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Articles

SOME REFLECTIONS ON GRAMM-RUDMAN-HOLLINGS

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This article comments on several aspects of Gramm-Rudman-Hollings (GRH or the Act),¹ the federal law enacted in December of last year, which purports to transfer major congressional budgetary powers to an administrative apparatus. The comments are divided into three parts. The first part concludes that the courts should not automatically assume that post-GRH appropriations bills are intended to operate within GRH's framework. The second part looks at the separation of powers challenges to GRH currently proceeding in the courts.² It concludes that, if the Supreme Court decides the delegation doctrine issue, it should, and probably will, for the first time since the 1930s, use that ground to invalidate a federal law.

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1. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat 1037 (1985) [hereinafter cited as GRH].

2. As this article was prepared for publication, the challenges to GRH continued making their way through the courts. The resulting flux affects only the middle portion of this article. Only papers filed with the district court on or before January 8, 1986 were considered for that section.

On February 7, 1986, a three-judge district court voted to strike down GRH on the ground that congressional power to remove the Comptroller General made the delegation to that office a violation of separation of powers doctrine. *Synar v. United States*, Nos. 85-3945, 85-4106, slip. op. at 34-50 (D.D.C. Feb. 7, 1986) (available Feb. 28, 1986, on LEXIS, Genfed library). In what it clearly described as dictum, that court rejected the general antidelegation argument and concluded that the powers which GRH attempted to grant the Comptroller General could be given to a proper delegate. *Id.* at 13-28. An appeal is currently pending before the Supreme Court. 54 U.S.L.W. 3548 (1986).

The third part examines GRH in the context of the recent separation of powers decisions by the Court and the current debate on the construction of our Constitution. It also examines the current Administration's position on such matters because that position may have some influence upon current or future Justices. It concludes that disturbing signs indicate that both the Court and the Administration sometimes adopt a Framers' intent approach to individual provisions of the Constitution and, at other times, ignore such an approach in favor of adjusting the Constitution to the times. Either approach, applied consistently and deftly, could conserve the relative balance of power between Congress and the executive branch, roughly as envisioned by the Framers. The inconsistent use of both approaches threatens to upset that balance.

1. *Gramm-Rudman-Hollings As a Dictionary Act*

A reading of the Congressional debates,³ the newspaper accounts,⁴ and the briefs in the cases attacking Gramm-Rudman-Hollings on constitutional grounds⁵ reveals a common, and potentially significant, misconception about the Act's effect. GRH is described as a measure by which Congress has delegated to administrative authorities, for six years if not repealed,⁶ the power to cut each annual budget deficit by specified amounts if Congress itself cannot.⁷ This

3. See 131 CONG. REC. S17,385 (daily ed. Dec. 11, 1985) (Remarks of Senator Johnston); *id.* at S17,439 (Remarks of Senator Hawkins); *id.* at S14,920 (daily ed. Nov. 6, 1985) (Remarks of Senator Pell).

4. N. Y. Times, Dec. 13, 1985, at B8, col. 4; *id.*, Dec. 12, 1985, at A1, col. 6.

5. Memorandum of Speaker and Bipartisan Leadership Group of the House of Representatives Regarding Balanced Budget and Deficit Control Act at 4, *National Treasury Employees Union v. United States*, No. 85-4106 (D.D.C. Feb. 7, 1986 *sub nom.* Synar v. United States) (available Feb. 28, 1986, on LEXIS, Genfed library) [hereinafter cited as Speaker Memorandum]:

All the significant versions of the Act, preliminary and final alike, shared the central principle which may be called "automaticity," namely, that the key determination to trigger the Act's across-the-board cuts had to be made automatically.

See also Memorandum of Intervenor United States Senate in Support of its Motions to Dismiss and in Opposition to Plaintiffs' Motion for Summary Judgment at 4, *Synar v. United States*, No. 85-3945 (D.D.C. Feb. 7, 1986) (available Feb. 28, 1986, on LEXIS, Genfed library) [hereinafter cited as Senate Memorandum]. *Synar* and *National Treasury Employees* were consolidated on January 2, 1986. See Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 2, *National Treasury Employees*. The plaintiffs' constitutional arguments are discussed *infra* at notes 23-62 and accompanying text. On February 7, 1986, the district court held GRH to be unconstitutional, and the parties appealed to the Supreme Court. See *supra* note 2.

6. For the relevance of implied repealers, see *infra* note 20 and accompanying text.

7. For examples of congressional debates, newspaper accounts, and briefs evidencing such a view, see *supra* notes 3-5.

correctly describes what the language of the Act attempts,⁸ but it cannot accurately describe its operation. Upon appropriations bills passed after its effective date, GRH can operate only to the extent that any such later bill expressly or impliedly incorporates it by reference. Thus, when Congress “appropriates \$200 million” for this or for that, the question must be asked: Did Congress intend to appropriate subject to GRH or not subject to it?

Surely there can be no question that either option is open to Congress. Congress cannot bind its future self not to pass laws of certain sorts: to do that would require a constitutional amendment. In light of this basic fact of the legislative process, it is clear that GRH will operate, however obscurely, only as something of a “dictionary act,” which attempts to legislate methods for construing later statutes. The Dictionary Act of 1871,⁹ and more recently the Administrative Procedure Act (APA),¹⁰ provide other examples of this kind of legislation. At the most, GRH seeks to *require* courts to read future appropriations bills as subject to GRH unless they contain express language opting out. At the least, it entreats courts to harmonize future law with GRH and may provide some evidence of the probable later intent of Congress.

While the federal courts have never squarely addressed the validity of a dictionary act, there are indications of limits on the power of Congress to control the interpretation of future laws. First, one state supreme court has struck down, on separation of powers principles, a state statute compelling the use of certain canons of statutory construction.¹¹ Second, reason dictates the existence of limits on Congress’ power to interfere with the courts’ performance of their duty to ascertain the intent of the legislature’s last pronouncement on a subject. To take a clear example, surely one Congress could not, through elaborate and obscure requirements that only “magic words” be used, make it difficult for successor legislatures to accomplish what they prescribe clearly in ordinary English. While the federal courts have never confronted such an extreme case as that just posed, the case law record contains strong evidence of the courts’ sense, if not conscious understanding, that they, and not the legislature, must ultimately determine how to read legislative intent.

8. See GRH § 201(a)(7) (defining maximum deficit amount for years 1986-91); §§ 251(a)(1)(A)-(C), (a)(2), (b)(1), (b)(2)(a); § 252(a)(1).

9. Act of Feb. 25, 1871, 16 Stat. 431 (1871).

10. 5 U.S.C. §§ 551-706 (1982).

11. *People v. Crawford Distrib. Co.*, 53 Ill.2d 332, 338-39, 291 N.E.2d 648, 652 (1973). See W. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL § 5.15 (1980).

The Supreme Court, in its decisions under the Administrative Procedure Act, seems to recognize the possibility that Congress can abuse its control of statutory construction.¹² The Court's actual position may well go beyond this. It apparently acknowledges that any "dictionary act" controls interpretation only to the extent that a court believes that the act helps to ascertain the real intent when it exists or, in default of such intent, a reasonable result. For example, in *Mitchum v. Foster*,¹³ the Supreme Court found that a later statute created an implied exception to an earlier statute that said it permitted only express exceptions.¹⁴ The driving force behind that decision, it seems, was the majority's sense of a real, but unexpressed, intent to exempt the later law from the operation of the earlier one.¹⁵

It is not my position that Congress is without a role to play in determining how later legislation will be read. It is rather that the courts themselves must decide, in light of a variety of policies, precisely what weight should be given to earlier statutes that would control the meaning of future legislation. There are two ways of articulating this view. The first would deny any binding effect to dictionary acts, but concede that courts should weigh them carefully because of their relevance to interpretation. The second would ascribe binding effect to such acts, but only when the courts determine that doing so does not frustrate the ability of the courts to give effect to the most recently expressed will of Congress. These two

12. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

13. 407 U.S. 225 (1972).

14. *Id.* at 231-43. The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), authorizes a "suit in equity"—and thus, implicitly, an injunction—against state officers. The Court found § 1983 to be an exception to the Anti-Injunction Act, Act of Mar. 2, 1793, 1 Stat. 335 (codified at 28 U.S.C. § 2283 (1982)), which bars federal courts from enjoining state court proceedings. 407 U.S. at 242-43.

15. The Court explained its decision as an interpretation of the word "express" in the earlier statute to include not simply clear words in a later law, but also clear legislative intent not literally expressly included in the text. *See id.* at 237-38. However it may be rationalized, I believe that the relationship of the courts to the legislative process requires consideration of evidence of later intent, despite the mandates of the earlier law. I believe that if pressed by a law that, even more clearly than that involved in *Mitchum*, required future exceptions to its provisions to be *express*, the Court would make clear its freedom to ignore the earlier law in favor of the implicit but clear intent of a later law. It is, however, difficult to imagine how a statute could be clearer than the anti-injunction act involved in *Mitchum* without resorting to drafting such as "express and we really mean express." Because never so pressed, the Court has either never considered the problem or used the host of typical avoidance devices. As said earlier, conscious or subconscious sensitivity to these concerns on the part of the courts, and perhaps Congress as well, has led to the issues being framed differently and resolved reasonably without confrontation.

positions are approximately the same, because in each the court would view itself as in control, willing and able to ignore earlier statutes which infringe on the court's role as interpreter of law.

The federal courts seem never to have expressly recognized their ultimate control largely because it is normally reasonable for a court to give great weight to earlier dictionary acts. Indeed as to earlier legislation such as the Federal Rules of Civil Procedure¹⁶ or the APA, which control the meaning of future legislation through control of the environment in which it will operate, it normally seems reasonable for courts to ignore the sort of issue that I am raising. I have no quarrel with viewing such acts as operative until repeal, and not simply hortatory, as long as it is recognized that the context or structure of a later enactment, if extraordinary, may merit the conclusion that the later Congress chose to opt out. It would be exhausting and generally unproductive, in the absence of overwhelming evidence, for the courts to consider, on an individual basis, whether new causes of action were to be adjudicated using some or all of the Federal Rules of Civil Procedure and whether new agency authority is subject to some or all of the APA.¹⁷ Indeed, it is normally fair to assume that any current Congress would prefer the relatively mindless, across-the-board application of such rules to the chaos which would result from attempted case-by-case adjustments.

GRH, however, poses a different case. It is not collateral but central, in any fair sense, to the meaning of future appropriations bills whether the sums they purport to provide may be taken at face value or as a ceiling subject to great reduction at the hands of administrators. The stakes are enormous, both in terms of the potential effect on the federal government and on the development of law dealing with the power of Congress to delegate responsibility for major structural economic decisions to other decisionmakers. For this reason, if the Court is inclined to allow the bureaucracy to make such budget cuts, it should consider taking the unusual step of requiring annual renewals of GRH in order for it to continue in operation. This would amount to a recognition that Congress may no longer intend to legislate subject to GRH, but, politically, may be

16. Although such rules are made by the courts under a congressional grant of rulemaking power, 28 U.S.C. § 2070 (1982), they are accorded the force of law and are equivalent to legislation for my purpose.

17. *Cf.* *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973) (interpreting Interstate Commerce Act requirement for decisions after hearing in light of the APA).

unable to pass a repealer because it fears, for example, a Presidential veto. GRH was enacted with broad yet thin support¹⁸ and has been called the least lobbied major bill in recent memory.¹⁹ The essence of the moral and legal charge against GRH is congressional abdication. When it is difficult to know just what Congress intends, an error on the side of reassertion of the ordinary legislative process seems less perverse than the reverse.²⁰ Under all of these circumstances, the Court should reverse its usual presumption that an earlier expressed will of Congress controls future legislation.²¹

The Court may well be unwilling to reverse its presumption of continued applicability based simply upon the policies discussed above. For appropriations bills passed shortly after GRH that spark little debate about that Act, the Court may reasonably conclude that

18. As for the breadth of support (1) the vote in the House of Representatives was 271 for, 154 against, 9 not voting, 131 CONG. REC. H11,903-04 (daily ed. Dec. 12, 1985); the vote in the Senate was 61 for, 31 against, 5 not voting, 2 paired, *id.* at S17,443-44 (daily ed. Dec. 11, 1985). As for the thinness of support, *Congressional Quarterly* reported that many members of Congress felt GRH unwise and unworkable and that Sponsor Rudman himself referred to the bill as a "bad idea whose time has come." 43 CONG. Q. 2604 (1985).

19. A Senate staff member of the author's acquaintance characterized GRH this way. Published accounts agree: "Many members reported little overt lobbying either for or against the legislation, except for strong, last-minute objections from the defense department." 43 CONG. Q. 2604 (1985).

20. Objections citing the presumption against implied repealer are to be anticipated, but are beside the point. The question is not one of GRH's repealer, but rather of its operation while in effect. It can be nothing more than hortatory in its aim that future money bills be subject to its dictates. It can be nothing more than persuasive, to an extent to be determined by a court, if seen as an attempt to provide presumptions through which later legislation is to be read.

21. A wide variety of reasons other than lack of majority support could account for the failure of a Congress that had turned against GRH to attempt express repealer. (*Cf.* Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 206 n.90 (1983) (Court assumes substantive, rather than tactical or political, reasons for Congress' failure to pass legislation to change administrative interpretation). It may be tempting, psychologically, to take the position that a Congress which had not the political will to pass a repealer should not be helped by the courts. Either as a punitive position or as one requiring clear signals for the courts own convenience, such a position does not recommend itself. The punitive view goes beyond poetic justice in inflicting harm, not only on Congress, but also on those Congress exists to serve. The clear signal approach is valid in its place—for example, the parole evidence rule and statute of frauds. It is even valid to a point in the setting of a dictionary act's application. For that reason, I see nothing pernicious in applying the Administrative Procedure Act when no strong evidence of contrary intent appears. When, as here, there are serious questions of unconstitutional congressional abdication of power and when there is strong implicit evidence of intent to legislate independently of an earlier measure, the calculus is different. It is one thing for the Court to create a presumption more likely than not to represent intent. It is another for it to ignore its own strongly held view of intent, in favor of a presumption serving only ease of labor.

the consensus which produced GRH continues. The passage of time and widespread statements in floor debate of intent to legislate outside of GRH may, however, raise a reasonable doubt about continued consensus.²² Surely, in those circumstances, it would be more reasonable for the Court to require the legislative process to reindorse this unusual legislation.

2. *The Court Challenges Based on Separation of Powers Doctrine*

Of more likely immediate impact than the issues discussed above is the constitutional challenge to GRH currently pending in the Supreme Court. The two suits recently decided by the special three-judge federal district court²³ attacked GRH on two main

22. There have already been some skirmishes in the Congress over opting out of GRH. In one case, there is a frontal attack, attempting an express exemption for a particular money bill. See 132 CONG. REC. H1093 (daily ed. Mar. 12, 1986) (description of H.R. 4391 as exempting certain veterans benefits from sequestration). In another, bearing more directly on my arguments, there were apparent attempts implicitly to override GRH as to funding for a particular program. See 44 CONG. Q. 595 (1986). One provision passed the House of Representatives, despite claims by the Reagan Administration that it would violate GRH spending restrictions. *Id.* This provision, a proposed amendment to H.R.J. Res. 534, would have added one billion dollars to a program for loans to farmers. It required hours of cajoling by Senate Republican leaders before the measure was defeated, then, by a large majority. *Id.* The pressures to opt out of GRH for popular programs are enormous and they will grow as its provisions for later years require vastly deeper cuts.

An interesting problem would arise if many members of Congress stated on the record in debates over an appropriations bill that they did not intend to legislate subject to GRH, but the President signed the bill with a message stating a contrary intent. The relevance, to statutory construction, of the express intent of the President in signing a bill has been almost completely neglected in cases and scholarly commentary. Notable exceptions include W. REYNOLDS, *LEGAL PROCESS IN A NUTSHELL* 234 (1980). Whether I agree with Professor Reynolds' statement that executive intent is entitled to weight equal to that accorded legislative intent depends upon how that statement is interpreted. The Constitution clearly contemplates that the process of passing a bill be proactive, that of vetoing reactive. Consequently, perhaps a President's statements that he or she understands a bill in a particular way generally should not contribute to fixing its meaning. Thus, the Presidential influence should be less than that of clearly influential statements made in legislative debates. On the other hand, it may be fair to say that the Constitution contemplates that, within reason, Presidents know that to which they assent. To what extent must they analyze committee reports and debates and bet on the outcome of a judicial process which considers such materials? The answers are not clear. Perhaps, in cases where, on language alone, there is one clearly preferable meaning of an act as to a particular issue, a President should be able to secure that meaning by expressly endorsing it. The courts would in effect allow the President, "by opting for the words," to eliminate or vastly reduce the relevance of legislative history. Note that adopting this approach will not solve problems under GRH or other dictionary acts, because there the precise issue is not the language of the act being construed, but how much focus should be placed upon earlier legislation in arriving at later meaning.

23. See *supra* note 2.

grounds: (1) improper delegation of legislative power, in the *Panama Refining*²⁴ and *Schechter*²⁵ line of argument and (2) delegation of legislative power to an improper delegate, in the *Buckley v. Valeo*²⁶ line.

The first argument has not been deployed successfully against a federal statute since 1935, when the Court declared that legislative standards, channeling the discretion granted, are necessary for constitutional delegations of legislative power.²⁷ Since that time, the Court, while incanting the need for statutory standards, has allowed the delegation of vast powers to regulate the economy despite little statutory guidance as to the policies to be pursued.²⁸

Long thought dead or near dead as a constitutional limitation with real world bite,²⁹ the delegation theory has enjoyed at least a minor renaissance in Supreme Court dicta in the 1970s and 1980s. In 1974, in *National Cable Television Association v. United States*,³⁰ five Justices, including three currently on the Court (Justices Burger, Rehnquist, and White) construed a statute in one of two possible ways to avoid what they perceived to be a serious possibility that the other construction would fail if analyzed in terms of constitutional limits on delegation.³¹ Some congressional powers, the majority suggested, might fall within a legislative core and, hence, be either undelegable or delegable only under very stringent limits and protections.³²

In 1980, in *Industrial Union v. American Petroleum Institute*,³³ three Justices, including one not involved in *Cable T.V.* (Justice Stevens),

24. *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

25. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

26. 424 U.S. 1 (1976) (per curiam).

27. S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 90 (1985).

28. See generally 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 3:1-3:10 (2d ed. 1978) (discussing delegation doctrine and its abandonment). For examples of cases upholding delegations despite vague standards, see *Yakus v. United States*, 321 U.S. 414 (1944); *Sunshine Anthracite Coal Corp. v. Adkins*, 310 U.S. 381 (1940); *United States v. Rock Royal Co-operatives*, 307 U.S. 533 (1939).

29. See 1 K. DAVIS, *supra* note 28.

30. 415 U.S. 336 (1974).

31. *Id.* at 342. The statute allowed the Federal Communications Commission (FCC) to impose a filing fee based on, inter alia, the "public policy or interest served." The Court feared that such a consideration would transform the fee into a tax, which could be imposed only by Congress. *Id.* at 341. Thus, the Court determined that the "public policy or interest served" criterion did not apply; rather, the FCC should base its fees on the "value to the recipient" of its services. *Id.* at 342-43.

32. *Id.* at 340-42.

33. 448 U.S. 607 (1980).

construed a statute somewhat narrowly to avoid possible problems with the delegation doctrine.³⁴ Although he concurred in the judgment, Justice Rehnquist would have found the delegation unconstitutional because the statute lacked sufficient standards to guide the delegate's discretion.³⁵ Dissenting in a case the following year, and this time joined by the Chief Justice, Justice Rehnquist favored striking down a delegation that he saw as so standardless that it constituted an abdication of Congress' policymaking responsibility.³⁶

Based on the opinions described above, four current Justices seem to take the delegation doctrine quite seriously; at least three of them may still believe in the existence of core legislative powers that are at least relatively undelegable. Moreover, all four believe that the presence of meaningful standards, at least when possible, is a requirement for a valid delegation. Justices Blackmun, Powell, and O'Connor have not made known their position on delegation. Still, the fact that four of their colleagues, and the two Justices most recently retired from the Court, are on record as willing to scrutinize delegations suggests a likelihood that at least one of the uncommitted Justices would take a similar position. Indeed, even Justices Brennan and Marshall, who have suggested that virtually anything goes after the movement away from *Schechter* and *Panama*,³⁷ might well view the delegation in GRH as of a different order.

GRH allows agencies to determine, by estimating the size of the deficits, how much to cut federal spending otherwise authorized by Congress. Even if it must be constantly renewed by Congress to be effective,³⁸ that power is potentially greater in impact than any delegated so far. GRH will reduce outlays in fiscal year 1986 by roughly 4.5%.³⁹ The magnitude of the cuts required in following fiscal years has been estimated to be as high as 27.1% of nonexempt, nondefense programs.⁴⁰ As a result, the delegation argument should get thoughtful attention from the Court.

34. *Id.* at 646, 652. Although Justice Powell concurred in the construction of the statute, he expressed no view about a different interpretation's violating the delegation doctrine. *Id.* at 664 n.1 (Powell, J., concurring in part and concurring in the judgment).

35. *Id.* at 686 (Rehnquist, J., concurring in the judgment).

36. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting).

37. *National Cable Television Ass'n v. United States*, 415 U.S. 336, 344 (1974); *FPC v. New England Power Co.*, 415 U.S. 345, 352-60 (1974) (Marshall and Brennan, JJ., dissenting).

38. *See supra* notes 3-21 and accompanying text.

39. 44 CONG. Q. 135 (1986).

40. *Id.* at 138.

The threshold issue is whether the power to determine the deficit size and, hence the cuts, involves the kind and quantity of discretion that conceivably could trigger antidelegation analysis. First, should the power to make predictions be characterized as delegated lawmaking power if the predictions themselves have immediate legal consequences? Certainly, in GRH Congress may have envisioned an administrative mental process different from that expected from those involved in ordinary administrative rulemaking. Still, if there is room for and incentive to manipulate the predictions in order to alter the state of the law, such predictive powers could be used to the same effect as rulemaking power. Even assuming utmost good faith on the part of those administering GRH, if reasonable, qualified forecasters could make vastly different predictions, delegation of predictive powers seems as much an abdication of congressional responsibility as delegated rulemaking. Therefore, delegation of the power to make such predictions should be judged by the standards applicable to delegations of lawmaking authority.⁴¹

Accepting this analysis, the amount of discretion is the crucial issue. That amount seems to depend upon the extent of agreement

41. The early cases sustaining what later commentators view as a species of delegated lawmaking authority involved rules prescribed in a statute which conditioned their operation upon the existence of a fact or facts to be found by the executive branch. The Court typically treated the executive involvement as one of factfinding and not delegated lawmaking power. *Field v. Clark*, 143 U.S. 649 (1892); *The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813). For discussion of these cases, see W. GELLHORN, C. BYSE, & P. STRAUSS, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 52-54 (7th ed. 1979).

For the Court to conclude that legislative power has been delegated, it must first conclude that the authority given to the agency apparatus in GRH is more than the power to find ordinary facts mechanically. Such a conclusion should be easy given the generally controversial nature of economic projections. Even so, to conclude a delegation occurred, the Court must then distinguish or overrule *Aurora* and *Clark*, both of which made the operation of international trade rules dependent upon rather complex political or economic judgments characterized as factfinding. In *Aurora*, for example, the key question was whether certain warlike activities had ceased. 11 U.S. (7 Cranch) at 388. In *Field*, it was whether foreign tariffs on United States goods were "reciprocally unequal and unreasonable." 143 U.S. at 680-81. There is obviously room, over a wide variety of states of the world, for reasonable people, even those from similar educational and political subcultures, to differ as to the existence of situations so described. Consequently, there is precedent for the constitutionality of such "factfinding."

Despite this, it is difficult to believe that a modern Court would not recognize that, at least in cases of blatant standardlessness, what is characterized as factfinding is in fact discretionary lawmaking power. If the Court recognizes this, then the conclusion is not automatic invalidity, but rather that the delegation doctrine in its present form is the appropriate test of constitutionality. At this stage, the amount of true discretion granted becomes relevant because it seems a component of delegation doctrine analysis on any view of that doctrine. In sum, a finding that significant discretion has been vested in the GRH agencies is likely to be necessary, first, to justify the application of delegation doctrine analysis and, second, to a conclusion of invalidity upon its application.

on the method for predicting revenues and outlays, and especially for predicting major contributing factors such as real growth, interest rates, and unemployment. The Office of Management and Budget (OMB) and the Congressional Budget Office (CBO), which make the initial determination under GRH and average their conclusions when they do not agree, came within \$.8 billion dollars of each other's estimate of an approximately \$221 billion deficit for fiscal year 1986.⁴² This consensus may cause some to conclude that the prediction is simply a mechanical one. It seems more reasonable, however, to view it as an aberration. Past gross disparities in similar predictions suggest an immense amount of discretion in making the predictions. For example, the OMB predicted a deficit of \$91.5 billion for fiscal year 1983, the first full fiscal year under President Reagan; the actual deficit was \$195.5 billion.⁴³

In addition to the discretion involved, the availability of judicial review is an important, related factor in determining the validity of attempted delegations. From the perspective of scholarly commentators at least, Judge Harold Levantahl wrote the most influential modern opinion dealing with the delegation doctrine in *Amalgamated Meat Cutters v. Connally*.⁴⁴ Rejecting the extremes of carte blanche power to delegate and per se condemnation of delegation, he stressed an approach that considered not only the need for delegation and the relative clarity of the legislative directions to the delegate, but also the presence of protections from abuse, particularly the availability of judicial review. Justice Rehnquist, in his 1980 concurrence in *Industrial Union v. American Petroleum Institute*, also placed great weight on the availability of meaningful judicial review in judging the constitutionality of a delegation.⁴⁵ GRH, it is worth noting, provides that no court shall review the "data, assumptions or methodologies" underlying the final administrative determination

42. Sequestration Report for Fiscal Year 1986 - A Joint Report to the Comptroller General of the United States, 51 Fed. Reg. 1923 (1986).

43. 131 CONG. REC. S14,905 (daily ed. Nov. 6, 1985). An excellent description of the difficulties involved in predicting the size of deficits can be found in some of Senator Moynihan's remarks on GRH and its background. It includes a discussion of recent past disparities between OMB and CBO predictions on the one hand, and between those predictions and the actual performance of the economy on the other. *Id.* at S14,905-07.

44. 377 F. Supp. 737 (D.D.C. 1971). One distinguished trio of commentators has characterized this opinion as "masterful." W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 41, at 70 n.1. A majority of the Supreme Court itself has cited *Meat Cutters* in addition to its own most basic opinions on the delegation doctrine. See *Eastlake v. Forest City Enters.*, 426 U.S. 668, 675 (1976).

45. See 448 U.S. at 2886-87. (Rehnquist, J., concurring in the judgment).

of the deficits by the Comptroller General.⁴⁶

Some conclusions follow. If the Court concludes, as much evidence indicates, that the deficit-determining function under GRH is not simply a mechanical process, but involves substantial discretion, then the Act may well be overturned on delegation grounds. So viewed, GRH abdicates to bureaucrats a key political decision cutting across all areas of federal activity. Congress wants such decisions to be made initially by a mindless averaging of two predictions, which is then subject to revision in some ill-defined, unreviewable way by a third bureaucrat. It may be too much to ask Congress itself to make all substantive federal policy ranging from aviation to zoology. These problems of micromanagement are what delegated lawmaking authority was designed for and, indeed, provide a major justification for federal administrative agencies. GRH is different. In light of the potential across-the-board effects on federal programs, is it too much to require Congress to determine for itself annually, with all the advice that it wants from OMB, CBO, and others, the crucial political fact of this and probably the next several years? I suspect that the Supreme Court may well think not.

The second attack on GRH assumes, for purposes of argument, that the power to cut the budget described above can be delegated to some administrative agency, but asserts that the Constitution prohibits the choice of delegates made in GRH. To understand this argument, one must understand its origins in the administrative law revolution of the 1930s and 1940s. During those years it became established that Congress could part with some of its legislative power.⁴⁷ Although the lines between executive discretion and lawmaking are inherently blurred, by 1950 it was clear to any thoughtful lawyer that the Constitution, as originally understood, had been changed to allow nonlegislative branch "legislation."⁴⁸ This change created a problem: How should constitutional provisions and doctrine written and evolved without the institution of delegated lawmaking in mind be applied to this new institution? In particular, how should the repositories of such powers be appointed and removed?

46. GRH § 274(h).

47. See *Yakus v. United States*, 321 U.S. 414 (1944).

48. "Delegation of power to administration is the dynamo of the modern social service state. . . . It must be admitted that in the field of federal administration the [antidelegation] doctrine as it operates today is essentially a caveat, a hint of reserved power." Jaffee, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 592 (1947). Other passages are also interesting. *Id.* at 577-81, 592-93. See also 1 K. DAVIS, *supra* note 28 (discussing abandonment of nondelegation doctrine).

In 1935, the Court made clear in *Humphrey's Executor*⁴⁹ that Congress could limit the President's usual power to remove some of the officers appointed by and with the advice and consent of the Senate.⁵⁰ An earlier decision of the Court elaborating, not the constitutional text, but separation of powers implications drawn from its structure, had held that, at least as to some executive branch officers, the President had absolute power of dismissal.⁵¹ *Humphrey's Executor* limited the implications of that decision and enabled the establishment of the independent regulatory agencies, which are called that precisely because they are exempt from Presidential removal pressures.⁵²

Buckley v. Valeo,⁵³ in 1974, dealt with the other portion of the problem: Must all repositories of delegated legislative power be officers of the United States, appointed by and with the consent of the Senate? Some of the officers of the Federal Election Commission, which had the power to make regulations limiting campaign contributions, were appointed not by the President with senatorial consent, but directly by officers of Congress.⁵⁴ The Court found this arrangement constitutionally impermissible. Anyone possessing significant authority under the laws of the United States was an "officer of the United States" within the meaning of Article II's appointment provision,⁵⁵ and hence must be appointed by the President with senatorial consent.⁵⁶

This decision contributed to the continuously unfolding process of mapping the old rules of separation of powers onto the new

49. 295 U.S. 602 (1935).

50. *Id.* at 631-32.

51. *Meyers v. United States*, 272 U.S. 52 (1926).

52. 295 U.S. at 626-32.

53. 424 U.S. 1 (1976) (per curiam).

54. *Id.* at 113. Officers of Congress appointed six of the Commission's eight members; only four of these six had voting privileges. For a description of the Commission, including its powers and the methods for appointing commissioners, see *id.* at 109-113.

55. *Id.* at 125-26. U.S. CONST. art. II, § 2, cl. 2 recognizes two methods of appointment of "officers of the United States." First, for all such officers, it recognizes Presidential appointment with senatorial advice and consent. Second, for officers other than "Ambassadors," "Ministers," "Consuls," and "Judges of the Supreme Court," Congress may by law vest the appointment power in "the Courts of Law, or in the Heads of Departments." Because it has not been used, the second provision was implicated in none of the cases under discussion. Nevertheless, note that it does not authorize legislation vesting appointment power in Congress or its officers.

56. 424 U.S. at 140-41. Superficially, *Buckley* might be read as concerned solely with appointments of those exercising purely executive functions such as enforcement. See *id.* at 138. Through the breadth of its statements covering all significant authority under federal law, *id.* at 141, *Buckley* makes clear, however, that those possessing delegated lawmaking authority are within its sweep.

institution of delegated lawmaking. As a result of the Court's broad definition of "officer of the United States" in *Buckley*, Congress is free to retain its lawmaking power or to delegate it to executive branch officers or independent agencies. It may not, however, "delegate" to parts of itself or even to both houses acting together without the President's participation.⁵⁷

Both the appointment and the removal of officers participating in decisions under GRH pose problems for that legislation, as the plaintiffs' briefs in the two cases make clear. Recall that the OMB and CBO make the initial determinations under GRH. If they do not agree, they average their conclusions. The Comptroller General, the head of the General Accounting Office (GAO), then reviews their joint report and issues a decision based on that joint report.⁵⁸ Congress appoints the director of the CBO; thus, it is clear that, were the GAO not interposed as a final decisionmaker, GRH's administrative apparatus would violate the Constitution as elaborated in *Buckley*.

The congressional plaintiffs argue, in essence, that the GAO's involvement should be ignored because it is not a meaningful participant in the administrative process.⁵⁹ Their brief cites the following facts: First, the Comptroller General has only a short period—five days—in which to review the joint OMB-CBO decision.⁶⁰ Second, GRH provides that, if any of its administrative decisionmaking provisions are struck down, Congress must automatically begin consideration of a budget having the features prescribed by the joint report.⁶¹ This provision gives credence to the plaintiffs' third, more general, argument: GRH, as revealed by its legislative history, views

57. The "incompatibility clause," U.S. CONST. art. 1, § 6, cl. 2, which prohibits members of Congress, during their tenure, from holding "any civil Office under the Authority of the United States," may prevent even a law signed by the President from accomplishing a delegation of lawmaking authority to Congress or a part of Congress. The issue is now largely academic, because the Court accomplished the same result in *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983), by interpreting U.S. CONST. art. I, § 7, cls. 2, 3, as allowing Congress to make laws only after complying with the Constitution's requirements of bicamerality and presentment. 462 U.S. at 952-57. For further discussion of *Chadha*, see *infra* notes 73-75 and accompanying text.

58. GRH § 251(b)(1) requires the Comptroller General to give "due regard" to the OMB-CBO report. The report submitted to Congress must explain fully any differences between the Comptroller's and the OMB-CBO reports. *Id.* § 251(b)(2).

59. See Memorandum of Plaintiffs in Support of Motion for Summary Judgment at 38-48, *Synar v. United States*, No. 85-3945 (D.D.C. Feb. 7, 1986) (available Feb. 28, 1986, on LEXIS, Genfed Library).

60. *Id.* at 39-40.

61. *Id.* at 42.

the Comptroller General as simply a figurehead, placed on the organization chart to insulate the mechanism from what would otherwise certainly be a fatal challenge under *Buckley*.⁶²

GRH's supporters respond to these arguments as follows: First, the GAO need not wait until it has the joint report to prepare to review it; what must be predicted and the data on which the predictions will be based are fairly clear.⁶³ Second, the legislative history makes clear that the House of Representatives insisted upon the insertion of the Comptroller General as the final meaningful decisionmaker because it did not trust economic predictions to which the OMB significantly contributed.⁶⁴ This was true, according to the briefs, because OMB's earlier unrealistic predictions of real economic growth, which it used to argue for the 1981 tax cut, angered the Democratic-controlled House of Representatives.⁶⁵ Since GRH's enactment, the Comptroller General has shown some independence,⁶⁶ which is probably unreviewable by the courts even if challenged.⁶⁷ As a result of this and of what would certainly be a reluctance to find congressional subterfuge unless beyond doubt, it seems unlikely that the courts will dispute the Comptroller's place as final decisionmaker.

The Justice Department has, however, indicated that it will challenge the Comptroller's office itself as a constitutionally impermissible delegate.⁶⁸ With this delegate, there are no problems under *Buckley*: by statute the Comptroller General is appointed by the President with the advice and consent of the Senate.⁶⁹ Thus, the GAO seems, on the surface, a valid independent regulatory agency. The arguments about the Comptroller General's ineligibility center on the provisions for removal. No remotely comparable act creating

62. *See id.* at 40-42.

63. Senate Memorandum, *supra* note 5, at 33.

64. Speaker Memorandum, *supra* note 5, at 16-22, 52.

65. *Id.*

66. Budget Reduction for Fiscal Year 1986: A Report to the President of the United States, President of the Senate and Speaker of the House of Representatives, 51 Fed. Reg. 2813-15 (1986). Although the Comptroller General used the same major economic assumptions as underlie the OMB-CBO Joint Report and appears to have reached conclusions only slightly different from those in that report, he apparently believes that he has the option of employing different assumptions and suggests a willingness to do so in the future. *See id.* at 2813-15, 2847.

67. *See supra* note 46 and accompanying text.

68. *See* Memorandum in Support of Defendant's Motion to Dismiss at 30 n.10, *Synar v. United States*, No. 85-3945 (D.D.C. Feb. 7, 1986) (available Feb. 28, 1986, on LEXIS, Genfed Library). The expedited schedule prevented the Department from presenting its arguments on the merits in this memorandum. *Id.*

69. 31 U.S.C. § 703(a)(1) (1982).

an independent agency like GAO has a provision for removal by a joint resolution of Congress for specified cause.⁷⁰ The President's lawyers must object primarily to the fact that, as to the Comptroller General, the President has lost the typical statutory power to initiate removal, and in the case when a veto is overridden, to block it. While this may not seem a serious encroachment, particularly since Congress is limited to removal for cause, two of the most distinguished commentators on administrative law (Jaffee and Nathanson) saw the status of the Comptroller as subject to serious questioning on separation of powers grounds.⁷¹

While one must take very seriously Messrs. Jaffee's and Nathanson's concern, it was expressed only as that and not as a judgment of condemnation. On balance, the GAO seems a permissible repository. The Constitution does not address removal expressly, and the constitutional limits on congressional control of removal of agency heads are constitutional common law.⁷² In the context of agencies meant to be independent of the political branches, there should be room for a wide variety of solutions to the removal problem. The Court has developed, and should continue to develop, the constitutional common law because it must create rules to balance power in light of its decisions permitting delegated lawmaking powers. "For cause" removal powers, which allow the President a meaningful, if non-initiatory, role, seem one reasonable way to balance power in the absence of textual constitutional prohibitions.

70. See 31 U.S.C. § 703(e)(1)(B) (1982). Additionally, as an "officer of the United States," the Comptroller General is subject to impeachment by the House of Representatives and conviction by the Senate.

The independent regulatory agencies often have commissioners or a director who, by clear statutory provision, can be removed by a President for specified cause. See, e.g., 49 U.S.C. § 10301(c) (1982) (President may remove a commissioner of the Interstate Commerce Commission for "inefficiency, neglect of duty, or malfeasance in office."); L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 162 (4th ed. 1976). In some cases a statute is silent as to removal, leaving an as yet unresolved uncertainty as to whether some additional Presidential removal powers are to be implied. *Id.* See, e.g., 15 U.S.C. § 78d(a) (1982) (specifying appointment but not removal process for members of Securities and Exchange Commission).

71. See JAFFEE & NATHANSON, *supra* note 70.

72. The phrase "constitutional common law" refers to the "substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions." Monaghan, *The Supreme Court 1974 Term—Foreward: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

3. *Mapping the Old Constitutional Text onto New Institutions: GRH, Chadha, and the Reagan Administration's View of Separation Powers*

Ranging well beyond the two specific arguments discussed above is the relationship of GRH to the Court's and the Reagan Administration's recent positions on separation of powers issues. In *Immigration and Naturalization Service v. Chadha*,⁷³ the Court declared unconstitutional the legislative veto, which had permitted Congress to allow either one or both houses, acting without Presidential participation, to repeal specified agency regulations. As often stated another way, the legislative veto conditioned the legal efficacy of agency regulations upon such legislative branch consent.

The Court concluded that, because the legislative veto determines the state of the law, it is legislation and its intended effects can be accomplished only by an act of both houses of Congress presented to the President.⁷⁴ In reaching such a conclusion, a majority of the Court seemed blind to the task at hand.⁷⁵ This task requires the Court to continue to give meaning to the Constitution after it has allowed a major structural departure from the document's provisions as originally understood. It is not clear that it is fair to characterize the legislative veto as the sort of thing the Framers had in mind in providing a process for legislation: The legislative veto was a check on a process that could not have existed under

73. 462 U.S. 919 (1983).

74. The Court applied U.S. CONST. art. 1, § 7, cls. 2, 3, which specify that laws are made by an affirmative vote of both houses and presentment to the President for a possible veto. 462 U.S. at 952-57. In doing so, it apparently concluded that any action of Congress aimed at altering legal relationships, other than those involving the internal affairs of the two houses of Congress, must either comply with the requirements of bicamerality and presentment in order to be valid or be within one of the few express constitutional exceptions. *Id.*

75. In a footnote, the majority attempted to respond to the assertion that the Court had sanctioned a departure from the Constitution by allowing Congress to delegate lawmaking power. 462 U.S. at 953 n.16. According to the majority, the fact that the statute which delegates lawmaking power also limits the delegate's authority distinguishes delegation from the legislative veto. *Id.* It is, however, undeniable that within the limits drawn by the statute the agency is free to convert policy choices into rules having the force of law. To the extent that the Court continues to allow the broadest delegations under the most vague standards, the majority's distinction between delegation and the legislative veto has little substance. It amounts to a justification of delegation on the grounds that *some* limits exist. To the extent that the Court anticipates tightening the requirements for standards, as suggested in *American Petroleum*, *supra* note 33, and *American Textile Manufacturers*, *supra* note 36, the distinction seems more coherent. Still, if the tightening is not so complete as to leave delegates with no major policymaking functions, delegation is more of a departure than the legislative veto.

the Constitution as originally understood. The majority did not seriously consider how the legislative veto enhanced or disturbed the balance of the relative powers of the branches in light of agency law-making. Instead, the Court resorted to the syllogism mentioned above—the legislative veto changes the law: therefore it is legislation.

It is as if early mapmakers, in attempting to “map” a flat map onto a globe, determined that they would preserve both the shapes and the relative areas of the continents, and then mapped to preserve only the shapes, deeming the areas to take care of themselves. Of course they do not: topologically both cannot be perfectly preserved.⁷⁶ One can preserve one or the other almost perfectly or distort both to some intermediate degrees, but a choice must be made, a choice best informed by the purpose at hand.⁷⁷ When the Court changed the topology of the Constitution by allowing virtually limitless delegation, it put itself in the position of having to make a choice between the literal application of other old rules to the new institutions that it sanctioned or the creation of new rules for the new institutions aimed at a similar interbranch balance as the old. The Court responded by making a choice while denying it was doing so.

Chadha may be part of a program of more literal or Framers-oriented constitutional interpretation, at least in the separation of powers area. If so, *Chadha's* unarticulated corollary must include some movement toward recognizing a meaningful delegation doctrine, one that would insist that Congress make the main policy choices and set intelligible limits on agency discretion. If this is the program of a majority of Justices,⁷⁸ then it is at least coherent as the product of evenhandedness in the application of a theory of constitutional interpretation, whether or not it is desirable in terms of practical effects or legal or political philosophy. If this is the direction of the Court, however, GRH seems ill starred unless the Court does conclude that the administrative apparatus makes a fairly mechanical decision in determining the size of the deficits.

On the other hand, it would seem inconsistent after *Chadha* for

76. *Mapping and Surveying*, 23 THE NEW ENCYCLOPEDIA BRITANNICA 522 (1985).

77. *Id.*

78. I am not suggesting that a majority of the Justices adhere, or even that any single Justice adheres, to a completely rigid Framers' intent-oriented theory of constitutional interpretation. There are degrees in these matters. A discussion of the voluminous current literature on the proper ways of construing our Constitution is beyond the scope of this article.

the Court to uphold GRH, if that Act is seen as conferring discretion to make momentous decisions. Such a decision would be based on a double standard of constitutional interpretation, allowing a departure from the one of the Constitution's most central provisions granting legislative power to Congress while not allowing the legislative veto, a more modest departure, designed as a check upon the first.

The Reagan Administration has been opinionated and active in connection with current constitutional issues, including those involving separation of powers. In *Chadha* it urged the unconstitutionality of the legislative veto. As for GRH, the President signed it while questioning its constitutionality,⁷⁹ and, as discussed above, the Justice Department plans to attack it under separation of powers doctrine.

The executive branch is also preparing the first serious challenge in nearly half a century to the constitutionality of the independent regulatory agencies.⁸⁰ Its grounds are nonadherence to the original view of government's three kinds of powers as consigned respectively to three branches, and, with express exceptions, relatively hermetically sealed therein. For example, Attorney General Meese, who has in general urged a return to the framers' "original understanding"⁸¹ as the test for constitutional interpretation, recently applied that view to the question of the legitimacy of independent regulatory agencies:

Federal agencies performing executive functions are themselves properly agents of the executive; they are not 'quasi' this or 'independent' that. In the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government.⁸²

This constitutional purist position, particularly as applied to separation of powers questions, seems based more on convenience than principle in light of other positions that the Administration has taken. The Administration has, of course, nowhere abjured power

79. 43 CONG. Q. 2604 (1985).

80. N. Y. Times, Nov. 6, 1985, at B8, col. 3.

81. *Id.*, Nov. 16, 1985, § 1, at 11, col. 1 ("Meese Says Some Judges Practice 'Chameleon Jurisprudence'"). For a description of the origins of the Administration's campaign and of the rare public responses by Supreme Court Justices to criticism, see *id.*, Oct. 28, 1985, at A12, col. 3 ("Administration Trolling for Constitutional Debate").

82. N. Y. Times, Nov. 16, 1985, § 1, at 11, col. 1.

on grounds that Congress cannot delegate its powers to the President, and, more particularly, it has sought delegated power to exercise a line-item veto of congressionally authorized expenditures.⁸³ Such a veto is an even clearer constitutional departure and abdication of legislative power than GRH.⁸⁴ Because the power to determine the level of spending was not originally understood as an executive function, it seems that Mr. Meese is willing to accept at least one convenient departure from the original understanding, while rejecting another, the safeguard of an independent delegate. Coherently, he can hold either his strict "original understanding" position as to constitutional interpretation or hold a view permitting broad delegation to the executive branch, not both.

In conclusion, if the Court reviews GRH on delegation grounds, *Chadha* may well have created a pressure for coherence which will tip the balance against such a massive surrender of congressional power. More broadly, it seems unlikely that, however the Court disposes of GRH, it will return radically to what the Administration has occasionally urged as dispositive "original understanding." At least with the Court as presently constituted, ordinary delegations of ordinary powers seem safe as does the existence of the independent regulatory agencies.

83. Most recently, President Reagan requested such authority in his 1986 State of the Union Address. Address Delivered Before a Joint Session of Congress, 22 WEEKLY COMP. PRES. DOC. 164 (Feb. 10, 1986). See also 43 CONG. Q. 1486 (1985); *id.* at 1415; N. Y. Times, May 4, 1984, at A19, col. 1.

84. While an attempt might be made to justify congressionally conferred line-item veto power as simply confirming inherent executive powers of impoundment, the cases and scholarly literature spawned by the impoundment crises during the Nixon administration suggest that such powers are much too narrow to support the line-item veto. See Quint, *The Separation of Powers under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1, 14-17 for a discussion of the case law. For a sampling of the scholarly literature, see Abascal and Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549, 1618 (1974); Mikva and Hertz, *Impoundment of Funds - The Courts, Congress and the President: A Constitutional Triangle*, 69 NW. U.L. REV. 335, 376-89 (1974); Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1534-35 (1973).