court*, *supra* note 4, at 3709-10.

The independence of Charles A. Bowsher, who served as Comptroller General during the litigation and continues in office, is demonstrated in his background. He is a certified public accountant (CPA) and before entering governmental service practiced as a partner in the accounting firm of Arthur Andersen & Co. See I WHO'S WHO IN AMERICA, 1986-1987, at 307 (44th ed. 1986) (listing of "Bowsher, Charles Arthur"). The Supreme Court recently acknowledged the high degree of professional independence of practicing CPAs vis-à-vis their clients. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984). As a CPA in governmental service, Bowsher arguably is even more independent than if he were in private practice, especially because he could significantly increase his income if he returned to private practice after removal as Comptroller General. In contrast, the Oregon postmaster whose discharge from governmental employment was at issue in *Myers v. United States*, 272 U.S. 52 (1926), may have been unable to obtain comparable employment elsewhere.

⁴⁰ The appellees did not allege subservient behavior by the Comptroller General. Instead, they argued that he is subservient as a matter of law. Brief for the United States at 33, *Bowsher*, 106 S. Ct. 3181 (1986) (No. 85-1377); Brief of Appellees, Mike Synar, Member of Congress, *et al.* at 47-48, *Bowsher*, 106 S. Ct. 3181 (1986) (No. 85-1377); Brief for Appellee National Treasury Employees Union at 37-43, *Bowsher*, 106 S. Ct. 3181 (1986) (No. 85-1377); see also *Arguments Before the Court*, *supra* note 4, at 3709-10.

⁴¹ *Bowsher*, 106 S. Ct. at 3213 (White, J., dissenting).

the Comptroller General on policy grounds would probably fail because the statutory grounds for removal do not include disagreements over policy.⁴² Thus, exercising his duties under Gramm-Rudman-Hollings appears to place the Comptroller General under no serious threat of removal from office.

In addition, the Comptroller General has limited discretion under Gramm-Rudman-Hollings. He receives drafts from CBO and OMB, prepares his own report within a few days, and submits it to Congress before the President issues a sequestration order. Although the Comptroller General undoubtedly exercises some discretion, it is so severely circumscribed that it affords him little, if any, opportunity to curry favor with Congress or anyone else.

B. Alternative Remedy—"De Facto" Executive Officer Removable by President

The Court's remedy—invalidating the primary triggering mechanism of Gramm-Rudman-Hollings—is questionable even if one accepts the Court's conclusions that the Act confers an "executive" function upon the Comptroller General, and that the threat of removal from office will influence the Comptroller General's decisions. Instead the Court could have upheld the statute by ruling that the exercise of "executive" power assigned by the Act rendered the Comptroller General a "de facto" executive officer, subject to removal by the President.⁴³

The concept of a "de facto" executive officer would require reexamination of the President's removal power under *Humphrey's Executor v. United States*⁴⁴ and *Wiener v. United States*.⁴⁵ This reexami-

⁴² *Id.* at 3211; see also *supra* note 36 (quoting statutory grounds for removal).

⁴³ The Solicitor General advanced a similar theory but urged a different conclusion. He argued that the Gramm-Rudman-Hollings Act is unconstitutional because, among other reasons, it confers upon the Comptroller General functions that "may be performed only by the President or by an Officer of the United States serving at the pleasure of the President." Brief for the United States, *supra* note 40, at 44. Justice White, in his *Bowsher* dissent, pointed out that the Court rejected this argument. 106 S. Ct. at 3206 (White, J., dissenting); see also *infra* note 45.

⁴⁴ 295 U.S. 602 (1935).

⁴⁵ 357 U.S. 349 (1958). *Wiener*, like *Humphrey's Executor*, indicates that Congress may protect an officer from policy-based presidential removal if that officer performs quasi-legislative or quasi-judicial functions. Apparently, Congress can also delegate some legislative power to private individuals and insulate those individuals from either congressional control under the senatorial advice and consent power, or executive control under the appointment power. *Melcher v. Federal Open Mkt. Comm.*, 644 F. Supp. 510, 519-524 (D.D.C. 1986) (deciding that Reserve Bank members of Federal Open Market Committee, elected by Reserve Bank board of directors, are private individuals exercising delegated legislative power). Even if *Humphrey's Executor* and *Wiener* retain their vitality, they do not protect an officer from policy-based presidential removal if that officer performs executive (or quasi-executive) functions. This conclusion seems consistent with *Myers v. United States*, 272 U.S. 52 (1926) (President has unrestricted removal

nation would be a natural sequel to *INS v. Chadha*⁴⁶ and its companion cases⁴⁷ which cast considerable doubt on the independence of the so-called independent agencies.⁴⁸ The inquiry would also permit the Court to clarify the question—only partly resolved in *Ameron*⁴⁹—regarding the validity of the Comptroller General's powers under the Competition in Contracting Act. The district court in *Synar* referred briefly to *Chadha*⁵⁰ and *Ameron*,⁵¹ but the Supreme Court did not continue this line of analysis in its *Bowsher* opinion. Had the Court decided that the Comptroller General was a "de

power over executive officers), and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (President has absolute immunity from civil liability for removing personnel in executive branch).

Distinguishing between executive (or quasi-executive) functions on the one hand and quasi-legislative or quasi-judicial functions on the other is an exercise in line drawing. It ultimately leads to a functional analysis and reconsideration of presidential and congressional control over the "independent" agencies. The district court in *Synar* recognized the problem, 626 F. Supp. at 1398-1400, and the Solicitor General offered some analysis of the problem in his Supreme Court brief. Brief for the United States, *supra* note 40, at 44-51. During oral argument in the district court and in the Supreme Court, the bench posed questions regarding the potential impact of this case on the Federal Reserve Board. Brief of the Speaker and Bipartisan Leadership Group, *supra* note 39, at 13 (referring to argument in district court); *Arguments Before the Court*, *supra* note 4, at 3710. Evidently the Supreme Court hesitated to embark on this analytical exercise in *Bowsher* or to reconsider existing case law on the removability of officers.

The majority opinion in *Bowsher* mentioned the possibility of invalidating the 1921 statutory removal provision but noted the complex ramifications that would follow such a declaration. Instead, the Court left the 1921 statute intact and invalidated that portion of the Gramm-Rudman-Hollings Act empowering the Comptroller General to trigger the cuts in spending, thereby invoking the fallback provision. 106 S. Ct. at 3192-93. The Court thus rejected *Ameron*, 787 F.2d 875 (3d Cir. 1986), and followed the approach taken in *Chadha*, 462 U.S. 919 (1983), and its companion cases of slowly squeezing the independent agencies without pronouncing the complete termination of their independence. See *infra* notes 46-49 and accompanying text.

Justice Blackmun argued in his *Bowsher* dissent that any incompatibility between the Comptroller General's functions under Gramm-Rudman-Hollings and the removal provisions of the 1921 statute "should be cured by refusing to allow congressional removal—if it ever is attempted—and not by striking down the central provisions of the Deficit Control Act." 106 S. Ct. at 3215 (Blackmun, J., dissenting).

⁴⁶ 462 U.S. 919 (1983).

⁴⁷ *Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983) (affirming D.C. Circuit's invalidation of one-House veto provision of Natural Gas Policy Act of 1978); *United States Senate v. FTC*, 463 U.S. 1216 (1983) (affirming D.C. Circuit's invalidation of two-House veto provision of Federal Trade Commission Improvement Act of 1980).

⁴⁸ The district court in *Synar* observed that "some of the language . . . in *Chadha* does not lie comfortably beside the central revelation of *Humphrey's Executor* that an officer such as a Federal Trade Commissioner 'occupies no place in the executive department.'" 626 F. Supp. at 1399 (quoting *Humphrey's Executor*, 295 U.S. at 628); see also *id.* at 1398 (citing Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 633-40 (1984)).

⁴⁹ 787 F.2d 875, *aff'd on other grounds on rehearing*, 809 F.2d 979 (3d Cir. 1986); see *supra* note 28.

⁵⁰ 626 F. Supp. at 1399.

⁵¹ *Id.* at 1399 n.29.

facto" executive officer removable by the President, it would then have had to face the delegation issue, namely, whether Gramm-Rudman-Hollings delegated excessive authority to the President or to an official removable by the President.

III

DELEGATION AT THE MACRO- AND MICROLEVELS

Gramm-Rudman-Hollings delegates power at two levels—the macrolevel and the microlevel. At the macrolevel, the Act delegates the power to compute the across-the-board percentage spending cut needed to meet the targeted deficit amount.⁵² The microlevel delegation authorizes the agency heads, subject to presidential control, to implement detailed spending cuts after the President issues a sequestration order or Congress enacts a joint resolution requiring the cut.⁵³

The district court in *Synar* sustained the validity of the macrolevel delegation in the Act,⁵⁴ but did not even mention the microlevel delegation. The Supreme Court, after disposing of the case on other grounds, expressly declined to decide the delegation issue.⁵⁵ Arguably, the courts should have clarified both the macro-

⁵² See *supra* notes 29-31 and accompanying text.

⁵³ See *infra* notes 54, 66 & 68.

⁵⁴ 626 F. Supp. at 1382-91. In a footnote, the court observed: "Plaintiffs do not challenge the procedure by which the administrators are to allocate the spending reductions necessary to reduce the deficit excess." *Id.* at 1387 n.11. In context, this footnote meant only that the plaintiffs did not challenge the specific allocations contained in the pre-sequestration reports prepared by CBO, OMB, and the Comptroller General. The footnote did not address the method by which the President decided to reduce spending for specific items after issuing the sequestration order. Indeed, the court had no means of knowing what specific spending cuts the President intended to make, because the President issued his sequestration order on February 1, 1986, to become effective on March 1, and the district court rendered its decision on February 7, apparently without any post-argument submissions from the parties. The President's sequestration order incorporated by reference the CBO, OMB, and Comptroller General reports without adding further detail. Only later did the President, acting through OMB and the agency heads, execute the spending cuts. See *supra* note 16; *infra* note 66.

Congressman Jack Brooks asserted that the Act is "a wholesale abdication of constitutional responsibility by the elected officials of our federal government." Brooks, *Gramm-Rudman: Can Congress and the President Pass This Buck?*, 64 TEX. L. REV. 131 (dated 1985, but published in 1986 after Supreme Court had noted probable jurisdiction to review district court's decision in *Synar*). Congressman Brooks and other congressional opponents of the Gramm-Rudman-Hollings Act joined in the amicus curiae brief filed in the Supreme Court in *Bowsher* by Congressman William H. Gray III. Brief Amicus Curiae of William H. Gray III *et al.*, Members of Congress, *Bowsher*, 106 S. Ct. 3181 (1986) (No. 85-1377). Although Congressmen Brooks and Gray focused on the Act's delegation at the macrolevel, their arguments support my criticism of the Act at the microlevel. See *infra* text accompanying note 68.

⁵⁵ 106 S. Ct. at 3193 n.10.

and microlevel delegation issues that were presented by *Bowsher* and are likely to recur.

A. Delegation at the Macrolevel

After a careful analysis of precedent, the district court in *Synar* concluded that Gramm-Rudman-Hollings delegates an acceptable amount of macrolevel discretion to the Comptroller General. The court, however, held the primary triggering provision unconstitutional because it conferred "executive" functions upon an official removable by Congress.⁵⁶

In finding the Act's macrolevel delegation constitutionally permissible, the district court's conclusion appears sound. The Act provides elaborate instructions for the macrocomputation; it requires drafts from both the CBO and the OMB; it requires the Comptroller General to submit his draft to Congress; and it empowers Congress to revise the budget as it sees fit, so long as the deficit reduction target is met, thereby rendering the entire sequestration process unnecessary.⁵⁷ Finally, Congress retains its ultimate authority to override the Comptroller General, the President, or even the entire Gramm-Rudman-Hollings system by enacting new legislation.

The macrolevel delegation to the Comptroller General appears no more offensive than the power delegated by other statutes to other agencies. The Supreme Court's reluctance to address the delegation issue is, however, understandable. The Court may prefer to leave the delegation doctrine unsettled until some basic questions regarding the status of the independent agencies are resolved.⁵⁸ If, for example, the Court determines that "de facto" executive officers are removable by and answerable to the President, even when housed in "independent" agencies, then the Court, relying on presidential supervision of officers, may allow even broader delegations than existing case law tolerates. The Court may want to avoid confronting the delegation issue in connection with across-the-board spending cuts because of concern that its words may be used in future debates about the validity of automatic income tax increases as a deficit reduction device.⁵⁹

B. Delegation at the Microlevel

The district court did not address the issue of delegation at the microlevel, arguably because of doubts about which plaintiffs had standing. The district court reluctantly conceded that prevailing

⁵⁶ 626 F. Supp. at 1403.

⁵⁷ See *supra* notes 29-31 and accompanying text.

⁵⁸ See *supra* notes 45 & 48 and accompanying text.

⁵⁹ See *infra* notes 87-88 and accompanying text.

District of Columbia Circuit case law granted standing to the congressional plaintiffs, but recognized without question the standing of the private plaintiffs because the sequestration order deprived them of COLAs to which they were otherwise entitled.⁶⁰ The Gramm-Rudman-Hollings Act requires total elimination of these COLAs before applying percentage reductions to other items.⁶¹ Thus, only the macrocomputation, not the microcomputation applying the across-the-board spending cuts, injured the private plaintiffs.

The appropriations process itself confers broad discretion upon the executive at the microlevel of specific spending decisions. This discretion depends on the amount of detail in each "line" of the appropriations bill,⁶² and on technical interpretations of terms used in preparing and executing budgets, such as "apportionment," "account," "program," "project," and "activity."⁶³ The detail in an appropriations act depends largely on the detail in the President's budget proposal, which in turn depends on the detail in budgets furnished to OMB by each agency.⁶⁴ Once Congress enacts an appropriations statute, the President is responsible for executing it. An essential step is the "apportionment" of each line of the appropriations act among the relevant time periods and functional subdivisions.⁶⁵

⁶⁰ 626 F. Supp. at 1380-82.

⁶¹ 2 U.S.C. § 901(a)(3)(C) (Supp. III 1985); see *supra* note 15.

⁶² In practice, the amount of detail in each line of an appropriations bill varies. The first Congress enacted appropriations acts with very little detail. Act of Sept. 29, 1789, ch. 23, 1 Stat. 95; Act of Mar. 26, 1790, ch. 4, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, 1 Stat. 190. More detail appeared in the appropriations acts enacted by the second Congress. Act of Dec. 23, 1791, ch. 3, 1 Stat. 226; Act of Feb. 25, 1793, ch. 18, 1 Stat. 325; see L. FISHER, *PRESIDENTIAL SPENDING POWER 59-74* (1975); Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549, 1578-83 (1974).

In *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321-22 (1937), the Court upheld the power of Congress to appropriate funds in a lump sum rather than in detail, at least in the context of that case, where a tax on the processing of coconut oil from the Philippines was given back to the Philippine treasury without spending restrictions. No case, however, expressly authorizes an appropriations act consisting of one line covering all the government's spending for the year. Evidently, control over the amount of detail in an appropriations act is primarily political rather than judicial.

⁶³ The Gramm-Rudman-Hollings Act defines "account" as "an item for which appropriations are made in any appropriation Act used to determine the budget base." 2 U.S.C. § 907(8) (Supp. III 1985). Thus, each line in the appropriations act represents an "account." After enactment, OMB makes a series of decisions about the specific "programs," "projects," and "activities" that comprise each "account." See *infra* notes 66-67 and accompanying text.

⁶⁴ See OMB CIRCULAR NO. A-11, *PREPARATION AND SUBMISSION OF BUDGET ESTIMATES* (1986) (on file at *Cornell Law Review*).

⁶⁵ 31 U.S.C. §§ 1511-1519 (1982); see OMB CIRCULAR NO. A-34, *INSTRUCTIONS ON BUDGET EXECUTION* (1985) (on file at *Cornell Law Review*). On the use and abuse of presidential discretion in executing appropriations, see L. FISHER, *supra* note 62, at 75-146.

Gramm-Rudman-Hollings, whether triggered by presidential sequestration order or by joint resolution of Congress, confers additional microlevel discretion. After completely eliminating COLAs, the Act requires across-the-board percentage cuts in each nondefense "account"⁶⁶ and in each defense "program, project or

⁶⁶ Across-the-board cuts are made after giving effect to exemptions and special computations in the case of some accounts. *See supra* note 15.

The Supreme Court in *Bousher* apparently believed that CBO, OMB, and the Comptroller General must calculate all cuts on a program-by-program basis, and that the President must sequester on the same program-by-program basis. 106 S. Ct. at 3184, 3192. In fact, the reports and the President's sequestration order for FY 1986 used *accounts* as the units for determining reductions in nondefense spending, rather than subdividing these nondefense accounts into programs, projects, or activities. *See OMB & CBO, supra* note 9, at 19, *reprinted in* 51 Fed. Reg. at 1940; COMPTROLLER GENERAL, *supra* note 9, app. A at 6, 19, *reprinted in* 51 Fed. Reg. at 2818, 2831; Sequestration Order, *supra* note 9, at 4291. Consequently, allocation of the spending cuts to each account's programs, projects, or activities occurred *after* the President issued the sequestration order. *See supra* note 54.

The Comptroller General's report makes this clear by stating that "neither the OMB/CBO report nor the report of the Comptroller General is required to adjust programs, projects, or activities within accounts in non-defense programs." COMPTROLLER GENERAL, *supra* note 9, app. A at 5, *reprinted in* 51 Fed. Reg. at 2817. Similarly, OMB/CBO's report for FY 1987 shows nondefense spending by "account" without subdivision into programs, projects, and activities. OMB & CBO, *supra* note 11, app., *reprinted in* 51 Fed. Reg. at 29,857-99.

I find the Comptroller General's interpretation of the Act more persuasive than the Court's. The Act requires the OMB/CBO report to specify the proposed reductions in spending "by account, for non-defense programs, and by account and programs, projects, and activities within each account, for defense programs." 2 U.S.C. § 901(a)(2) (Supp. III 1985). The Act uses consistent language in other provisions regarding the OMB/CBO report, *id.* § 901(a)(3)(B), (a)(4)(C)(i)-(ii), and the Comptroller General's report. *Id.* § 901(b)(1), (d)(2).

The President's initial sequestration order must specify the reductions in spending "from each affected program, project, and activity . . . , applying the same reduction percentage as the percentage by which the account involved is reduced in the [Comptroller General's] report submitted under section 901(b) . . . , or from each affected budget account if the program, project, or activity is not so set forth." *Id.* § 902(a)(1)(B)(i) (emphasis added). This requirement is subject to exceptions, *id.* § 902(a)(2), giving the President special flexibility to reduce defense spending for FY 1986.

If the Comptroller General's report does not show any detail regarding programs, projects, or activities included within nondefense accounts, then neither will the President's sequestration order. However, the Comptroller General's report cannot show these details unless the OMB/CBO reports include them. Therefore, by exercising its statutory right to omit this detail from its report, OMB can prevent the Comptroller General from including it in his report, thus allowing the President to omit from the sequestration order any detail about cuts in programs, projects, or activities within nondefense accounts. This analysis is consistent with other provisions of the Act. *See id.* § 902(a)(3), (a)(5)(A), (b)(1)(C).

Nonetheless, the President is prohibited from "eliminating any program, project, or activity of the Federal Government." *Id.* § 902(d). This provision implies that the President may impose disproportionate cuts in certain programs so long as each program, project, and activity is preserved at or above a minimal level. Other provisions may raise additional questions. *See id.* § 902(a)(6)(D)(i)(II) (for FY 1986 only, congressional appropriations committees may define "program, project, and activity"); *id.* § 906(b) (special treatment of federal administrative expenses); *id.* § 922(d)(1)(B) (enforcement

activity.”⁶⁷ The nondefense “accounts” which are subject to reduction under the Act are the same units found in the President’s budget proposals and in the appropriations acts. In a formal sense, therefore, the across-the-board cuts have as much detail as appears in an appropriations act, although the elaborate documentation and committee work typically clarifying the legislative intent of an appropriations act does not accompany the spending cuts.

In a practical sense, however, a standard percentage cut in all “accounts” produces varying and sometimes unpredictable consequences because the mix between administrative and service costs varies, and because some programs need a minimal dollar amount even to exist.⁶⁸ As the overall macrolevel percentage cut increases, the consequences of that cut at the microlevel become increasingly volatile. For example, a 60% across-the-board cut would create more uneven results at the microlevel, and would therefore pose much greater delegation problems than did the 4.3% cut in nondefense accounts for FY 1986 involved in *Bowsher*. Perhaps Congress delegates excessive, and therefore unconstitutional, microlevel discretion when the percentage cut becomes so large that Congress cannot reasonably anticipate the consequences at the microlevel.

Additional discretion arises because the estimates providing the basis for the macrolevel cuts at the beginning of the fiscal year almost certainly need revision in light of actual events and updated projections during the year.⁶⁹ Eliminating the resulting discrepancy

mechanism available if President sequesters incorrect amount “with respect to any program, project, activity, or account”). Read in context, these provisions may mean only that the President is bound by the amount of detail contained in the Comptroller General’s report, so long as the President does not completely eliminate any program.

⁶⁷ *Id.* § 901(a)(2), (a)(3)(B), (b)(1), (c)(4)(C)(i), (d)(2). Defense and nondefense accounts receive different treatment, perhaps because defense accounts are usually much larger than nondefense accounts. Therefore Congress has greater need for the breakdown of a defense account into its constituent programs, projects, and activities.

⁶⁸ Two of the *Bowsher* briefs discussed the impact of microlevel spending cuts. Brief of Amicus Curiae Edward Blankstein at 7-9, 21-23, *Bowsher*, 106 S. Ct. 3181 (1986) (No. 85-1377); Brief for Amici Curiae Coalition for Health Funding, *et al.* at 17-19, *Bowsher*, 106 S. Ct. 3181 (1986) (No. 85-1377). The General Accounting Office has also issued reports on implementation of the spending cuts. IMPLEMENTING FY 1986 REDUCTIONS: BALANCED BUDGET AND EMERGENCY DEFICIT CONTROL ACT OF 1985 (1986) (on file at *Cornell Law Review*); TRAINING BUDGETS: AGENCY BUDGET REDUCTIONS IN RESPONSE TO THE BALANCED BUDGET ACT (1986) (on file at *Cornell Law Review*); BUDGET ISSUES: LIMITATIONS ON ANALYZING THE COST OF ADMINISTRATIVE OPERATIONS (1986) (on file at *Cornell Law Review*); FY 1986 BUDGET SEQUESTRATION: AGENCY APPROACHES TO IMPLEMENTING REDUCTIONS UNDER FORMULA GRANTS (1986) (on file at *Cornell Law Review*).

⁶⁹ Gramm-Rudman-Hollings requires the first OMB/CBO report to use the prior year’s appropriations, unless Congress has already enacted appropriations for the year covered by the report. 2 U.S.C. § 901(a)(6)(B) (Supp. III 1985). The revised OMB/CBO report must reflect the impact of any legislation enacted after preparation of

between the spending cuts projected by the macrodecision and the actual microlevel reductions resulting from applying this percentage cut is largely the responsibility of the executive, subject to congressional controls of varying effectiveness.⁷⁰

Congress has established mechanisms for controlling the President's exercise of discretion in executing appropriations acts. The crux of these mechanisms is the Comptroller General's power, established in the 1921 statute⁷¹ and elaborated in the Impoundment Act of 1974⁷² and in the Gramm-Rudman-Hollings Act of 1985,⁷³ to examine the government's accounts, to report any irregularities to Congress, and, in some circumstances, to bring suit seeking the President's compliance with statutory requirements.

IV

LEGISLATIVE PROCESS

The fallback provision in Gramm-Rudman-Hollings provides for congressional action by joint resolution, under streamlined procedures and with limited time for floor debate.⁷⁴ Arguably, the appropriate legislative vehicle under these circumstances is a statute rather than a joint resolution with its abbreviated procedures. The Supreme Court did not address this issue in *Bowsher*, although it impliedly approved of the fallback process.⁷⁵

The Constitution requires that appropriations be "made by Law."⁷⁶ Because the spending cuts are, in effect, negative appropriations, they should also be made only by "Law." In many ways, a

the first report. *Id.* § 901(c)(1). The OMB/CBO FY 1987 Initial Report was based on the previous year's level of appropriations. OMB & CBO, *supra* note 11, at 2, *reprinted in* 51 Fed. Reg. at 29,832.

⁷⁰ Any item sequestered under a presidential order is permanently cancelled. 2 U.S.C. § 906(a)(2) (Supp. III 1985). Apparently, then, if the cuts produce a surplus because they were greater than necessary to meet the statutory target, only new legislation can appropriate this surplus. If the deficit worsens, the President may seek rescissions under the Impoundment Act. *See supra* note 24. Although Gramm-Rudman-Hollings requires the Comptroller General to report by November 15 on the extent to which the President's sequestration order complies with the Act, 2 U.S.C. § 903 (Supp. III 1985), it establishes no mechanism for monitoring any economic conditions or variations between actual and projected revenues and spending.

Congress displayed an opportunistic approach toward changing conditions when in October 1986 it transferred some spending from FY 1987 back into already-expired FY 1986, in order to achieve the target for FY 1987. *See supra* note 18.

⁷¹ 31 U.S.C. §§ 3501-3544 (1982 & Supp. III 1985).

⁷² 2 U.S.C. §§ 686-687 (1982 & Supp. III 1985).

⁷³ 2 U.S.C. § 903 (Supp. III 1985).

⁷⁴ *Id.* § 922(f). The Impoundment Act of 1974, *id.* § 688 (1982), provides legislative precedent for such streamlined congressional procedures, but the Gramm-Rudman-Hollings procedures are considerably more abbreviated.

⁷⁵ *See supra* text accompanying note 7.

⁷⁶ U.S. CONST. art. I, § 9, cl. 7.

joint resolution is equivalent to a statute; for example, each requires presentation to the President for approval or veto.⁷⁷ Courts have consistently held that the legal effect of a joint resolution is identical to that of an enacted bill.⁷⁸

The congressional rules of procedure for adopting a joint resolution are the same as those for enacting a bill.⁷⁹ The legislative tradition, however, is different. Expedited procedures usually govern the adoption of joint resolutions.⁸⁰ Gramm-Rudman-Hollings builds upon this tradition by providing special streamlined procedures, including limited time for debate on joint resolutions implementing spending cuts under the fallback provision.⁸¹

Even if implementing the fallback provision by some type of joint resolution is valid, arguably the streamlined process in Gramm-Rudman-Hollings is unacceptable because it does not give Congress the same opportunity for deliberation that was available when the funds were initially appropriated. For example, the streamlined joint resolution procedure might prevent any significant congressional examination of the microeffects of a proposed macrocut in spending.

Although each House of Congress may adopt new rules by simple majority at the beginning of a session, waiver or suspension of the rules during a session requires a special majority. Accordingly, a closely divided Congress could vote to implement the fallback provision without being able to extend debate beyond the limits stated in Gramm-Rudman-Hollings. Confined by these limits, Congress probably could not express any legislative intent to guide the Executive's discretion in applying the macrocut at the microlevel. The resulting joint resolution would be subject to serious constitutional question as a standardless delegation.⁸²

⁷⁷ *Id.*, § 7, cl. 3. The *Bowsher* Court recognized this requirement in its discussion of the Comptroller General's removal by joint resolution under the 1921 statutory provision. 106 S. Ct. at 3189-90 & 3189 n.7.

⁷⁸ See, e.g., *United States ex rel. Levey v. Stockslager*, 129 U.S. 470, 475 (1889); *United States v. Powell*, 761 F.2d 1227, 1234-35 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1947 (1986); *International Bhd. of Elec. Workers v. Washington Terminal Co.*, 473 F.2d 1156, 1163 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 906 (1973).

⁷⁹ 4 A. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 3370-3375 (1907).

⁸⁰ According to congressional aides, joint resolutions are more likely to be processed under waivers of the rules or under the most informal procedures available.

⁸¹ 2 U.S.C. § 922(f)(4) (Supp. III 1985) limits the debate to two hours in each House and applies the limiting procedures of *id.* § 904(a)(4) to any action taken in either House.

⁸² The joint resolution enacted under the fallback provision in July 1986 is subject to challenge on these grounds, but that action is probably valid because FY 1986 was almost over, the microimpact of the cuts was reasonably well understood at the time, the

V

DEALING WITH FUTURE BUDGET ISSUES: SOME
HYPOTHETICALS

The following examples illustrate the broad range of justiciable

cuts were already absorbed, and therefore Congress was not delegating any significant power to the President to engage in future cuts.

U.S. CONST. art. I, § 5, cl. 2 empowers each House to determine its own procedural rules. By tradition, one Congress cannot impose procedures upon its successors, either by statute or by procedural rule. See 5 A. HINDS, *supra* note 79, §§ 6744-6747, 6765-6768; Brooks, *supra* note 54, at 138. The Gramm-Rudman-Hollings Act expressly preserves the power of each House to make and change its own rules. Pub. L. No. 99-177, § 271(c), 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 1037, 1094 (codified at 2 U.S.C. § 901 note (Supp. III 1985) (exercise of congressional rulemaking power)). I believe section 271(c) incorporates the requirements contained in the rules of each House for special majorities to waive or suspend the rules. See House of Representatives Rule 27(1) (suspension of rules requires two-thirds vote; motion to suspend only entertained on Mondays, Tuesdays, and last six days of session), reprinted in CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 925 (M. Wormser 3d ed. 1982); Senate Rule 5 (waiver of rules requires unanimous consent unless upon one day's written notice), reprinted in CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS, *supra*, at 944.

The Act allows the first OMB/CBO report, due August 20, to be based on the prior year's appropriations if Congress has not already enacted appropriations for the coming year. See *supra* notes 29 & 69. If Congress operates within the statutory timetable, however, the House will complete action on annual appropriations bills by June 30, 2 U.S.C. § 631 (Supp. III 1985), and the Senate and the President can then meet the August 20 due date of the OMB/CBO report. Thus the Act recognizes and even anticipates that Congress may fail to act within its own statutory timetable. This does not necessarily mean, however, that Congress may take legislative action in violation of its own procedural rules.

In fact, Congress failed to comply with this timetable for FY 1987 and instead enacted a series of short-term continuing appropriations until it completed work on continuing appropriations for the entire fiscal year on October 17, 1986. One such continuing resolution, Pub. L. No. 99-491, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1239, expired and government workers were sent home because the government had run out of money for their salaries. Calmes, *The 99th Congress: A Mixed Record of Success*, 44 CONG. Q. WEEKLY REP. 2647, 2651 (1986). For the President's position on Congress's failed attempt to pass a FY 1987 budget, see Radio Address to the Nation, 22 WEEKLY COMP. PRES. DOC. 1287 (Sept. 27, 1986) (chiding Congress for not meeting appropriations deadline); Message to the House of Representatives Returning H.J. Res. 748 Without Approval, 22 WEEKLY COMP. PRES. DOC. 1365 (Oct. 9, 1986) (in course of vetoing resolution because of its provision for rehiring fired air traffic controllers, noting time for congressional action on budget "long past due"); Statement upon Signing H.J. Res. 751 into Law, 22 WEEKLY COMP. PRES. DOC. 1372 (Oct. 11, 1986) (referring to failure of Congress to "do its duty" as being "inefficient, disruptive, and costly—in a word, it is a disgrace").

The inability of one Congress to bind its successors applies not only to procedural matters, but also to the substance of legislation. See Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986); Young, *Some Reflections on Gramm-Rudman-Hollings*, 45 MD. L. REV. 1 (1986). Congress has enacted statutes requiring balanced budgets and subsequently ignored them. See 41 CONG. Q. ALMANAC: 99TH CONG., 1ST SESS. 460 (1985) (citing balanced budget requirements of Act of Oct. 10, 1978, Pub. L. No. 95-435, § 7, 92 Stat. 1051, 1053 (codified at 31 U.S.C. § 27 (Supp. V 1981), restated in Act of Oct. 7, 1980, Pub. L. No. 96-389, § 3, 94 Stat. 1551, 1553 (codified at 31 U.S.C. § 1103 (1982))).

issues that could arise in a future unfolding budgetary nightmare. In each case, I assume the existence of hypothetical statutes, enacted in response to ever-increasing budgetary crises.

A. Case One

In contrast to past practice, congressional appropriations acts divide the total appropriated amount into fewer lines, each representing a larger number of items.

Comment. This allows the President more microlevel discretion in executing each "line" of the appropriations act. Thus the delegation issue is at stake here. At the same time, using larger, more inclusive lines in the appropriations act forces the President to think more carefully before exercising the line-item veto (discussed below in case three), because the veto affects everything included in a particular line.

B. Case Two

Congress provides insufficient revenues to cover the total amount of all appropriations, but makes all appropriations mandatory rather than making some mandatory and others permissive.

Comment. In *Train v. City of New York*⁸³ the Supreme Court held that by using mandatory language in an appropriations act, Congress can compel the President to spend the appropriated funds. In *Train*, Congress designated some of its appropriations as mandatory and others as permissive, but allowed only enough resources for the mandatory appropriations and a portion of the permissive ones. In order to ensure that total spending would not exceed available resources, President Nixon reduced the amount spent on some programs covered by mandatory appropriations and some covered by permissive appropriations. The *Train* Court did not speculate on the President's discretion to spend less than the full amount of permissive appropriations, or on the President's duty if Congress's mandatory appropriations exceed the available resources.

The hypothetical situation in case two illustrates the latter issue. By enacting mandatory appropriations beyond the level of available resources, Congress compels the President to reduce spending in some of the programs, but gives no indication as to which programs

⁸³ 420 U.S. 35 (1975). The distinction between mandatory and permissive appropriations, an essential predicate of the *Train* Court's decision, is echoed in Gramm-Rudman-Hollings. The Act states that the President may not alter the relative budget priorities established by Congress. 2 U.S.C. § 902(e) (Supp. III 1985). Thus, Congress claims continuing power to assign higher priority to some spending categories (mandatory) than to others (permissive).

he should cut, because all appropriations carry the top-priority designation of "mandatory." Absent congressional guidance, the President, in his sole discretion, must make the needed spending cuts. Congress thus abdicates its own responsibility by delegating excessive authority to the Executive.

C. Case Three

The President exercises a line-item veto pursuant to statute.

Comment. President Reagan has recommended as one remedy for the budget crisis a constitutional amendment granting the President the power to veto lines in an appropriations act.⁸⁴ Most state constitutions provide for a line-item veto by the Governor, and a few go even further by allowing the Governor either to eliminate or to reduce any line.⁸⁵ Some members of Congress suggest that if a constitutional amendment establishing the line-item veto is politically unfeasible then Congress should create a line-item veto by statute. They reason that the statutory veto would be merely a condition attached to appropriations. But any such statutory attempt to authorize a line-item veto raises the issues of the delegation of power to the President, of the basic powers of the President, and of the absence of any mention of a line-item veto in the text of the Constitution.⁸⁶

D. Case Four

The remaining hypotheticals represent the cumulative stages of case four with each stage further exacerbating the budgetary crisis.

1. Stage A

The Comptroller General, now removable under statute either by joint resolution or by the President, projects an enormous deficit for the coming year and orders the President to make across-the-board spending cuts at the rate of 50%, the maximum allowed by the statute, in each line of the appropriations act.

Comment. The constitutional questions here are whether the Comptroller General can, by statute, be removable both by Con-

⁸⁴ President Reagan enjoyed a similar power while Governor of California. He noted that as Governor of California he exercised the line-item veto 943 times in eight years, without once being overridden. Remarks at a Meeting with State Chairpersons, National White House Conference on Small Business, 22 WEEKLY COMP. PRES. DOC. 1101, 1102 (Aug. 15, 1986).

⁸⁵ See tabulation in 26 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 111-13 (1986) and GENERAL ACCOUNTING OFFICE, BUDGET ISSUES: STATE BALANCED BUDGET PRACTICES (1985) (on file at *Cornell Law Review*).

⁸⁶ Cf. Gressman, *supra* note 14 (questioning constitutionality of statute granting President line-item veto power).

gress and by the President, whether the Comptroller General (if so removable) can compel the President to issue a sequestration order, and whether the 50% spending cut is inherently unconstitutional because Congress cannot reasonably foresee such a cut's impact on specific spending at the microlevel.

2. *Stage B*

The Treasury determines that even with the 50% spending cut ordered by the Comptroller General in stage A, a 20% income tax increase is needed to reach the deficit reduction target. The Treasury accordingly imposes the tax increase, as allowed by statute in such situations.

Comment. A statute authorizing the Executive to impose an automatic income tax increase raises a distinctive problem under the delegation doctrine. Although Congress may delegate to the President the power to alter tariffs without further Congressional action,⁸⁷ more recent case law indicates that Congress's ability to delegate the power to tax may be more limited than its ability to delegate other types of power.⁸⁸ Congress may therefore possess more leeway in delegating the power to reduce spending than in delegating the power to increase taxes, even though each action is a means of reducing the deficit, and each requires the Executive to engage in the same kind of economic analysis and forecasting.

3. *Stage C*

Congress disapproves the Treasury's automatic income tax increase but approves the spending cuts ordered by the President in order to conform to the Comptroller General's report. Congress meets the statutory deadline requiring action within twenty-four hours of receipt of the reports from the Comptroller General and the Secretary of the Treasury, and limits its debate to one hour, as provided by statute. In meeting these statutory time limits, Congress complies with the strict prohibition against stopping the clock, and respects the statutory provision requiring unanimous consent by roll call vote to waive these rules.

Comment. By approving the spending cut but not the tax increase, Congress fails to meet the deficit reduction target and negates the purposes of prior deficit-reduction legislation. Thus, Congress abdicates its responsibility for dealing with the deficit and, by default, delegates this responsibility to the President. In this cri-

⁸⁷ J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

⁸⁸ National Cable Television Ass'n v. United States, 415 U.S. 336 (1974).

sis situation, however, Congress conforms to its strict limitations on debate.

This stage illustrates a Congress that appears paralyzed by its own rules, and may even welcome this paralysis as an excuse for avoiding difficult decisions on tax increases and further cuts in spending. Prior judicial guidance might have helped, by defining the circumstances in which Congress may overturn or violate its rules of procedure.

4. *Stage D*

The President reduces spending by impounding the amount necessary to compensate for the disapproved tax increase, thereby meeting the deficit reduction target. The President fails to send a rescission request to Congress and ignores congressional objections when the Comptroller General reports this impoundment to Congress.

Comment. In this emergency situation, the President purports to exercise inherent powers, ignoring an apparently irresponsible Congress.⁸⁹

5. *Stage E*

Members of Congress bring suit.

Comment. At issue here is whether members of Congress have standing. Courts are more willing of late to resolve disputes within the government.⁹⁰ *Bowsher* stands as a manifestation of this willingness, despite the presence of private parties whose standing as plaintiffs played an important part in the outcome. The Supreme Court granted certiorari in another case concerning congressional standing even before deciding *Bowsher*.⁹¹ Decisions on the scope of

⁸⁹ The nation suffers a crisis of some proportion every time the government runs out of money and sends its personnel home because the new fiscal year starts before Congress enacts appropriations. *See supra* note 82.

The Court examined the limits of the President's emergency powers in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *See generally* L. FISHER, *supra* note 19, at 287-92 (reviewing Executive's prerogative to act in accordance with his own perception of public good); C. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 209-314 (1948) (noting inherent problems that presidential governments experience in securing emergency power for Executive in time of crisis).

⁹⁰ *See Barnes v. Kline*, 759 F. 2d 21, 25-26 (D.C. Cir. 1985) (holding that congressional plaintiffs had standing to challenge President's allegedly improper exercise of his pocket veto power), *vacated as moot sub nom. Burke v. Barnes*, 107 S. Ct. 734 (1987); *Melcher v. Federal Open Mkt. Comm.*, 644 F. Supp. 510, 512-17 (D.D.C. 1986) (finding U.S. Senator had standing to sue to assert his power to vote on membership associated with FOMC).

⁹¹ In *Barnes v. Kline*, 759 F.2d 21, 25-26 (D.C. Cir. 1985), *see supra* note 90, the Supreme Court granted certiorari on March 3, 1986. *Burke v. Barnes*, 106 S. Ct. 1258

congressional standing to litigate against other governmental officials or branches indicate, to a considerable extent, how far courts will go in resolving the government's internal disputes.

CONCLUSION

Bowsher suggests that in future cases the Court will determine pragmatically how much congressional experimentation with macrobudgeting it will allow and which issues will form the basis of the Court's decision. Clearly the Court is not always obliged to address every justiciable issue. The selection of issues for resolution is a matter of judgment; determining which issues are justiciable may require further balancing. In addition, courts lack power to eliminate some sources of budgetary problems, such as those resulting from the style of campaigning for elective political office⁹² and decisions on whether to adopt constitutional amendments. Most potential issues, however, are justiciable, or could be treated as justiciable by a court willing to provide guidance to society.

Bowsher gave the Court an opportunity to provide guidance on most, if not all, of the issues raised in the above hypothetical cases. Either by basing its decision on different grounds or by stating, in dictum, that certain parts of the Gramm-Rudman-Hollings Act approached the outer limits of tolerance (or raised serious constitutional questions), the Court could have given the nation much needed guidance on the budget process, an issue that rivals in importance virtually any other that the Court has ever faced.⁹³ Instead, the Court gave priority to achieving other goals, such as limiting the independence of the independent agencies while withholding significant clarification of the limits. Had the Court provided more guidance on budget-related issues at this time, Congress and the President would have listened. Unfortunately, the Court may not have another such opportunity for a long time—and by then, the time for effective judicial resolution of budgetary problems

(1986). The Court decided *Bowsher* on July 7, 1986. 106 S. Ct. at 3181. The Court subsequently vacated *Barnes* as moot. 107 S. Ct. 734 (1987).

⁹² For example, no court can solve the potential budget problems resulting from the political pressure placed on candidates who promise big spending to the poor and middle class who cast the votes, and at the same time promise low taxes to the rich who pay the campaign costs and symbolize economic opportunities after the end of the candidates' government service. For a thorough discussion of the role of financing in political campaigns, see Symposium, *Money in Politics: Political Campaign Finance Reform*, 10 HASTINGS CONST. L.Q. 463 (1983).

⁹³ For a general discussion of the legal structure and rules governing fiscal policy, see Conyers, *Social Reform and Law Reform: Toward an Economic Bill of Rights*, 1983 DEB. C.L. REV. 1121; Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977); Elliott, *supra* note 14; Symposium, *Agendas for Dealing with Deficits*, 37 NAT'L TAX J. 261 (1984).

may have passed.⁹⁴

⁹⁴ I am concerned that a massive breakdown in the budgetary process could lead to serious social and political consequences, including pressures for radical changes in our governmental institutions.