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John D. Beling

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# DELEGATION AND THE DEFICIT: THE GRAMM-RUDMAN ACT

In this century the separation of powers doctrine has been utilized by the Supreme Court to strike down various laws as intrusive of one branch of the government into the domain of another branch.<sup>1</sup> These decisions have ranged from legislative interference with the executive power,<sup>2</sup> executive exercise of legislative functions,<sup>3</sup> and unauthorized Congressional creation of judicial in-

<sup>1</sup> The doctrine of separation of powers is derived from Articles I, II and III of the Constitution. Article I provides: "All legislative powers herein granted shall be vested in a Congress of the United States and a House of Representatives." U.S. CONST. art. I, § 1, cl. 1. Article II states in pertinent parts: "The executive power shall be vested in a President of the United States of America," U.S. CONST. art. II, § 1, cl. 1, "the president shall have power, by and with the Advice and Consent of the Senate to make treaties, appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." U.S. CONST. art. II, § 2, cl. 2. Article III governs the judiciary: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the congress may from time to time ordain and establish." U.S. CONST. art. III, § 1, cl. 1. Further evidence of the separation of powers is found in the "Decision of 1789," referred to in *Bowsher v. Synar*, 106 S. Ct. 3181, 3187 (1986). The "Decision" involved the acceptance of a proposal by James Madison in the first Congress which rejected the role of Congress in the removal of executive branch officers. See *Bowsher*, 106 S. Ct. at 3187. The "Decision of 1789" was given substantive weight by a modern court in *Marsh v. Chambers*, 463 U.S. 783, 793 (1983).

<sup>2</sup> See *Myers v. United States*, 272 U.S. 52, 106 (1926). In *Myers*, President Wilson ordered that Myers, a postmaster, be removed without the "advice and consent" of the Senate, as required by statute. *Id.* Chief Justice Taft, writing for the majority, ruled that the statute unconstitutionally limited the powers vested in the President by Art. II. 272 U.S. at 119. Cf. *Humphrey's Executor v. United States*, 295 U.S. 602, 631-32 (1935). In *Humphrey's Executor*, a similar statutory limitation on the President's removal power was upheld. *Id.* The limitation was distinguished from the *Myers* case in that Humphrey, the Federal Trade Commissioner, did not perform a "purely executive function," as did Myers. *Id.* Rather, Humphrey performed "quasi-judicial" and "quasi-legislative" functions, and therefore needed to be free from executive interference. *Id.* This decision was pivotal in that it promoted the growth of administrative agencies. See generally Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 376 (1976) (general overview of doctrine); Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064, 1099-1108 (1981) (questioning distinctions between "independent" agencies and executive ones).

<sup>3</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-84 (1952). In *Youngstown*, President Truman sought to avert an impending nationwide strike by steel companies by ordering a government seizure of the steel mills. *Id.* The Supreme Court found this action to be violative of the separation of powers doctrine, as only Congress could order such action through their lawmaking power. *Id.* at 587-89.

stitutions.<sup>4</sup> Recent cases have focused on congressional usurpation of executive power,<sup>5</sup> and have led to decreased congressional power in overseeing enacted laws.<sup>6</sup>

<sup>4</sup> See *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 52-89 (1982). *Northern Pipeline* dealt with the limitations art. III placed on Congress' ability to create courts. *Id.* at 52-89. Congress, through the Bankruptcy Reform Act of 1978 conferred broad authority to bankruptcy judges without granting them life tenure and the salary provisions provided by art. III. *Id.* at 60-61. The art. III guarantee of life tenure was designed to establish an independent judiciary, free from legislative or executive interference. *Id.* at 57-60. Because the types of cases the bankruptcy judges heard were historically heard by art. III tribunals, vesting this authority in art. I courts violated the doctrine of separation of powers. *Id.*

<sup>5</sup> See *INS v. Chadha*, 462 U.S. 919, 952-55 (1983). *Chadha* invalidated the use of the "legislative veto", the practice of issuing concurrent resolutions, which are veto-proof, to control laws in effect. *Id.* at 954-55. The *Chadha* Court concentrated on Congressional use of such a "veto" to circumvent the decision of the Attorney General regarding the deportation of illegal aliens. *Id.* at 952. By concurrent resolution, Congress could order the deportation of individuals that the Attorney General chose to let remain in the country. *Id.* at 923-28. By using concurrent, as opposed to joint resolutions, Congress could avoid the possibility of a Presidential veto. *Id.* at 954-55. The Court held that this was violative of the separation of powers doctrine, as it effectively allowed Congress to oversee the execution of the laws, a function reserved for the executive branch. *Id.* The Court laid great stress on the bicameralism aspect of the United States Government, stating that this type of action can only be carried out by bicameral passage followed by presentment to the president. *Id.* The invalidation of the legislative veto had far-reaching implications. More than 300 statutes were subsequently ruled unconstitutional. See, e.g., *Equal Employment Opportunity Comm'n v. Hernando Bank Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984) (one House veto provision of Reorganization Act of 1977 severable from remainder of Act); *Lewis v. Sava*, 602 F. Supp. 571, 572 (S.D.N.Y. 1984) (Immigration and Nationality Act one-House veto severable). Justice White, in his *Chadha* dissent, lamented over the broad language used by the Court, feeling that the legislative veto provided a useful tool for Congressional oversight of enacted legislation. Justice White stated, "The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures, the accountability of executive and independent agencies." 462 U.S. at 967-68 (White, J., dissenting). See generally Schwartz, *The United States Supreme Court and the Laying of Regulations Before the Legislature*, 100 LAW Q. REV. 9, 11 (1984) (*Chadha* represents a too-rigid interpretation of the Constitution; there should be safeguards outside the legislative branch); Note, *Re-Separating the Powers: The Legislative Veto and Congressional Oversight After Chadha*, 33 CLEV. ST. L. REV. 145, 188-89 (1984) [hereinafter Note, *Re-Separating the Powers*] (Congress should have some power to oversee administrative agencies); Note, *INS v. Chadha and the Impoundment Control Act of 1974: A Shift in the Balance of Power*, 45 U. PITT. L. REV. 673, 684 (1984) [hereinafter Note, *Impoundment Control Act*] (ruling shifts power to the executive).

Another recent case which held that Congress violated the separation of powers doctrine was *Buckley v. Valeo*, 424 U.S. 1, 143-44 (1976). In *Buckley*, the Court found that Congress had violated the doctrine by reserving the right to appoint members of the Federal Election Commission, essentially an executive function. *Id.* at 143-44. See Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 WAYNE L. REV. 1335, 1336 (1976) (*Buckley* represents a giant step against Congressional control over policymaking).

<sup>6</sup> See *INS v. Chadha*, 462 U.S. at 967-1003 (White, J., dissenting).

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In *Bowsher v. Synar*<sup>7</sup> the separation of powers doctrine was invoked once again to invalidate provisions of The Balanced Budget and Emergency Deficit Control Act of 1985,<sup>8</sup> commonly referred to as the "Gramm-Rudman" Act. At issue in *Bowsher* was Congress' delegation to the Comptroller General, the Chief of the General Accounting Office (GAO), of the power to order mandatory deficit cuts.<sup>9</sup> The Supreme Court ruled that this provision violated the separation of powers doctrine, due to the fact that this function was executive in nature, and Congress' ability to remove the Comptroller therefore gave it "control" over an executive function.<sup>10</sup> Rather than relying on the separation of powers doctrine in a dogmatic fashion, it is submitted that the Court should have relied on the delegation doctrine<sup>11</sup> and in doing so

<sup>7</sup> 106 S. Ct. 3181 (1986).

<sup>8</sup> Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1039, (codified at 2 U.S.C.S. § 901) (Law. Co-op. 1986).

<sup>9</sup> See 2 U.S.C.S. at § 251.

<sup>10</sup> See *Bowsher v. Synar*, 106 S. Ct. 3181, 3194 (1986). The Court relied heavily on the rationale espoused in *INS v. Chadha*, 462 U.S. 919 (1983). The Court re-stated the bicameralism concerns which it set forth in *Chadha*, concerns which were skirted by the Gramm-Rudman Act. 106 S. Ct. at 3192.

<sup>11</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 519-28 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 405-10, 433 (1935). These cases represent the only true application of the delegation doctrine by the Supreme Court. *Panama Refining* involved Presidential intervention with the transport of illegally produced state oil pursuant to Title I of the National Industrial Recovery Act of 1933. 293 U.S. at 405-10. The Court held that such policymaking functions are properly within the legislative authority of Congress. *Id.* at 433. *Schechter* dealt with Presidential involvement with codemaking in the poultry industry, again pursuant to the National Industrial Recovery Act. 295 U.S. at 519-28. In *Schechter*, Justice Cardozo, who had dissented in *Panama Refining*, agreed that granting such power without constriction was "delegation running riot." *Id.* at 553. (Cardozo, J., concurring).

Another case often associated with *Panama Refining* and *Schechter* is *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). *Dicta* in *Carter* indicates that the decision, which involved the delegation of the ability to set maximum hours and wages to coal producers and mine workers, was based on the delegation doctrine. *Id.* at 311. However, close reading of the case indicates a primary concern with the denial of substantive due process rights. *Id.*

The *Panama Refining* and *Schechter* cases developed the "standards" test, by which nearly all future constitutional challenges based on the delegation doctrine were to be judged. See *Schechter*, 295 U.S. at 541-42; *Panama Refining*, 293 U.S. at 430. This test involves scrutinizing the statute in question to ascertain whether Congress articulated sufficient standards to confine the judgment of the parties exercising the delegated authority. See *Schechter*, 245 U.S. at 541-42; *Panama Refining*, 293 U.S. at 430. See, e.g., *Yakus v. United States*, 321 U.S. 414, 424-25, (1944) (standards in Emergency Price Control Act adequate); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165-66, (1941) (sufficient standards for Administrator of Wage & Hour Division to set maximum hours); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 133 (1941) (NLRB supplied adequate standards in determining proper represent-

would have rendered a ruling with far more practical precedential value, one which stresses accountability as its goal.<sup>12</sup> Before dis-

atives in bargaining agreements).

The delegation doctrine is not as easily traceable to constitutional provisions as is the separation of powers doctrine. Among the theories that exist as to its origin is that the doctrine is derived directly from John Locke's *TREATISE ON CIVIL GOVERNMENT*, and even further back to Justinian's *DIGEST*. See E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (1787-1984), 441 n. 11 (5th rev. ed. 1984). The doctrine has also been said to be a corollary of the separation of powers doctrine, see Freedman, *Delegation of Powers and Institutional Competence*, 43 U. CHI. L. REV. 307, 312 (1976), as an offshoot of the common law maxim, "*delegation potestas non protest delegari*" - "power that is originally delegated may not be re-delegated," see *id.* at 313, and as an aspect of due process: the prevention or transfer of legislative power to an officer or agency without the restraining influence of legislative standards. *Id.* Several early cases recognized the existence of the principle, although none ruled that an unconstitutional delegation had taken place. See *Field v. Clark*, 143 U.S. 649, 692 (1892) (Congress cannot delegate legislative authority to the president); *Cargo of the Brig Aurora v. United States*, 11 U.S.L. (7 Cranch.) 382, 388 (1812) (earliest judicial notice of doctrine in U.S.). See generally S. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* (1975) (general discussion of delegation doctrine); K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 215 at 207-08 (2d ed. 1978) (functional analysis of doctrine).

<sup>12</sup> See *Bowsher*, 106 S. Ct. at 3202 (Stevens, J., concurring). Justice Stevens believes that the type of authority Congress attempts to grant the Comptroller General is not delegable to Congress' agent. *Id.* at 3204. Justice Stevens wrote, "if a resolution is intended to make policy that will bind the Nation and thus is 'legislative in its character and effect'," such legislation must meet the bicameralism requirements. *Id.* Since the budget cuts the Comptroller General was to make were of such a character, "Congress may not simply delegate those functions to an agent such as the Congressional Budget Office. Since I am convinced that the Comptroller General is also fairly deemed to be an agent of Congress, he too cannot exercise such functions." *Id.* Justice Stevens' opinion implies that a politically accountable body must make such sweeping national policy decisions. Congressman Jack Brooks, (D-Texas), is also of the view that accountability is of the utmost importance when dealing with such important policy decisions. See Brooks, *Gramm-Rudman: Can Congress and the President Pass This Buck?*, 64 TEX. L. REV. 131, 132 (1985). Congressman Brooks wrote:

[T]he separation of powers demanded by the Constitution is founded on values more fundamental than hypertechnical distinctions between classifications of powers, and . . . these values form a sound and independent basis for finding the Act unconstitutional. The nondelegation doctrine is a judicially recognized principle for policing the separation of powers created by the Constitution. Separation of powers analysis often focuses solely on whether one branch of government has intruded upon or abdicated to another branch; in contrast, the nondelegation doctrine also addresses the extent to which Congress may evade its own constitutionally mandated role by any delegation, even one that remains within the legislative branch . . . Gramm-Rudman violates essential principles of the Constitution's allocation of powers, and even if other separation of powers flaws are cured . . . the Act is invalid under a proper understanding and application of the nondelegation doctrine.

*Id.* at 132-33. Congressman Brooks' attitude is that even where the separation of powers doctrine is satisfied by placing the automatic cut authority in the hands of an officer not controllable by Congress, an improper delegation has occurred. See *id.* at 151. This is due to the fact that essential policymaking decisions, the type that Congress cannot delegate even with sufficient standards, would be delegated under the Act. *Id.* Congressman Brooks' view is also espoused by Rep. Mike Synar, as a plaintiff challenging the validity of the Act.

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cussing this alternative view, a discussion of the machinations of the Gramm-Rudman Act as enacted will be provided to aid in the understanding of the doctrine's relevance in this situation.

### I. THE BUDGET CRISIS AND RESPONSE

In recent years, the federal deficit has grown to staggering proportions.<sup>13</sup> Public awareness and concern about this problem has prompted Congress to take somewhat drastic measures in an effort to curb this mounting problem.<sup>14</sup> The Balanced Budget and

*See Synar v. United States*, 626 F. Supp. 1374, 1383-84 (D.D.C. 1986). It is submitted that the Congressmen's analysis, supported by Justice Stevens' concurrence, serves as a better basis in preventing a lack of accountability which is evident in the Gramm-Rudman Act.

<sup>13</sup>

#### COMPARISON OF FIGURES ON ANNUAL DEFICITS (in billions)

	President's Budget	1st Budget Resolution	2nd Budget Resolution	Actual
1985	180.40	181.20	181.20	222.20 est.
1984	188.80	169.90	169.90	185.30
1983	91.50	103.90	103.90	195.40
1982	45.00	37.65	37.65	110.60
1981	15.80	+0.20	27.40	57.90
1980	29.00	23.00	29.80	59.60
1979	60.60	50.90	38.80	27.70
1978	57.75	64.65	61.25	48.80
1977	43.00	50.80	50.60	44.90
1976	51.90	68.82	74.10	66.40

(Figures not adjusted for inflation)

*Statements Presented at the Hearing on The Balanced Budget and Emergency Deficit Control Act of 1985. Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 99th Cong., 1st Sess. 40 (1985) (table prepared by Congressional Research Service, Government Division, derived from budget documents) [hereinafter Statements].*

This table illustrates the growth of the deficit from 1976 to 1985, in billions of dollars. As indicated by the figures, the deficit has nearly quadrupled in that time.

<sup>14</sup> See Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1039, (codified at 2 U.S.C.S. § 901) (Law. Co-op. 1986) §§ 251, 252 (1986). 2 U.S.C.S. § 251 authorizes the CBO and OMB to estimate the amount of the deficit for the upcoming year. See *id.* Should that amount exceed the maximum deficit amount established by Congress in 2 U.S.C.S. § 201(a)(1) (1986), the CBO and OMB shall prepare their own recommendations for the Comptroller General to review. See *id.* at § 251. The Comptrol-

Emergency Deficit Control Act of 1985 was passed in response to this disestimable situation.<sup>16</sup> The Gramm-Rudman Act sought to do away with one of the major dilemmas involved with budget deficit reduction, the inevitable political pressure that accompanies a reduction of federal funding.<sup>16</sup> Congress sought to apply pressure both to itself and to the President by grafting into the Act a process which, should appropriate budget cuts<sup>17</sup> fail to be made, would put the budget-cutting authority into the hands of the Comptroller General.<sup>18</sup> This aspect of the Act was designed to prompt Congress and the President to set aside differences in enacting budget cuts which would gradually eliminate the deficit by 1991.<sup>19</sup> Should the budget presented for the year exceed the "maximum deficit amount," Section 251 of the Act was to come into play.<sup>20</sup> Estimates of the Congressional Budget Office (CBO) and the Office of Management and Budget (OMB) were to be submitted to the Comptroller General, outlining proposed program-

ler General then issues his report to the President. *Id.* The President then issues a "sequestration order" and the Comptroller's cuts become effective in thirty days. *See id.* at § 252; Wehr, *Court Strikes Down Core of Gramm-Rudman*, 44 CONG. QUART. 1559, 1563 (1986). "The sequester cuts . . . were designed to be so appalling that to avoid them, the President and Congressional factions would compromise longstanding budget disputes and produce an alternative." *Id.* These sequester cuts were feared by both the President and Congress because they "slash indiscriminately" from essential programs such as law enforcement and air traffic safety. *Id.*

<sup>16</sup> *See Raising the Statutory Limit on Public Dept: Hearing on H.J. Res. 372 Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 66 (1985) (Statement of Rep. Jim Saxton, member, Legislation and National Security Subcommittee) [hereinafter *Hearings*]. "The deficit is the No. 1 problem facing our Nation. I hear about it in my weekly town meetings, I read about it in my constituent mail, and I cannot sit down with any group of people who know how business operates in our country without discussing it." *Id.*

<sup>17</sup> *See Wehr, Court Strikes Down Core of Gramm-Rudman*, 44 CONG. QUART. 1559, 1563 (1986). Gramm-Rudman-type cuts are particularly difficult for Congress to make in an election year like 1986. *See id.* at 1559. Rep. Mike Synar (D-Okla), one of the principal opponents of the Act, and a plaintiff in *Bowsher v. Synar*, commented, "Gramm-Rudman tried to insulate Congress from the hard choices our Founding Fathers gave us and expected us to make." *Id.* at 1562. The article noted, "the beauty of the invalidated procedure . . . was also its fatal flaw." *Id.* at 1559.

<sup>18</sup> See 2 U.S.C.S. § 201(a)(1) (Law. Co-op. 1986). The Act sets specified maximum deficit limits starting at \$171.9 billion in Fiscal Year 1986, gradually declining to zero for Fiscal Year 1991. *Id.* at § 201 (a)(1).

<sup>19</sup> *See id.* at § 251.

<sup>20</sup> *See id.* at § 201(a)(1).

<sup>21</sup> *Supra* note 17.

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by-program cuts necessary to meet the maximum deficit amount.<sup>21</sup> Congress and the President then had thirty days to make alternative cuts.<sup>22</sup> If this was not accomplished, Section 252 (which actually took effect when the Comptroller General made his recommendations to the President, requiring him to issue a "sequestration order" containing the Comptroller General's reductions) mandated that the Comptroller General's cuts were to become effective.<sup>23</sup> This process was actually set into motion on February 1, 1986.<sup>24</sup> Before the cuts became effective, the United States District Court for the District of Columbia ruled the process unconstitutional, invalidating the proposed cuts.<sup>25</sup>

From the outset, serious doubts were raised by Congressional leaders and the President as to the constitutionality of the Act.<sup>26</sup> In fact, in anticipation of a constitutional challenge, the Act provided for an extraordinary judicial review procedure for such issues to expedite ascent of any such case to the Supreme Court.<sup>27</sup> The Act was also equipped with a "fallback" provision,<sup>28</sup> which essentially provided that if any of the reporting provisions or au-

<sup>21</sup> See 2 U.S.C.S. at § 251.

<sup>22</sup> See *id.* at § 252.

<sup>23</sup> *Id.*

<sup>24</sup> See Order, Emergency Deficit Control Measures for Fiscal Year 1986 (Feb. 1, 1986).

<sup>25</sup> See *Synar v. United States*, 626 F. Supp. 1377, 1404 (D.D.C. 1986).

<sup>26</sup> See *Hearings*, *supra* note 18, at 60. (letter of Rep. Peter Rodino, Chairman House Judiciary Committee). "While under the Constitution Congress can delegate the authority to implement laws, it cannot delegate the authority to repeal laws. This is precisely what the Gramm-Rudman proposal purports to do." *Id.* See 21 Weekly Comp. Pres. Doc. 1490, 1491 (Dec. 12, 1985). President Reagan stated, "In signing this bill, I am mindful of the serious constitutional questions raised." *Id.*

<sup>27</sup> 2 U.S.C.S. § 274 (f) (Law. Co-op. 1986). Resolution of such a case is expedited. *Id.* 2 U.S.C.S. § 274(b) provides in pertinent part, "any order of the . . . District Court . . . under paragraph (1), (2), or (3) of subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States." 2 U.S.C.S. § 274 charges the District Court and the Supreme Court with "the duty . . . to advance on the docket and expedite to the greatest possible extent the disposition of any matter brought pursuant to subsection (a)." Representative Mike Synar brought an action pursuant to 2 U.S.C.S. § 274 (a)(1), joined by eleven other Representatives. See *Synar v. United States*, 626 F. Supp. at 1378 (1986). This action was consolidated with an action brought pursuant to 2 U.S.C.S. § 274 (a)(2) by the National Treasury Employees Union. See *Synar*, 626 F. Supp. at 1378. See also 2 U.S.C.S. § 274 (b) (appeal to the Supreme Court authorized).

<sup>28</sup> 2 U.S.C.S. § 274(f) (Law. Co-op. 1986). Rather than reporting to the Comptroller General, the CBO/OMB report is submitted to a special joint committee of Congress. *Id.* This committee must then submit a joint resolution to both Houses within five days, detailing the Director's report. *Id.* The joint resolution is considered, and, when signed by the president, is the basis for any sequestration. *Id.*



automatic deficit cutting procedures were found unconstitutional, the budget cutting duties ascribed to the Comptroller General were to be fulfilled by Congress by joint resolution.<sup>29</sup>

It is understandable that the first version of Gramm-Rudman placed the heavy burden of automatic budget reductions on the Comptroller General.<sup>30</sup> Congress did not wish to be held responsible for the difficult decisions implicit in such actions.<sup>31</sup> It is submitted that an invalidation of the Gramm-Rudman Act based on the delegation doctrine would place the primary focus of the decision on this attempted abdication of responsibility, a result with far greater practical applicability than hypertechnical distinctions between the executive and legislative functions of the Comptroller General.

## II. THE COMPTROLLER GENERAL AND THE SEPARATION OF POWERS

In *Bowsher*, the Supreme Court invalidated Section 251 of the Balanced Budget and Emergency Deficit Act of 1985 as violative of the doctrine of separation of powers.<sup>32</sup> The Court focused on the role of the Comptroller General in the budget-cutting process,<sup>33</sup> and on the fact that Congress has the power to remove the Comptroller for cause or by impeachment<sup>34</sup> as a basis for its ra-

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at § 252.

<sup>31</sup> See Wehr, *supra* note 16, at 1562.

<sup>32</sup> 106 S. Ct. 3181, 3193-94 (1986).

<sup>33</sup> See *id.* at 3184-86, 3188 n.4, 3189, 3191-94. The Court discussed the Comptroller's authority to initiate the sequestration process. See *id.* at 3192. The Court, in agreement with the District Court, found that these powers were executive in nature. See *id.* at 3192. See *Synar v. United States*, 626 F. Supp. 1374, 1400-02 (D.D.C. 1986). But see *Bowsher*, 106 S. Ct. at 3200-02 (Stevens, J., concurring) (Court's reasoning somewhat contradictory, "executive" powers may be performed by Congress under the "fallback" provision). See also *infra* note 48 and accompanying text.

<sup>34</sup> See *Bowsher*, 106 S. Ct. at 3188-91. At issue was the removal provision contained in the Budget and Accounting Act of 1921, which provides in pertinent part:

A Comptroller General or Deputy Comptroller General retires on becoming 70 years of age. Either may be removed at any time by-

- A) impeachment; or
- B) joint resolution of Congress, after notice and an opportunity for a hearing, only

for

- (i) permanent disability;
- (ii) inefficiency;
- (iii) neglect of duty;
- (iv) malfeasance; or

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tionale. Relying heavily on the bicameralism requirement set forth in *INS v. Chadha*,<sup>36</sup> the Court reasoned that this "control" of the Comptroller General would enable Congress to oversee the execution of the laws, thereby violating the doctrine of separation of powers.<sup>36</sup> While this removal power had never been exercised in the sixty years the GAO has existed, and could only be realized by the difficult measures of impeachment or joint resolution,<sup>37</sup> the Court felt that this represented sufficient control over the Comptroller General as to make Section 251 violative of the separation of powers doctrine.<sup>38</sup>

Examination of the GAO reveals that it is indeed primarily an investigative arm of the legislative branch.<sup>39</sup> However, proponents

(v) a felony or conduct involving moral turpitude.

31 U.S.C. § 703(e)(1) (1982).

Justice White, in his dissent, disagreed with the majority's view that this removal power makes the Comptroller General controllable by Congress. *See* 106 S. Ct. at 3211-12. Justice White noted:

The substantial role played by the President in the process of removal through joint resolution reduces to utter insignificance the possibility that the threat of removal will induce subservience to the Congress. As I have pointed out above, a joint resolution must be presented to the President and is ineffective if it is vetoed by him, unless the veto is overridden by the constitutionally prescribed two-thirds majority of Congress. The requirement of presidential approval obviates the possibility that the Comptroller will perceive himself as so completely at the mercy of Congress that he will function as its tool.

*Id.*

<sup>36</sup> 462 U.S. 919, 954-55 (1983).

<sup>36</sup> *See* 106 S. Ct. at 3192 (1986). The Court reasoned, "as *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly by passing new legislation." *Id.*

<sup>37</sup> 106 S. Ct. at 3218-19 (1986) (Blackmun, J., dissenting). Justice Blackmun, in urging the Court to utilize severability as a means to preserve the important function of Gramm-Rudman, pointed out that the removal power had never been exercised. 106 S. Ct. at 3219 (1986) (Blackmun, J., dissenting). Justice Blackmun indicated that the Court may be doing the country a disservice by relying on the all but forgotten removal powers to invalidate the Act; instead, it could preserve the legislation by holding invalid any future attempts to remove the Comptroller by Congress. 106 S. Ct. at 3218 (1986) (Blackmun, J., dissenting). *Cf.* Hook, *Court Ruling on Budget Law Puts Spotlight on GAO Role*, 44 CONG. QUART. 298 (1986) (split in Congress as to necessity of removal provision). Some members of Congress favored the option of giving up the removal power, the existence of which was not known to all. *Id.* But this measure was not favored by many Congressional leaders. *Id.* Rep. Jack Brooks, (D-Texas), noted, "It is difficult to see how the GAO could be expected to continue to conduct independent and responsible audits of executive branch agencies if its head were subject to removal at the will of the President." *Id.*

<sup>38</sup> *See* 106 S. Ct. at 3194 (1986).

<sup>39</sup> *See* 31 U.S.C. § 3523(a) (1982) (GAO audits and investigates expenditure of public funds); 31 U.S.C. § 719 (1982) (GAO makes reports on same to Congress or Committees).

of the Act stressed that while the GAO has a crucial function in its investigative capacity for the legislature, the supposed "control" aspect of such a relationship was not the reason Congress chose the Comptroller General to be the person charged with the automatic budget reductions.<sup>40</sup> Rather, the Comptroller General was chosen as a "neutral officer",<sup>41</sup> not to be influenced in this role by Congress or the President.<sup>42</sup> In fact, many members of Congress were not even aware of the removal provision.<sup>43</sup>

Another aspect of the Court's reasoning in *Bowsher* which was critical in its separation of powers analysis was the nature of the functions the Comptroller General was to perform pursuant to Section 251.<sup>44</sup> The Court adopted the reasoning of the District Court,<sup>45</sup> finding that the functions were executive in nature.<sup>46</sup> In his concurrence, Justice Stevens refuted this analysis.<sup>47</sup> Justice Stevens aptly pointed out the inherent contradiction in this reasoning: when the Comptroller performed the budget cuts pursuant to Section 251, the function was considered executive in nature; yet the Court found valid Section 274, the "fallback" provision which ascribed the same function to Congress itself.<sup>48</sup>

*See Hook, supra* note 37, at 300. The GAO has investigated improper expenditures in the Nixon re-election campaign. *Id.* at 300. It has investigated improper funding by the Reagan administration in Honduras, and has audited contested Congressional election ballots. *Id.*

<sup>40</sup> *See* L.A. Daily Journal, April 24, 1986, at 1, col. 2. Michael Davidson, legal counsel for the Senate, stressed in his argument before the Supreme Court that, "Congress was only seeking a neutral officer" to enact the cuts, not one under its control. *Id.* Davidson further argued that cause for removal could not be based on a disagreement regarding the cuts. *Id.* *See Hook, supra* note 37, at 300. "We must be independent of pressures from the executive branch and pressures from Congress" to function effectively. *Id.* (Comptroller General Charles A. Bowsher).

<sup>41</sup> *See* L.A. Daily Journal, April 24, 1986, at 1, col.2.

<sup>42</sup> *See id.* at 1, col.2.

<sup>43</sup> *See Hook, supra* note 37, at 298 (1986).

<sup>44</sup> *See* 106 S. Ct. at 3191-92 (1986).

<sup>45</sup> *See Synar v. United States*, 626 F. Supp. 1374, 1400 (D.D.C. 1986). The court in *Synar* found that the Comptroller essentially made judgments concerning the application of the law, and also interpreted the new law, each executive functions. *See id.*

<sup>46</sup> 106 S. Ct. at 3194.

<sup>47</sup> *See id.* at 3194-3205.

<sup>48</sup> *See id.* at 3200-02. Justice Stevens expressed his view that "the function may appropriately be labelled 'legislative' even if performed by the Comptroller General or an executive agency." *Id.* at 3201. The plaintiffs in *Bowsher* held a similar view. *See Synar v. United States*, 626 F. Supp. 1374, 1387 (D.D.C. 1986). They asserted that the cuts made would effectively "nullify" and "override" existing laws, a legislative function. *Id.* Also central to their argument was that this function was a nondelegable function per se of the legislature. *Id.*

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The exact role of the Comptroller General also came under fire in a similar context in *Ameron v. Army Corps of Engineers*.<sup>49</sup> In *Ameron*, the Army Corps of Engineers and other executive departments challenged the constitutionality of the Competition in Contracting Act (CICA).<sup>50</sup> CICA empowered the Comptroller General to make determinations followed by recommendations or affirmative action once a government contract bid was protested.<sup>51</sup> In an argument remarkably similar to the one set forth in *Bowsher*, the executive department challenged this power on the grounds that it constituted the exercise of executive and/or judicial functions by a legislative branch officer, thereby violating the doctrine of separation of powers.<sup>52</sup> The Third Circuit's holding in *Ameron* that there was no violation of the separation of powers doctrine<sup>53</sup> is in conflict with the Supreme Court's holding in *Bowsher*. The *Ameron* Court recognized the GAO's role as an investigative arm

<sup>49</sup> 787 F.2d 875 (3rd Cir. 1986).

<sup>50</sup> Publ. L. No. 98-369, subtitle D, 98 Stat. 1149-1201 (codified at 31 U.S.C.A. § 3553 et. seq.) (West Supp. 1985). The Act enabled the Comptroller General to review protests made by bidders for government contracts. See 787 F.2d at 879. The Comptroller General can make recommendations to agencies concerning the options they may exercise in reconsidering a bid (termination, re-bid, refrain from exercising options, or award a new contract). *Id.* The Comptroller General can also "award a prevailing protester its bid and proposal preparation costs, as well as its costs and attorneys fees in filing and pursuing the bid protests." *Id.*

<sup>51</sup> 787 F.2d at 879.

<sup>52</sup> See *id.* at 878.

<sup>53</sup> See *id.* at 886. The Third Circuit in *Ameron* took notice of the fact that the removal power vested in Congress had never been exercised. See *id.* at 884. The court did not consider the removal power question ripe for review, stating that an attempted removal would be necessary before the removal provision could properly be challenged. *Id.* The court also did not recognize the Comptroller General as a legislative branch officer, noting that he is appointed by the president, and stating further that, "unlike heads of most departments and establishments of the Government, [the Comptroller General] occupies a dual position and performs a two-fold function." *Id.* at 885. The court recognized the Comptroller General's role as an investigative arm of Congress as, "that of an officer of the legislative branch of the Government." *Id.* The court then noted that the Comptroller's function as the chief accounting officer of the government was an executive function. *Id.* Essentially, the court in *Ameron* views the Comptroller General as independent from both the executive and legislative branches, the removal provision notwithstanding. See Note, *GAO Bid Protest Procedures Under the Competition In Contracting Act: Constitutional Implication After Buckley and Chadha*, 34 CATH. U.L. REV. 485, 494 (1985) [hereinafter Note, *GAO Bid Protest Procedures*] (supportive of GAO's role pursuant to CICA, urging a finding of constitutionality).

It should be noted that the *Ameron* case was decided before *Bowsher*, and may not stand up to a renewed challenge after the Supreme Court's holding in *Bowsher*.

of the legislative branch.<sup>54</sup> By referring to the statute which created the GAO, the concurrence in *Ameron* further stressed the Comptroller General's role as an officer of the legislative branch.<sup>55</sup>

*Ameron* underscores the inadequacy of the separation of powers analysis when dealing with agencies such as the GAO.<sup>56</sup> The classification of the authority delegated as legislative or executive should not be the primary focus of judicial inquiry, rather the scope of that authority should be scrutinized.<sup>57</sup> For the GAO to function effectively, it must perform some executive-type functions,<sup>58</sup> but it should not perform the task of making national policy decisions in the place of Congress, as Gramm-Rudman would have permitted.<sup>59</sup> When the "fallback" provision was activated, this policy-making authority was removed from the Comptroller's hands, and placed back into the hands of Congress.<sup>60</sup>

### III. THE FALLBACK FAILS

By striking down Section 251 of the Gramm-Rudman Act,<sup>61</sup> the

<sup>54</sup> 787 F.2d at 885.

<sup>55</sup> *Id.* at 893. Numerous other cases have recognized the GAO as part of the legislative branch. See *Bowsher v. Synar*, 106 S. Ct. 3181, 3191 (1986) (removal provision makes Comptroller an arm of the legislative branch); *Synar v. United States*, 626 F. Supp. 1374, 1394 (D.D.C. 1986) (removal provision gives Congress control over Comptroller); *United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (1984) (GAO an auditing and investigative arm of Congress).

<sup>56</sup> See *Bowsher*, 106 S. Ct. at 3200, 3201 (1986) (Stevens, J., concurring). Justice Stevens notes that there is no "definite line that distinguishes executive power from legislative power." *Id.* See Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 87 COLUM. L. REV. 573, 581-87, 605-59 (1984) (refutes distinction between executive branch and independent agencies; strict separation of powers analysis of agency functions not realistic at present time).

<sup>57</sup> See Brooks, *supra* note 12, at 132-33.

<sup>58</sup> See *Ameron*, 787 F.2d at 885. The GAO's role as the chief accounting officer is essentially an executive function. See *id.* See Note, *GAO Protest Procedures*, *supra* note 53, at 498 (Comptroller General must have some executive abilities to effectively monitor governmental bid procedures).

<sup>59</sup> See *supra* notes 12, 16, 48 and accompanying text.

<sup>60</sup> See *Bowsher v. Synar*, 106 S. Ct. 3181, 3194 (1986). The Court did not order the "fallback" provision to come into play, but "permitted" it. *Id.* Congress' options were as follows: affirm the spending cut order that was to take effect on March 1, 1986 which had been invalidated by the district court; eliminate the removal provision; or reduce the federal deficit by joint resolution - the "fallback" provision. See Wehr, *Court Strikes Down Core of Gramm-Rudman*, 44 CONG. QUART. 1559, 1562 (1986).

<sup>61</sup> *Bowsher*, 106 S. Ct. at 3194 (1986).

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Court permitted the “fallback” provision of the Act to take effect.<sup>63</sup> Congress’ actions subsequent to the implementation of the “fallback” provision highlight the difficulty that politicians have in cutting federal spending due to political accountability.<sup>63</sup> Rather than making “tough” cuts, which could have potentially cost votes in the 1986 elections, the cuts proposed represent softer, less politically painful budgetary reductions.<sup>64</sup> Also, although the deadline which should have initiated the “dreaded snapshot”<sup>65</sup> automatic cuts, passed, no such automatic cuts were implemented.<sup>66</sup> Congress’ failure to effectuate these difficult cuts indicates that the delegation of responsibility for these cuts to the Comptroller General was for the purpose of avoiding political accountability, rather than for a legitimate use of delegation.<sup>67</sup> While delegations of authority are proper for various reasons, such as technical expertise on the part of the agency or official, or for the practical purpose of assigning ministerial duties, the delegation involved in Gramm-Rudman was nothing less than the wholesale abdication of responsibility for an important legislative function.

#### IV. GRAMM-RUDMAN AND THE DELEGATION DOCTRINE: AN ALTERNATIVE PROPOSAL

While the Court’s ruling in *Bowsher* may have had the unfortu-

<sup>63</sup> See *id.*

<sup>64</sup> See Gettinger, *Deficit-Cutting Proposal Seeks To Avoid Cuts*, 44 CONG. QUART. 2179, 2179 (1986). The plan by the House and Senate constituted a technical compliance with Gramm-Rudman, “enough to avoid politically sensitive votes on uniform budget cuts required by Gramm-Rudman.” *Id.* Various members of the House and Senate scoffed at the plan, pointing out that while it complied in a strict sense with Gramm-Rudman, the plan represented “no real savings or revenues.” *Id.* See Gettinger, *House, Senate Pass Deficit-Cutting Measures*, 44 CONG. QUART. 2258, 2258 (1986). The plan “steers a course between the embarrassment of inaction and the pain of tax increases or program cuts. It relies largely on asset sales, better collection of taxes and budgetary expedients to reduce the deficit.” *Id.* Among the asset sales is the sale of Conrail, the nationalized railroad. *Id.*

<sup>65</sup> See Gettinger, *Fidgety Congress Inches Toward Adjournment*, 44 CONG. QUART. 2519, 2519 (1986). Rep. John Edward Porter commented, “[o]pponents of Gramm-Rudman should feel pretty good today. Congress has once again practiced the politics of delay and rendered the dreaded snapshot . . . a paper tiger.” *Id.*

<sup>66</sup> See *id.*

<sup>67</sup> *Id.*

<sup>67</sup> See Wehr, *supra* note 16, at 1562. See also Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1276 (1985) (some delegations of authority are advisable, such as those involved with control of pollution and the regulation of the trucking industry).

nate result of delaying the reduction of the federal deficit,<sup>68</sup> the Court's choice was the correct one. The deficit problem is surely one of great magnitude, which is precisely why Congress, and not an agent of Congress, should assume the responsibility in seeing that it is reduced.<sup>69</sup> However, while the results of *Bowsher* satisfy this aim, it is submitted that the Court should have utilized the delegation doctrine to invalidate Section 251. By invoking the delegation doctrine, which has renewed significance,<sup>70</sup> the Court would have sent a strong signal to Congress, making it clear that the task of reducing the deficit, as well as other essential national policy decisions, should be carried out by Congress itself, and not a subordinate of Congress.<sup>71</sup>

A primary concern of Congress in enacting Gramm-Rudman was whether it violated the delegation doctrine.<sup>72</sup> In challenging the constitutionality of the Act, the plaintiffs in *Bowsher*<sup>73</sup> invoked this doctrine.<sup>74</sup> The district court rejected the argument.<sup>75</sup> On ap-

<sup>68</sup> See Gettinger, *supra* note 64, at 2519.

<sup>69</sup> See *Bowsher v. Synar*, 106 S. Ct. 3181, 3204 (Stevens, J., concurring). Justice Stevens observed Congress may delegate authority to its agents who act in furtherance of legislative activities. See *id.* at 3202. Justice Stevens stressed that Congress may not delegate its authority to make policy "that will bind the Nation and thus is 'legislative in character and effect'" to one of its agents. *Id.* at 3204 (quoting S. REP. NO. 1335, 54th Cong., 2d Sess., 8, 1986). See Brooks, *supra* note 12, at 137. Congressman Brooks argued forcefully that this type of authority cannot be delegated to anyone, rather, Congress itself must make choices of this magnitude. *Id.*

<sup>70</sup> See *INS v. Chadha*, 462 U.S. 919, 946-47, 952-54 (1983). The Court in *Chadha* inferred that the delegation doctrine may be due for a revival. The Court wrote, "[t]here is unmistakable expression [in the records of the Constitutional Convention] of a determination that legislation by the national Congress be a step-by-step deliberate and deliberative process." *Id.* at 959. While not dispositive of the issue in *Chadha*, the Court nonetheless sent a strong signal to Congress to legislate more efficiently. See *id.* See also Goldsmith, *INS v. Chadha and the Nondelegation Doctrine: A Speculation*, 35 SYRACUSE L. REV. 749, 757 (1984) (revival of doctrine consistent with Court's model of public administration); Comment, *Scope of Review of Rulemaking After Chadha: A Case for the Delegation Doctrine?*, 33 EMORY L.J. 953, 1020-22 (1984) [hereinafter Comment, *Rulemaking*] (*Chadha* indicates a renewed philosophy regarding delegation by the Supreme Court leading to a possible revival of the doctrine).

<sup>71</sup> See *Industrial Union Dep't v. American Petroleum Inst., Inc.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring). Justice Rehnquist observed, "[f]irst, and most abstractly [the delegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Id.*

<sup>72</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 519-28 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 405-10, 433 (1935).

<sup>73</sup> 106 S. Ct. 3181 (1986).

<sup>74</sup> See *Bowsher*, 106 S. Ct. at 3193 n. 10; *Synar v. United States*, 626 F. Supp. 1377, 1382 (1986).

<sup>75</sup> See *Synar*, 626 F. Supp. at 1382-85 (D.D.C. 1986). The District Court also rejected the

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peal, the Supreme Court did not reach the issue,<sup>76</sup> relying instead on the separation of powers doctrine to hold that the Act was unconstitutional.<sup>77</sup>

The delegation doctrine has been employed by the Supreme Court only twice to strike down statutes.<sup>78</sup> However, it should not be inferred that the delegation doctrine is no longer good law.<sup>79</sup>

'core functions' analysis propounded by the plaintiffs. *See id.* at 1385. This analysis purports that the budget cutting function granted to the Comptroller General is non-delegable per se. *Id.* *See* Brooks, *supra* note 12, at 148. In rejecting this argument, the district court noted that the "appropriations power is similar in nature to the taxing power, which has been successfully delegated to the President." *Synar*, 626 F. Supp. at 1385-86 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). *Cf.* *Bowsher*, 106 S. Ct. at 3202-04 (Stevens, J., concurring) (Congress cannot delegate this type of power to an agent). Justice Stevens wrote:

If Congress were free to delegate its policy making authority to one of its agents, it would be able to evade the 'carefully crafted constraints spelled out in the Constitution.' That danger - congressional action that evades constitutional restraints - is not present when Congress delegates lawmaking power to the executive or to an independent agency.

*Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 959 (1983)). Justice Stevens implied that while the "core functions" of lawmaking may be delegable, it cannot be delegable to an agent of Congress. *Id.*

The plaintiffs in *Synar*, in asserting that certain "core functions" were nondelegable, cited dictum of Chief Justice Marshall which stated, "[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest" which may be delegated. *Synar*, 626 F. Supp. at 1385 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). The district court rejected this argument noting that no case holding directly supported this proposition, and furthermore, a discernible standard to distinguish "core" functions from "non-core" functions was lacking. *See* 626 F. Supp. at 1385. *But see* Brooks, *supra* note 12, at 148-49 (intent of the Framers of the Constitution was to make Congress' power over the purse nondelegable).

Another argument set forth by the plaintiffs in *Synar* and *Bowsher* was that the delegation authorized the Comptroller General to override or nullify laws by cutting the funding of federal programs, and that such a delegation was invalid per se. *See* 626 F. Supp. at 1387. The district court rejected this argument, citing cases which had upheld delegations permitting officials to make similar determinations. *Id.* *See, e.g.*, *United States v. Rock-Royal Co-op., Inc.*, 307 U.S. 533, 545-46 (1939) (Secretary of Agriculture given extensive control over milk industry); *Currin v. Wallace*, 306 U.S. 1, 45 (1939) (Secretary of Agriculture granted power to regulate tobacco industry). However, these cases cited by the district court involved ministerial decision making, not legislative policymaking.

<sup>76</sup> 106 S. Ct. at 3193 n.10.

<sup>77</sup> *Id.* at 3194.

<sup>78</sup> *See* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432-33 (1935).

<sup>79</sup> *See* *Industrial Union Dep't. v. American Petroleum Inst., Inc.*, 448 U.S. 607, 675 (Rehnquist, J., concurring). Justice Rehnquist wrote on the limited use of the delegation doctrine since its brief heyday in the 1930's:



While the Court has not specifically employed the doctrine by name, it has struck down unconstitutional delegations using a different rationale, holding for example, that the statute is overly vague or is violative of due process.<sup>80</sup> Also, although the Supreme Court has not relied specifically on the doctrine, state courts continue to employ it regularly.<sup>81</sup> The Court's language in *Chadha* has led some scholars to predict a revitalization of the doctrine.<sup>82</sup> Since the 1930's, and before its decision in *Chadha*, the Supreme Court could uphold broad delegations of authority with the knowledge that a curb on such delegations existed in the form of the legislative veto, which was invalidated by the *Chadha* Court.<sup>83</sup>

[In] my opinion decisions such as *Panama Refining Co. v. Ryan* . . . suffer from none of the excesses of judicial policymaking that plagued some of the other decisions of that era. The many later decisions that have upheld congressional delegations of authority to the Executive Branch have done so largely on the theory that Congress may wish to exercise its authority in a particular field, but because the field is sufficiently technical . . . the most that may be asked . . . is that Congress lay down the general policy and standards that animate the law.

*Id.* Justice Rehnquist recognized the viability of the delegation doctrine as opposed to the largely discredited doctrine of "substantive due process" with which the delegation doctrine is often associated. *See id.* at 574-75. It is submitted that the "technical" rationale for the delegation of authority expounded upon by Justice Rehnquist is not applicable to the delegation attempted by Gramm-Rudman, an area in the unique realm of Congressional discretion.

<sup>80</sup> *See* Schoenbrod, *supra* note 67, at 1289 (Court employs different reasoning in striking down excessive delegations, doctrine still relevant).

<sup>81</sup> *See, e.g.*, *Thygesen v. Callahan*, 74 Ill. 2d 404, 407, 385 N.E.2d 699, 703 (1979) (maximum check-cashing and money order rates, inadequate standards); *Texas Antiquities Comm. v. Dallas County Community College Dist.*, 554 S.W.2d 924, 930-31 (Texas 1977) (overbroad language in antiquities code); *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 784, 104 N.W.2d 227, 235 (1960) (arbitrary promulgation of regulations with criminal sanctions); *Allen v. Board of Barber Examiners*, 25 Cal. App. 3d 1014, 1020, 102 Cal. Rptr. 368, 372 (1972) (inadequate standards in state rate-setting statute). *See generally* Note, *Administrative Law: The Delegation Doctrine and the Imposition of Criminal Sanctions Through Agency Regulations*, 29 WAYNE L. REV. 1317, 1321-22 (1983) (states have been more stringent in their review of standards).

<sup>82</sup> *See* Goldsmith, *supra* note 70, at 737 (Court's decision in *Chadha* could lead to revival of doctrine); *see also* Comment, *Rulemaking*, *supra* note 70, at 1020 (*Chadha* indicates delegation doctrine still viable).

<sup>83</sup> *Cf. Chadha*, 462 U.S. at 969-70 (White, J., dissenting) (legislative veto useful tool for Congress). Justice White observed, "The legislative veto balanced delegations of statutory authority in new areas of governmental involvement, the space program, international agreements on nuclear energy, tariff arrangements, and adjustments of federal pay rates." *Id. Cf. Tribe, The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 4 (1986) (legislative veto means by which Congress could maintain control over agencies after delegating power to those agencies); Note, *Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto*, 94 YALE L.J. 1493, 1499 (1985) [hereinafter Note, *Chadha and the Nondelegation Doctrine*] (the legislative veto prompted numerous standar-

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While the legislative veto was not the only form of congressional oversight in existence, it was among the most effective and widely used.<sup>84</sup> The use of the legislative veto by Congress gave rise to numerous broad delegations of authority.<sup>85</sup> While the Court ostensibly relied on the "standards" test<sup>86</sup> (which required that adequate standards exist for the agency or official to whom power was delegated to insure compliance with Congressional intent) in upholding broad delegations of authority,<sup>87</sup> implicit in such decisions was the Court's knowledge of the existence of the legislative veto, an effective means of congressional oversight.<sup>88</sup>

The reasons for reviving the delegation doctrine are twofold, one relating to the degree of accountability which Congress should have in the formation of national policy,<sup>89</sup> the second hav-

dless delegations of legislative power). While the Court did not specifically refer to the legislative veto in any cases upholding Congressional delegations of authority, it is submitted that the existence of such a curb served to influence the Court's decisions.

<sup>84</sup> See *Chadha*, 462 U.S. at 969-74 (White, J., dissenting). Justice White enumerated the practical uses of the legislative veto as a means of controlling extensive delegations of power in modern government. *Id.* See generally Schwartz, *supra* note 5 (veto an effective means of overseeing delegated power); Note, *Re-Separating the Powers*, *supra* note 5 (favorable view of legislative veto in modern government); Note, *Impoundment Control Act*, *supra* note 5 (critical of *Chadha* decision).

<sup>85</sup> See Note, *Chadha and the Nondelegation Doctrine*, *supra* note 83, at 1500-01 (use of legislative veto incompatible with standards doctrine); see also Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1381-1409 (1977) (study of five regulatory proceedings, indications that Congress left many points unresolved, used legislative vetoes to control agency action).

<sup>86</sup> See *Yakus v. United States*, 321 U.S. 414, 426 (1944) (Emergency Price Control Act found to have adequate standards). *Yakus* was decided subsequent to the use of the first legislative vetoes in the 1930's, and expanded upon the test set forth in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). *Hampton* required an "intelligible principle" to guide the agency to whom power was delegated. *Id.* at 409. This was expanded upon in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) setting forth the requirement of "legislative standards", which delegate "subordinate rules". See *Schechter* 295 U.S. at 530; *Panama Refining* 293 U.S. at 421. The *Yakus* Court went further, calling for more "definiteness and precision" in the standards. 321 U.S. at 425-26.

<sup>87</sup> See *Arizona v. California*, 373 U.S. 546, 625 (1963) (vague statute regarding allocation of water by executive official satisfied standards test); *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 104 (1946) (standards-"unduly or unnecessary", "unfairly or inequitably" found to be adequate).

<sup>88</sup> See Note, *Chadha and the Nondelegation Doctrine*, *supra* note 83, at 1500.

<sup>89</sup> See *Industrial Union Dep't. v. American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring). Justice Rehnquist wrote, "[i]t is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people . . . the buck stops with Congress and the President," when making national policy decisions. *Id.* See generally Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68

ing a more practical basis, focusing on congressional oversight of the day-to-day functions of administrative agencies.<sup>90</sup> A revived delegation doctrine would not only force Congress to establish more stringent standards for these agencies but would also assure that an accountable body politic would be responsible for implementing major policy decisions.<sup>91</sup> It is submitted that while no standards are adequate to validate the delegation of authority attempted in *Gramm-Rudman*, a revitalization of the delegation doctrine, coupled with a clearer standards test elucidated by the Court, would serve to aid Congress when drafting post-*Chadha* delegations of authority.

#### A. *The Delegation Doctrine and Political Accountability*

One of the fundamental principles of our democracy is that the parties entrusted with forming national policy should be held accountable to the electorate.<sup>92</sup> In times of economic crisis, it is tempting for legislators to abdicate this responsibility so that they are not damaged by the passage or administration of unpopular laws.<sup>93</sup> A revived delegation doctrine of the type favored by Justice Stevens in his concurrence in *Bowsher v. Synar*,<sup>94</sup> or alterna-

CORNELL L. REV. 1, 64 (1982) (delegation doctrine prevents legislators from taking the credit for legislation without taking the corresponding risks or blame); Cf. Bunn, Irwin & Sido, *No Regulation Without Representation: Would Judicial Enforcement of a Stricter Delegation Doctrine Limit Administrative Lawmaking?*, 1983 WIS. L. REV. 341, 343 (1983) (delegation doctrine increases accountability).

<sup>90</sup> See *Chadha*, 462 U.S. at 967-1003 (White, J., dissenting).

<sup>91</sup> See *supra* note 89 and accompanying text.

<sup>92</sup> Cf. THE FEDERALIST, No. 70 at 455 (H. Jones ed. 1961). James Madison wrote of the problems which may be encountered were the executive composed of a council. Madison warned against the shunning of responsibility; "[i]t is shifted from one to another with so much dexterity, and under such plausible appearances, that the opinion is left in suspense about the real author." *Id.*

<sup>93</sup> See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (case decided during the Depression); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (Depression-era case). See generally Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegation of Power*, 72 NW. U.L. REV. 443, 445 (1977) (economic crises tend to produce excessive delegations of power). Professor Schwartz wrote, "[t]he Schechter-type delegations represented a democratic loss of nerve . . . throughout the depression-racked western world, people turned to the strong leader, vesting him with unprecedented powers." See *id.* at 445.

<sup>94</sup> 106 S. Ct. at 3202-05 (Stevens, J., concurring). Justice Stevens did not take issue with the possibility that the type of authority granted the Comptroller could be delegated to the executive or to an independent agency; he did, however, distinguish between "policy considerations that bind the Nation" and other functions that do not "rise to this level." *Id.* at

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tively by Congressmen Synar and Brooks,<sup>95</sup> would further the principle of accountability.<sup>96</sup> Justice Stevens believes that Congress should not be able to delegate national policymaking authority to one of its own agents.<sup>97</sup> Congressmen Brooks and Synar go one step further, stating that the type of sweeping authority delegated to the Comptroller General by Gramm-Rudman should be non-delegable *per se*.<sup>98</sup> It is submitted that both of these views further the proposition that Congress or the President must take responsibility for national policymaking.

### B. *The Delegation Doctrine After Chadha: Further Justification for Revival*

Since the Supreme Court's decisions in *Panama Refining Co. v. Ryan*<sup>99</sup> and *A.L.A. Schechter Corp. v. United States*,<sup>100</sup> the Court has relied principally on the standards test to refute constitutional challenges to statutes based on the delegation doctrine.<sup>101</sup> The Court has employed the standards test to uphold broad delegations of power, often by narrowly construing the broad language

3203 n. 20 (Stevens, J., concurring).

<sup>95</sup> See Brooks, *supra* note 12, at 145 (type of authority delegated should be nondelegable *per se*). "The nondelegation doctrine remains our most effective barrier against massive, broad delegation of lawmaking power from the politically accountable legislature to unelected administrators. Some delegations are fundamentally too excessive for a democracy; by virtue of their size alone, such delegations should be struck down." *Id.* Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 336 (1976) (Congress should not delegate legislative tasks).

<sup>96</sup> See *supra* notes 89 and 95.

<sup>97</sup> See 106 S. Ct. at 3205 (Stevens, J., concurring); *supra* note 93.

<sup>98</sup> See *supra* note 95 and accompanying text.

<sup>99</sup> 293 U.S. 388 (1935).

<sup>100</sup> 295 U.S. 495 (1935).

<sup>101</sup> See Comment, *supra* note 70, at 1020. After *Chadha*, "[i]f standards are lacking, Congress has not performed its fundamental constitutional role as legislator." *Id.* "The primary emphasis is on the language of the statute itself [and] . . . [i]f it does not sufficiently delimit the power of an agency by its own terms, then the delegation is unconstitutional." *Id.* at 1018.

Often, the Court has construed broadly worded statutes with a narrow reading in order to uphold them. See, e.g., *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342-45 (1974) (narrow reading of Independent Offices Appropriation Act of 1952 to avoid constitutional conflict); *Kent v. Dulles*, 357 U.S. 116, 124 (1958) (narrow reading of Immigration and Nationality Act of 1952 to avoid constitutional question). This is especially true where the Act involves the fundamental rights of a citizen. See *Kent*, 357 U.S. at 124. See also *supra* note 80 and accompanying text.

used.<sup>103</sup> However, since the Court invalidated the legislative veto in *Chadha*,<sup>103</sup> the technique of narrow construction is no longer as effective when determining whether the legislature has delegated too much authority.<sup>104</sup> The legislative veto had traditionally provided Congress with a method for overseeing federal agencies.<sup>105</sup> With the legislative veto invalidated, it is submitted that the pre-*Chadha* standards test, calling for "sufficiently definite and precise"<sup>106</sup> standards to allow a court to establish "whether the will of Congress has been obeyed"<sup>107</sup> is no longer adequate. The Court should have seized the opportunity presented by *Bowsher v. Synar* to set forth a clearer standards test, even though the clearest set of standards would not justify the Gramm-Rudman delegation of

<sup>103</sup> See *Arizona v. California*, 373 U.S. 546, 625 (1963) (broad language granted executive official power to make decisions allocating water to various states, standard ruled adequate); *United States v. Rumely*, 345 U.S. 41, 58 (1953) (overbroad statutory power given to legislative committee, narrow reading applied). Commentators have objected to the narrow reading approach, claiming that judicial interpretation is not an effective means to limit regulatory agencies' range of discretion. See, e.g., Ginnane, *The Control of Federal Administration By Congressional Resolutions and Committees*, 66 HARV. L. REV. 568, 593 (1953) (history and criticism of legislative veto); Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto and the "Independent" Agencies*, 75 NW. U.L. REV. 1064, 1074 (1981) (search for definite standards often futile).

<sup>103</sup> See *Chadha*, 462 U.S. at 958-59. The Court's broad language discreetly signalled to Congress the need for stricter statutory guidelines. *Id.* By invalidating the legislative veto, the Court removed an external device often relied on implicitly by courts upholding broad delegations of power. *Id.*

<sup>104</sup> Cf. *Chadha*, 462 U.S. 919, 968 (White, J., dissenting). Justice White observed, "[w]ithout the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with the hopeless task of writing laws with the requisite specificity or . . . to abdicate its lawmaking function." *Id.* at 968. The "hopelessness" of this task is not clear, but it is submitted that the Court no longer has the option of tailoring the wording of statutes to avoid finding unconstitutional delegations.

<sup>105</sup> See *INS v. Chadha*, 462 U.S. at 967-1003 (White, J., dissenting). Justice White believed that the legislative veto should not have been invalidated, due to its usefulness as a device Congress could use to oversee agencies. *Id.* at 968. See generally Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1381-1409 (1973) (general overview of use of legislative vetoes); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 445, 459 (1977) (defense of resolutions as acceptable means of implementing policy); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 989-90 (1975) (critical overview of legislative veto).

<sup>106</sup> See *Yakus v. United States*, 321 U.S. 414, 426 (1944) (Emergency Price Control Act upheld notwithstanding vague standard to guide Price Administrator in setting maximum wartime prices).

<sup>107</sup> See *id.* at 425. See Schoenbrod, *supra* note 67, at 1249-74 (present standards test is inadequate, proposes a "qualitative" approach in evaluating standards).

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authority.<sup>108</sup>

### CONCLUSION

The Court's decision in *Bowsher v. Synar* was the correct one, in terms of immediate results. However, by relying on a strict separation of powers analysis, the Court ignored the far more useful challenge raised as to the constitutionality of Gramm-Rudman. Had the Court followed the lead set forth in *Chadha* and invalidated the Act based on its sweeping delegation of authority to the Comptroller General, it would have achieved the same immediate results. More importantly, however, the decision would have served as a strong warning to Congress and the President that they cannot abdicate their responsibility for important policy decisions, thereby providing greater precedential value in the post-*Chadha* analysis of congressional delegations.

*John D. Beling*

<sup>108</sup> See *Synar v. United States*, 626 F. Supp. at 1389. The District Court found that the Act contained adequate "standards, definitions, context and reference to past administrative practices" to provide an "intelligible principle to guide and define administrative decisionmaking." *Id.* However, as Congressman Brooks points out, the budget base projections of total revenues and outlays on which the Comptroller is to base his cuts are extremely subjective and often arbitrary figures. See 2 U.S.C.S. § 251 (a)(2) (Law. Co-op. 1986); Brooks, *supra* note 12, at 148-52. It is submitted that even if the standards provided the Comptroller are adequate to satisfy the standards test, Congressman Brooks' view, that delegations of this magnitude are non-delegable per se, is correct.