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Message:

The Judicial And Congressional Response to the Invalidation of the Legislative Veto

*by John R. Bolton and Kevin G. Abrams**

I. Introduction

FOR THE past fifty years, Congress has placed increasing reliance on various forms of the legislative veto to control the exercise of delegated authority in virtually every area of government activity.[1] These statutory provisions were designed to permit one or

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* John R. Bolton is a partner at Covington & Burling and Kevin G. Abrams is a student at the University of Virginia.

[1] Congress has utilized an exceedingly complex variety of legislative veto mechanisms to control the activities of the executive and independent agencies. As many as five major and six minor types of veto procedures have been enacted by Congress. See Hearings on Administrative Procedure Act Amendments of 1978 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 860 (1978) (Congressional Research Service report). Almost all the disapproval provisions require only simple or concurrent resolutions, which need not be presented to the President for signature or veto.

Some of these statutes provide for Congressional disapproval of proposed administrative regulations. Some involve review of decisions of individual cases (*Chadha*, for example, involved the suspension of the deportation of a single person), or review of other executive actions under authority granted by statute. Other legislation, such as the War Powers Resolution, involves the allocation of broad constitutional powers.

The legislative vetoes in all these statutes fall into two general categories. First, there are those in which the full Congress, or one House or one committee, is purportedly given a right to "veto" an administrative action. A typical statute of this kind requires the President to report an action or rule to both Houses of Congress. The executive action may not be made or take effect until after a fixed period (60 days, for example). If Congress does not act during the period, the executive action can take effect, but if the Congress disapproves (or one House or committee, as the statute may provide), it does not take effect. Second, there are statutory schemes by which an administrative action purportedly becomes valid only when approved by Congress. The typical statute of this kind requires the President to report a proposed action and then provides for affirmative approval by one or two Houses of the Congress. Most legislative vetoes, like the one in *Chadha*, fall within the first category.

Legislative Veto: Arms Export Control Act, Hearing Before the Senate Committee on Foreign Relations, 98th Cong., 1st Sess. 18 (1983) (statement of Kenneth W. Dam, Deputy Secretary of State)

both Houses of Congress, or even a committee, to disapprove an action undertaken by the President or an administrative agency pursuant to authority delegated by a general statute.[2] Most provisions were added in the 1970's after Congress became determined to play an expanded role in the postenactment process of formulating and executing the policies and programs of the federal government.[3] While the legislative veto has enjoyed widespread support in Congress, particularly in the House of Representatives, the Supreme Court decisions last summer in *Immigration & Naturalization Service v. Chadha* and two related cases effectively declared all legislative veto provisions unconstitutional.[4]

This article will address the possible responses by the courts and Congress in the wake of *Chadha*. After a brief review of the highlights of the *Chadha* opinion, the next section of the article will explore the ramifications of the Court's severability analysis on the continued validity of the more than one hundred statutes containing veto provisions. The following section analyzes the availability and utility of the numerous techniques which may be exercised by Congress to control administrative decisions and policies. This survey of the constitutionally acceptable alternatives to the legislative veto will set the stage for the argument in the final section of the article. We believe Congress may best respond to *Chadha* by repealing all of the outstanding veto provisions and undertaking the responsibility

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[hereinafter cited as the Foreign Relations Hearing]. See also J. Bolton, The Legislative Veto: Unseparating the Powers 1-2 (1977); Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983, 984-1029 (1975); Javits & Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N.Y.U. L. Rev. 455, 456-58 (1977).

[2] As used herein and unless otherwise indicated, "agency" denotes both the units of the Executive Branch directly responsible to the President and the "independent" agencies which have been shielded by Congress from presidential supervision.

[3] Approximately 210 laws containing some 320 separate veto provisions have been enacted since 1932 and over 120 federal statutes contain one or more veto provisions. Rosenberg, Congressional Life After *Chadha*: Searching for an Institutional Response, CRS Review 5 (Fall 1983) [hereinafter cited as Rosenburg]. See also C. Norton, Statistical Summary of Congressional Approval and Disapproval Legislation, The Library of Congress, Congressional Research Service (January 12, 1983).

[4] Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983) [hereinafter *Chadha*]; United States Senate v. Federal Trade Commission, 103 S. Ct. 3556 (1983) (hereinafter the *FTC* decision); Process Gas Consumers Group v. Consumers Energy Council of America, 103 S. Ct. 3556 reh'g denied 104 S. Ct. 40 (1983) [hereinafter the *FERC* decision] (summary affirmances of two lower court holdings that respectively declared unconstitutional a two-House veto of a FTC regulation and a one-House veto directed against a FERC rule); see also American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (holding unconstitutional a veto by a congressional committee of an authorized expenditure of funds).

for enacting narrower and more precise limitations on the exercise of delegated authority.

II. The Chadha Decision

The *Chadha* case involved the passage of a single resolution by the House of Representatives which purported to reverse the Attorney General's decision on the immigration status of an alien who had successfully applied for administrative relief from a deportation order. In a long-anticipated ruling,[5] The Court focused its attention on the constitutionality of the legislative veto.

Writing for the majority, Chief Justice Burger summarily disposed of a number of procedural challenges to the Court's authority

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[5] Jagdish Chadha commenced his effort to avoid deportation for overstaying his visa in 1973, when he requested suspension of deportation under section 244 of the Immigration and Nationality Act (INA). This statute, INA § 244 (a)(1), 8 U.S.C. § 1254(a)(1) (1982), permits the Attorney General of the United States to suspend the deportation of an otherwise deportable alien if certain factors establish "extreme hardship." An immigration judge of the Department of Justice's Immigration and Naturalization Service, acting pursuant to a delegation of authority by the Attorney General, found that Kenya's unwillingness to receive him (since he had declined an opportunity to elect citizenship in that country) and Chadha's difficulty in obtaining admittance to Great Britain supported such a finding. Accordingly, the immigration judge suspended Chadha's deportation and transmitted a report to Congress pursuant to INA § 244(c), 8 U.S.C. § 1245(c) (1982), which also provides for a one-House veto of Immigration and Naturalization Service decisions during the following two sessions of Congress.

Only three days before the deportation proceeding would have been cancelled and the suspension order finalized, the House of Representatives passed without significant debate an unprinted resolution to repudiate the determination of the immigration judge. The resolution had the effect of restoring the effectiveness of the final deportation order which had been entered previously. Following dismissal of his appeal to the Board of Immigration Appeals (which held it had no power to declare unconstitutional an act of Congress), Chadha petitioned for review of the reinstated deportation order in the United States Court of Appeals for the Ninth Circuit. When the Immigration and Naturalization Service joined Chadha in arguing the unconstitutionality of the legislative veto provision INA § 244 (c)(2), 8 U.S.C. § 1254(c)(2) (1982), the Ninth Circuit invited both the Senate and House of Representatives to file briefs *amici curiae*. The Ninth Circuit determined that the legislative veto provision violated the separation of powers doctrine and ruled that the House was without constitutional authority to order Chadha's deportation. Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980).

The decision of the Ninth Circuit was issued on December 22, 1980. The Supreme Court granted certiorari and the case was argued initially on February 22, 1982. In a rare development, the Court (over two dissents) ordered reargument of the case, see 102 S. Ct. at 3507 (1982) (Brennan and Blackmun, J.J., dissenting), which was held on December 7, 1982. The decision was announced on June 23, 1983.

Questions involving the legislative veto were raised in several cases prior to *Chadha*, but the Court did not provide a definitive resolution as to the constitutionality of the device. See, e.g., Buckley v. Valeo, 424 U.S. 1, 140 n.176 (1976); Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (en banc), aff'd mem. sub. nom. Clark v. Kimmett, 431 U.S. 950 (1977).

to reach and resolve the substantive question of the case.[6] Challenges were raised as to the Court's jurisdiction, Chadha's standing, the effect of the availability of other statutory avenues of relief for Chadha, the lack of jurisdiction of the lower court, the absence of case or controversy, and the presence of a political question. After determining that the parties were properly before the Court, the majority turned to the central issue of whether an action by one House of Congress to disapprove a determination by an executive officer pursuant to authority delegated by Congress violates the strictures of the Constitution.

At the outset, the Chief Justice acknowledged the widespread usage of the veto device and the view of many that it constitutes a "useful 'political invention.' "[7] Nevertheless, the majority swiftly rejected the variety of pragmatic justifications for the device which were presented by congressional *amici*. Arguments couched in terms of efficiency, convenience, and utility were deemed insufficient in the face of explicit and unambiguous constitutional provisions prescribing the respective functions of Congress and the President in the legislative process.

For six members of the Court, the critical inquiry turned on the nature of the veto itself. Their analysis focused on whether the legislative veto is a species of lawmaking, and, if so, whether there is any reason to justify not holding this variety of lawmaking to the traditional requirements for passing a law.[8] To answer this question, the majority examined the nature and purpose of the lawmaking process defined in the Constitution.

Relying on the express terms of Article I, §§ 1, 7 of the Constitution and the deliberations of the Framers, the majority held that the prerequisites to the enactment of legislation are: (1) the bicameral consideration of the proposal by Congress; and (2) the presentation of the product to the President for signature or veto.[9] Chief Justice

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[6] See Chadha, 103 S. Ct. at 2772-80. Chief Justice Burger's majority opinion was joined by Justices Brennan, Marshall, Blackmun, Stevens, and O'Conner. Justice Powell wrote an opinion concurring in the judgment. Justice White filed a dissent and joined in another dissent filed by Justice Rehnquist.

[7] Id. at 2781 (quoting id. at 2795 (White, J., dissenting)).

[8] Id. at 2784-87.

[9] The justifications for the Presidential veto cited by Chief Justice Burger included its importance as a defensive mechanism against legislative intrusion on Presidential power, as a check against ill-

Burger reasoned that the choice of a narrow and burdensome path for congressional activity was dictated by the Framers specifically to restrain the exercise of power. Taking a literal view of the terms of Article I, the majority stated that the Framers intended that all exercises of legislative power having the substantive effect of legislation must follow "a single, finely wrought and exhaustively considered, procedure" for lawmaking — irrespective of the form of congressional action.[10]

In the view of the majority, the act of reversing the Attorney General's decision to suspend deportation, like the initial grant of authority to make that decision, "involves determinations of policy that Congress can implement. . . only" by lawmaking: "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."[11] To underscore the need for compliance with the requirements of bicameralism and presentment, the Court stated on two occasions in this section of the opinion that the Constitution does not give Congress the power to repeal or amend laws other than by legislative means comporting with Article I.[12] In a lengthy footnote, the Court concluded that "Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto."[13]

Having reviewed the constitutional requirements for enacting legislation, the Court then turned to the critical task of defining a "legislative act." The Court specified that any action having "the purpose and effect of altering legal rights, duties and relations of persons. . .outside the legislative branch" must be adopted through the constitutionally mandated lawmaking process.[14] The breadth of

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considered legislation, and to assure the presence of a national perspective. Id. at 2782-83. The bicameralism requirement was emphasized as a means of ensuring the careful consideration of the proposals by the Congress, its utility as a device which divides and disperses power in order to protect liberty, and to protect the interests of large and small states. Id. at 2783-84.

[10] Id. at 2784.

[11] Id. at 2786.

[12] Id. at 2785 & n.18.

[13] Id. at 2785 n.16.

[14] Id. at 2784 (answering the question of whether the action "is properly to be regarded as legislative in its character and effect."). For commentary critical of the "altering legal rights" inquiry employed by the majority in *Chadha*, see Strauss, Was There a Baby in the Bathwater?: A Comment on the Supreme Court's Legislative Veto Decision, 1983 Duke L.J. 789, 795-801; The Supreme Court,

this definition was emphasized by the majority's explicit recognition that only four exceptions in the Constitution allow action by a single House of Congress.[15] The "narrow, explicit and separately justified" nature of these exceptions demonstrated to the majority the Framers' intention to specify clearly the constitutionally authorized departures from the prescribed process of lawmaking.[16] Since none of the constitutional provisions sustained the legislative veto as a justifiable exception, the majority applied its all-embracing definition of a "legislative act" to hold the legislative veto inconsistent with the premises of the American constitutional structure.[17]

1982 Term, 97 Harv. L. Rev. 185, 191-92 (1983).

[15] Chadha, 103 S. Ct. at 2786-87 (referring to the initiation of impeachments by the House, the Senate's power to conduct impeachment trials on charges initiated by the House, the Senate's power to confirm presidential appointments, and the Senate's power to ratify treaties submitted by the President).

[16] Id. at 2787. Presumably, only those legislative actions specifically excepted by the Constitution escape the sweeping terms of the *Chadha* opinion.

[17] Id. at 2788. Justices White and Rehnquist dissented from the Court's judgment.

Justice White attacked the majority's recognition of the legislative veto as a species of lawmaking and vigorously objected to the reach of the decision. Id. at 2792-2816. Under Justice White's pragmatic view of the modern administrative state, the legislative veto is "a central means by which Congress secures the accountability of executive and independent agencies," id. at 2793, and "an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking." Id. at 2795.

Directly challenging the majority's determination that all "legislative" action must conform to the requirement of Article I, Justice White recognized that "legislative authority is routinely delegated to the Executive Branch, to the independent regulatory agencies and to private individuals and groups," and that such congressional delegations of legislative power have been upheld repeatedly by the Court. Id. at 2801. Justice White contended that federal agencies act outside the scope of Article I in making law and observed that "[i]f Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check on legislative power for itself." Id. at 2802.

Justice White then proceeded to argue that even if the legislative veto is the functional equivalent of legislation, its use satisfies the principles underlying the bicameralism and presentment clauses. The core of this argument is the recognition that "a change in the legal status quo"—suspension of the deportation order—could not be effected under the legislative veto scheme without the approval of the President (through the recommendation of his subordinate—the Attorney General) and both Houses of Congress (since either body could effectively enforce the deportation order by passing a resolution of disapproval, the failure to veto indicates Congressional approval). Justice White viewed the ability of one House to block the suspension of deportation proposal under the legislative veto scheme as no different from the ability of either House to block deportation suspensions under the pre-veto statutory format, which required both Houses of Congress and the President to act affirmatively in enacting a private immigration bill. Id. at 2804-08. Thus, the veto mechanism simply inverts the standard process of legislation (since the President is the source of the action subject to the veto), while continuing to satisfy the premises of Article I because of the need to secure the acquiescence of all three actors to alter the status quo.

Chief Justice Burger addressed Justice White's two main arguments in separate footnotes. While

The application of the legislative veto in *Chadha* was particularly objectionable because it resulted in legislative review of an individual adjudication without the benefit of the normal procedural safeguards. Some believe that the Court should have chosen a narrow ground for the *Chadha* decision and thereby preserved the constitutional validity of the device as applied in other contexts.[18] However, the Court correctly made no effort to circumscribe the reach of the holding in *Chadha*.[19]

Because compliance with the bicameralism and presentment requirements of Article I was found to be an inextricable element of the discerned constitutional purpose of constraining the exercise of legislative power, every congressional veto provision was immediately suspect after this decision — regardless of the manner of its

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conceding that rulemaking may resemble lawmaking, the Chief Justice attempted to distinguish the two practices by arguing that the former is subject to check by the terms of authorizing legislation, judicial review, and subsequent Congressional enactments. Id. at 2785 n.16. Since lawmaking by Congress is subject only to the checks imposed by the Constitution, the Chief Justice resorted to his view of the equivalence between the identity of the House and the character of its action by arguing that any action—like a one-House veto—which is "legislative in character and effect" must comply with the requirements of Article I. Id.

Chief Justice Burger responded in the final footnote of his opinion to Justice White's main argument that the legislative veto scheme inversely satisfies the presentment and bicameralism requirements of Article I. Id. at 2787 n.22. After noting that Justice White's dissent contained an "arcane theory," the Chief Justice stated that the steps required by Article I "make certain that there is an opportunity for deliberation and debate." Id. He found Justice White's theory wanting on these grounds with Article I because the failure of Congress to disapprove an Executive proposal for legislation by exercising a veto would "allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence. . . ." Id.

Justice Rehnquist, joined by Justice White, also dissented from the judgment. Despite the presence of a severability clause in the Immigration & Nationality Act, see infra note 23, Justice Rehnquist concluded that the legislative veto clause was inseverable from the statutory scheme giving the Attorney General the power to suspend deportation. Id. at 2816-17. Assuming that Chadha could have successfully challenged the constitutionality of the veto clause, a finding of inseverability would result in the invalidation of the deportation relief procedure. Thus, Justice Rehnquist argued that Chadha could not have benefited from the outcome and would have reversed the judgment of the Ninth Circuit.

[18] Justice Powell concurred in the result in *Chadha*, but would have decided the case on narrower grounds. He argued that Congress impermissably assumed a judicial function in determining that a particular person is eligible for suspension of a deportation order, and demurred on the broader question as to whether the legislative veto was invalid under the Presentment Clause. Id. at 2788-92. The majority differed from Justice Powell in its determination that the action taken by the House "was essentially legislative in purpose and effect" and therefore subject to Article I. Id. at 2784-85.

[19] In his concurring opinion, Justice Powell commented that the Court's decision "apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause." Id. at 2788. Justice White, writing in dissent, recognized the "surpassing importance" of the decision because it ". . .sounds the death knell for nearly 200 other statutory provisions in which Congress had reserved a 'legislative veto.'" Id. at 2792.

exercise or the subject matter which it covered. Subsequent decisions confirmed this interpretation of the *Chadha* opinion. Less than two weeks after issuing the *Chadha* decision, the Court brushed aside a series of alternative arguments regarding the validity of the veto and bypassed the opportunity to qualify the scope of its opinion.

The Court's summary affirmance of the opinions by the United States Court of Appeals for the District of Columbia in *United States Senate v. Federal Trade Commission* and *Process Gas Consumers Group v. Consumers Energy Council of America* conclusively demonstrated the invalidity of the legislative veto.[20] In these cases, the principles of the *Chadha* decision were applied to invalidate vetoes exercised against executive and independent agencies and to unicameral and bicameral disapproval statutes. No variant of the legislative veto survives the constitutional holding in *Chadha* and its progeny. The reliance by the Court on the Presentment Clause rationale is the key to the Court's resolution of the three cases. This line of analysis undercuts every type of legislative veto. Even though the most definitive type of legislative veto — a concurrent or two-House resolution of approval or disapproval — satisfies the bicameralism requirements of *Chadha*, this device does not satisfy the requirement of presentation to the President. The *Chadha* majority recognized that any congressional effort to veto an otherwise permitted executive or agency action constitutes an act of legislative power which may be exercised only as provided in Article I. Accordingly, the decision by a solid majority of the Court to invalidate the legislative veto squarely places the responsibility on both the lower federal courts and Congress to respond.

III. The Judicial Response: Severability Analysis

Since *Chadha* and its progeny have invalidated all types of legislative veto provisions which do not satisfy the presentment and bicameralism requirements, the severability of each of the legislative veto provisions from their accompanying statutes is the only outstanding issue which remains to be decided. The federal courts now have the difficult task of determining whether each and every statu-

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[20] FTC, 103 S. Ct. at 3556; FERC, 103 S. Ct. at 3556.

tory veto provision can be isolated or severed from the accompanying delegation of authority, or whether the act or part of the act that incorporates the veto provisions is so interdependent or inseparably connected to the veto that both must fall.[21]

The importance of resolving the severability question should not be underestimated. Numerous suits challenging the exercise of authority under statutes containing veto provisions have been initiated on the theory that the unconstitutional segment cannot be severed from the general grant of authority and, therefore, the entire statute is invalid. The severability question also implicates the balance of power between the executive and legislative branches of government. Excission of a particular veto provision will leave the executive agency with a greater degree of unencumbered power and present Congress with the possibility that it will have to muster two-thirds majorities to retrieve a delegated authority which the President wishes to retain. For these reasons, the framework utilized by the majority in *Chadha* to analyze the severability question deserves special attention.

A. The *Chadha* Decision and the Three-Factor Test for Severability

The general rule of severability analysis established in earlier cases and reaffirmed by the Court in *Chadha* is "that the invalid portions of the statute are to be served 'unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' "[22] Although the key inquiry still revolves around the determination of whether Congress would have enacted the remainder of the statute in the

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[21] At least initially, a reviewing court must overcome its reluctance to consider a case in which no legislative veto has been exercised. Questions involving ripeness and other prudential considerations have prompted at least one court to withhold a decision on the merits of a challenge to a veto provision which had not yet been exercised. See Clark v. Valeo, 559 F.2d 642, (D.C. Cir.) (en banc), aff'd mem. sub nom. Clark v. Kimmit, 431 U.S. 950 (1977). However, the definitive nature of the Court's ruling in *Chadha* should overcome the earlier judicial hesitation to render such judgments and result in widespread consideration of legal challenges to the exercise of authority pursuant to statutes containing veto provisions. See id. 559 F.2d at 648 n.5; Ehlke, The Legal Landscape after *INS v. Chadha*: Some Litigation Possibilities, CRS Review 28, 29 (Fall 1983).

[22] Chadha, 103 S.Ct. at 2774, citing Buckley v. Valeo, 424 U.S. 1, 108 (1976), quoting Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932).

absence of the unconstitutional provision, the Court in *Chadha* utilized a three-step process to address the severability issue.

The first factor to be considered is the presence or absence in the statute of a severability clause. These provisions, which are routinely added to statutes in boiler-plate fashion, typically provide that judicial invalidation of any provision of an act, or its application to any person or circumstances, does not affect the remainder of the act or even the affected provision as it applies to other persons or in other circumstances.[23] The Court emphasized the importance of the presence of the severability clause as evidence that "Congress itself has provided the answer to the question of severability."[24] A severability clause creates a "presumption that Congress did not intend the validity of the Act as a whole, or any part of the Act, to depend on whether the [challenged veto provision] was invalid."[25]

Although the presence of a severability clause creates a presumption in favor of excising the offensive portion of the statute, the Court's analysis indicates that the simple presence of severability language in the statute does not conclusively resolve the inquiry.[26] The second factor lower courts will consider in the wake of *Chadha* is whether the presumption of severability conforms to the intent of the lawmakers. This "elusive inquiry" requires an examination of the statute's legislative history for evidence that either supports or rebuts the presumption of severability.[27] In the face of the severability clause, the presumption in favor of excission may be overcome by the demonstration that Congress *clearly* would not have enacted the statute in the absence of the offensive veto provision.[28] Although

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[23] The severability clause in the Immigration and Naturalization Act § 406, 8 U.S.C. §1101 (1976), which was at issue in *Chadha*, contained the following language:

> If *any* particular provision of this Act, or the application thereof to *any* person or circumstance, is held invalid, *the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.*

Chadha, 103 S. Ct. at 2774 (emphasis in original).

[24] Id.

[25] Id.

[26] The Court has held consistently that the presence of a severability clause does not conclusively resolve the issue. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936); United States v. Jackson, 390 U.S. 570, 585 n.27 (1968).

[27] Chadha, 103 S. Ct. at 2774. See also Consumers Energy Council v. FERC, 673 F.2d 425, 442 (D.C. Cir. 1982) aff'd sub nom. Process Gas Consumers Group v.Consumers Energy Council of America, 103 S. Ct. 3556, reh'g denied, 104 S. Ct. 40 (1983).

[28] Many statutes contain severability clauses which are more narrowly drawn than the one at issue

the Court did not address the inquiry which would be utilized in the absence of a legislative declaration of severability, a statute of this type presumably would import neutrality or a clean slate unencumbered by a presumption of any kind, and require reviewing courts to place special emphasis on any evidence of the intent of the lawmakers concerning severability.[29]

The final factor to be considered in conducting the severability analysis is whether the statute "survives as a workable administrative mechanism" in the absence of the veto provision.[30] If the au-

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in *Chadha*. Compare Immigration and Naturalization Act § 406, 8 U.S.C. § 1101 (1976) (broad severability provision) with Impoundment Control Act of 1974, §§ 1011-1013, 31 U.S.C. §§ 1401-1403 (1976) (no severability provision) and War Powers Resolution, § 5, 50 U.S.C. § 1544 (1976)(narrower severability provision). It is arguable that in these cases the Court should lower the presumption of severability or eliminate it entirely. However, the guidance provided by the Supreme Court in two cases subsequent to *Chadha* suggests that plaintiffs will bear a heavy burden in attempting to demonstrate non-severability. See infra text accompanying notes 36-46.

[29] Earlier cases suggest that in the absence of a severability clause the party seeking to uphold the remainder of the statute bears the burden of demonstrating the separability of the provisions. See Carter Coal, 298 U.S. at 312; Williams v. Standard Oil Co., 278 U.S. 235, 241 (1927). However, the *FERC* decision appears to minimize the importance of either the presence or absence of a severability clause. See infra text accompanying notes 41-44.

[30] Chadha, 103 S. Ct. at 2776. This section of Chief Justice Burger's opinion is somewhat ambiguous and raises the question as to the precise test which will be utilized to determine whether the challenged provision remains "fully operative as a law" following severance. At first, the Chief Justice appears to indicate that the third factor relevant to the severability inquiry is whether the delegation of substantive authority constitutes "workable administrative machinery without the veto provision. . . ." Id. at 2775. After analyzing the provision of the Immigration and Nationality Act containing the veto clause, Chief Justice Burger concludes that congressional authorization for the Attorney General to suspend an alien's deportation was "[e]ntirely independent of the one-House veto." Id. These comments suggest that lower court determination will rest simply on whether the agency can administer, implement, or execute the statute in the absence of the veto provision.

However, this paragraph also contains one sentence suggesting that Congress' ability to oversee the exercise of delegated authority will be preserved without the veto mechanism. According to the Chief Justice, legislative oversight would be effective in the absence of the veto because all of the Attorney General's suspension decisions will continue to be reported to Congress under the terms of a related subsection of the Statute. This suggests that proponents of severability must demonstrate that in the context of the statutory scheme Congress' capacity to conduct oversight will not be impaired by the loss of the veto.

For at least three reasons, the "oversight" element of the third factor in the Court's severability analysis should not have a significant impact in future cases. First, the transmutation of the veto clauses into "report-and-wait" provisions which appears to be required under *Chadha* will automatically provide Congress with an opportunity to review proposed executive branch activities following their transmission to Capitol Hill. Second, earlier decisions by the Court indicate that an important element of the Court's severability analysis is whether "[i]t is evident that the [unconstitutional provisions] are not so interwoven with the other provisions of the Act that there is any inherent or practical difficulty in the separation and independent enforcement of the former while reserving all questions as to the validity of the latter." See Electric Bond Co. v. SEC, 303 U.S. 419, 434-35 (1938). If the veto provision is not an inseparable component of the statutory scheme, the delegation of authority presum-

thority conferred in the statute becomes inoperable or cannot be administered without the veto clause, the entire statutory scheme is unconstitutional.[31] This factor supports a strong presumption in favor of severability because most statutes containing veto provisions establish a system empowering the executive branch to make or implement a decision sixty or ninety days after submitting the issue for legislative review — unless Congress intervenes. Thus, Congress likely intended in the majority of statutes that the exercise of delegated authority would be "fully operative as a law" in the absence of a legislative veto.

In summary, resolving the severability issue will depend on a case-by-case review of the provisions in the overall statute, its legislative history, and the statute's ability to operate without the veto mechanism.[32] The Court's inquiry in *Chadha* resulted in the mechanical determination that the veto provision was severable from the remainder of the section. This result was achieved by virtue of the broad severability clause in the Immigration and Nationality Act,[33] the Court's reading of the legislative history of the administrative deportation suspension provision,[34] and the Court's determination that both a workable administrative mechanism and effective congressional oversight over the delegated authority remained in the absence of the legislative veto, since the Attorney General would still have to report his actions to Congress.[35]

B. Analysis of the Severability Inquiry in *Chadha* and Its Progeny

The analytic framework established in *Chadha* ensures that

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ably constitutes a workable mechanism on its own. The third reason for the low level of significance which should be attached to Chief Justice Burger's "oversight" suggestion is the fact that the most important severability factor will continue to be whether Congress would have delegated its authority in the absence of a veto provision. See supra text accompanying notes 26-29.

[31] Since the Court in *Champlin Refining* did not specifically analyze the continuing operability of a statute after severance of its unconstitutional provision as creating a presumption of severability, *Chadha* appears to establish a new "presumption" in the analysis of the severability issue.

[32] See generally Legislative Veto: Arms Export Control Act: Hearing Before the Senate Committee on Foreign Relations, 98th Cong., 1st Sess. 56-68 (1983) (appendix prepared by Raymond J.Celada, The Library of Congress) [hereinafter cited as Celada].

[33] Chadha, 103 S. Ct. 2774.

[34] Id. at 2774-75.

[35] Id. at 2775-76.

lower courts will continue to decide the severability issue on a statute-by-statute basis. Competing arguments for and against severability will be mustered to test or defend the exercise of delegated authority pursuant to statutes containing veto clauses. Despite the seemingly clear rules and criteria utilized by the Court to determine severability, resolution of the issue in future cases under the *Chadha* framework requires the weighing of invariably competing considerations over which reasonable people will differ.[36] While it is instructive to note that, in *Chadha*, Chief Justice Burger and Justice Rehnquist examined the same legislative history and reached diametrically opposite conclusions on the issue of severability,[37] the Court's recent treatment of the severability issue, and the traditional practice of saving as much of the statute as possible,[38] indicate that most legislative vetoes are likely to be severed from the underlying statutory provisions to which they are attached.

In *Chadha*, the Court found that the presence of a severability clause created a strong presumption that could not be overcome by arguments premised on the statute's legislative history. Despite the strength of the argument in support of finding the veto provision to be inseverable,[39] the contrary determination by the Court signals a strong disposition for severance. The selective construction of the legislative history by the *Chadha* majority indicates that proponents of inseverability must advance a substantial record which demonstrates such a pervasive and abiding concern on the part of Congress over the delegation of final authority to the executive branch that passage of the statute was critically dependent on the reservation of legislative authority in the form of the veto provision.[40]

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[36] See Celada, supra note 32, at 60, 77.

[37] Compare Chadha, 103 S. Ct. at 2774-75 (Chief Justice Burger believes Congress intended the veto to be severable "because there is insufficient evidence that Congress would have continued to subject itself to the onerous burdens of private bills had it known that [the one-house veto] would be held unconstitutional"), with id. at 2816-17 (Rehnquist, J., dissenting) (Justice Rehnquist believes Congress did not intend the one-House veto provision to be severable because "the history elucidated by the Court shows that Congress was unwilling to give the Executive Branch permission to suspend deportation on its own").

[38] See, e.g., El Paso & N.R. Co. v. Gutierrez, 215 U.S. 87, 96 (1909); Tilton v. Richardson, 403 U. S. 672, 684 (1971)(plurality opinion), quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)("cardinal principle of statutory construction is to save and not to destroy.").

[39] See Chadha, 103 S. Ct., at 2816-17 (Rehnquist, J., dissenting).

[40] See The U.S. Supreme Court Decision Concerning the Legislative Veto: Hearings before the House Comm. Foreign Affairs, 98th Cong., 1st Sess. 5 (1983)(statement of Stanley M. Brand, counsel

The summary affirmance of the decision by the Court of Appeals for the District of Columbia in *FERC* confirms the Court's predilection to find severability.[41] In that case, the Court was faced with deciding the severability of a one-House legislative veto device attached to rulemaking authority in a statute that did *not* contain a severability clause. Despite the presence in the legislative history of comments which arguably suggested non-severabilty,[42] the Court upheld the decision of the Court of Appeals in finding the veto mechanism to be severable.[43] Thus, even the absence of a severability clause does not appear to present an insuperable impediment to the presumption of severability.

These decisions suggest that most veto provisions will be found to be surgically removable without damaging the excise of the residual authority conferred by the statute to the executive branch.[44] The Court's disposition to seek out grounds for severance indicates that lower courts will not have to go very far to find sufficient evidence of severability under the *Chadha* test to excise unconstitutional legislative veto provisions. There is a strong presumption that the basic statutory authority will be retained by the agency and that the courts will treat the legislative veto clause as a "report and wait" provision.[45] The agency will be required to delay the effective date of its proposed action for the time period prescribed in the statute, and Congress will retain its authority to disapprove the proposal through the bicameral consideration of legislation which is presented to the President.[46] Thus, in the typical case, the delegation of authority to the executive branch will remain available without the check of the legislative veto.

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to House of Representatives)[hereinafter cited as Brand].

[41] FERC, 103 S. Ct. at 3556. The severability issue was not addressed in the third decision by the Supreme Court which invalidated the legislative veto. In United States Senate v. FTC 103 S. Ct. at 3556, the issue of severability was not contested due in large measure to the fact that the two-House legislative veto involved in that case was enacted separately from, and subsequent to, the underlying rulemaking authority as part of a statute which was specifically designed to secure judicial resolution of the constitutionality of that particular type of veto device.

[42] FERC, 673 F.2d at 442-445.

[43] FERC, 103 S Ct. 3556.

[44] See Brand, supra note 40.

[45] See Chadha, 103 S. Ct. at 2776, n. 9.

[46] See House Comm. on Foreign Affairs, supra note 40, at 136-137 (statement of Professor David A. Martin, University of Virginia School of Law) [hereinafter cited as Martin].

The transmutation of the existing legislative vetoes into "report and wait" provisions is not necessarily a positive development. Under the pre-*Chadha* regime, many of the veto provisions would allow the affected agencies to implement their rules or decisions unless and until Congress intervened in the specified manner. This scheme was extinguished by the severability analysis employed in *Chadha*. As a practical matter, the invalidation of a veto by a court and the subsequent imposition of a "report and wait" requirement may now have the automatic effect of a legislative veto because the review period could frustrate the agency's effort to undertake a pressing initiative. This danger is particularly evident in the case of programmatic agencies, and conceivably could have an adverse impact on the operations of the regulatory agencies as well.

The answer to this problem requires Congress to consider whether the continued presence of the "report and wait" provisions are worth the risks associated with what amounts to Congressional involvement in day-to-day administrative decisions. After focusing on the impact of this result of the Court's severability analysis, Congress should terminate what are bound to be the large number of unnecessary "report and wait" provisions, and preserve the proper alignment of responsibilities between the branches.

Some Members of Congress have discussed the possibility of enacting legislation which would either extinguish the severability clauses or add inseverability clauses to statutes containing the unconstitutional veto provisions.[47] The evident purpose of this action would be to remove the grounds for severing the veto provisions and, thereby, attempt to force the courts to declare that the delegation of authority accompanying the veto provision must also fall. While this type of legislation has the potential to prevent the executive branch from acquiring unencumbered delegations of authority following the nullification of the veto provisions, there are two prominent reasons why this remedial approach is both unwise and unlikely to be successful.

The practical reason for bypassing this route is that it would result in the invalidation of executive authority to undertake policy and rulemaking initiatives in many of the most important areas of

[47] See Brand, supra note 40.

government activity. Even if Congress were to decide that this result would be more desirable than to leave broad delegations in the hands of the executive branch, attempts to excise severability clauses are unlikely to be upheld by the courts. "[I]n light of the element of contemporanity of congressional intent which undergirds the Court's separability analysis", the courts would be predisposed to look to the congressional intention at the time of each statute's original passage to resolve the severability issue.[48] *Post hoc* attempts to add inseverability clauses will not prevent the courts from reaching the result which appears to be required by the *Chadha* and *FERC* decisions.

The major cause for alarm over the easy finding of severability which results from the application of the principles announced in the *Chadha* and *FERC* decisions is arguably that a wholesale delegation of authority to the executive branch will remain intact and Congress will be deprived of its chosen means of supervision and review. Unfortunately for Congress, the alternative outcome has its own inherent difficulty. Even if the courts were emboldened to extinguish a delegation of power to the executive by invalidating an entire statutory scheme due to the inseverability of a veto provision,[49] the void left by the elimination of the centerpiece for the accomodation of power between the executive and legislative branches would be an imminent source of confrontation.[50] Thus, in the absence of a statute establishing a spending deferral process or the control mechanism regarding the commitment of military forces in the War Powers Act, for example, the President may be inclined to explore the limits of the executive's (asserted) inherent authority to impound funds or act as commander-in-chief of the armed forces.

While these dilemmas and dangers should not be overlooked, the Court's predisposition to find severability has many pragmatic ad-

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[48] Id.

[49] The leading statutory candidates for invalidation due to the inseverability of their legislative veto clauses include the War Powers Resolution, supra note 28; Impoundment Control Act of 1974, supra note 28; and the Federal Election Campaign Act of 1971 § 301 et seq., 2 U.S.C. § 431 et seq. and 18 U.S.C. § 591 et seq. (1976). The legislative histories of these statutes indicate that Congress intended the Congressional review provisions to be an integral part of its legislative scheme. See Rosenburg, supra note 3, at Appendix II (brief legislative histories of the War Powers Resolution and the Budget and Impoundment Control Act). This is especially the case with the FECA, where Congress wished to be certain that the Federal Election Commission could not operate independently of Congress.

[50] See infra text accompanying notes 57-58.

vantages.[51] By transmuting legislative veto provisions into "report and wait" provisions, the Court avoided prolonged uncertainty and minimized the disruption of on-going government activities and programs which would certainly result from the wholesale invalidation of statutory schemes due to a finding of inseverability. Furthermore, there is little reason to be concerned about the unencumbered delegations of authority possessed by the executive branch upon the invalidation of the veto provisions. As we point out in the next section of the article, Congress continues to have a large variety of mechanisms at its disposal to control the exercise of delegated authority.

IV. The Congressional Response: Alternatives to the Legislative Veto

Although the immediate focus of the *Chadha* litigation was a relatively obscure provision in an immigration statute, the decision's impact will be felt throughout the legislative and administrative decisionmaking processes. The seemingly timeless debate over the degree to which Congress should participate in administrative matters has assumed a new vitality since the Court declared the legislative veto unconstitutional. Widely divergent views have existed in Congress and elsewhere regarding the problems the veto was designed to address, the laws which should be subject to the mechanism, and how Congress should carry out its oversight responsibilities.[52] Now that the alarmist pronouncements regarding the impact of *Chadha* have died down, Congress should analyze the continuing validity of the numerous statutes containing veto provisions and seek an institutional means to confront the uncertainties raised by the decision.[53]

As Congress considers how it may best exercise control over the executive branch in the post-*Chadha* environment, it should bear in mind that the legislative veto was historically a weapon of limited use in the congressional arsenal of oversight devices.[54] Controversies

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[51] Martin, supra note 46, at 137.

[52] Some of the highlights of the bountiful literature on the legislative veto are contained in Chadha, 103 S. Ct., at 2797 n.3 (White, J., dissenting).

[53] For a sampling of the statutes containing legislative veto provisions which are affected by *Chadha*, see id. at 2811 (Appendix I).

[54] See C. Norton, Use of the Legislative Veto: Introduction Of and Action On Congressional Reso-

and differences between the executive branch and Congress generally have been disposed or reconciled without reliance of the legislative veto. Congress has always utilized other tools to constrain the executive branch, and most of these oversight powers — those that have traditionally been used most frequently and effectively — continue to be at its constitutional disposal.[55] *Chadha* has in fact done little to alter the availability to Congress of a wide variety of statutory, non-statutory, and informal mechanisms that directly overturn, terminate, or prohibit executive actions, have the effect of nullifying them, or simply discourage them.[56]

Even if the Court has clearly not effected a fundamental reallocation of government powers, a serious problem has been created by the sudden dismantling of a large number of delicate "political treaties" reflecting interbranch accommodations which granted power to the executive branch while reserving to Congress the authority to review its exercise.[57] Recognizing that the imposition of statutory restrictions on executive action through the various veto devices contributes to the balance of power between the two branches, Congress relied heavily on the veto in the 1970's in attempts to resolve a number of severe disagreements with the executive branch over the

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lutions of Approval or Disapproval, The Library of Congress, Congressional Research Service (September 24, 1982). Since 1932, when Congress authorized the first legislative veto of proposed executive actions, over 1,100 legislative veto resolutions have been introduced. More than one-fifth (237) of all resolutions introduced became effective. However, nearly half (111) were largely non-controversial concurrent resolutions passed during 1949-1959 to approve proposals by the Attorney General to suspend deportation proceedings. Another sixty-three resolutions were passed by the House or Senate to disapprove an insignificant number of proposals by the President to defer the expenditure of appropriated funds. Excluding the resolutions dealing with alien deportation suspensions and budget deferrals, less than six percent (63) of the resolutions introduced became effective. Id. at 1-4. In light of the fact that more than 150 of the over 200 statutes containing veto provisions and more than 250 of the 300 plus veto authorizations have been enacted since 1950, "it seems apparent that usage by Congress of its approval and disapproval procedures has been considerably less frequent than might be presumed from the total number of congressional veto authorization enactments." Id. at 5. See also Smith & Struve, Aftershocks of the Fall of the Legislative Veto, 69 A.B.A. J. 1258 (1983). See generally Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369, 1371, 1381 (1977).

[55] See Chadha, 103 S. Ct. at 2786 n.19 ("The Constitution provides Congress with abundant means to oversee and control its administrative creatures."). See also Martin, supra note 46, at 138-39.

[56] F. Kaiser, Congressional Control of Executive Action: Alternatives to the Legislative Veto, The Library of Congress, Congressional Research Service (July 12, 1983).

[57] See Rosenberg, supra note 3. See also Davidson, Reflections from the Losing Side, 7 Regulation 23, 24 (July/August 1983); Schick, Politics Through Law: Congressional Limitations on Executive Action, in Both Ends of the Avenue 155 (A. King ed. 1983).

allocation of budgetary, foreign and domestic policy, and warmaking powers. The most important ramification of eliminating the veto is the creation of potential power vacuums in these and a multitude of other fragile policy areas.[58] By altering the terms of accommodations between the Congress and the executive branch, the decision destroyed the basis of past understandings which had resulted in the development of working relationships in those areas of public policy where the respective powers of the two branches are both shared and separated.

Although *Chadha* has disrupted congressional expectations, understandings, and lawmaking habits, it is important to recognize that the reestablishment of suitable arrangements can be accomplished with devices that are for the most part familiar to both Congress and the executive branch. There are, however, significant differences between the oversight mechanisms available to Congress. Aside from the initial question whether specific exercises of congressional power are legally binding under *Chadha*, they vary in terms of specificity, range, scope, and permanency of impact.[59] The difficult question, as usual, is to determine which weapon or combination of weapons should be taken from the legislative arsenal and utilized to constrain executive actions or assert the constitutional prerogatives of Congress.

Congress can take any combination of three major approaches in responding to the loss of the legislative veto. One is to seek to maintain the same type of leverage over the executive branch as provided by the veto through different statutory mechanisms. A second approach is to exercise its influence without the use of legislation by operating in a less formal and adversarial manner to monitor and direct agency actions. The third response to *Chadha* would require Congress to enlist the courts and the President in the effort to con-

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[58] With the demise of the legislative veto, the most promising areas for interbranch conflict include the commitment of armed forces to hostile situations, the expenditure of public funds and accompanying efforts to constrain budget deficits, the management of public lands, arms transfers, and nuclear nonproliferation. The fact that several of these areas involve questions which are by nature uniquely political and, therefore, unlikely to receive judicial review suggests the adverse implications of losing the veto "as an instrument of the continuing political dialogue between President and Congress, on matters having high and legitimate political interest to both. . . ." Strauss, supra note 14, at 191.

[59] See Kaiser, supra note 56, at 1-2. See also Hearings on the Legislative Veto Before the House Committee on Rules, 98th Cong., 2nd Sess., 10-13 (1984) (statement of Rep. Rodino).

trol agency activities. This section of the article will examine the statutory devices, informal approaches, and non-legislative institutional means which may be used by Congress after *Chadha* to resolve potential and actual points of disagreement with the independent and executive agencies.

A. Statutory Mechanisms to Control Executive Action

1. *Limit Agency Discretion:* Since the elimination of the legislative veto affects so many areas of government activity, Congress should give substantial consideration to rethinking the justification for its grants of power to the executive branch. The Court's decision has left Congress free to use limitations in the original authorizing legislation or through subsequent amendments to curtail the exercise of administrative discretion. New legislation should be more detailed, explicit, and circumscribed in the delegation of authority. Ongoing programs generate sufficient information for Congress to periodically refine and tighten the scope of delegated authority through statutory amendment.[60]

Many continue to argue that writing laws with greater specificity and precision is easier said than done, and that the political process occasionally requires purposeful ambiguity at the expense of unassailable clarity to reach a compromise.[61] It is true that Congress cannot anticipate *every* change in technology or resources that might dictate an alternative statutory command. However, the proponents of legislative abdication ignore the fact that many of the broad delegations of power have been utilized for a sufficient period of time to give Congress a base of experience to provide the agencies with more exact statutory guidance. Major staff increases have given Congress the capacity to draft and analyze detailed statutory proposals and frame its own alternatives to the initiatives submitted by the executive agencies. With all of its available resources, Congress

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[60] See Rosenberg, Summary and Preliminary Analysis of the Ramifications of INS v. Chadha, The Legislative Veto Case, The Library of Congress, Congressional Research Service 16 (June 28, 1983); Martin, supra note 46, at 138-39.

[61] See, e.g., Stewart, Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1695-96 (1975); Cooper, Postscript on the Legislative Veto: Is There Life After Chadha?, 98 Pol. Sci. Q. 427, 428-29 (1983); Brand, supra note 40, at 35. See also Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263, 288-90 (1982).

can — and undoubtedly should — place more precise limits on agency authority to administer programs and promulgate rules.[62]

Even if it is unwilling or unable to draft more instructive legislation and provide greater particularity in its statutory commands, Congress can utilize several alternatives to control administrative behavior.[63] Congress could achieve this objective by limiting or abolishing a specific area of jurisdiction,[64] deregulating or decontrolling the industry,[65] transferring jurisdiction among federal agencies or from federal to state authorities,[66] imposing a moratorium on specific action,[67] or establishing an exemption or waiver from the agency's authority.[68] These types of statutory responses to agency transgressions have been used frequently in the past, and should receive grater attention in the future.

2. *Direct Override or Preemption:* Despite the dilemmas caused by the failure of Congress to provide precise language in enabling legislation,[69] a number of executive and independent agencies have legitimately earned their share of criticism by legislating and regulating in a manner which only they consider to be in the best interest of the public. The most obvious and compelling way for Congress to correct regulatory or progammatic excesses is to enact a statute explicitly revoking or terminating the offensive regulations or programs, or preempting the precise area of policy from agency activity.[70] Direct statutory nullifications and preemptions have the

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[62] See Olson, Restoring the Separation of Powers, 7 Regulation 19, 29 (July/August 1983).

[63] Kaiser, Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto," 32 Ad. L. Rev. 667, 673-74 (1980).

[64] See the Federal Trade Commission Improvements Act, Pub.L. No. 96-252, 94 Stat. 374 (1980) (prohibiting the FTC from regulating trade groups that set product or industry standards).

[65] See, e.g., Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (phased deregulation of the air passenger industry). See generally Breyer, Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform, 92 Harv. L. Rev. 547, 604-08 (1979); D. Martin & W. Schwartz (eds.), Deregulating American Industry (1977).

[66] See The Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-217, 91 Stat. 1566 (transfer of authority for specified water pollution regulatory activities from the EPA to states with approved programs).

[67] See, e.g., The Saccharin Study and Labeling Act Amendment of 1983, Pub. L. No. 98-22, 97 Stat. 173 (the most recent moratorium on FDA efforts to ban saccharin).

[68] See The Federal Communications Act Amendments of 1959, Pub.L. No. 86-274, 73 Stat. 557 (the "equal time" amendment to Section 315 (a) of the Communications Act exempting certain election news programs from FCC regulation).

[69] In Rosado v. Wyman, 397 U.S. 397, 413 (1970), Justice Harlan observed that Congress "sometimes legislates by innuendo."

[70] In the event that administrative passivity is the problem in a particular context, Congress may

advantages of specificity, clarity, and relative permanency. They also have a solid consensual foundation due to the necessity of agreement by both Houses of Congress and the President or, in the event of a veto by the President, by extraordinary majorities in both the House and Senate.

On such controversial issues as mandatory automobile safety restraint systems, cigarette advertising, the taxation of fringe benefits, urban parking restrictions, and motorcycle helmet requirements, Congress has asserted its will over the relevant agencies by using or threatening to implement the conventional process of legislation.[71] Since rulemaking constitutes an exercise of the legislative function, Congress should be prepared to assume responsibility for the output of the administrative process, and to intervene on a selective basis when an agency seriously misinterprets a particular statute.

While the direct route appears to offer a number of attractive features, this approach is unlikely to be utilized on a frequent basis for a variety of reasons. Because of the inordinate number of agencies which exercise regulatory authority, some errors and abuses will be noted by few parties outside the regulated community. More importantly, passing legislation makes extensive demands on institutional resources and the Members' time, normally requires review hearings by several committees and the approval of both Houses, and necessitates the expenditure of political capital for matters which are inherently controversial due to the conflicting positions of the agency and the affected community.[72]

3. *Joint Resolution of Approval or Disapproval:* Two of the most prominently suggested direct responses to *Chadha* involve the

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resort to an "agency-forcing" statute to compel positive action by a prescribed deadline. See Ackerman & Hassler, Beyond the New Deal: Coal and the Clean Air Act, 89 Yale L. J. 1466, 1470, 1536 (1980); Hendersen & Pearson, Implementing Federal Environmental Policies: The Limits of Aspirational Commands, 78 Colum. L. Rev. 1429, 1468 (1978).

[71] See Congressional Review of Administrative Rulemaking: Hearings Before the Subcomm. on Admin. Law & Gov'tal Regulations of the House Judiciary Committee, 94th Cong., 1st Sess. 272 (1975)(memorandum of Professor Ernest Gellhorn).

[72] Despite the apparent difficulty of passing full-fledged legislation, some commentators argue that this option is more potent than many proponents of the legislative veto have made it sound. They argue that the legislative-cumberness objection ignores the ability of either House to streamline its procedures and add corrective language in the form of an amendment to other relevant legislation making its way through the process. The prospect of a presidential veto is discounted by the limitations on the President's own supply of political capital which may be devoted to confrontations with Congress. See, e.g., Martin, supra note 46, at 143-44.

substitution of joint resolutions for concurrent or one-House resolutions as the vehicle for either approving or disapproving executive action.[73] One version, sponsored by Representative Trent Lott, provides that a "major" rule could not take effect unless Congress enacts a joint resolution of approval within ninety days; all other rules would become effective after ninety days unless a joint resolution of disapproval is enacted within that period.[74] A second version, sponsored by Senators Levin and Boren, would authorize a joint resolution of disapproval for all agency rules.[75]

One variation of the joint resolution of approval would involve a "reversal of the burden of legislative inertia."[76] Under this approach, Congress would withdraw general executive authority to act in a particular field and require the President or agency to seek specific authorization from the Congress before proceeding.[77] Statutes might be drafted to incorporate a requirement that certain future actions would not commence unless and until conventional legislation is approved (possibly under expedited procedures) by both Houses and signed by the President, or until a presidential veto is overridden.

Since the only — albeit significant — difference between an unconstitutional concurrent veto resolution and a valid joint resolution is that the President is included in the latter process, a joint resolution of approval is the functional equivalent of a legislative veto.

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[73] A concurrent resolution, which is simply a motion passed by both Houses of Congress, is recognized as merely a statement of legislative opinion. A joint resolution, which must be adopted by both Houses of Congress and presented to the President for approval or rejection, has the full force of law when approved in the manner of routine legislation or passed by a two-thirds vote over a presidential veto. The joint resolution approach to approving or voiding an administrative action is implicitly valid under *Chadha* because it requires the approval of both the House and Senate (satisfying the bicameralism requirement) and must be signed by the President to become effective (satisfying the presentment requirement). Concurrent resolutions of approval or disapproval, which need not be presented to the President, are simply two-House vetoes which are invalid under the constitutional requirements of the *Chadha* decision. The Court of Appeals for the District of Columbia has specifically approved the use of a joint resolution to invalidate an administrative initiative. Consumer Energy Council of America v. FERC, 673 F.2d 425, 470 (D.C. Cir. 1982), aff'd ____ U.S. ____ (1983).

[74] H. R. 3939, 98th Cong., 1st Sess., 129 Cong. Record H7166-69 (September 20, 1983) [hereinafter Lott Proposal].

[75] S. 1650, 98th Cong., 1st Sess., 129 Cong. Record S10473-77 (July 20, 1983).

[76] See Martin, supra note 46, at 145, 148.

[77] Examples of this device include the War Powers Act, supra note 28 (requiring congressional authorization for troop deployments of longer than sixty days in hostile situations); the Budget and Impoundment Control Act, supra note 28, (failure of Congress to approve recission requests within forty-five days requires the President to expend the funds).

The simple failure of the joint resolution of approval to pass in either House would annul the proposed executive action. As a practical matter, therefore, an affirmative joint resolution is virtually indistinguishable from the one-House legislative veto.

Despite its attractiveness as a variant of the legislative veto, the resolution of approval scheme would be a two-edged sword. The primary advantage to Congress of requiring a joint resolution of approval is that rules would not become effective unless the administration could persuade Congress of the initiative's necessity. However, there are also a number of important disadvantages associated with the use of this oversight mechanism.

Obviously, the requirement of a joint resolution of approval would generate a significant increase in the Members' workload and could quickly overcrowd the legislative agenda with requests from the executive branch for the requisite legislative authorizations.[78] This approach would also place responsibility for the administrative action squarely on Congress since passage of the joint resolution would ordinarily result in the rule becoming effective. On the other hand, more-concentrated oversight of existing statutory requirements would have a positive impact by limiting Congress' ability to pass additional regulatory statutes.

Faced with the prospect of the legislative-approval mechanism, agencies might employ vague language compatible with several different interpretations in its proposals to obscure the final decision or avoid having to choose between competing alternatives. Agencies would also have an incentive to avoid issuing regulations, and will be tempted to try to bypass the process of securing congressional approval by minimizing cost estimates and segmenting proposed rules.[79] Finally, the agencies may turn to means of making policy decisions, such as adjudicatory proceedings, which are not open to congressional oversight or public input.[80] Since it may encourage the

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[78] The Chairman of the House Committee on Foreign Affairs immediately raised this concern when counsel for the House of Representatives suggested that Congress should respond to *Chadha* by enacting a "wholesale repeal" of the delegations of authority to the executive branch which were premised on the availability of the legislative veto. See House Comm. on Foreign Affairs, supra note 40, at 7, 30.

[79] See DeMuth, Constraining Regulatory Costs: Part I, The White House Review Programs, Regulation 21 (Jan.-Feb. 1980).

[80] See Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudi-

continuation of vague statutory enactments, invite abusive application at the hands of special interests, and interfere with legitimate legislative oversight of agency rulemaking, an across-the-board scheme for reviewing all "major" or "significant" regulations poses many of the same problems as the legislative veto.

Because of the drawbacks associated with the resolution of approval, many Members and commentators are supporting proposals with would allow Congress to veto agency initiatives through a joint resolution of disapproval. This approach would impose less of a burden on the congressional workload, but it would also enhance the possibility that a presidential veto could be utilized to negate the congressional action. Given the likelihood that the President would favor a rule proposed by his appointees and having survived the scrutiny of the Office of Management & Budget (OMB),[81] vitiating a rule through a joint resolution of disapproval would ordinarily require a two-thirds vote in both Houses. To the extent that Members of Congress think that the President will defend the agency proposal by vetoing the disapproval resolution (thereby allowing it to become effective despite potential majority votes in both Houses against the rule), the disapproval resolution may serve only to allow Members to grandstand on the issue for the benefit of the affected constituent or interest group.

Since *Chadha*, Congress has been torn between the alternatives of joint resolutions of approval or disapproval. This institutional inability to agree on one or the other alternatives has, for example, stalled consideration of several legislative proposals. Whether this disagreement will be resolved in the near future will have an important impact on Congress' ability to shape the future agenda of its response to *Chadha*, or whether the response will be episodic and *ad hoc*.

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cation, 118 U. Pa. L. Rev. 485, 526-39 (1970). However, Congress and the public can, of course, always provide "informal input" through speeches, threats of legislative action, or other rhetorical devices.

[81] The primary sources of OMB influence over the regulatory process stem from: Exec. Order 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 note (1982); The Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended in scattered sections of 5 U.S.C.; 20 U.S.C.; 30 U.S.C.; 42 U.S.C. and 44 U.S.C.); OMB enabling legislation, 3 C.F.R. 1080 (1966-70 Comp.), reprinted in 31 U.S.C. § 16 app. at 1197 (1976); and periodic statutory grants of reorganization authority to the President, see 5 U.S.C. § 903(a)(2) (Supp. IV 1980).

Part of the popularity for both types of joint resolution proposals rests on their accompanying modifications of congressional procedures. These measures invariably contain provisions designed to guarantee expedited floor consideration of the resolution.[82] The House Rules Committee has raised strong concerns that the cumulative impact of numerous automatic discharge provisions will be to disrupt the legislative process by giving high priority to too many approval/disapproval resolutions and thereby ". . .prevent the House from reaching matters of greater importance to which no special procedures attach."[83] The combination of this concern and its implications for the jurisdictional authority of the Rules Committee to control access of legislation to the floor may curtail the support of the House leadership for this review mechanism.[84]

The two major practical problems with the joint resolution approach parallel objections voiced against the legislative veto. First, reliance on the joint resolution device invites attention to the merits and shortcomings of individual rules and decisions at the expense of precluding debate over the broad policy questions which are more properly the province of Congress.[85] The Members cannot and should not immerse themselves in every item of agency regulation and activity. Congress simply does not possess the institutional capacity to manage this type of inquiry.[86]

The second problem with this mechanism is that it is not very constructive to pass a resolution overruling a proposed regulation unless Congress goes on to inform the agency in a positive manner as to how it should exercise its discretion.[87] An agency's efforts to

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[82] The most prominent proposals for ensuring expedited congressional consideration include special rules to hasten committee discharge of veto resolutions and limitations on floor debate. See supra notes 74, 75.

[83] House Rules Comm., Export Administration Amendments Act of 1983, H.R. Rep. 257, Part 3, 98th Cong., 1st Sess. 6 (1983).

[84] See Rosenburg, supra note 3, at 6-7.

[85] See, The Supreme Court Decision in *INS v. Chadha* and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the House Judiciary Committee, 98th Cong., 1st Sess., 251 (1983) (testimony of Rep. Moakley); S. Rep.No. 866, 96th Cong., 2d Sess. at 20-22 (1980) (dissenting views of Sen. Danforth).

[86] Given the limitations on congressional interest and staff, no more than a small percentage of proposed or objectionable agency activities could expect to reach the floor of either the House or Senate. See Senate Comm. on Government Operations, 95th Cong., 1st Sess., Study on Federal Regulation 120-22 (Comm. Print 1977) [hereinafter cited as Study on Regulation].

[87] See American Bar Association Committee on Law and the Economy, Federal Regulation: Roads

implement its statutory responsibilities may meet with repeated rejection as the members of the political branches battle over the correct approach. In most instances, the remedy for a specific problem will require considerably more thought and subtlety than can be supplied by Congress through a simple resolution of disapproval.[88] If Congress invests the time and resources to disapprove a regulatory proposal, it should also accept the responsibility of sending the agency back to the drawing board with specific guidance as to an alternative course of action.[89]

Because Congress has the capacity to prescribe more explicit statutory guidelines for both agency decisionmakers and rulemaking proceedings, there is little justification for placing great reliance on these devices to control agency activities. Only certain types of issues seem to readily invite the participation of Congress through either variant of the joint resolution approach.[90] There are several areas where it would be difficult and perhaps undesirable for Congress to delineate detailed standards for executive action in advance. When the agency or presidential determination will be significantly affected by events in contexts which are not foreseeable at the time of the original delegation of the authority in the general statute, the joint resolution mechanism constitutes a legitimate means for the Congress to assess or participate in a singularly important decision.

While there is a justification for a *post facto* legislative review mechanism in a limited number of policy areas, congressional interest in controlling executive discretion can be satisfied in the majority

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to Reform (1978) [hereinafter cited as ABA Regulation Study]; Martin, supra note 46, at 144-45.

[88] House Comm. on Rules, 96th Cong., 2d Sess., Recommendations on Establishment of Procedures for Congressional Review of Agency Rules 6 (Comm. Print. 1980) [hereinafter cited as House Rules Committee Report].

[89] The opportunity for Congress simultaneously to review agency rules and enact replacements under either variant of the joint resolution approach has been described by one commentator as the "silver lining" of the *Chadha* decision. See Davidson, supra note 57, at 26. Congress is well acquainted with this mechanism through its consideration of rules of civil and criminal procedure which have been prescribed by the Supreme Court and submitted to Congress for review. See Chadha, 103 S. Ct. at 14 n.9.

[90] Aside from executive reorganization plans, the most pressing examples involve foreign policy determinations by the President on the commitment of military forces, arms sales, and nuclear nonproliferation matters. In some of these areas, Congress may be deprived on constitutional grounds from removing the discretionary authority of the President. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-38 (1952) (Jackson, J., concurring); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

of cases by the prospective establishment of clearer standards for the agencies or the President.[91] Frequent utilization of either type of concurrent resolution would remove the incentive for Congress to delegate specifically and contribute to the passage of standardless statutes which often create problems when the agencies confront difficult matters. Congress has the responsibility to address controversial policy questions; if they cannot be resolved, they should not be passed off to another branch of government for decision.

4. *"Report and Wait" Requirements:* Related to the joint resolution approach, this requirement would delay the effective date of an administrative action for a specific period (usually thirty to ninety days) to give Congress time to scrutinize the proposal, utilize informal methods to block or modify the proposed action, and possibly enact legislation before the proposal takes effect.[92] A standard component of the prior-notification approach is to require consultation with specified committees of the Congress.[93] The period of delay will allow for negotiation and possible compromise between the agencies and the congressional oversight committees. Since the agencies demonstrated varying abilities to resist congressional demands for change in the substance of proposed rules or programs during the pre-*Chadha* period,[94] it is reasonable to assume that the bargaining process conducted without the shadow of the legislative veto will continue to be dependent on the amount of bargaining power possessed by the agency with Congress. Extrinsic political factors ensure that Congress will be able to utilize the transmission of regulations or programs to Capitol Hill as a means of reviewing and

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[91] Even if—as some commentators suggest—statutes of the past decade have tended to prescribe standards and clarify goals more precisely than in earlier years, this observation confirms the capacity of Congress to legislate responsibly when it has the will to do so. See Marcus, Environmental Protection Agency, in The Politics of Regulation 267-303 (J. Wilson ed. 1980); Diver, Policymaking Paradigms in Administrative Law, 95 Harv. L. Rev. 393, 413 (1981).

[92] See Chadha, 103 S. Ct. at 2776 n.9; Sibach v.Wilson, 312 U.S. 1, 15-16 (1941) (legitimizing use of the "report and wait" approach); 129 Cong. Rec. H4758-84 (daily ed. June 29, 1983) (proposals of Representatives Waxman and Levitas); S. 1650, 98th Cong., 1st Sess., § 4, 129 Cong. Rec. 10,473-77 (daily ed. July 20, 1983) (proposal by Senators Levin and Boren).

[93] The Court in *Chadha* reaffirmed the general constitutional validity of these provisions. Chadha 103 S. Ct. at n.9. However, certain suggested departures from the conventional "report and wait" format appear to be constitutionally suspect. For example, allowing a committee to waive or extend the waiting period is arguably a legislative act under *Chadha* which requires compliance with the decision's lawmaking procedures.

[94] See Bruff & Gellhorn, supra note 54, at 1410-11.

modifying administrative proposals.

The obvious defect of a "report and wait" provision is that it often unnecessarily prolongs the rulemaking process or program implementation. Since the waiting period is often measured by legislative days or days of continuous session of Congress (rather than calendar days), the effective date of the agency's initiative may be delayed for a substantial period of time, even if Congress undertakes no action whatsoever. As Judge McGowan has pointed out, it is questionable whether the obstruction of a few undesirable rules will prove sufficiently beneficial to justify delaying for sixty or ninety "legislative" days the vast majority of rules that would pass through Congress unscathed.[95] Thus, the "report and wait" approach should be limited to policy decisions which occur on an infrequent basis and do not require immediate implementation.

5. *Limitations on Appropriations:* The annual budget process provides an opportunity for the appropriations committees in both the House and Senate to review agency activities and affect future policy development within the agency by adjusting appropriation levels, conditioning the use of appropriated funds, or simply expressing opinions on past actions.[96] Since *Chadha* has eliminated the legislative veto, Congress can be expected to rely more heavily on the use of restrictive language in appropriations bills to prevent agencies from embarking on or implementing particular actions.[97] The obvious advantage to using the appropriations process is that the money bills are typically viewed as "must" legislation which will be enacted in order to fund programs and agencies.[98] Even if the limitations on executive discretion are not included in the statutes, Congress can and often does utilize language in the reports accompanying appropriation (and authorization) bills. While not

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[95] McGowan, Congress, Court, and Control of Delegated Power, 77 Colum. L. Rev. 1119, 1146 (1977).

[96] Study on Federal Regulation, supra note 86, at 18-32.

[97] For a brief overview of the issues associated with the use of appropriations riders to control agency behavior, see Fisher, Chadha's Impact on the Budget Process, CRS Review 13 (Fall, 1983).

[98] "Continuing resolutions" keep the agencies funded in the absence of regular appropriations. However, this practice is unsatisfactory both to Congress and the agencies for a variety of reasons. Frequently, as in the case of foreign aid appropriations, reliance on this device demonstrates Congress' inability to pass any type of appropriations measure due to a lack of political consensus. Funding the agencies in this manner also precludes the formation of administration initiatives and the effective exercise of congressional oversight.

binding on agencies as a matter of law, report language is at least taken into serious account by the agency affected.

Numerous limitations have been attached to appropriations bills to restrict executive and regulatory discretion in implementing certain policies by prohibiting the use of funds to promulgate new rules, carry out a proposed action, or conduct inspection and enforcement activities.[99] The appropriations process has even been used to exempt specified groups from the agency's jurisdiction. By expressly denying or conditioning the use of funds for a specific purpose, the appropriations bill effectively nullifies or severely restricts the statutory authorization under which an agency is operating. Unless the bill contains an unconstitutional condition, the limitation is direct, self-enforcing, and final.[100] Although some limitations are repeatedly inserted in boilerplate fashion, one of the inherent difficulties with spending restrictions is that they are effective only for the duration of the appropriation. The appropriations process also tends to consider justifications for incremental budget requests rather than the wisdom of basic regulatory or program policy, and to focus on only a few relatively expensive or controversial programs. These constraints account in part for the House and Senate rules which restrict the use of appropriations bills to propose new or general legislation or amendments to existing legislation.[101]

Traditionally, Members of Congress have expressed concerns

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[99] The dramatic increase in the number of limitation amendments offered and accepted during House consideration of annual appropriation bills in the 1970's is charted in Schick, supra note 57, at 170-74.

[100] See Kaiser, supra note 56, at 6-7.

[101] The interplay between congressional efforts to utilize limitations in appropriations bills and the restrictions in the rules of House and Senate has been summarized as follows:

> Although the rules of the House of Representatives bar legislation in appropriation bills (the Senate has a much weaker prohibition), the House's precedents allow limitations to be incorporated in such bills on the grounds that the power to withhold funds is inherent in the power to appropriate. Although the line between legislation and limitation is fuzzy, if restrictive language imposes new duties or requirements, it is likely to be ruled out of order; if it merely limits the use of funds, it is likely to be sustained. Limiting provisions are thus cast in negative form; in the usual case, they do not establish policies or program direction, but place certain activities beyond the affected agency's reach. Members of Congress, however, have become adept in drafting limitations that change substantive laws, thereby satisfying the rules of the House while achieving their objectives.

Schick, supra note 59, at 170 (footnote omitted). See generally Deschler's Procedure (chaps. 25 & 26). For a general discussion of House Rule XXI and Senate Rule XVI, see Fisher, The Authorization-Appropriations Process, U.S. Library of Congress, Congressional Research Service 29-39 (August 1, 1979).

about "legislating on appropriations bills." There is a generalized preference (at least outside the appropriations committees) for allowing authorizing committees to establish policy by operating through the conventional process of holding hearings, writing report language, and passing authorization bills. Encumbering appropriations measures with substantive legislation mingles policy judgments with budgetary considerations and causes friction between authorizing and appropriations committees. The *ad hoc* consideration of floor amendments circumvents the deliberations by the authorizing committees which hold the best prospect for producing sensible substantive enactments, and precludes the careful assessment of the complex issues which usually surround controversial regulations of programs.[102]

Despite the acknowledged effectiveness of this legislative response to controversial agency conduct, using the appropriations process can have a particularly disruptive impact on the agency's operations. This is especially true in the case of a congressional effort to alter the outcome of a rulemaking proceeding. Almost without exception, appropriations riders simply prevent the agency from spending funds to enforce or implement the rule.[103] The adverse effect of this outcome is that it allows Congress to avoid the responsibility of having to choose between the competing alternatives (each of which has its own disadvantages and costs), or even providing a definitive statement of the legislature's policy preference.

Opposition to the use of appropriations bills to legislate has also been growing in recent years due to attempts to add riders dealing with such controversial issues as abortion, busing, and school prayer. While many limitations adopted by the House or Senate are ultimately dropped by conference committees to ensure passage of the appropriations bills, these riders occasionally create deadlocks in conference which prevent the passage of regular appropriations bills, cripple the budget system through extended delays, and force agencies to depend on the disruptive process of operating under continuing resolutions.

The loss of the legislative veto threatens to overturn this body of

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[102] See Olson, supra note 62.

[103] Because House Rules prohibit attaching legislation on appropriations bills, riders must be drafted in the broadest possible terms to prevent a point of order.

conventional wisdom, as questions regarding the control exercised by the appropriations committees grow louder. Members from both sides of the aisle are arguing that controlling agency rulemaking and programs through the power of the purse is a crucial legislative weapon which could be more widely available. Congressional consideration of these proposals should provide a powerful insight into how aggressive the legislative branch will be in the post-*Chadha* world.[104]

6. *Changes in Parliamentary Procedures:* Rather than directly subjecting the appropriations process to "legislative" amendments, each House of Congress may decide to alter its rules governing appropriations in a manner which would give either body the equivalent of a legislative veto. One alternative would make it "out of order" for the House or Senate to consider appropriations which would fund an agency activity covered by a concurrent resolution of disapproval.[105] A second option would be to amend the House of Senate rules to prohibit the appropriation of funds for a specific activity until Congress has passed a concurrent resolution of approval.

These proposals seek the evade the lawmaking requirements discussed in *Chadha* by casting review provisions in a manner which involves only the internal rules of Congress.[106] Some argue that this type of disapproval (one-House or concurrent) is unaffected by *Chadha* and immune from judicial scrutiny because the direct and immediate effect of the resolution would be confined to House and Senate consideration of appropriations.[107] Nevertheless, under *Chadha*, any action by the legislature which alters the rights and duties of parties outside the legislative branch must comply with the

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[104] As with the institutional controversy over joint resolutions of approval versus joint resolutions of disapproval, the continuing inability of Congress to resolve the issue of "legislating on appropriations" virtually guarantees that Congress will respond to *Chadha* on an *ad hoc* basis. Once again, the issue could be decided while Congress fiddles because it cannot establish an institutional position.

[105] A variant of this approach would attempt to reestablish the one-House veto by deeming an appropriation "out of order" if that body had adopted its own disapproval resolution. See Legislative Veto and the "Chadha" Decision: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess., 190-91 (1983) (statement of Representative Elliott H. Levitas).

[106] The majority opinion in *Chadha* recognizes that under Article I "[e]ach House has the power to act alone in determining specified internal matters." Chadha, 103 S. Ct. at 2803 n.20.

[107] See Fisher, supra note 97.

bicameralism and presentment requirements of Article I.[108] the disapproval resolution is an act which is "legislative in its character and effect" because it would have the evident impact of a legislative veto on the activities of the executive agency.[109] These types of changes in parliamentary procedure are, therefore, constitutionally invalid.

7. *Shorten Authorization and Appropriation Periods:* Mandating regular and frequent authorizations for agencies that are not already under an annual or biannual cycle could improve Congress' ability to review, monitor, and clear executive actions by providing an opportunity for periodic examination and leverage to ensure agency compliance. Congress should also maintain its current policy of utilizing annual or biannual appropriations to obtain these benefits. Limited authorizations and appropriations shift the burden of stopping regulatory excesses away from Congress by forcing the agencies to secure regular legislative support for their activities.

One of the most widely discussed mechanisms based on congressional power to renew agency authorizations is popularly described as the "sunset" proposal.[110] This type of legislation establishes predetermined dates for the review and possible phase-out or expiration of federal agencies or regulatory programs. Sunset legislation has two primary objectives: (1) to require agencies to return to Congress on a periodic basis for reenactment of their generic authority, thereby forcing their advocates to demonstrate affirmatively the need for continuation; and (2) to impose a flexible but definite discipline on Congress to reconsider the appropriateness of recasting or terminating an agency or one of its programs.[111] Although the en-

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[108] Chadha, 103 S. Ct. at 2785, 2787. Chief Justice Burger emphasized the four express constitutional exceptions to the presentment and bicameralism requirements as support for his view of the proper means of exercising legislative power. Id., at 2786-87.

[109] Chadha, 103 S. Ct. at 2784, citing S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897). Footnote twenty of the majority opinion also states that the "internal matters" exception to the bicameral and presentment requirements "only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances." Chadha, 103 S. Ct. at 2803 n.20.

[110] See, e.g., H.R. 2, 97th Cong., 1st Sess. (1981) (The Sunset Act of 1981) reprinted in Congressional Oversight of Federal Programs: Hearings Before the Subcomm. on the Legislative Process of the House Comm. on Rules, 97th Cong., 1st and 2d Sess. 3-47 (1982).

[111] See generally, Adams, Sunset: A Proposal for Accountable Government, 28 Ad. L. Rev. 511 (1976); ABA Regulation Study, supra note 87, at 133-40.

thusiasm for sunset legislation seems to have dissipated in recent years,[112] interest in the concept is likely to be renewed in light of *Chadha*.

Limited-term authorizations and the sunset proposal would provide only marginal opportunities to control the agencies. These devices do offer the opportunity to specify permissible and prohibited activities in the reauthorizing legislation. However, they will also add a heavy burden to the congressional workload. Attempts to increase legislative attention to agency authorizations may also actually frustrate efforts to maximize congressional control because time constraints could easily compel pro forma reviews.[113] If complaints regarding overloaded congressional schedules are to be believed,[114] this control should only be invoked on a selective basis.

8. *Modify Rulemaking Procedures:* Yet another means by which Congress could act to improve agency decisionmaking would be to continue to amend organic statutes to require agencies to follow more elaborate rulemaking procedures than those prescribed in the Administrative Procedure Act.[115]

Congress has increasingly formalized rulemaking (with the assistance of the courts) by requiring agencies to give public notice of a proposed rule's underlying factual and analytical basis, to provide commenters a mechanism for on-the-record dialogue with agency staff, and to respond to every significant alternative or objection raised.[116] These "hybrid" procedures are intended to require the agencies to open themselves to public scrutiny, explain the bases

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[112] See Behn, The False Dawn of the Sunset Laws, 49 The Public Interest 103 (1977).

[113] See Schick, supra note 57, at 174-75.

[114] See Ass'n of the Bar of the City of New York, Congress and the Public Trust 10-12 (1970).

[115] See, e.g., Magnuson-Moss Warranty - Federal Trade Commission Improvement Act, Pub. L. No. 93-637, §202(a), 88 Stat. 2183, 2193-98 (1975)(codified as amended at 15 U.S.C. §57a) (1982) (stringent procedures for FTC rulemaking). See generally Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L. J. 451, 458, 489-90 (1979).

A number of reform proposals contain recommendations to amend other portions of the Administrative Procedure Act. Some of the leading proposals include limitations on the number of cases subject to the statutory requirement of trial-type procedures, the establishment of a "unitary" administrative procedure, a requirement that administrative decisions be accompanied by a concise statement of reasons, a provision stating that agency decisions would not be invalidated due to minor procedural irregularities, measures to improve efficient agency decisionmaking, and alterations in the appointment and tenure of administrative law judges. See Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258, 321-26 (1978).

[116] See Diver, supra note 91, at 410-11. See also note 145.

and reasoning behind their decisions, and increase public participation in the decisionmaking process.[117] Creating a surrogate political process through increased public participation and imposing an explication requirement are designed to minimize the chance of unconscious policy bias, permit the agency to adopt only those policies for which it can give a reasoned response to objections raised by the participants, and diminish public cynicism.[118]

Congress should recognize, however, that broadening interest group representation before the agencies and attempting to reduce the dangers of interest group capture of regulatory policymaking are unlikely to significantly improve the output of the administrative process. Reliance on procedural safeguards may support indirectly the continuation of congressional withdrawal from the policymaking process.

Any system which seeks to ensure the participation of all affected interests in agency proceedings also "involves major difficulties of implementation, is likely to be quite costly, and may lead to the employment of inferior decisional processes."[119] First, it may not be necessary or even possible to provide for the representation of interests affected by agency decisionmaking. Second, this approach cannot guarantee agency responsiveness to newly represented interests. Third, these reforms may frustrate rational decisionmaking by complicating and delaying administrative proceedings. Fourth, at least some "public interest" representation is purely ideological and has no more "public" content then the interests actually being regulated. Attempting to satisfy the universe of selectively presented and conflicting interests may force administrators to make decisions based on expediency or an *ad hoc* evaluation of "all the relevant circumstances."[120] The imposition of detailed procedural requisites could also have the perverse impact of interfering with inter-agency

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[117] See Study on Regulation, supra note 86, pt. 3, at 3-5; Bazelon, Coping with Technology Through the Legal Process, 62 Cornell L. Rev. 817, 825 (1977); Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1292 (1975); Stewart, supra note 61, at 1679-80, 1702; Lazarus & Onek, The Regulators and the People, 57 Va. L. Rev. 1069, 1094-1108 (1971) (advocating wider participation rights).

[118] See Note, Regulatory Analyses and Judicial Review of Informal Rulemaking, 91 Yale L. J. 739, 742 (1982); see also Crampton, The Why, Where, and How of Broadened Public Participation in the Administrative Process, 60 Geo. L. J. 525, 527-30 (1972).

[119] Stewart, supra note 61, at 1789.

[120] Diver, supra note 91, at 424, citing Stewart, supra note 61, at 11776-81.

efforts to reach coordinated and coherent policy decisions.[121] Thus, it appears doubtful that the increased participation of various affected interests will improve the chances of achieving objectively-defined rational policy.[122]

9. *Mandate Inter-Agency Consultation Requirements:* Another indirect device for influencing agency activity is to require an agency to consult with other executive agencies before making particular types of decisions or submitting proposals for new or amendatory legislation. The intent of the consultation or review provision is to inject additional priorities and recommendations into the decisionmaking process and thereby change the terms, mitigate the impact, or possibly even terminate the proposed action.

This approach can be useful when one agency's jurisdiction overlaps intimately with other agencies' or when a regulatory or programmatic decision is bound to be controversial. Members of Congress benefit from the consultation requirement because of their ability to stay out of the decisionmaking process and allow the designated agencies to resolve the conflict.

The primary criticism of this approach is that it supports the continuation of Congress' disposition to enact vague statutes which over-delegate authority to the agency, and provides little guidance as to the preferred resolution of the underlying policy issue. Furthermore, this proposal does not, of course, guarantee a particular result. Nor does it preclude an administration from devising its own alternative, non-statutory mechanisms for consultation. In the Reagan Administration, for instance, the Trade Policy Committee,[123] chaired by the United States Trade Representative, has had many of its functions superseded by the Cabinet Council on Commerce and Trade. Both consultation mechanisms operate, with allocation of responsibilities between them made on an *ad hoc* basis. Moreover, statutorily created bodies can fall into disuse. There has not been, during the Reagan Administration, even one formal meeting of the full Development Coordination Committee.

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[121] Bruff, supra note 115, at 458-59; see also Stewart, supra note 61, at 1760-90.

[122] Diver, supra note 91, at 424.

[123] Exec. Order No. 11846, 3 C.F.R. 971 (1975), reprinted in 19 U.S.C. § 2111 note (1982).

B. Non-Statutory Mechanisms

Aside from the numerous statutory devices available to Congress for monitoring and supervising executive actions, there are a variety of non-statutory weapons which can be utilized to accomplish the same objective. These control mechanisms have varying degrees of potency and ease of operation. While these indirect devices are usually implemented in combination with other techniques, their impact on the regulatory and administrative process is well-recognized.[124]

1. *Oversight Hearings and Investigations:* As the two most prominent non-statutory checks on administrative activity, these devices will continue to be utilized on a frequent basis for the remainder of this session of Congress. Oversight committees review the conduct and policies of federal agencies which become controversial, and force senior officials to justify their practices or decisions. At a minimum, hearings and investigations enhance the level of communication between the Congress and the executive branch. If conducted in an aggressive manner, oversight hearings may result in the postponement of planned agency activities, changes in policy directions and agency personnel, and findings which reveal abuses of authority as well as illegal, improper, and unethical conduct.[125] Studies of investigations by committee staff, congressional support agencies, and outside consultants can also contribute to the effort to alter administrative policy, challenge questionable conduct, or substantiate recommendations for further congressional action.[126]

Unfortunately, congressional performance of its oversight function has never lived up to its promise. Many of the deficiencies are caused by the decentralized and overly complex committee structure

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[124] See H. Linde & G. Bunn, Legislative and Administrative Processes 591-632 (1976); M. Ogul, Congress Oversees the Bureaucracy (1976); W. Cary, Politics and the Regulatory Agencies 27-59 (1967); H. Friendly, The Federal Administrative Agencies 163-73 (1962); Newman & Keaton, Congress and the Faithful Execution of the Laws—Should Legislators Supervise Administrators?, 41 Calif. L. Rev. 565 (1953).

[125] However, Courts have occasionally invalidated agency actions which were found to have been actually motivated by undue congressional influence or which give the appearance of having deprived parties of unbiased decisions by agency heads. See D.C. Federation of Civic Ass'ns. v. Volpe, 459 F.2d 1231, 1248 (D.C. Cir.), cert. denied, 405 U.S. 1030 (1972); Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966).

[126] See Kaiser, supra note 56, at 15.

in Congress.[127] It is virtually impossible for Congress to coordinate policy and conduct oversight when numerous subcommittees with overlapping jurisdictions and differing policy preferences are each trying to influence the operation of a single agency.[128]

The structural barriers, while a significant impediment to constructive congressional oversight, pale in comparison to the problems reflected in the superficial manner in which Congress conducts its hearings and investigations. The number of review activities conducted in the 1970's indicates that Congress engaged in more oversight than ever before. There is, however, a widespread consensus on Capitol Hill that oversight continues to be a neglected function of Congress.[129] The asserted "right of continuous intervention" which underlies the contemporary oversight model improperly deflects the attention of Congress from its lawmaking function and precludes effective monitoring of executive activities.[130] Having transformed oversight into little more than a tool for political self-aggrandizement and a constituent service function which result in the micro-management of selected administrative activities, Congress gives the appearance of attending to details even as it neglects its responsibility to evaluate the agencies' performance and, if necessary, alter the statutory rules which have resulted in unsatisfactory programs and policies.[131] Rather than continuing to use oversight to become actively involved in the execution of policy, legislators should spend more time testing the performance of the administrators against prescribed statutory standards.

Committee oversight operations appear for the most part to be

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[127] See House Select Comm. on Committees, Report on Committee Reform Amendments of 1974, H.R. Rep. No. 916, 93d Cong., 2d Sess. 62-71 (1974); Cutler, To Form a Government, Foreign Aff. 126-43, 135-36 (Fall 1980); Oppenheimer, Policy Effects of U.S. House Reform: Decentralization and the Capacity to Resolve Energy Issues, 5 Legis. Stud. Q. 5-30 (1980); Ribicoff, Congressional Oversight and Regulatory Reform, 28 Ad. L. Rev. 415, 420 (1976).

[128] See Bruff, supra note 114, at 456-57; see also Bruff & Gellhorn, supra note 54, at 1418; Robinson, The Federal Communications Commission: An Essay on Regulatory Watchdogs, 64 Va. L. Rev. 169, 179-82 (1978).

[129] Study on Regulation, supra note 86, at 109; see House Select Comm. on Committees, Final Report, H. R. Rep. No. 866, 96th Cong., 1st Sess. 286 (1980) (only twenty-nine of 168 members responding to a survey thought that House committees were doing an adequate job of oversight).

[130] See Huntington, Congressional Responses to the Twentieth Century, in The Congress and America's Future 27-32 (D. Truman ed. 1965).

[131] See generally Schick, supra note 57, at 164-66; Macmahon, Congressional Oversight of Administration: The Power of the Purse, 58 Pol. Sci. Q. 161 (1943).

directed at simply blocking policy initiatives or generating publicity,[132] rather than at establishing a dialogue between the agency and Congress which gives direction to the policymaking process.[133] These structural and dispositional impediments will have to be removed (or at least lessened) if Congress ever hopes to implement a productive oversight program.[134]

2. *Miscellaneous Practices:* Performance of its traditional oversight activities does not exhaust Congress' supply of non-statutory means of influencing executive actions. The confirmation process, demanding information or reports from the agencies, and declarations of legislative intent are means which continue to be available in the post-*Chadha* environment to influence agency activity.

The Senate has the opportunity to utilize constructively the process of confirming presidential appointments to solicit (non-binding) pledges from the nominees to notify or consult with the appropriate congressional committees before undertaking major initiatives. Unfortunately, this potential mechanism for congressional influence has had little effect because the confirmation power has usually been exercised in a perfunctory fashion.[135]

Providing information to Congress could be enhanced by amendments to authorizing statutes requiring that committees be kept "fully and currently informed" by agency heads under their jurisdiction.[136] Committees would be able to monitor the development of future agency actions if the scope of the disclosure statute were defined to include "significant anticipated activities."[137] These requirements would give each authorizing committee the same authority to demand and receive information as is currently (and exclusively)

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[132] Bruff & Gellhorn, supra note 54, at 1420-22; Study on Regulation, supra note 86, at 107-09.

[133] Robinson, supra note 128, at 179-82.

[134] Since the effort to monitor and control effectively is not cost-free, the communication of elected officials' preferences may be distorted. This observation supports the argument that Congress should more fully assume its responsibility to choose between policy alternatives, rather than use open-ended statutory language and rely on devices like oversight to confine agency discretion. See generally J. Sundquist, The Decline and Resurgence of Congress 318-24 (1981); W. Niskanen, Bureaucracy and Representative Government 24-35 (1971).

[135] Robinson, supra note 128, at 183 n.35.

[136] See, e.g., Intelligence Authorization Act, Pub. L. No. 96-450, § 501, (Select Committees on Intelligence to be kept fully informed of current intelligence activity of CIA); Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 136, 60 Stat. 812 (directive by Congress to its standing committees to exercise "continuous watchfulness" over agency operations).

[137] Intelligence Authorization Act, supra note 136, at § 501(a)(1)(A).

possessed by the Select Committees on Intelligence. Since *Chadha* does not affect statutory procedures by which Congress is informed of actions planned or implemented by the executive branch, Congress remains free to impose requirements involving notifications, certifications, findings, reports, or consultation with appropriate committees.[138] Finally, leaks of information by agency personnel to congressional staffers will continue to be a bountiful source of information to Members.

Conference committee reports accompanying enacted legislation could be written to include more emphatic language or directives to amplify the legislative intent by providing the implementing agency with specific guidance regarding its activities.[139] While they are not legally binding upon an agency, one-House or concurrent resolutions could also be used to deliver a message or warning to an agency regarding a specific action or policy. The failure of an agency to abide by congressional directives expressed in either report language or a resolution would constitute an invitation for Congress to consider the statutory sanctions discussed earlier.

C. Informal Accommodations Between Branches

In addition to the statutory and non-statutory mechanisms described above, Congress has still other options at its disposal to influence executive activities. The two most prominent devices are usually characterized as clearance procedures and informal communications.

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[138] See Foreign Relations Hearing, supra note 1, at 19.

[139] Judicial reliance on committee reports in construing legislative enactments should not be underestimated. See Zuber v. Allen, 396 U.S. 168, 185-186 (1969); see also Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205 (1970); Alfange, The Relevance of Legislative Facts in Constitutional Law, 114 U. Pa. L. Rev. 637 (1966). But cf. Ackerman & Hassler, supra note 70, at 1559-61 (urging courts to adopt the principle of "textual priority" and ignore committee reports in reading agency-forcing statutes). See also Chadha, 103 S. Ct. at 2796 n.11 (Justice White's suggestion that Congress should provide the courts with statutory direction to regard legislative resolutions of disapproval as relevant legislative history). The decisions to utilize report language rather than supply precise statutory guidance is essentially a political judgment. If Members believed they had a clear opportunity to enact a particular preference, presumably they would do so. Report language, therefore, is functionally equivalent to the settlement of litigation—the risks of putting the issue to a vote are sufficiently high that the Members are willing to settle for report language expressing the view of a substantial number of Members rather than putting the issue on the floor for a vote. Nevertheless, the agency in question contravenes report language at its own risk.

Congressional committees and executive agencies have entered into a number of agreements in recent years to balance the executive branch's need for flexibility in administering programs with the congressional need for oversight and at least a minimal degree of ongoing control. These clearance procedures are commonly relied upon in the reprogramming of appropriations, and operate to ensure executive compliance with the objectives of the relevant committees.[140] Depending on the nature and magnitude of the proposed reprogramming, agencies notify and in certain cases seek the prior approval of designated committees and subcommittees before shifting money between projects within a budget account.[141] If the reprogramming procedures are not present in the statute, the affected agency remains legally free to ignore the committees.[142] However, agencies usually choose to comply with the clearance procedures, because of the readily available congressional sanctions.[143]

Direct communications between Members of Congress, their staff, and executive officials are a time-honored means of reducing the possibility of confrontation and resolving disputes in Washington. These contacts usually result in the delivery of the congressional (or at least the Member's) perspective on the given issue, but sometimes this approach is utilized to gain access for an interest group to the appropriate decisionmaker in the executive branch. Occasionally, members of Congress, interest group leaders, and representatives from the agency and White House meet in an "interior process of policymaking" to bargain in an attempt to resolve the administrative action at issue.[144]

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[140] Informal clearance procedures and reprogramming arrangements are now sufficiently important and formalized to be incorporated into many agencies' financial management manuals and directives. See Fisher, The Constitution Between Friends 33-36 (1978); Kaiser, supra note 56, at 15. See generally Watson, supra note 1.

[141] See Miller & Knapp, The Congressional Veto: Preserving the Constitutional Framework, 52 Ind. L. J. 3167, 374 (1977).

[142] See American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303, 305-06 (D.C. Cir. 1982).

[143] Fisher, supra note 97, at 14.

[144] See T. Lowi, The End of Liberalism 106 (2d ed. 1979); Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Colum. L. Rev. 943, 944-47 (1980); Stewart, Regulation, Innovation, and Administrative Law: A Conceptual Framework, 69 Calif. L. Rev. 1256, 1341-54 (discussing informal negotiating and bargaining to establish regulatory policy); T. Cronin, The State of the Presidency 93-96 (1975).

D. Expanded Judicial and Presidential Control over the Administrative Process

Since Congress has to date demonstrated only a limited inclination and capacity to conduct effective oversight of agency activities, calls for regulatory reform may be better addressed by more expansive judicial or Presidential supervision.

Congress has traditionally relied upon the judiciary as the proper body to review the rulemaking activities of the regulatory agencies and confine any abuses in the exercise of agency discretion.[145] Although the courts unfortunately appear to have abandoned the use of the delegation doctrine to control the transfer of legislative power to the agencies,[146] the courts continuously review the activities of the agencies under the standards established in the Administrative Procedure Act.[147] *Chadha* imposes no restraint on the ability of Con-

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[145] The transformation of judicial review of rulemaking and adjudication during the 1970's confirms the fact that "courts have gone beyond their role as obliging handmaidens to congressional intent." Diver, supra note 91, at 420. For example, courts have removed obstacles to the justiciability of administrative inaction and reinterpreted grants of authority seemingly intended to be permissive as mandatory. Claims of expertise and experimentation which underlie policies announced in adjudicative orders now receive far less deference than before. These developments illustrate the role the federal appeals courts already play in policing the formulation of public policy by the agencies. See id. at 409-13, 418-21.

[146] Courts no longer read the delegation doctrine to require that the legislature state a "prescribed standard" or "intelligible principle" in order to constrain agency discretion to the stated legislative purpose. See, e.g., Chadha, 103 S. Ct. at 2801-02 (White, J., dissenting); FPC v. New England Power Co., 415 U.S. 345, 352-53 (Marshall, J., concurring and dissenting) (nondelegation doctrine, "which was briefly in vogue in the 1930's has been virtually abandoned by the Court for all practical purposes"); see also American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring in the judgment) [hereinafter cited as the *Benzene* case]. Nevertheless, the delegation doctrine continues to survive — a number of Justices from the Warren and Burger Courts have cast votes to invalidate acts of Congress because of its violation—and receive scholarly approval. See generally, Aranson, Gellhorn & Robinson, A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 7-21 (1982); J. Ely, Democracy and Distrust 131-34 (1980); J. Bolton, supra note 1 at 288; Gewirtz, The Courts, Congress, and Executive Policymaking: Notes on Three Doctrines, 40 Law & Contemp. Probs. 46, 49-65 (1976); Freedman, Delegation of Powers and Institutional Competence, 43 U. Chi. L. Rev. 307 (1976); S. Barber, The Constitution and the Delegation of Congressional Power (1975); Wright, Beyond Discretionary Justice, (Book Review), 81 Yale L. J. 575, 582-87 (1972); McGowan, supra note 95, at 1127-30.

[147] Although the courts are not supposed to substitute judicial judgment for a discretionary decision by an administrative agency, they have been tempted in the past to influence the process of regulatory policymaking by imposing procedural requirements which exceed the terms of the APA or by imposing their own judgment when they disagreed with the agency. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). The procedural creativity which characterized the efforts of the lower

gress to increase indirectly the controls over executive action by granting broader review powers to the federal courts.[148]

The Bumpers Amendment is the leading proposal to enlist the courts in the effort to ensure that agencies act within the limits of their delegated authority and jurisdiction.[149] In its current version, Senator Bumper's proposal would remove any presumption of validity accorded agency determinations of fact and law, and require the factual basis of the rule to have "substantial support" in the record of the agency proceeding. The imposition of a more rigorous standard of judicial review for agency rulemaking is designed to result in closer judicial scrutiny of agency activities to ensure conformity with congressional intent.

This proposal has been heavily criticized for its potential to generate additional delay in agency rulemaking proceedings and to

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courts to put a "high gloss" on the APA were abruptly halted by the Court in Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519, 546-48 (1978). In the absence of special statutory procedures, courts may not impose procedural requirements for agency rulemaking which go beyond the APA. However, the courts may continue to review agency rules for arbitrariness, (5 U.S.C. § 706(2)(A) (1976)), and may remand for an agency's failure to explain rules sufficiently, (Vermont Yankee, 435 U.S. at 535 n.14; Camp v. Pitts, 411 U.S. 138, 143 (1973) (per curiam)). Many courts have followed the lead of the Court of Appeals for the District of Columbia in undertaking a structural review of the rulemaking process as the primary means of checking the exercise of discretion. See, e.g., American Pub. Gas Ass'n v. FPC, 567 F.2d 1016, 1063 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976) (en banc). While recent Supreme Court decisions have emphasized Vermont Yankee's narrow concept of the court's role in reviewing agency decisions (see, e.g., Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980); Steadman v. SEC, 450 U.S. 91 (1981)), the continuing elaboration of procedural requirements in notice-and-comment rulemaking has created more delay, complexity, and procedural formality. See generally S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 499-524 (1979); Bruff, supra note 115 at 459-61; Davis, Administrative Common Law and the *Vermont Yankee* Opinion, 1980 Utah L. Rev. 3 (1980); Rodgers, A Hard Look at *Vermont Yankee*: Environmental Law Under Close Scrutiny, 67 Geo. L. J. 699 (1979); Gifford, Administrative Rulemaking and Judicial Review: Some Conceptual Models, 65 Minn. L. Rev. 63 (1980).

[148] Congress has at least three other options which would have the same effect. The first option would involve easing the requirements for standing to bring civil suits against executive actions. The second option would be to empower lower federal courts to rule directly on agency requests for authorization to undertake planned activities. See, e.g., Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, §§ 103-105, 92 Stat. 1783 (where specially designated court is required to issue warrants for certain electronic surveillance operations). The third option would involve the continuation of Congress' current disposition to enact new or amended agency charters which provide for more intensive judicial oversight of agency action. See DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 Va. L. Rev. 257 (1979).

[149] S. 1766, 98th Cong., 1st Sess., 129 Cong. Rec. S. 11583 (daily ed. Aug. 4, 1983) (Senator Bumper's proposed amendments to 5 U.S.C. § 706 (1976)).

stimulate an excessive amount of litigation.[150] There is also a serious question whether increasing judicial intervention in the administrative process would miscast the institutional role of the judicial branch in our system of government.

For at least two major reasons, the judicial strategy should be limited to determining whether the action was selected by fair and regular procedures within constitutional and statutory limits, and whether the action constitutes a reasoned resolution of fact and policy issues which is consistent with identifiable statutory policies and the Constitution.[151] Even if the courts could find the time to give detailed consideration in every instance of contested agency action, the difficulty of articulating neutral principles for deciding what constitutes "substantial support" for an agency record would resurrect as a matter of necessity judicial subjectivity in assessing execution actions under the Bumpers Amendment.[152] While the courts have the capacity to address issues related to the statutory distribution of policymaking authority (*i.e.*, does the statute resolve the relevant policy issues or did Congress intend to allow the exercise of executive discretion?), they are ill-equipped and untrained to intrude in the manner required by the Bumpers Amendment on the policymaking functions of the two political branches.[153] In light of

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[150] See Woodward & Levin, In Defense of Deference: Judicial Review of Agency Action, 31 Ad. L. Rev. 329 (1979); McGowan, supra note 95, at 1162-68 (also summarizing the views of Professors Byse and Nathanson).

[151] See 5 U.S.C. § 706 (2)(A)-(D) (1976). However, challenges to the notion that judicial review should be highly deferential are contained in DeLong, supra note 148, at 259-61; Wright, supra note 146, at 597.

[152] The "substantial support" clause reflects the continuing debate over the appropriate scope of review of agency fact findings. See, e.g., DeLong, supra note 148 at 284-89; Gifford, Rulemaking and Rulemaking Review: Struggling Toward a New Paradigm, 32 Ad. L. Rev. 577 (1980); Pederson, Formal Records and Informal Rulemaking, 85 Yale L. J. 38 (1975); Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185 (1974). For comment on the no-presumption provisions, see, e.g., Proceedings of the Forty-First Annual Judicial Conference for the District of Columbia circuit, 89 F.R.D. 169, 187-210 (1980); Levin, Judicial Review and the Bumpers Amendment, 1979 Recommendations & Resp. of the Ad. Conf. of the United States 565 (1981); Pierce & Shapiro, Political and Judicial Review of Agency Action, 59 Tex. L. Rev. 1175, 1189-95 (1981).

[153] See Ethyl Corp. v. EPA, 541 F.2d 1, 66-7 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976) (Bazelon, C.J., concurring); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651-52 (D.C. Cir. 1973) (Bazelon, C.J., concurring); Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375, 393 (1974). But see Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). See generally McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729, 749-53, 796-810 (1979);

the limitations on judicial competence and legitimacy to police the executive implementation of a statute, it is difficult to see how the expansion of judicial review powers will either promote the coordination of policy or result in the satisfactory performance of increased oversight of administrative decisions.[154]

Some commentators have recognized the limitations of congressional and judicial review, and suggested that the President is uniquely qualified to perform oversight functions which are ineffectively performed by Congress and forbidden to the courts under both statutory and constitutional doctrines.[155] Most of the current proposals for increasing presidential power to review, modify, and reverse agency policy rely upon the prospective imposition of procedural and substantive requirements on the agencies through executive order.[156]

Mashaw, Administrative Due Process as Social-Cost Accounting, 9 Hofstra L. Rev. 1423, 1435-36, 1447-50 (1981); D. Horowitz, The Courts and Social Policy 33-56 (1977); Glazer, Should Judges Administer Social Services?, 50 Pub. Interest 64 (1978); A. Bickel, The Supreme Court and the Idea of Progress 175 (1970) (judicial process "too remote from conditions, and deals, case by case, with too narrow a slice of reality" and "is, in a vast and changeable society, a most unsuitable instrument for the formation of policy"); Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 393-96 (1978) (courts ill-equipped to handle "polycentric" problems). For an argument in favor of judicial deference to administrators' choice of rule formulations, see Diver, The Optimal Precision of Administrative Rules, 93 Yale L. J. 65 (1983). See generally Note, Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy, 89 Yale L. J. 513, 514-18 (1980) (collecting the literature addressing whether the courts are well-equipped to intervene in matters of policy and administration).

[154] See Bruff, supra note 114, at 459; Bruff, Judicial Review and the President's Statutory Powers, 68 Va. L. Rev. 1, 7-8 (1982) [hereinafter cited as President's Powers]. A more productive approach would have the courts apply the technique of narrow statutory construction to constrain agency initiatives undertaken pursuant to broad delegations of authority by Congress. See, e.g., Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 639-46 (1980) (Stevens, J., concurring); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). See generally Gewirtz, supra note 146, at 65-80.

[155] See Cutler & Johnson, Regulation and the Political Process, 84 Yale L. J. 1395, 1410-17 (1975); Bruff, supra note 114; ABA Regulation Study, supra note 87, at 79-80; B. Schwartz, Administrative Law § 204 (1976); A New Regulatory Framework: Report by the President's Advisory Council on Executive Organization 20-26 (1971) [hereinafter cited as the Ash Council Report] (advocating consolidation of several independent agencies with single administrator responsible to the President); President's Comm. on Administrative Management 41-2 (1937) (proposing independent agencies be made responsible to the President). For a description of the existing powers of the President to coordinate agency activities, see Bruff, supra note 115, at 488-97.

[156] See Exec. Order No. 12,044, 3 C.F.R. 152 (1979), superseded by Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 note (1982) (President Carter's executive order imposed a number of procedural requirements on the rulemaking activities of the federal agencies and the executive branch); Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. §601 note (1982) (President Reagan's executive order attempting to impose both procedural and substantive

At its core, the argument for the performance of regulatory oversight by the President has three elements.[157] Because the chief executive has a national constituency,[158] the President will be able to take initiatives to resolve problems involving government regulation without being hampered by the factionalism which hinders congressional oversight.[159] Presidential directives influencing regulation would also force Congress as an institution to consider broad policy issues and limit the inter-committee rivalries and jurisdictional disputes which so often prevent Congress from acting. Finally, proponents of presidential oversight contend that only the President enjoys the unique vantage point which allows him to superintend and coordinate the execution of numerous statutes by a variety of independent and executive agencies. From an *executive* perspective, increased Presidential control is a desirable means of stemming the flow of incoherent and inconsistent policymaking which flows from the "headless fourth branch of government."

While there are several attractive arguments for organizing the executive branch under the President and thereby terminating the continuous fragmentation of decisionmaking authority, the arguments of the Presidential proponents are open to serious challenge. Because Congress does not hold the agencies accountable only through the President and due to the fact that Presidents and department heads are not elected and dismissed as a team, no President has more than a tenuous capacity to coordinate the activities of the Executive Branch. The extent to which the President may law-

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requirements on rulemaking activities of all federal agencies). The legal status of the Reagan Order is sharply contested in Rosenberg, Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291, 80 Mich. L. Rev. 193 (1981). See generally Fleischman & Aufses, Law and Orders: The Problem of Presidential Legislation, 40 Law & Contemp. Probs. 1 (1976); Noyes, Executive Orders, Presidential Intent, and Private Rights of Actions, 59 Tex. L. Rev. 837 (1981); Bliss, Regulatory Reform: Toward More Balanced and Flexible Federal Agency Regulation, 8 Pepperdine L. Rev. 619 (1981). Several other means of allowing the President to monitor rulemaking activity are also under consideration. One would give the President a statutory authorization to direct agencies to consider or reconsider the issuance of major regulations. See ABA Regulation Study, supra note 87. Others would impose regulatory reporting requirements on the President. See, e.g., Lipan & Nordhaus, With the Veto Game, The New York Times, July 5, 1983, at A19, col. 1; Lipan & Nordhaus, Reforming Federal Regulation (1983) (proposing a federal regulatory calendar).

[157] See Cutler & Johnson, supra note 155, at 1410-11.

[158] See The Federalist No. 11 (J. Madison); id. No. 73 (A. Hamilton); Myers v. United States, 272 U.S. 52, 123 (1926).

[159] See Bruff, supra note 115, at 456-57.

fully supervise a decision allocated to another officer is uncertain and, as a practical matter, no President can supervise more than a handful of executive branch decisions.[160] Past experience suggests that agency compliance with executive orders establishing centralized review and analytic requirements has been uneven and incomplete.[161] Numerous programs are outside the President's direct control and function under the powers of administrative supervision exercised by Congress and the courts. The managerial task facing the President today is more complex, subject to the intervention of outside forces and contingencies, and therefore less predictable. These factors impede the establishment of a system which will bring coherence and centralized loyalities to executive branch leadership.[162]

Those who argue that the President benefits from a national constituency fail to recognize that any effort to synthesize the agencies' policy agendas may destroy any linkage between the executive agency and a potent, preexisting constituency. Presidential intervention would require in the most difficult cases the creation of new coalitions following successful efforts to reconcile competing policy prescriptions which are based increasingly on unrelinquishable value preferences held by people with a conscious stake in government activities. While every President has been forced to grapple with the demands of interest groups,[163] today's policy activists are more numerous, professional, narrowly focused, and better endowed with financial and voting power. Since major groups in our political system may be mobilized to frustrate efforts to reach common interests rather than particular interests, a by-product of each group's participation in the policymaking process is the complication of the President's effort to sketch a grand design.[164]

From an institutional perspective, granting the President a significant increase in his powers over the rulemaking activities of the executive and independent regulatory agencies could also amount to

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[160] See President's Powers, supra note 154, at 22; DeMuth, supra note 79.

[161] See Raven-Hansen, Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291, 1983 Duke L. J. 285, 344-47 (1983).

[162] Heclo, One Executive Branch or Many?, in Both Ends of the Avenue 26, 31 (A. King ed. 1983).

[163] See generally D. Truman, The Governmental Process (1951).

[164] See Heclo, supra note 162, at 34-38.

an abdication of congressional responsibility. Efforts to "coordinate" agency initiatives may well involve the reassessment and reordering of legislative priorities. Congress has acted in recent years to reverse the expansion of the President's power and is likely to resist proposals to give the White House new authority to influence agency activities.[165]

Eliminating the constitutional anomaly of "independent" agencies has a powerful appeal. Nonetheless, Congress cannot continually defer to the executive branch for the resolution and coordination of policy initiatives. Instead of criticizing agencies for doing precisely what Congress permitted them to do by making broad grants of authority, Congress should instead assume the responsibility for defining the law with greater precision.

E. Summary

The Supreme Court decisions in *Chadha* and its related cases brought to a climax sixty years of tension between the executive and legislative branches over how federal laws are made and by whom they are enforced.[166] Although these rulings eliminate the availability of the legislative veto as a means of checking the exercise of delegated authority by executive officials, relations between the branches are unlikely to be radically altered. Clearly, Congress remains capable of exercising control in a variety of other ways.

The immediate future undoubtedly will be a period of intensive reevaluation and adjustment of statutes containing legislative veto provisions.[167] Since the remedies fashioned and methods utilized to reaffirm its constitutional prerogatives may reshape the relationship between the political branches, Congress should resist the temptations in the post-*Chadha* environment to resort to a single device as a means of checking the operations of the executive branch. In light

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[165] See Leidenstein, The Reservation of Congressional Power: New Curbs on the President, 93 Pol. Sci. Q. 393 (1978). Criticisms of expanded Presidential oversight of delegated authority are contained in McGowan, supra note 95, at 1168-73; H. Friendly, supra note 125, at 153 ("I find it hard to think of anything worse."); see also Panama Ref. Co. v. Ryan, 293 U.S. 388, 435 (1935) (Cardozo, J., dissenting) (the President would have a "roving commission to inquire into evils and then, upon discovering them, do anything he pleases.").

[166] Olson, supra note 62, at 19.

[167] Martin, supra note 46, at 134. See also Rodino, supra note 59, at 11 (". . .it is unnecessary to adopt new mechanisms of congressional control.").

of the differing effect of the statutory, non-statutory, informal, and institutional mechanisms which continue to be available, Congress should deliberately examine the policy context and carefully choose the control mechanism which is best suited to that particular need.[168]

As Congress proceeds to evaluate the potency and appropriateness of its techniques and devices, it would do well to concede that the legislative veto was a manifestation of a long-standing tendency to respond to perceived deficiencies in policy by adopting procedural solutions, rather than addressing the underlying problems.[169] The rapid multiplication of veto provisions in recent years was less of a realistic solution than a symptom of congressional frustration over the vast array of specialized agencies which are administering complex programs with different and frequently inconsistent objectives. Perhaps the major benefit of *Chadha* is the opportunity provided by the Court for Congress to reconsider the justification and necessity of delegating authority to the executive branch and conditioning its exercise. Since the legislative branch is the source of most of the problems which the legislative veto was designed to address, Congress should reassume its responsibility as the institution in our system of government which must identify and reconcile conflicts among the federal government's policies, programs, and regulations.

V. Toward a Renewal of Congressional Responsibility and Accountability

The long litany of alternatives to the legislative veto recited in the previous section demonstrates that Justice White was incorrect in suggesting that the invalidation of the legislative veto leaves Congress with a Hobson's choice of "either to refrain from delegating the necessary authority, leaving itself with the hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch and in-

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[168] See Martin, supra note 167, at 143-44.

[169] See Bruff, Ban on Legislative Veto Could Lead to Less Lawmaking, L.A. Times, June 28, 1983.

dependent agencies."[170] The problem facing Congress today is certainly not the possibility that it must delegate its lawmaking function. The multitude of devices which continue to be available illustrates that the central question is not one of technique, but rather is one of political will.

At the national level, the role and prerogatives of the legislative branch in our political structure have eroded in the Twentieth Century due in large measure to two related factors. Congress created the vast bureaucratic establishment in response to numerous forms of political pressure and then delegated substantial amounts of discretionary authority to the President and his political and career subordinates to implement administrative activities.[171] To be sure, Congress has attempted to adapt to the condition of modern government by strengthening its own capabilities.[172] Unfortunately, jurisdictional jealousies and widely differing policy preferences among the Members and committees of Congress have generated an institutional barrier to the definition of national priorities and the implementation of effective responses to executive initiatives.[173] Statutory efforts to regulate the administrative process or respond to specific rules have been unsuccessful in preventing the agencies from becoming autonomous lawmaking bodies.[174] Judicial emasculation of the "nondelegation" doctrine has removed the possibility (at least for now) that the courts might impose some constraint on vague legislative grants of authority. In short, Congress has been unwilling — due more to political pressures than a lack of expertise

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[170] Chadha, 103 S. Ct. at 2793.

[171] See Freedman, Crisis and Legitimacy in the Administrative Process, 27 Stan. L. Rev. 1041, 1058 (1975); J. Landis, The Administrative Process 10-17 (1938).

[172] The reform efforts range from the consolidation of congressional committees in the 1940's and the budget reforms of the 1970's to the incremental changes in structure, process, and resources which suddenly exploded in the 1970's with the geometric expansion of congressional staff and the proliferation of subcommittees. See West & Cooper, Congressional Veto and Administrative Rulemaking, 98 Pol. Sci. Q. 285 (1983).

[173] This observation has been concisely summarized:

> The uncoordinated structure of committee government, forcing piecemeal oversight, played a major role in the position of Congress vis-a-vis the administrative state. Although the decentralization of the committee system allowed for specialized attention to individual agencies by specific committees or subcommittees, decentralization, unsupplemented by mechanisms of committee coordination, left Congress open to co-optation and misdirection by the bureaucratic agencies.

L. Dodd & R. Schott, Congress and the Administrative State 82 (1979).

[174] See House Rules Committee Report, supra note 88, at 4.

— to prescribe particular standards to accompany delegations of authority and unable to develop satisfactory alternatives to guide and oversee the administrative agencies.[175]

Justice White undervalued these developments and their relationship to the damage caused to the legislative decisionmaking process by the increasing reliance of the Congress on the veto mechanism. It has always been easier to pass a statute containing vague language about the "public interest" in resolving a problem which has allegedly generated the need for a legislative remedy.[176] This truism has been repeatedly confirmed by the inclusion of high-sounding generalities and spacious delegations in contemporary authorizing statutes which are meaningless in either directing or restricting the exercise of executive power.[177] Because of an inability to reach a consensus and the decline of legislative discipline, the Congress has continued its inclination to grant the agencies broad and far-reaching legislative authority with virtually no guidance for its

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[175] Two insightful criticisms of broad delegations of authority are contained in T. Lowi, supra note 144; Jaffee, The Illusion of the Ideal Administration, 86 Harv. L. Rev. 1183 (1973).

[176] But cf. Jaffe, The Illusion of Ideal Administration, 86 Harv. L. Rev. 1183, 1191 (1973) (the meaning of a "public interest" standard in a regulatory statute "should be derived initially from the occasion for its enactment, and after that from its development over time, rather than from the abstract terms in which it may be phrased."). Even if this is the most appropriate manner to interpret a statutory "public interest" standard, it does not relieve Congress from its abdiction of legislative judgment. If the best Congress can do is legislate in the "public interest," then no legislation at all is preferable.

[177] As Judge Antonin Scalia observed in his indictment of the legislative veto, Congress has approved broad and unimpeachable platitudes such as "safe and healthy" places to work, products free from "unreasonable risks of injury," and freedom from "sex discrimination" without converting these ideals into hard policy choices. Scalia, The Legislative Veto: A False Remedy for System Overload, 3 Regulation 19, 23 (Nov./Dec. 1979). Many agencies have been given broad discretion to regulate a simple industry under "public interest" standard. This practice conflicts with the traditional view of the proper scope of a delegation subject to legislative control. See Stewart, supra note 61, at 1676-77. While broad statutory mandates allow agencies to try to balance competing and sometimes conflicting goals, an uncircumscribed delegation of authority destroys the efficiencies associated with an agency's focused perspective and specialization, as well as hinders judicial and legislative review. Furthermore, the problem of accountability is heightened dramatically in this context because an agency with essentially independent authority can undertake its initiatives with only a low-level of consensus. The agency decision requires only enough support to withstand judicial or legislative reversal, not achieve the type of consensus required to achieve an affirmative legislative victory. Freed from the prospect of policy cancellation except by legislative majority, the agency is relatively unaccountable. See Note, Delegation and Regulatory Reform: Letting the President Change the Rules, 89 Yale L. J. 561, 568-73 (1980). See generally G. Robinson, E. Gellhorn & H. Bruff, The Administrative Process 57-61 (2d ed. 1980); J. Choper, Judicial Review and the National Political Process 371-76 (1980); Davis, A New Approach to Delegation, 36 U. Chi. L. Rev. 713 (1969); H. Friendly, The Federal Administration Agencies: The Need for Better Definition of Standards (1962).

implementation.[178]

The availability of the legislative veto has led to the adoption of loosely drafted statutes, supported the unwillingness of Congress to resolve thorny issues,[179] and resulted in the same over-delegation of authority which has caused so many in Congress to express concern over the impact of the *Chadha* decision on the relationship between the executive and legislative branches. Many commentators have recognized that Congress has repeatedly used broad delegations of authority to evade the need to exercise the type of political courage which has all too often in the last decade seemed beyond its institutional capacity.[180] In fact, the now-common view holds that Congress attempts to shift the blame for controversial policies to the agencies by enacting legislation which fails to resolve actual trade-offs between competing values and loading the legislative history with inconsistent statements designed to placate the affected interest groups.[181] By deliberately transferring to others the responsibility for decision among salient policy alternatives, Congress fails to ex-

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[178] See Javits & Klein, supra note 1, at 459-65; Stewart, Constitutionality of the Legislative Veto, 13 Harv. J. Legis. 593, 616-19 (1976); Schwartz, The Legislative Veto and the Constitution—A Reexamination, 46 Geo. Wash. L. Rev. 351, 351-52, 357-59 (1977-78).

[179] The exercise of the legislative veto at issue in the *FERC* case is a perfect illustration of this point. Congress included a veto in the statute authorizing FERC to adopt a particular rule precisely because the legislation was highly controversial and difficult to enact. But when FERC ultimately submitted its rule for legislative review, the House exercised its veto when it became convinced that the statutory authorization for the rulemaking should not have been enacted. FERC's effort to draft a rule in compliance with the statute had become irrelevant. See FERC, 673 F.2d at 437. See also Scalia, supra note 177, at 23-26; Bruff & Gellhorn, supra note 54, at 1427-28.

[180] Martin, supra note 46, at 139. See American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 545-46 (1981) (Rehnquist, J., dissenting) ("Rather than make that choice and resolve that difficult policy issue, however, Congress passed. . . .The words. . .were used to mask a fundamental policy disagreement in Congress."); McGowan, supra note 95, at 1169 ("Congress often shuffles difficult decisions off to administrators with statutes that provide little guidance either as to what means might accomplish the specific legislative ends addressed or as to how those means should relate to the many other, often conflicting, goals that Congress purportedly is pursuing."); J. Bolton, supra note 1; Scalia, supra note 177; Ely, supra note 146, at 131-33; Lowi, supra note 144, at 288-99; Jaffee, supra note 175, at 1190-92 (broad delegations often amount to "little more than a disposition to pass the buck"); Hodgson, All Things to All Men: The False Promise of the American Presidency, 138, 179-82 (1980); Ackerman & Hassler, supra note 70, at 1509-11 (1980); Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253, 270 (1982).

[181] See R. Dahl & C. Lindbloom, Politics, Economics, and Welfare 304 (1976); L. Rieselbach, Congressional Politics 196-97 (1973). It is well-recognized that Members of Congress serve their own interests by avoiding the resolution of controversial issues. M. Fiorina, Congress, Keystone of the Washington Establishment 41-49 (1977); Wiltse, The Representative Function of Bureaucracy, 35 Am. Pol. Sci. Rev. 510, 514-15 (1941).

ercise its powers and abdicates its constitutional responsibilities.[182]

There are at least three major problems with the practice of enacting standardless and inconsistent delegations of authority. First, only the most powerful lobbies — including the so-called "public interest" groups — have the resources which are necessary to influence the lower visibility rulemaking and decisionmaking processes within the Executive Branch and independent agencies. The predominant contemporary critique of the administrative process is that agencies are generally unresponsive to unorganized interests, resistant to new facts and policy arguments, and institutionally biased in favor of regulated industries and client groups.[183] Second, the appointed and career members of the bureaucracy are accountable to only an extremely limited extent and, therefore, may act with little regard for the will of the electorate. By contrast, every member of the voting public has the opportunity on election day to "throw the rascals out" of Congress. Recognizing that broader delegations than are necessary for effective governance contribute to "the atrophy of institutions of popular control,"[184] controversial issues of public policy are more properly decided in forums which are closest to sources of popular representation.[185]

The third problem with the deliberate use of ambiguous statutory language is that the practice often results in the transfer of many politically delicate problems to the courts. As compared to the operations of the political branches of government, courts certainly lack the institutional competence and democratic legitimacy to choose between competing values which are not prescribed by statute.[186] Al-

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[182] See S. Barber, supra note 146, at 38.

[183] See Stewart, supra note 61, at 1682-88, 1711-16; Study on Regulation, supra note 86, pt. 3, at 1-5; Freedman, supra note 171, at 1053-56; Estreicher, Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law, 80 Colum. L. Rev. 894 (1980); K. Davis, Discretionary Justice (1969); M. Edelman, The Symbolic Uses of Politics 22-66 (1964); Ash Council Report, supra note 155; Lowi, supra note 144, at 92-126. See generally J. Freedman, Crisis and Legitimacy: The Administrative Process and American Government (1978).

The notion that widely dispersed costs or benefits are less effectively represented in policymaking than concentrated costs or benefits is described in R. Noll, Reforming Regulation 39-42 (1970); W. Riker, The Theory of Political Coalitions (1962). See also R. Dahl, A Preface to Democratic Theory 134-35 (1956).

[184] Lowi, The Public Philosophy: Interest Group Liberalism, 61 Am. Pol. Sci. Rev. 5, 18 (1967).

[185] See E. Freund, Administrative Powers Over Persons and Property 28-30 (1928); Bickel, The Constitution and the War, Commentary 49, 52 (July, 1972).

[186] See, e.g., Industrial Union Dep't v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974); J. Choper,

though the courts and agencies necessarily make certain types of policy determinations,[187] the Constitution mandates that Congress specify the fundamental guidelines under which the judicial and executive branches must operate.

All three objections to unconfined delegations flow from the fact that the political responsiveness and broad-based diversity which characterize Congress supply the respresentative assembly with a special institutional competence not possessed by the executive or judicial branches to make uniquely political decisions. Some have suggested, however, that if Congress cannnot muster the will to make the necessary choices between competing policies, our political system would benefit if Congress stands aside by making a broad delegation of authority and letting the agencies use their best judgment to fill in the details.[188] This view reflects a lack of faith in the prescriptions of the Constitution and would confirm Justice White's concern about the abdication by Congress of its lawmaking function.

The structural checks which serve as the basis of the *Chadha* decision — the bicameralism requirement and the President's veto — were included in the constitutional scheme precisely because the Framers simultaneously intended Congress to be the center of national policymaking and to minimize the amount of lawmaking to which the public would be subjected.[189] Thus, yet another problem with broad delegations is that the accompanying transfers of authority from the Congress to the Executive increase the amount of lawmaking which is likely to occur (because there are fewer impedi-

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supra note 177, at 60; Bazelon, supra note 116, at 822; Stewart, supra note 61, at 1786-87; A. Cox, The Role of the Supreme Court in American Government, 103 (1976); Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 718-23 (1978).

[187] See K. Davis, Administrative Law Treatise §3:7 (2d ed. 1978); *Benzene*, supra note 146, 448 U.S. at 673-75 (Rehnquist, J., concurring in judgment).

[188] Davis, supra note 177, at 725, 728-29; Martin, supra note 46, at 139; Diver, supra note 91, at 433-34.

[189] The fact that the Framers did not reach out in the manner evident in the terms of Article I to define the scope of power vested in either the President or the Supreme Court suggests the extent to which they feared legislative hegemony and designed institutions to avoid the threat posed by the legislature. See Strauss, supra note 14, at 794, 810. The records of the Constitutional Convention also express the Framers' fear that the legislature would aggrandize its powers and result in "legislative usurpations." See The Federalist No. 48, at 343-44 (B. Wright ed. 1961) (J. Madison) ("[the] legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."); id. No. 73, at 468-69 (A. Hamilton) (discussing the "propensity of the legislative department to intrude upon the rights, and to absorb the powers of the other departments").

ments to lawmaking in the agencies) and decrease the political accountability of government policymaking.[190]

It is by no means obvious that government has become so complex in the last few years that writing reasonably specific delegations of authority has become as "hopeless" as Justice White suggested.[191] While it need not legislate all of "the details of administration" or confine executive officers to ministerial functions,[192] Congress must attempt to impose limits on administrative policy choices by fashioning more precise directives and positing unambiguous goals and standards. There is no excuse for those who draw their special character from a representative relationship with the people to fail to articulate intelligible principles as to matters of basic policy.[193]

Moreover, if there is insufficient consensus within Congress to resolve certain issues, then that lack of consensus should lead Congress to defer legislative action. Rather than empowering an executive agency with broad discretion — and with the unspoken desire that the problem under discussion will then go away — Congress should take no action at all. An overregulated society would certainly benefit if Congress spent more time reviewing the effects of previously enacted statutes, and correcting problems that have arisen under them, instead of adding new vague legislation to the U.S. Code.

Since Congress continues to have effective means at its disposal to ensure that the laws are faithfully executed, the search for alternatives to the legislative veto should be redirected to a coordinated program by both Houses of Congress to repeal the now unconstitu-

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[190] See President's Powers, supra note 154, at 28; Freedman, supra note 171, at 1044, 1055-56; McGowan, supra note 95, at 1130-31; Stewart, supra note 61, at 1672, 1684-87.

[191] See Olson, supra note 62, at 30. The fact that Congress has the capacity and occasionally even the willingness to adopt detailed statutory provisions is undeniable. For example, Congress was unwilling to leave the tradeoffs between automative fuel economy, auto safety, and emission control to the process of negotiation between the agencies and the automobile manufacturers. In this case, Congress insisted on enacting specific regulatory requirements. See R. Goodson, Federal Regulation of the Automobile 14-29; Stewart, supra note 144, at 1301-07.

[192] See W. Wilson, Congressional Government 49 (1885).

[193] See Freedman, supra note 146, at 336; *Benzene*, supra note 146, 448 U.S. at 686 (Rehnquist, J., concurring in the judgment)(the nondelegation 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."); United States v. Robel, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in the result); J. Ely, supra note 146, at 131-32.

tional veto provisions. The central focus of the authorizing committees' effort to prepare an Omnibus Legislative Veto Recission Act would require an examination of whether Congress wishes to continue to delegate authority to the agencies without the limitation of the veto, or whether specific guidelines (or outright withdrawals of delegated authority) should be enacted to clarify or limit the scope of agency discretion. Each standing committee of Congress should resist the temptation to resort to procedural alternatives to the legislative veto and, instead, should prepare recommendations containing proposed statutory amendments which resolve the uncertain specification of policy which prompted Congress to rely on the veto in the first place.

While the legislative effort to terminate the outstanding veto provisions cannot include the redrafting of all of the more than 200 statutes directly affected by the *Chadha* decision, this type of institutional response has at least three significant advantages. First, this tactic moots the severability inquiry by allowing Congress—instead of the federal courts—to decide which statutes will stand or fall in the wake of *Chadha*. Second, a Congressional determination that a veto-less statute would leave too broad a delegation of authority in the hands of an agency or the President could be remedied immediately by the inclusion of appropriate legislative guidance in the Omnibus Act. The third feature of this remedy is that the reexamination of statutory delegations will lay the groundwork for subsequent amendments to the agencies' organic statutes. The choices which will be made in the future by Congress will contribute to the establishment of clear national policies and the restoration of political accountability for the actions of government.

By now, it should be clear that Congress cannot solve its problems with the executive branch and regulatory agencies by continuing to point an accusatory finger at the "bureaucrats" who make the decisions and issue the rules and regulations. All of the complaints about the "runaway bureaucracy" directly raise the point that "excessive" discretion vested in executive agencies cannot be made without congressional approval. There is something fundamentally inappropriate about Congress making broad delegations of authority, and later complaining that the authority is being exercised. Congress should meet its constitutional responsibilities by affirmatively deciding at the outset what limits is wishes to set and

not "pass the buck" because the issues are politically sensitive or personally agonizing. Members of Congress are elected to decide between conflicting proposals presented by clashing interests, not to avoid painful and difficult choices.[194]

Only by reassuming its rightful role as the architect of substantive policies to be administered by the executive agencies can Congress control the exercise of delegated authority. The central focus of the legislative response to *Chadha* should involve an assessment of the propriety of the regulatory schemes or policy frameworks which generate unsatisfactory outcomes. Congress should begin to behave as a responsible legislative body by undertaking the fundamental job of reviewing the statutory mandates given the executive branch and independent agencies for implementation and preparing revised statutory prescriptions. New legislation should provide authoritative guidance to the agencies through the explicit specification of precise statutory standards and reflect a clear, deliberated choice between policy alternatives. The sweeping and definitive pronouncement by the Supreme Court in *Chadha* signals that the time has arrived for the Congress to meet its constitutional responsibility to make basic policy decisions before delegating legislative power, and the recognition that the responsibility for the faithful execution of the law belongs in the executive branch and not in the halls of Congress.

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[194] See Barber, supra note 146, at 38. Members of Congress should never lose sight of the fact that after the Preamble the first sentence of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ." U.S. Const. art. I, §1. See also J. Locke, Second Treatise on Civil Government §141, at 83-84 (E. Barker, ed. 1967) (a "legislature cannot transfer the power of making laws to other hands; for its being but a delegated power from the people, they who have it cannot pass it over to others.").

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Message:

THE THOMAS F. RYAN LECTURE*

The Legislative Veto After *Chadha*

STEPHEN BREYER**

The Supreme Court, in *INS v. Chadha*,[1] held the legislative veto unconstitutional. Early reports have described the opinion as changing the balance of power between Congress and the executive.[2] Certainly, the decision is important; Congress or the courts will have to reexamine dozens of statutes to determine whether an offending veto clause is severable or whether the entire statute falls with the clause.[3] The balance of power consequences are more difficult to predict.

Tonight, I shall begin a discussion of that subject by asking whether the old veto might reemerge in new legal clothes. Drawing on my experience on the Senate staff, I shall suggest it is just possible that there may be life after death for the legislative veto; but whether Congress will take the necessary steps is uncertain. One might also ask, "Is such a resurrection desirable?" Here, based upon my study of government regulation, I shall express skepticism.

I

Let me clear the undergrowth with three preliminary questions: What is the legislative veto; where did it come from; what does it do.

What it is, essentially, is a clause in a statute, which says that a particular executive action (and by "executive" I mean to include the independent agencies) will take effect only if Congress does not nullify it by resolution within a specified period of time. Variations of detail are possible; the resolution might have to be passed by one House of Congress, both Houses, or simply by a committee.[4] The action itself might take effect while Congress debates, or it might rest in limbo. Whatever the details, three elements are essential:

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** Circuit Judge, United States Court of Appeals for the First Circuit.

1. 103 S. Ct. 2764 (1983).

2. N.Y. Times, June 24, 1983, at 1, col. 4; Wash. Post, June 24, 1983, at 1, col. 1; *see Chadha*, 103 S. Ct. at 2792-93 (White, J., dissenting); *id.* at 2788 (Powell, J., concurring).

3. *See Chadha*, 103 S. Ct. at 2811-16 (appendix to opinion of White, J., dissenting) (listing examples of current statutes containing legislative veto provisions).

4. There are also various, more exotic arrangements. Many statutes condition executive actions not on the absence of a legislative veto, but on affirmative endorsement by a congressional resolution. *See, e.g.*, Trade Expansion Act of 1962, 19 U.S.C. § 1981(a)(2)(B) (1976); Energy Conservation and Production Act, 42 U.S.C. § 6834(c) (1976) (specific section repealed by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1041(b), 95 Stat. 357, 621 (codified at 42 U.S.C. § 6834 (1976 & Supp. V 1981))). Several statutes employ what has been labelled the "one and one-half House veto," which gives one House the power to veto an executive action unless the other House affirmatively supports the executive. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9655(a)-(d) (1976 & Supp. V 1981); Omnibus Budget Reconciliation Act of 1981, 15 U.S.C. § 1276(a)-(d) (1982).

1. A statutory delegation of power to the executive;
2. An exercise of that power by the executive;
3. A power reserved by the Congress to nullify that exercise of authority.

Thus, Congress might delegate to the President the authority to commit armed forces to action overseas;[5] it might delegate to the Attorney General the authority to suspend the deportation of those not legally entitled to remain in the United States;[6] it might delegate to the Federal Trade Commission the authority to regulate trade practices by rule.[7] In each instance, it might reserve to itself the power to nullify an individual act taken pursuant to the delegated authority.

Where did the legislative veto come from? Apparently, the first time Congress enacted a veto clause was in 1932 when it gave President Hoover the authority to reorganize executive departments subject to a one-House veto.[8] Since 1932, veto clauses have proliferated like water-lilies on a pond (or algae in a swimming pool, depending on one's point of view). One survey found five such statutes enacted between 1932 and 1939, nineteen in the 1940's, thirty-four in the 1950's, forty-nine in the 1960's, and eighty-nine enacted between 1970 and 1975.[9] Justice White, dissenting in *Chadha*, lists fifty-six statutes that now contain veto clauses.[10] He adds that they have appeared in about 200 laws enacted in the past fifty years.[11] Recently, Congress has found particular delight in applying the veto to regulators—to the actions of the Federal Trade Commission,[12] the Federal Energy Regulatory Commission,[13] and the Consumer Product Safety Commission.[14] Judging from recent legislative proposals to apply the veto across the board to all regulatory activity,[15] *Chadha* may have cut the veto down well before its prime.

What does the veto do? The short answer is "many different things," for its

5. *See* War Powers Resolution, 50 U.S.C. § 1541 (1976 & Supp. V 1981).
6. *See* Immigration and Nationality Act, 8 U.S.C. § 1254 (1982).
7. *See* Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, Pub. L. No. 93-637, § 202(a), 88 Stat. 2183, 2193 (1975) (codified at 15 U.S.C. § 57(a) (1976)) (amended to include legislative veto by Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21, 94 Stat. 374, 393 (codified at 15 U.S.C. § 57a-1 (1982))).
8. Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414; *see Chadha*, 103 S. Ct. at 2793 (White, J., dissenting).
9. Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977).
10. *Chadha*, 103 S. Ct. at 2811-16 (appendix to opinion of White, J., dissenting). It should be noted that a number of Justice White's examples involve requirements of affirmative congressional endorsement of executive actions rather than standard veto provisions.
11. *Id.* at 2793.
12. *See supra* note 7. This particular legislative veto was held unconstituional in Consumers Union of United States, Inc. v. FTC, 691 F.2d 575, 577 (D.C. Cir. 1982) (per curiam) (en banc), *aff'd mem.*, 103 S. Ct. 3556 (1983).
13. Natural Gas Policy Act of 1978, Pub. L. No. 95-621, § 202(c)(1)-(2), 92 Stat. 3350, 3372 (codified at 15 U.S.C. § 3342(c)(1)-(2) (1982)). This legislative veto provision was held unconstitutional in Consumers Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 478-79 (D.C. Cir. 1982), *aff'd mem.*, 103 S. Ct. 3556 (1983).
14. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1207, 95 Stat. 357, 718-19 (codified at 15 U.S.C. §§ 1204, 1276, 2083 (1982)). The Consumer Product Safety Commission veto provisions are instances of the one and one-half House veto. *See supra* note 4.
15. *See* S. 1080, §§ 801-803, 97th Cong., 2d Sess., 128 CONG. REC. S2719-21 (daily ed. Mar. 24, 1982).

practical effect differs depending upon whether one looks at Defense Department expenditures on airplanes[16] or FTC regulation of undertakers.[17] At a general level, one might describe the veto's function as a legislative compromise of a fight for delegated power. Such compromises are of various sorts.

The veto sometimes offers a compromise of important substantive conflicts embedded deeply in the Constitution. How are we to reconcile the Constitution's grant to Congress of the power to declare war[18] with its grant to the President of authority over the Armed Forces as their Commander in Chief?[19] The War Powers Act approaches the problem, in part, by declaring that the President cannot maintain an armed conflict for longer than ninety days if both Houses of Congress enact a resolution of disapproval.[20] Similar vetoes are embedded in laws authorizing the President to exercise various economic powers during times of "national emergency."[21] To take another example, how are we to reconcile article I's grant to Congress of the power to appropriate money[22] with article II's grant to the President of the power to supervise its expenditure?[23] Must the President spend all that Congress appropriates? Congress has addressed this conflict, authorizing the President to defer certain expenditures subject to a legislative veto.[24]

The veto has also been used to compromise a quite different type of conflict: that which arises within Congress itself because of ever scarcer legislative time. To what extent should Congress, rather than that the executive, spend time on certain highly individual matters that historically called for private bills? Consider *Chadha* itself. Traditionally, an illegal alien, seeking to escape deportation on grounds of special hardship, had to ask Congress for relief. Congress, lacking the time to process the many requests, eventually decided to change the matter to one of administrative discretion, instead of legislative grace. Yet, in granting the executive the authority to grant hardship exceptions, Congress retained one element of grace: the right to veto a deportation suspension it believed unwarranted.[25] Similar time pressure can give rise to tension with respect to private claims for money. Without *Chadha* we might have seen increased delegation to the executive, perhaps with veto attached, as a substitute for some categories of private requests for legislative compensation.

The *regulatory* veto's focus, however, is upon a still different need for compromise, a need arising out of the classic conflict in the administrative state between political accountability and the necessary complexity of regulatory

16. *See* Department of Defense Appropriation Authorization Act, 50 U.S.C. § 1431 (1976 & Supp. V 1981).
17. *See supra* note 7. The funeral industry regulations are codified at 16 C.F.R. § 453 (1983). Although the regulations were hotly contested and a veto resolution was introduced in the House, no veto was voted and the rules are to go into effect at the beginning of 1984. *See* 44 ANTITRUST & TRADE REG. REP. (BNA) No. 1118, at 1123 (June 9, 1983).
18. U.S. CONST. art. I, § 8, cl. 11.
19. *Id.* art. II, § 2, cl. 1.
20. War Powers Resolution, 50 U.S.C. § 1544(b) (1976).
21. *See* International Emergency Economic Powers Act, 50 U.S.C. § 1706(b) (1976 & Supp. V 1981).
22. U.S. CONST. art. I, § 8, cl. 1.
23. *Id.* art. II, § 3.
24. Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. § 1403(a)-(c) (1976).
25. Immigration and Nationality Act, Pub. L. No. 82-414, § 244(c), 66 Stat. 163, 216 (1952) (codified at 8 U.S.C. § 1254(c) (1982)). For a brief history of congressional handling of the responsibility for deportation decisions, see *Chadha*, 103 S. Ct. at 2803-04 (White, J., dissenting).

decisionmaking. This complexity forces broad statutory delegations of power. Of course, in principle under article I of the Constitution, "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard."[26] Indeed, the Supreme Court in *Schechter Poultry Corp. v. United States*[27] held the National Industrial Recovery Act unconstitutional as an example of "delegation running riot."[28] In practice, however, since *Schechter* Congress has delegated agencies vast powers under statutes written in the broadest possible language. The FTC can stop business practices that are "unfair";[29] the ICC sets "reasonable" rates;[30] the FCC simply acts to serve "public convenience, interest, or necessity."[31]

This breadth of language reflects the underlying complexity of regulatory problems. Congress cannot set individual rates, award television licenses, or identify all undesirable business practices. Examination of the arguments made before commissions about how these tasks should be carried out reveals the inordinate difficulty of writing more specific legislation. Indeed, the practical, as well as the political, difficulties of doing so are sufficiently obvious that few if any federal cases since *Schechter* have applied the nondelegation doctrine (though one finds the occasional judicial murmuring about its reappearance).[32]

In a word, Congress delegated broadly to the agencies because it had to do so. The federal judiciary, recognizing the need, ratified the means. At the same time that necessity compelled Congress to delegate, however, concern for congressional authority demanded continuing checks on the agencies. The veto offered the most direct and effective guarantee that delegation would not drain power from Congress.

Once we recognize that the legislative veto acts in different ways to compromise different sorts of interests, we can see the difficulty of assessing the impact of its abolition on the relative power of the President and Congress. The power shift that results from a veto clause depends upon what Congress would have done had the veto device not been available as a compromise.

Many choices are available in the absence of a veto power. At one extreme, Congress might simply have delegated unqualified power to the executive. Of course, even then Congress could still later enact a special law setting aside an executive action with which it disagreed; but it is obviously easier to obtain a resolution of veto from one House of Congress than to obtain a new law from

26. United States v. Chicago, M. St. P. & Pac. R.R., 282 U.S. 311, 324 (1931).
27. 295 U.S. 495 (1935).
28. *Id.* at 553 (Cardozo, J., concurring).
29. 15 U.S.C. § 45(a)(1)-(2) (1982); *see* FTC v. Gratz, 253 U.S. 421, 427 (1920) (construing phrase "unfair method of competition"); Sears, Roebuck & Co. v. FTC, 258 F. 307, 312 (7th Cir. 1919) (same).
30. 49 U.S.C. § 15a(2) (1976 & Supp. V 1981); *see* Atchison, T., & S.F. Ry. Co. v. United States, 284 U.S. 248, 262 (1932) (discussing nature of ICC's duty to set "reasonable rates").
31. 47 U.S.C. § 303 (1976); *see* FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953) ("public interest, convenience, or necessity" criterion gives FCC wide but not unbounded discretion); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) ("public convenience, interest or necessity" criterion does not confer unlimited power).
32. *See, e.g.*, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion); *id.* at 664 (Powell, J., concurring); *id.* at 671-88 (Rehnquist, J., concurring in judgment); National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1974); Fort Worth & D. Ry. Co. v. Lewis, 693 F.2d 432, 435 n.8 (5th Cir. 1982).

both Houses and the President. Thus, if one believes that Congress, if forbidden the veto, would delegate authority anyway,[33] then one would believe that the veto makes Congress more powerful, and its absence will shift power to the executive.

At the other extreme, Congress might have declined to delegate in these areas at all if it could not retain the security of the veto, or, more plausibly, Congress might have delegated to the executive only the power to recommend substantive changes to Congress. Narrowly drawn, a law along such lines would consist of a sentence added to a statute where there now appears a legislative veto, stating that the agency's exercise of the authority to which the veto is attached is ineffective unless Congress enacts a confirmatory law within, say, sixty days.[34] This alternative would significantly shift the balance toward the legislature, because agency decisions would be ineffective without the attention and approval of committees of Congress, both Houses, and the President.

Neither of these alternatives seems realistic in many of the contexts in which legislative vetoes appear. The former would often grant too much discretion to the executive to be palatable to Congress. The other would often hamstring governmental decisionmaking. To state that the executive could never commit troops,[35] or suspend alien deportations,[36] or prohibit unfair business practices,[37] or adjust the rules governing railroad passenger service[38] without a confirmatory law might handicap too severely the executive's, and the nation's, ability to perform needed tasks. As a practical matter, Congress and the President would likely have to forge some other compromise, perhaps a delegation of a more circumscribed but unconstrained power, or perhaps a reliance on the other means of congressional oversight of the exercise of delegated powers.

To the extent that the viable alternatives to the veto are uncertain, so is the veto's effect on the balance of governmental power. This uncertainty likely accounts for the historical fact that presidential attitudes toward the veto have been ambivalent. Every modern President has criticized the legislative veto in principle and questioned its constitutionality,[39] but the same Presidents have often signed into law bills containing vetoes, defended their constitutionality, and even proposed them.[40]

In sum, the legislative veto is new. Its popularity has grown by leaps and bounds. It can serve several very different objectives by responding to several very different sorts of need for compromise. The effect of its abolition upon the legislative/executive power balance must be described with the words, "it depends."

33. *See* S. 1714, 98th Cong., 1st Sess. (1983), *reprinted in* 45 ANTITRUST & TRADE REG. REP. (BNA) No. 1133, at 486-92 (Sept. 20, 1983) (reauthorizing FTC rulemaking without a legislative veto).
34. *See* 129 CONG. REC. H4773 (daily ed. June 29, 1983) (text of Congressman Levitas' amendment to Consumer Product Safety Commission reauthorization bill).
35. *See supra* note 5.
36. *See supra* note 6.
37. *See supra* notes 7 & 29.
38. *See* 45 U.S.C. § 564(c)(3) (1976 & Supp. V 1981).
39. *See* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1002-29 (1975).
40. *See Chadha*, 103 S. Ct. at 2793 & nn. 4-5 (White, J., dissenting).

II

Now let us turn to the Supreme Court's decision in *Chadha*. The most important feature of that decision, in my view, is that its holding that the veto is unconstitutional does *not* turn upon any fact concerning the veto's origin, its purposes, or its balance of power effects. Rather, the decision appears formal; it is based upon the language of the Constitution, upon its structural dictates, not upon the function of the veto.

The Court's logic might be explained roughly as follows. From a logical point of view, the exercise of a legislative veto must constitute an exercise of legislative, of executive, or of judicial power—the powers that the Constitution specifically grants to the federal government. If the power is executive or judicial, Congress cannot exercise it, for with a few specifically mentioned exceptions (none of which is relevant here)[41] the Constitution grants Congress only legislative power. If, however, the power is legislative, it must be exercised in the constitutionally prescribed manner. Article I, section 1 vests "all legislative Powers . . . in a Congress . . . which shall consist of a Senate and House of Representatives," both of which must concur in the enactment of legislation. Further, article I, section 7, clause 3, the presentment clause, specifically requires that "[e]very Order, Resolution, or Vote to which the Concurrence of [the two Houses] may be necessary" must be "presented to the President" for his signature or veto. How then can a legislative act such as the legislative veto be valid under the Constitution without both bicameral action and the opportunity for Presidential participation?

The delegation of specified powers from the states and the people to particular branches of the federal government and the system of specified procedural checks on enactment of legislation are, of course, at the very heart of the Constitution's scheme. The *Chadha* majority's simple reliance on the logic and letter of the Constitution and its disclaimer of any concern for the possible wisdom or utility of the legislative veto[42] reflects recognition of this fact. Still, one might wonder at the formality of the decision. Is the logic of the Constitution here so compelling that one can ignore the purposes, the effects, the practical virtues of the legislative veto? In constitutional matters this would be unusual, but the majority believed it had before it that unusual case.

Justice White, in dissent, urged that attention to the functional importance of the veto demanded a more circumspect approach that would allow a more flexible interpretation of the Constitution's language.[43] Yet a reading of his dissenting opinion is instructive in part because it demonstrates how difficult it is to read the language more flexibly in this particular case. The pure constitutional logic to which the majority pointed is very difficult to overcome. Essentially, the dissent agreed that to legitimate the veto the Court would have to stretch the Constitution's language, but Justice White argued that its language

41. The exceptions include U.S. CONST. art. I, § 2, cl. 5 (House's power to impeach); *id.* art. I, § 3, cl. 6 (Senate to try impeachments); *id.* art. II, § 2, cl. 2 (Senate power to approve Presidential appointments and to ratify treaties); *id.* art. I, § 5, cl. 2 (control over internal congressional rules).

42. *Chadha*, 103 S. Ct. at 2784-88.

43. *Id.* at 2796-98 (White, J., dissenting).

has been stretched equally far in other analogous instances. The analogies he offered, however, did not persuade the Court.

First, if Congress can delegate a form of legislative power to the executive,[44] Justice White asked, why can it not delegate a form of legislative power to some of its own members?[45] This question, however, does not answer itself. The type of legislative power that Congress has delegated to the executive is the power to make rules, and rulemaking is often an integral part of administering just as it is an integral part of judging. Thus, one does not depart far from the Constitution's letter in stating that the Constitution, in granting administrative powers to judges allows them, at least in some instances, to make rules. So, this example does not readily justify the greater departure from the Constitution's letter that would be necessary to allow a part of Congress to legislate on its own.

Similarly, the dissent points to cases that have upheld congressional delegation of legislative-like powers to private groups.[46] The legislative veto, however, involves a delegation to those who will act in their official capacities as members of Congress; in that capacity they can possess only those powers bestowed upon them by article I. The question of how, say, one House could exercise legislative power in the face of express bicameral and presentation requirements then seems to arise in a context different enough to make the private group analogy less compelling.

Finally, the dissent noted that the one-House veto carries out the Constitution's spirit, for it means that executive action would take effect only if the Executive and both Houses of Congress approved it.[47] The executive action might be viewed as an executive proposal to the Congress, later enacted by the silence of both Houses. Yet, to analogize silence to legislating goes rather far. If one takes the analogy literally (if, for example, one would still require the President to act pursuant only to constitutionally, and thus congressionally, delegated authority) one destroys the analogy's power. If the President can act only along express constitutional paths, how can Congress act differently? Why is it any more reasonable to view silence as the legislative approval of an executive act taken pursuant to statutorily delegated authority than to view it as a grant of appropriate legislative authority? In both cases, silence seems quite far removed from the Constitution's paths of bicameralism and presentation to the President.

This brief discussion points to weaknesses in the force of the dissent's analogies. Perhaps stronger analogies are available. Professor Freund has suggested looking at the basic veto-conditioned delegation as an effort to make certain that future Congresses and Presidents continue to agree to the delega-

44. *See* text accompanying *supra* notes 26-33.

45. *Chadha*, 103 S. Ct. at 2801-03 (White, J., dissenting).

46. *See id.* at 2802-03 (discussing Currin v. Wallace, 306 U.S. 1, 16-17 (1939), and United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 577-78 (1939)).

47. *Chadha*, 103 S. Ct. at 2807-08 (White, J., dissenting). As Justice White observes, this justification is applicable only to one-House veto provisions. When a two-House veto is required to block executive action, one House's unwillingness to go along with a proposal will not render it null if the other House sides with the executive and refuses to join the first House in enacting a veto resolution. Justice White concluded that "the one-House veto is of more certain constitutionality than the two-House version." *Id.*

tion, and the nonexercise of the veto as evidence of the continued agreement. Regardless, the main difference between the majority and the dissent in my view is a difference that centers on the role of the Constitution's language here. The majority believed that approval of the veto would require too much flexibility in reading the words, too drastic a departure from the Constitution's form. It would leave us at sea as to what the Constitution does or does not require when separation of powers is at issue. The dissent's analogies failed to convince the majority (again, when separation of powers is at issue) that the Court has ever previously departed so significantly from the Constitution's text and logic.

If I am right, the majority may have believed it had before it a *Schechter*-type example—an extreme case. *Chadha* may then follow *Schechter* as a judicial tree that bears little fruit. To define an extreme tells us little about what happens in the more ordinary case.

III

Chadha's avoidance of consideration of the veto's functions or objectives leaves open the question of the extent to which Congress can still accomplish those functions and pursue those objectives after *Chadha*. Congress unquestionably retains a host of traditional weapons in its legislative and political arsenal that can accomplish some of the veto's objectives. These include the power to provide that legislation delegating authority to the executive expires every so often. To continue to exercise that authority, the executive would have to seek congressional approval, at which point past agency behavior that Congress disliked would become the subject of serious debate. Moreover, Congress might sometimes tailor its statutes more specifically, limiting executive power.[48] Further, Congress can require the President, before taking action, to consult with congressional representatives whose views would carry significant political weight. Additionally, Congress can delay implementation of an executive action (as it does when the Supreme Court promulgates rules of civil procedure)[49] until Congress has had time to consider it and to enact legislation preventing the action from taking effect. Finally, each year Congress considers the agency's budget. If a significant group of legislators strongly opposes a particular agency decision, it might well succeed in including a sentence in the appropriations bill denying the agency funds to enforce that decision.[50]

All of these traditional alternatives, however, have obvious drawbacks or features that make them function quite differently from the legislative veto itself, and their balance of power effects are different. Building in an expiration of executive authority risks agency program disruption; trying carefully to tailor legislation presents the practical difficulties of greater linguistic specificity; requiring consultation does not compel obedience; delaying implementation would condition congressional control upon the eventual enactment of a law; and budget control is often random, given time pressure to enact appropriations bills. Still, these alternatives, imperfect as they are, count for something.

48. *See* S. 1714, §§ 6, 9, 98th Cong., 1st Sess. (1983), *reprinted in* 45 ANTITRUST & TRADE REG. REP. (BNA) No. 1133, at 486, 488, 489 (Sept. 29, 1983) (narrowing authority of FTC to engage in rulemaking in wake of *Chadha*).

49. *See* 28 U.S.C. § 2072 (1976).

50. *See* Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a-1(c)(1) (1982) (refusing the FTC funds for issuing rules concerning funeral industry unless rules conform to congressionally prescribed contours).

Moreover, if my basic view of the *Chadha* opinion is correct, it should be possible to come closer—to develop a veto substitute that satisfies the literal wording of the Constitution's bicameral and presentation clauses while it more nearly approximates the compromise functions of the legislative veto. I shall describe as a veto substitute the closest I have been able to come to doing so.

My veto substitute is a variant on the suggestion that Congress could replace veto provisions in present statutes with provisions that conditioned the legal effect of exercises of delegated authority on subsequent enactment of a confirmatory statute. We noted before that the confirmatory law strategy would drastically and unworkably undermine executive or agency power because it is so much harder to enact a new law than to decline to exercise a veto.[51] Thus, the confirmatory law approach is too big a gun to be of practical value.

Whether a confirmatory law is easy or difficult to enact, however, is largely a function of internal congressional procedural rules, a matter that is within the exclusive control of Congress. If those rules could be changed to make confirmatory law procedures rather like legislative veto procedures, the practical effect of the two could be made quite similar; the confirmatory law gun could be reduced to a size about equal to the legislative veto gun. Then Congress could reasonably have no more qualms about attaching the one to a delegated power than the other, and the shift of power from legislative to executive branch need not take place.

To be more specific, if the legislative procedural rules can be changed to make the enactment of a confirmatory law no more difficult than stopping the enactment of a veto resolution, then there will be no shift of power away from the executive branch. If those rules could make stopping the passage of such a law precisely as easy as the passage of a resolution of veto, then there would be no shift of power toward the executive branch. In fact, there would be no change at all in the balance of power. Because the burden of inertia is a function of internal legislative procedure, not of the Constitution, this might be done.

Take the Senate as an example. Assume that all legislative veto provisions in statutes were replaced with special confirmatory law requirements. Then suppose that the Senate rules provided a special fast track for special confirmatory laws. That fast track rule would provide: 1) when an executive branch agency enacts a regulation (or takes other action) subject to a special confirmatory law requirement, a bill embodying that special confirmatory law shall be introduced automatically (say, under the name of the Majority Leader, as sponsoring Senator); 2) the bill will be held at the desk, and not referred to committee; 3) the bill will be neither debatable nor amendable; it cannot be tabled or subjected to filibuster, etc.; and 4) the Senate will vote upon the bill, up or down, within sixty days of its introduction. The House would have a

51. *See supra* notes 34-38 and accompanying text (discussing use of confirmatory laws).

similar fast track. If the fast track is followed, the bill automatically becomes law (unless, of course, one House opposes it).

The rule could even go on to say that the bill can be derailed, that is, removed from the fast track, but only by a majority vote of the Senate. Because derailing means referral to committee, etc., it likely means defeat. In other words, the confirmatory law could be stopped, and thus the executive action at issue could be stopped, if and only if a majority of the Senate or the House votes to derail it. That *is* the one-House veto. To replicate a committee veto the rule would simply allow derailment by a majority vote of the relevant committee. If there is a need to have the executive branch action take effect immediately instead of after sixty days, the basic authorizing law would simply allow the action (say, committing troops) for sixty days, but no longer, without a confirming law.

In its main features then, the substitute fast track approach closely resembles the legislative veto. The agency is given effective authority to take an action of a specified type unless Congress disagrees. All of the compromises achieved by the veto can be largely preserved. Congress is able to delegate broad powers but retains the opportunity to review any exercises of those powers that it finds particularly objectionable, without imposing on itself the burden of reviewing each particular exercise. The method by which this is done, however, is different from that followed by the traditional legislative veto; the Constitution's language is followed as a matter of form. Thus, whatever legal questions might arise, they should not be the same as those at issue in *Chadha*.

The substitute does not replicate the veto perfectly, and the difference should be noted. First, the veto substitute imposes on Congress a degree of visible responsibility for the actions it confirms, a burden that the veto system allowed it to avoid. Under the legislative veto, the vast bulk of decisions subject to review would elicit absolutely no congressional action or consideration. Even when congressional action was initiated, a resolution of veto might be introduced into a committee only to disappear, thereby freeing the Senators from having to take a public vote on the matter. With the proposed veto substitute, however, a small group of senators could force a roll-call vote on even the most run of the mill (nondebatable, nonamendable) confirmatory law because the Constitution requires that one-fifth of the senators present retain the power to require a roll-call on any matter.[52] Even in cases where no vote was recorded, the fact that the legislators had to admit that Congress *acted*, rather than passively failed to act, might make a difference to constituents. That in turn might make a difference to the legislator. Moreover, a future Congress or either House, hostile to the agency, might simply repeal the special procedural rules. All this might make the balance of power consequences somewhat different from those of the legislative veto.[53]

52. U.S. CONST. art. I, § 5, cl. 3.

53. Another limitation of the veto substitute is its inability to replicate the one and one-half House veto. *See supra* note 4 (discussing one and one-half House veto). The one and one-half House veto permitted one House to override, by affirmative vote, the veto of agency action adopted by the other House. Under any arrangement, no matter how streamlined, that conditions agency actions on a confirmatory law, opposition to a particular agency decision by a majority of either House will be fatal, regardless of the other House's overwelming approval of the agency's choice.

Second, the veto substitute could affect judicial review of administrative exercises of delegated authority. The chief task of judicial review at present is to determine whether the administrative action abides by the terms of the statutory delegation that authorizes it. If, however, the agency action were promptly embodied in a new statute, there would be no opportunity for this issue to be raised because the new statute would stand independent of the original delegating statute. One can minimize this problem by making the proposal more complex. Judicial review could be preserved if the congressional rules required that each special confirmatory law include a clause rendering it ineffective unless the administrative action that initiated it would have been a valid exercise of the delegated authority, absent the requirement of a confirmatory statute. Alternative forms of language are possible, but all are complicated and Congress might be reluctant to provide them.

Third, the confirmatory law approach, unlike the legislative veto, would require the President's signature to confirm each administrative action. Where the original delegation was to the executive branch, the President might routinely be expected to back the executive agency so that the added requirement would not make much difference. Where independent agencies are involved, however, the substitute approach would, in effect, introduce an executive veto everywhere it provided for legislative review. Congress would have to choose whether to subject agency action to checks by both branches or by neither.

Fourth, it is difficult to replicate the two-House veto. One could try by having the Senate rules, for example, condition derailment on the House also voting to derail from the fast track. The fast track, however, must eventually lead to a vote, and if one House votes "no," the confirmatory law is stopped and the agency action fails.

Fifth, there is an important question of practical politics: Would Congress wish to amend its rules even if it knew that it could replicate the veto by doing so?[54] For one thing, the overall political effects of doing so are uncertain. For another, some fine tuning, hence several consecutive amendments, would likely be needed. Finally, to open the subject of rules change is itself treacherous. Many different legislators with wide-ranging and conflicting notions of rules reform would be likely to seize the occasion to present their own ideas. Present House and Senate rules have the virtue of an uneasy compromise that has stood the test of time. Opening the subject and adopting changes that are potentially far-reaching and of uncertain outcome cannot be undertaken lightly.

In sum, the veto substitute is not a precise functional replica of the veto, but it comes close. Still, the question for Congress is whether it so strongly desires the legislative veto that it will pay the price of radical and complex change of its internal rules of procedure (a change that could bring with it a more thorough consideration of rules reform), or whether Congress will rest content with a status quo that includes the less effective substitutes for the veto that I have

54. Congress' attitude on this question may be tested by an amendment offered by Senator Kasten to the Senate's proposed FTC reauthorization bill. *See* 129 CONG. REC. S13,110-11 (daily ed. Sept. 28, 1983) (text of Kasten amendment). Senator Kasten would delay the effective date of any FTC rule to allow Congress an opportunity to enact an overriding law and would place any proposed "resolutions of disapproval" on a special fast-track in both Houses.

mentioned.[55] To answer the question, Congress will have to reconsider a matter that the *Chadha* Court expressly put to one side, namely the veto's wisdom or desirability. In a word, is it necessary?

IV

I cannot answer the question of the veto's necessity as a general matter. Because the veto serves many different purposes, one can only conclude whether the veto is good or bad after studying the particular substantive areas where its use is proposed. Of course, at a highly abstract level of argument, one can imagine a general point in its favor. The veto allows Congress to mitigate the risks of delegating vast, unchecked power to the executive. It assures Congress that when the executive makes a decision that has political impact it can review that decision. Thus, ultimate case-by-case authority rests in a politically responsible body, one elected by the people, rather than a bureaucracy.

Even this argument, however, does not ring true as applied, for example, to presidential war powers. As soon as one is at all specific, it becomes apparent that questions concerning national defense or the President's spending powers are quite different from those surrounding the regulatory powers of the Federal Trade Commission, the Consumer Product Safety Commission, or the Federal Energy Administration. My view of the veto's wisdom is not necessarily the same in all of these areas. I can, however, discuss the practical arguments for and against the veto in the regulatory area, an area with which I am familiar, and doing so might suggest the type of pragmatic judgment called for in evaluating the veto in other contexts.

The major argument favoring the regulatory veto, and one accounting for its popularity, is a simple one: Regulatory agencies are out of control and the veto offers the electorate a rein to halt or to guide them. This argument draws added force from our growing disenchantment with alternative methods of checking agency power.[56] At the time of the New Deal, some believed that the agencies might develop a science of regulation, the canons of which would hold agency managers in check through their sense of professional discipline. Today, few believe, for example, in a science of ratemaking. In the 1940's and the 1950's it seemed that fair and open procedures, as embodied in the Administrative Procedure Act,[57] would keep agency power in check, but today we suspect that at best procedures guarantee a fair result; and we are aware that a fair ratesetting or power plant siting process does not necessarily mean an economically sensible rate or an environmentally optimal plant location.

It is not surprising that those who now diagnose the regulatory problem as one of unchecked bureaucratic power look for another responsible body to provide a check. Under our Constitution, when we search for checks and controls we are inevitably drawn toward one of the three major branches.[58]

55. *See supra* notes 33-40 and accompanying text (discussing possible veto substitutes).

56. *See* S. BREYER, REGULATION AND ITS REFORM 341-68 (1982) (discussing virtues and weaknesses of alternative methods of controlling agencies).

57. Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C. & 7 U.S.C.).

58. *See* S. BREYER, *supra* note 56, at 357-61 (discussing possible supervisory roles of three branches at greater length).

One might reasonably find flaws in proposals that would give the President more power to control agencies. Does the President have the time or the inclination to involve himself in the details of regulation? Can the Executive Office staff adequately second guess the agencies, or, in order to understand the subject matter and hence the merits of a proposed regulation, will it have to grow in size, replicating the very bureaucracy it seeks to replace? The subject requires more discussion, but it is safe to say that increased Presidential power to control the agencies is no panacea for the problems of regulators.

The judges cannot control the agencies very effectively. Statutory standards that are broad enough to allow them to escape congressional control similarly inhibit review of agency action by judges. The judges' legal ability to require more procedure, the efficacy of their doing so, their ability to second guess agencies on matters of substance, are all open to most serious question.

Under these circumstances, a broad congressional delegation of power to the agency coupled with a veto that allows Congress subsequently to review actions that turn out to have political importance appears to be a plausible compromise with the needs of the administrative state. If the regulatory agencies are out of control, the veto provides a practical check on the power of the agencies to act in a politically unpopular way, a power that, without a veto, practical necessity might require Congress to concede them through a broad statutory delegation.

Despite the appeal of this argument, there are powerful if not overwhelming practical considerations on the other side.[59] Some of its opponents argue that the veto gives those who are subject to regulation a chance to escape it; those likely to succeed are those with sufficient political influence to capture the attention of Capitol Hill. The critics add that the possibility of a veto would make it difficult for agencies to plan. How could a Maritime Commission Chairman, for example, introduce procompetitive reform of ocean shipping regulation, knowing that Congress might veto one essential element of the plan but approve another? Furthermore, what would happen to the procedural regularity that, from the point of view of fairness, is one of the virtues of agency practice? Given the large number of agency rules, would a legislative veto or veto substitute not tend to become a congressional *staff* veto? In self-defense, would agencies not have to seek the advice of congressional staff before promulgating a rule? If so, would interested parties not seek to convert that staff before approaching the agency? Because Congress has no set procedures for such negotiations, the parties would thereby circumvent agency procedures designed to allow them to see and comment upon one another's claims. Finally, will the veto increase the congressman's fear of special interest groups, each of which is likely to hold the member responsible for numerous agency decisions over which, in reality, he has little control?

The argument against the veto that I find strongest, however, is one that asks, is the diagnosis of the regulatory disease that it presupposes the correct one? Is it that agencies are, or were, simply out of control and that the veto

59. *See id.* at 357; *Improving Congressional Oversight of Federal Regulatory Agencies: Hearings Before the Senate Government Operations Comm.*, 94th Cong., 2d Sess. 166-72 (1976) (statements of Alan B. Morrison and Reuben B. Robertson).

acted as a salutory check on bureaucratic overreaching? I think it fair to say that such was not true of airline or trucking regulation, two instances where overregulation severely harmed the public and where procompetitive reform has brought shippers, travelers and consumers significant benefits in the form of lower prices.[60] The agencies prior to reform may not have been doing well, but they were not overreaching. They were simply following the statutes that Congress had previously enacted, carrying out regulatory practices developed over half a century and doing so, at worst, in an overly literal manner. Reform in those areas consisted of a total rethinking of the regulatory program followed by a total rewriting of the basic statutes in order to introduce price competition into the industries.[61] There is no reason whatsoever to believe that the legislative veto of agency rules, had it existed, could have contributed significantly to the reform process.

Vetoes have typically been used only in interstitial ways. Consider the two regulatory vetoes that so far have atttracted the most attention: the congressional decisions to veto the Federal Trade Commission rule concerning used car dealers[62] and the Federal Energy Regulatory Commission rules governing the distribution of price increases resulting from the deregulation of natural gas.[63] Arguments can be made for, and against, each of the vetoed rules, but it is difficult to see how, from any point of view, they can be viewed as exemplifying the worst agency abuses or how the vetoes of them constitute major regulatory reform.

I shall stop the discussion of the regulatory veto's wisdom here, for I have said enough to show that the arguments and considerations are very different from those at issue in the context of, say, presidential war powers or even deportation suspensions. I have expressed a strong note of skepticism as to the need for the veto in the regulatory area.

V

One result of *Chadha* is that either Congress or the courts will have to reexamine the many statutes in which legislative vetoes appear and redetermine their wisdom. A reexamination is necessary because undoubtedly parties affected by each of the many statutes will argue that, without the veto, Congress would intend the whole delegation of authority to fail, so the agency lacks authority to act. Others will argue that without the veto Congress would still

60. For a good general history of airline regulation and deregulation, see E. BAILEY, D. GRAHAM & D. KAPLAN, DEREGULATING THE AIRLINES—AN ECONOMIC ANALYSIS 6-53 (report of Civil Aeronautics Board, May 1983); *Oversight of Civil Aeronautics Board Practices and Procedures: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) (presenting backround for deregulation).

61. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.); Revised Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1464 (1978) (codified in scattered sections of 49 U.S.C.).

62. S. Con. Res. 60, 97th Cong., 2d Sess., adopted by Senate, 128 CONG. REC. S5402 (daily ed. May 18, 1982), and by House of Representatives, 128 CONG. REC. H2882-83 (daily ed. May 26, 1982). The veto was invalidated as unconstitutional in Consumer Union v. FTC, 691 F.2d 575, 577-78 (D.C. Cir. 1982) (per curiam) (en banc), *aff'd mem.*, 103 S. Ct. 3556 (1983).

63. H.R. Res. 655, 96th Cong., 2d Sess., 126 CONG. REC. 11,800 (1980). The veto was invalidated as unconstitutional in Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 478-79 (D.C. Cir. 1982), *aff'd mem.*, 103 S. Ct. 3556 (1983).

wish to delegate authority, so the agency retains the authority to act. If Congress does not answer these questions, the courts apparently will have to draw on past legislative history in an effort to do so.

If my analysis is correct, then Congress, in addressing the many statutes containing veto provisions, has the option of eliminating the veto and falling back on traditional alternatives, such as reliance upon hearings or appropriations bill amendments, or it can make radical changes in its rules and create a veto susbstitute. The latter course is open to it if it believes the veto necessary. The political difficulties of changing the rules will create a practical test of congressional belief in the veto's importance.

One suspects that, in fact, the traditional alternatives will prove adequate in most areas. If the veto totally disappears, however, one need not necessarily blame the Supreme Court. One might conclude that there was not a sufficiently strong demonstration of its practical necessity.

Congressional Review of Executive and Agency Actions After *Chada*: "The Son of Legislative Veto" Lives On

ELLIOTT H. LEVITAS*
AND STANLEY M. BRAND**

The Supreme Court's decision last term in *INS v. Chadha*[1] declared unconstitutional the exercise of a legislative veto of agency action based on the procedural requirements for the enactment of legislation imposed by the Constitution.[2] The Court's opinion resolved, at least for the time being, a debate raging for decades over the constitutionality of the so-called legislative veto,[3] a device used by Congress to retain control over exercise of authority delegated to executive and independent agencies. Although *Chadha* involved quasi-judicial deportation proceedings within the delegated authority of the Attorney General under the Immigration and Nationality Act[4] and not rulemaking authority, the Court sounded the "death knell"[5] for all legislative review mechanisms that are not subjected to bicameral action and submitted for presidential approval.[6]

This article explores the impact of *Chadha* on Congress' ability to control its delegation to agencies through alternative means and the likely shifts in power and the focus of decisionmaking within the government that may result from the implementation of alternative means of congressional control. The alternatives available after *Chadha* for controlling agency delegations are surveyed. The article will advance the theory that the result is likely to be a less efficient and more cumbersome government process, with an overall diminution of power in the executive in the long run.

In one sense, any alternative that is available to Congress today was also available, and in some instances employed, prior to the *Chadha* decision. The legislative veto was the means of choice for a variety of reasons[7] and Congress

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* Member, United States House of Representatives. B.A. 1952, Emory University; J.D. 1956, Emory University; M.A. 1958, Oxford University.
** Adjunct Professor of Law, Georgetown University Law Center. B.A. 1970, Franklin and Marshall University; J.D. 1974, Georgetown University Law Center.

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1. 103 S. Ct. 2764 (1983).
2. *See* U.S. CONST. art. I, § 7, cl. 1.
3. *See Chadha*, 103 S. Ct. at 2797 n.12 (White, J., dissenting).
4. 8 U.S.C. § 1254(a) (1982).
5. *Chadha*, 103 S. Ct. at 2792 (White, J., dissenting).
6. *Id.* at 2784. The sweeping effect of *Chadha* was confirmed two weeks later when the Court summarily affirmed two other veto rulings. *See* Consumers Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 478-79 (D.C. Cir. 1981) (invalidating one-House veto of natural gas pricing rules), *aff'd*, 103 S. Ct. 3556 (1983); Consumers Union of the United States v. FTC, 691 F.2d 575, 577-78 (D.C. Cir. 1982) (en banc) (invalidating two-House veto of rules governing sale of used cars), *aff'd*, 103 S. Ct. 3556 (1983).
7. *See* 103 S. Ct. at 2795 n.10 (White, J., dissenting) (discussing relative superiority of legislative veto as means of agency oversight). One commentator has noted that without the legislative veto

must now simply revert to other constitutional means of checking agency and executive power. Critics of the legislative veto, including the Supreme Court, have exalted the constitutionally prescribed procedures to a degree that requires Congress to choose less desirable means for the sake of adherence to procedural dictates never before thought to apply.[8] Even ardent critics of the legislative veto concede that given the broad range of Congress' enumerated powers, the reassertion of congressional control is simply a function of the time and effort necessary to recapture that control. In light of the manifest prescription for reassertion of congressional control borne by adherence to the purely procedural mandates of *Chadha*, there is reason to believe that the long range impact of the decision will alter only the means, and not the constitutional power, of Congress to review and check agency action.

I. WHAT ARE THE ALTERNATIVES?

Regardless of one's view of the Supreme Court's decision in *Chadha*, it is clear that the need for the legislative veto still remains. Congress must and will find new ways to address the problem within the bounds of the Court's decision.

The Supreme Court defined legislative action as having "the purpose and effect of altering the legal rights, duties and relations of persons," and came to the conclusion that all actions that are legislative in "purpose and effect" must follow the procedures set forth in article I, section 7 of the Constitution, the so-called presentment clause.[9] In the months immediately following the *Chadha* decision the Congress began to move in a variety of ways to recoup the control it had lost.

> [i]n most areas of government, whenever the Congress desired to assert control, it would still find ways of doing so. Only the form of the veto would be changed and the alternative procedures would add to the burden on the Congress, would make relations between the branches more cumbersome, and would lead to a net reduction in the authority that the Congress would be willing to delegate.

J. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 360 (1981). Similarly, another commentator notes that

> if Congress is denied the legislative veto, no one should underestimate its ingenuity in inventing other devices that will be more cumbersome for the President and just as satisfactory to the Congress. . . . Opponents of the legislative veto warn about the workload imposed on Congress by having to review administrative actions. But the workload is likely to be far heavier if Congress has to act positively through the regular process.

Fisher, *Congress Can't Lose on Its Veto Power*, Wash. Post, Feb. 21, 1982, at D1, col. 1.

8. The Supreme Court has insisted on procedural regularity in the enactment of legislation, but always upon the basis of explicit textual provisions. *See* Powell v. McCormack, 395 U.S. 486, 550 (1969) (Congress may not exclude member for misconduct by simple majority); Rainey v. United States, 232 U.S. 310, 317 (1914) (statute becomes law only if it conforms to constitutional procedures for enacting laws); Flint v. Stone Tracy Co., 220 U.S. 107, 176-77 (1911) (Senate may substitute tax for revenue provision in bill originating in House); United States v. Ballin, 144 U.S. 1, 4 (1882) (quorum required for enactment of laws). No provision of the Constitution expressly authorized or forbade the legislative veto. *Chadha*, 103 S. Ct. at 2798 (White, J., dissenting).

9. *Chadha*, 103 S. Ct. at 2784. The irony of this point is that it seems to ignore the fact that through regulatory actions, the administrative agencies regularly legislate by issuing rules and regulations that have the force and effect of law without being presented to either the Congress or the President. It is ironic that the unelected officials in the bureaucracy may bypass constitutional authority and procedure when they legislate, yet the Congress, elected by the people, must go through the full legislative process just to *prevent* the unelected bureaucrat from legislating.

The methods of control left to Congress are more cumbersome than control through the legislative veto, and will likely add to the burdens of an already burdened legislature.[10] The majority opinion in *Chadha*, however, asks us to overlook this problem, proclaiming that "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."[11] Congress has no choice under the Court's decision but to turn to alternative devices in order to regain adequate control over the bureaucracy.

Control through the legislative veto has been excersised in numerous areas over the years. Actions in the area of war powers, budget impoundment and control, foreign arms sales, nuclear non-proliferation, export controls, immigration policy, and regulatory policy have been subject to the legislative veto, as have executive actions in many other areas.[12] While we are focusing primarily on alternative means of controlling the actions of independent regulatory agencies, some form of the alternative means of control discussed herein could be applied to any executive action that has been subject to a legislative veto.

The simplest means of regaining control over the bureaucracy is to restrict or contract the authority delegated to the agencies. Granting shorter authorization and appropriation terms for agencies and programs is one means by which the Congress can control the agencies, allowing Congress to review agency action on a more frequent basis and to curtail action that is inappropriate through limits imposed in the funding and authorizing process. The Congress has come to use periodic appropriations bills as a means for controlling agency authority on an almost routine basis.[13] Examples of such provisions in recent years include prohibitions on the use of funds for abortions except where the life of the mother is endangered, and prohibitions on the use of funds for personal services, such as chauffeurs. Restrictions such as these are frequently added by the appropriations subcommittee with jurisdiction over a

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10. *See supra* note 7 (discussing increased burden on Congress resulting from elimination of legislative veto).

11. 103 S. Ct. at 2781. Some would argue, contrary to the Supreme Court's opinion, that the Framers "were deeply concerned about the efficiency of government." *Legislative Veto and the* Chadha *Decision: Hearings on Effects of the Supreme Court's Decision in* INS v. Chadha *on the Legislative Veto Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 112-13 (1983) (statement of Louis Fisher, Congressional Research Service) [hereinafter cited as *Legislative Veto Hearings*].

12. *See, e.g.*, War Powers Resolution, 50 U.S.C. §§ 1544-1548 (1976 & Supp. V 1981); Nuclear Non-Proliferation Act, 42 U.S.C. §§ 2153-2160 (1976 & Supp. V 1981); International Security Assistance and Arms Control Act of 1976, 22 U.S.C. § 2276(b) (1982). In an appendix to his dissent in *Chadha*, Justice White lists 56 statutes containing one or more legislative veto provisions. 103 S. Ct. at 2811-16 (White, J., dissenting). For other lists of legislative veto provisions contained in current statutes, see RULES AND PRACTICE OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. No. 271, 97th Cong., 2d Sess. 755-60 (1982); M. Rosenberg, Summary and Preliminary Analysis of the Ramifications of *INS v. Chadha*, The Legislative Veto Case, Appendix I (June 28, 1983) (unpublished manuscript) (copy on file at *Georgetown Law Journal*); Office of Legal Counsel, Dep't of Justice, Compilation of Currently Effective Statutes that Contain Legislative Veto Provisions (July 15, 1983) (copy on file at *Georgetown Law Journal*).

13. Congress frequently limits the amount of money appropriated and the manner in which it may be spent. *See, e.g.*, Department of the Interior and Related Agencies Appropriation for 1979, Pub. L. No. 95-465, 92 Stat. 1279, 1298 (1978) (no money available to Smithsonian Research Foundation); Department of Transportation and Related Agencies Appropriation for 1978, Pub. L. No. 95-85, § 316, 91 Stat. 402, 417 (1977) (no money available for improvements to Flushing Airport); Department of Defense Appropriation Act of 1978, Pub. L. No. 95-111, § 840, 91 Stat. 886, 906 (1977) (no money available for research involving uninformed or non-voluntary human subjects).

particular agency. Even though restrictions may also be added during floor consideration, changes in the House rules as of the beginning of the 98th Congress have made this difficult from a procedural standpoint.[14]

Such control clearly does not violate the conditions set forth in *Chadha*. Appropriation bills, which go through the full bicameral process and are presented to the President for his signature, may have these provisions attached to them. The Supreme Court has previously ruled that it is up to Congress to determine what should be funded and what should not be funded. The Supreme Court has ruled that Congress' refusal to fund an activity "cannot be equated with the imposition of a 'penalty' on that activity."[15]

Alternative legislative veto mechanisms could also be fashioned through the appropriations and authorization process by combining a report-and-wait provision with a disapproval resolution, the passage of which would effect a prohibition of funding for the activity or for the implementation of the regulatory action being reviewed. The report-and-wait procedure is not new to the legislative veto discussion. Essentially, this procedure requires that agency rules and regulations be submitted to the Congress for a certain number of days before taking effect. During this time, Congress could review the regulations and, if so inclined, act to disapprove them. While the *Chadha* decision strikes down disapproval through the passage of simple or concurrent resolutions that do not go through the full legislative process, the report-and-wait method has been upheld as a constitutional means of delaying agency action.[16] In *Pacific Legal Foundation v. Watt*[17] it was held that the Congress could delay the effectiveness of Secretary of Interior James Watt's decision to lease wilderness areas for oil and gas exploration for a "reasonable time," thus affording congressional review of the report required to be filed by the Secretary and allowing for passage of legislation on the action.[18]

Senators Carl Levin and David Boren have introduced legislation that embodies the report-and-wait procedure combined with the opportunity for Congress to disapprove action through the passage of a joint resolution.[19] This proposal offers a reasonable alternative for the review of nonmajor regulations,[20] but we must limit its promise to nonmajor regulations for good reason. The report-and-wait provision combined with disapproval through joint resolution (requiring the President's signature) does constrain to some extent the ability of Congress to control adequately the regulatory actions of the agencies, especially in the case of executive branch agencies. Disapproval through joint resolution is less effective than a true congressional veto because the President may veto the disapproval resolution. When compared with the legislative veto, the numbers required for action through joint resolution change dramatically. Congress has to muster a two-thirds vote in order to override the President and sustain its disapproval of the rule or other action. Furthermore, if it is to be at all effective, it is imperative that the provision contain procedures for expedited consideration of a resolution of disapproval.

14. *See* RULES AND PRACTICE OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 721, 98th Cong., 1st Sess. Rule XXI, § 2 (1983).
15. Harris v. McRae, 448 U.S. 297, 317 n.19 (1979).
16. *See Chadha*, 103 S. Ct. at 2776 n.9.
17. 529 F. Supp. 1194 (D. Mont. 1982).
18. *Id.* at 997-98.
19. S. 1650, 98th Cong., 1st Sess., 128 CONG. REC. S10,474 (daily ed. July 20, 1983).
20. A major regulation is generally defined as a regulation that has an annual economic impact of $100 million or more. *See* H.R. 220, 98th Cong. 1st Sess. § 621(a)(6) (1983); S. 1080, 98th Cong., 1st Sess. § 4(a) (1983).

Procedures for expedited consideration of a resolution of disapproval would facilitate discharging the resolution from the committee considering it if the committee did not act within a specified period of time.[21] The expedited procedures for consideration are important because they ensure that the decision on whether to disapprove regulations is made by the full Congress, and not by a handful of committee members who may be sympathetic to the agency. Without expedited procedures, a committee chairman could prevent full consideration of the disapproval measure by not reporting the resolution until after the waiting period had expired.

Disapproval resolutions as a means of controlling agency action also run the risk that the committee with jurisdiction over the relevant agency might be inclined to support the regulations developed by the agency and would act to frustrate the adoption of the resolution. There is a similar chance that the President will be inclined to support the Secretary or the political appointees who head the agency issuing the regulations.[22] While the former problem may be mitigated to some extent by expedited procedures, the latter problem encumbers the effectiveness of congressional review.

The need for congressional oversight of even the nonmajor actions of the executive and independent agencies is compelling to anyone familiar with the regulatory process and the impact of regulations on individuals and society. Congress, however, cannot be expected to act on each of the thousands of regulations promulgated each year. The report-and-wait procedure with a joint resolution of disapproval gives Congress the opportunity to express its disapproval, and, if that disapproval is severe, to halt regulations. It does not, however, require legislative action for the rule to become legally effective.

For the more significant regulations, those with an economic impact of $100 million or more per year, legislative action should be required. Perhaps *Chadha* should be read as stating that Congress should not simply authorize the agencies to make these far-reaching decisions, but should consider the proposed rules and regulations and vote on them as they vote on legislation. Certainly, the major rules promulgated by the regulatory agencies have an impact on society equal to or even greater than that of many of the statutes passed by Congress.

For major rules the most effective method of legislative review would be to require that rules be affirmatively approved by the Congress before taking effect. The rules would have to be approved through the enactment of a joint resolution passed by both Houses of Congress and signed by the President.

21. *See supra* note 19 (example of expedited procedures).
22. Ironically, in the course of litigation concerning the legislative veto, presidential appointees voiced support for the veto in specific circumstances. For example, while the Department of Justice, representing the FTC, attacked the validity of the FTC Improvements Act of 1980, 15 U.S.C. § 57(a)(1) (1982), the chairman of the FTC stated his support for the veto of the used car rule litigated in that case. *See* U.S. News and World Report, Aug. 11, 1982, at 62, col. 1 (interview with FTC Chairman James C. Miller III).

Obviously, if one House fails to pass the resolution of approval, in effect a one-House veto will have been exercised. The regulation or other agency action would fail because Congress did not pass it. The "son of legislative veto" would have been exercised. The regulations would thus be subject to the same fate as thousands of the bills introduced in each Congress—but that fate would be decided by *elected* representatives of the people, not by unelected officials to whom the Constitution gives no power to legislate.[23]

The House of Representatives has already endorsed this concept in adopting an amendment to the Consumer Product Safety Commission (CPSC) reauthorization bill requiring that rules that were previously subject to a legislative veto be approved through the passage of a joint resolution before taking effect.[24] The provision would work well for an agency such as the CPSC, or the Federal Trade Commission, that does not promulgate an enormous number of regulations.[25]

There is concern that the Congress would be overburdened by having to approve all of the regulations put out by an agency, but there are ways around this concern. Robert E. Litan, a Washington attorney, and William D. Nordhaus, a professor of economics at Yale University, suggest that the President periodically present to Congress the major regulatory proposals with an analysis of their costs and benefits.[26] These proposed major rules (of which there are an estimated fifty to one hundred per year) could then be put into effect if approved through an act of Congress.[27] This legislated regulatory calendar could operate in a way similar to that of omnibus budget reconciliation bills reviewed by Congress as a package.

Another possible concern over the use of an approval mechanism is that it might cut off avenues of judicial review of agency rulemaking. While this belief is purely speculative, the problem can be avoided by structuring the approval mechanism in such a way that it does not affect the legality of the rule. For example, an approval resolution could be structured simply to authorize the agency to *implement* the proposed rule. In such a case, it would be clear that enactment of the resolution did not constitute congressional approval of the rule itself for the purposes of judicial review.

A Congressional Research Service analysis of this point concludes that "the mere statutory statement of approval of a rule or regulation, however, is ambiguous."[28] Commenting on the approval mechanism included in the CPSC reauthorization bill, the report notes that

> Congress does not adopt the language of the regulation as its own when it passes the resolution. Under such circumstances, a court might be reluctant to hold that Congress intended, in effect, to implicitly repeal the rulemaking procedures governing the CPSC in the case of a particular regulation and cut off challenges to the regulation by aggrieved parties.[29]

This suggests that if the Congress does not intend to cut off judicial review, it can make its intent clear to the courts through the legislative history, through specific language in the resolution, or both.[30]

Even if affirmative approval of major rules does have the effect of legislating the rules and subjecting them only to the judicial review accorded to a statute passed by Congress, who can really object? Can one object to the elected Congress legislating? Congressional approval of agency action is far better than permitting unelected officials to legislate subject to limited judicial review, available only to those who can afford it. The opportunity for public accessibility and input is the best check on arbitrary action and such access is an integral part of the legislative process. Congressional approval is especially appropriate in the case of major rules, and in the wake of the *Chadha* decision, seems to be the course advocated by the Supreme Court.

A consensus appears to be growing in the Congress that the use of a joint resolution of approval for major regulations combined with the use of a joint resolution of disapproval for the other regulations offers the best alternative to the legislative veto as it existed prior to the *Chadha* decision. This son of legislative veto[31] will be used in future authorizations of agencies, programs, and executive branch activities.

II. SEVERABILITY—WHAT IS AT STAKE?

The status of laws already on the books containing the now unconstitutional legislative veto provisions remains unclear. If we are going to sort out the governmental wreckage of *Chadha* fully, then the Congress must address the question of severability.

In his dissent in *Chadha*, Justice White noted that the majority's decision "sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto'."[32] For Justice White and for others, the question of whether Congress would have delegated the authority granted to the executive branch through these laws *without* a legislative veto attached is of fundamental importance. Justice White noted that

> [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 to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch and independent agencies. To

23. Rulemaking has traditionally been a legislative function. *See* Rosenberg, *Presidential Control of Agency Rule-Making*, 80 MICH. L. REV. 193, 212 (1981) (rulemaking a legislative function of Congress by virtue of history, precedent and policy).

24. 129 CONG. REC. H4773-4781 (daily ed. June 29, 1983) (text of amendment and debate).

25. *See Consumer Product Safety Commission Reauthorization: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. 22 (1983) (statement of Nancy Steorts, Chairman, CPSC).

26. N.Y. Times, July 5, 1983, at A19, col. 1.

27. *Id.*

28. R. Ehlke, The Impact of Joint Resolution of Approval of Agency Rules on Judicial Review of Approved Rules 5-6 (1983) (unpublished manuscript) (copy on file at *Georgetown Law Journal*).

29. *Id.*

30. *Id.*

31. A form of the son of legislative veto has been introduced by Congressman Trent Lott and endorsed by 75 cosponsors. H.R. 3939, 98th Cong., 1st Sess. (1983).

32. 103 S. Ct. at 2792 (White, J. dissenting).

> choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.[33]

Stripped of the legislative veto provision, the laws that remain on the books constitute an unadulterated abdication of responsibility by the legislative branch. Under *Chadha*, however, the statutes involved in these cases appear to stand absent the veto provisions.

In *Chadha* the Supreme Court relied on the presence of a severability clause to conclude that the legislative veto provision could be severed from the law without affecting the validity of the remaining statute.[34] The Court stated that the legislative history of the statute "is not sufficient to rebut the presumption of severability raised by section 406 because there is insufficient evidence that Congress would have continued to subject itself to the onerous burdens of private bills had it known that Sec. 244(c)(2) would be held unconstitutional."[35] The presence or absence of a severability clause, however, is not the determining factor. In *Consumers Energy Council of America v. Federal Energy Regulatory Commision*,[36] which did not involve a severability clause, the court held, as in *Chadha*, that the rest of the statute, including the delegated authority, would be valid notwithstanding the invalidation of the statute's one-House veto provision.[37]

The *Chadha* Court reasoned that "a provision is further presumed severable if what remains after severance 'is fully operative as a law.' "[38] This leaves only the most disruptive and difficult options for the Congress in addressing the unanswered questions on severability.

One available alternative is to leave the delegated power intact without the legislative veto, but as Justice White noted, this option runs the risk of "unaccountable policymaking by those not elected to fill that role."[39] A second approach is for the Congress to sit back and do nothing as the inevitable litigation contesting the validity of each statute containing a legislative veto provision winds its way through the courts, leaving the validity of operating statutes in question and clouding the operation of government with uncertainty for years to come. A third alternative is for Congress to take legislative action to rectify the damage done by the *Chadha* decision by clarifying or repealing the authority that was originally delegated with a legislative veto provision included.

The first option is obviously an irresponsible and unacceptable one for the Congress to follow and one that would likely collapse under public scrutiny. One of the many grievances enumerated against George III in the Declaration of Independence was that "[h]e has erected a multitude of New Offices and sent hither swarms of Officers to harass our people, and eat out their substance."[40] Would the American people stand for an uncontrolled, unencumbered, and unelected bureaucracy possessing such power?

33. *Id.* at 2793.
34. 103 S. Ct. at 2775-76.
35. *Id.* at 2775.
36. 673 F.2d 425 (D.C. Cir. 1981), *aff'd*, 103 S. Ct. 3556 (1983).
37. *Id.* at 442.
38. 103 S. Ct. at 2775 (quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1934)).
39. *Chadha*, 103 S. Ct. at 2793 (White, J., dissenting).

Under the second approach, the government would virtually drown in disorder. Already, the courts are calling into question actions taken years ago under statutes now shadowed by the constitutional questions emanating from the *Chadha* decision. The United States District Court for the Southern District of Mississippi struck down the Reorganization Act of 1977 as unconstitutional, holding that there was "no doubt that Congress intended the one-House veto provision to be an integral and inseparable part of the entire Act."[41] If this decision is followed by other courts, the repercussions would topple significant government institutions.[42] In cases where the the legislative veto provision is found to be severable, the risk arises that delegated authority will be approved even if Congress would have been unlikely to delegate the authority absent the legislative veto as a check on agency action. As the counsel for the House of Representatives noted, "[w]hile we in Congress, as participants in the conferences and negotiations which produced these statutes, may feel in our hearts that authority would not have been delegated without a veto, absent an overwhelming record to support our viscera, I believe the courts will find severability in many cases."[43]

The clearest path is for the Congress to legislate the answer to the severability question. Legislation has been introduced by Congressman Levitas that would repeal all authority delegated within 180 days after its enactment, unless during those 180 days the Congress acted to reinstate the authority with or without an alternative legislative veto mechanism.[44] This "super sunset" legislation would erase the uncertainty that now exists and that will continue to exist as we wait for litigation to wind its way through the courts and answer the questions. While seemingly dramatic, such legislative action is no more dramatic than the impact of the *Chadha* decision.

40. Declaration of Independence, para. 1. Ultimate responsibility for the agencies is vested in Congress, so that failure to address the changes wrought to by *Chadha* would subvert the express constitutional plan:

> [E]xecutive power was vested in the President; no other offices in the Executive Branch, other than the Presidency and Vice Presidency, were mandated by the Constitution. Only two Executive Branch offices, therefore, are creatures of the Constitution; all other departments and agencies, from the State Department to the General Services Administration, are the creatures of the Congress and owe their very existence to the Legislative Branch.

Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 508 (1977) (Burger, C.J., dissenting).

41. EEOC v. Allstate Ins. Co., 570 F. Supp. 1224, 1232 (S.D. Miss. 1983). *See also* Allen v. Carmen, No. 83-3099 (D.D.C. Dec. 3, 1983) (striking down GSA regulations allowing National Archives to release Nixon administration documents because regulations subject to legislative veto); United States v. Exxon Corp., No. 78-1035 (D.D.C. June 7, 1983) (Exxon relieved of judgment obtained against it under statutes containing inseverable veto provisions).

42. For a list of reorganization plans subject to the legislative veto prior to 1977, see H.R. REP. NO. 105, 95th Cong., 1st Sess. 32 (1977).

43. *Legislative Veto Hearings*, *supra* note 11, at 95 (statement of Stanley M. Brand, General Counsel to the Clerk, U.S. House of Representatives).

44. H.R. 4535, 98th Cong., 1st Sess. (1983). *See also* 129 CONG. REC. H10,589-91 (daily ed. Nov. 19, 1983) (statement of Rep. Levitas discussing proposals requiring congressional action to authorize agency action).

III. THE FUNDAMENTAL ISSUE

Whether the solution is to be found in a discussion of severability or the alternatives, it is clear that the Congress must act to restore the balance between the branches of government that *Chadha* has disturbed. Our government stands on the principles of separation of powers and checks and balances. Without the legislative veto, the independent and executive branch agencies take on the character of the legislature, yet lack the constitutionally mandated checks upon legislative power.

Rules and regulations have the force and effect of law and in some cases are made pursuant to the broadest and vaguest authority imaginable.[45] The issue is still a simple one, even after *Chadha*: Who makes the laws in this country, the unelected bureaucrats or the elected Congress?

In his dissenting opinion, Justice White calls the legislative veto "a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the nation's lawmaker."[46] Justice White's words reveal a clear understanding of the workings of government and the manner in which the legislative veto operates today. Unfortunately, as Representative Levitas has testified, "the Supreme Court, in its majority opinion, displayed an abysmal ignorance of the way in which our government has evolved today."[47]

Critics of the legislative veto have argued that the device would shock our Founding Fathers. It is more probable that if Thomas Jefferson, James Madison, or any of the other Founding Fathers were to visit us today, they would be more shocked by the existence of administrative agencies and by the delegation of lawmaking power to this part of the executive. The administrative agencies have become a fourth branch of government, deranging our three-branch legal theories in much the same manner as the concept of a fourth dimension unsettles our three dimensional thinking. As noted by Justice Jackson,

> administrative agencies have been called quasi-legislative, quasi-executive, or quasi-judicial, as the occasion required in order to validate their functions within the separation of powers scheme of the Constitution. In effect, all recognized classifications have broken down and the qualifying prefix "quasi" is a smooth cover that we draw over confusion as we might use a counterplane to conceal a disordered bed.[48]

The *Chadha* decision, at the very least, raises questions and concerns about the validity of the rulemaking power of the agencies themselves.

45. *See* Federal Trade Commission Act, § 5, 15 U.S.C. § 45 (1982) (empowering FTC to prevent "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce"); National Broadcasting Company v. United States, 319 U.S. 190, 225-26 (1943) (FCC to license radio broadcasts "as the public convenience, interest, or necessity requires").

46. *Chadha*, 103 S. Ct. at 2796 (White, J., dissenting).

47. *Legislative Veto Hearings*, *supra* note 11, at 98 (statement of Rep. Levitas).

48. FTC v. Rubberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting). President Roosevelt's Committee on Administrative Management noted that the Constitution "sets up no administrative organization for the government." REORGANIZATION OF THE EXECUTIVE DEPARTMENTS: MESSAGE OF THE PRESIDENT OF THE UNITED STATES TRANSMITTING A REPORT ON REORGANIZATION OF THE EXECUTIVE DEPARTMENTS OF GOVERNMENT, S. DOC. NO. 8, 75TH CONG., 1ST SESS. 55 (1937).

Thoughts of abolishing the agencies, of course, carry us even further beyond modern reality, but the desire and need to maintain the foundations of our government require that alternatives to the legislative veto be enacted and that the authority contingent on the resolution of the severability issue be rescued in one way or another. Separation of powers must remain as it is spelled out in the Constitution, the ultimate legislative authority resting with the elected representatives of the people. Congress must also maintain the system of checks and balances that limit all authority delegated to the executive branch.

The Congress must move in this regard. A form of the legislative veto may have died in *Chadha*, but its spirit, as well as the desire to ensure that fundamental decisions are made by elected representatives, remains alive and strong and is embodied in the son of legislative veto. In the last analysis, the Congress, elected by the people, will prevail.

Spinning the Legislative Veto*

GIRARDEAU A. SPANN**

I am delighted to have been given the opportunity to comment on Judge Breyer's proposal for a fast-track substitute to the legislative veto.[1] Although the Supreme Court invalidated the legislative veto device in *INS v. Chadha*,[2] Judge Breyer's proposal demonstrates that innovative thinking may well permit those with enough determination to circumvent the apparent effect of the Court's decision. Even more important, the proposal illustrates why such circumvention is possible.

As a doctrinal matter, the legislative veto poses a real dilemma—one that is rooted in fundamental uncertainty about the proper relationship between the Supreme Court and the elected branches of government. Because the Supreme Court tried to resolve the constitutional issues raised by the legislative veto without first resolving that dilemma, the *Chadha* opinion is unsatisfying. Its tone is glib; its reasoning is superficial; and its analysis is linguistic rather than functional in nature.[3]

Judge Breyer's fast-track proposal illustrates these defects in a rather dramatic fashion. By posing the pertinent constitutional issues in a way that cannot be resolved without directly confronting the underlying dilemma, Judge Breyer's veto alternative places so much strain on the reasoning of *Chadha* that the opinion threatens to burst apart at the seams. All of this not only permits clever lawyers and legislators to conjure up strategies for sidestepping the Court's decision, but precludes us, as well, from making any reliable determination of whether those strategies are consistent with the theory of our Constitution. Using the raw materials provided in the *Chadha* decision, it is possible to spin legal analysis of the legislative veto around and around until we get any answer concerning its validity that we desire. It strikes me that this is a useful thing to know, and we are indebted to Judge Breyer for providing the catalyst that makes it so apparent.

I. THE FAST-TRACK PROPOSAL

The legislative veto has been viewed by many as a useful device because it permits Congress to make broad delegations of authority to executive agencies while retaining the authority to invalidate particular exercises of that authority when it disapproves of what the executive has done.[4] Of course, Congress can generally invalidate an act of the executive branch by passing a new statute,

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 This article consists of comments on a paper entitled *The Legislative Veto After* Chadha, which was delivered on October 13, 1983, by Judge Stephen Breyer, as part of the Ryan Lecture series, at the Georgetown University Law Center, Washington, D.C.

** Associate Professor of Law, Georgetown University Law Center.

1. *See* Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785 (1984).
2. 103 S. Ct. 2764 (1983).
3. I have in the past argued that functional analysis is preferable to, and less dangerous than, linguistic analysis for a variety of reasons. *See* Spann, *Functional Analysis of the Plain-Error Rule*, 71 GEO. L.J. 945 (1983).
4. The history and purpose of the legislative veto, as well as many of the ideas expressed in this

but statutes are not always so easy to enact. They require the expenditure of enough time and political capital to amass the majorities or supermajorities needed for enactment. The legislative veto, however, permits Congress to invalidate an executive action with the concurrence of something less than the full majorities required for passage of new legislation. It is, therefore, a politically expedient way for Congress to exert control over executive agencies. Viewed in this light, as Judge Breyer points out,[5] the legislative veto is a political compromise between efficiency on the one hand and accountability on the other.[6]

Broad delegations of power to executive agencies are efficient in two ways. First, they tend to be stated in general terms that facilitate enactment by reducing political opposition that might accompany more specific legislative proposals. Second, the breadth of agency delegations minimizes questions that might otherwise arise concerning an agency's statutory authority to take particular actions. However, this efficiency reduces the degree of accountability to which executive agencies are subject. As a result, Congress sought to provide a substitute form of accountability through retention of the power to veto particular exercises of agency authority. Even when a veto is not actually exercised, the threat of a veto is often enough to prompt executive officials to make concessions to the elected Members of Congress before taking potentially controversial actions.

Although *Chadha* declared the legislative veto to be invalid, it is not clear precisely why. As Judge Breyer has emphasized,[7] the reasoning relied on by the Court was literal and mechanical. The Court merely declared the exercise of a legislative veto to be an act that was legislative in nature and, therefore, invalid for failure to comply with the article I enactment procedures prescribed for legislation.[8] Because the Court offered no functional explanation of why the veto ought to be subject to the article I enactment procedures, the opinion is unsatisfying. Now, Judge Breyer has proposed an alternative to the veto device that demonstrates just how unsatisfying the *Chadha* opinion is.

Under Judge Breyer's alternative,[9] executive actions taken pursuant to broad congressional delegations of power would not automatically have legal effect. Rather, they would serve as legislative proposals that would become effective only if affirmatively enacted by Congress. The internal rules of each House, however, would be amended to provide a "fast track" for such legislative proposals, pursuant to which the proposals would quickly be voted on by each House without procedural delays. This would provide a quasi-automatic process by which executive proposals could become law, but the procedure could be terminated with respect to any particular executive proposal through passage of a "derailing" resolution by one or both Houses. Such a resolution

article, are more fully developed in Spann, *Deconstructing The Legislative Veto*, 68 MINN. L. REV. — (1984) (forthcoming).

5. *See* Breyer, *supra* note 1, at 787-88.

6. To the extent that the legislative veto permits Congress to take actions that a majority of the Members of Congress would not agree to take, it is not a "legislative" veto at all. Rather, it is a veto exercised by some entity that is smaller than, and different from, Congress. *See* Spann, *supra* note 4.

7. *See* Breyer, *supra* note 1, at 790.

8. *Chadha*, 103 S. Ct. at 2780-88.

9. *See* Breyer, *supra* note 1, at 793-94.

would have the effect of taking the executive proposal off of the fast track and subjecting it to the normal legislative process, with all of its attendant political maneuvering and delays.

The derailing resolution would have roughly the same effect as a one- or a two-House veto, depending on which derailing option Congress selected, because it would strike roughly the same political compromise as that struck by the legislative veto.[10] However, the fast-track proposal would not depart from the legislative procedures prescribed by article I, and would not, therefore, appear to be invalid under the terms of the *Chadha* decision. How then should the fast-track alternative be viewed in constitutional terms? Should it be viewed as constitutional because it satisfies the language of article I, or should it be viewed as unconstitutional because it serves the same purpose as that served by the unconstitutional legislative veto? Stated differently, was the Supreme Court merely disapproving of the manner in which Congress chose to strike the political compromise embodied in the legislative veto, or was it invalidating the political compromise itself? As it turns out, that question poses a dilemma so fundamental that it is easy to understand why the Court chose to avoid it.

II. THE DILEMMA

The dilemma is this: Constitutional theory both permits and precludes Congress from relying upon the legislative veto as a device for controlling executive action. Watch what happens when we undertake a functional analysis of the legislative veto.

Subject to certain exceptions that are not here pertinent,[11] Congress can exercise only legislative power, because that is the only power that it is granted under the Constitution.[12] The doctrine of separation of powers, which is implicit in the structure of the Constitution, requires the concurrence of three separate constituencies to make legislation valid. The Senate—which represents state interests, the House of Representatives—which represents the interests of local majorities, and the President—who represents the interests of the national majority all must agree on the desirability of a particular action before that action can have the effect of valid legislation.[13] Consistent with our system of checks and balances, this three-constituency-concurrence requirement provides a degree of quality control over the development of federal policies that helps to ensure that imprudent legislative proposals will not be implemented. Because the legislative veto permits one or two Houses of Congress acting alone to implement legislative policy decisions without the concurrence of the three required constituencies, the veto is unconstitutional, in violation of separation of powers principles . . . .

10. The political compromise would not be precisely the same, however, for the reasons that Judge Breyer specifies. *See id.* at 794-95.

11. *See, e.g.*, U.S. CONST. art. I, § 5.

12. *See id.* art. I, § 1.

13. The separate-constituency theory was articulated most clearly in the legislative veto context by the United States Court of Appeals for the District of Columbia Circuit in Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 461-65 (D.C. Cir. 1982), *aff'd mem.*, 103 S. Ct. 3556 (1983) (invalidating one-House veto with respect to agency rulemaking).

But the legislative veto is authorized by legislation. Moreover, that legislation is perfectly valid because it has been agreed to by the three separate constituencies specified in the Constitution, thereby satisfying our quality control standards. Both Houses of Congress and the President have determined that, in the contexts in which it is authorized, the legislative veto constitutes a prudent method of achieving a valid governmental objective. Because the legislative veto is an essential component of a perfectly valid piece of legislation, the veto is constitutional and is completely consistent with separation of powers principles.

Separation of powers principles are designed to ensure that the political process operates properly, but here, a properly operating political process has chosen to take an action that can be said to violate separation of powers principles. When the two conflict, which should prevail—the principle designed to protect the political process or the political process that the principle was designed to protect? It is not possible to resolve this dilemma without first adopting a normative position regarding the primacy of principle versus politics. That is what the Supreme Court failed to do in *Chadha*, and that is why the *Chadha* decision is unsatisfying. In more cosmic terms, the problems that plague the *Chadha* decision are the same problems that plague the legitimacy of judicial review itself. When we decide how we feel about judicial review, we should be able to decide how we feel about the legislative veto. Until that time, however, constitutional analysis is likely to be a somewhat dizzying experience. By making a minor modification to Judge Breyer's proposal I can illustrate what I mean.

III. ANALYTICAL SPIN

Judge Breyer's fast-track alternative is appealing because it closely approximates the political compromise that is struck by the legislative veto. As ingenious as the fast-track alternative is, however, it does not perfectly replicate that compromise.[14] Luckily, I have developed the perfect alternative. Now, your initial reaction will be that my alternative is absurd and impractical, and you will be tempted to say, "Thank God for Judge Breyer and his down-to-Earth approach to this difficult subject." But on reflection, it should become apparent that mine is, indeed, the perfect alternative. My alternative proposal is called the "legislative veto!"

At the beginning of the next session of Congress, the Members of both Houses should meet to discuss the consequences of the *Chadha* decision. If they genuinely wish to use the legislative veto as a means of controlling executive discretion, and if they are willing to pay the price, the Members of Congress have it well within their power to exercise legislative vetos that are every bit as effective as the veto invalidated in *Chadha*. They need only agree to rubber stamp, through affirmative legislation, all vetos exercised by a designated House or Committee of Congress. My proposal differs from Judge Breyer's in that it does not rely on a rules change or any other method of formally binding legislators to the veto scheme. Moreover, because enactment

14. *See* Breyer, *supra* note 1, at 794-95.

of the affirmative legislation would be truly automatic under my scheme—Members would not even need to be told the subject matter of the bills for which they were voting—the entire process would replicate, rather than merely approximate, the efficiency of the traditional legislative veto; it would capture precisely the same political compromise. However, each veto will have been implemented through affirmative legislation, in accordance with the procedures specified in article I, thereby honoring the dictates of *Chadha*.

Because my legislative veto so effectively mirrors the legislative veto set aside in *Chadha*, one might well wonder whether it is truly constitutional. But the constitutional issue is easily disposed of. My legislative veto is nothing more than a standard political deal. Whenever a rubber-stamp bill is introduced, each legislator agrees to vote for that bill, even though he or she may not actually favor it, in exchange for the commitment of other legislators to vote for future rubber-stamp legislation that they might not favor. This is classic political logrolling, in its purest form. If the Court attempted to invalidate such a scheme it would be telling legislators that their votes were effective only if the Supreme Court approved of their motives in casting those votes. Such a holding would involve a separation of powers violation all right, but it would be the Supreme Court that was intruding impermissibly into the legislative process. *Chadha* may preclude Congress from binding itself to a legislative veto scheme by law, but it certainly cannot preclude the Members of Congress from making such a scheme politically binding.

As fate would have it, my legislative veto not only turns out to be constitutional, but it turns out to be a prudent policy choice as well. In fact, it turns out to be the most prudent policy choice imaginable. Not only will the scheme have been agreed to by the Members of Congress, but the scheme will be continuously reevaluated and immediately corrected if it ever proves to have become imprudent. The moment that the Congress ceases to believe that the scheme is warranted, the scheme will cease to work; the moment that too many legislators decide that they no longer wish to rubber stamp legislative vetos through affirmative legislation, the legislation will be defeated and the vetos will cease to be effective.[15] Instantaneous political accountability . . . what could be better.

As I mentioned earlier, you may be thinking that such a scheme would be impractical and that it would never work because the Members of Congress would break ranks the first time they were called upon to rubber stamp a veto of which they disapproved on the merits. Well, I suppose that's right, but that's also the point. If Congress does not believe strongly enough in the legislative veto to pay the political price required to make it work, why should the veto continue to be an available legislative device? Wasn't the Supreme Court right to invalidate the legislative veto, because it would only be useful to a Congress that did not truly believe in the political compromise that the veto was intended to embody?

15. The scheme will continue to work as long as a majority of the Members of each House are prepared to vote in favor of a legislative veto. If a presidential veto is exercised, the scheme will continue to work as long as two-thirds of the Members of each House are prepared to vote in favor of the legislative veto.

If you are about to say "yes," think carefully before you answer. Just as we were able to predict that an informal veto scheme would not work because the Members of Congress might not always honor their political commitments, Congress too could make the same prediction. Why then should not Congress be able to guard against that danger by making the political commitments of its Members to a legislative veto scheme legally, as well as politically, binding? As long as the three pertinent constituencies agree that legal commitments are a prudent way to supplement political commitments, and they do so in accordance with the prescribed article I procedures, shouldn't the resulting legislation be legally effective?

Well, look where we are. We are right back on the horns of that dilemma again, and our analysis has simply gone around and around. But where else could it go? Until we resolve our ambivalence concerning the proper interaction of law and politics—of the Court and the elected branches of government—it is fitting that we go around in circles. At least those circles will remind us of how hopelessly interconnected law and politics appear to be.