The constitutional challenge to the Gramm-Rudman bill

by Sanford Roberts and John Chambless

The first challenge to the constitutionality of the Gramm-Rudman budget-cutting bill took place on Jan. 10, as a special three-judge panel heard motions for dismissal and summary judgment in the consolidated actions of *Synar v. United States* and *National Treasury Employees Union v. United States*. The panel consisted of Circuit Judge Antonin Scalia, District Judge Oliver Gasch, and District Judge Norma Holloway Johnson.

Immediately following the passage of Gramm-Rudman, three suits were filed challenging the constitutionality of certain portions of the bill, one by a group of 11 congressmen led by Mike Synar (D-Okla.), the second by the National Association of Retired Federal Employees, and the third by the National Treasury Employees Union.

In all cases, what is being challenged is the constitutionality of mechanisms established in the bill, but not the bill's underlying concept: that the federal budget must be balanced—and debt-service payments to the banks be guaranteed—by savage cuts in defense and in the standard of living of the U.S. population. The idea that a balanced budget could instead be achieved through expanding the tax base, by increasing industrial and agricultural production, putting the unemployed and underemployed back to work at productive jobs, and gearing up a defense buildup to match that which the Soviet Union has under way, has somehow not suggested itself in Washington.

The mechanisms in question in these constitutional challenges, are those invoked by the bill in the event that the "automatic cuts" provision is triggered by a failure of the Congress to balance the budget. According to this provision, the Congress has mandated both the Office of Management and Budget and the Congressional Budget Office to prepare projections on the receipts and expenditures of the federal government. These are then presented to the comptroller general; if the two sets of projections do not agree, he takes a statistical average of the two, making that the basis for a report submitted to the President, who is then authorized to make the specified cuts. "*There is no legislative, judicial, or administrative recourse or appeal against the methods or assumptions in making the projections,*" the bill specifies.

Two constitutional issues were raised at the hearings by Alan Morrison, attorney for the congressional plantiffs, who carried the brunt of the argumentation: Gramm-Rudman involves an unconstitutional delegation of powers on the part of Congress, and it involves a violation of the constitutional principle of the separation of powers.

Congress throws in the towel

Morrison began by attacking Congress for its cowardice, in abdicating responsibility for the function allotted it under the Constitution. "Never before in the history of our Congress," he said, "has Congress said that it would not make the decisions that it is supposed to make and put the budget on automatic pilot. This is not what the Founding Fathers had in mind." Congress, he said, has found a way of cutting the budget without having to take the responsibility for the cuts when faced by angry constitutents back home.

Morrison argued there are certain powers which are "quintessentially legislative in nature," and that this is a "core function" under the Constitution. The idea, he reported, derives from Chief Justice John Marshall, in the case of *Wayman v. Southward*. Marshall was the third chief justice of the United States, who did more than any other individual to shape the republican concepts of constitutional law. It was he who enforced a vigorous interpretation of the Constitution, against the efforts of Thomas Jefferson and others to weaken the federal union. Marshall proclaimed that certain powers are so essential to the legislature, that they cannot be delegated.

Under Gramm-Rudman, Congress can pass an appropriation bill, and then that bill can be changed without the passage of another law. This, said Morrison, is a violation of Article 1, Section 7 of the Constitution, which defines the lawmaking procedure of Congress. For a law to be changed, another law must be passed, as was decided by the Supreme Court in 1983 in *Chadha v. INS*. The *Chadha* decision concerned the issue of a "legislative veto" that, the Court ruled, would have given Congress an unconstitutional power over the President.

Morrison further argued that Congress is also delegating

its power to make appropriations, and is thus violating Article 1, Sections 7 and 8. In response to a question from Judge Scalia concerning cases in which executive agencies make the decisions, Morrison answered that Congress is not, in this case, passing mere regulations that are then enforced by executive action. In Gramm-Rudman, as Morrison pointed out, there is not a word concerning standards to be used by those making the decisions, and the people who will make the actual decisions are not part of the legislative body.

Morrison's presentation was interrupted numerous times by the panel, primarily Judge Scalia, whose questions and remarks were extremely negative toward Morrison's arguments, indicating that a positive decision on this particular issue is unlikely.

The separation of powers

The second point raised by Morrison is that Gramm-Rudman violates the constitutional principle of separation of powers. The Gramm-Rudman process is one of "shared administration" of the law, and such sharing is unconstitutional. He argued that the real power in this legislation lies with the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO), and that the General Accounting Office (GAO), headed by the comptroller general, performs a mere "umpire" role in case of disagreement. But regardless of the GAO's specific role, it is a legislative office which will be performing an executive function. Morrison suggested that it was concern about the OMB which prompted Congress to bring in the CBO and GAO, in an attempt to have some say in how the act will be administered. This, he argued, violates the separation of powers.

The other lawyer for the plaintiffs was Lois Williams, representing the National Treasury Employees Union. To the surprise of all, the court challenged the standing of the NTEU, that is, the right of the union to sue, even though it had not previously been challenged by the Justice Department. Williams was given five days to prepare a new brief arguing why NTEU should be given standing. Williams argued that the primary issue was the "automatic pilot" provision of Gramm-Rudman. She argued that the President will be empowered by the bill to make legislative decisions, another form of violation of separation of powers.

The Justice Department was represented by Assistant Attorney General Richard Willard, and took the curious position of defending Gramm-Rudman against the attacks from the plaintiffs, while maintaining that the bill is unconstitutional on other grounds. The DoJ's attack on the bill centers on the role of the comptroller general, a legislative officer who, it claims, will be given executive powers and will be able to "give orders to the President," and become "the President's boss." President Reagan himself questioned the bill's constitutionality on this basis when he signed it—but he signed it anyway!

Representing the comptroller general's office was attorney Lloyd Cutler, the Trilateral Commission member who has made a career of subverting the U.S. Constitution and replacing our form of government with the British parliamentary system. Cutler argued that the comptroller general is the historical successor of the comptroller of the treasury, and is thus an independent office and not an agent of the legislative branch. Judge Scalia pointed out in response that, since the comptroller general can be removed from office by a joint resolution of Congress, he is therefore an agent of the Congress, and again raised what he referred to as the "Chadha problem"—that is, a legislative official performing an executive act.

The next round

The consensus among observers was that Judge Scalia will make the decision and the other two judges will merely ratify what he decides. Scalia, in the words of one reporter, mounted "an aggressive defense of the statute." Judge Scalia, who is frequently mentioned as President Reagan's possible next appointee to the U.S. Supreme Court, is a short, burly man in his forties. His manner is aggressive and rather jesuitical, and it is clear that he is the dominant force on the panel.

The options open to Scalia are twofold: He can deny standing to the plaintiffs and throw out the case altogether, putting the entire question on hold until March 1, when the bill's so-called sequestration orders go into effect (freezing government funds until the computers produce a solution), at which time it is arguable that every man, woman, and child in the United States will have "standing" to challenge the law. In this case, there will probably be no appeal, since, by the time an appeal could be reviewed, heard, and decided, March 1 would have been long past.

The second option is to pass over the standing issue and decide the case on its merits. It seems likely that Judge Scalia will decide against the plaintiffs' arguments that the delegation of authority is unconstitutional, but may strike the statute on the issue of the separation of powers. The key question for Scalia seems to be, not the constitutionality of locking the budget into "automatic pilot," but rather, who is sitting in the pilot's seat. Any decision on merits will be appealed, and will be afforded an expedited appeal to the Supreme Court.

Whatever the results of these deliberations, the more fundamental issue of Gramm-Rudman will remain untouched. It is not merely the Gramm-Rudman mechanisms that are unconstitutional, but the bill itself—including the "fallback" version proposed by Synar et al. The Constitution established as the purposes of government, "to promote the general warfare," to promote "the progress of science and the useful arts," and to "provide for the common defense." Gramm-Rudman dictates the dismantling of any and all government activity directed toward those ends, to provide for usurious debt payments to the banks.