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violates the doctrine of separation of powers and is without legal force and effect. The court specifically stated, however, that this order was without prejudice to the implementation of a fallback deficit reduction procedure in Gramm-Rudman under which sequestration is to be accomplished pursuant to a joint resolution of Congress. As provided for in the Gramm-Rudman Act, the panel stayed the effectiveness of its decision pending appeal to the Supreme Court.

## II. CONSTITUTIONAL ISSUES

This litigation raised three constitutional issues:

- (a) whether the Synar plaintiffs and the NTEU have standing to bring suit testing Gramm-Rudman's constitutionality;
- (b) whether Gramm-Rudman's automatic sequestration procedure results in an unconstitutional delegation of Congress's lawmaking powers; and
- (c) whether the procedure violates the constitutional principle of separation of powers.

### A. Standing

The court held that the Synar plaintiffs met the constitutional tests for standing because the automatic deficit reduction procedure interfered with their duty to enact laws regarding federal spending. The panel based its ruling on U.S. Court of Appeals cases in the District of Columbia Circuit and noted that prudential considerations that might otherwise limit

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review were not applicable because an express provision in the statute granted standing to congressional plaintiffs.<sup>1/</sup> The district court also found that the NTEU plaintiffs had standing.

B. Delegation

The NTEU and Synar plaintiffs argued that Gramm-Rudman's sequestration procedure unconstitutionally delegates Congress's power to set and change spending laws to administrative officials in the Congressional Budget Office and Office of Management and Budget and to the Comptroller General because sequester orders based on their reports amend existing laws which govern spending. In order to address the delegation issue, it is necessary to review the sequestration procedures under Gramm-Rudman. Section 252 of the Gramm-Rudman Act sets forth the Act's procedure for the issuance of sequester orders. See Appendix A.

Under the procedure, the Congressional Budget Office ("CBO"), a legislative branch agency, and the executive branch's Office of Management and Budget ("OMB") shall prepare a report to estimate budget base levels of total revenues and budget outlays to determine whether the deficit will exceed the maximum deficit amount specified for that fiscal year and to estimate real economic growth (in certain cases where real economic growth is zero as reported by the OMB and CBO or one percent or less as reported by the Department of Commerce the

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<sup>1/</sup> This finding does not appear to be relevant to the case of Melcher v. FOMC where the issue was the exercise of equitable discretion in granting standing to Senatorial plaintiffs.

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deficit reduction procedure is suspended). If the agencies determine the reduction target will not be met, they formulate a report of further reductions to meet the target. The Comptroller General reviews and considers the OMB-CBO report and issues his own report to the President making the same type of estimates and determinations as are in the OMB-CBO report. The Comptroller General's report is to be based on the OMB-CBO report, give due regard to the data, and assumptions and methodologies in that report and must explain any differences from it. The President then issues a sequester order that implements the Comptroller General's report. The President has no discretion to reject or alter the Comptroller General's report. The sequester order becomes law unless Congress passes a reconciliation bill or resolution within thirty days. A presidential veto of a reconciliation bill or resolution will revive the President's sequester order unless the veto is overridden by a two-thirds vote by Congress.

The three-judge panel upheld this procedure noting that the Supreme Court has not applied the doctrine limiting delegations of legislative power to strike down legislation since the 1930s when it was applied to overturn New Deal legislation and noted that Gramm-Rudman is remote from legislative abdication and provides an adequate, intelligible principal to guide administrative decision-making and therefore meets the constitutional standard for delegation of powers.

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C. Separation of Powers

The Justice Department argued that Gramm-Rudman confers executive powers upon the Comptroller General, but the Comptroller cannot constitutionally exercise them because Congress can remove him by a joint resolution and he therefore lacks the independence from Congress that the Constitution requires for the exercise of executive powers.

The court agreed with the Justice Department and found that the sequestration procedure was unconstitutional because it violates the constitutional principle of separation of powers. The court noted that the Comptroller General's enabling statute allows Congress to remove him despite presidential opposition and suggested that this provision has the effect, and presumably the immediate purpose, of requiring the Comptroller General to look to the legislative branch rather than to the President for guidance. Having found essentially that the Comptroller General is in the legislative branch, the court noted that under Gramm-Rudman the Comptroller General must exercise judgment in determining the anticipated revenues and expenditures giving rise to the deficit and must interpret Gramm-Rudman to determine specific budget cuts. Both of these determinations are binding on the President. The court viewed the exercise of these powers as the exercise of executive powers which cannot be exercised by an officer removable by Congress. Consequently, the court held that the

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provision violated the constitutional requirement for separation of powers.

### III. FALLBACK PROCEDURE

The panel did not address the fallback procedure under Gramm-Rudman, but stated that it saw no reason to doubt its constitutionality. Under this mechanism, the OMB and CBO continue to prepare deficit estimates and a list of budget cuts, but the Comptroller General is eliminated from the process; instead, the OMB and CBO send their estimates to a temporary joint committee of Congress. This committee reports a joint congressional resolution within five days, and Congress follows the usual procedure for adopting legislation. In sum, the fallback procedure essentially copies the present process for creating the federal budget. See Appendix B. The fallback procedure may not be effective as Congress may simply not agree on the appropriate reductions.

### IV. APPEAL TO THE SUPREME COURT

An appeal from The Synar and NTEU suits will likely be heard by the Supreme Court in March or April and ruled on by early July. It is probable that the Supreme Court will find that at least the NTEU plaintiffs have standing. There is also a substantial likelihood that the Court will uphold the district court's decision that Gramm-Rudman violates the constitutional principle of separation of powers but does not constitute an impermissible delegation of congressional powers.

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The Court has not overturned a law due to improper delegation for fifty years or since the New Deal Era, and it is unlikely that the scope of delegation in this case is sufficiently unique to lead to a different result. In contrast, the Court has been much more sensitive to problems arising out of the separation of powers doctrine. In the 1983 decision of I.N.S. v. Chada, 462 U.S. 919 (1983), the Court struck down a legislative veto scheme which allowed one house of Congress to nullify executive branch decisions concerning deportation of aliens, and in effect, share powers with the executive branch because it violated the doctrine of separation of powers. In 1976 in a case more directly on point involving the Federal Election Commission, the Court struck down the appointment procedures for the Commission because Congress was to appoint some members to perform executive functions. Buckley v. Valeo, 424 U.S. 1 (1976). These and other cases suggest that the Supreme Court will adhere to the doctrine of separation of powers and apply it in this case to strike down the sequestration process.

V. A PRELIMINARY ASSESSMENT OF RELEVANCE TO THE FEDERAL RESERVE SYSTEM

One other aspect of the panel's decision in this case is worth noting. The court's proposition that the Comptroller General is an officer of the legislative branch because he is removable by Congress by joint resolution and without the

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concurrence of the President seems comparatively straightforward. Nevertheless, in reaching this conclusion, the court engaged in a lengthy discussion of the powers of the President to remove officers of various governmental agencies. This discussion suggests that this district court believes that the President has the inherent power to remove officers of independent regulatory agencies for failure to accept presidential instruction. This view is contrary to language in at least one Supreme Court case, Humphrey's Executor v. United States, 294 U.S. 602 (1935), which the panel discussed extensively and criticized. Humphrey's Executor held that the President had no right to remove a member of the Federal Trade Commission. The Supreme Court reasoned that the Federal Trade Commission was a legislative and judicial agency and that the ability of the President to remove its members for reasons other than those specified by Congress threatened its independence. The Court distinguished the Federal Trade Commission from purely executive officers who may be removed by the President without cause.

Humphrey's Executor has long stood as a precedent for judicial recognition of the existence of independent governmental entities such as the Federal Reserve System (the Federal Reserve Act has no provision for the removal of Governors). Although the panel's opinion cannot override Humphrey's Executor, it indicates that the District Court for



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the District of Columbia may be reluctant to recognize the status of independent Federal agencies in future litigation. This line of reasoning must be kept under careful review in future developments of this case to assess its impact on the Federal Reserve System.

APPENDIX A

GRAMM-RUDMAN'S AUTOMATIC DEFICIT REDUCTION PROCEDURE

CBO + OMB  
(leg.) (exec.)

Prepares deficit estimates to determine whether the reduction level specified in Gramm-Rudman will be met; and if not, formulates a list of further cuts to meet the level.

GAO  
(leg.)

Reviews CBO-OMB estimates and prepares a final list of cuts based on them; the list specifically calculates the amount of money which must be removed from each program to reduce the deficit from the estimated level to the level required by Gramm-Rudman. Directs the President to issue a sequester order which enforces the list of cuts.

President

Issues a sequester order which implements the GAO list; the President has no discretion to reject or alter the list.

Sequester Order

Becomes law unless Congress passes a reconciliation bill or resolution within 30 days.

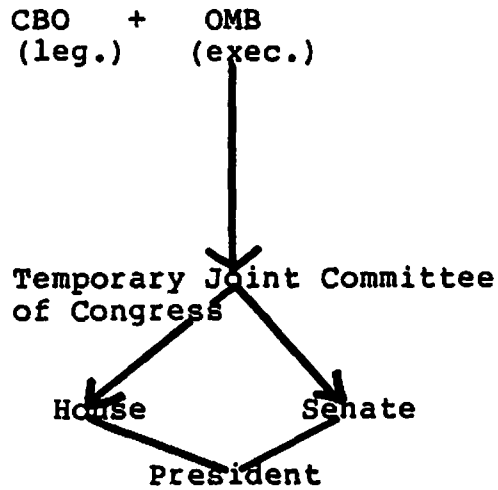
Congress

President

A presidential veto of a reconciliation bill or resolution will prevent its adoption unless it is overridden by a 2/3 vote by Congress.

APPENDIX B

GRAMM-RUDMAN'S FALLBACK PROCEDURE FOR REDUCING THE BUDGET



Prepares deficit estimates to determine whether the reduction level specified in Gramm-Rudman will be met; and if not, formulates a list of further cuts to meet the level.

Reports a joint resolution to Congress; the usual procedure for enacting federal laws is then followed.