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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	John G. Roberts ro Fred F. Fielding re :Draft OMB Statement Concerning Legislative Veto, 5p. (3-p. memo + 2-p. memo from Fielding to Brandon Blum)	5/4/84	~~P5~~ CB 12/14/00

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]
- F-1 National security classified information [(b)(1) of the FOIA].
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- F-3 Release would violate a Federal statue [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

THE WHITE HOUSE

WASHINGTON

May 4, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Draft OMB Statement Concerning Legislative Veto

OMB has asked for our views by 3:00 p.m. May 4 on testimony Chris DeMuth proposes to deliver on May 10 before the House Rules Committee on legislative veto. The testimony considers the various omnibus responses that have been proposed to INS v. Chadha. Those proposals generally either require all rules to be submitted to Congress for a 90-day period before going into effect, providing an opportunity for Congress to pass a law disapproving them, or require Congress to pass a law affirmatively approving all "major" rules before they may go into effect. DeMuth notes that the Administration has not yet taken a position on the various proposals, and states that this reticence should not be taken to suggest the Administration will ultimately support any such proposal.

The remainder of DeMuth's testimony discusses in a general way the various concerns surrounding the post-Chadha debate. DeMuth touches upon the problem of the political accountability of agencies, the shift of policymaking to courts exercising expansive review of agency decisions, and the various constitutional means by which Congress can influence agencies (oversight hearings, informal dialogue, the confirmation process, etc.). He also discusses the ways in which either omnibus approach to overturning Chadha would have practical effects significantly different from the legislative veto scheme in place before Chadha.

At several points in his broad-ranging discussion, DeMuth directly contradicts previous Administration positions on the Chadha issue. In the carryover paragraph between pages 4 and 5, DeMuth notes that expansive judicial review of the regulatory process has led to a migration of policy-making to an unelected judiciary. DeMuth states: "This is not, as is often supposed, the result of the growth of 'activist' judicial doctrines among modern judges; rather it is a direct corollary of the increasing economic importance of regulatory law." The Attorney General and numerous other Justice Department officials are, however, among those who have "supposed" and indeed argued publicly that the shift of

policymaking to the judiciary in the regulatory area is at least partly the result of the activist jurisprudence embraced by many judges. DeMuth can make his point by saying the problem is partly the result of an activist judiciary but also caused by the increasing economic importance of regulatory law.

On page 6, lines 21-22, DeMuth refers to executive orders requiring agencies to consider the costs and benefits of rules and to "consult with members of the President's immediate office" before issuing them. The executive orders referred to by DeMuth, such as E.O. 12291, however, require consultation with OMB, which is generally not considered part of "the President's immediate office." I would change "members of the President's immediate office" to "the Office of Management and Budget."

On page 8, lines 16-20, DeMuth dismisses as "vain" the hope expressed by "many observers" that Congress will respond to Chadha by drafting better laws confronting policy choices rather than shunting them to agencies and the courts. The observers faulted by DeMuth include you and the Attorney General. In his press release on the day the Chadha decision was announced, the Attorney General stated that its longterm effect "will be a better and more effective Congress as well as a more effective Presidency." The Attorney General made the same point in his subsequent op-ed piece for the New York Times. On the day after the Chadha decision you circulated to the Senior Staff a memorandum stating "the Chadha decision will promote better government by forcing Congress to draft statutes more clearly and narrowly" -- the precise point rejected by DeMuth. Guidance provided the Press Office by our office made the same argument. Quite apart from this "precedent," I happen to believe the argument DeMuth rejects is in fact sound. Acts of Congress will not suddenly become paragons of precision, but Congress will be forced to be more circumspect in delegating authority, since it will not have a "second bite" at agency action through a legislative veto. Again, DeMuth can make his point that the nature of the modern Federal Government makes it difficult for Congress to write precise laws without completely rejecting the argument that Chadha will force Congress to be at least somewhat more responsible.

On page 10, lines 14-15, DeMuth states that "Presidents accepted [legislative vetoes] to induce broader grants of authority from Congress." Every President presented with the question, however, has opposed legislative vetoes as unconstitutional. By signing bills with legislative vetoes,

Presidents have not "accepted" them in any legal sense. This point was explicitly recognized in the Chadha opinion itself, slip op. at 21, n. 13. The sentence should be deleted.

Attachment

THE WHITE HOUSE

WASHINGTON

May 4, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft OMB Statement
Concerning Legislative Veto

Counsel's Office has reviewed the above-referenced draft testimony. In the carryover paragraph between pages 4 and 5, the testimony dismisses the supposition that the shift of policymaking authority in the regulatory area to the judiciary is due to judicial activism. The argument that such activism is in fact at least one cause of this shift has been advanced publicly on numerous occasions by Justice Department officials, most prominently the Attorney General, and the testimony should not undermine this position. I would change the carryover sentence to read as follows: "This is not only the result of judicial activism but also a consequence of the increasing economic importance of regulatory law."

On page 6, lines 21-22, "members of the President's immediate office" should be changed to "the Office of Management and Budget." The phrase "the President's immediate office" is imprecise and would generally suggest something other than OMB.

On page 8, lines 16-20, the proposed testimony dismisses as "vain" the hopes that Chadha will compel Congress to act more responsibly in drafting laws. Again, this is inconsistent with previous Administration statements that made the precise point that is rejected. Furthermore, I do not consider it accurate to dismiss the hope as unfounded. It is entirely reasonable to suppose -- certainly to hope -- that Congress will be more circumspect in delegating lawmaking authority now that it will not have a ready opportunity to review agency action in specific cases. This paragraph should be rewritten to make its point without altogether dismissing the argument that, as the Attorney General stated in his press release the day Chadha was decided, the long-term effect of the decision "will be a better and more effective Congress as well as a more effective Presidency."

The sentence on page 10, lines 14-15, should be deleted. Presidents have not accepted legislative vetoes; all 11 that have addressed the issue have expressed the view that they are unconstitutional. As the Chadha opinion itself makes clear, Presidents have not "accepted" legislative vetoes in any legal sense simply by signing bills that contain them.

Because of the Department of Justice's involvement, this testimony should be reviewed by it as soon as possible.

FFF:JGR:aea 5/4/84
cc: FFFielding/JGRoberts/Subj/Chron

ID # CU

WHITE HOUSE
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

John

SPECIAL

May 2, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

SEE DISTRIBUTION

SUBJECT: Draft OMB statement concerning legislative veto

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

3:00 P.M. FRIDAY, MAY 4, 1984. (NOTE: A hearing is scheduled for May 10, 1984.)

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: B. Bedell
F. Fielding
E. Strait
J. Frey
J. Hill
M. Horowitz
C. DeMuth
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Central Intelligence Agency

Administrative Conference of the United States

DRAFT (4/1/84)

STATEMENT OF CHRISTOPHER DeMUTH
ADMINISTRATOR FOR INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE COMMITTEE ON RULES
U.S. HOUSE OF REPRESENTATIVES
ON
LEGISLATIVE VETO

May 10, 1984

Chairman Pepper and members of the Committee:

I appreciate the opportunity to appear before you this afternoon to discuss the impact of the Supreme Court's decision in INS v. Chadha on the regulatory process. Before the Court's decisions last term in Chadha and related cases, the Administration had opposed on constitutional grounds many legislative veto provisions and proposals (many of them affecting Executive branch decisions other than rulemaking). At the same time, substantial majorities of both Houses of the previous Congress were on record as favoring some version of legislative veto over agency rules.

Now that the Court has definitively resolved the constitutional issue, we are faced with the more direct and difficult policy issue: Should the President and Congress agree, through legislation, to procedures that would approximate the

defunct legislative vetoes over some or all agency rules, while avoiding their constitutional pitfalls? Recent "regulatory veto" proposals 1/ offered by Members of both Houses and both political parties have answered this question in the affirmative--while differing significantly on what those procedures should be.

The Administration has not yet adopted a position on any of these proposals. Our hesitation regarding the various across-the-board regulatory veto proposals is not, however, a result of a lack of interest. We believe these proposals are of profound importance, and therefore worthy of the most careful deliberation. We are following the Congressional debates with close and keen interest, and hope to have a position in the near future. But I do not want to leave the impression that we will ultimately conclude by supporting some provision. It may well be that given existing forms of oversight and the complexities of adding new, constitutional procedures for Congressional review of individual rules, a universal regulatory veto requirement is not the best solution.

This afternoon, I would like to offer three general considerations which are guiding our own efforts to think through this issue, in the hope that they will be useful to you as well.

1/ I refer to these proposals as "regulatory veto" to distinguish them from proposals concerning Congressional involvement in non-regulatory matters such as spending deferrals and the President's military and foreign policy authorities.

* * * * *

First, it is important to recognize that the regulatory veto proposals address a serious and fundamental problem. This is the increasing use of administrative "rulemaking" to establish substantive law--a trend that has seriously weakened the authority and accountability of the two political branches for major national policies, and led to an increasing migration of policy control to the Federal courts.

The growth of the pre-Chadha legislative veto was roughly coincident with the rise of the large administrative state. Over the past half-century, Congress has extended the Federal government's reach into one new territory after another that had previously been the domain of the states, of private markets, or of other voluntary arrangements--highways, education, medical care, the design of automobiles and other products, pollution abatement, and so forth. With the Federal government involving itself more and more deeply in private markets and local governance, Congress has increasingly lacked the resources--chiefly time and information--to enact into law all of the discrete judgments and compromises necessary to guide these interventions. As a result, Congress has increasingly hedged, enacting vague or even contradictory statutory standards that have effectively transformed Executive officials (and, derivatively, judges) into de facto lawmakers.

The Executive branch has responded to this challenge with a series of administrative innovations that has demonstrated its relative versatility in writing detailed and complex laws--and, as a result, has induced further Congressional lawmaking and increasing regulatory growth. The most important innovation has been "informal rulemaking," a technique that subtly combines the efficiencies of hierarchical, executive decisionmaking with the key legitimating features of judicial and legislative decisionmaking--due process and public sanction. The agency issues a "notice of proposed rulemaking," receives and evaluates written comments from the public, and then issues a "final rule" that becomes, with the courts' permission, the law of the land.

The success of informal rulemaking, however, has been problematic at best. While it has solved the problem of high-volume decisionmaking in the large modern state, it has done so at a very high cost in policy coherence and political accountability. While the regulatory bureaucracies have never exactly been "out of control," the locus of that control, and its relationship to any publicly articulated conception of the national interest have been increasingly difficult to discern.

Judicial preoccupation with "due process" has led to an increasing migration of large areas of policymaking to an unelected judiciary. This is not, as is often supposed, the

result of the growth of "activist" judicial doctrines among modern judges; rather it is a direct corollary of the increasing economic importance of regulatory law. With freewheeling discretion delegated to administrative agencies, and with large stakes riding on the results of their proceedings, private groups have strong incentives to invest in litigating thoroughly every conceivable aspect of a rulemaking proceeding--and the courts must attend to these arguments. The reach of the Judicial branch is not determined simply by views of appellate judges, but also, and more importantly, by the ingenuity of litigants in devising persuasive arguments within the context of whatever legal precedents may exist.

There can be little debate that the scope and detail of judicial review is today of an altogether different order than Congress envisioned in adopting the "arbitrary, capricious, or abuse of discretion" standard of the Administrative Procedure Act of 1946. While everyone, regardless of political viewpoint, is pleased with some court decisions under the current standards, it can hardly be said that the result has been greater agency accountability. This would be so only if the agencies had been ignoring clear Congressional mandates until the courts suddenly brought them into line. Instead, the usual case is that Congress does not issue the clear mandates in the first place, or else does not foresee the issues its laws will raise in specific instances--leaving the courts as well as the agencies adrift

regardless of the "strictness" of judicial review.

Whatever the role of the courts, the "public sanction" vested in agency rules by public notice-and-comment procedures is a very thin substitute for formal lawmaking by two representative majorities plus the President. Indeed, the rulemaking process is highly and inherently unrepresentative, both politically and economically. Rulemaking proceedings are, of course, lavishly attended by organized groups with immediate stakes in the decisions, and their arguments are necessarily couched in terms of the broad public interest. But the fact remains that the interests of organized groups are frequently opposed to the general public interest--whether this interest is defined by a vote of the Congress or suggested by the conclusions of a cost-benefit analysis.

The legislative veto, both before and after Chadha, has been of course just one of a variety of devices the Executive and Legislative branches have used to increase the accountability of the regulatory bureaucracies and to minimize agency parochialism. Presidents Ford, Carter, and Reagan have issued increasingly explicit Executive orders requiring agencies to assess the benefits and costs of their rules and to consult with members of the President's immediate office. President Reagan's Executive Order 12291 requires regulatory agencies, to the extent permitted by statute, to fashion rules that will produce the greatest net

social benefits; it seeks to guide administrative discretion towards decisions that are in the broadest public interest--which may, of course, be different than the interest of any notice-and-comment petitioner. The Order further directs agencies to report on their regulatory proposals and final rules to the Office of Management and Budget, and thus seeks to increase the accountability of the regulatory process by ensuring that individual rules are in harmony with the President's policies.

The pre-Chadha legislative vetoes put the legislative branch directly "in the loop" of Executive branch decisions, and thus made Congress more accountable to the public for agency actions. Although these were the Congress' most conspicuous response to the problems of galloping lawmaking-by-rulemaking, they were not Congress' only response. In fact, they were of much less practical significance than other forms of Congressional influence. Legislative vetoes of agency rules were exercised on only a few occasions. When Congress was strongly opposed to a regulatory decision, it was more likely to override that decision by statute, as in the cases of the saccharin ban and the automobile seatbelt-ignition-interlock rule. In some cases where vetoes were exercised, as in the 1982 override of the FTC's used-car labelling rule (nullified by the Supreme Court shortly after Chadha), a statutory override with the President's signature was probably available. And appropriations riders

barring or directing agency action have come into increasing use in recent years. They have (I am sorry to say!) been used or threatened on a number of occasions to prevent the Reagan Administration from undertaking important regulatory reforms.

On a day-to-day basis, however, the most important tools of Congressional influence over Executive policymaking have been the long-established informal ones: the growth of committee and subcommittee staffs working intimately with agency staffs and private groups; increasingly frequent oversight hearings; and the constant process of dialogue, negotiation, and compromise between Executive officials and committee chairmen and other Congressional leaders. And Congress has utilized several large institutions to help it with the details of these efforts--the Congressional Budget Office, the General Accounting Office, and the Office of Technology Assessment.

Many observers have expressed the hope that Congress will respond to the challenge of Chadha by becoming "more responsible"--by writing "better" laws that face up to the tough policy choices it avoided under cover of legislative veto provisions. This is a vain hope, however. The problem of modern lawmaking has nothing to do with legislators avoiding their responsibilities. It is rather an institutional problem, inherent in the size and ambitions of today's Federal government and the intentional, incorrigibly ponderous nature of legislative

decisionmaking. The Congress remains a collegial body of individuals representing a wide variety of differing and often conflicting interests and viewpoints. It is best suited to making occasional broad decisions requiring the definition of a common consensus. So long as Congress feels that it is under such great pressure to write and finance so many laws, it cannot possibly write "better" or even more detailed laws that, through statutory language, take back large chunks of policymaking discretion from the Executive branch.

The Congressional advocates of the new, post-Chadha regulatory veto procedures clearly recognize this dilemma. They also recognize that, for purposes of practical impact and accountability to the public, there is no substitute for having Congress stand up and be counted on a concrete proposition--not whether one is for or against clean air or for or against cancer, but whether one is for or against a specific level of control for a specific pollutant, or for or against banning a specific product. What remains to be determined is whether the regulatory veto advocates have identified not only the correct problem but a workable solution as well.

* * * * *

My second point is that the Chadha decision has had a major effect on the regulatory veto debate. On occasion, proponents of one or another regulatory veto device have claimed that their new approach would be functionally equivalent to the pre-Chadha legislative vetoes--implying that the Supreme Court's holdings were an academic and punctilious exercise easily avoided by practical men. It is important to recognize that these claims are incorrect: the principle that Congress may make policy only by making law as specified in Article I of the Constitution changes fundamentally the procedures now available for vetoing agency rules. These changes could affect the positions of those on both sides of the pre-Chadha legislative veto debate.

Pre-Chadha, there were a variety of institutional reasons why legislative veto procedures were enacted. Presidents accepted them to induce broader grants of authority from Congress. Congressmen supported them to counterbalance broad statutory standards with greater influence over Executive interpretation and implementation. House members supported them to share in regulatory influence provided the Senate by the confirmation process. Authorizing committees supported them to counterbalance the power of appropriations committees. Junior members supported them to equalize power held by authorizing committee chairmen. Program opponents supported them to dilute the power of program advocates. The House and the Senate supported them as a check upon the other body.

Under Chadha, however, the variety of veto procedures has been narrowed, and so have the possible motivations for supporting them. To see this, consider the two paradigmatic regulatory veto mechanisms now available. Under one procedure--"statutory disapproval"--a law would provide that agency rules could go into effect only after a "report-and-wait" period, and that Congress could disapprove rules by joint resolution before the end of the period. Except for the procedures involved, this would be little different from the status quo, since Congress can always override a regulation by statute.

Under the second procedure--"statutory approval"--a law would provide that agency rules could go into effect only after a "report-and-wait" period, and then only if Congress had approved the rule by joint resolution before the end of the period. This would be a considerable change from the status quo, and would permit a simple majority of either House, in effect, to "veto" any agency rule. But it would do so by swamping Congress with thousands of minute decisions that could bring the legislative as well as the regulatory process to a screeching halt. The regulatory veto could "solve" the regulatory problem by virtually abolishing regulation itself, converting rules into statutes and regulatory agencies into proposers of legislation.

Of course, the major proposals to establish a regulatory veto would modify the simpler approval or disapproval procedures in important respects. The proposal sponsored by Senators Levin and Boren adopts the statutory disapproval approach--but features expediting procedures to move disapproval resolutions promptly to the floors for votes of the entire Houses without delay by committees or subcommittees. Since the authorizing committees are often champions of "their" agencies' programs, and can protect their programs from floor majorities through the usual legislative routine, the expediting procedures would make regulatory programs more responsive to majority sentiment. The proposal sponsored by Senator Grassley and Congressman Lott adopts the statutory approval approach (with expediting procedures)--but only for "major" rules (fifty or sixty a year), leaving the large majority of less significant rules covered by a statutory disapproval procedure similar to that in Levin-Boren.

Both of these proposals would give Congress greater responsibility and purport to make Congress more accountable to the public for Federal regulations. To the extent they do so, however, it is at a cost: both would place new administrative burdens on the Congress, and both would limit Congress' ability to pick and choose among the issues that may come before it. And there are two other, fundamental respects in which they would differ from the pre-Chadha legislative vetoes, both arising from the requirement that Congress must act jointly (between the two

Houses always, and with the President always, unless his veto is overridden).

The first difference is that the President could veto the "veto" under the Levin-Boren statutory disapproval procedure. If the President favors a rule issued by agencies and vetoes a joint resolution presented to him which would disapprove the rule, a two-thirds majority in both Houses would be required to override his veto.

On the other hand, the Grassley-Lott statutory approval approach for "major" rules is closer to a one-House simple majority veto. Either House could block a major regulation by not approving the joint resolution of approval.

The second difference is that the President's role in the rulemaking process could change significantly. Under Grassley-Lott, once a major rule is issued, at least one House will be obliged to vote on it; if the first House to vote approves, the other House will then be obliged to vote as well. Thus, the current prerogatives of both the Executive and Legislative branches would change, and the Executive would be obliged to persuade a majority of both Houses to put a major new regulation into effect, or to make any major change in an existing regulation. And, the Congress would lose some control over its calendar, and could not avoid voting on controversial

issues it would prefer to avoid or delay. The President would be able to determine, several times each session, when and in what context Congress would have to stand up and be counted.

This is not intended as an argument against the regulatory veto. It is merely intended to emphasize that, with the options properly limited by Chadha, some very different dynamics for Congressional and Executive Review are presented. New procedures will also affect the Judiciary. Indeed, to the extent agency rules were adopted as statutory law, the courts could be--or may be required to be--removed altogether from review except on constitutional grounds.

* * * * *

My third point is that there are strong and serious arguments on all sides of the issues raised by the proposed regulatory veto devices. For each of these issues, we will need to weigh how the details of each regulatory veto proposal will affect the function and authority of each branch and its accountability to the public. And, most importantly, whether one of them will improve government operations.

1. Administrative Burdens for Congress. The opponents of regulatory veto proposals have good cause for concern over the

potential volume and technical detail of the issues that would be coming into the Congress. These could require a great deal of time and attention under any of the regulatory veto proposals. Grassley-Lott in particular would entail a substantial increase in Congressional workload. Under Executive Order 12291, OMB reviews 40 to 50 "major" (over $100 million in impact) final rules 2/ and about 1,500 "non-major" final rules a year. OMB does not review the rules of most "independent" regulatory agencies, which might involve an additional dozen "major" rules each year. Neither does OMB review most of the rules issued by the Treasury Department (including the Internal Revenue Service).

To place this in context, over the past ten years, Congress has passed about 200 public laws in its first session; 400 public laws in the second. Adding to Congress' annual legislative calendar 60 or more joint resolutions to affirm major regulations, plus an unknown number of regulatory disapprovals, could increase the number of legislative transactions considered by Congress from 10% to more than 25%.

2. Executive Accountability. Although the President and officials of the Executive Branch must work closely with Congress, there can be only one Executive. The President, like

2/ To illustrate the possible impact of the Grassley-Lott proposal, I am attaching a listing of 125 major final rules reviewed under Executive Order 12291 during 1981-83, which provides a brief explanation of each rule and a summary of any court challenges.

Congress, is accountable to the public. With so much execution of Federal law taking place through regulation, traditional Executive oversight mechanisms--budget and accounting controls--may no longer suffice. Any meaningful "reform" of the regulatory process must include the means for the official charged by the Constitution to see to the execution of the laws of the United States--the President--to coordinate and direct executive policymaking, including rulemaking.

Yet regulatory veto procedures could seek to limit Executive authority over the regulatory agencies. Agency regulatory management and staff may, even more than now, perform a balancing act between Congressional interests and the President's. Requiring agencies to forge new lines of responsibility to the Congress could threaten the ability of the Executive to perform as the Executive.

3. Judicial Review. A public law, unlike a regulation, is not subject to review under the Administrative Procedure Act. Unless constitutional considerations require otherwise, a law--in contrast to an agency rule--cannot be overturned by a court on the grounds of having been created in an arbitrary and capricious manner.

The effect upon subsequent judicial review of a joint resolution approving--or even disapproving--a regulation is a

matter that must be squarely addressed. We are not aware of any experience with requirements that rules do not take effect unless approved by a joint resolution. Therefore, we do not know the effect on judicial review of rules approved by a joint resolution, for example. Similarly, we do not have experience with joint resolutions of disapprovals of agency rules that are passed by Congress but are not signed by the President. Both of these possibilities are presented by the proposed regulatory veto provisions. Unfortunately, this absence of experience further compounds the difficulty of assessing with confidence appropriate mechanisms for a regulatory veto.

The statutes providing for a legislative veto could provide that the effect of a joint resolution of approval is to preclude further judicial consideration of the rule, except, of course, for constitutional challenges. This would treat an "approved" rule like a statute. On the other extreme, the statute providing for the regulatory veto could purport to provide that the Congressional approval has no effect on subsequent judicial review. In this case, a rule could be overturned by a court for record inadequacies, procedural defects, or on any other ground provided by the APA or authorizing statute even though both Houses of Congress and the President have approved a joint resolution supporting the rule. Any law authorizing a regulatory veto must state its intended effect upon judicial review.

4. Agency Efficiency. Just as the regulatory veto process should not stymie Congress in its other legislative work, it should not stymie the ability of agencies to implement statutory obligations. Any regulatory veto mechanism should contain emergency procedures allowing agencies to take prompt and lasting agency regulatory action, without the necessity of prior Congressional review. Any provision authorizing legislative veto must also state how changes to rules approved by a joint resolution can be altered by subsequent agency action. Must minor changes to such a rule also be approved by a joint resolution?

5. Scope. A statute, establishing a joint resolution procedure to either disapprove or approve a regulation, needs to define the regulatory statutes to which it will apply. Some existing proposals limit Congressional review to rules issued through the informal rulemaking provisions of the APA. The rulemakings implementing certain regulatory statutes are not clearly subject to the APA, however, and may not be subject to the proposed regulatory veto mechanism--for example, most rules under the Clean Air Act, and possibly the hybrid rulemaking procedures of the CPSC and FTC. It is not only necessary to determine which agencies should be subject to the proposed legislative veto mechanism, but also which statutes administered by those agencies should be.

6. Procedures and Review Periods. The administrative details of the regulatory veto bills are also important, and can seriously affect whether or not the proposal would work. Both the major proposals would amend the Rules of the House and the Senate to expedite regulatory reviews. They set time limits for committee review of each joint resolution; provide procedures for discharge of each joint resolution; and for floor consideration, make the joint resolutions highly privileged, not subject to amendment, and subject to limited times for debate. The agency's maximum "report-and-wait" period would be 90 days of continuous session of Congress. This would mean that, if an agency submitted a proposed rule to Congress after the middle of May this year, the 90 days of continuous session as defined in the bills could run out by adjournment.

* * * * *

Mr. Chairman, thank you for the opportunity to present these views.

Proposed subsection 3801(c) would require that the Attorney General submit to the Congress every guideline and amendment and every "formal interpretation" of such a guideline at least 30 days before they are promulgated. As I indicated, the guidelines are matters of public record. Accordingly, we have no objection to transmitting to the Congress any new or amended guidelines or to responding to Congressional requests regarding the manner in which we interpret the guidelines. However, the 30 day delay requirement could inhibit our ability to amend or formally interpret the guidelines in response to a rapidly evolving situation. More important, the phrase "formal interpretation" of the guidelines is apparently intended to require a report to the Congress in every instance in which the Department determines that an action would or would not be subject to a provision in guidelines. We strongly oppose such a requirement. It would cause undue delays in investigations, and even if procedures could be devised to overcome this problem, such a reporting requirement would discourage our investigative agencies from seeking legal advice and interpretations of guidelines from their own legal counsel and from the Department's Office of Legal Counsel. Moreover, we believe that any general requirement for submitting reports to the Congress during the pendency of an

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to solicit the views of OLC on unusally difficult or complex legal issues that arise during the work of the committees. This procedure is working well and full time OLC membership is not necessary.

object to this provision. Our guidelines for undercover operations are matters of public record and have proved useful. Hence we would depart from our usual position of disfavoring mandates that federal law enforcement be administered pursuant to a regulatory scheme in this instance.

The subject matters which subsection 3801(b) would require to be included in the guidelines are, for the most part, appropriate. However, we do not support proposed subsection (b)(6) which requires that the Undercover Review Committee for each component of the Department have no less than six members including one Assistant Director of the FBI and a representative of the Office of Legal Counsel. The composition of these committees should be left to the discretion of the Attorney General so that their membership can reflect the anticipated nature of the work of each committee. In particular, there is no reason for an official of the high level of an Assistant Director of the FBI to be required so serve on these committees. Indeed, under current FBI guidelines it is an Assistant Director who, based on the recommendation of the Undercover Review Committee, is authorized to make ultimate decisions regarding many proposed undercover operations. Moreover, there is no justification for requiring any official of the FBI to serve on a committee reviewing those operations proposed by agencies such as the DEA or INS.[2]

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[2] Membership of an attorney in the Department's Office of Legal Counsel (OLC) is also not necessary and would be wasteful of resources. OLC attorneys typically do not become involved in particular investigations or prosecutions. Current practice is

despite the fact that the bill contains some features that we support or find unobjectionable, the Department of Justice is constrained on balance to strongly oppose S. 804.

PART I. UNDERCOVER OPERATIONS

Section two of the bill adds new sections 3801-3805 to title 18 of the United States Code. I will discuss each new section in turn. Section 3801 would set out statutory authority for undercover operations generally, would provide for Attorney General guidelines governing their initiation and execution, and would provide for reports to the Congress on the guidelines and their interpretation.

Initially, we point out that, as a legal matter, subsection 3801(a), which gives the Attorney General specific authority to authorize the conducting of undercover operations by the Department of Justice in accordance with guidelines to be promulgated in accordance with the new statute, is unnecessary. There is no question but that the Attorney General's present authority to direct and supervise the investigation of federal offenses extends to the use of undercover operations and the issuance of governing guidelines. Such guidelines are now in effect for the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA) and the Immigration and Naturalization Service (INS).[1] There is thus no need for codification of these authorities of the Attorney General. Nevertheless, we do not

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[1] The INS guidelines are the most recent to go into effect. They were approved by the Attorney General on March 5, 1984, and were implemented on March 19, 1984.

DRAFT

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to present the views of the Department of Justice on S. 804, a bill dealing with undercover operations. As the members of the Subcommittee know, undercover operations have long been an important part of federal law enforcement and are crucial to the investigation of crimes usually committed in clandestine manner or by secretive, organized groups. Major crimes such as drug trafficking, espionage, racketeering, terrorism and public corruption fall into these categories and can often be successfully investigated only by means of undercover operations. Therefore it is vital that the Subcommittee approach any legislation in this area with the view of not imposing unnecessary obstacles to effective law enforcement.

We also recognize that undercover law enforcement operations can pose legal and policy issues of particular sensitivity. The intent of S. 804 is evidently to protect law abiding citizens from the harmful effects of an overreaching undercover operation. While we share that objective, the bill in our judgment attempts to regulate undercover operations in ways that are overly stringent and would allow so little flexibility that legitimate and vital undercover operations could be seriously jeopardized. Moreover, S. 804 would drastically alter the law of entrapment and tort liability in ways that have been repeatedly and for sound reasons rejected by the courts and that would unjustifiably impede the use of undercover operations without benefit to truly innocent citizens. For these reasons, and

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

April 30, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Department of the Treasury

SUBJECT: Justice testimony on S. 804, a bill dealing with undercover operations

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

Noon Tuesday, May 1, 1984

Direct your questions to Gregory Jones (395-3856), of this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: M. Uhlmann
A. Curtis
K. Wilson
M. Horowitz
F. Fielding

THE WHITE HOUSE

WASHINGTON

February 7, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Legislative Veto and Regulatory Reform

Bob Bedell has provided me with a copy of the testimony Chris DeMuth proposes to deliver tomorrow before Senator Grassley's Subcommittee on Administrative Practice and Procedure. The testimony discusses Grassley's proposed amendment of S. 1080, the regulatory reform bill, which would require affirmative Congressional approval of major rules (while providing an opportunity for disapproval of minor rules).

You may recall that I mentioned at our February 2 staff meeting that DeMuth was trying to obtain Administration support for such an approach to regulatory accountability in the post-Chadha world. This testimony does not announce any Administration position, noting that the matter is still under review. The testimony simply discusses policy arguments pro and con on various forms of regulatory oversight.

I have no objections. There is no need for us to respond at this point, but I wanted to keep you abreast of developments on this issue.

Attachment

I am concerned that OMB is taking the policy options away, w/o policy-decisions being made.

Rec 1/2

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

DATE: 2/7/84

TO: John Roberts

FROM: Bob Bedell

Attached is a ROUGH DRAFT of our testimony for tomorrow. Please call ASAP after you have reviewed.

OMB FORM 38
REV AUG 73

DRAFT (2/7/84)

STATEMENT OF CHRISTOPHER DeMUTH
ADMINISTRATOR FOR INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE
AND PROCEDURE
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON LEGISLATIVE VETO

February 8, 1984

Chairman Grassley and members of the Subcommittee:

It is a pleasure to appear before you this morning to discuss legislative veto. During my last appearance before this Subcommittee in September, I only referred to it briefly: today I want to discuss legislative veto in more detail. I will start with a general discussion, and then narrow my comments to consider legislative veto of agency rulemakings, or "regulatory veto."

For many years Congress has adopted a wide variety of legislative vetos to provide oversight of Executive actions, and for other reasons. Since 1932, Congress has included over 200 versions of legislative veto in over 135 public laws, involving, e.g., war powers, budget deferrals, reorganizations of Federal agencies, and specific rulemakings.

Congress has not vetoed many Executive actions, however. In these 50 years, Congress has actually vetoed agency actions only 35 times. It also vetoed Presidential action 90 times--66 were veto rejections of Presidential spending deferrals; 24 were disapprovals of Presidential agency reorganization plans.

But when Congress did veto agency regulations, the regulations were highly controversial. For example, the Natural Gas Policy Act of 1978 (NGPA)1/ provides a phased deregulation of natural gas prices, with a system of incremental pricing to ease the transition. In effect, the statute provided for an initial experiment with incremental pricing for a small class of industrial users, while requiring the Federal Energy Regulatory Commission to promulgate "Phase II" rules to expand the coverage of incremental pricing to other industrial users. The statute permitted either House of Congress to disapprove the proposed expansion. When FERC submitted the proposed expansion to Congress, FERC itself recommended that the regulation be rejected. Congress vetoed the regulations; the Supreme Court declared the veto unconstitutional.2/

Another example, in 1975, Congress directed the Federal Trade Commission to "initiate ... a rulemaking proceeding dealing with

1/ P.L. 95-621.

2/ Process Gas v. Energy Council, 103 S.Ct. 3556 (1983).

the warranties and warranty practices in connection with the sale of used motor vehicles; ...". In 1980, the Congress provided that an FTC trade regulation rule should become effective unless both Houses of Congress (but not the President) disapproved it.3/ A concurrent resolution disapproving the rule passed both Houses of Congress in May 1982 by wide margins. The Supreme Court subsequently declared this veto legislative unconstitutional.4/

And finally, Chadha, an alien who remained in the United States after his student visa expired, was ordered by the Immigration and Naturalization Service to show cause why he should not be deported. The Attorney General ordered suspension of his deportation. But Congress had authorized either House of Congress to invalidate the Attorney General's decision to suspend. The House vetoed this suspension of deportation, and the Supreme Court, in INS v. Chadha, 103 S.Ct. 2764 (1983), declared this unconstitutional. Since that decision, Congress has enacted at least 16 provisions of law by which Appropriations Committees either need to approve the subsequent use of certain agency funds, or are authorized to waive certain time delays in agency action.

Nonetheless, efforts to apply a legislative veto to the rules of specific agencies continues unabated. Indeed, they have

3/ P.L. 96-252, sec. 21(a).

4/ Process Gas v. Energy Council, 103 S.Ct. 3556 (1983).

recently expanded in scope--at least on the regulatory front--since Chadha.

During this Administration, a large majority of both Houses have supported legislative veto of all agency rules in one form or another. In March 1982, Congressman Levitas had 252 cosponsors of a one-House veto proposal--144 Republicans, 108 Democrats. At the same time, the Senate adopted a two-House veto, 69 to 25, with support from 41 Republicans, 27 Democrats, and one Independent.

Until last year when the Supreme Court decided cases invalidating certain legislative vetos, a key characteristic of legislative veto provisions and proposals was that the Congressional resolution would not be presented to the President for his signature. In 1983, in Chadha and related decisions, the Supreme Court held this form of legislative veto unconstitutional in terms that appear to cover regulatory, spending, and foreign policy actions of both Executive and "independent" agencies. Congress has since considered what, if anything, should be done about the legislative vetoes contained in existing laws--and also whether a general regulatory veto provision, consistent with Chadha, would be good policy.

Mr. Chairman, you asked us today to discuss the Administration's position on regulatory veto, particularly your Amendment No. 2655 to S. 1080. We have yet to complete our

discussions of this amendment, and I cannot, therefore, express an Administration position concerning it at this time. But, as you are aware, this is an issue of great importance and broad impact on the basic roles of the three branches. We hope to soon have a position and will advise the Subcommittee when we do.

Supporters of regulatory veto focus on the need for Congress to constrain unelected bureaucracies which impose needlessly burdensome and confusing regulatory standards beyond what Congress intended. They argue that rulemaking is essentially lawmaking--and that Congress has granted too much authority for writing laws to Executive and "independent" agencies, and (derivitively) to the courts. Since the Congressional process of lawmaking is inherently one of consensus, negotiation, and compromise, they suggest a regulatory veto would return a share of the broad responsibility granted to others back to the Congress, where--they maintain--it belongs. Regulatory agencies, as they envision it, would continue to perform the technical work of designing rules, and would retain the initiative of drafting and proposing rules. But, the final say would rest with the Congress and President through the process of passage of a joint resolution.

Critics of regulatory veto argue on the other hand that the strength of Congress--as a voice of the people from each State and District--lies in its consideration and determination of broad public policy issues; that the role of Executive regulatory

agencies is to provide the technical expertise and scope of attention necessary to carry out the details of these broad policy decisions. They argue further that regulatory veto will undermine the finality of legislative--and therefore Executive--decisionmaking by a continuing process of second-guessing by one or both Houses. The resulting legal uncertainty will prevent the rules concerning statutory programs from becoming clear, thus hindering private efforts to comply with, or benefit from whatever regulatory standards a given Congress may adopt.

These popular arguments, however, mask more subtle, perhaps more important considerations. Since adoption of any new regulatory veto mechanism presents a very intricate set of new dynamics, it is essential to look first at the existing methods through which the President and Congress now oversee specific agency rulemakings, and then compare these with the proposal for additional forms of Congressional oversight. With this background of existing Presidential and Congressional oversight, we must then decide whether a new mechanism for oversight of agency regulations is really needed.

Clearly, there is a need for both the President and the Congress to oversee the issuance of agency regulations. The President is the Chief Executive, charged with seeing to the execution of the laws. Congress passes those laws. The courts review the actions of each. Oversight arises because the Congress, the President, and the Judiciary are both dependent

upon and independent of one another. Recognizing this, oversight is carried out, or not carried out as Chadha teaches, through various means.

The President's first responsibility, as Chief Executive, is to manage the government's administrative apparatus. Last September, I described two essential components of President Reagan's regulatory oversight program--that statutory discretion be exercised to ensure that rules are as cost-beneficial as possible, and that rules be reviewed to that end by the President and his designated agents, in this instance, the Heads of Departments and Agencies and the Office of Management and Budget. Four Presidents of both political parties have now established regulatory review programs, and it is now difficult to imagine that any President would discontinue the practice of centralized review so long as regulations are such an important part of the federal policy apparatus.

Most Congressional regulatory oversight is not lawmaking. There are constant oral communications leading to a readjustment of activity and positions, designed to accomodate mutual interests. These types of contacts, which are no different than most informal interagency negotiations, also avoid more formal confrontations. The President, Executive Office staff, Congressional Committee chairmen, Committee staff, other Members of Congress and their staff, agency heads, agency staff, constituent groups, and the public at large all talk with, meet

with, consult with, negotiate with, accommodate, litigate, and argue with each other and arrive at decisions.

Some Congressional regulatory oversight mechanisms are more formal. They involve Congressional Hearings, the enactment of statutes, or detailed budget justifications leading to appropriations; or, and often, in Appropriations Acts. The Congress has several large institutions to help it in these efforts, including its own staffs, the Congressional Budget Office, the General Accounting Office, and the Office of Technology Assessment.

Except in the Senate, where regulatory oversight is also tied to the confirmation process, Congressional regulatory oversight is tied to the legislative process--to authorizing legislation and appropriations. Much of the Congress' regulatory oversight is periodic, through annual appropriations, and annual or other fixed terms for reauthorization. And because of the thousands of regulations issued each year, there is continual discussions with Congress and its staffs.

Given the large number and kinds of existing methods by which Congress now oversees agency rulemakings, we have identified specific considerations by which we are evaluating the various proposals for Congressional regulatory veto.

1. Historical. There are several reasons why legislative veto

procedures have been enacted in the past. While these may not be decisive now, they are instructive:

-- Presidents used it to induce broader grants of authority from Congress.

-- Congressmen used it as a counterbalance to deliberately broad statutory standards.

-- House Members used it to share in regulatory influence provided the Senate by the confirmation process.

-- Members of authorizing Committees used it to counterbalance existing Appropriations Committees line-item spending delays and other appropriations riders.

-- Junior Members have supported the expedited floor votes found in most legislative veto provisions to dilute power held by authorizing Committee Chairmen.

-- Program opponents have supported it to dilute power of program advocates, generally clustered in authorizing committees.

-- The House and the Senate have used it as a check upon the other Body.

Experience with prior legislative veto provisions is of limited value, however. We are not aware of any developed experience with statutory provisions which provides that rules do not take effect unless approved by a joint resolution. We don't have experience therefore as to the effect of rules approved by a joint resolution on subsequent agency action or on judicial review of that rule. Similarly, we do not have experience with joint resolutions of disapprovals of agency rules that are not signed by the President. Unfortunately, this absence of experience further compounds the difficulty of deciding with confidence the appropriate mechanism for a regulatory veto provision.

2. Efficiency. To be effective, a new regulatory veto mechanism should not swamp Congress with new legislative business. The mechanism selected is critical.

At one extreme, Congress could provide expedited procedures to disapprove any agency rule by joint resolution. However, Congress has demonstrated that it can act quickly when it is strongly against a rule--without any legislative veto procedures at all--e.g., the statutory override of the saccharin ban (P.L. 95-203) and the seatbelt-ignition interlock rule (P.L. 93-492). Therefore, some argues that no special provisions are needed or desirable.

At the other extreme, Congress could provide that no agency

rule could take effect for a pre-determined time period, and that the rule would go into effect only if it had been approved during this time by joint resolution. Expediting procedures could provide for floor consideration within designated time periods. This would involve moving thousands of additional regulatory matters through Congress and the White House each year, and most of them would be of little Congressional interest. On the other hand, giving Congress increased responsibility and accountability for regulations could have several desirable effects on regulatory policy and agency management.

3. Agency Efficiency. Just as the regulatory veto process should not stymie Congress in its other legislative work, nor should it stymie the ability of agencies to implement statutory obligations. Furthermore, any regulatory veto mechanism should contain emergency procedures allowing prompt and lasting agency regulatory action. Any provision authorizing legislative veto must also address how changes to rules approved by a joint resolution can be altered by subsequent agency action. Must minor changes to such a rule also be approved by a joint resolution?

4. Executive Accountability. Although the President and officials of the Executive Branch must be accountable to Congress and the public, there can be only one Executive.

5. A final issue is the effect of regulatory veto procedures on

judicial review of agency rules. A public law, unlike a regulation, is not subject to review under the APA. Unless constitutional considerations require otherwise, a law cannot be overturned by a court on the grounds of having been created in an "arbitrary and capricious" manner as agency rules are.

The effect upon subsequent judicial review of a joint resolution approving--or even disapproving--a regulation is a matter that must squarely be addressed. The statutes providing for a legislative veto could provide that this effect is to preclude further judicial consideration of the rule, except, of course, for constitutional challenges. This would treat an "approved" rule like a statute. On the other extreme, the statute providing for the regulatory veto could provide that the Congressional approval has no effect on subsequent judicial review. In this case, a rule could be overturned by a court for record inadequacies, procedural defects or any other ground provided by the APA or authorizing statute even though both Houses of Congress and the President have approved a joint resolution approving the rule. The provision authorizing the legislative veto must address the effect upon judicial review.

The regulatory veto proposals in Amendment No. 2655 to S. 1080, and in title II of H.R. 3939, offer a combination in procedures. "Major" rules would not take effect without Congressional approval; "non-major" rules would take effect unless disapproved by joint resolution.

Even this proposal, however, entails a substantial increase in Congressional workload. Under Executive Order 12291, OMB reviews 40 to 50 "major" (over $100 million in impact) final rules and about 1,500 "non-major" final rules a year. In addition, OMB does not review the rules of most "independent" regulatory agencies which might involve an additional dozen "major" rules each year.

To place this in context, over the past ten years, Congress has passed about 200 public laws in its first session; 400 public laws in the second. Adding to Congress' annual legislative calendar 60 or more joint resolutions to affirm major regulations, plus an unknown number of regulatory disapprovals, could increase the number of legislative transactions considered by Congress from 10% to more than 25%. However, Congress' workload might just shift in focus, not increase. Currently, Congress spends most of its time laying down new laws. Regulatory veto would demand "equal time" to ratifying or modifying the application of existing laws.

Mr. Chairman, thank you for the opportunity to present these views. I assure you we will transmit our views on your amendment to S. 1080 as soon as we can. We wish to commend you and thank you and your colleagues for working so diligently to improve the regulatory process.

Regulatory Roundup

Legislative Veto Confusion Hampers EEOC Enforcement

The Supreme Court's 1983 ruling throwing out the legislative veto has created a major headache for **Equal Employment Opportunity Commission** (EEOC) officials trying to litigate age bias and equal pay cases nationwide.

The 1977 law that transferred age bias and equal pay enforcement from the Labor Department to EEOC contained a legislative veto provision, which has been challenged by age and equal pay defendants in more than 70 pending cases in the district courts.

In one recent age discrimination case in the Southern District of New York (*EEOC v. Pan American World Airways*, No. M-18-304, Jan. 4, 1984), Judge Charles L. Brieant's attempt to fashion a judicial solution to the jurisdictional uncertainty spawned by *INS v. Chadha* (51 U.S.L.W. 4907 (1983)) created even more problems for EEOC litigators. Brieant had previously granted enforcement of an EEOC subpoena for Pan Am documents on the condition that the investigation be conducted jointly by EEOC and Labor so that if *Chadha* ultimately invalidates the transfer of enforcement authority to EEOC, the government's interest would be protected.

EEOC sought relief from Brieant's order in December, but the judge denied EEOC's motion in his Jan. 4 written order. He attributed EEOC's refusal to coinvestigate with Labor to "turf consciousness among bureaucrats . . . with which this Court has little patience."

EEOC has decided to drop the investigation because the statute of limitations for bringing suit against Pan Am will have expired before EEOC can complete its investigation, according to an EEOC source. The agency has issued a right-to-sue letter to the complainants, however, enabling them to bring a timely action. "In this case Pan Am triumphed because we can't complete our investigation," the EEOC source said.

EEOC officially said "we understand Judge Brieant's frustration with this problem, but we think his decision was ill-considered. We don't believe he realized the administrative quagmire that would have been created" by a joint EEOC-Labor investigation.

No resolution of the uncertainty surrounding EEOC's enforcement authority appears imminent, EEOC officials said, although the agency rapidly is compiling a stack of district court rulings in its favor. EEOC's authority to prosecute age discrimination cases has now been upheld by eight lower courts. The lead case in this group (*Muller Optical Co. v. EEOC*, W.D. Tenn., No. 83-2836-H, Nov. 10, 1983) now is pending on appeal in the 6th Circuit.

EEOC has lost two equal pay cases on the post-Chadha jurisdictional question. The first case decided on the issue (*EEOC v. Allstate Insurance Co.*, 570 F. Supp., S.D. Miss., Sept. 9, 1983) has been appealed to both the 5th Circuit and the Supreme Court (No. 83-1021). Neither court is expected to rule in the case until the Supreme Court rules in a related case on the issue of where such legislative veto appeals should lie (*Heckler v. Edwards*, No. 82-874, argued Nov. 30, 1983).

Labor Logjam Breaks

With the **National Labor Relations Board**'s resolution of four lead labor law issues in the past month, the big logjam of pending cases at the NLRB could soon begin to break up. As of Oct. 1, 1983, the NLRB had a backlog of more than 500 cases awaiting resolution of a number of major lead issues, according to NLRB Chairman Donald Dotson's testimony before a House subcommittee.

In his November testimony, Dotson suggested that the backlog "should begin disappearing soon" after the board resolves some of the lead issues clogging up the pipeline. In deciding the lead cases, the NLRB departed from longstanding policy of deciding major issues with a full board (the NLRB still lacks a fifth member).

Last week's ruling that midcontract work relocations do not constitute unfair labor practices absent a specific contract clause barring such shifts (*Milwaukee Spring Division of Illinois Coil Spring Company*, 268 NLRB No. 87, Jan. 23, 1984) marks the fourth time since late December that the current board has overturned major NLRB precedents. In a pair of decisions handed down Jan. 19 (*Olin Corporation*, 268 NLRB 86, and *United Technologies Corporation*, 268 NLRB No. 83), the NLRB reversed past precedents by deciding to defer to arbitration in more cases and to overturn arbitration rulings only when the arbitrator's award is "palpably wrong."

Earlier in January, the board narrowed its past definition of "concerted activity" to limit protection of worker actions related to job safety and other mutual concerns solely to cases in which the worker actually acts in concert with other employees (*Meyers Industries Inc.*, 268 NLRB No. 73, Jan. 6, 1984; *see Legal Times, Jan. 16, 1984, p. 2*). And in a Dec. 20, 1983, ruling (*Our Way Inc.*, 268 NLRB No. 61), the NLRB held that employers need not specify the exact times when employees may conduct union solicitations on company premises, making solicitation more difficult, according to union leaders.

NLRB sources indicate that these decisions are but the first of a group of rulings on important issues that will be addressed soon by the board. Management attorneys are eagerly awaiting new NLRB precedents on such issues as the scope of no-strike clauses, employers' right to hire temporary replacements during economic lockouts, nonmajority bargaining orders, union picketing on private property, and employers' duty to bargain with unions in the face of valid decertification petitions, among others.

Leverage Rules Issued

The **Commodities Futures Trading Commission** adopted a final rule on leverage contracts Jan. 16, but commodities practitioners complain that the commission's first attempt to regulate the industry has produced more questions than it has resolved.

Leverage contracts are similar to commodities futures contracts, but they apply to purchases by a customer of contracts to deliver commodities on an installment plan. The CFTC rule, to be published in the Federal Register during the week of Jan. 30, applies to leverage contracts for delivery of some precious metals and foreign currencies.

One of the major complaints made by commodities attorneys is that the regulation continues a moratorium adopted by the CFTC in 1979 that limits entry of new firms into the leverage business while the commission studies the field. According to Jeffrey S. Rosen of D.C.'s Stoppelman & Rosen, the grandfathering of "no more than a half a dozen" companies "is nothing less than granting a state monopoly" to these firms.

Another major question raised is whether the CFTC has authority to create a whole new registration category for leverage merchants when every other new registration category has been set up under specific congressional mandate. Richard E. Nathan of New York's Gaston Snow Beekman & Bogue said the commission "went all the way around the block," leaving it open to legal challenges, he said, when it could have taken a course that he believes Congress intended—simply requiring leverage firms to register as trading advisers.

Other areas that came under attack include the definition of leverage contracts as those of 10 years or longer, and a provision allowing first-time leverage customers three days to change their mind and rescind the purchase.

Severance Policy Disallowed

In the first circuit court ruling on the application of §4(f)(2) of the Age Discrimination in Employment Act (ADEA) to severance benefits paid at the time of layoffs, the 3rd Circuit has ruled that Westinghouse Electric Corporation cannot justify on the basis of cost its policy denying severance benefits to older workers who are eligible for early retirement benefits (*EEOC v. Westinghouse Electric Corporation*, No. 83-5008, Dec. 29, 1983).

The 3rd Circuit found that the lower court erred in granting summary judgment for Westinghouse and remanded the case to it for trial, holding that Westinghouse cannot use the ADEA's exemption for cost-based age distinctions in benefit plans (§4(f)(2)) to defend its policy of limiting severance pay to younger workers who are ineligible for early retirement benefits under the company's pension plan (*see Legal Times, Dec. 5, 1983, p. 1*). Workers over age 55 who were eligible for early retirement benefits were denied lump sum severance pay, even though the value of the severance pay may have been greater than the retirement benefits in some cases. The company argued that the severance pay policy was exempt from the ADEA because it was justified on the basis of cost under §4(f)(2).

The circuit court found that the severance pay plan, even though tied to the company's pension plan, "is more analogous to a 'fringe benefit' than to the types of employee benefit plans covered under 4(f)(2). Fringe benefit plans unrelated to the age cost factor are not included in the 4(f)(2) exception."

Appeals raising similar issues are pending in the 6th and 10th circuits, with decisions expected soon. ■

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S. HRG. 98-430

LEGISLATIVE VETO AND THE "CHADHA" DECISION

HEARING

BEFORE THE

SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

EFFECTS OF THE SUPREME COURT'S DECISION IN *IMMIGRATION AND NATURALIZATION SERVICE* v. *CHADHA* ON LEGISLATIVE VETO

JULY 20, 1983

Serial No. J-98-56

Printed for the use of the Committee on the Judiciary

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ADDITIONAL STATEMENTS FOR THE RECORD

The Washington Times

DATE: 2-7-84

PAGE: 1A

Judge refuses to hear sex cases until law is resolved

By David Sellers
WASHINGTON TIMES STAFF

A senior D.C. Superior Court judge — uncertain whether defendants are being prosecuted under valid laws — yesterday said he no longer will handle sex-offense cases until there is some clarification of a recent Supreme Court ruling barring congressional vetoes of some laws.

The Supreme Court held last summer that the legislative veto constitutes an unwarranted intrusion into the powers of the executive branch. Some legal scholars said the ruling also applies to vetoes over District laws.

Yesterday, Judge Donald S. Smith joined those unwilling to act — caught between the ruling of the Supreme Court and the actions of Congress. He announced he will not handle any more sex-related cases until the issue is resolved.

The focus of the new controversy is The Sexual Assault Reform Act, approved by the City Council in 1981.

The legislation was highly criticized for its apparent liberalized approach to sex between consenting teenagers, and the House vetoed the act.

The question now is, given the Supreme Court ruling, was the law illegally overturned?

Some authorities question whether defendants should be prosecuted under the liberalized law or under the current, more stringent law.

The Supreme Court's ruling came as a result of a deportation case brought by Jagdish Rai Chadha, a Kenyan with an British visa who sought to renew his application for permanent resident status.

When immigration agents found out his student visa had expired, they tried to deport him.

Mr. Chadha appealed the order up to the Justice Department, but Congress vetoed the ruling and he went to the federal courts.

The majority opinion, written by Chief Justice Warren E. Burger, said the legislative veto, which Congress used to overturn the Justice Department ruling, improperly left out the president. Both houses of Congress should have approved the bill and submitted it to the president for his signature, Mr. Burger ruled.

The ruling invalidated or seriously jeopardized legislative veto provisions in at least 200 laws, said Justice Byron R. White in the dissenting opinion, and "strikes down in one fell swoop provisions in more laws enacted by Congress than the court has cumulatively invalidated in its history."

Under the Home Rule Act, all District legislation is reviewed by Congress.

Legislation to resolve the legal status of D.C. laws potentially affected by the Supreme Court ruling was introduced last year by Delegate Walter Fauntroy, D-D.C., and was approved by the House in September.

The bill has been stalled in the Senate since then, in the Governmental Efficiency and District of Columbia Committee headed by Sen. Charles Mathias, R-Maryland.

Since the court's ruling, the status of several D.C. laws has been in limbo, and local authorities have expressed uncertainty over exactly what the Chadha decision means to the city.

Judge Smith, the only judge of the 44 on the local trial court to adopt such a policy, made his announcement yesterday from the bench after the prosecutor and defense attorney had said their witnesses were present and they were ready for trial.

Before calling the case, Judge Smith asked Assistant U.S. Attorney Michael Rankin to call his supervisor, Steven Gordon, the chief of the office's felony section, to the courtroom.

Judge Smith was scheduled to begin the trial of Michael Price, 24, of Southeast Washington, who was charged with rape, carnal knowledge, indecent acts and enticing a minor.

Instead of calling for a jury panel to begin jury selection, Judge Smith told Mr. Gordon he would postpone this case and others like it until there was a determination on the full implication of the Supreme Court ruling.

Yesterday afternoon Judge Smith declined to discuss his decision, but said through his law clerk that "people seem to be overreacting."

Judge Smith adopted this policy, his clerk said, because he is waiting for the government's reply to a motion to overturn a conviction in a similar case. It is possible that, depending on how he rules in the case, the sexual statutes could be found unconsititutional, the clerk said.

The other case before Judge Smith is the subject of a challenge by the Public Defender Service, which hopes to use the Supreme Court ruling to reverse the conviction of Sylvester Cole, who was convicted of having sex with a minor.

Judge Smith considers the Cole case and the Price case very similar, his clerk said. The U.S. Attorney's Office expects to file its reply brief in the Cole case this week and a ruling is expected from Judge Smith this month.

A 12-year veteran of the court, Judge Smith is one of only three judges to hear the most severe criminal cases, usually rapes or murders. His law clerk said yesterday that the judge did not think his decision will cause a significant backlog in the court's docket.

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Home Rule Issue Puts Sex Assault Cases on Hold

By Ed Bruske
Washington Post Staff Writer

A D.C. Superior Court judge yesterday suspended all action on sexual assault cases in his court until the U.S. Attorney's office responds to challenges lodged against the District's home rule charter.

Judge Donald S. Smith said he will not hold any trials, accept any guilty pleas or hand out any sentences in cases involving the city's sexual assault codes until prosecutors respond to defense arguments that the criminal statutes are unconstitutional.

"If there's a substantial legal problem, we may have to dismiss all the indictments" in sexual assault cases, Smith said yesterday. "To keep trying them could prove to be a real problem. That's a waste of my time."

A Supreme Court ruling last year barring legislative vetoes—the mechanism by which Congress can overturn laws passed by the city—prompted defense attorneys to challenge both the District's home rule charter and the city's sexual assault laws.

The lawyers argue that under the Supreme Court ruling, the city's current sexual assault statutes are void because the House exercised its veto authority when it rescinded the city's 1981 Sexual Assault Reform Act.

The highly unusual action yesterday by Smith, one of three judges on the court who hear the most serious felony cases, came amid fears that thousands of criminal convictions could be overturned as a result of the high court ruling.

U.S. Attorney Joseph E. diGenova yesterday said he has met with Deputy Attorney General Edward C. Schmults and Solicitor General Rex E. Lee to formulate a response to the defense claims. It will be filed with the court in the next few days, he said.

"We understand the court's concerns and that's exactly why we've spent a little more time filing our ultimate position," diGenova said. "We're just trying to be professional."

DiGenova declined to state Justice's position on the matter, but he said his office would continue to indict and prosecute sexual assault cases despite Smith's ruling. "The law is on the books. It is to be enforced until it is struck down," he said.

The Justice Department has taken the position that the Supreme Court ruling applies to the D.C. home rule charter. That stance has put officials in the U.S. attorney's office in the awkward position of, on the one hand, contending that home rule is affected by the high court's decision, and, on the other, trying to protect thousands of local criminal convictions that could be jeopardized by the ruling.

Smith's action yesterday is not binding on any of the court's other judges and there was no indication that any other judges would take similar steps.

In two cases pending before Smith, the D.C. Public Defender Service has appealed the convictions of two men charged with sexual assault, arguing that the Supreme Court ruling voids the criminal statutes.

Attorneys for the city have filed a request to intervene in at least one case, arguing that the Supreme Court never intended for its decision to apply to District laws, and that the issue of legislative vetoes should be viewed separately. The Public Defender Service filed its appeal in one of the cases Dec. 19.

Smith yesterday postponed one trial after the defendant's lawyers said he would file a similar appeal by the end of the week. Smith summoned Steven Gordon, chief of the felony division of the U.S. attorney's office, into court and explained his decision.

Smith said that in recent weeks he had repeatedly asked Gordon for a response, and until yesterday had held off acting because Gordon had assured him the defense arguments "were just fluff."

"I know it's a very important problem, but I'd like to get their [federal prosecutors'] answer," Smith said. "As soon as we get some idea of what the government's position is, it shouldn't be any problem. We can rule one way or the other."

One other appeal has been filed in Superior Court since the Supreme Court ruling. In that case, Judge Paul F. McArdle is considering a challenge to one of the city's theft statutes.

Larry P. Polansky, D.C. Court System executive officer, said Smith's action was not without precedent and that he knew of no action the court might take against Smith to force the judge to hear cases.

Following the Supreme Court decision last year, Justice told congressional leaders that all criminal laws passed by the city should be approved by both houses of Congress and sent to the president.

City officials maintain this would be a step backward from home rule and have been pressing Congress to pass legislation clarifying the city's lawmaking authority.

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THE LEGISLATIVE VETO DECISION: A LAW BY ANY OTHER NAME?*

LAURENCE H. TRIBE**

In INS v. Chadha, *the Supreme Court decided that the one-House legislative veto was unconstitutional. The Court held that the veto undermined the separation of powers and violated the bicamerality and presentment requirements. In this Article, Professor Tribe examines the reasoning behind the Court's decision and the potential impact of the decision on Congress and the lower courts. Professor Tribe challenges the Court's premise that Congress's veto decision in* Chadha *was necessarily a legislative action and questions the general principle that Congress cannot delegate power to itself. Nevertheless, he argues that the* Chadha *result may be defensible on narrower bill of attainder or usurpation-of-judicial-function grounds. Finally, Professor Tribe agrees with the majority's holding that the legislative veto provision was severable from the rest of the delegation of power. He proposes a test for severability that avoids the traditional focus on hypothetical legislative intent and that will permit the survival of most of the existing statutes containing legislative veto provisions.*

I. THE JUDICIARY'S RENEWED ASSERTION OF STRUCTURAL CHECKS ON CONGRESSIONAL INNOVATION

In the past seven years, the Supreme Court has not been very receptive to Congress's more innovative assertions of authority. Three major decisions, the most recent of which is the legislative veto case, *INS v. Chadha*,[1] have undermined Congress's assertions of control on separation of powers and/or federalism grounds. The first two of those decisions—*Buckley v. Valeo*,[2] dealing with the Appointments Clause, and *National League of*

 For research assistance in connection with earlier (unpublished) versions of this analysis, I am indebted to Brian Koukoutchos, J.D., Harvard Law School, 1983, and to Thomas Rollins, J.D., Harvard Law School, 1982.

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

[2] 424 U.S. 1, 140 (1976) (per curiam) (holding the Federal Election Commission to be composed in a manner violative of U.S. CONST. art. II, § 2, cl. 2, and of the separation of powers, insofar as some of the Commission's voting members were appointed by the Speaker of the House and by the President *pro tempore* of the Senate rather than by "the President, . . . the Courts of Law, or . . . the Heads of Departments"). *See infra* note 68; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-8 (1978) [hereinafter cited as L. TRIBE, ACL]. Throughout this Article, references to *Buckley* deal only with this holding—not with that decision's substantive rulings with respect to campaign finances.

Cities v. Usery,[3] dealing with state sovereignty—appear thus far to have been signposts to nowhere in particular.

Buckley v. Valeo, to be sure, triggered renewed caution within the Justice Department and in Congress lest proposed statutes confer on state officials—or on others not appointed by the federal executive in accord with Article II, Section 2, Clause 2—"significant authority pursuant to the laws of the United States."[4] But *Buckley* has had no acknowledged judicial offspring. Indeed, the case seems to have been essentially ignored in *Chadha*, the one recent decision that may be partially understood as an application of *Buckley*'s teaching about who may exercise authority pursuant to federal statutes. *Buckley* appears in *Chadha* only as a vague symbol that separation-of-powers concerns are to be taken seriously.[5]

Unlike *Buckley*, *National League of Cities* has been noted in an impressive array of Supreme Court opinions. But all such subsequent decisions have thus far distinguished, rather than followed, *National League of Cities* itself.[6] Indeed, on at least one important occasion when *National League of Cities* seemed directly pertinent, the Court overlooked that precedent altogether.[7]

Of course, it is too early to say whether *Chadha*, the third in the trio of cases imposing new structural limits on Congress, will similarly prove to be less a fount of legal development than one more episodic judicial outburst against the pragmatic accommodations of our times.[8] But it seems plain even now that no clear unifying vision—and surely no vision the Framers of the Constitution would have recognized as theirs—emerges from

[3] 426 U.S. 833, 845 (1976) (holding that Congress violated the rights of the "States as States" when it extended the federal minimum wage and maximum hour provisions to state and municipal employees). *See* L. Tribe, ACL, *supra* note 2, § 5-22.

[4] *Buckley*, 424 U.S. at 126.

[5] *Chadha*, 103 S. Ct. at 2781, 2785 n.16.

[6] *See* EEOC v. Wyoming, 103 S. Ct. 1054, 1062–64 (1983); FERC v. Mississippi, 456 U.S. 742, 758–59 (1982); United Transp. Union v. Long Island R.R., 455 U.S. 678, 686–90 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 293 (1981); Massachusetts v. United States, 435 U.S. 444, 456 n.13 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976), all discussed in the forthcoming volume, L. Tribe, American Constitutional Law, 1978–84 (Foundation Press).

[7] *See* Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) (holding that a municipality is not entitled to exemption from the Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1982), under a home-rule delegation of state power); *cf.* Parker v. Brown, 317 U.S. 341 (1943) (states are exempted from the Sherman Antitrust Act).

[8] *See* L. Tribe, ACL, *supra* note 2, § 4-2, at 163. Indeed, with new appointments to the Court, even *National League of Cities* could still be transformed into an enduring source of law.

the *Chadha* opinion. Although the opinion refers broadly to the Framers' wisdom in not "permitting arbitrary government acts to go unchecked,"[9] it seemingly countenances both an executive apparatus and a federal bureaucracy more autonomous and unaccountable in wielding their power than Congress itself could ever have become by using the legislative veto device.

What emerges from *Buckley*, *National League of Cities*, and *Chadha* taken as a group is less a coherent picture of checks and balances than a sense of judicial frustration and desire—a frustration with governmental structures that have long since outgrown the Framers' dreams, and a desire to reclaim—for the judiciary as the "least dangerous"[10] branch, or for the states as the most modest—some measure of the power that, under the exigencies of modernity, Congress has sought to centralize along the banks of the Potomac.

II. The Legislative Veto Decision: Its Unspoken Premises

The separation-of-powers ideal—variously decried as vaguely foolish[11] or praised as truly fundamental[12]—remains a central theme for the Supreme Court. When striking down the legislative veto in *INS v. Chadha*, the Court described "[t]he provisions of Art. I [as] integral parts of the constitutional design for the separation of powers."[13]

The intense controversy surrounding the legislative veto is as old as the device itself. Since 1932, Congress has passed a wide range of legislative veto procedures allowing it, or one of its Houses or committees, to review and revoke the actions of

[9] 103 S. Ct. at 2788.

[10] The Federalist No. 78, at 490 (A. Hamilton) (B. Wright ed. 1961).

[11] *See, e.g.*, F. Frankfurter, The Public and Its Government 77–78 (1930) (The separation of powers principle is "what Madison called a 'political maxim,' and not a technical rule of law."); K. Loewenstein, Political Power and the Governmental Process 34–37 (1957) (doctrine is "obsolete and devoid of reality"); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 Ind. L.J. 367, 390 (1977) ("It is doubtful that the concept of separation of powers could really have any objective meaning."); Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 Rutgers L. Rev. 449, 464–65 (1958) (separation of powers doctrine is at best vague and uncertain).

[12] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 124 (1976) (per curiam); 1 Annals of Congress 604 (J. Gales ed. 1789) (statement of James Madison) ("[I]f there is a principle in our constitution, indeed in any free constitution, more sacred than another, it is that which separates the legislative, executive, and judicial powers.").

[13] 103 S. Ct. at 2781.

various federal agencies and departments.[14] Some 200 statutes containing half again as many legislative veto provisions have been enacted—more than half of them since 1970 alone.[15] The President's power to reorganize the executive branch, to impound appropriated funds temporarily, to introduce American armed forces into foreign conflicts, to provide nuclear fuel and technology to other nations, and to sell sophisticated weaponry abroad are all statutorily constrained by the purported authority of one or both Houses of Congress to exercise what may loosely be called a legislative veto.[16]

The legislative veto has become steadily more important since its conception in the waning days of Herbert Hoover's administration.[17] The veto offered lawmakers a way to delegate vast power to the executive branch or to independent agencies while retaining the authority to cancel particular exercises of such power—and to do so without having to pass new legislation or to repeal existing laws. Whatever the practical virtues or vices of the veto,[18] its popularity as a means of controlling agency action and executive discretion has been enhanced by two other apparent advantages. First, the veto afforded Congress a visible means of stemming the tide of executive regulation of American life and industry. Such regulation is at the lowest ebb of its popularity since the beginning of the modern regulatory period.[19] Second, the veto appealed to many who resist deregulation but espouse increased democratic control over those regulations which remain.[20] Yet, while the legislative veto appeared to stand at the confluence of the desires to curtail regulation, restrain the executive, and assert the prerogatives of popular control, it also stood at the intersection of a number of doctrines that cast grave doubt on its constitutional validity.

[14] The first legislative veto provision was included in the Legislative Appropriations Act for fiscal 1933. Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414 (repealed 1966); *see* Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachments on Legislative Prerogative*, 52 IND. L.J. 323, 324 n.5 (1977), *cited in Chadha*, 103 S. Ct. at 2793 (White, J., dissenting).

[15] *See* 103 S. Ct. at 2792 (White, J., dissenting); Abourezk, *supra* note 14, at 324.

[16] *See* 103 S. Ct. at 2811–16 app. (White, J., dissenting); 128 CONG. REC. S2575 (daily ed. Mar. 23, 1982) (listing 33 laws containing legislative veto provisions enacted by the 96th Congress).

[17] *See supra* note 14.

[18] For a useful compilation of conflicting views, see 103 S. Ct. at 2797 n.12 (White, J., dissenting).

[19] *See, e.g.*, J. BOLTON, THE LEGISLATIVE VETO: UNSEPARATING THE POWERS 8–10 (1977).

[20] *See, e.g.*, Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 459–65 (1977).

The constitutionality of the legislative veto was tested not on the battlefield of so crucial an executive prerogative as the power to wage war, but in a skirmish over the authority to suspend the deportation of a small class of aliens. Congress, weary of handling such matters through cumbersome special immigration bills, delegated to the Department of Justice's Immigration and Naturalization Service (INS) limited discretion to suspend deportations, subject to a legislative veto within a specified period by either the Senate or the House of Representatives.[21] Jagdish Rai Chadha, born in Kenya of Indian parents, had come to the United States under a student visa with a British passport. In order to suspend deportation when his visa expired, Chadha applied for permanent resident status under section 244(a)(1) of the Immigration and Nationality Act.[22] That provision permits an alien who has been a continuous resident of the United States for seven years, who is of good moral character, and whose deportation would cause him to suffer extreme hardship, to become a permanent resident.[23] Kenya refused to take Chadha back on the ground that he was a British, not a Kenyan, citizen, and the United Kingdom told Chadha that he would not be allowed to immigrate for at least a year.[24] Since Chadha was literally a man without a country, the immigration judge, acting on behalf of the Attorney General, granted Chadha's request and suspended his deportation.[25]

A year and a half later, Representative Eilberg (D-Pa.), Chairman of the Subcommittee on Immigration, Citizenship, and International Law of the House Judiciary Committee, introduced a resolution striking Chadha and five others from a list of 340 resident aliens to whom the INS had decided to accord permanent resident status.[26] The House of Representatives approved

[21] *See* Act of Oct. 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247, 1248, *amending* Immigration and Nationality Act, ch. 477, § 244(c), 66 Stat. 163, 216 (1952) (codified at 8 U.S.C. § 1254(c)(2) (1982)).

[22] 103 S. Ct. at 2770.

[23] 8 U.S.C. § 1254(a)(1) (1982).

[24] Transcript of Hearing of Deportation Proceedings held Jan. 11, 1974, Joint Appendix to the Briefs at 12–15, 33–46, *Chadha* (available on LEXIS, Genfed library, Briefs file).

[25] 103 S. Ct. at 2770.

[26] H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,800 (1975).

> So far as the record . . . shows, the House consideration of the resolution was based on Representative Eilberg's statement from the floor that "[i]t was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution [Chadha and five others] did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended."

Chadha, 103 S. Ct. at 2772 (quoting 121 CONG. REC. 40,800 (1975)).

the resolution, thus vetoing the suspension of those six deportations. That House action allowed the suspensions of the deportations of the other 334 aliens to become final, thereby permitting those aliens to remain in the United States. The resolution was adopted without debate or recorded vote.[27] The INS judge agreed with Chadha that the legislative veto provision in section 244(c)(2) was unconstitutional but decided that he had no authority to rule on that question. He therefore ordered Chadha deported.[28] Following the affirmance of his deportation order by the INS, Chadha filed a petition for review in the United States Court of Appeals for the Ninth Circuit. That court upheld Chadha's constitutional challenge to the legislative veto.[29] After plenary consideration of the case, the Supreme Court held it over to the following Term for reargument. In 1983, the Court affirmed the appellate judgment.[30]

The demise of the legislative veto was not without its harbingers. Eleven Presidents have gone on record at one time or another to challenge the constitutionality of at least some forms of congressional veto.[31] At least five Presidents have vetoed

[27] 121 CONG. REC. 40,800 (1975).

[28] 103 S. Ct. at 2772. The Court properly rejected the contention that no Article III controversy existed simply because "Chadha and the INS [took] the same position on the constitutionality of the one-House veto." *Id.* at 2778.

[29] Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983). The Supreme Court recognized the House and Senate as parties in the case. INS v. Chadha, 103 S. Ct. at 2773 n.5 (1983).

[30] INS v. Chadha, 103 S. Ct. 2764 (1983).

[31] *See, e.g.*, President's Memorandum of Disapproval of the Amendments to the Education Consolidation Improvements Act, 19 WEEKLY COMP. PRES. DOC. 38 (Jan. 12, 1983); President's Memorandum of Disapproval of the Amendments to the Tribally Controlled Community College Assistance Act, 19 WEEKLY COMP. PRES. DOC. 7 (Jan. 3, 1983) (Reagan); President's Message on Regulatory Reform, 15 WEEKLY COMP. PRES. DOC. 491 (Mar. 26, 1979); President's Message on Legislative Vetoes, 14 WEEKLY COMP. PRES. DOC. 1146 (June 21, 1978); International Security Assistance Act of 1977: Statement on Signing H.R. 6884 Into Law, [1977] 2 PUB. PAPERS 1431 (Aug. 5, 1977) (Carter); Veto of the Atomic Energy Act Amendments, 1974 PUB. PAPERS 294 (Oct. 12, 1974) (Ford); President's Statement Upon Signing the Public Buildings Amendment of 1972, 8 WEEKLY COMP. PRES. DOC. 1076 (June 17, 1972); President's Statement Upon Signing the Second Supplemental Appropriations Act, 8 WEEKLY COMP. PRES. DOC. 938 (May 28, 1972) (Nixon); Statement by the President Upon Signing the Omnibus Rivers and Harbors Bill, [1965] 2 PUB. PAPERS 1082 (Oct. 23, 1965) (Johnson); Memorandum on Informing Congressional Committees of Changes Involving Foreign Economic Assistance Funds, 1963 PUB. PAPERS 6 (Jan. 9, 1963) (Kennedy); Special Message to the Congress Upon Signing the Department of Defense Appropriations Act, 1955 PUB. PAPERS 688 (July 13, 1955) (Eisenhower); Disapproval of House Bill After Sine Die Adjournment, 98 CONG. REC. 9756 (July 19, 1952); Veto of Bill Relating to Land Acquisition and Disposal Actions by the Army, Navy, Air Force, and Federal Civil Defense Administration, 1951 PUB. PAPERS 280 (May 15, 1951) (Truman); F.D. Roosevelt, Memorandum for the Attorney General (Apr. 7, 1941), *reprinted in* Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357 (1953) (Roosevelt); Veto Message from the President of the United States—The First Deficiency Bill (H. Doc. No. 529), 76 CONG. REC. 2445 (Jan. 24, 1933) (Hoover); Veto Message—The Budget Bill, 59 CONG. REC. 8609 (June 4, 1920); Legislative, Executive, and Judicial Appropriations Bill—Veto Message, 59 CONG. REC. 7026 (May 13, 1920) (Wilson).

legislation containing congressional veto provisions on the express ground that they considered such provisions unconstitutional.[32] Others have declined to do so but have raised specific objections to the veto provisions.[33] It is therefore understandable that the Justice Department has occasionally conceded the unconstitutionality of a legislative veto provision in open court, even while representing the federal government.[34]

Much, although far from all, of the controversy over the legislative veto was resolved when the Supreme Court held in *INS v. Chadha* that the one-House legislative veto provision in section 244(c)(2) was unconstitutional.[35] In an opinion by Chief Justice Burger,[36] the Court held that *all* action by Congress that is "legislative" in "character"[37] must be taken in accord with the "single, finely wrought and exhaustively considered,

[32] Presidents Eisenhower, Johnson, Nixon, Ford, and Carter. *See, e.g.*, Veto of Department of Energy Authorization Bill, [1977] 2 PUB. PAPERS 1972 (Nov. 5, 1977) (Carter); Veto of the Federal Fire Prevention and Control Bill, [1976–1977] 2 PUB. PAPERS 1984 (July 7, 1976); Veto of Atomic Energy Act Amendments, 1974 PUB. PAPERS 294 (Oct. 12, 1974) (Ford); President's Message Vetoing the War Powers Resolution, 9 WEEKLY COMP. PRES. DOC. 1285 (Oct. 24, 1973) (Nixon); Veto of the Military Authorization Bill, [1965] 2 PUB. PAPERS 907 (Aug. 21, 1965) (Johnson); Veto of Bill Providing for the Conveyance of Lands Within Camp Blanding Military Reservation, Florida, 1954 PUB. PAPERS 507 (May 25, 1954) (Eisenhower); *see also* Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423, 428 & n.21, 429 & n.24, 432 & n.29 (1978). Members of the Ford and Carter administrations testified against legislative vetoes in various legislative hearings. *See, e.g.*, *Improving Congressional Oversight of Federal Regulatory Agencies: Hearings on S. 2258, S. 2716, S. 2812, S. 2878, S. 2903, S. 2925, S. 3318, and S. 3428 Before the Senate Comm. on Governmental Operations*, 94th Cong., 2d Sess. 124 (1976) (statement of Asst. Atty. Gen. Antonin Scalia); Letter from Asst. Atty. Gen. Patricia Wald to Rep. Peter Rodino, Jr. (D-N.J.) (May 5, 1977) (letter prepared in response to congressional request for Justice Dept. opinion), *cited in* McGowan, *Congress, Court and the Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1141–42 (1977).

[33] The most famous example is that of President Franklin Roosevelt, who signed the Lend-Lease Act of 1941 despite its legislative veto provision but filed a memorandum with his Attorney General asserting the President's constitutional objections to the concurrent resolution veto section of the bill. F.D. Roosevelt, Memorandum for the Attorney General (Apr. 7, 1941), *reprinted in* Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357 (1953). Presidents have often restrained their opposition to specific legislative veto provisions where they greatly desired the statutory authority vested in the bills containing such provisions. *See* J. BOLTON, *supra* note 19, at 10–13.

[34] Then Assistant Attorney General Rex Lee, for example, made such an admission to the Court of Claims in Atkins v. United States, 556 F.2d 1028, 1079 (Ct. Cl. 1977) (Skelton, J., concurring in part and dissenting in part), *cert. denied*, 434 U.S. 1009 (1978).

[35] 103 S. Ct. 2764 (1983).

[36] The Chief Justice's opinion was joined by Justices Brennan, Marshall, Blackmun, Stevens, and O'Connor.

[37] 103 S. Ct. at 2785.

procedure"[38] set out in the "explicit and unambiguous provisions" of Article I.[39] Those provisions expressly mandate both *bicamerality* (passage by a majority of both Houses)[40] and *presentment* to the President for possible veto (with a requirement of two-thirds of each House to override),[41] not simply when Congress *purports* to be legislating but whenever it takes action that must be *regarded* as "legislative."[42] Otherwise, the separation of powers—which the Court saw as more than "an abstract generalization"[43]—could be betrayed by congressional lawmaking masquerading as something else. Given the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power,"[44] the Court must police all such attempts by Congress to circumvent the bicamerality and presentment checks on its authority. A law by any other name is still a law.

According to a majority of the Court, the House veto of Chadha's status as a permanent resident alien *had* to be viewed as "an exercise of legislative power."[45] Thus, since it was neither approved by both Houses nor presented to the President for signature or veto—two independently fatal flaws—the House's action was doubly unconstitutional.[46]

That "a law is a law is a law" is hard to refute. But that statement sheds little light on *why* the veto at issue in *Chadha was* so "law-like" an action that it "had" to be deemed legislative. Certainly the Court's careful enumeration of the "four provisions in the Constitution, explicit and unambiguous, by which one house *may* act alone with the unreviewable force of law, not subject to the President's veto"[47] is of no help in deciding which of the actions that a House might seek to take *pursuant to a statutory delegation of power* are inherently "legislative" in nature.[48]

[38] *Id.* at 2784; *see also id.* at 2786.
[39] *Id.* at 2781.
[40] U.S. CONST. art. I, §§ 1, 7; *see* 103 S. Ct. at 2783–84.
[41] U.S. CONST. art. I, § 7, cl. 2; *see* 103 S. Ct. at 2782–83.
[42] 103 S. Ct. at 2781.
[43] 103 S. Ct. at 2781, *quoting* Buckley v. Valeo, 424 U.S. 1, 124 (1976) (per curiam).
[44] 103 S. Ct. at 2784.
[45] *Id.* at 2787.
[46] *Id.* at 2787–88.
[47] 103 S. Ct. at 2786 (emphasis added). The four provisions are U.S. CONST. art. I, § 2, cl. 6 (House impeachment); U.S. CONST. art. I, § 3, cl. 5 (Senate trial and conviction in impeachment cases); U.S. CONST. art. II, § 2, cl. 2 (Senate approval of presidential appointments); U.S. CONST. art. II, § 2, cl. 2 (Senate treaty ratification).
[48] *See* 103 S. Ct. at 2804 n.21 (White, J., dissenting).

The Court's only direct attempt at defining this set of inherently legislative actions is also not particularly illuminating. The Chief Justice explained that the veto of Chadha's suspension of deportation was "essentially legislative" because it "had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch."[49] Absent the veto, after all, Chadha would remain in the United States. Therefore, "Congress has *acted* and its action has altered Chadha's status."[50] Moreover, "[w]ithout the challenged [veto] provision in § 244(c)(2), this [change of status] could have been achieved, if at all, only by legislation requiring deportation."[51] In a sense, all of this may be so.[52] But the same observations could apply with equal validity to nearly *all* exercises of delegated authority. Nearly all such actions alter legal rights, duties, and relations, thereby changing the legal status of persons outside the legislative branch in ways that, *without* the challenged delegation, could have been achieved, if at all, only by legislation.

Both through rulemaking and through case-by-case dispositions, exercises of delegated authority change legal rights and privileges no less than do full-fledged laws. Unlike such laws, however, these actions need meet neither the bicamerality requirement nor the presentment requirement. Indeed, as Justice

[49] 103 S. Ct. at 2784.
[50] *Id.* at 2784–85 (emphasis added).
[51] *Id.* at 2785 (footnote omitted).
[52] In another sense, *none* of this is so. For example, as Justice White argues in his dissent, the structure and history of § 244(c) make plain that, unless and until Congress ratifies a deportable alien's permanent residence by the silence of both the House and the Senate in the congressional session in which the Attorney General reports his suspension order and in the next session, the suspension order merely *defers deportation*. This order alters no legal rights; it merely proposes such an alteration. 103 S. Ct. at 2804–08 (White, J., dissenting). The retort of the *Chadha* majority—that this understanding of the legal sequence would impermissibly allow Congress to legislate by inaction, *see* 103 S. Ct. at 2787 n.22—is less than convincing. As I have suggested elsewhere, constitutional objections to lawmaking by inaction are inapposite when Congress itself enacts a statute ascribing operational meaning to its own future silence:

> Sunset provisions [ascribe meaning to silence] by creating situations in which *inaction* by a future Congress will lead a law to *lapse* when it would otherwise have survived. And the one-House veto technique . . . does so by making the fact of *joint inaction* by both Houses for a specified period the *condition precedent* for an agency's action under its delegated authority to become final. Once authority has been delegated in this special way, such inaction by Congress functions *not* as a "sign" of unenacted "intent," but rather as an operative fact giving final effect to an otherwise incomplete exercise of delegated power.

Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 528–29 (1982) (emphasis original); *see also* 103 S. Ct. at 2796 n.11 (White, J., dissenting).

White stressed in his thoughtful dissent,[53] we live in a sprawling administrative state in which "legislative" power, in the exact sense employed by the *Chadha* majority, is *routinely* exercised by the federal executive branch, by the headless "fourth branch of the government,"[54] and even by private individuals and groups.[55] These exercises of power all occur without any of the structural checks the *Chadha* Court held indispensable when similar power is wielded by legislators pursuant to otherwise indistinguishable statutory delegations of authority to Congress or to one of its parts. Yet the absence of those checks is evidently deemed immaterial in these many cases.

In other words, it is only when power is delegated to Congress (or to part of that body) that the Court insists on squeezing such power into one of the three classic pigeonholes envisioned by the Framers, labeling that power "executive," "judicial," or "legislative." The Court therefore appears to suppose that, although members of the executive or judicial branches (or of hybrid entities difficult to classify as either) need not be seen as acting purely in their executive or judicial capacities when they act pursuant to a statutory delegation from Congress, members of the *legislative* branch must be seen as acting purely in their *lawmaking* role even when they are simply discharging duties delegated to them by statute. It is as though the mere fact of statutory delegation obviates the need for formal classification of the power delegated when the recipient of such power is *outside* the legislative branch, while the fact of delegation somehow becomes irrelevant in assessing an exercise of delegated power by part of the legislative branch itself.

The only imaginable justification for what Justice White called "this odd result"[56] lies in a principle never expressly articulated by the majority: "that the legislature can delegate authority to others *but not to itself*."[57] Although the *Chadha* majority never

[53] 103 S. Ct. at 2801–04 (White, J., dissenting).

[54] Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556, 3558 (1983) (White, J., dissenting).

[55] 103 S. Ct. at 2803 (White, J., dissenting) (citing United States v. Rock Royal Coop., 307 U.S. 533, 577 (1939)) (statutory delegation to affected producers of specified commodities); Currin v. Wallace, 306 U.S. 1 (1939) (statutory delegation to farmers affected by restrictions upon production or marketing of agricultural commodities).

[56] 103 S. Ct. at 2803 (White, J., dissenting).

[57] *Id.* at 2802 (emphasis added). Rather than reflecting generic problems with the very *logic* of self-reference, inhibitions of a "constitutional" character against self-delegation would presumably reflect more particularistic concerns as to the *psychology* of roles and of their behavioral elaboration. *Cf.* D. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID (1979). An analogy between legislators and testators is useful in discussing this point. Rules permitting testators—so long as various formalities are observed—to delegate to independent others the discretionary authority to act with less formality than is demanded of the testamentary disposition itself need not entail the existence of rules permitting the same testators, acting with identical formality, to attach decisive consequences to their own future informal actions (e.g., "I hereby bequeath to my nephew whichever bonds I happen to leave in my desk the day I die"). Similarly, it might be supposed that rules permitting legislators—as long as they comply with the formalities of bicameral agreement and presentment—to delegate to agencies the discretionary authority to act informally (i.e., without the safeguards of bicamerality and presentment) need not entail the existence of rules permitting the same legislators, acting identically, to attach decisive consequences to their own future non-lawmaking acts. However, the *reasons* for taking this view as to testators—reasons grounded in a fear that ritualized solemnity in the assumption of a role will assure adequately considered choice, while informal, independent action might not do so—are difficult to extend to the congressional-administrative context.

says this in so many words, it seems to recognize that the decision's pivotal rationale is indeed to be found in this unspoken premise. In a relatively cryptic footnote, the majority admits that agencies and executive officers commonly wield "quasi-legislative" power[58] without the safeguards of bicamerality and presentment. The Court proceeds to distinguish such exercises of power solely on the ground that those who wield it are executive officers—that is, officers whose appointment is by the Chief Executive or his subordinates and whose conduct is always subject to judicial review for compliance with duly enacted statutory standards.[59]

Such judicial review is, admittedly, unavailable to ensure that legislative vetoes are wielded only in the circumstances, and for the reasons, contemplated by the underlying statute. For, even if all veto-delegating statutes were to specify the conditions under which legislative vetoes could be invoked—something most such statutes certainly do not attempt[60]—the Speech or Debate Clause[61] would presumably prevent any court from holding a member of the House or Senate accountable for that member's vote on a veto resolution.[62]

[58] 103 S. Ct. at 2785 n.16.

[59] *Id.*

[60] For a relatively rare exception, see 20 U.S.C. § 1232(d)(1) (1976 & Supp. IV 1980) (specifying that a regulation by the Secretary of Education may be vetoed by concurrent resolution only if deemed by Congress to be "inconsistent with the Act from which [the regulation] derives its authority").

[61] U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place.").

[62] It is, perhaps, a theoretical possibility that deciding whether or not to cast such votes might be deemed a task so inherently non-legislative in character as to fall outside the protection of the Speech or Debate Clause. But the breadth of the protection the clause has been deemed to confer seemingly precludes such a result, *see* L. TRIBE, ACL, *supra* note 2, § 5-18, and certainly precludes it for a Court that deems a one-House veto an inherently *legislative* act.

The same insulation from judicial review may also exist, however, even with respect to exercises of delegated authority by officers *outside* Congress. Even the *Chadha* majority conceded that Article III limits on the federal judiciary would ordinarily prevent federal courts from reviewing exercises of executive or administrative discretion *favorable* to the private parties whom Congress seeks to regulate: witness the Attorney General's suspension of deportation of Chadha himself.[63] Thus, even where the available criteria for judicial review might create more than an illusory predicate for holding the agents of delegated power within statutory bounds in the context of a properly justiciable case or controversy,[64] the case-or-controversy requirement itself refutes the notion that the exercise of congressionally delegated authority by agents outside Congress "is *always* subject to check by the terms of the legislation that authorized it."[65]

Thus the *only* objection peculiarly applicable to the exercise of statutorily delegated power by all or part of Congress itself—as opposed to such exercise of delegated power by an agent or agency *external* to Congress—must be the proposition that entrusting members of Congress with such power ipso facto confers upon federal lawmakers the mantle of "officers" of the United States government, in violation of the Appointments Clause[66] and of the Incompatibility Clause.[67] It is noteworthy that the *Chadha* majority not only failed to mention but also seems not to have envisioned[68] any such rationale for its holding.

[63] 103 S. Ct. at 2787 n.21 (invoking this observation as a reply to Justice Powell's rationale, 103 S. Ct. at 2788–92 (Powell, J., concurring), that the one-House veto in *Chadha* usurped a judicial function); *see* 103 S. Ct. at 2803, 2810 (White, J., dissenting).

[64] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 103 S. Ct. 2856 (1983) (holding that the National Highway Traffic Safety Administration acted in disregard of its statutory duties in revoking passive-restraint requirements without adequate substantive basis).

[65] 103 S. Ct. at 2785 n.16 (emphasis added).

[66]

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2, *applied in* Buckley v. Valeo, 424 U.S. 1, 40–41 (1976) (per curiam).

[67] U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

[68] The Court cited Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), only in passing and only for a less directly relevant proposition. *See* 103 S. Ct. at 2774, 2781, 2785 n.16.

Instead the Court insisted that invocation of the legislative veto at issue in the case before it *had* to be regarded as an exercise of *legislative* authority[69]—a "characterization [under which] the practice does not, even on the surface, constitute an infringement of executive . . . prerogative."[70]

One must, nonetheless, ask whether this rationale that "Congressmen cannot be officers" could be put forward to declare the veto unconstitutional. Its key premise would, of course, have to be that the delegation of legislative veto authority to Congress (or to part of that body) automatically makes the members of Congress who are entrusted with such veto power into "officers of the United States." The objection would then have to be made that these officers were not appointed by the executive branch in the manner required by Article II, Section 2, Clause 2.[71] To add the final blow, it would be stressed that the very membership of these officers in Congress violates the Incompatibility Clause of Article I, Section 6, Clause 2.[72]

The argument is a tidy one—but it confronts at least one major problem. Neither is there, nor could there be, any general principle that anyone to whom a federal statute delegates a significant decisionmaking role on which the rights or duties of persons outside Congress may depend becomes, by virtue of such delegation, an "Officer of the United States" within the meaning of the Appointments Clause and the Incompatibility Clause. If such a principle existed, then Congress could not "confer upon the *States*"—which are surely not United States "Officers"—"an ability to restrict the flow of interstate commerce that they would not otherwise enjoy."[73] And the private individuals and groups to whom decisionmaking roles were delegated in *Currin v. Wallace*[74] and *United States v. Rock Royal Co-Operative*,[75]

[69] *See* 103 S. Ct. at 2784–87.

[70] 103 S. Ct. at 2810 (White, J., dissenting).

[71] *See* L. TRIBE, ACL, *supra* note 2, § 4-8.

[72] Presumably someone like Chadha—i.e., someone adversely affected by an action taken by a member of Congress in an allegedly "incompatible" role—would have standing to invoke the clause in a lawsuit urging that the action be disregarded. *Cf.* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (holding that individuals suing only in their capacity as citizens lack standing to invoke the Incompatibility Clause against members of Congress holding commissions in the Armed Forces Reserve). *See also* L. TRIBE, ACL, *supra* note 2, § 3-20, at 89–91.

[73] Lewis v. BT Inv. Managers, 447 U.S. 27, 44 (1980) (emphasis added). *See generally* L. TRIBE, ACL, *supra* note 2, § 6-31.

[74] 306 U.S. 1 (1939) (marketing restrictions effective only upon approval by majority of affected farmers).

[75] 307 U.S. 533 (1939) (marketing orders issued by Secretary of Agriculture subject to veto by certain affected producers).

for example, would have been United States officers whose failure to be appointed in accord with Article II would have constituted fatal constitutional flaws in the statutory schemes upheld in those two landmark decisions.

What made the members of the Federal Election Commission (FEC) United States "officers" in *Buckley v. Valeo* was the significant executive responsibility those FEC members exercised under the Federal Election Campaign Act of 1971.[76] The responsibility exercised by the House and Senate under the reservation of legislative veto authority struck down in *Chadha* seems profoundly different. Whether viewed as the *unicameral rejection* of an action taken by the Attorney General in those instances where a veto is cast by one House, or viewed as the *bicameral acceptance* of a legislative proposal made by the Attorney General in those instances where neither House vetoes the Attorney General's suspension of deportation,[77] what Congress does in cases like *Chadha* hardly seems to involve congressional interference with the "execution" of any enacted law. Indeed, it bears repeating here that the *Chadha* majority itself was at pains to insist that the power at issue in the veto is "legislative" in nature.[78]

Whatever classification scheme one may adopt for other purposes, the core concern of the Appointments and Incompatibility Clauses hardly seems to be activated by legislative vetoes of the sort involved in *Chadha*. That concern, which is tied closely to the Constitution's rejection of parliamentary government, is to ensure that federal executive power is located under the ultimate direction of a single President chosen by and responsive to a national electorate. Such power is not to be dispersed among a series of ministries selected from the National

[76] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, *amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified at 2 U.S.C. §§ 431–455 (1982)); *see* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). The 1974 amendments to that 1971 act vested in the eight-member FEC primary responsibility for administering and enforcing the act by bringing civil actions against violators, making rules for carrying out the act's provisions, temporarily disqualifying federal candidates for failing to file required reports, and authorizing convention expenditures in excess of the act's specified limits. Because such powers of enforcement, rulemaking, and adjudication could not "be regarded as merely in aid of the legislative function of Congress," *id.* at 138, they could be "exercised only by persons who are 'Officers of the United States,'" *id.* at 141.

[77] *See supra* note 52.

[78] *See supra* note 69 and accompanying text.

Legislature, each headed by a congressman answerable only to a local constituency.[79]

Giving Congress a legislative veto over certain intrinsically executive functions, such as the initiation of criminal prosecutions,[80] or entrusting a legislative veto to a congressional committee or committee head, might significantly implicate this anti-parliamentary concern. But treating *all* legislative vetoes[81]—or even all vetoes in situations analogous to that in *Chadha*—as a threat to the Constitution's choice of a presidential over a parliamentary system seems altogether implausible, particularly in an era when presidential politics may be no less sectional than congressional politics often is.

Apart from this anti-parliamentary rationale, *Chadha* might be deemed defensible on an entirely different ground in those special contexts where Congress or one of its Houses uses a legislative veto either to decide the legal fate of an identifiable individual or to pass upon the conformity of generic rules or regulations to the underlying statute. In such cases, the task Congress has delegated to itself is arguably too "adjudicative" in character to be performed by anything but a court. Perhaps sensing the difficulty of reconciling this argument with the long-standing judicial approval of agency action "construing" Congress's laws in both generic and individual settings,[82] Justice Powell, whose concurring opinion was the only one to voice this particular view, endorsed it only as applied to action by a

[79] *See* THE FEDERALIST No. 76 (A. Hamilton). *See also* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1523 (Boston 1833); *cf.* Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 150–51 (1963) (refusing to accord national pre-emptive effect to federal marketing rules not drafted "by impartial experts in Washington or even in Florida, but rather by the South Florida Avocado Administration Committee," under a delegation of federal regulatory authority).

[80] *See* 103 S. Ct. at 2810 (White, J., dissenting).

[81] In fact, without so much as setting the issue for separate briefing or argument, the Court summarily extended *Chadha* to legislative vetoes of entirely generic rulemaking by administrators or executives less than two weeks later in a set of eight related cases. Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983), *aff'g mem.* Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982) (Nos. 81-2008, 81-2020, 81-2152, and 81-2171), *denying cert. to* 673 F.2d 425 (Nos. 82-177 and 82-209), *and rev'g mem.* Consumers Union of United States v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (Nos. 82-935 and 82-1044). *Process Gas* invalidated the one-House legislative veto provision of the Natural Gas Policy Act of 1978, as applied to a FERC regulation shifting part of burden of higher natural gas prices from residential to industrial users, and invalidated the two-House legislative veto provision of the Federal Trade Commission Improvements Act of 1980, as applied to an FTC regulation requiring used car dealers to disclose major defects to buyers.

[82] *See, e.g.*, FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981).

legislative body adversely affecting the legal status of a specific person. Such action, he opined, offends "not only . . . [the Constitution's] general allocation of power, but also . . . the Bill of Attainder Clause," which concretely embodies "the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power."[83]

The most striking thing about any such rationale for the *Chadha* result—either in the broader form represented by a ban on delegating adjudicative tasks to bodies other than courts, or in the narrower form espoused by Justice Powell—is that this rationale would *divorce the Chadha decision entirely from objections to the legislative veto as such*. For if exercise of the legislative veto is objectionable because it usurps the functions of an Article III court by "construing" pre-existing law in a manner binding on the federal judiciary, that objection seemingly remains even if such usurpation is engaged in by both Houses acting with the signature of the President.[84] And, even more clearly, if exercise of the legislative veto is objectionable because it amounts to trial by legislature, that objection persists even if bicameral action and presentment to the President are assured. Chadha's claim under the Bill of Attainder Clause would not have been weakened in the least had his exile from this country been legislatively decreed by the House and Senate acting through an ordinary bill designating Chadha and his five co-victims for deportation notwithstanding the Attorney General's favorable ruling—a bill solemnly passed with the political safeguards of bicamerality and duly signed by the President in full conformity with the Presentment Clause.[85]

Thus, to whatever extent it is the usurpation-of-judicial-function theme of *Chadha*, or its bill-of-attainder flavor, that may commend its factual outcome to some observers, the Court's legal holding seems even harder to defend than the invalidation

[83] 103 S. Ct. at 2789–90 (Powell, J., concurring); *see* U.S. CONST. art. I, § 9, cl. 3. *See generally* L. TRIBE, ACL, *supra* note 2, §§ 10-4 to 10-5.

[84] That Congress's action would thereby comply with Article I's formal requirements for legislation certainly would not preclude its invalidation on these Article III grounds. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1872), *discussed in* L. TRIBE, ACL, *supra* note 2, § 3-5, at 39–40.

[85] *Cf.* L. TRIBE, ACL, *supra* note 2, § 10-6. Justice Powell seems to recognize as much when he compares "the effect on Chadha's personal rights" with the impact "had he been acquitted of a federal crime and thereafter found by one House of Congress to have been guilty." 103 S. Ct. at 2791 n.8 (Powell, J., concurring). Needless to say, such a legislative "conviction" would fare no better if decreed by both Houses with the President's express approval. *See id.* at 2792 n.9 (Powell, J., concurring). *But see id.* at 2776 n.8, 2785 & n.17 (purporting to leave this question open).

of "an entire class of statutes based on . . . a somewhat atypical and more-readily indictable exemplar of the class."[86] For in truth, the *Chadha* decision—if viewed through a usurpation-of-adjudication lens or a bill-of-attainder lens—is *not* an exemplar of "the class" of legislative vetoes *at all*.

Chadha thus seems remarkable particularly because it is so *transparently* perplexing. The gaps in the Court's argument are almost too obvious, leaving one with the strange feeling that comes from confronting an edifice in which the flaws seem too conspicuous to be accidental, rather like approaching a building with windows but no door. Surely the architect knew that the omission would strike others as a defect in design. But if the architect knew, then are we perhaps overlooking something?

Two speculations suggest themselves. The first is that *Chadha* represents a return to a form of constitutional exegesis that simply proclaims intelligible essences more than it purports to explain or to justify philosophical or practical premises. "The legislative veto simply *is* a perversion of the Constitution's design," the *Chadha* Court seems to announce; "those who cannot 'see' it that way are just out of touch." The second, and more plausible, possibility is that *Chadha* represents only a transition to a more thoroughgoing repudiation of the constitutional upheaval that led to the approval, beginning in the mid-1930's, of the modern administrative state. Even if *Chadha* makes little sense against a backdrop of nearly limitless judicial tolerance for delegations of lawmaking authority to federal agencies and commissions, the decision would at least be of a piece with a significant judicial tightening of the limits within which Congress may entrust *anyone* with lawmaking power.[87]

In the end, for those who find neither of these speculations a satisfying enough answer, *Chadha* must remain something of a mystery. Neither the near-unanimity with which the Court decided *Chadha*, nor the breathtaking sweep of the Court's holding, are easily explained by anything in the Constitution's text,

[86] 103 S. Ct. at 2796 (White, J., dissenting).

[87] Justice White may have just this in mind. He finds in the majority's holding "a profoundly different conception of the Constitution than that held by the Courts which sanctioned the modern administrative state." *Id.* at 2810 (White, J., dissenting); *see also supra* note 64; *cf.* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543–48 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J.) (arguing that OSHA was an unconstitutional delegation of legislative power to the executive branch); Industrial Union Dep't., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671–88 (1980) (Rehnquist, J., concurring) (same).

history, or structure; by the force of the Court's own logic; or by the thrust of any analysis thus far advanced, at least to my knowledge, in the decision's defense. That *Chadha* realigns power in America in an extraordinary exercise of what some like to call "judicial activism" is clear enough. *Why* the Court has chosen to take this step remains unclear.

III. Allowable Methods of Ex Post Congressional Restraint on Executive and Agency Action After *Chadha*

Just how *much* and in what precise *ways* the *Chadha* decision realigns governmental power also remains to be seen. That the ruling, purely as a matter of arithmetic, "[struck] down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history,"[88] seems indisputable. But how "monumental [a] change [will result] in the way government does business"[89] will surely depend (a) on how many devices *analogous* to legislative vetoes are actually felled by *Chadha*'s ax; and (b) on how many of the provisions rendered inoperative by *Chadha* must be deemed *inseverable* from, and thus fatal to, the entire delegations of authority to which those provisions are attached.

So far as *Chadha*'s reach into analogous areas is concerned, even the most cursory analysis uncovers many legislative methods for containing, after the fact, the power delegated to agencies, commissions, or the executive branch that simply do not implicate the holding of *Chadha* at all. Thus, even the broadest reading of *Chadha* contains nothing that would prevent Congress from enacting "report and wait" provisions. The Federal Rules of Evidence and of Civil Procedure are already governed by such provisions—mandating that rule changes shall not take effect as law until after the legislative session in which they have been reported to Congress by the Attorney General.[90] Such

[88] 103 S. Ct. at 2810–11 (White, J., dissenting).

[89] Press, *The Court Vetoes the Veto*, Newsweek, July 4, 1983, at 16, 17 (quoting Stanley Brand, Counsel to the House of Representatives).

[90] *See* 28 U.S.C. § 2072 (1976) (Rules of Civil Procedure take effect 90 days after reported to Congress); 28 U.S.C. § 2076 (1976) (Rules of Evidence take effect 180 days after reported to Congress); *see also* Sibbach v. Wilson, 312 U.S. 1 (1941), *cited with approval in Chadha*, 103 S. Ct. at 2776 n.9. On July 20, 1983, four Senators introduced a bill under which *no* proposed agency rule could go into effect until thirty days had elapsed. During that time, if a congressional committee approved a joint resolution of disapproval, the rule would be delayed for a further sixty days, in which time the House and Senate could pass the resolution and send it to the President for his signature or veto. S. 1650, 98th Cong., 1st Sess. (1983); *see* N.Y. Times, July 21, 1983, at A19, col. 5.

laws give Congress a greater opportunity to pass otherwise valid legislation denying legal effect to those executive, agency, or court actions with which it disagrees. Similarly, a law declaring that no administrative agency rule would take effect until affirmatively approved by a joint resolution of Congress and presented to the President,[91] while perhaps unwise, would nevertheless be constitutional. Nothing in *Chadha*, and nothing in the Constitution, prevents Congress from reducing the regulatory agencies to the status of advisory study commissions.[92] Refinements of this type of continuous legislative scrutiny are also possible. For example, a rule that all proposed regulations, or all regulations of a certain description, are automatically to be introduced as congressional resolutions and brought to a floor vote in both Houses within a fixed time, subject to delay beyond that time only pursuant to a majority vote in both chambers, would be less cumbersome than requiring the regulatory state to grind to a halt while proposed regulations wandered endlessly from one committee to another. The constitutional validity of such a scheme follows quite plainly from the Constitution's reservation to each House of the prerogative to determine its own rules of operation.[93]

May Congress specify by statute the circumstances in which approval by *both* Houses—in the form of a further statute, a step such as an explicit declaration of war, or a concurrent resolution expressly approving a presidential request—must be obtained by the Chief Executive in order for a particular exercise of presidential power (such as an arms sale, an impoundment of funds beyond a stated time or amount, or various troop deployments abroad) to occur or to continue? Provided the contested presidential action is not altogether beyond Con-

[91] Such a provision, sponsored by Representative Elliot Levitas (D-Ga.), was tentatively added to an appropriations bill for the Consumer Product Safety Commission, H.R. 2668, incorporated into S. 861, 98th Cong., 1st Sess. (1983). *See* 129 Cong. Rec. H4773 (daily ed. June 29, 1983) (statement of Rep. Levitas).

[92] Arguments such as those of House Counsel Stanley Brand that, once Congress has delegated power, it cannot "involve [itself] in the rule-making process on a return trip," N.Y. Times, June 29, 1983, at A19, col. 1, col. 4, greatly overstate *Chadha* by misconstruing its disapproval of one *method* of ex-post restraint on the executive as a blanket prohibition of *any* form of after-the-fact legislative oversight.

[93] U.S. Const. art. I, § 5, cl. 2.

gress's constitutional power to constrain,[94] the answer to this question does not depend on *Chadha*—for such congressional specification and delegation of power circumvents neither presentment nor bicamerality.[95] The answer depends, rather, upon the extent to which Congress may, within limits, *define the boundary* between (a) the zone in which the executive *may* act absent statutory *prohibition*,[96] and (b) the zone in which the executive may *not* act absent statutory *authorization*.[97] That Congress may indeed specify such a boundary, within a fairly wide band whose outer limits are defined by the federal judiciary, seems an inescapable corollary of Congress's broad Article I powers and of its undoubted authority, by creating rights based on federal statute (e.g., rights of property), to add to the circumstances in which executive action (e.g., action seizing property) would be unlawful absent further statutory authorization.

Having declined to forbid a contested presidential action by statute, and having declined to condition that action on specific congressional approval, may Congress nonetheless specify by statute that such presidential actions may not occur, or must cease, if either House so demands within a stated time—or if Congress so directs by a concurrent resolution not subject to

[94] For an example of an action that *is* beyond Congress's constitutional power to restrict, see Myers v. United States, 272 U.S. 52 (1926) (holding that Congress may not protect certain executive officials appointed by the President with the approval of the Senate from removal by the President without the Senate's consent).

[95] Thus it seems plain that nothing in *Chadha* casts doubt on the validity of those provisions of the War Powers Resolution that impose *reporting requirements* on the President, War Powers Resolution § 4(a), 50 U.S.C. § 1543(a) (1976), and set *durational limits* of 60 to 90 days on the presence of United States Armed Forces in "hostilities" abroad "unless the Congress . . . has declared war or has enacted a specific [statutory] authorization for such use of United States Armed Forces," War Powers Resolution § 5(b), 50 U.S.C. § 1544(b) (1976 & Supp. V 1981). As the Court expressly stated in *Chadha*, "other means of control [by Congress], such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power." 103 S. Ct. at 2786 n.19. It follows from *Chadha*, however—as well as from the purpose of § 5(b) of the War Powers Resolution—that such reporting requirements and durational limits must be triggered by the objective presence of events such as "hostilities"—events whose presence or absence a court can itself ascertain—and *not* by a one-House or even two-House "resolution" that such events have indeed occurred. The contrary reading of § 5(b) in Crockett v. Reagan, 558 F. Supp. 893, 899–901 (D.D.C. 1982) (holding that the time limit in § 5(b) does not begin to run until Congress "take[s] action to express its view that the [War Powers Resolution] is applicable to the situation"), is thus manifestly untenable after *Chadha*.

[96] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding President Carter's Iranian hostage settlement), *discussed in* Tribe, *supra* note 52, at 526–27.

[97] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (invalidating President Truman's Steel Seizure), *discussed in* Tribe, *supra* note 52, at 519–20, 524–25.

presidential veto? *Chadha* strongly suggests not. Even if the presidential action subjected to legislative veto represents an exercise of authority inherent in the executive office (albeit limitable by Congress) rather than a discharge of authority traceable entirely to a delegation by Congress, it is the delegation *to* Congress, or to one of its Houses, of a continuing role in the implementation of extant laws that *Chadha* forbids.[98]

The upshot of this analysis is that, after *Chadha* as before, "[t]he Constitution provides Congress with abundant means to oversee and control [both] its administrative creatures"[99] and the semi-autonomous executive branch. Justice White may be correct in concluding that "the alternatives [to the legislative veto] to which Congress must now turn are not entirely satisfactory,"[100] and that the Court had insufficient warrant for constraining Congress as it did in *Chadha*. But that constraint, while considerable, is far from total.

IV. Legislative Veto Provisions: An Occasion to Rethink the Problem of Severability

What follows for a law as a whole, and for actions taken under its authority, when a legislative veto mechanism included in the law is held unconstitutional? An analysis of that question may shed useful light on the general problem of severability and on the nature of judicial review itself.

Legislative veto provisions that simply purport to constrain exercises of inherent executive authority—such as section 5(c) of the War Powers Resolution[101]—if struck down under *Chadha*, leave in place whatever residuum of authority the Constitution itself entrusts to the executive over the matter at hand absent a valid statutory limitation by Congress. No real problem of severability is posed in this circumstance.[102]

In contrast, striking down a legislative veto provision that is attached to an exercise of authority wholly dependent on an

[98] It follows that § 5(c) of the War Powers Resolution, 50 U.S.C. § 1544(c) (1976 & Supp. V 1981), is invalid under *Chadha* insofar as that section purports to require a removal of United States Armed Forces in specified circumstances "if the Congress so directs by concurrent resolution."

[99] 103 S. Ct. at 2786 n.19.

[100] 103 S. Ct. at 2795 (White, J., dissenting) (footnote omitted).

[101] *See supra* note 98.

[102] Certainly § 5(b), *see supra* note 95, is in no way jeopardized by the invalidity of § 5(c).

underlying delegation by Congress typically does pose a genuine severability problem. Congress might have chosen to withhold the delegated authority altogether, rather than see it survive shorn of the veto that Congress had insisted on retaining for itself or for one of its Houses or committees. Once the veto provision is held void and thus unenforceable, it may always be argued that a court cannot permit the delegated authority to be exercised even in cases where *no* veto occurs (and, a fortiori, in cases where there has been a veto). Therefore, the court must strike down the entire law.[103] Indeed, the question of who bears the burden of persuasion in determining Congress's intent may even be irrelevant. It may not matter whether, as the *Chadha* majority held, the presence of a boilerplate severability clause (of the sort most laws contain) raises a presumption that Congress would have enacted the law even without its veto provision;[104] or, as Justice Rehnquist argued in dissent, Congress should be strongly (although not conclusively) presumed to have made an all-or-nothing choice.[105] For clearly, whatever Congress *would have done* if the veto device had been unavailable to it at the time of the underlying law's enactment, the fact is that Congress *has not enacted* the law in a veto-free form.

When a severability clause is regarded as an instruction to judges that they ought to act *as if* Congress has enacted a veto-free law (or, indeed, any other law severed from a portion subsequently held to be unconstitutional), the clause seems nothing more than an invitation for courts to disregard the absence of any actual enactment of the severed law in accord with Article I's strictures. The constitutional safeguards of bicamerality and presentment are thereby abandoned, and a new law is created by judicial fiat.[106] Given the President's inability to exercise an "item veto," it is particularly striking that the law at issue was enacted, and presented to the President for veto or signature, *as a single entity* and *not* as two distinct pieces of legislation. It seems especially odd for these concerns to be overlooked in *Chadha*—the very decision that held the legislative veto device void precisely because of its failure to meet the bicamerality and presentment requirements.

On the other hand, the option of *refusing* to sever the invalid provision so as to leave the underlying law in effect once its unconstitutional veto provision has been held void and rendered inoperative poses separation-of-powers problems of its own. After all, striking down a provision "fully operative as a law"[107] simply because Congress passed that provision only on a mistaken guess about how courts would treat *another* provision seems akin to invalidating one otherwise perfectly sound statute solely because those who voted for it wrongly supposed that another, closely related statute would be upheld. Moreover, if a severability clause is read as a legislative mandate that the two provisions should be regarded as two distinct laws, the President's failure to veto the entire measure, or its passage over his veto, may be treated as satisfying the presentment requirement as to each provision separately regarded.

If the debate is conducted in these terms, the anti-severability position seems the winner by a wide margin. This position avoids the apparent trap of judicial legislation. Moreover, the anti-severability viewpoint requires a court to invalidate the entire law *not* because of Congress's mistaken assumption as to the invalid part but because of Congress's failure to *enact* the remainder, and to present it to the President, as a separate piece of legislation.

There is another ground, however, on which the survival of nearly all laws infected by invalid legislative veto devices may be supported—a ground available even for laws containing no severability clause at all. At least where no legislative veto has been exercised in the case before the reviewing court,[108] it may be argued with considerable force that a litigant who is subjected only to an exercise of the underlying authority delegated by Congress has *no standing to invoke the rights of the third parties*

[103] A federal district court recently reached just this conclusion in striking down the Carter Administration's transfer of Equal Pay Act enforcement authority from the Labor Department to the Equal Employment Opportunity Commission. This transfer occurred under a plan adopted pursuant to the Executive Reorganization Act of 1977, 5 U.S.C. § 906 (1982), which gave the President authority to restructure the executive branch subject to a one-House veto. Finding such a scheme unconstitutional under *Chadha*, the district court deemed the veto provision inseverable from the act as a whole because Congress would not, in the court's view, have delegated such broad power to the President without reserving a veto. The court thus held the transfer of authority to EEOC void although no legislative veto was exercised. EEOC v. Allstate Ins. Co., 98 Lab. Cas. (CCH) ¶ 34,431 (S.D. Miss. Sept. 9, 1983). The approach urged in this Article would require that decision to be reversed.

[104] *See* 103 S. Ct. at 2774–76.

[105] 103 S. Ct. at 2816–17 (Rehnquist, J., dissenting).

[106] *See* L. TRIBE, ACL, *supra* note 2, § 12-27, at 717–18.

[107] *Chadha*, 103 S. Ct. at 2775, (quoting Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)).

[108] *See supra* note 103.

who would be injured were the legislative veto to be used to their disadvantage.[109] Unless a law is void because of some defect in the process by which it was enacted, only very special considerations—such as the avoidance of an intolerable chill of First Amendment rights—would warrant facial attack by *all* litigants who are subject to a law where the constitutional defect in that law is salient in only a few of the law's applications.[110]

Even in the absence of a severability clause, the consequence of holding a law's legislative veto device unconstitutional is not, after all, to *excise* that device,[111] leaving behind a truncated and judge-made law that Congress never passed. Rather, the consequence is only to hold that the law Congress *did* pass is unconstitutional *as applied to cases in which the law's veto provision is invoked*. When the veto has *not* been used, the law may well be constitutionally inoffensive. Any suggestion that enforcing the law when no veto occurs entails treating the mere inaction of the House and Senate as legislation[112] betrays a basic misunderstanding of the objections to congressional legislation through silence.[113]

These observations leave open the question of remedy in a case in which the legislative veto *has* been cast—as it had been in *Chadha* itself. Once the invalidity of the immigration law as applied against Chadha is conceded, permitting *him* to invoke the deportation-suspension action taken by the Attorney General on his behalf pursuant to Congress's underlying delegation of authority in that immigration law may seem to give him the benefit of a law that Congress simply did not pass in the veto-free form that he seeks to have applied to him.[114]

Despite the analytic appeal of the resulting argument against Chadha—and indeed against giving *any* litigant the benefit of an

[109] *See* L. TRIBE, ACL, *supra* note 2, §§ 3-23, 3-25 to 3-29.

[110] *See* L. TRIBE, ACL, *supra* note 2, §§ 12-24, 12-29.

[111] As David Shapiro has remarked, "No matter what language is used in a judicial opinion, a federal court *cannot* repeal a duly enacted statute of any legislative authority." Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U.L. REV. 759, 767 (1979) (emphasis added).

[112] The *Chadha* majority may be understood to have suggested as much, *see* 103 S. Ct. at 2787 n.22, but only in response to Justice White's dissenting argument that the *exercise* of a one-House veto should be viewed not as unicameral lawmaking but as a failure to obtain bicameral approval. *See* 103 S. Ct. at 2808 (White, J., dissenting).

[113] *See supra* note 52.

[114] Compare Justice Rehnquist's argument in Arnett v. Kennedy, 416 U.S. 134, 154 (1974) (plurality opinion), that one who relies on an Act of Congress for his underlying substantive entitlement "must take the bitter with the sweet." *See* L. TRIBE, ACL, *supra* note 2, § 10-12.

agency adjudication or rule which has been subjected to a legislative veto that a court later decides to invalidate—it seems most unpalatable to conclude that the very invalidity of the veto device has the de facto effect of vetoing, albeit judicially, any agency action that has actually been subjected to it! Since a court could not *enjoin* future uses of the veto,[115] the upshot would be to render the *Chadha* holding binding only to the degree Congress might choose to obey it—a result that is hard to swallow, even for those who think *Chadha* was wrongly decided.

To escape this nasty conclusion, one need only accept a somewhat more modest view of precisely what a federal court does when it strikes down a veto provision in a case like *Chadha*, or indeed invalidates any provision of any law. Rather than conceiving of the court as enforcing the law "minus" its invalidated provision—a "law" the legislature never enacted—perhaps one should simply understand the court as resolving the controversy before it in terms of the *entire* body of law applicable to that controversy, the entire Act of Congress (*not* the Act "minus" any offending portion) *plus the Constitution*.[116]

So conceived, the Court's holding in *Chadha* is that, because of the bicamerality and presentment requirements of Article I, the only way to give constitutional effect to Congress's enactment in the case at bar—i.e., the only way to give effect to the Constitution while enforcing, to the degree possible and to the extent consistent with its meaning, the statute Congress enacted—is to treat Congress's specific action in exercising a "legislative veto" against Chadha as incapable of abridging whatever rights Chadha otherwise enjoys under the law that Congress passed. That Congress might not have conferred such rights upon Chadha had it anticipated this outcome is interesting but immaterial to this perspective. Invalidation of the entire law would result only if one could show that the meaning of the entire law Congress enacted was so thoroughly and radically compromised by the invalidation of the law's veto device that, as a matter of ordinary statutory construction, the stump that remains after the veto branch has been cut off ought to be given no legal effect at all.

[115] The Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1, would presumably immunize Congress at least to that degree.

[116] That is, after all, the theory of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

This approach to severability regards courts not as choosing how much or how little of a law to "strike down" but as resolving controversies in a manner that rejects only such claims based upon a given law as are themselves deemed incompatible with the Constitution. Such a perspective avoids the several paradoxes to which the more heavily intent-based approaches to severability—the approaches ordinarily employed by the Supreme Court[117]—give rise. In particular, the approach urged here avoids both the puzzle of how a court can ever choose to enforce a law "severed" into a form that was never duly enacted, and the converse puzzle of how a court that views itself as powerless to enforce a law "minus" a severed veto can ever effectuate its holding that the veto's exercise should be disregarded.

Under the view urged here, a law's total invalidity would follow from a holding that the law's application in a given case, or in a given class of cases, is unconstitutional only when the entire law's very invocation is held to be inconsistent with the Constitution. Such an inconsistency could be found when the law is not duly enacted, is vague in all applications, is facially overbroad under the First Amendment, or deals with a matter beyond the enacting jurisdiction's authority. Under the approach here proposed, inseverability would *never* follow from the mere prospect that the legislature might not have enacted the law at all if it had known that the offending aspects or applications of that law would not survive.

Of course, if Congress were actually to *enact*, as part of a law, an explicit *non*-severability clause—directing that no part of the law should survive if a certain portion, or a certain set of applications of the law, were invalidated—then an adjudication of unconstitutionality would necessarily doom the law in its entirety, simply as a matter of statutory interpretation. Similarly, if a fair reading of a law is that it cannot have been meant to apply *at all* once certain parts or applications had been excised, then ordinary canons of interpretation would leave the law a nullity once such partial invalidity had been decreed.[118] But

[117] *See Chadha*, 103 S. Ct. at 2816 (Rehnquist, J., dissenting); Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936).

[118] To be sure, legislative history and intent may shed light on this issue of meaning just as on other issues of statutory construction. But there is a major, even if subtle, difference, both in principle and as a practical matter, between (a) treating evidence of what Congress would have done, or would have wanted courts to do, in the event of partial invalidation as shaping our understanding of what Congress's law *means*; and (b) treating Congress's unenacted wishes or inclinations as the very *objects* of the court's search. *See, e.g.*, Tribe, *supra* note 52, at 523, 533–34 & n.105. In practice, the former perspective—which I regard as the only defensible one—is much less likely than the latter to generate rulings of inseverability. For such rulings follow with considerably greater ease when the question put is whether Congress *might have preferred* no law to a severed law had the choice been unavoidable than they do when the question put is whether Congress *in fact meant*, and all but expressly *agreed*, to enact a law that would indeed self-destruct rather than survive a certain form of partial invalidation. Whenever the law's language and logic leave the matter in doubt, only the clearest evidence that a majority of both Houses of Congress actually *meant to choose self-destruction over severability* should suffice to yield an interpretation of inseverability. And, whenever the law's language and logic compel the contrary interpretation (i.e., one of severability), that should end the matter whatever the evidence of intent.

these quite rare instances of total nullification would be far more exceptional under the view proposed here than they are apt to be under the much looser approach to inseverability that has characterized adjudication in the past.

V. Conclusion

The immodesty of the Supreme Court's wide-ranging holding in *Chadha* presents more than a puzzle in divining the Court's aims; it presents, as well, a challenge in confining the dislocation caused by the Court's ruling. The Court's own lack of restraint in destroying "an important if not indispensable political invention"[119] need not, and should not, inspire a similar abandon on the part of those who must be guided by the Court's work.

[119] *Chadha*, 103 S. Ct. at 2795 (White, J., dissenting).

ARTICLE

THE LEGISLATIVE VETO: A CONSTITUTIONAL AMENDMENT

DENNIS DECONCINI*
ROBERT FAUCHER**

In response to the Supreme Court's decision in INS v. Chadha, *Senator DeConcini introduced a joint resolution that would amend the Constitution to provide expressly for a legislative veto mechanism. The Subcommittee on the Constitution of the Senate Judiciary Committee has scheduled hearings on Senator DeConcini's bill for February, 1984.*

In this Article, Senator DeConcini and Mr. Faucher sketch the history of the legislative veto, from the "laying procedure" of colonial times to the Chadha *decision. The authors then discuss the proposed amendment and demonstrate how the amendment reinforces the separation of powers and preserves Congress's constitutional role in the lawmaking process. Senator DeConcini and Mr. Faucher argue that the legislative veto mechanism promotes efficiency in government and increases Congress's ability to check abuses of power by the executive branch. They contend that the* Chadha *decision, with its literal reading of the Article I requirements, has not altered or diluted the separation of powers rationale that has persuaded Congresses, for over fifty years, to adopt and utilize the legislative veto. Finally, the authors review alternatives to the legislative veto and conclude that the amendment is necessary to restore a balance of power among the branches of government.*

In *INS v. Chadha*,[1] the Supreme Court held unconstitutional the one-House veto provision contained in section 244(c)(2) of the Immigration and Nationality Act.[2] The Supreme Court's sweeping language in *Chadha* appears to invalidate every use of the legislative veto,[3] and this decision "will be remembered as the beginning of a fundamental restructuring of the powers between the executive and legislative branches in Washington."[4]

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

[2] Act of Oct. 24, 1962, Pub.L.No. 87-885, § 4, 76 Stat. 1247, 1248, *amending* Immigration and Nationality Act, ch. 477, § 244(c), 66 Stat. 163, 216 (1952) (codified at 8 U.S.C. § 1254(c)(2) (1982)).

[3] *Chadha*, 103 S. Ct. at 2788 (Powell, J., concurring); *id.* at 2792 (White, J., dissenting). "Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history." *Id.* at 2810–11 (White, J., dissenting).

[4] 129 CONG. REC. S9554 (daily ed. June 29, 1983) (statement of Sen. Nunn (D-Ga.)).

A constitutional amendment proposed in response to *Chadha*, S.J. Res. 135,[5] would prevent this "fundamental restructuring of powers" by expressly providing for a legislative veto mechanism in the Constitution. Moreover, both by promoting efficient government and by increasing Congress's ability to check abuses of power by administrative agencies, such an amendment would reinforce the separation of powers doctrine incorporated in the Constitution.

The legislative veto has been surrounded by controversy[6] since its first modern use in 1932.[7] This controversy involves the respective powers, limitations, and responsibilities of the executive, legislative, and judicial branches of government under the Constitution. Before *Chadha*, "[t]he legislative veto offered the means by which Congress could confer additional authority while preserving its own constitutional role."[8] The proposed amendment would reinstate the means by which Congress can delegate broad authority to the executive branch, yet retain its constitutional mandate to check the exercise of that power.

This Article first will sketch a brief history of the congressional veto, from the "laying procedure" of colonial times to the termination of its use with the decision in *Chadha*. The main body of this article will deal with S.J. Res. 135, which would restore Congress's right to approval of executive actions through the legislative veto device. After explaining the amendment, the Article will demonstrate how the amendment complements the constitutional framework and accords with the political theory underlying the Constitution. Finally, the Article reviews other approaches with which Congress can respond to the Supreme Court's holding in *Chadha* and concludes that this constitutional amendment is necessary to restore a balance of power among the branches of government.

I. Historical Development of the Congressional Veto

The modern congressional veto device evolved from an early British parliamentary antecedent, the laying system. As early as 1386, Parliament delegated authority to make rules and regulations to various executive agents.[9] Such delegation of statutory authority increased over the centuries[10] and included the delegation by Parliament of legislative and judicial authority in the American colonies.[11] By the eighteenth century, it was not uncommon for delegation statutes to contain provisions that required delegatees to lay before Parliament various matters under their charge, including rules and regulations.[12]

The delegation of legislative authority, along with other principles of British parliamentary government, formed the background for the writing of the Constitution and provided guidance for early congressional statutes requiring delegatees to "lay before" Congress several matters which were under their delegated control.[13] A notable example of the laying of delegated legislation involved the administration of the Louisiana Purchase. In 1804, Congress passed an act that divided the recently purchased land of Louisiana into two territories and delegated Congress's rulemaking authority under the Constitution[14] to the governors of the two territories, subject to disapproval of such rules by Congress:

> The legislative powers shall be vested in the governor, and in thirteen of the most fit and discreet persons of the territory . . . . The governor shall publish throughout the said terri-

[5] S.J. Res. 135, 98th Cong., 1st Sess., 129 Cong. Rec. S11,015–17 (daily ed. July 27, 1983).

[6] For a survey of materials on the controversy see *Chadha*, 103 S. Ct. at 2797 nn.12–14 (White, J., dissenting).

[7] Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414 (authorizing reorganization of executive departments subject to legislative review).

[8] *Chadha*, 103 S. Ct. at 2793 (White, J., dissenting).

[9] 10 Rich. 2, ch. 1 (1386).

[10] *See, e.g.*, Statute of Wales, 34 & 35 Hen. 8, ch. 26, §§ 119–120 (1542–1543) (authorizing Henry VIII to issue rules for governing Wales, including the power to levy taxes); 9 Geo. 3, ch. 8 (1769) (empowering certain harbor commissioners "to make such Bye-laws, Rules, Orders, and Regulations, as shall be found necessary for the Purposes in this Act . . . .").

[11] *See, e.g.*, 14 Geo. 3, ch. 19 (1774) (giving the King authority to reopen all or part of port of Boston); 14 Geo. 3, ch. 83 (1774) (authorizing the King to appoint council for governing Quebec with power to make ordinances, to avoid "delay and inconvenience").

[12] *See, e.g.*, 18 Geo. 3, ch. 13 (1778) (granting commissioners the power to make "Regulation, Provision, Matters" to quiet disorder, but providing that the regulations should not become effective until confirmed by Parliament); *see also* 9 Anne, ch. 21, § 17 (1710); 1 Geo., stat. 2, ch. 21, § 8 (1714); 27 Geo. 3, ch. 13, § 122 (1787); 33 Geo. 3, ch. 29, § 9 (1793) (all requiring the delegatees to lay before Parliament matters relating to finances); 31 Geo. 3, ch. 30 (1791) (requiring the King to lay before Parliament orders he was authorized to make with respect to the price of grain).

[13] *See, e.g.*, Act of May 4, 1798, ch. 38, § 2, 1 Stat. 555, 555–56; Act of May 6, 1796, ch. 21, § 4, 1 Stat. 461, 461; Act of Mar. 3, 1795, ch. 43, § 13, 1 Stat. 426, 429; Act of July 1, 1790, ch. 22, 1 Stat. 128. *See generally Chadha*, 103 S. Ct. at 2800 n.18 (White, J., dissenting); Sibbach v. Wilson, 312 U.S. 1, 15 n.17 (1941); A Motion for Leave to file Amici Curiae Brief, and the Brief Amici Curiae of The Honorable Charles Pashayan, Jr., Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983) (brief for consolidated case, United States House of Representatives v. FTC).

[14] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property, belonging to the United States . . . ." U.S. Const. art. IV, § 3, cl. 2.

> tory, all the laws which shall be made, and shall from time to time, report the same to the President of the United States, *to be laid before Congress; which, if disapproved of by Congress, shall thenceforth be of no force.*[15]

Although the statutory requirements vary, typically under the laying procedure Congress delegates authority to an agent to perform some legislative act, subject to the condition that the act will not assume the force of law until after a certain period of time during which the agent presents his proposed action to Congress. During the post-presentment period, Congress may disapprove of the proposal by passing a law (to be presented to the President), which would nullify or amend the proposed action. Without congressional action, the proposal becomes law.[16]

The modern legislative veto evolved from this laying procedure. The congressional veto, however, differs from the laying procedure in that Congress expresses its disapproval of a delegatee's proposal without the formal passage of a second piece of legislation. Historically, congressional veto provisions have lacked uniformity. Statutes may require that executive proposals be approved by Congress before they can be implemented, or they may provide that any such proposals would become effective unless specifically disapproved by Congress within a designated period.[17] Some statutes authorize either the Senate or the House of Representatives, acting alone, to reject proposals.[18] Other statutes require that both Houses grant approval or

[15] Act of Mar. 26, 1804, ch. 38, § 4, 2 Stat. 283, 284 (emphasis added).

[16] *See, e.g.*, Act of June 19, 1934, ch. 651, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1976)) (Federal Rules of Civil Procedure prescribed by the Supreme Court shall not take effect until the expiration of ninety days after they have been reported to Congress). In Sibbach v. Wilson, 312 U.S. 1, 15–16 (1941) (footnote omitted), the Court noted that:

> in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.
>
> The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose.

[17] *See, e.g.*, Trade Expansion Act of 1962, Pub. L. No. 87-794, § 351, 76 Stat. 872, 899 (codified at 19 U.S.C. § 1981(a) (1982)) (tariff or duty recommended by the International Trade Commission may be imposed by concurrent resolution of approval); International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 211(a), 90 Stat. 729, 743 (codified as amended at 22 U.S.C. 2776(b)(1) (Supp. V 1981)) (President's letter of offer to sell major defense equipment may be disapproved by concurrent resolution); Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93-577, § 12, 88 Stat. 1878, 1892–93 (codified at 42 U.S.C. § 5911 (1976)) (rules or orders proposed by the President concerning allocation or acquisition of essential materials may be disapproved by a resolution of either House).

[18] *See, e.g.*, Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, § 201(1), 90 Stat. 303, 309 (codified at 10 U.S.C. § 7422(c)(2)(C) (1982)) (President's extension of production period for naval petroleum reserves may be disapproved by resolution of either House); Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 43(f)(3), 92 Stat. 1705, 1752 (codified at 49 U.S.C. § 1552(f)(3) (Supp. V 1981)) (rules or regulations governing employee protection program may be disapproved by a resolution of either House).

pass a disapproval measure.[19] A number of statutes, however, allow affirmation or rejection merely by committee action.[20]

The types of measures that may be used by Congress to express its approval or disapproval also differ. Quite often, a simple resolution of either House is sufficient.[21] Many laws provide that a concurrent resolution of approval or disapproval must be employed.[22] A few congressional veto acts in recent years have required that both Houses pass a joint resolution.[23]

Typically, a legislative veto provision is included in a statute as part of a compromise between the executive and legislative branches whereby the executive is delegated authority, the exercise of which is subject to a form of congressional approval.[24]

[19] *See, e.g.*, International Navigational Rules Act of 1977, Pub. L. No. 95-75, § 3(d), 91 Stat. 308, 308–09 (codified at 33 U.S.C. § 1602(d) (Supp. V 1981)) (presidential proclamation of International Regulations for Preventing Collisions at Sea may be disapproved by concurrent resolution); Federal Civil Defense Act of 1950, Pub. L. No. 81-920, § 201(g), 64 Stat. 1245, 1248 (codified at 50 U.S.C. app. § 2281(g) (Supp. V 1981)) (interstate civil defense compacts may be disapproved by concurrent resolution).

[20] *See, e.g.*, Futures Trading Act of 1978, Pub. L. No. 95-405, § 26, 92 Stat. 865, 877 (codified at 7 U.S.C. § 16(a) (1982)) (two-committee approval of any plan of fees developed by the Commodity Futures Trading Commission to cover the estimated cost of regulating transactions); Act of Sept. 5, 1962, Pub. L. No. 87-639, § 1, 76 Stat. 438 (codified at 16 U.S.C. § 1009 (1982)) (one committee of either House may direct the making of investigations, surveys, and reports for flood prevention).

[21] *See, e.g.*, Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, § 3(a), 84 Stat. 1946, 1949 (codified at 5 U.S.C. § 5305(m) (1982)) (President's alternative plan for federal pay adjustment may be disapproved by resolution of either House).

[22] *See, e.g.*, International Security Assistance Act of 1977, Pub. L. No. 95-92, § 16, 91 Stat. 614, 622 (codified at 22 U.S.C. § 2753(d)(2) (Supp. V 1981)) (except in a presidentially certified emergency, Congress by concurrent resolution may disapprove of certain transfers of defense equipment or services); Energy Security Act, Pub. L. No. 96-294, § 129(a)(1), 94 Stat. 611, 652 (1980) (codified at 42 U.S.C. § 8725(a)(1) (Supp. V 1981)) (amendments substantially altering the use of funds under the comprehensive strategy of the Synthetic Fuels Corporation must be approved by concurrent resolution).

[23] *See, e.g.*, Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 1326(a), 94 Stat. 2371, 2488 (1980) (codified at 16 U.S.C. § 3213(a) (1982)) (approval by joint resolution of withdrawals of public lands covering more than 5000 acres in the aggregate); Crude Oil Windfall Profits Tax Act of 1980, Pub. L. No. 96-223, § 402, 94 Stat. 229, 301 (codified at 19 U.S.C. § 1862(e) (1982)) (disapproval by joint resolution of a presidential action to adjust imports of petroleum or petroleum products); Education Amendments of 1980, Pub. L. No. 96-374, § 248, 94 Stat. 1367, 1389 (codified at 20 U.S.C. § 1047(g) (Supp. V 1981)) (approval by joint resolution of any design for a national periodical system).

[24]

> Typically the way the device has come into being is that Congress and the President reach an agreement that the executive will be granted a specific power, which would not exist except for the enactment of the law, and Congress ties a limitation to that delegation—that the executive decision will be subject to a form of congressional nullification.

129 CONG. REC. H4824 (daily ed. June 29, 1983) (statement of Rep. Moakley (D-Mass.)).

A recent commentator has described the mechanics of a veto provision:

> [The legislative veto] enables Congress, by action short of enactment of new legislation, to preclude implementation of proposed executive or administrative actions which have been advanced pursuant to statutory authority . . . . The congressional veto customarily takes effect in the following manner. Congress enacts a statute, either signed by the President or passed over his veto, requiring implementation by the executive or an administrative agency. Pursuant to a delegation of authority in the enabling statute, an affected agency must submit to Congress whatever executive orders, rules, regulations or directives it proposes to implement the stated congressional policy. If at the expiration of a specified time period, usually thirty to sixty days, no disapproval action is taken by Congress, the proposed action becomes effective.[25]

The resolutions of approval or disapproval cannot be amended in committee or on the floor.[26] This characteristic, along with the mandated time period within which Congress must consider the issue, permits a large and diversified legislature to make judgments efficiently.

The congressional veto was first employed in the government reorganization acts in the first half of this century.[27] More than 200 laws containing over 350 separate congressional veto provisions have been enacted in the last half-century.[28] Although legislative veto provisions were adopted sparingly in earlier years, the number of acts containing such provisions increased markedly during the 1970's.[29] For example, in the Ninety-sixth Congress alone, legislative veto provisions were included in thirty-three statutes.[30]

Congress has been modest in its exercise of the veto. Since 1932, Congress has passed approximately 125 resolutions over-

[25] Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 323–24 (1977).

[26] *See, e.g.*, Energy Security Act, Pub. L. No. 96-294, § 129, 94 Stat. 611, 652 (1980) (codified at 42 U.S.C. § 8725 (Supp. V 1981)). See also the discussion in HOUSE COMM. ON RULES, EXPORT ADMINISTRATION AMENDMENTS OF 1983, H.R. REP. NO. 257, 98th Cong., 1st Sess. 3–4 (1983) (questioning such limitations).

[27] *See supra* note 7 and accompanying text. For a discussion of the development of the modern legislative veto see *Chadha*, 103 S. Ct. at 2793–96 (White, J., dissenting).

[28] C. Norton, Data on and Examples of Congressional Disapproval of Rules and Regulations, Congressional Research Service Report (July 8, 1983).

[29] *Id.*

[30] 127 CONG. REC. S2575 (daily ed. Mar. 23, 1982) (list of congressional veto laws enacted by the 96th Congress).

turning presidential or administrative agency actions.[31] Of these, sixty-six have been rejections of presidential requests under the 1974 Congressional Budget and Impoundment Control Act[32] for deferrals of spending authority, and twenty-four have been disapprovals of executive reorganization plans.[33]

The creation and use of the veto mechanism was a direct response to increasingly broad congressional delegations of authority to administrative agencies. The delegation of congressional power to the heads of territories by the Congress of 1804[34] can be seen as a decision by that Congress that the day-to-day administration of the nation's territories and the concomitant requirement of rulemaking would have been an inefficient use of its limited time. Similarly, the burdens inherent in governing a complex industrialized society have led Congress to increase its delegation of rulemaking authority to the heads of administrative agencies.[35] As Congress has increasingly resorted to statutes delegating authority, so has it attempted to preserve the legislative branch's role as the supreme lawmaking and policy-directing body of government through the legislative veto.

By declaring all uses of the legislative veto constitutionally invalid, *Chadha* dismantled this highly evolved political system.[36] The specific question in *Chadha* was the constitutional validity of section 244(c)(2) of the Immigration and Nationality Act, which authorizes either House of Congress, by resolution, to invalidate the decision of the executive branch (pursuant to authority delegated by Congress to the Attorney General) to allow a particular deportable alien to remain in the United States.

The Court held the congressional veto provision in section 244(c)(2) to be unconstitutional.[37] The Court's rationale was based upon the constitutional design for the separation of powers.[38] The Court reasoned that "the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in

[31] Norton, *supra* note 28.

[32] Pub. L. No. 93-344, § 1013, 88 Stat. 297, 334–35 (codified at 2 U.S.C. § 684 (1982)).

[33] Norton, *supra* note 28.

[34] *See supra* note 15 and accompanying text.

[35] *See* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940); *see also infra* text accompanying notes 97–103.

[36] *See supra* note 3 and accompanying text.

[37] *Chadha*, 103 S. Ct. at 2788.

[38] *Id.* at 2781–84.

accord with a single, finely wrought and exhaustively considered, procedure."[39]

The Court considered the action of the House of Representatives under section 244(c)(2) to be essentially legislative in purpose and effect.[40] The challenged resolution, therefore, was subject to the procedural requirements of Article I, Sections 1, 7, for legislative action: passage by a majority of both Houses and presentment to the President.[41]

The Court concluded its opinion by forecasting the negative effects its decision would have upon the efficiency of government:

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.[42]

The Supreme Court may consider the legislative procedure to be "clumsy" and "inefficient," but that perceived awkwardness results only when strict constitutional formalism is forced upon the structure of the government. The legislative process has always included procedures that serve efficiency and preserve the basic principles upon which the Constitution is founded: the principles of accountability and representative legislation. The legislative veto, as evolved from the laying procedure, reinforces those principles within the framework of the Constitution.

II. The Proposed Amendment

On July 25, 1983, S.J. Res. 135 was introduced in the Senate.[43] This joint resolution would amend the Constitution specifically

[39] *Id.* at 2784.
[40] *Id.* at 2785–86.
[41] *Id.* at 2787.
[42] *Id.* at 2788 (citations omitted).
[43] S.J. Res. 135, 98th Cong., 1st Sess., 129 Cong. Rec. S11,015, S11,017 (daily ed. July 27, 1983). The amendment was referred to the Senate Committee on the Judiciary.

to permit the use of the congressional veto. The proposed amendment would restore the balance of power that existed among the branches of government prior to *Chadha*. The text of the amendment is concise.

The joint resolution states:

***Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission by the Congress:**

"ARTICLE—

"Section 1. Executive action under legislatively delegated authority may be subject to the approval of one or both Houses of Congress, without presentment to the President, if the legislation that authorizes the executive action so provides."

This amendment reinforces the full powers granted to Congress under the Necessary and Proper Clause.[44] Of this provision, Madison wrote in *The Federalist*:

> The sixth and last class [of provisions] consists of the several powers and provisions by which efficacy is given to all the rest.
>
> 1. "Of these the first is the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States."
>
> Few parts of the Constitution have been assailed with more intemperance than this; yet on a fair investigation of it, no part can appear more compleatly invulnerable. Without the *substance* of this power, the whole Constitution would be a dead letter.[45]

The proposed amendment explicitly permits Congress, in accordance with the broad grant of power in the Necessary and Proper Clause, to utilize a legislative procedure necessary "to respond to contemporary needs without losing sight of fundamental democratic principles."[46]

The first phrase of the amendment, "Executive action under legislatively delegated authority," encompasses only those ac-

[44] U.S. Const. art. I, § 8, cl. 18.
[45] The Federalist No. 44, at 302–03 (J. Madison) (J. Cooke ed. 1961) (emphasis original).
[46] *Chadha*, 103 S. Ct. at 2798 (White, J., dissenting).

tions taken to execute a law pursuant to a legislative delegation of authority. "Executive action" under this amendment includes both action and failure to act, whether by executive or independent agencies or by the President. Thus, if Congress appropriates funds and the President impounds those funds, the impoundment may be subject to the approval of Congress.

Under the separation of powers doctrine, Congress may not subject the constitutionally authorized powers of the executive branch to its legislative approval.[47] Constitutionally authorized executive action includes the power to pardon criminals[48] and the general administrative control of those executing the laws, including the power of removal of executive officers.[49] Furthermore, after Congress enacts a statute, the executive branch is constitutionally empowered to apply the law of that statute. In *Myers v United States*, the Supreme Court stated that "Article II grants to the President the executive power of the Government, . . . a conclusion confirmed by his obligation to take care that the laws be faithfully executed."[50]

Yet, unless Congress legislates, the executive generally will have no power to act. The authority to apply executive power and the manner in which the executive power may be applied are dictated by the statute itself. As Justice Holmes stated, "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."[51] It is the exercise of this power under the statute that may be subjected to Congress's approval. In his dissent in *Chadha*, Justice White pointed out, "*The Steel Seizure Case* resolved that the Article II mandate for the President to execute the law is a directive to enforce the law which Congress has written."[52] Under this amendment, as long as Congress does not interfere with or encroach upon the constitutional powers of the executive, Congress may condition its delegations of power through the legislative veto device.

[47] "The separation of powers doctrine has heretofore led to the invalidation of government action only when the challenged action violated some express provision in the Constitution." *Id.* at 2809 (White, J., dissenting); *see also id.* at 2790 (Powell, J., concurring).

[48] U.S. CONST. art. II, § 2, cl. 1; *see also* Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867); United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833).

[49] *See* Myers v. United States, 272 U.S. 52 (1926).

[50] *Id.* at 163–64.

[51] *Id.* at 177 (Holmes, J., dissenting).

[52] 103 S. Ct. at 2809 (White, J., dissenting); *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

The amendment's phrase "may be subject to approval" envisions that Congress may choose, as it has in the past, what action it wishes to subject to approval. "Approval" may be demonstrated by conditioning the action of the executive branch upon affirmative congressional acceptance, such as the passage of a simple resolution. "Approval" could also be expressed by permitting executive action to become effective unless Congress passes a disapproval measure. Under this amendment, Congress may select whatever means it wishes to employ to express approval, as long as the procedure for approval is clearly delineated in the enabling act. The committee veto thus remains a viable option as a means of expressing approval.

The phrase "of one or both Houses of Congress" clearly permits a one-House veto. Furthermore, the one-House veto procedure is consistent with the bicameral requirement of the Constitution. A properly constructed legislative disapproval provision is not a veto by Congress of action that the executive branch is authorized to take, but rather is a rejection by Congress of a recommendation that the executive branch is authorized or directed to make. The executive action essentially is a proposal for legislation. As with other proposals for legislation, the disapproval of but a single House is all that is required to prevent its passage. Since approval is indicated by the failure of both Houses to veto the proposal, the one-House veto functionally is in harmony with the requirement of bicameral approval contained in the Constitution.[53]

The phrase "without presentment to the President" clearly allows all the veto mechanisms the Supreme Court struck down in *Chadha*. Under this amendment, the presentment requirement will have been fulfilled when the enabling legislation containing the veto provision passed Congress and was signed by the President or passed over his veto. This phrase would render moot the Supreme Court's more stringent interpretation of presentment.

There is a noteworthy parallel between legislation containing a legislative veto provision and legislation authorizing the appointment of officers of the federal government. If Congress by law vests the appointment of inferior officers in the President

[53] *See Chadha*, 103 S. Ct. at 2807–08 (White, J., dissenting).

alone, it may not, without further legislation, assert a power in the Senate to advise and consent to such appointments. But Congress can initially reserve such a power to the Senate.[54] Congress in this way has the constitutional power to choose to participate or not to participate in the appointment process.

Similarly, under the amendment, Congress—in a statute presented to the President and if necessary, passed over his veto—may authorize agencies to propose or recommend rules but retain for itself the power to disapprove any such rules and regulations. Such a provision would not subvert the President's veto power. Congress has simply determined the extent of its own participation under the broad scope of choice provided by this amendment and in keeping with the spirit of the Necessary and Proper Clause of the Constitution.[55]

The concluding phrase "if the legislation that authorizes the executive action so provides" requires that the approval mechanism be in the legislation enabling the executive branch to act. As before, Congress can decide whether to include a legislative veto procedure in a statute delegating authority. A post-hoc veto, however, cannot be applied to previously unlimited delegations of authority.[56]

This amendment permits Congress to utilize fully the congressional veto device. In effect, Congress will be permitted to proceed as it has in the past. The amendment simply gives the legislative veto the constitutional approval which the Supreme Court declared does not presently exist.

III. The Separation of Powers

The American system of government, under the Constitution, is premised upon the doctrine of separation of powers. While the Constitution distributes authority, it does not mandate absolute separation of power. Within this constitutional framework, the theory of separation of powers serves a dual purpose. First, the Constitution divides governmental power among the three branches in order to prevent abuses of power. Second, power is distributed among the three branches of governement

[54] U.S. Const. art. II, § 2, cl. 2.

[55] U.S. Const. art. I, § 8, cl. 18.

[56] On the other hand, Congress may amend the authorizing statute to provide for a legislative veto mechanism.

in order to provide for a more efficient government.[57] In short, the Framers established a blueprint for governing that would maximize both protection from governmental abuses and economy in governmental action. Because the legislative veto is an extension of the accountability and efficiency aspects of this doctrine, this amendment fully accords with the pre-existing constitutional framework. The *Chadha* decision, with its literal reading of the Article I requirements, has not altered or diluted the separation of powers rationale that has persuaded Congresses, for over fifty years, to adopt and utilize the legislative veto. By expressly providing for a legislative veto in the Constitution, this amendment reinforces that doctrine.

Montesquieu, in his famous exposition of the separation of powers doctrine in *The Spirit of Laws*, states that "[i]n every government there are three sorts of power: the legislative; the executive; . . . [and the judiciary]."[58] The Framers incorporated the principle of separation of powers into the Constitution by distributing authority among the three branches of government: Article I vests the legislative power in the Congress; Article II vests the executive power in the President; and Article III vests the judicial power in the Supreme Court and such inferior courts as the Congress may establish.

At the same time, the Framers did not intend for the distribution of authority among the three branches of the government to be an absolute separation of the three powers. In *The Federalist* No. 47, Madison maintained that the preservation of liberty does not require the total separation of the legislative, executive, and judiciary departments from each other. Madison began his discussion of separation of powers by stating a political maxim: "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[59] Madison then pointed out that Montesquieu viewed the British system and its characteristic principle of separation of powers as the model of political liberty. Yet, under that system of government, Madison wrote, "the legislative, executive and judiciary departments are by no means totally separate and distinct from each

[57] For a discussion of the efficiency aspects of the separation of powers principle, see Fisher, *The Efficiency Side of Separated Powers*, 5 J. Am. Stud. 113 (1971).

[58] C. Montesquieu, The Spirit of the Laws 151 (T. Nugent trans. 1949).

[59] The Federalist No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

other."[60] Madison continued, "[Montesquieu's meaning] can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."[61] In *The Federalist* No. 48, Madison further argued "that unless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained."[62]

Under the Constitution, there are no "watertight compartments"[63] of power.[64] Instead, there is an overlap of the three powers among the different branches of government. For example, the chief of the executive branch, the President, exercises legislative power when he vetoes acts of Congress[65] or recommends legislative proposals for action. He may also act on his judicial prerogative and pardon citizens found guilty of crimes.[66] Congress acts in an executive manner when the Senate participates in the process of appointment of executive officers of the government[67] and when it ratifies treaties negotiated by the executive branch.[68] Furthermore, the House of Representatives may initiate[69] and the Senate conduct the judicial process of impeachment.[70] The Constitution also makes Congress the judge of the election and qualification of its members.[71]

The authors of the Constitution believed that by separating the powers and distributing them among three branches of government, each branch would contain any tendency to usurp power by either of the other branches. They thus created a separation of powers to serve as a complete system of checks and balances that would restrain abuses by any branch of the

[60] *Id.* at 325.
[61] *Id.* at 325–26 (emphasis original).
[62] THE FEDERALIST No. 48, at 332 (J. Madison) (J. Cooke ed. 1961).
[63] Springer v. Phillipine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting).
[64] *See* Buckley v. Valeo, 424 U.S. 1 (1976), which stated that the Framers "saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Id.* at 121.
[65] U.S. CONST. art. I, § 7, cls. 2–3.
[66] U.S. CONST. art. II, § 2, cl. 1.
[67] U.S. CONST. art. II, § 2, cl. 2.
[68] *Id.*
[69] U.S. CONST. art. I, § 2, cl. 5.
[70] U.S. CONST. art. I, § 3, cl. 6.
[71] U.S. CONST. art. I, § 5, cl. 1; *see also* Kilbourne v. Thompson, 103 U.S. 168, 190 (1880).

government. As one modern commentator has observed, "[t]yranny or arbitrariness does not stem from blended power; it is more likely to stem from unchecked power."[72]

Madison wrote that if Congress should exercise powers not warranted under the Constitution, the "success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts . . . ."[73] The above quotation reveals that the Framers, in their day, identified the legislative branch as especially likely to encroach upon the powers of the coordinate branches. Yet, as one commentator has noted:

> The Framers' day . . . is not our day. The branch that now threatens to expand beyond its proper place, assert the proponents of the legislative veto, is the executive branch. Among other causes, the rapid growth of administrative agencies over the last half century has contributed to executive exercise of a wide array of powers that more traditionally lodged within the other two branches.[74]

This growth of power in the executive branch did not come in one day, but rather developed slowly in conjunction with the growth of the modern administrative state. The legislative veto enables Congress to reduce the concentration of power in the executive branch, in keeping with the intent of the Framers. As stated in *The Federalist*, "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."[75] The legislative veto empowers the legislative branch to counteract the ambition of the executive branch. The veto is a "means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the nation's lawmaker."[76]

"When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II."[77] The Article II executive functions respecting legislation, including the Section 3 duties of the President to "take Care that the Laws

[72] 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2:6, at 81 (2d ed. 1978).
[73] THE FEDERALIST No. 44, at 305 (J. Madison) (J. Cooke ed. 1961).
[74] Madin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 263 (1982).
[75] THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).
[76] *Chadha*, 103 S. Ct. at 2796 (White, J., dissenting).
[77] *Id.* at 2785.

be faithfully executed,"[78] are merely duties to execute "the laws consistent with the provisions therefor made by Congress."[79] The Supreme Court, in the past, has made it clear that the executive provisions of Article II primarily empower the President simply to carry out the laws enacted by Congress.[80] "The President's power, if any, to issue an order must stem either from an act of Congress or from the Constitution itself."[81] Moreover, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[82] This "power to execute the laws starts and ends with the laws Congress has enacted."[83]

In short, the President has nothing to execute unless legislation on that subject is passed by Congress or unless he is acting under his constitutional power as Commander in Chief, his power to grant pardons and reprieves, his power to receive ambassadors, or his power to make treaties. Under this amendment, "[u]nless Congress invades a power specifically granted to the President in the Constitution . . . , or fails to provide guidelines, no separation-of-powers problem arises from [a delegation of power with a legislative veto provision attached]."[84]

The legislative veto mechanism originates from the constitutional concept that Congress will be responsible for legislation. Legislative power is the authority to make laws.[85] One article described the characteristics of lawmaking:

> Several attributes of legislative authority may be deduced by reference to what is perhaps the core of Congress' powers—the authority to enact laws. The essence of law-making is the issuance of rules that have the substantive authority to regulate conduct or direct the operation of government. These rules take effect prospectively through standards of general application. They impose legal sanctions or constitute legal authorization to take certain actions. If not unconstitutional, laws bind courts as well as other branches of government . . . . If characterized by any single feature, legislative power involves the formulation of policy, as opposed to the actual implementation of law.[86]

[78] U.S. Const. art. II, § 3.
[79] Myers v. United States, 272 U.S. 52, 247 (1926) (Brandeis, J., dissenting).
[80] *See*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[81] *Id.* at 585.
[82] *Id.* at 587.
[83] *Id.* at 633 (Douglas, J., concurring).
[84] Atkins v. United States, 556 F.2d 1028, 1068 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).
[85] *See* Springer v. Philippine Islands, 277 U.S. 189, 209 (1928).
[86] Note, *Constitutionality of the Legislative Veto*, 13 Harv. J. on Legis. 593, 603–04 (1976) (footnotes omitted).

Agency rules and regulations—presently immunized by *Chadha* from direct congressional oversight—have similar attributes. In his dissent in *Chadha*, Justice White described the force of administrative rulemaking as equivalent to that of lawmaking.[87] Without the legislative veto device, the ability to control this administrative "lawmaking," especially by independent agencies, is greatly diminished.[88] The doctrine of separation of powers urgently requires the use of the legislative veto as a check upon the actions of these regulatory agencies.

The encroachment upon congressional lawmaking by such extra-legislative rulemaking should not be dismissed lightly. Senator Charles E. Grassley (R-Iowa) recently testified before Congress: "For every statute created by Congress in recent years the unelected bureaucracy has cranked out 18 regulations . . . . As noted by Murray Weidenbaum, former Chairman of the President's Council of Economic Advisors, federal regulations cost the U.S. economy about $126 billion annually."[89]

The legislative veto provides Congress with a direct means of oversight over the rules and regulations that are promulgated by executive bodies. This preserves the doctrine, under the theory of separation of powers, that no power go unchecked. It also preserves Congress's role as the lawmaking body under the Constitution.

[87]
> There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. The Administrative Procedure Act, 5 U.S.C. § 551(4) provides that a "rule" is an agency statement "designed to implement, interpret, or prescribe law or policy." When agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded "legislative effect." . . . These regulations bind courts and officers of the federal government, may pre-empt state law, . . . and grant rights to and impose obligations on the public. In sum, they have the force of law.

Chadha, 103 S. Ct. at 2802 (White, J., dissenting) (citations omitted).

[88]
> Congress, with the President's consent, characteristically empowers the agencies to issue regulations. These regulations have the force of law without the President's concurrence; nor can he veto them if he disagrees with the law that they make. The President's authority to control independent agency lawmaking, which on a day-to-day basis is non-existent, could not be affected by the existence or exercise of the legislative veto. To invalidate the device, which allows Congress to maintain some control over the law-making process, merely guarantees that the independent agencies, once created, for all practical purposes are a fourth branch of the government not subject to the direct control of either Congress or the executive branch.

Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556, 3558 (1983) (White, J., dissenting).

[89] *Legislative Veto: Hearings on the Supreme Court's Decision in* INS v. Chadha *Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) (in press) (statement of Sen. Grassley (R-Iowa)) [hereinafter cited as *Hearings*].

The legislative veto also establishes a check upon the abuse of power by administrative agencies. With the veto, Congress can force accountability while retaining the flexibility of action which the broad delegation of legislative authority permits. At the same time, Congress can continue to oversee the overall legislative policy of the government. The requirements of checks and balances dictate that Congress have the power to restrict abuses by the executive branch. With ineffective checks on that power, the executive branch certainly will attempt to achieve as great an authority as possible. Montesquieu wrote that "constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go . . . . To prevent this abuse, it is necessary from the very nature of things that power should be a check to power."[90] As Madison put it, "You must first enable the government to controul the governed; and, in the next place, oblige it to controul itself."[91]

The veto mechanism is a controlling device in the government. The use of a legislative veto makes the legislative branch rightfully accountable for the laws of the nation. This is important as citizens look to Congress for relief from the oppressive measures promulgated by the administrative arm of the government.

The legislative veto was rarely used before it was found constitutionally impermissible. This does not mean that the legislative veto was an ineffective instrument, serving only to salve Congress's conscience for its generous delegations of power. For, although it was rarely exercised, it does not follow that it would never be exercised. The very threat of this flex of legislative muscle often seemed to temper otherwise extreme action by the executive branch. For instance, a threatened use of the veto figured prominently in the recent debate on the sale of military equipment to Saudi Arabia.[92]

In addition to creating a system of checks and balances, power is distributed among the branches in order to provide for a more efficient government. In fact, the failure of the Articles of Confederation to provide an efficient, workable system of government led to the demands for a new constitution. Under the Articles of Confederation, power was vested only in the legislature.[93] The net effect was an inefficient government suffering from paralysis.[94] In constructing the new government, the Framers sought economy of government by division of authority and specialization of duties.

In *The Federalist*, Hamilton described the problems of governing under the Articles of Confederation[95] and then advocated an effective centralized government.[96] The Framers applied the separation of powers doctrine to create an efficient government.[97] They realized that complete separation of authority would only increase the problem of inefficiency.

The demands of governing in modern society have forced Congress to delegate authority and effectively intermix the functions of the three branches of government. As a result, the government does not have sharply defined boundaries around each of the coordinate branches. Instead, the boundaries between each branch are fixed "according to common sense and the inherent necessities of governmental co-ordination."[98] As Justice Jackson stated, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.

[90] C. MONTESQUIEU, *supra* note 58, at 150.

[91] THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

[92] *See* 127 CONG. REC. S12,171–204 (daily ed. Oct. 27, 1981).

[93] ARTICLES OF CONFEDERATION art. IX.

[94] *See* Fisher, *supra* note 57.

[95]

> In our case, the concurrence of thirteen distinct sovereign wills is requisite under the confederation to the complete execution of every important measure, that proceeds from the Union. It has happened as was to have been forseen. The measures of the Union have not been executed; and the delinquencies of the States have step by step matured themselves to an extreme; which has at length arrested all the wheels of the national government, and brought them to an awful stand.

THE FEDERALIST No. 15, at 98 (A. Hamilton) (J. Cooke ed. 1961).

[96]

> The result of these observations to an intelligent mind must be clearly this, that if it be possible at any rate to construct a Foederal Government capable of regulating the common concerns and preserving the general tranquility, it must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed constitution. It must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislation; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. . . . It must in short, possess all the means and have a right to resort to all the methods of executing the powers, with which it is entrusted, that are possessed and exercised by the governments of the particular States.

THE FEDERALIST No. 16, at 102–03 (A. Hamilton) (J. Cooke ed. 1961).

[97] *See* Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583 (1973). Miller states that "[e]fficiency was stressed as the principal reason for establishing an executive independent from the legislature by, among others, John Adams, Thomas Jefferson, John Jay and James Wilson." *Id.* at 588.

[98] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[99]

The benefit of coordination of effort by the three branches of government has led directly through the process of delegation of legislative powers to the creation of modern administrative government. "Delegation by Congress," said the Supreme Court in 1940, "has long been recognized as necessary in order that the exertion of legislative power does not become a futility . . . . [T]he burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues."[100]

Many advantages result from delegating the power to solve a complex problem to an administrative agency. An agency created to solve a problem possesses or obtains accurate and comprehensive knowledge of the problem. Its solutions exhibit a steady and systematic adherence to the same views concerning the problem. Decisionmaking with dispatch is facilitated. In short, specialization promotes efficiency that could not exist in the congressional bodies.

In the past fifty years, delegation to administrative agencies has increased dramatically. As Justice Jackson stated:

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decision apart. They also have begun to have important consequences on personal rights . . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.[101]

The delegation of rulemaking authority to agencies should be thought of as "unfinished law which the administrative body must complete before it is ready for application."[102] Congress

[99] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[100] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) (citations omitted) (upholding the constitutionality of independent agency rulemaking under congressional delegation).

[101] FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

[102] *Id.* at 485 (Jackson, J., dissenting) (footnote omitted). Jackson continued:

> In a very real sense the legislation does not bring to a close the making of the law. The Congress is not able or willing to finish the task of prescribing a positive and precise legal right or duty by eliminating all further choice between policies, expediences or conflicting guides, and so leaves the rounding out of its command to another, smaller and specialized agency. . . . Because Congress cannot predetermine the weight and effect of the presence or absence of all the competing considerations or conditions which should influence decisions regulating modern business, it attempts no more than to indicate generally the outside limits of the ultimate result and to set out matters about which the administrator must think when he is determining what within those confines the compulsion in a particular case is to be.

Id. at 485–86 (Jackson, J., dissenting).

can only provide broad outlines because it does not know what the agency will encounter. But Congress cannot, for that reason alone, lose all voice in the rulemaking that the agency performs. Therefore, Congress attaches a legislative veto provision to those delegations which it deems too broad to go unchecked.

The delegation of rulemaking authority results from cooperation between Congress and the President. The President usually will initiate the cooperative process by recommending the establishment of an agency or the expansion of the authority of an existing agency in order to handle a specific problem. Members of the President's staff will then meet with their congressional counterparts to reach a compromise on the details of the legislation.

Without a veto provision in the enabling legislation, this cooperation between the President and Congress often ends with the passage of the enabling statute. On the other hand, the cooperation between the executive and legislative branches of government does not end with the passage of a statute containing a veto provision. Rather, the cooperation continues when the executive branch presents to Congress its recommendations under the statute. The requirement of congressional concurrence will lead to continued cooperation and will "have a powerful, though in general a silent operation."[103] Moreover, the inclusion of a legislative veto provision serves as an excellent check on partisanship in the delegatees.

Just as the executive is made more cooperative by the congressional checks in the appointment process, so the executive will be made more cooperative by a congressional veto provision in the rulemaking process. As Hamilton pointed out in *The Federalist* No. 76:

> It will readily be comprehended, that a man, who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and indepen-

[103] THE FEDERALIST No. 76, at 513 (A. Hamilton) (J. Cooke ed. 1961) (discussing advice and consent of Senate in the appointment process).

> dent body; and that body an entire branch of the Legislature. The possibility of rejection would be a strong motive to care in proposing.[104]

In this way, the veto works to produce the best proposals for regulation from the administrative bodies.

With a legislative veto, Congress can delegate without losing its voice in the delegated matter and can at the same time approach a problem without becoming overburdened by the weight of information generated while researching the problem. For example, Congress may not have much information about the technicalities of providing for clean water or a safe workplace at the time it passes authorizing legislation. The delegatee agency, however, develops that information through adjudication on a case-by-case basis or through hearings specifically convened to develop the expertise required to write the regulations to implement the statutes Congress enacts. The veto process permits Congress to draw on the developed expertise of the delegatee agency when the proposed regulations are presented to Congress. With a legislative veto provision, Congress gets the benefits of delegation as well as the continued oversight of the delegatee's exercise of delegated legislative authority.

In addition to controlling the use of delegated legislative power by another arm of the government, the legislative veto enhances the efficiency of the congressional branch of the government. The legislative veto procedure often promotes better-informed deliberation than the regular legislative process. "Under the legislative veto procedure, members of Congress act in the presence of specific and contemporary facts about a pending administrative proposal. Debates are often sharply focused and carefully considered."[105] Recent examples of more extensive deliberation by Congress include the debates on the sale of nuclear fuel to India in 1980,[106] on the sale of military equipment to Saudi Arabia in 1981,[107] and on the used-car rule promulgated by the Federal Trade Commission in 1982.[108]

Efficiency in government militates against permitting agency regulations to go into effect only to be revoked or replaced by later congressional actions. The inconsistency and uncertainty

[104] *Id.*

[105] *Hearings*, *supra* note 89 (statement of Louis Fisher, Congressional Research Service).

[106] *See* 126 CONG. REC. S13,249–88 (daily ed. Sept. 24, 1980).

[107] *See* 127 CONG. REC. S12,171–204 (daily ed. Oct. 27, 1981).

[108] *See* 128 CONG. REC. S5380–402 (daily ed. May 18, 1982).

this would create for those governed by the regulations would be devastating. Such unsound governing most assuredly would burden the commerce of the nation.

The congressional veto ensures that the delegated power is exercised as Congress intended. Yet it does add another level to the legislative process, a layer that causes delay. This would seem to militate against any efficiencies Congress was seeking when it delegated authority in the first place. The delay, however, in practice only slightly expands the legislative process. The standard period for approval, thirty or sixty days, does not cause excessive delays. Indeed, the additional time for approval is relatively short compared to the time required for passage of a bill that would alter or eviscerate a regulation promulgated by an agency.[109]

Subjecting the expert decisionmaking of an agency to congressional review is also necessary in order to maintain public support for the agency's policies. The congressional process allows for an interaction between what the regulator proposes and what the American people, speaking through Congress, are willing to support. Without a blend of those two, no strong policy may ever be carried out.

For the private individual, the legislative veto procedure is "among the simplest and most direct methods of introducing accountability to the federal regulatory structures and enhancing Congressional responsiveness to the public's demands for sensible government."[110] For example, small businesses do not have the time or the resources to work directly with regulatory agencies or even to go to court to challenge unfair or inequitable regulations. With a legislative veto procedure, "the small business owner could take his case directly to his senators or representative."[111] Congress would then be able to correct any regulatory excesses evidenced by the complaint of the small business owner. This reinforces Congress's role as the supreme legislative body of government.

[109] For example, in 1973 the Department of Transportation promulgated its unpopular regulation requiring seatbelt interlock systems in all new automobiles. 38 Fed. Reg. 16,072 (1973) (amending 49 C.F.R. § 571.208 (1973)). Despite overwhelming opposition to the regulation, it took Congress more than a year after the regulation took effect to reverse it by legislation. *See* Motor Vehicles and School Bus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1470, 1482 (codified at 15 U.S.C. § 1410b (1976)).

[110] *Hearings*, *supra* note 89 (statement of James McKevitt, Director of Fed. Legislation, Nat'l Fed'n of Indep. Business).

[111] *Id.*

It may be argued that a legislative veto would inappropriately interfere with executive functions and would serve only to give Congress an improper influence over the executive branch. But Congress has some power of interference and influence without the legislative veto.[112] The legislative veto, however, provides a much more effective and direct technique to control the exercise of delegated authority by the executive branch than do the other available alternatives, such as the threat of a bill to abolish an agency or restrict its jurisdiction. Furthermore, if what these critics mean by "influencing or interfering" with the executive is "restraining him," this is precisely what is intended.

Two commentators addressed the "problem" of congressional interference with the executive branch in this way:

> To argue that the veto is unconstitutional because it interferes with execution is to assume that oversight which interferes with execution can be distinguished from oversight which does not; in short, that there is a "proper" kind of congressional oversight which does not interfere and an "improper" kind which does. As the brief survey of Congress' oversight weapons demonstrates, such a distinction cannot be maintained. Basically, all oversight interferes with execution; indeed, it cannot avoid doing so. When Congress passes a piece of amendatory legislation, reduces an appropriation, conducts an investigation, formally or informally requires prior reporting, criticizes administrators on the floor or contacts them on behalf of constituents, it involves itself in the administrative process and interferes with what has been going on or what would go on if it had not stepped into the process.[113]

There is nothing "improper" about the legislative veto. Under this amendment, the executive branch becomes a party to the act when the President signs the enabling legislation and a member of the executive branch administers the law. These two conditions combine to preserve the integrity of the executive branch and spare needless interferences by the legislative branch. Congress will only intervene when necessary.

The legislative veto is a complex tool that has proven its benefits over the years. The proposed amendment is fully consonant with the spirit of the Constitution and the principles underlying that document. Congress will be able to continue to

[112] *See* Atkins v. United States, 556 F.2d 1028, 1068 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

[113] Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 492-93 (1962).

delegate power in order to achieve efficient solutions to the problems at hand. Congress, however, may retain a control over that delegated power. As the Supreme Court stated, without the legislative veto, governmental processes will be "clumsy, inefficient, even unworkable" with "obvious flaws of delay, untidiness, and potential for abuse."[114] This does not necessarily have to be so. The legislative veto that this amendment explicitly permits would change the Supreme Court's formulation of the legislative process to allow a more efficient, workable process.

IV. OTHER APPROACHES

Without passage of this constitutional amendment, Congress must resort to statutory mechanisms in order to overturn or preempt federal agency rules, to limit their impact, or to prevent or hinder their promulgation.[115] These statutory mechanisms include: (1) direct override or preemption of rules; (2) modification of agency jurisdiction; (3) limitations in agency authorizations and appropriations; (4) extra-agency prior consultation requirements; and (5) advance notification requirements. While each of these statutory alternatives gives Congress some check over the exercise of delegated authority, none of these devices has proven as effective as the legislative veto.

The most direct alternative to a legislative veto is a statutory override of the offending rule or action. This method ensures that the executive branch acts in accordance with Congress's intent. However, requiring Congress to enact a second piece of legislation in order to implement its intent is highly inefficient. Further legislation presents heavy demands on congressional resources, requires review and approval by the entire Congress, and must be signed by the President or his veto overridden. If the President chooses to veto this second bill, Congress could enforce the intent of its original act only by a two-thirds majority of both Houses. In addition, until the proposed legislation is adopted, a controversial agency rule remains in effect, in direct conflict with congressional intent.

Congressional experience during the Vietnam War demonstrated the difficulties involved in passing a second bill.

[114] *Chadha*, 103 S. Ct. at 2788.

[115] *See generally* Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto,"* 32 AD. L. REV. 667 (1980).

> The Vietnam war underscored the concern by Members of Congress that they might have to form extraordinary majorities in both Houses to control the President. Twice in 1973 Congress passed legislation to bring the war to a halt. Twice President Nixon vetoed these measures. On both occasions attempts in Congress to override the President were unsuccessful. The need to "enact a law" meant that the President could continue a war opposed by a majority in each House so long as he retained the support of a minority in a single chamber. Federal district judge Orrin Judd held that "It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized." It was precisely for that reason that Congress insisted on a concurrent resolution of disapproval in the War Powers Resolution of 1973.[116]

Even if Congress is able to enact corrective legislation, this probably will not occur until after the executive branch officials have acted or the agency rule has gone into effect. This creates further serious problems:

> Post hoc substantive revision of legislation, the only available corrective mechanism in the absence of post-enactment review, could have serious prejudicial consequences; if Congress retroactively tampered with a price control system after prices had been set, the economy could be damaged and private rights seriously impaired; if Congress rescinded the sale of arms to a foreign country, our relations with that country would be severely strained; and if Congress reshuffled the bureaucracy after a President's reorganization proposal had taken effect, the results could be chaotic.[117]

As a second alternative, Congress could pass a statute altering the jurisdiction of a regulatory agency or expanding the exemptions from its authority, thereby affecting both existing and anticipated rules. This mechanism, however, requires Congress to restructure an agency or its powers whenever congressional intent is ignored. As a result, Congress would rarely utilize this option and would more likely overlook the agency's transgression.

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[116] *Hearings*, *supra* note 89 (statement of Louis Fisher, Congressional Research Service) (quoting Holtzman v. Schlesinger, 361 F. Supp. 553, 565 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974)).

[117] Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 464 (1977) (footnotes omitted).

Congress may also attempt to influence executive action through the budget process by prohibiting expenditures for enforcement of particular rules or by revoking funding discretion for rulemaking activity. These limitations prevent an agency from promulgating or implementing a rule during the authorization or appropriation period. The effectiveness of such authorization or appropriation restraints is limited, however, because certain types of budget expenditures are largely immune from control: borrowing and contract authority (or "backdoor spending"); permanent authorizations or appropriations; expenditures for off-budget agencies; and carry-overs of unexpended funds.

Moreover, congressional reduction of a specific appropriation account may not generate sufficient pressure to compel the executive branch to implement a policy that it wishes to ignore. The impoundment controversy of the 1970's demonstrated the ineffectiveness of appropriations as a substitute for the legislative veto.[118]

A similar, but nonstatutory, control involves the prior approval by designated congressional committees of agency "reprogramming" of funds above a dollar threshold from one program to another.[119] The agency, however, can ignore the committee recommendation and spend the funds as appropriated in the lump-sum accounts. Generally, the agency will defer to the committee because it fears retribution in the form of budget cutbacks, line-itemization, or other sanctions.[120] As a result, this mechanism effectively acts as a committee veto. The informality of this procedure makes reprogramming a very dubious form of congressional control.

A fourth statutory mechanism would require agency consul-

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[118] *See id.*

[119] *See* Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 374 (1977).

[120] *Hearings*, *supra* note 89 (statement of Louis Fisher, Congressional Research Service). Fisher goes on to state a recent example of reprogramming:

> This type of legislative (or committee) veto operated this year when President Reagan wanted to reprogram $60 million to El Salvador. The administration honored the reprogramming procedure, touching base with the authorizing and appropriations committees to secure their support. In a reprogramming request a month ago submitted by the Commerce Department, agency officials sought approval from the Appropriations Committees to shift one million dollars to another program. Technically and legally they could have spent this money without consulting the committees and obtaining their approval, but a bureau official admitted that "whatever the particulars of the legalities might be, one ignores appropriations subcommittees at one's own peril."

Id. (footnotes omitted).

tation with or review by congressional committees or other agencies.[121] Such a procedure gives Congress only an indirect influence over proposals but has the salutary effect of broadening the agency's perspective during the decisionmaking process.

A fifth mechanism, which is similar to the consultation and review provisions, would require an agency to notify Congress or the appropriate congressional committee regarding proposed or final rules, usually within a specified period (e.g., thirty days) before the rules become effective.[122] While such a provision enables committees to be more readily aware of forthcoming regulations and might spur negotiations between Congress and the agency prior to the effective date of the regulation, this mechanism also gives Congress only an indirect role in the rulemaking process. After the *Chadha* decision, both the advance notice and the consultation and review requirements could be used to disapprove a regulation only in conjunction with a joint resolution of Congress. Thus, Congress would have to produce a super-majority vote of both Houses, if faced with a President's veto, in order to invalidate an offending agency proposal or regulation. This is an extraordinary requirement for Congress to meet in order to get an agency to act as it intended.

Many nonstatutory controls are also available to Congress. A congressional committee could explore the matter in a public hearing. Congress could mandate specialized committee staff

[121] *See, e.g.*, Federal-Aid Highway Act of 1976, Pub. L. No. 94-280, § 208(b), 90 Stat. 425, 454–55 (codified at 23 U.S.C. § 402 note (1976)) (prohibiting the Secretary of Transportation from enforcing any uniform safety standards which he promulgates until he conducts an evaluation of their adequacy and appropriateness and reports his findings to Congress); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 202(b), 90 Stat. 31, 35 (codified at 49 U.S.C. § 1(5) (1976)) (requiring the Interstate Commerce Commission to solicit and consider the recommendations of the Attorney General and the Federal Trade Commission in establishing rules to determine "market dominance").

[122] *See, e.g.*, Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 5(b), 89 Stat. 773, 794 (codified at 20 U.S.C. § 1411 note (1976)) (the Commissioner of Education must submit for review and comment any proposed regulations concerning the classification of children with special learning disabilities to Congress at least fifteen days before their publication in the Federal Register); Foreign Relations Authorization Act, Fiscal Year 1976, Pub. L. No. 94-141, § 406, 89 Stat. 756, 770–71 (1975) (codified at 22 U.S.C. § 2666 (1976)) (regulations by the Secretary of State authorizing security officers to carry firearms must be transmitted to Congress twenty days before the date on which such regulations take effect); Air Transportation Security Act of 1974, Pub. L. No. 93-366, § 315(a), 88 Stat. 409, 415 (codified at 49 U.S.C. § 1356(a) (1976)) (the Administrator of the Federal Aviation Administration, unless he determines that an emergency exists, must notify Congress of any changes in passenger screening regulations at least thirty days before such changes become effective).

and General Accounting Office examinations. Congress also could establish select committees and specialized subcommittees to oversee agency rulemaking and enforcement. Committee reports, especially those reports accompanying authorizations and appropriations, may be used to advocate agency reconsideration of particular rules and their implementation. Congressmen could issue floor statements critical of specific rules or agency enforcement procedures. All of these devices, however, increase congressional workload without directly controlling executive action. As a result, the control that these mechanisms provide is inefficient and often ineffective.

Another course that has been recommended as an alternative to the legislative veto is a Legislated Regulatory Calendar.[123] The proposed calendar would consist of the following elements:

> 1. Each year Congress would receive a list of planned major regulatory proposals . . . , together with preliminary analyses of projected costs and benefits, from the Executive Branch and independent agencies . . . .
> 2. New Regulatory Authorization committees in the House and Senate . . . would consider the list, modify it as necessary, and then send it to the floor . . . .
> 3. The full Congress would be required to approve the Calendar before the agencies could proceed with their rulemakings . . . .[124]

The legislated calendar approach would require the establishment of regulatory authorization committees in the House and Senate. Each committee would consider the list of proposed regulations, modify it as necessary, and send the list with its recommendations to the floor for approval. This process would consume a tremendous amount of Congress's time and resources. Moreover, the Legislated Regulatory Calendar is an inflexible, indirect approach to legislative control of agencies.

Chadha also might revive interest in the Bumpers Amendment.[125] That bill would expand judicial review of agency action by removing any presumption in favor of agency action in determinations on questions of law and by imposing a more rigorous standard of judicial review for agency rulemakings.[126]

[123] *Hearings*, *supra* note 89 (statement of Robert Litan, former Energy and Regulation Economist, President's Council of Economic Advisors).

[124] *Id.*

[125] The latest version of the Bumpers Amendment is S. 1766, 98th Cong., 1st Sess., 129 CONG. REC. S11,587 (daily ed. Aug. 4, 1983).

[126] *Id.*; *cf. Chadha*, 103 S. Ct. at 2796 n.11 (White, J., dissenting) (suggesting a limited role for a redefined legislative veto as a guide to interpretation of congressional intent);

While this proposal would result in closer judicial scrutiny of agency rulemaking to ensure conformity with congressional intent, it also may substantially delay the administrative process. In addition, the role contemplated for the judiciary under this proposal is not entirely appropriate.[127]

For Congress, "the greatest difficulty that will be caused by the Supreme Court decision is a mushrooming of workload during a time when Congress is having difficulty coping as it is with its necessary legislative activities."[128] None of the alternatives suggested to date will enable Congress to review effectively executive proposals before they take effect. None permit a direct expression of congressional intent to control the exercise of delegated authority by the executive branch. Thus, the only effective response to the *Chadha* dilemma is the adoption of this amendment.

V. Conclusion

The Constitution of the United States has been in operation for nearly two hundred years. Although the Framers realized that the document was not perfect and provided means for its amendment, it has undergone surprisingly few changes. The Constitution has proven to be an enduring instrument. In the course of the growth of this nation, more than 6,900 constitutional amendments have been proposed, but only twenty-six have been adopted.[129]

Hearings, *supra* note 89 (statement of Sen. Grassley (R-Iowa)) ("[Another option is] a proposal to attach a presumption of invalidity to an agency action that is challenged before the courts where that action has been the subject of congressional resolution of disapproval.").

[127] *See* R. Natter & M. Rosenberg, Scope of Judicial Review of Agency Rulemaking: A Review and Assessment of Pending Congressional Proposals for Change, Congressional Research Service Report (Aug. 24, 1982).

> [S]ome question may be raised whether the role envisioned for the courts is appropriate. Under the proposed statutory scheme some argue, it is possible the courts will become enmeshed, willingly or otherwise, in substantive rationality review of informal rulemaking determinations. Such involvement carries the potential that the courts will engage in tasks that in administrative law have been considered both beyond their competence or legitimate sphere of concern.

Id. at 73.

[128] *Hearings*, *supra* note 89 (statement of Norman Ornstein, Professor of Politics, Catholic University).

[129] According to *Proposed Amendments to the Constitution of the United States Introduced in Congress from the 88th Congress, 1st Session Through the 90th Congress, Introduced in Congress from the 88th Congress, 1st Session Through the 90th Congress*, 6940 proposals to amend the Constitution had been offered as of the end of 1968. Since then, there has been no reduction in the number of proposals.

An amendment to the Constitution is never to be treated lightly. Nevertheless, the *Chadha* decision seriously weakens the government's ability to function as an accountable, harmonious whole. Therefore, even though amending the Constitution will take time, it is a necessary endeavor. As Hamilton stated, "'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE."[130]

The *Chadha* case presents a situation that requires an amendment to the Constitution. The legislative veto "is 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."[131]

The words of Justice White in his dissent in *Chadha* best describe the role of the legislative veto:

> The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a 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 choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.[132]

As Thomas Jefferson predicted, the people "will see and amend the error in our Constitution, which makes any branch independent of the nation."[133] The *Chadha* decision establishes the administrative agencies of the government as an independent, unaccountable fourth branch. This amendment will correct that error.

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[130] The Federalist No. 82, at 553 (A. Hamilton) (J. Cooke ed. 1961) (emphasis original).

[131] *Chadha*, 103 S. Ct. at 2795 (White, J., dissenting).

[132] *Id.* at 2792–93 (White, J., dissenting).

[133] D. Malone, Jefferson, The President: Second Term, 1805–1809, 304–05 (1974) (questioning the degree to which the Constitution insulates the judiciary).