SUPREME COURT OF THE UNITED STATES

Nos. 80-1832, 80-2170 AND 80-2171

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

80-1832 *v.*

JAGDISH RAI CHADHA ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

80-2170 *v.*

IMMIGRATION AND NATURALIZATION SERVICE ET AL.

UNITED STATES SENATE, PETITIONER

80-2171 *v.*

IMMIGRATION AND NATURALIZATION SERVICE ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 1983]

JUSTICE POWELL, concurring in the judgment.

The Court's decision, based on the Presentment Clauses, Art. I, § 7, cl. 2 and 3, apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause. Congress has included the veto in literally hundreds

of statutes, dating back to the 1930s. Congress clearly views this procedure as essential to controlling the delegation of power to administrative agencies.[1] One reasonably may disagree with Congress' assessment of the veto's utility,[2] but the respect due its judgment as a coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide this case. In my view, the case may be decided on a narrower ground. When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers. Accordingly, I concur in the judgment.

I

A

The Framers perceived that "[t]he 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." The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison). Theirs was not a baseless fear. Under British rule, the colonies suffered the abuses of unchecked executive power that were attributed, at least popularly, to an hereditary monarchy. See Levi, Some As-

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[1] As JUSTICE WHITE's dissenting opinion explains, the legislative veto has been included in a wide variety of statutes, ranging from bills for executive reorganization to the War Powers Resolution. See *post*, at 3–9. Whether the veto complies with the Presentment Clauses may well turn on the particular context in which it is exercised, and I would be hesitant to conclude that every veto is unconstitutional on the basis of the unusual example presented by this litigation.

[2] See Martin, The Legislative Veto and The Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253 (1982); *Consumer Energy Council of America* v. *FERC*, —— U. S. App. D. C. ——, ——, 673 F. 2d 425, 475 (1982).

pects of Separation of Powers, 76 Colum. L. Rev. 369, 374 (1976); The Federalist No. 48. During the Confederation, the States reacted by removing power from the executive and placing it in the hands of elected legislators. But many legislators proved to be little better than the Crown. "The supremacy of legislatures came to be recognized as the supremacy of faction and the tyranny of shifting majorities. The legislatures confiscated property, erected paper money schemes, [and] suspended the ordinary means of collecting debts." Levi, 76 Colum. L. Rev., at 374–375.

One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures. The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the "tyranny of shifting majorities." Jefferson observed that members of the General Assembly in his native Virginia had not been prevented from assuming judicial power, and "'[t]hey have accordingly *in many* instances *decided rights* which should have been left to *judiciary controversy.*'"[3] The Federalist No. 48, p. 336 (J. Cooke ed. 1961) (emphasis in original) (quoting T. Jefferson, Notes on the State of Virginia 196 (London edition 1787)). The same concern also was evident in the reports of the Council of the Censors, a body that was charged with determining whether the Pennsylva-

[3]Jefferson later questioned the degree to which the Constitution insulates the judiciary. See D. Malone, Jefferson the President: Second Term, 1805–1809, pp. 304–305 (1974). In response to Chief Justice Marshall's rulings during Aaron Burr's trial, Jefferson stated that the judiciary had favored Burr—whom Jefferson viewed as clearly guilty of treason—at the expense of the country. He predicted that the people "will see and amend the error in our Constitution, which makes any branch independent of the nation." *Id.*, at 305 (quoting Jefferson's letter to William Giles). The very controversy that attended Burr's trial, however, demonstrates the wisdom in providing a neutral forum, removed from political pressure, for the determination of one person's rights.

nia Legislature had complied with the state constitution. The Council found that during this period "[t]he constitutional trial by jury had been violated; and powers assumed, which had not been delegated by the Constitution. . . . [C]ases belonging to the judiciary department, frequently [had been] drawn within legislative cognizance and determination." *Id.*, at 336–337.

It was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches. Their concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person was expressed not only in this general allocation of power, but also in more specific provisions, such as the Bill of Attainder Clause, Art. I, § 9, cl. 3. As the Court recognized in *United States* v. *Brown*, 381 U. S. 437, 442 (1965), "the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." This Clause, and the separation of powers doctrine generally, reflect the Framer's concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power.

B

The Constitution does not establish three branches with precisely defined boundaries. See *Buckley* v. *Valeo*, 424 U. S. 1, 121 (1976) (*per curiam*). Rather, as Justice Jackson wrote, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (concurring opinion). The Court thus has been mindful that the boundaries between each branch should be fixed "according to common

sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U. S. 394, 406 (1928). But where one branch has impaired or sought to assume a power central to another branch, the Court has not hesitated to enforce the doctrine. See *Buckley* v. *Valeo*, *supra*, at 123.

Functionally, the doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 433 (1977); *United States* v. *Nixon*, 418 U. S. 683 (1974). Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, at 587 (1952); *Springer* v. *Philippine Islands*, 277 U. S. 189, 203 (1928). This case presents the latter situation.[4]

II

Before considering whether Congress impermissibly assumed a judicial function, it is helpful to recount briefly Congress' actions. Jagdish Rai Chadha, a citizen of Kenya, stayed in this country after his student visa expired. Although he was scheduled to be deported, he requested the Immigration and Naturalization Service to suspend his deportation because he met the statutory criteria for permanent residence in this country. After a hearing,[5] the Service

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[4] The House and the Senate argue that the legislative veto does not prevent the executive from exercising its constitutionally assigned function. Even assuming this argument is correct, it does not address the concern that the Congress is exercising unchecked judicial power at the expense of individual liberties. It was precisely to prevent such arbitrary action that the Framers adopted the doctrine of separation of powers. See, *e. g.*, *Myers* v. *United States*, 272 U. S. 52, 293 (1926) (Brandeis, J., dissenting).

[5] The Immigration and Naturalization Service, a division of the Department of Justice, administers the Immigration and Naturalization Act on behalf of the Attorney General, who has primary responsiblity for the Act's

granted Chadha's request and sent—as required by the reservation of the veto right—a report of its action to Congress.

In addition to the report on Chadha, Congress had before it the names of 339 other persons whose deportations also had been suspended by the Service. The House Committee on the Judiciary decided that six of these persons, including Chadha, should not be allowed to remain in this country. Accordingly, it submitted a resolution to the House, which stated simply that "the House of Representatives does not approve the granting of permanent residence in the United States to the aliens hereinafter named." 121 Cong. Rec. 40800 (1975). The resolution was not distributed prior to the vote,[6] but the Chairman of the Judiciary Committee explained to the House:

> "It was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet [the] statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended." *Ibid.* (remarks of Rep. Eilberg).

Without further explanation and without a recorded vote, the House rejected the Service's determination that these six people met the statutory criteria.

On its face, the House's action appears clearly adjudica-

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enforcement. See 8 U. S. C. § 1103. The Act establishes a detailed administrative procedure for determining when a specific person is to be deported, see § 1252(b), and provides for judicial review of this decision, see § 1105(a); *Foti* v. *INS*, 375 U. S. 217 (1963).

[6] Normally the House would have distributed the resolution before acting on it, see 121 Cong. Rec. 40800 (1975), but the statute providing for the legislative veto limits the time in which Congress may veto the Service's determination that deportation should be suspended. See 8 U. S. C. § 1254(c)(2). In this case Congress had Chadha's report before it for approximately a year and a half, but failed to act on it until three days before the end of the limitations period. Accordingly, it was required to abandon its normal procedures for considering resolutions, thereby increasing the danger of arbitrary and ill-considered action.

tory.[5] The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches. Even if the House did not make a *de novo* determination, but simply reviewed the Immigration and Naturalization Service's findings, it still assumed a function ordinarily entrusted to the federal courts.[6] See 5 U. S. C. § 704 (providing generally for judicial review of final agency action); cf. *Foti* v. *INS*, 375 U. S. 217 (1963) (holding that

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[5] The Court concludes that Congress' action was legislative in character because each branch "presumptively act[s] within its assigned sphere." *Ante*, at 31. The Court's presumption provides a useful starting point, but does not conclude the inquiry. Nor does the fact that the House's action alters an individual's legal status indicate, as the Court reasons, see *ante*, at 32, that the action is legislative rather than adjudicative in nature. In determining whether one branch unconstitutionally has assumed a power central to another branch, the traditional characterization of the assumed power as legislative, executive, or judicial may provide some guidance. See *Springer* v. *Philippine Islands*, 277 U. S. 189, 203 (1928). But reasonable minds may disagree over the character of an act and the more helpful inquiry, in my view, is whether the act in question raises the dangers the Framers sought to avoid.

[6] The Court reasons in response to this argument that the one-house veto exercised in this case was not judicial in nature because the decision of the Immigration and Naturalization Service did not present a justiciable issue that could have been reviewed by a court on appeal. See *ante*, at 36–37, n. 21. The Court notes that since the administrative agency decided the case in favor of Chadha, there was no aggrieved party who could appeal. Reliance by the Court on this fact misses the point. Even if review of the particular decision to suspend deportation is not committed to the courts, the House of Representatives assumed a function that generally is entrusted to an impartial tribunal. In my view, the legislative branch in effect acted as an appellate court by overruling the Service's application of established law to Chadha. And unlike a court or an administrative agency, it did not provide Chadha with the right to counsel or a hearing before acting. Although the parallel is not entirely complete, the effect on Chadha's personal rights would not have been different in principle had he been acquitted of a federal crime and thereafter found by one House of Congress to have been guilty.

courts of appeals have jurisdiction to review INS decisions denying suspension of deportation). Where, as here, Congress has exercised a power "that cannot possibly be regarded as merely in aid of the legislative function of Congress," *Buckley* v. *Valeo*, 424 U. S., at 138, the decisions of this Court have held that Congress impermissibly assumed a function that the Constitution entrusted to another branch, see *id.*, at 138–141; cf. *Springer* v. *Philippine Islands*, 277 U. S., at 202.

The impropriety of the House's assumption of this function is confirmed by the fact that its action raises the very danger the Framers sought to avoid—the exercise of unchecked power. In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country.[9] Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency[10] adjudicates individual rights. The only effective

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[9] When Congress grants particular individuals relief or benefits under its spending power, the danger of oppressive action that the separation of powers was designed to avoid is not implicated. Similarly, Congress may authorize the admission of individual aliens by special acts, but it does not follow that Congress unilaterally may make a judgment that a particular alien has no legal right to remain in this country. See Memorandum Concerning H. R. 9766 Entitled "An Act to Direct the Deportation of Harry Renton Bridges," reprinted in S. Rep. No. 2031, pt. 1, 76th Cong., 3d Sess., 8 (1940). As Attorney General Robert Jackson remarked, such a practice "would be an historical departure from an unbroken American practice and tradition." S. Rep. No. 2031, *supra*, at 9.

[10] We have recognized that independent regulatory agencies and departments of the Executive Branch often exercise authority that is "judicial in nature." *Buckley* v. *Valeo*, 424 U. S. 1, 140–141 (1976). This function, however, forms part of the agencies' execution of public law and is subject to the procedural safeguards, including judicial review, provided by the

constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority."

Chief Justice Marshall observed: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules would seem to be the duty of other departments." *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810). In my view, when Congress undertook to apply its rules to Chadha, it exceeded the scope of its constitutionally prescribed authority. I would not reach the broader question whether legislative vetoes are invalid under the Presentment Clauses.

Administrative Procedure Act, see 5 U. S. C. § 551 *et seq.* See also n. 5, *supra*.

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UNITED STATES SENATE, PETITIONER
80-2171 *v.*
IMMIGRATION AND NATURALIZATION SERVICE ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 1983]

JUSTICE WHITE, dissenting.

Today the Court not only invalidates §244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the

Court's decision is of surpassing importance. And it is for this reason that the Court would have been well-advised to decide the case, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.[1]

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. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes.[2] The device is known in

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[1] As JUSTICE POWELL observes in his separate opinion, "the respect due [Congress'] judgment as a coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide the case." *Ante*, at 2. The Ninth Circuit Court of Appeals also recognized that "We are not here faced with a situation in which the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device." 634 F. 2d, at 433.

[2] A selected list and brief description of these provisions is appended to this opinion.

every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment and the economy.

I

The legislative veto developed initially in response to the problems of reorganizing the sprawling government structure created in response to the Depression. The Reorganization Acts established the chief model for the legislative veto. When President Hoover requested authority to reorganize the government in 1929, he coupled his request that the "Congress be willing to delegate its authority over the problem (subject to defined principles) to the Executive" with a proposal for legislative review. He proposed that the Executive "should act upon approval of a joint committee of Congress or with the reservation of power of revision by Congress within some limited period adequate for its consideration." Pub. Papers 432 (1929). Congress followed President Hoover's suggestion and authorized reorganization subject to legislative review. Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414. Although the reorganization authority reenacted in 1933 did not contain a legislative veto provision, the provision returned during the Roosevelt Administration and has since been renewed numerous times. Over the years, the provision was used extensively. Presidents submitted 115 reorganization plans to Congress of which 23 were disapproved by Congress pursuant to legislative veto provisions. See Brief of U. S. Senate on Reargument, App. A.

Shortly after adoption of the Reorganization Act of 1939, 54 Stat. 561, Congress and the President applied the legislative veto procedure to resolve the delegation problem for national security and foreign affairs. World War II occasioned the need to transfer greater authority to the President in these areas. The legislative veto offered the means by which Congress could confer additional authority while pre-

serving its own constitutional role. During World War II, Congress enacted over thirty statutes conferring powers on the Executive with legislative veto provisions.[3] President Roosevelt accepted the veto as the necessary price for obtaining exceptional authority.[4]

Over the quarter century following World War II, Presidents continued to accept legislative vetoes by one or both Houses as constitutional, while regularly denouncing provisions by which Congressional committees reviewed Executive activity.[5] The legislative veto balanced delegations of

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[3] Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983, 1089–1090 (1975) (listing statutes).

[4] The Roosevelt Administration submitted proposed legislation containing veto provisions and defended their constitutionality. See *e. g.*, General Counsel to the Office of Price Administration, "Statement on Constitutionality of Concurrent Resolution Provision of Proposed Price Control Bill (H. R. 5479), reprinted in Price-Control Bill: Hearings Before the House Comm. on Banking and Currency on H. R. 5479, Part 1, 77th Cong., 1st Sess. 983 (1941).

[5] Presidential objections to the veto, until the veto by President Nixon of the War Powers Resolution, principally concerned bills authorizing committee vetoes. As the Senate Subcommittee on Separation of Powers found in 1969, "an accommodation was reached years ago on legislative vetoes exercised by the entire Congress or by one House, [while] disputes have continued to arise over the committee form of the veto." S. Rep. No. 549, 91st Cong., 1st Sess., p. 14 (1969). Presidents Kennedy and Johnson proposed enactment of statutes with legislative veto provisions. See National Wilderness Preservation Act: Hearings Before the Senate Comm. on Interior and Insular Affairs on S. 4, 88th Cong., 1st Sess., p. 4 (1963) (President Kennedy's proposals for withdrawal of wilderness areas); President's Message to the Congress Transmitting the Budget for Fiscal Year 1970, 5 Weekly Comp. Pres. Doc. 70, 73 (Jan. 15, 1969) (President Johnson's proposals allowing legislative veto of tax surcharge). The administration of President Kennedy submitted a memorandum supporting the constitutionality of the legislative veto. See General Counsel of the Department of Agriculture, Constitutionality of Title I of H. R. 6400, 87th Cong., 1st Session (1961), reprinted in Legislative Policy of the Bureau of the Budget: Hearing Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture, 89th Cong., 2d Sess. 27, 31–32 (1966).

statutory authority in new areas of governmental involvement: the space program, international agreements on nuclear energy, tariff arrangements, and adjustment of federal pay rates.[6]

During the 1970's the legislative veto was important in resolving a series of major constitutional disputes between the President and Congress over claims of the President to broad impoundment, war, and national emergency powers. The key provision of the War Powers Resolution, 50 U. S. C. § 1544(c), authorizes the termination by concurrent resolution of the use of armed forces in hostilities. A similar measure resolved the problem posed by Presidential claims of inherent power to impound appropriations. Congressional Budget and Impoundment Control Act of 1974, 31 U. S. C. § 1403. In conference, a compromise was achieved under which permanent impoundments, termed "rescissions," would require approval through enactment of legislation. In contrast, temporary impoundments, or "deferrals," would become effective unless disapproved by one House. This compromise provided the President with flexibility, while preserving ultimate Congressional control over the budget.[7] Although the

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During the administration of President Johnson, the Department of Justice again defended the constitutionality of the legislative veto provision of the Reorganization Act, as contrasted with provisions for a committee veto. See Separation of Powers: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong. 1st Sess. 206 (1967) (testimony of Frank M. Wozencraft, Assistant Attorney General for the Office of Legal Counsel).

[6] National Aeronautics and Space Act of 1958, Pub. L. No. 85–568, § 302, 72 Stat. 426, 433 (space program); Atomic Energy Act Amendment of 1958, Pub. L. No. 85–479, § 4, 72 Stat. 276, 277 (cooperative nuclear agreements); Trade Expansion Act of 1962. Pub. L. No. 87–794, § 351, 76 Stat. 872, 899, 17 U. S. C. 1981 (tariff recommended by Tariff Commission may be imposed by concurrent resolution of approval); Postal Revenue and Federal Salary Act of 1976, Pub. L. No. 90–206, § 255(i)(1), 81 Stat. 613, 644.

[7] The Impoundment Control Act's provision for legislative review has

War Powers Resolution was enacted over President Nixon's veto, the Impoundment Control Act was enacted with the President's approval. These statutes were followed by others resolving similar problems: the National Emergencies Act, § 202, 90 Stat. 1255, 50 U. S. C. § 1622 (1976), resolving the longstanding problems with unchecked Executive emergency power; the Arms Export Control Act, § 211, 90 Stat. 729, 22 U. S. C. § 2776(b)(1976), resolving the problem of foreign arms sales; and the Nuclear Non-Proliferation Act of 1978, §§ 303, 304(a), 306, 307, 401, 92 Stat. 120, 130, 134, 137, 139, 144–145, 42 U. S. C. §§ 2160(f), 2155(b), 2157(b), 2158, 2153(d) (Supp. IV. 1980), resolving the problem of exports of nuclear technology.

In the energy field, the legislative veto served to balance broad delegations in legislation emerging from the energy crisis of the 1970's.[8] In the educational field, it was found that fragmented and narrow grant programs "inevitably lead to Executive-Legislative confrontations" because they inaptly limited the Commissioner of Education's authority. S. Rep. No. 763, 93d Cong., 2d Sess. 69 (1974). The response

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been used extensively. Presidents have submitted hundreds of proposed budget deferrals, of which 65 have been disapproved by resolutions of the House or Senate with no protest by the Executive. See Appendix B to Brief on Reargument of U. S. Senate.

[8] The veto appears in a host of broad statutory delegations concerning energy rationing, contingency plans, strategic oil reserves, allocation of energy production materials, oil exports, and naval reserve production. Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94–258, § 201, 90 Stat. 303, 309, 10 U. S. C. 7422(c)(2)(C) (naval reserve production); Energy Policy and Conservation Act, Pub. L. No. 94–163, §§ 159, 201, 401(a), and 455, 89 Stat. 871, 886, 890, 941, and 950 (1975), 42 U. S. C. 6239 and 6261, 15 U. S. C. 757 and 760a (strategic oil reserves, rationing and contingency plans, oil price controls and product allocation); Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93–577, § 12, 88 Stat. 1878, 1892–93, 42 U. S. C. 5911 (allocation of energy production materials); Act of November 16, 1973, Pub. L. No. 93–153, § 10, 87 Stat., 576, 582, 30 U. S. C. 185(u) (oil exports).

was to grant the Commissioner of Education rulemaking authority, subject to a legislative veto. In the trade regulation area, the veto preserved Congressional authority over the Federal Trade Commission's broad mandate to make rules to prevent businesses from engaging in "unfair or deceptive acts or practices in commerce."[9]

Even this brief review suffices to demonstrate that the legislative veto is more than "efficient, convenient, and useful." *Ante*, at 23. It 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. Perhaps there are other means of accomodation and accountability, but the increasing reliance of Congress upon the legislative veto suggests that the alternatives to which Congress must now turn are not entirely satisfactory.[10]

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[9] Congress found that under the agency's

"very broad authority to prohibit conduct which is 'unfair or deceptive' . . . the [Federal Trade Commission] FTC can regulate virtually every aspect of America's commercial life . . . . The FTC's rules are not merely narrow interpretations of a tightly drawn statute; instead, they are broad policy pronouncements which Congress has an obligation to study and review."

124 Cong. Rec. 5012 (1978) (statement by Rep. Broyhill). A two-House legislative veto was added to constrain that broad delegation. Federal Trade Commission Improvements Act of 1980, § 21(a), 94 Stat. 374, 393, 15 U. S. C. §§ 57a–1 (Supp. IV 1980). The constitutionality of that provision is presently pending before us. *United States Senate* v. *Federal Trade Commission*, No. 82–935; *United States House of Representatives* v. *Federal Trade Commission*, No. 82–1044.

[10] While Congress could write certain statutes with greater specificity, it is unlikely that this is a realistic or even desirable substitute for the legislative veto. "Political volatility and the controversy of many issues would prevent Congress from reaching agreement on many major problems if specificity were required in their enactments." Fuchs, Administrative Agencies and the Energy Problem 47 Ind. L. J. 606, 608 (1972); Stewart, Reformation of American Administrative Law, 88 Harv. L. Rev. 1667,

The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches—the concerns of Madison and Hamilton. Rather, the veto has been 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. While the President has

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1695–1696 (1975). For example, in the deportation context, the solution is not for Congress to create more refined categorizations of the deportable aliens whose status should be subject to change. In 1979, the Immigration and Naturalization Service proposed regulations setting forth factors to be considered in the exercise of discretion under numerous provisions of the Act, but not including § 244, to ensure "fair and uniform" adjudication "under appropriate discretionary criteria." 44 Fed. Reg. 36187 (1979). The proposed rule was canceled in 1981, because "[t]here is an inherent failure in any attempt to list those factors which should be considered in the exercise of discretion. It is impossible to list or foresee all of the adverse or favorable factors which may be present in a given set of circumstances." 46 Fed. Reg. 9119 (1981).

Oversight hearings and congressional investigations have their purpose, but unless Congress is to be rendered a think tank or debating society, they are no substitute for the exercise of actual authority. The "laying" procedure approved in *Sibbach* v. *Wilson*, 312 U. S. 1, 15 (1941), while satisfactory for certain measures, has its own shortcomings. Because a new law must be passed to restrain administrative action, Congress must delegate authority without the certain ability of being able to check its exercise.

Finally, the passage of corrective legislation after agency regulations take effect or Executive Branch officials have acted entail the drawbacks endemic to a retroactive response. "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 have been set, the economy could be damaged and private interests 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 proosal had taken effect, the results could be chaotic." Javits and Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N. Y. U. L. Rev. 455, 464 (1977).

often objected to particular legislative vetoes, generally those left in the hands of congressional committees, the Executive has more often agreed to legislative review as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority.

II

For all these reasons, the apparent sweep of the Court's decision today is regretable. The Court's Article I analysis appears to invalidate all legislative vetoes irrespective of form or subject. Because the legislative veto is commonly found as a check upon rulemaking by administrative agencies and upon broad-based policy decisions of the Executive Branch, it is particularly unfortunate that the Court reaches its decision in a case involving the exercise of a veto over deportation decisions regarding particular individuals. Courts should always be wary of striking statutes as unconstitutional; to strike an entire class of statutes based on consideration of a somewhat atypical and more-readily indictable exemplar of the class is irresponsible. It was for cases such as this one that Justice Brandeis wrote:

> "The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress. . . . The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Commissioners, supra.*" *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347 (1936) (concurring opinion).

Unfortunately, today's holding is not so limited.[11]

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[11] Perhaps I am wrong and the Court remains open to consider whether certain forms of the legislative veto are reconcilable with the Article I re-

If the legislative veto were as plainly unconstitutional as the Court strives to suggest, its broad ruling today would be more comprehensible. But, the constitutionality of the legislative veto is anything but clearcut. The issue divides scholars,[12] courts,[13] attorneys general,[14] and the two other

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quirements. One possibility for the Court and Congress is to accept that a resolution of disapproval cannot be given legal effect in its own right, but may serve as a guide in the interpretation of a delegation of lawmaking authority. The exercise of the veto could be read as a manifestation of legislative intent, which, unless itself contrary to the authorizing statute, serves as the definitive construction of the statute. Therefore, an agency rule vetoed by Congress would not be enforced in the courts because the veto indicates that the agency action departs from the Congressional intent.

This limited role for a redefined legislative veto follows in the steps of the longstanding practice of giving some weight to subsequent legislative reaction to administrative rulemaking. The silence of Congress after consideration of a practice by the Executive may be equivalent to acquiescence and consent that the practice be continued until the power exercised be revoked. *United States* v. *Midwest Oil Co.*, 236 U. S. 460, 472–473 (1914). See also *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965) (relying on Congressional failure to repeal administration interpretation); *Haig* v. *Agee* 453 U. S. 280 (1981) (same); *Bob Jones University* v. *United States*, —— U. S. —— (1983) (same), *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U. S. 353, 384 (1982) (relying on failure to disturb judicial decision in later revision of law).

Reliance on subsequent legislative reaction has been limited by the fear of overturning the intent of the original Congress and the unreliability of discerning the views of a subsequent Congress. *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U. S. 102, 117–118 (1980); *United States* v. *Price*, 361 U. S. 304, 313 (1960). These concerns are not forceful when the original statute authorizes subsequent legislative review. The presence of the review provision constitutes an express authorization for a subsequent Congress to participate in defining the meaning of the law. Second, the disapproval resolution allows for a reliable determination of Congressional intent. Without the review mechanism, uncertainty over the inferences to draw from subsequent Congressional action is understandable. The refusal to pass an amendment, for example, may indicate opposition to that position but could mean that Congress believes the amendment is redundant with the statute as written. By contrast, the ex-

[Footnote 12 is on page 11]

[Footnotes 13 and 14 are on page 12]

branches of the National Government. If the veto devices so flagrantly disregarded the requirements of Article I as the Court today suggests, I find it incomprehensible that Congress, whose members are bound by oath to uphold the Constitution, would have placed these mechanisms in nearly 200 separate laws over a period of 50 years.

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ercise of a legislative veto is an unmistakable indication that the agency or Executive decision at issue is disfavored. This is not to suggest that the failure to pass a veto resolution should be given any weight whatever.

[12] For commentary generally favorable to the legislative veto see Abourezk, Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogative, 52 Ind. L. J. 323 (1977); Cooper & Cooper, The Legislative Veto and the Constitution, 30 Geo. Wash. L. Rev. 467 (1962); Dry, The Congressional Veto and Constitutional Separation of Powers, in the Presidency in the Constitutional Order 195 (J. Bessette & J. Tulis eds.); Javits & Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N. Y. U. L. Rev. 455 (1977); Miller & Knapp, The Congressional Veto: Preserving the Constitutional Framework, 52 Ind. L. J. 367 (1977); Nathanson, Separation of Powers and Administrative Law: Delegation, The Legislative Veto, and the "Independent" Agencies, 75 Nw. U. L. Rev. 1064 (1981); Newman & Keaton, Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?, 41 Calif. L. Rev. 565 (1953); Pearson, Oversight: A Vital Yet Neglected Congressional Function, 23 U. Kan. L. Rev. 277 (1975); Rodino, Congressional Review of Executive Actions, 5 Seton Hall L. Rev. 489 (1974); Schwartz, Legislative Veto and the Constitution—A Reexamination, 46 Geo. Wash. L. Rev. 351 (1978); Schwartz, Legislative Control of Administrative Rules and Regulations: I. The American Experience, 30 N. Y. U. L. Rev. 1031 (1955); Stewart, Constitutionality of the Legislative Veto, 13 Harv. J. Legis. 593 (1976).

For Commentary generally unfavorable to the legislative veto, see J. Bolton, The Legislative Veto: Unseparating the Powers (1977); Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369 (1977); Dixon, The Congressional Veto and Separation of Powers: The Executive On a Leash?, 56 N. C. L. Rev. 423 (1978); Fitzgerald, Congressional Oversight or Congressional Foresight: Guidelines From the Founding Fathers, 28 Ad. L. Rev. 429 (1976); Ginaane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569 (1953); Henry,

The reality of the situation is that the constitutional question posed today is one of immense difficulty over which the executive and legislative branches—as well as scholars and judges—have understandably disagreed. That disagreement stems from the silence of the Constitution on the precise question: The Constitution does not directly authorize or prohibit the legislative veto. Thus, our task should be to determine whether the legislative veto is consistent with the purposes of Art. I and the principles of Separation of Powers which are reflected in that Article and throughout the Constitution.[15] We should not find the lack of a specific constitu-

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The Legislative Veto: In Search of Constitutional Limits, 16 Harv. J. Legis. 735 (1979); Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253 (1982); Scalia, The Legislative Veto: A False Remedy For System Overload, Regulation, Nov.-Dec. 1979, at 19; Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983 (1975); Comment, Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto, 26 Am. U. L. Rev. 1018 (1977); Note, Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge, 1976 Duke L. J. 285; Recent Developments, The Legislative Veto in the Arms Control Act of 1976, 9 Law & Pol'y Int'l Bus. 1029 (1977).

[13] Compare *Atkins* v. *United States*, 556 F. 2d 1028 (Ct. Claims 1977), cert. denied, 434 U. S. 1009 (1978), (upholding legislative veto provision in Federal Salary Act, 2 U. S. C. §§ 351 et seq. (1976)) with *Consumer Energy Council of America* v. *FERC*, 673 F. 2d 425 (CA DC 1982), appeals and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209, (holding unconstitutional the legislative veto provision in the Natural Gas Policy Act of 1978, 15 U. S. C. §§ 3301-3342 (Supp. III 1979)).

[14] See, *e. g.*, 6 Op. Att'y Gen. 680, 683 (1854); Department of Justice, Memorandum re Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress, reprinted in S. Rep. No. 232, 81st Cong., 1st Sess. 19–20 (1949); Jackson, "A Presidential Legal Opinion," 66 Harv. L. Rev. 1353 (1953); 43 Op. Att'y Gen. No. 10, at 2 (1977).

[15] I limit my concern here to those legislative vetoes which require either one or both Houses of Congress to pass resolutions of approval or disapproval, and leave aside the questions arising from the exercise of such powers by committees of Congress.

tional authorization for the legislative veto surprising, and I would not infer disapproval of the mechanism from its absence. From the summer of 1787 to the present the government of the United States has become an endeavor far beyond the contemplation of the Framers. Only within the last half century has the complexity and size of the Federal Government's responsibilities grown so greatly that the Congress must rely on the legislative veto as the most effective if not the only means to insure their role as the nation's lawmakers. But the wisdom of the Framers was to anticipate that the nation would grow and new problems of governance would require different solutions. Accordingly, our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles. This was the spirit in which Justice Jackson penned his influential concurrence in the *Steel Seizure Case*:

> "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952).

This is the perspective from which we should approach the novel constitutional questions presented by the legislative veto. In my view, neither Article I of the Constitution nor the doctrine of separation of powers is violated by this mechanism by which our elected representatives preserve their voice in the governance of the nation.

III

The Court holds that the disapproval of a suspension of de-

portation by the resolution of one House of Congress is an exercise of legislative power without compliance with the prerequisites for lawmaking set forth in Art. I of the Constitution. Specifically, the Court maintains that the provisions of § 244(c)(2) are inconsistent with the requirement of bicameral approval, implicit in Art. I, § 1, and the requirement that all bills and resolutions that require the concurrence of both Houses be presented to the President, Art. I, § 7, cl. 2 and 3.[16]

I do not dispute the Court's truismatic exposition of these clauses. There is no question that a bill does not become a law until it is approved by both the House and the Senate, and presented to the President. Similarly, I would not hesitate to strike an action of Congress in the form of a concurrent resolution which constituted an exercise of original lawmaking authority. I agree with the Court that the President's qualified veto power is a critical element in the distribution of powers under the Constitution, widely endorsed among the Framers, and intended to serve the President as a defense against legislative encroachment and to check the "passing of bad laws through haste, inadvertence,

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[16] I agree with JUSTICE REHNQUIST that Congress did not intend the one-House veto provision of § 244(c)(2) to be severable. Although the general rule is that the presence of a savings clause creates a presumption of divisibility, *Champlin Rfg Co.* v. *Commission*, 286 U. S. 210, 235 (1931), I read the savings clause contained in § 406 of the Immigration Act as primarily pertaining to the severability of major parts of the Act from one another, not the divisibility of different provisions within a single section. Surely, Congress would want the naturalization provisions of the Act to be severable from the deportation sections. But this does not support preserving § 244 without the legislative veto any more than a savings provision would justify preserving immigration authority without quota limits.

More relevant is the fact that for forty years Congress has insisted on retaining a voice on individual suspension cases—it has frequently rejected bills which would place final authority in the Executive branch. It is clear that Congress believed its retention crucial. Given this history, the Court's rewriting of the Act flouts the will of Congress.

or design." The Federalist No. 73, at 458 (A. Hamilton). The records of the Convention reveal that it is the first purpose which figured most prominently but I acknowledge the vitality of the second. *Id.*, at 443. I also agree that the bicameral approval required by Art. I, §§ 1, 7 "was of scarcely less concern to the Framers than was the Presidential veto," *ante*, at 28, and that the need to divide and disperse legislative power figures significantly in our scheme of Government. All of this, the Third Part of the Court's opinion, is entirely unexceptionable.

It does not, however, answer the constitutional question before us. The power to exercise a legislative veto is not the power to write new law without bicameral approval or presidential consideration. The veto must be authorized by statute and may only negative what an Executive department or independent agency has proposed. On its face, the legislative veto no more allows one House of Congress to make law than does the presidential veto confer such power upon the President. Accordingly, the Court properly recognizes that it "must establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7 apply" and admits that "not every action taken by either House is subject to the bicameralism and presentation requirements of Art. I." *Ante*, at 31.

A

The terms of the Presentment Clauses suggest only that bills and their equivalent are subject to the requirements of bicameral passage and presentment to the President. Article I, § 7, cl. 2, stipulates only that "Every Bill which shall have passed the House of Representatives and the Senate, shall before it becomes a Law, be presented to the President" for approval or disapproval, his disapproval then subject to being overridden by a two-thirds vote of both houses. Section 7, cl. 3 goes further:

> "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Although the Clause does not specify the actions for which the concurrence of both Houses is "necessary," the proceedings at the Philadelphia Convention suggest its purpose was to prevent Congress from circumventing the presentation requirement in the making of new legislation. James Madison observed that if the President's veto was confined to bills, it could be evaded by calling a proposed law a "resolution" or "vote" rather than a "bill." Accordingly, he proposed that "or resolve" should be added after "bill" in what is now clause 2 of § 7. 2 M. Farrand, *The Records of the Federal Convention of 1787* 301–302. After a short discussion on the subject, the amendment was rejected. On the following day, however, Randolph renewed the proposal in the substantial form as it now appears, and the motion passed. *Id.*, at 304–305; 5 Elliot's Debates 431 (1845). The chosen language, Madison's comment, and the brevity of the Convention's consideration, all suggest a modest role was intended for the Clause and no broad restraint on Congressional authority was contemplated. See Stewart, Constitutionality of the Legislative Veto, 13 Harv. J. Legisl. 593, 609–611 (1976). This reading is consistent with the historical background of the Presentation Clause itself which reveals only that the Framers were concerned with limiting the methods for enacting new legislation. The Framers were aware of the experience in Pennsylvania where the legislature had evaded the requirements attached to the passing of legislation by the use of "resolves,"

and the criticisms directed at this practice by the Council of Censors.[17] There is no record that the Convention contemplated, let alone intended, that these Article I requirements would someday be invoked to restrain the scope of Congressional authority pursuant to duly-enacted law.[18]

When the Convention did turn its attention to the scope of Congress' lawmaking power, the Framers were expansive. The Necessary and Proper Clause, Art. I, § 8, cl. 18, vests

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[17] The Pennsylvania Constitution required that all "bills of [a] public nature" had to be printed after being introduced and had to lie over until the following session of the legislature before adoption. Pa. Const. § 15 (1776). These printing and layover requirements applied only to "bills." At the time, measures could also be enacted as a "resolve," which was allowed by the Constitution as "urgent temporary legislation" without such requirements. Pa. Const. § 20 (1776). Using this method the Pennsylvania legislature routinely evaded printing and layover requirements through adoption of resolves. A. Nevins, The American States During and After the Revolution 152 (1969).

A 1784 Report of a committee of the Council of Censors, a state body responsible for periodically reviewing the state government's adherence to its Constitution, charged that the procedures for enacting legislation had been evaded though the adoption of resolves instead of bills. Report of the Committee of the Council of Censors 13 (1784). See Nevins, *supra*, at 190. When three years later the federal Constitutional Convention assembled in Philadelphia, the delegates were reminded, in the course of discussing the President's veto, of the dangers pointed out by the Council of Censors Report. 5 J. Elliot, Debates on the Adoption of the Federal Constitution 430 (1974 ed.). Furthermore, Madison, who made the motion that led to the Presentation Clause, knew of the Council of Censors report, The Federalist No. 50, at 353 (Wright ed. 1974), and was aware of the Pennsylvania experience. See The Federalist No. 48, at 346. We have previously recognized the relevance of the Council of Censors report in interpreting the Constitution. See *Powell* v. *McCormack*, 395 U. S. 486, 529–530 (1969).

[18] Although the legislative veto was not a feature of Congressional enactments until the twentieth century, the practices of the first Congresses demonstrate that the constraints of Article I were not envisioned as a constitutional straightjacket. The First Congress, for example, began the practice of arming its committees with broad investigatory powers without

Congress with the power "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers [the enumerated powers of § 8], and all other Powers vested by this Constitution in the government of the

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the passage of legislation. See A. Josephy, On the Hill: A History of the American Congress 81–83 (1975). More directly pertinent is the First Congress' treatment of the Northwest Territories Ordinance of 1787. The ordinance, initially drafted under the Articles of Confederation on July 13, 1787, was the document which governed the territory of the United States northwest of the Ohio River. The ordinance authorized the territories to adopt laws, subject to disapproval in Congress.

"The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original states, criminal and civil, as may be necessary and best suited to the circumstances of the district, *and report them to Congress*, from time to time; which laws shall be in force in the district until the organization of the general assembly therein, *unless disapproved of by Congress*; but afterwards the legislature shall have authority to alter them as they shall think fit." (emphasis added)

After the Constitution was enacted, the ordinance was reenacted to conform to the requirements of the Constitution. Act of Aug. 7, 1789, ch. VIII, § 1, 1 Stat. 50–51. Certain provisions, such as one relating to appointment of officials by Congress, were changed because of constitutional concerns, but the language allowing disapproval by Congress was retained. Subsequent provisions for territorial laws contained similar language. See, *e. g.*, 48 U. S. C. § 1478 (1970).

Although at times Congress disapproved of territorial actions by passing legislation, see *e. g.*, Act of March 3, 1807, 4 Laws of the United States, Ch. 99, 117, on at least two occasions one House of Congress passed resolutions to disapprove territorial laws, only to have the other House fail to pass the measure for reasons pertaining to the subject matter of the bills. First, on February 16, 1795, the House of Representatives passed a concurrent resolution disapproving in one sweep all but one of the laws that the governors and judges of the Northwest Territory had passed at a legislative session on August 1, 1792. 4 Annals of Congress 1227. The Senate, however, refused to concur. 4 Annals of Congress 830. See B. Bond, The Civilization of the Old Northwest 70–71 (1934). Second, on May 9, 1800, the House passed a resolution to disapprove of a Misssissippi territorial law imposing a license fee on taverns. 3 House Journal 704–706. The Senate unsuccessfully attempted to amend the resolution to strike

United States, or in any Department or Officer thereof." It is long-settled that Congress may "exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government," and "avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415–416, 420 (1819).

B

The Court heeded this counsel in approving the modern administrative state. The Court's holding today that all legislative-type action must be enacted through the lawmaking process ignores that legislative authority is routinely delegated to the Executive branch, to the independent regulatory agencies, and to private individuals and groups.

> "The rise of administrative bodies probably has been the most significant legal trend of the last century. . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theo-

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down all laws of the Mississippi territory enacted since June 30, 1799. Carter, Territorial Papers of the United States Vol. 5—Mississippi, 94–95 (1937). The histories of the territories, the correspondence of the era, and the Congressional reports contain no indication that such resolutions disapproving of territorial laws were to be presented to the President or that the authorization for such a "congressional veto" in the Act of August 7, 1789 was of doubtful constitutionality.

The practices of the First Congress are not so clear as to be dispositive of the constitutional question now before us. But it is surely significant that this body, largely composed of the same men who authored Article I and secured ratification of the Constitution, did not view the Constitution as forbidding a precursor of the modern day legislative veto. See *Hampton* v. *United States*, 276 U. S. 394, 412 (1928) ("In the first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixed the construction to be given its provisions.")

ries. . ." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 487 (1952) (Jackson, J. dissenting).

This Court's decisions sanctioning such delegations make clear that Article I does not require all action with the effect of legislation to be passed as a law.

Theoretically, agencies and officials were asked only to "fill up the details," and the rule was that "Congress cannot delegate any part of its legislative power except under a limitation of a prescribed standard." *United States* v. *Chicago, Milwaukee R. Co.*, 282 U. S. 311, 324 (1931). Chief Justice Taft elaborated the standard in *J.W. Hampton & Co.* v. *United States*, 276 U. S. 394, 409 (1928): "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a fobidden delegation of legislative power." In practice, however, restrictions on the scope of the power that could be delegated diminished and all but disappeared. In only two instances did the Court find an unconstitutional delegation. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). In other cases, the "intelligible principle" through which agencies have attained enormous control over the economic affairs of the country was held to include such formulations as "just and reasonable," *Tagg Bros & Moorhead* v. *United States*, 280 U. S. 420 (1930), "public interest," *New York Central Securities Corp.* v. *United States*, 287 U. S. 12 (1932), "public convenience, interest, or necessity," *Federal Radio Comm.* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933), and "unfair methods of competition." *FTC* v. *Gratz*, 253 U. S. 421 (1920).

The wisdom and the constitutionality of these broad delegations are matters that still have not been put to rest. But for present purposes, these cases establish that by virtue of congressional delegation, legislative power can be exercised

by independent agencies and Executive departments without the passage of new legislation. For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. 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, intepret, 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." See, *e. g. Schweiker* v. *Gray Panthers*, 453 U. S. 34, 43–44 (1981); *Batterton* v. *Francis*, 432 U. S. 416 (1977).[19] These regulations bind courts and officers of the federal government, may pre-empt state law, see, *e. g.*, *Fidelity Federal Savings & Loan Assoc.* v. *De la Cuesta*, —— U. S. —— (1982), and grant rights to and impose obligations on the public. In sum, they have the force of law.

If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check

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[19] "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute, as for example, the proxy rules issue by the Securities and Exchange Commission . . . Such rules have the force and effect of law.' U. S. Dept. of Justice, Attorney General's Manual on the Administrative Procedures Act 30 n. 3 (1947)." *Batterton* v. *Francis*, 432 U. S. 416, 425 n. 9 (1977).

Substantive agency regulations are clearly exercises of lawmaking authority; agency interpretations of their statutes are only arguably so. But as Henry Monaghan has observed, "Judicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of lawmaking authority to an agency." H. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 26 (1983). See, *e. g.*, *NLRB* v. *Hearst Publications*, 322 U. S. 111 (1944); *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U. S. 170 (1981).

on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President's signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test. In both cases, it is enough that the initial statutory authorizations comply with the Article I requirements.

Nor are there strict limits on the agents that may receive such delegations of legislative authority so that it might be said that the legislature can delegate authority to others but not to itself. While most authority to issue rules and regulations is given to the executive branch and the independent regulatory agencies, statutory delegations to private persons have also passed this Court's scrutiny. In *Currin* v. *Wallace*, 306 U. S. 1 (1939), the statute provided that restrictions upon the production or marketing of agricultural commodities was to become effective only upon the favorable vote by a prescribed majority of the affected farmers. *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 577 (1939), upheld an act which gave producers of specified commodities the right to veto marketing orders issued by the Secretary of Agriculture. Assuming *Currin* and *Rock Royal Co-operative* remain sound law, the Court's decision today suggests that Congress may place a "veto" power over suspensions of deportation in private hands or in the hands of an independent agency, but is forbidden from reserving such authority for itself. Perhaps this odd result could be justified on other constitutional grounds, such as the separation of powers, but certainly it cannot be defended as consistent with the Court's view of the Article I presentment and bicameralism commands.[20]

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[20] As the Court acknowledges, the "provisions of Art. I are integral parts of the constitutional design for the separation of powers." *Ante*, at 25. But these separation of power concerns are that legislative power be exer-

The Court's opinion in the present case comes closest to facing the reality of administrative lawmaking in considering the contention that the Attorney General's action in suspending deportation under § 244 is itself a legislative act. The Court posits that the Attorney General is acting in an Article II enforcement capacity under § 244. This characterization is at odds with *Mahler* v. *Eby*, 264 U. S. 32, 40 (1924), where the power conferred on the Executive to deport aliens was considered a delegation of legislative power. The Court suggests, however, that the Attorney General acts in an Article II capacity because "[t]he courts when a case or controversy arises, can always 'ascertain whether the will of Congress has been obeyed,' *Yakus* v. *United States*, 321 U. S. 414, 425 (1944), and can enforce adherence to statutory standards." *Ante*, at 33, n. 16. This assumption is simply wrong, as the Court itself points out: "We are aware of no decision . . . where a federal court has reviewed a decision of the Attorney General suspending deportation of an alien pursuant to the standards set out in § 244(a)(1). This is not surprising, given that no party to such action has either the motivation or the right to appeal from it." *Ante*, at 37, n. 21. It is perhaps on the erroneous premise that judicial review may check abuses of the § 244 power that the Court also submits that "The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that

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cised by Congress, executive power by the President, and judicial power by the Courts. A scheme which allows delegation of legislative power to the President and the departments under his control, but forbids a check on its exercise by Congress itself obviously denigrates the separation of power concerns underlying Article I. To be sure, the doctrine of separation of powers is also concerned with checking each branch's exercise of its characteristic authority. Section 244(c)(2) is fully consistent with the need for checks upon Congressional authority, *infra*, at 28–31, and the legislative veto mechanism, more generally is an important check upon Executive authority, *supra*, at 2–9.

created it—a statute duly enacted pursuant to Art. I, §§ 1,7." *Ante*, at 33, n. 16. On the other hand, the Court's reasoning does persuasively explain why a resolution of disapproval under § 244(c)(2) need not again be subject to the bicameral process. Because it serves only to check the Attorney General's exercise of the suspension authority granted by § 244, the disapproval resolution—unlike the Attorney General's action—"cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Article I."

More fundamentally, even if the Court correctly characterizes the Attorney General's authority under § 244 as an Article II Executive power, the Court concedes that certain administrative agency action, such as rulemaking, "may resemble lawmaking" and recognizes that "[t]his Court has referred to agency activity as being 'quasi-legislative' in character. *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628 (1935)." *Ante*, at 32, n. 16. Such rules and adjudications by the agencies meet the Court's own definition of legislative action for they "alter[] the legal rights, duties, and relations of persons . . . outside the legislative branch," *ante*, at 32, and involve "determinations of policy," *ante*, at 34. Under the Court's analysis, the Executive Branch and the independent agencies may make rules with the effect of law while Congress, in whom the Framers confided the legislative power, Art. I, § 1, may not exercise a veto which precludes such rules from having operative force. If the effective functioning of a complex modern government requires the delegation of vast authority which, by virtue of its breadth, is legislative or "quasi-legislative" in character, I cannot accept that Article I—which is, after all, the source of the non-delegation doctrine—should forbid Congress from qualifying that grant with a legislative veto.[21]

[21] The Court's other reasons for holding the legislative veto subject to the presentment and bicameral passage requirements require but brief discussion. First, the Court posits that the resolution of disapproval should

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The Court also takes no account of perhaps the most relevant consideration: However resolutions of disapproval under § 244(c)(2) are formally characterized, in reality, a departure from the status quo occurs only upon the concurrence of opinion among the House, Senate, and President. Reservations of legislative authority to be exercised by Congress should be upheld if the exercise of such reserved authority is consistent with the distribution of and limits upon legislative power that Article I provides.

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As its history reveals, § 244(c)(2) withstands this analysis.

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be considered equivalent to new legislation because absent the veto authority of § 244(c)(2) neither House could, short of legislation, effectively require the Attorney General to deport an alien once the Attorney General has determined that the alien should remain in the United States. *Ante*, at 32–33. The statement is neither accurate nor meaningful. The Attorney General's power under the Act is only to "suspend" the order of deportation; the "suspension" does not cancel the deportation or adjust the alien's status to that of a permanent resident alien. Cancellation of deportation and adjustment of status must await favorable action by Congress. More important, the question is whether § 244(c)(2) as written is constitutional and no law is amended or repealed by the resolution of disapproval which is, of course, expressly authorized by that section.

The Court also argues that "the legislative character of the challenged action of one House is confirmed by the fact that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." *Ante*, at 35. Leaving aside again the above-refuted premise that all action with a legislative character requires passage in a law, the short answer is that all of these carefully defined exceptions to the presentment and bicameralism strictures do not involve action of the Congress pursuant to a duly-enacted statute. Indeed, for the most part these powers—those of impeachment, review of appointments, and treaty ratification—are not legislative powers at all. The fact that it was essential for the Constitution to stipulate that Congress has the power to impeach and try the President hardly demonstrates a limit upon Congress' authority to reserve itself a legislative veto, through statutes, over subjects within its lawmaking authority.

Until 1917, Congress had never established laws concerning the deportation of aliens. The Immigration Act of 1924 enlarged the categories of aliens subject to mandatory deportation, and substantially increased the likelihood of hardships to individuals by abolishing in most cases the previous time limitation of three years within which deportation proceedings had to be commenced. Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924). Thousands of persons, who either had entered the country in more lenient times or had been smuggled in as children, or had overstayed their permits, faced the prospect of deportation. Enforcement of the Act grew more rigorous over the years with the deportation of thousand of aliens without regard to the mitigating circumstances of particular cases. See Mansfield, The Legislative Veto and the Deportation of Aliens, 1 Public Administration Review 281 (1940). Congress provided relief in certain cases through the passage of private bills.

In 1933, when deportations reached their zenith, the Secretary of Labor temporarily suspended numerous deportations on grounds of hardship, 78 Cong. Rec. 11783 (1934), and proposed legislation to allow certain deportable aliens to remain in the country. H. R. 9725, 73d Cong., 2d Sess. (1934). The Labor Department bill was opposed, however, as "grant-[ing] too much discretionary authority," 78 Cong. Rec. 11790 (remarks of Rep. Dirksen), and it failed decisively. *Id.*, at 11791.

The following year, the administration proposed bills to authorize an inter-Departmental committee to grant permanent residence to deportable aliens who had lived in the United States for 10 years or who had close relatives here. S. 2969 and H. R. 8163, 74th Cong., 1st Sess. (1935). These bills were also attacked as an "abandonment of congressional control over the deportation of undesirable aliens," H. R. Rep. No. 1110, Part 2, 74th Cong., 1st Sess. 2 (1935), and were not

enacted. A similar fate awaited a bill introduced in the 75th Congress that would have authorized the Secretary to grant permanent residence to up to 8,000 deportable aliens. The measure passed the House, but did not come to a vote in the Senate. H. R. 6391, 83 Cong. Rec. 8992–96 (1938).

The succeeding Congress again attempted to find a legislative solution to the deportation problem. The initial House bill required congressional action to cancel individual deportations, 84 Cong. Rec. 10455 (1939), but the Senate amended the legislation to provide that deportable aliens should not be deported unless the Congress by Act or resolution rejected the recommendation of the Secretary. H. R. 5138, § 10, as reported with amendments by S. Rep. No. 1721, 76th Cong., 3d Sess. 2 (1940). The compromise solution, the immediate predecessor to § 244(c), allowed the Attorney General to suspend the deportation of qualified aliens. Their deportation would be canceled and permanent residence granted if the House and Senate did not adopt a concurrent resolution of disapproval. S. Rep. No. 1796, 76th Cong., 3rd Sess. 5–6 (1940). The Executive Branch played a major role in fashioning this compromise, see 86 Cong. Rec. 8345 (1940), and President Roosevelt approved the legislation, which became the Alien Registration Act of 1940, P. L. No. 670, 54 Stat. 670.

In 1947, the Department of Justice requested legislation authorizing the Attorney General to cancel deportations without congressional review. H. R. 2933, 80th Cong., 1st Sess. (1947). The purpose of the proposal was to "save time and energy of everyone concerned . . ." Regulating Powers of the Attorney General to Suspend Deportation of Aliens: Hearings Before the Subcomm. on Immigration of the House Comm. on the Judiciary, 80th Cong., 1st Sess. 34 (1977). The Senate Judiciary Committee objected, stating that "affirmative action by the Congress in all suspension cases should be required before deportation proceedings may be can-

celed." S. Rep. No. 1204, 80th Cong., 2d Sess. 4 (1948). See also H. R. Rep. No. 647, 80th Cong., 1st Sess. 2 (1947). Congress not only rejected the Department's request for final authority but amended the Immigration Act to require that cancellation of deportation be approved by a concurrent resolution of the Congress. President Truman signed the bill without objection. Act of July 1, 1948, P. L. No. 863, 62 Stat. 1206.

Practice over the ensuing several years convinced Congress that the requirement of affirmative approval was "not workable . . . and would, in time, interfere with the legislative work of the House." House Judiciary Committee, H. R. Rep. No. 362, 81st Cong., 1st Sess. 2 (1949). In preparing the comprehensive Immigration and Nationality Act of 1952, the Senate Judiciary Committee recommended that for certain classes of aliens the adjustment of status be subject to the disapproval of either House; but deportation of an alien "who is of the criminal, subversive, or immoral classes or who overstays his period of admission," would be cancelled only upon a concurrent resolution disapproving the deportation. S. Rep. No. 1514, 81st Cong. 2d Sess 610 (1950). Legislation reflecting this change was passed by both Houses, and enacted into law as part of the Immigration and Nationality Act of 1952 over President Truman's veto, which was not predicated on the presence of a legislative veto. Pub. L. No. 414, 66 Stat. 163, 214 (1952). In subsequent years, the Congress refused further requests that the Attorney General be given final authority to grant discretionary relief for specified categories of aliens, and § 244 remained intact to the present.

Section 244(A)(1) authorizes the Attorney General, in his discretion, to suspend the deportation of certain aliens who are otherwise deportable and, upon Congress' approval, to adjust their status to that of aliens lawfully admitted for permanent residence. In order to be eligible for this relief, an alien must have been physically present in the United States

for a continuous period of not less than seven years, must prove he is of good moral character, and must prove that he or his immediate family would suffer "extreme hardship" if he is deported. Judicial review of a denial of relief may be sought. Thus, the suspension proceeding "has two phases: a determination whether the statutory conditions have been met, which generally involves a question of law, and a determination whether relief shall be granted, which [ultimately] . . . is confided to the sound discretion of the Attorney General [and his delegates]." 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 7.9a(5) at 7–134.

There is also a third phase to the process. Under § 244(c)(1) the Attorney General must report all such suspensions, with a detailed statement of facts and reasons, to the Congress. Either House may then act, in that session or the next, to block the suspension of deportation by passing a resolution of disapproval. § 244(c)(2). Upon Congressional approval of the suspension—by its silence—the alien's permanent status is adjusted to that of a lawful resident alien.

The history of the Immigration Act makes clear that § 244(c)(2) did not alter the division of actual authority between Congress and the Executive. At all times, whether through private bills, or through affirmative concurrent resolutions, or through the present one-House veto, a permanent change in a deportable alien's status could be accomplished only with the agreement of the Attorney General, the House, and the Senate.

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The central concern of the presentation and bicameralism requirements of Article I is that when a departure from the legal status quo is undertaken, it is done with the approval of the President and both Houses of Congress—or, in the event of a presidential veto, a two-thirds majority in both Houses. This interest is fully satisfied by the operation of § 244(c)(2). The President's approval is found in the Attorney General's

action in recommending to Congress that the deportation order for a given alien be suspended. The House and the Senate indicate their approval of the Executive's action by not passing a resolution of disapproval within the statutory period. Thus, a change in the legal status quo—the deportability of the alien—is consummated only with the approval of each of the three relevant actors. The disagreement of any one of the three maintains the alien's pre-existing status: the Executive may choose not to recommend suspension; the House and Senate may each veto the recommendation. The effect on the rights and obligations of the affected individuals and upon the legislative system is precisely the same as if a private bill were introduced but failed to receive the necessary approval. "The President and the two Houses enjoy exactly the same say in what the law is to be as would have been true for each without the presence of the one-House veto, and nothing in the law is changed absent the concurrence of the President and a majority in each House." *Atkins* v. *United States*, 556 F. 2d 1028, 1064 (Ct. Claims, 1977), cert. denied, 434 U. S. 1009 (1978).

This very construction of the Presentment Clauses which the Executive Branch now rejects was the basis upon which the Executive Branch defended the constitutionality of the Reorganization Act, 5 U. S. C. § 906(a) (1979), which provides that the President's proposed reorganization plans take effect only if not vetoed by either House. When the Department of Justice advised the Senate on the constitutionality of congressional review in reorganization legislation in 1949, it stated: "In this procedure there is no question involved of the Congress taking legislative action beyond its initial passage of the Reorganization Act." S. Rep. No. 232, 81st Cong., 1st Sess. 20 (1949) (Dept. of Justice Memorandum). This also represents the position of the Attorney General more recently.[22]

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[22] In his opinion on the constitutionality of the legislative review provi-

Thus understood, § 244(c)(2) fully effectuates the purposes of the bicameralism and presentation requirements. I now briefly consider possible objections to the analysis.

First, it may be asserted that Chadha's status before legislative disapproval is one of nondeportation and that the exercise of the veto, unlike the failure of a private bill, works a change in the status quo. This position plainly ignores the statutory language. At no place in § 244 has Congress delegated to the Attorney General any final power to determine which aliens shall be allowed to remain in the United States. Congress has retained the ultimate power to pass on such changes in deportable status. By its own terms, § 244(a) states that whatever power the Attorney General has been delegated to suspend deportation and adjust status is to be exercisable only "as hereinafter prescribed in this section." Subsection (c) is part of that section. A grant of "suspension" does not cancel the alien's deportation or adjust the alien's status to that of a permanent resident alien. A suspension order is merely a "deferment of deportation," *McGrath* v. *Kristensen*, 340 U. S. 162, 168 (1950), which can mature into a cancellation of deportation and adjustment of status only upon the approval of Congress—by way of silence—under § 244(c)(2). Only then does the statute author-

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sions of the most recent reoganization statute, 5 U. S. C. 906(a) (Supp. III 1979), Attorney General Bell stated that "the statement in Article I, § 7 of the procedural steps to be followed in the enactment of legislation does not exclude other forms of action by the Congress. . . . The procedures prescribed in Article I § 37, for congressional action are not exclusive." 43 Op. Atty Gen. No. 10, at 2 (1977). "If the procedures provided in a given statute have no effect on the constitutional distribution of power between the legislature and the executive," then the statute is constitutional. *Id.*, at 3. In the case of the reorganization statute, the power of the President to refuse to submit a plan, combined with the power of either House of Congress to reject a submitted plan suffices under the standard to make the statute constitutional. Although the Attorney General sought to limit his opinion to the reorganization statute, and the Executive opposes the instant statute, I see no Article I basis to distinguish between the two.

ize the Attorney General to "cancel deportation proceedings" § 244(c)(2), and "record the alien's lawful admission for permanent residence . . ." § 244(d). The Immigration and Naturalization Service's action, on behalf of the Attorney General, "cannot become effective without ratification by Congress." 2 Gordon and Rosenfield, Immigration Law and Procedure, § 8.14 p. 8–121 (rev. ed. 1979). Until that ratification occurs, the executive's action is simply a recommendation that Congress finalize the suspension—in itself, it works no legal change.

Second, it may be said that this approach leads to the incongruity that the two-House veto is more suspect than its one-House brother. Although the idea may be initially counter-intuitive, on close analysis, it is not at all unusual that the one-House veto is of more certain constitutionality than the two-House version. If the Attorney General's action is a proposal for legislation, then the disapproval of but a single House is all that is required to prevent its passage. Because approval is indicated by the failure to veto, the one-House veto satisfies the requirement of bicameral approval. The two-House version may present a different question. The concept that "neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body," *Kilbourn* v. *Thompson*, 103 U. S. 168, 182 (1881) is fully observed.[23]

Third, it may be objected that Congress cannot indicate its approval of legislative change by inaction. In the Court of Appeals' view, inaction by Congress "could equally imply endorsement, acquiescence, passivity, indecision or indifference." 634 F. 2d, at 435, and the Court appears to echo this concern, *Ante*, at 38, n. 22. This objection appears more properly directed at the wisdom of the legislative veto than

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[23] Of course, when the authorizing legislation requires approval to be expressed by a positive vote, then the two-House veto would clearly comply with the bicameralism requirement under any analysis.

its constitutionality. The Constitution does not and cannot guarantee that legislators will carefully scrutinize legislation and deliberate before acting. In a democracy it is the electorate that holds the legislators accountable for the wisdom of their choices. It is hard to maintain that a private bill receives any greater individualized scrutiny than a resolution of disapproval under § 244(c)(2). Certainly the legislative veto is no more susceptible to this attack than the Court's increasingly common practice of according weight to the failure of Congress to disturb an Executive or independent agency's action. See *supra* at 9–10, n. 9. Earlier this Term, the Court found it important that Congress failed to act on bills proposed to overturn the Internal Revenue Service's interpretation of the requirements for tax-exempt status under § 501(c)(3) of the tax code. *Bob Jones University* v. *United States*, —— U. S. ——, —— (1983). If Congress may be said to have ratifed the Internal Revenue Service's interpretation without passing new legislation, Congress may also be said to approve a suspension of deportation by the Attorney General when it fails to exercise its veto authority.[24] The requirements of Article I are not compromised by the Congressional scheme.

IV

The Court of Appeals struck § 244(c)(2) as violative of the constitutional principle of separation of powers. It is true

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[24] The Court's doubts that Congress entertained this "arcane" theory when it enacted § 244(c)(2) disregards the fact that this is the historical basis upon which the legislative vetoes contained in the Reorganization Acts have been defended, *supra* at 29, n. 20, and that the Reorganization Acts then provided the precedent articulated in support of other legislative veto provisions. See, *e. g.* 87 Cong. Rec. 735 (Rep. Dirksen) (citing Reorganization Act in support of proposal to include a legislative veto in Lend-Lease Act). H. R. Rep. No. 658, 93d Cong., 1st Sess. 42 (1973) (citing Reorganization Act as "sufficient precedent" for legislative veto provision for Impoundment Control Act.).

that the purpose of separating the authority of government is to prevent unnecessary and dangerous concentration of power in one branch. For that reason, the Framers saw fit to divide and balance the powers of government so that each branch would be checked by the others. Virtually every part of our constitutional system bears the mark of this judgment.

But the history of the separation of powers doctrine is also a history of accomodation and practicality. Apprehensions of an overly powerful branch have not led to undue prophylactic measures that handicap the effective working of the national government as a whole. The Constitution does not contemplate total separation of the three branches of Government. *Buckley* v. *Valeo*, 424 U. S. 1, 121 (1976). "[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." *Ibid.*[25]

Our decisions reflect this judgment. As already noted, the Court, recognizing that modern government must address a formidable agenda of complex policy issues, countenanced the delegation of extensive legislative authority to executive and independent agencies. *Hampton & Co.* v. *United States*, 276 U. S. 394, 406 (1928). The separation of powers doctrine has heretofore led to the invalidation of gov-

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[25] Madison emphasized that the principle of separation of powers is primarily violated "where the whole power of one department is exercised by the same hands which possess the whole power of another department." Federalist No. 47, 302–303. Madison noted that, the oracle of the separation doctrine, Montesquieu, in writing that the legislative, executive and judicial powers should not be united "in the same person or body of persons," did not mean "that these departments ought to have no *partial agency* in, or *control* over the acts of each other." The Federalist No. 47, p. 325 (J. Cooke ed. 1961) (emphasis in original). Indeed, according to Montesquieu, the legislature is uniquely fit to exercise an additional function: "to examine in what manner the laws that it has made have been executed." W. Gwyn, The Meaning of Separation of Powers 102 (1965).

ernment action only when the challenged action violated some express provision in the Constitution. In *Buckley* v. *Valeo*, 424 U. S. 1, 118–124 (1976) (per curiam) and *Myers* v. *United States*, 272 U. S. 52 (1926), congressional action compromised the appointment power of the President. See also *Springer* v. *Phillipine Islands*, 277 U. S. 189, 200–201 (1928). In *United States* v. *Klein*, 13 Wall. 128 (1871), an Act of Congress was struck for encroaching upon judicial power, but the Court found that the Act also impinged upon the Executive's exclusive pardon power. Art. II, § 2. Because we must have a workable efficient government, this is as it should be.

This is the teaching of *Nixon* v. *Administrator of Gen. Servs.*, 433 U. S. 425 (1977), which, in rejecting a separation of powers objection to a law requiring that the Administrator take custody of certain presidential papers, set forth a framework for evaluating such claims:

> "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States* v. *Nixon*, 418 U. S. at 711–712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." 433 U. S., at 443.

Section 244(c)(2) survives this test. The legislative veto provision does not "prevent the Executive Branch from accomplishing its constitutionally assigned functions." First, it is clear that the Executive Branch has no "constitutionally assigned" function of suspending the deportation of aliens. "'Over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Kleindiest* v. *Mandel*, 408 U. S. 753, 766

(1972), quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909). Nor can it be said that the inherent function of the Executive Branch in executing the law is involved. *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. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). "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." *Myers* v. *United States*, 272 U. S., at 177 (Holmes, J., dissenting); 272 U. S., at 247 (Brandeis, J., dissenting). Here, § 244 grants the executive only a qualified suspension authority and it is only that authority which the President is constitutionally authorized to execute.

Moreover, the Court believes that the legislative veto we consider today is best characterized as an excercise of legislative or quasi-legislative authority. Under this characterization, the practice does not, even on the surface, constitute an infringement of executive or judicial prerogative. The Attorney General's suspension of deportation is equivalent to a proposal for legislation. The nature of the Attorney General's role as recommendatory is not altered because § 244 provides for congressional action through disapproval rather than by ratification. In comparison to private bills, which must be initiated in the Congress and which allow a Presidential veto to be overriden by a two-thirds majority in both Houses of Congress, § 244 augments rather than reduces the executive branch's authority. So understood, congressional review does not undermine, as the Court of Appeals thought, the "weight and dignity" that attends the decisions of the Executive Branch.

Nor does § 244 infringe on the judicial power, as JUSTICE POWELL would hold. Section 244 makes clear that Congress has reserved its own judgment as part of the statutory process. Congressional action does not substitute for judicial re-

view of the Attorney General's decisions. The Act provides for judicial review of the refusal of the Attorney General to suspend a deportation and to transmit a recommendation to Congress. *INS* v. *Wang*, 450 U. S. 139 (1981) (per curiam). But the courts have not been given the authority to review whether an alien should be given permanent status; review is limited to whether the Attorney General has properly applied the statutory standards for essentially denying the alien a recommendation that his deportable status be changed by the Congress. Moreover, there is no constitutional obligation to provide any judicial review whatever for a failure to suspend deportation. "The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend." *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713–714 (1893). See also *Tutun* v. *United States*, 270 U. S. 568, 576 (1926); *Ludecke* v. *Watkins*, 335 U. S. 160, 171–172 (1948); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 590 (1952).

I do not suggest that all legislative vetoes are necessarily consistent with separation of powers principles. A legislative check on an inherently executive function, for example that of initiating prosecutions, poses an entirely different question. But the legislative veto device here—and in many other settings—is far from an instance of legislative tyranny over the Executive. It is a necessary check on the unavoidably expanding power of the agencies, both executive and independent, as they engage in exercising authority delegated by Congress.

V

I regret that I am in disagreement with my colleagues on the fundamental questions that this case presents. But even more I regret the destructive scope of the Court's holding.

It reflects a profoundly different conception of the Constitution than that held by the Courts which sanctioned the modern adminstrative state. 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. I fear it will now be more difficult "to insure that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people," *Arizona* v. *California*, 373 U. S. 546, 626 (1963) (Harlan, J., dissenting). I must dissent.

APPENDIX 1

STATUTES WITH PROVISIONS AUTHORIZING CONGRESSIONAL REVIEW

This compilation, reprinted from the Brief for the United States Senate, identifies and describes briefly current statutory provisions for a legislative veto by one or both Houses of Congress. Statutory provisions for a veto by committees of the Congress and provisions which require legislation (i. e., passage of a joint resolution) are not included. The fifty-six statutes in the compilation (some of which contain more than one provision for legislative review) are divided into six broad categories: foreign affiars and national security, budget, international trade, energy, rulemaking and miscellaneous.

A.

FOREIGN AFFAIRS AND NATIONAL SECURITY

1. Act for International Development of 1961, Pub. L. No. 87–195, § 617, 75 Stat. 424, 444, 22 U. S. C. 2367 (Funds made available for foreign assistance under the Act may be terminated by concurrent resolution).

2. War Powers Resolution, Pub. L. No. 93–148, § 5, 87 Stat. 555, 556–557 (1973), 50 U. S. C. 1544 (Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.)

3. Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93–155, § 807, 87 Stat. 605, 615 (1973), 50 U. S. C. 1431 (National defense contracts obligating the United States for any amount in excess of $25,000,000 may be disapproved by resolution of either House).

4. Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93–365, § 709(c), 88 Stat. 399, 408 (1974), 50 U. S. C. app. 2403–1(c) (Applications for export of

defense goods, technology or techniques may be disapproved by concurrent resolution).

5. H. R. J. Res. 683, Pub. L. No. 94-110, § 1, 89 Stat. 572 (1975), 22 U. S. C. 2441 note (Assignment of civilian personnel to Sinai may be disapproved by concurrent resolution).

6. International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 310, 89 Stat. 849, 860, 22 U. S. C. 2151n (Foreign assistance to countries not meeting human rights standards may be terminated by concurrent resolution).

7. International Security Assistance and Arms Control Act of 1976, Pub. L. No. 94-329, § 211, 90 Stat. 729, 743, 22 U. S. C. 2776(b) (President's letter of offer to sell major defense equipment may be disapproved by concurrent resolution).

8. National Emergencies Act, Pub. L. No. 94-412, § 202, 90 Stat. 1255 (1976), 50 U. S. C. 1622 (Presidentially declared national emergency may be terminated by concurrent resolution).

9. International Navigational Rules Act of 1977, Pub. L. No. 95-75, § 3(d), 91 Stat. 308, 33 U. S. C. § 1602(d) (Supp. III 1979) (Presidential proclamation of International Regulations for Preventing Collisions at Sea may be disapproved by concurrent resolution).

10. International Security Assistance Act of 1977, Pub. L. No. 95-92, § 16, 91 Stat. 614, 622, 22 U. S. C. § 2753(d)(2) (Supp. III 1979) (President's proposed transfer of arms to a third country may be disapproved by concurrent resolution).

11. Act of December 8, 1977, Pub. L. No. 95-223, § 207(2)(b), 91 Stat. 1625, 1628, 50 U. S. C. 1706(b) (Supp. III 1979) (Presidentially declared national emergency and exercise of conditional powers may be terminated by concurrent resolution).

12. Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, §§ 303, 304, 306, 307, 401, 92 Stat. 120, 130, 134,

137–38, 139, 144, 42 U. S. C. §§ 2160(f), 2155(b), 2157(b), 2153(d) (Supp. III 1979) (Cooperative agreements concerning storage and disposition of spent nuclear fuel, proposed export of nuclear facilities, materials or technology and proposed agreements for international cooperation in nuclear reactor development may be disapproved by concurrent resolution).

B.

BUDGET

13. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93–344, § 1013, 88 Stat. 297, 334–35, 31 U. S. C. 1403 (The proposed deferral of budget authority provided for a specific project or purpose may be disapproved by an impoundment resolution by either House).

C.

INTERNATIONAL TRADE

14. Trade Expansion Act of 1962, Pub. L. No. 87–794, § 351, 76 Stat. 872, 899, 19 U. S. C. 1981(a) (Tariff or duty recommended by Tariff Commission may be imposed by concurrent resolution of approval).

15. Trade Act of 1974, Pub. L. No. 93–618, §§ 203(c), 302(b), 402(d), 407, 88 Stat. 1978, 2016, 2043, 2057–60, 2063–64, 19 U. S. C. 2253(c), 2412(b), 2432, 2434 (Proposed Presidential actions on import relief and actions concerning certain countries may be disapproved by concurrent resolution; various Presidential proposals for waiver extensions and for extension of nondiscriminatory treatment to products of foreign countries may be disapproved by simple (either House) or concurrent resolutions).

16. Export-Import Bank Amendments of 1974, Pub. L. No. 93–646, § 8, 88 Stat. 2333, 2336, 12 U. S. C. 635e (Presidentially proposed limitation for exports to USSR in excess of $300,000,000 must be approved by concurrent resolution).

D.

ENERGY

17. Act of November 16, 1973, Pub. L. No. 93–153, § 101, 87 Stat. 576, 582, 30 U. S. C. 185(u) (Continuation of oil exports being made pursuant to President's finding that such exports are in the national interest may be disapproved by concurrent resolution).

18. Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93–577, § 12, 88 Stat. 1878, 1892–1893, 42 U. S. C. 5911 (Rules or orders proposed by the President concerning allocation or acquisition of essential materials may be disapproved by resolution of either House).

19. Energy Policy and Conservation Act, Pub. L. No. 94–163, § 551, 89 Stat. 871, 965 (1975), 42 U. S. C. 6421(c) (Certain Presidentially proposed "energy actions" involving fuel economy and pricing may be disapproved by resolution of either House).

20. Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94–258, § 201, 90 Stat. 303, 309, 10 U. S. C. 7422(c)(2)(C) (President's extension of production period for naval petroleum reserves may be disapproved by resolution of either House).

21. Energy Conservation and Production Act, Pub. L. No. 94–385, § 305, 90 Stat. 1125, 1148 (1976), 42 U. S. C. 6834 (Proposed sanctions involving federal assistance and the energy conservation performance standards for new buildings must be approved by resolution of both Houses).

22. Department of Energy Act of 1978—Civilian Applications, Pub. L. No. 95–238, §§ 107, 207(b), 92 Stat. 47, 55, 70, 22 U. S. C. 3224a, 42 U. S. C. 5919(m) (Supp. III 1979) (International agreements and expenditures by Secretary of Energy of appropriations for foreign spent nuclear fuel storage must be approved by concurrent resolution, if not consented to by legislation;) (plans for such use of appropriated funds may be disapproved by either House;) (financing in excess of $50,000,000 for demonstration facilities must be approved by

resolution in both Houses).
23. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95–372, §§ 205(a), 208, 92 Stat. 629, 641, 668, 43 U. S. C. §§ 1337(a), 1354(c) (Supp. III 1979) (Establishment by Secretary of Energy of oil and gas lease bidding system may be disapproved by resolution of either House;) (export of oil and gas may be disapproved by concurrent resolution).
24. Natural Gas Policy Act of 1978, Pub. L. No. 95–621, §§ 122(c)(1) and (2), 202(c), 206(d)(2), 507, 92 Stat. 3350, 3370, 3371, 3372, 3380, 3406, 15 U. S. C. 3332, 3342(c), 3346(d)(2), 3417 (Supp. III 1979) (Presidential reimposition of natural gas price controls may be disapproved by concurrent resolution;) (Congress may reimpose natural gas price controls by concurrent resolution;) (Federal Energy Regulatory Commission (FERC) amendment to pass through incremental costs of natural gas, and exemptions therefrom, may be disapproved by resolution of either House;) (procedure for congressional review established).
25. Export Administration Act of 1979, Pub. L. No. 96–72, § 7(d)(B), 7(g)(3), 93 Stat. 503, 518, 520, 50 U. S. C. app. 2406(d)(2)(B), 2406(g)(3) (Supp. III 1979) (President's proposal to domestically produce crude oil must be approved by concurrent resolution;) (action by Secretary of Commerce to prohibit or curtail export of agricultural commodities may be disapproved by concurrent resolution).
26. Energy Security Act, Pub. L. No. 96–294, §§ 104(b)(3), 104(e), 126(d)(2), 126(d)(3), 128, 129, 132(a)(3), 133(a)(3), 137(b)(5), 141(d), 179(a), 803, 94 Stat. 611, 618, 619, 620, 623–26, 628–29, 649, 650–52, 659, 660, 664, 666, 679, 776 (1980) (to be codified in 50 U. S. C. app. 2091–93, 2095, 2096, 2097, 42 U. S. C. 8722, 8724, 8725, 8732, 8733, 8737, 8741, 8779, 6240) (Loan guarantees by Departments of Defense, Energy and Commerce in excess of specified amounts may be disapproved by resolution of either House;) (President's proposal to provide loans or guarantees in excess of established amounts may be disapproved by resolution of either House;) (proposed award by President of individual contracts for pur-

chase of more than 75,000 barrels per day of crude oil may be disapproved by resolution of either House;) (President's proposals to overcome energy shortage through synthetic fuels development, and individual contracts to purchase more than 75,000 barrels per day, including use of loans or guarantees, may be disapproved by resolution of either House;) (procedures for either House to disapprove proposals made under Act are established;) (request by Synthetic Fuels Corporation (SFC) for additional time to submit its comprehensive strategy may be disapproved by resolution of either House;) (proposed amendment to comprehensive strategy by SFC Board of Directors may be disapproved by concurrent resolution of either House or by failure of both Houses to pass concurrent resolution of approval;) (procedure for either House to disapprove certain proposed actions of SFC is established;) (procedure for both Houses to approve by concurrent resolution or either House to reject concurrent resolution for proposed amendments to comprehensive strategy of SFC is established;) (proposed loans and loan guarantees by SFC may be disapproved by resolution of either House;) (acquisition by SFC of a synthetic fuels project which is receiving financial assistance may be disapproved by resolution of either House;) (SFC contract renegotiations exceeding initial cost estimates by 175% may be disapproved by resolution of either House;) (proposed financial assistance to synthetic fuel projects in Western Hemisphere outside United States may be disapproved by resolution of either House;) (President's request to suspend provisions requiring build up of reserves and limiting sale or disposal of certain crude oil reserves must be approved by resolution of both Houses).

E.

RULEMAKING

27. Education Amendments of 1974, Pub. L. No. 93–380, § 509, 88 Stat. 484, 567, 20 U. S. C. 1232(d)(1) (Department

of Education regulations may be disapproved by concurrent resolution).

28. Federal Education Campaign Act Amendments of 1979, Pub. L. No. 96–187, § 109, 93 Stat. 1339, 1364, 2 U. S. C. 438(d)(2) (Supp. III 1979) (Proposed rules and regulations of the Federal Election Commission may be disapproved by resolution of either House).

29. Act of January 2, 1975, Pub. L. No. 93–595, § 2, 88 Stat. 1926, 1948, 28 U. S. C. 2076 (Proposed amendments by Supreme Court of Federal Rules of Evidence may be disapproved by resolution of either House).

30. Act of August 9, 1975, Pub. L. No. 94–88, § 208, 89 Stat. 433, 436–37, 42 U. S. C. 602 note (Social Security standards proposed by Secretary of Health and Human Services may be disapproved by either House).

31. Airline Deregulation Act of 1978, Pub. L. No. 95–504, § 43(f)(3), 92 Stat. 1705, 1752, 49 U. S. C. 1552(f) (Supp. III 1979) (Rules or regulations governing employee protection program may be disapproved by resolution of either House).

32. Education Amendments of 1978, Pub. L. No. 95–561, §§ 1138, 1212, 1409, 92 Stat. 2143, 2327, 2341, 2341, 2369, 25 U. S. C. 2018, 20 U. S. C. 1221–3(e) (Supp. III 1979) (Rules and regulations proposed under the Act may be disapproved by concurrent resolution).

33. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96–247, § 7(b)(1), 94 Stat. 349, 352–355 (1980) (to be codified in 42 U. S. C. 1997e) (Attorney General's proposed standards for resolution of grievances of adults confined in correctional facilities may be disapproved by resolution of either House).

34. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96–252, § 21(a), 94 Stat. 374, 393 (to be codified in 15 U. S. C. 57a–1) (Federal Trade Commission rules may be disapproved by concurrent resolution).

35. Department of Education Organization Act, Pub. L. No. 96–88, § 414(b), 93 Stat. 668, 685 (1979), 20 U. S. C. 3474

(Supp. III 1979) (Rules and regulations promulgated with respect to the various functions, programs and responsibilities transferred by this Act, may be disapproved by concurrent resolution).

36. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 102, 94 Stat. 1208, 1213 (to be codified in 29 U. S. C. 1322a) (Schedules proposed by Pension Benefit Guaranty Corporation (PBGC) which requires an increase in premiums must be approved by concurrent resolution;) (revised premium schedules for voluntary supplemental coverage proposed by PBGC may be disapproved by concurrent resolution).

37. Farm Credit Act Amendments of 1980, Pub. L. No. 96-592, § 508, 94 Stat. 3437, 3450 (to be codified in 12 U. S. C. 2121) (Certain Farm Credit Administration regulations or delayed by resolution of either House.)

38. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 305, 94 Stat. 2767, 2809 (to be codified in 42 U. S. C. 9655) (Environmental Protection Agency regulations concerning hazardous substances releases, liability and compensation may be disapproved by concurrent resolution or by the adoption of either House of a concurrent resolution which is not disapproved by the other House).

39. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, § 501, 94 Stat. 2987, 3004 (to be codified in 16 U. S. C. 470w-6) (Regulation proposed by the Secretary of the Interior may be disapproved by concurrent resolution).

40. Costal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, § 12, 94 Stat. 2060, 2067 (to be codified in 16 U. S. C. 1463a) (Rules proposed by the Secretary of Commerce may be disapproved by concurrent resolution).

41. Act of December 17, 1980, Pub. L. No. 96-539, § 4, 94 Stat. 3194, 3195 (to be codified in 7 U. S. C. 136w) (Rules or regulations promulgated by the Administrator of the Envi-

ronmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act may be disapproved by concurrent resolution).

42. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, §§ 533(a)(2), 1107(d), 1142, 1183(a)(2), 1207, 95 Stat. 357, 453, 626, 654, 659, 695, 718–20 (to be codified in 20 U. S. C. 1089, 23 U. S. C. 402(j), 45 U. S. C. 761, 767, 564(c)(3), 15 U. S. C. 2083, 1276, 1204) (Secretary of Education's schedule of expected family contributions for Pell Grant recipients may be disapproved by resolution of either House;) (rules promulgated by Secretary of Transportation for programs to reduce accidents, injuries and deaths may be disapproved by resolution of either House;) (Secretary of Transportation's plan for the sale of government's common stock in rail system may be disapproved by concurrent resolution;) (Secretary of Transportation's approval of freight transfer agreements may be disapproved by resolution of either House;) (amendments to Amtrak's Route and Service Criteria may be disapproved by resolution of either House;) (Consumer Product Safety Commission regulations may be disapproved by concurrent resolution of both Houses, or by concurrent resolution of disapproval by either House if such resolution is not disapproved by the other House).

F.

MISCELLANEOUS

43. Federal Civil Defense Act of 1950, Pub. L. No. 81–920, § 201, 64 Stat. 1245, 1248, 50 app. U. S. C. 2281(g) (Interstate civil defense compacts may be disapproved by concurrent resolution).

44. National Aeronautics and Space Act of 1958, Pub. L. No. 85–568, § 302c, 72 Stat. 426, 433, 42 U. S. C. 2453 (President's transfer to National Air and Space Administration of functions of other departments and agencies may be disapproved by concurrent resolution).

45. Federal Pay Comparability Act of 1970, Pub. L. No. 91–656, § 3, 84 Stat. 1946, 1949, 5 U. S. C. 5305 (President's alternative pay plan may be disapproved by resolution of either House).

46. Act of October 19, 1973, Pub. L. No. 93–134, § 5, 87 Stat. 466, 468, 25 U. S. C. 1405 (Plan for use and distribution of funds paid in satisfaction of judgment of Indian Claims Commission or Court of Claims may be disapproved by resolution of either House).

47. Menominee Restoration Act, Pub. L. No. 93–197, § 6, 87 Stat. 770, 773 (1973), 25 U. S. C. 903d(b) (Plan by Secretary of the Interior for assumption of the assets the Menominee Indian corporation may be disapproved by resolution of either House).

48. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93–198, §§ 303, 602(c)(1) and (2), 87 Stat. 774, 784, 814 (1973) (District of Columbia Charter amendments ratified by electors must be approved by concurrent resolution;) (acts of District of Columbia Council may be disapproved by concurrent resolution;) (acts of District of Columbia Council under certain titles of D.C. Code may be disapproved by resolution of either House).

49. Act of December 31, 1975, Pub. L. No. 94–200, § 102, 89 Stat. 1124, 12 U. S. C. 461 note (Federal Reserve System Board of Governors may not eliminate or reduce interest rate differentials between banks insured by Federal Deposit Insurance Corporation and associations insured by Federal Savings and Loan Insurance Corporations without concurrent resolution of approval).

50. Veterans' Education and Employment Assistance Act of 1976, Pub. L. No. 94–502, § 408, 90 Stat. 2383, 2397–98, 38 U. S. C. 1621 note (President's recommendation for continued enrollment period in Armed Forces educational assistance program may be disapproved by resolution of either House).

51. Federal Land Policy and Management Act of 1976, Pub.

L. No. 94–579, §§ 203(c), 204(c)(1), 90 Stat. 2743, 2750, 2752, 43 U. S. C. 1713(c), 1714 (Sale of public lands in excess of two thousand five hundred acres and withdrawal of public lands aggregating five thousand acres or more may be disapproved by concurrent resolution).

52. Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95–19, § 401, 91 Stat. 39, 45, 2 U. S. C. 359 (Supp. III 1979) (Preident's recommendations regarding rates of salary payment may be disapproved by resolution of either House).

53. Civil Service Reform Act of 1978, Pub. L. No. 95–454, § 515, 92 Stat. 1111, 1179, 5 U. S. C. 3131 note (Supp. III 1979) (Continuation of Senior Executive Service may be disapproved by concurrent resolution).

54. Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95–523, § 304(b), 92 Stat. 1887, 1906, 31 U. S. C. 1322 (Supp. III 1979) (Presidential timetable for reducing unemployment may be superseded by concurrent resolution).

55. District of Columbia Retirement Reform Act, Pub. L. No. 96–122, § 164, 93 Stat. 866, 891–92 (1979) (Required reports to Congress on the District of Columbia retirement program may be rejected by resolution of either House).

56. Act of August 29, 1980, Pub. L. No. 96–332, § 2, 94 Stat. 1057, 1058 (to be codified in 16 U. S. C. 1432) (Designation of marine sanctuary by the Secretary of Commerce may be disapproved by concurrent resolution).

SUPREME COURT OF THE UNITED STATES

Nos. 80–1832, 80–2170 AND 80–2171

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

80–1832 *v.*

JAGDISH RAI CHADHA ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

80–2170 *v.*

IMMIGRATION AND NATURALIZATION SERVICE ET AL.

UNITED STATES SENATE, PETITIONER

80–2171 *v.*

IMMIGRATION AND NATURALIZATION SERVICE ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 1983]

JUSTICE REHNQUIST, with whom JUSTICE WHITE joins, dissenting.

A severability clause creates a presumption that Congress intended the valid portion of the statute to remain in force when one part is found to be invalid. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312 (1936); *Champlin Refining Co.* v.

Corporation Comm'n, 286 U. S. 210, 235 (1932). A severability clause does not, however, conclusively resolve the issue. "[T]he determination, in the end, is reached by" asking "[w]hat was the intent of the lawmakers," *Carter*, *supra*, at 312, and "will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U. S. 570, 585, n. 27 (1968). Because I believe that Congress did not intend the one-House veto provision of § 244(c)(2) to be severable, I dissent.

Section 244(c)(2) is an exception to the general rule that an alien's deportation shall be suspended when the Attorney General finds that statutory criteria are met. It is severable only if Congress would have intended to permit the Attorney General to suspend deportations without it. This Court has held several times over the years that exceptions such as this are not severable because

> "by rejecting the exceptions intended by the legislature . . . the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions." *Spraigue* v. *Thompson*, 118 U. S. 90, 95 (1886).

By severing § 244(c)(2), the Court permits suspension of deportation in a class of cases where Congress never stated that suspension was appropriate. I do not believe we should expand the statute in this way without some clear indication that Congress intended such an expansion. As the Court said in *Davis* v. *Wallace*, 257 U. S. 478, 484–485 (1922):

> "Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which was intended to qualify or restrain. The rea-

soning on which the decisions proceed is illustrated in *State Ex Rel. McNeal* v. *Dombaugh*, 20 Ohio St. 167, 174. In dealing with a contention that a statute containing an unconstitutional provision should be construed as if the remainder stood alone, the court there said: 'This would be to mutilate the section and garble its meaning. The legislative intention must not be confounded with their power to carry that intention into effect. To refuse to give force and vitality to a provision of law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional provision of a statute is 'stricken out.' For all the purposes of construction it is to be regarded as part of the act. The meaning of the legislature must be gathered from all that they have said, as well from that which is ineffectual for want of power, as from that which is authorized by law.'

Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the State; and no other authority is competent to give them a larger application."

See also *Frost* v. *Corporation Comm'n*, 278 U. S. 515, 525 (1929).

The Court finds that the legislative history of § 244 shows that Congress intended § 244(c)(2) to be severable because Congress wanted to relieve itself of the burden of private bills. But the history elucidated by the Court shows that Congress was unwilling to give the Executive Branch permission to suspend deportation on its own. Over the years, Congress consistently rejected requests from the Executive

for complete discretion in this area. Congress always insisted on retaining ultimate control, whether by concurrent resolution, as in the 1948 Act, or by one-House veto, as in the present Act. Congress has never indicated that it would be willing to permit suspensions of deportation unless it could retain some sort of veto.

It is doubtless true that Congress has the power to provide for suspensions of deportation without a one-House veto. But the Court has failed to identify any evidence that Congress intended to exercise that power. On the contrary, Congress' continued insistence on retaining control of the suspension process indicates that it has never been disposed to give the Executive Branch a free hand. By severing § 244(c)(2) the Court has "confounded" Congress' "intention" to permit suspensions of deportation "with their power to carry that intention into effect." *Davis*, *supra*, at 484, quoting *Dombaugh*, *supra*, at 174.

Because I do not believe that § 244(c)(2) is severable, I would reverse the judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1295—August Term, 1983

Argued: May 17, 1984 Decided: August 28, 1984

Docket No. 84-6063

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

—against—

CBS, INC.,

Defendant-Appellant.

Before:

CARDAMONE, PRATT, and DANIEL M. FRIEDMAN of the United States Court of Appeals for the Federal Circuit, sitting by designation,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Sprizzo, *J.*,

determining that the presence of a one-house veto clause in the Reorganization Act of 1977 did not invalidate the authority of the Equal Employment Opportunity Commission, transferred to it by Reorganization Plan No. 1 of 1978, to enforce the Age Discrimination in Employment Act.

Reversed.

GEORGE A. STOHNER, Washington, DC (James Skelly Wright, Jr., Donna S. Mangold, Morgan, Lewis & Bockius, of Counsel), *for Defendant-Appellant.*

MARK S. FLYNN, Attorney, Equal Employment Opportunity Commission, Washington, DC (Richard K. Willard, Acting Assistant Attorney General, Carolyn Kuhl, Deputy Assistant Attorney General, Douglas Letter, Attorney, Department of Justice, Washington, DC; David L. Slate, General Counsel, Philip B. Sklover, Associate General Counsel, Susan Buckingham Reilly, Acting Assistant General Counsel, Equal Employment Opportunity Commission, Washington, DC, of Counsel) *for Plaintiff-Appellee.*

John R. Crenshaw, Atlanta, GA (Anne S. Rampacek, Alston & Bird, Atlanta, GA, of Counsel), *for Amicus Curiae Chrysler Corporation.*

Joseph M. Wells, Lumbard, IL (Majorie Nemzura, Lumbard, IL, of Counsel), *for Amicus Curiae Natural Gas Pipeline Company of America.*

Rodger A. Kershner, Detroit, MI, *for Amicus Curiae ANR Pipeline Company.*

Herschel L. Abbott, Jr., New Orleans, LA (H. Mark Adams, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, LA, of Counsel), *for Amicus Curiae ANR Pipeline Company* and *Natural Gas Pipeline Company of America.*

PRATT, *Circuit Judge*:

This appeal presents a narrow but important question of first impression in this circuit:

> Does the presence of a one-house veto clause in the Reorganization Act of 1977 invalidate the authority of the Equal Employment Opportunity Commission (EEOC), transferred to it by Reorganization Plan No. 1 of 1978, to enforce the Age Discrimination in Employment Act (ADEA)?

Judge Sprizzo below held that, although the legislative veto clause in question is unconstitutional in light of the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*, 103 S.Ct. 2764 (1983), the EEOC retains authority to enforce the ADEA, 29 U.S.C. § 621 *et seq.*, because (1) the veto clause is severable from the rest of the Reorganization Act and, alternatively, (2)

congress has ratified the transfer of enforcement authority to the EEOC. Because we conclude that the unconstitutional veto provision is not severable from the rest of the Reorganization Act, and that congress has not ratified the transfer of authority, we reverse the judgment of the district court and hold that, as of the effective date of our judgment on this appeal, absent corrective action by congress, the EEOC's authority to prosecute this action will cease.

BACKGROUND

The Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29, codified at 5 U.S.C. § 901 *et seq.* (the Act), conferred on the President authority to reorganize executive departments and agencies subject to a "veto" by either house of congress. Procedurally, the Act required the President to transmit any proposed reorganization plan to both houses, and such a plan was to become effective if neither house passed a resolution of disapproval within 60 days. 5 U.S.C. §§ 903, 906(a).

As authorized by the Act, President Carter prepared and submitted to congress Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807, 92 Stat. 3871, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9795-9800 (the Plan), which was designed to reorganize and expand the functions of the EEOC. Among the functions and responsibilities transferred to the EEOC were enforcement and administrative authority for the ADEA, which had previously been enforced by the Secretary of Labor. Since neither house passed a resolution of disapproval, the entire Plan, including its transfer of enforcement authority over the ADEA, became effective. *See generally EEOC v. Allstate Insurance Co.*, 104 S.Ct. 3499 (1984)

(Burger, *Ch. J.*, dissenting from dismissal of appeal for lack of jurisdiction).

In May 1981 the EEOC filed the complaint in this action, charging CBS with violating the ADEA. Over two years later, in September 1983, CBS moved to dismiss, claiming that the EEOC lacks power to enforce the ADEA, because the Plan's transfer of ADEA enforcement authority from the Department of Labor to the EEOC was subject to a one-house veto, a legislative device that was held unconstitutional in *Chadha*. The district court denied CBS's motion, but on its certification pursuant to 28 U.S.C. § 1292(b) we permitted this interlocutory appeal.

DISCUSSION

In one broad stroke, the Supreme Court in *Chadha* invalidated every use of the legislative veto. 103 S.Ct. at 2788 (Powell, *J.*, concurring); *see also id.* at 2792, 2810-11 (White, *J.*, dissenting). Chief Justice Burger's majority opinion reasoned that this device, various forms of which had been inserted in nearly 200 federal laws since the mid-1930's, violated constitutional mandates of separation of powers, bicameralism, and presentment. *Id.* at 2781-88. In effect, the Court held that the convenience, flexibility, and efficiency of the device could not overcome the fact that it is clearly inconsistent with our constitutional structure. *Id.* at 2781.

Given such a strongly worded position by the Supreme Court, it is not surprising that the EEOC does not dispute that the legislative veto provision contained in the Reorganization Act is unconstitutional.

Instead, the EEOC argues that notwithstanding the unconstitutionality of the legislative veto device, it retains

enforcement authority under the Plan, because (a) the veto provision is severable from the rest of the Act; (b) even if it is not severable, congress has ratified the Plan by its subsequent appropriation of funds for ADEA enforcement to the EEOC and by a reference to the Plan in § 905 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1224, codified at 5 U.S.C. § 1101 (note); and (c) even if the provision is not severable and has not been ratified, our ruling should not be applied retroactively to invalidate a government reorganization that was implemented nearly five years ago.

We disagree with the EEOC on its first two arguments, severability and ratification, but will stay our judgment for a reasonable time in order to give congress an opportunity to cure the legislative defect.

A. *SEVERABILITY*

Whether or not we should sever an unconstitutional provision from the remainder of the statute in which it appears is primarily an issue of legislative intent. "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)); *accord Regan v. Time, Inc.*, 104 S.Ct. 3262, 3269 (1984). Thus, we must decide whether congress would have delegated to the President the broad reorganizing authority granted him by the Act without reserving for itself the one-house veto power contained in 5 U.S.C. § 906(a). For guidance we look to the statute and its relevant legislative history.

To begin with we note that to hold the veto provision to be severable would confer upon the statute "a positive operation beyond the legislative intent * * * ", *Spraigue v. Thompson*, 118 U.S. 90, 95 (1886), because the President alone then would have been permitted to reorganize the executive branch without any congressional control over the process, short of formal legislation, and this would have been contrary to congress's intent as expressed in the Act, in the debates on the Act, and in the committee reports that preceded its enactment.

The Act was a compromise between two bills. One, H.R. 3407, sponsored by the administration, allowed either house to veto a reorganization plan with a resolution of disapproval introduced and processed through that house's normal parliamentary procedures. The other, H.R. 3131, drafted by Rep. Brooks, chairman of the House Committee on Government Operations, contained no legislative veto clause, but instead proposed to follow the usual legislative process of requiring approval for each reorganization plan by both houses and then presentment to the President for signature. H.R. Rep. No. 105, 95th Cong., 1st Sess. 3-4, 9, *reprinted in* 1977 U.S. Code Cong. & Ad. News 43, 49 (House Report); *see also id.* at 36, *reprinted in* 1977 U.S. Code Cong. & Ad. News 63 (additional views of Rep. Brooks).

The compromise was H.R. 5045. Under it, formal legislative procedures for reorganization plans were set aside in favor of a special, expedited procedure for processing disapproval resolutions. Those resolutions had to be introduced in both houses immediately after submission of a proposed reorganization plan, and then referred to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House. 5 U.S.C. § 910. After 45 days, the resolu-

tions automatically went onto the appropriate calendars of the house and senate even if they were not reported out by either committee. § 910(b). At this point, any member of congress could move for consideration of the disapproval resolution, and a majority "yes" vote in either house would veto the plan. § 912. This expedited mechanism for processing a disapproval resolution was designed to strengthen the role of congress in the reorganization process and to allay doubts that the Act would delegate too much legislative authority to the President. House Report at 3, 17, *reprinted in* 1977 U.S. Code Cong. & Ad. News 43, 56-57.

Many still questioned whether H.R. 5045 went far enough. They contended that the entire one-house veto mechanism was of questionable constitutionality and that even though the compromise bill permitted active congressional intervention in the reorganization process, it still violated the requirements of article I of the constitution. House Report at 9-17, *reprinted in* 1977 U.S. Code Cong. & Ad. News 49-57; *see also id.* at 36, *reprinted in* 1977 U.S. Code Cong. & Ad. News 63 (additional views of Rep. Brooks). Professor Philip Kurland of the University of Chicago Law School testified before the house subcommittee:

> The question that I have been asked to address is whether Congress can authorize the President to write legislation which shall have the effect of law unless a majority of either House of Congress votes against accepting it as law.
>
> *The plain and simple answer is that the Constitution does not provide for such a lawmaking procedure. It specifies a different process for the writing of laws.* It is for Congress, the legislative branch, to write the laws. A President is authorized to veto laws

> enacted by Congress and Congress is enpowered [sic] to override any such Presidential veto by a two-thirds majority of each House. The proposed executive reorganization bill would stand the Constitution on its head by putting the lawmaking power in the President and the veto power in Congress. *I know of no way constitutionally to justify such a process.*

House Report at 13-14, *reprinted in* 1977 U.S. Code Cong. & Ad. News 53 (emphasis added). Professor Laurence Tribe of Harvard Law School similarly thought the legislative veto procedure was unconstitutional. *Id.* at 15, *reprinted in* 1977 U.S. Code Cong. & Ad. News 54-55.

Even more telling were the pointed additional remarks of Rep. Drinan, who, in objecting to the one-house veto provision on constitutional grounds, emphasized that, if the veto provision was found to be unconstitutional, the whole act would necessarily be found unconstitutional:

> Why is it not possible or practical or wise to undertake reorganization through the normal legislative process? Why is it necessary to take all these constitutional short-cuts when the regular procedures are in place and available? And why would the administration want to risk that the courts might hold the act unconstitutional and thus upset administrative action taken pursuant to reorganization plans? *It must be remembered that H.R. 5045 intentionally does not contain a severability clause. The one House veto provision is deemed to be an integral and necessary part of the legislative scheme for reorganization. That is a proposition to which all agree.* Yet that unanimous concurrence jeopardizes the plans developed under the statute, and all agency authority exercised pursuant to them.

Id. at 42, *reprinted in* 1977 U.S. Code Cong. & Ad. News 69 (emphasis added); *see also* Rep. Drinan's comment at 123 Cong. Rec. 9352 (1977) ("In the absence of a severability clause [congress recognizes] that if the one House veto clause fails, the whole act fails").

In spite of these constitutional warnings, the House Committee on Government Operations recommended the bill because in its judgment "the risk [was] worth taking." House Report at 3, *reprinted in* 1977 U.S. Code and Ad. News 42-43. Moreover, in the conclusion of its report to the house, the committee stated:

> The question remains unresolved, but it is the position of the committee that the risk of an unfavorable ruling by the courts, while still remaining, may have been lessened by the adoption of the new voting procedure and the added limitations on the use of the reorganization authority.

Id. at 7, *reprinted in* 1977 U.S. Code Cong. & Ad. News 57.

Rather than delete the veto provision or add a severability clause expressing its desire that the Act remain effective should the court invalidate the veto provision, congress followed the route recommended by the house committee. It did so in a well-intentioned effort to combine efficiency with ultimate congressional control. The veto provision insured substantial congressional oversight of the reorganization process while the Act's other provisions granted the President wide flexibility in designing the reorganizations by not requiring each plan to obtain full and formal congressional approval. *See* 123 Cong. Rec. 9344 (1977) (remarks of Rep. Brooks); 123 Cong. Rec. 6145 (1977) (remarks of Sen. Ribicoff). Because it served both of these objectives so well, the one-house veto

was viewed as "the key provision" of the bill, House Report at 17, *reprinted in* 1977 U.S. Code Cong. & Ad. News 57, and "an integral and necessary part of the legislative scheme for reorganization". *Id.* at 42, *reprinted in* 1977 U.S. Code Cong. & Ad. News 69 (additional views of Rep. Drinan).

It follows that, without such a provision, congress would have been unwilling to delegate to the President such extensive authority to reorganize the executive branch. We therefore conclude that the unconstitutional veto provision is not severable and that the entire Reorganization Act is unconstitutional.

We are aware that in so holding we depart from the fifth circuit, which, in *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190-92 (5th Cir. 1984), held this legislative veto provision to be severable. We disagree with their view for three reasons. First, the fifth circuit concluded that, with the exception of Rep. Drinan's comments, there was nothing in the language of the Act or its legislative history to indicate that congress would not have enacted this statute in the absence of the unconstitutional provision. *Id.* at 1191. We think that, in light of the rest of the legislative history discussed above, and particularly, the house report, this conclusion is clearly incorrect. Moreover, as indicated above, the consequences of excising the veto provision, the comments on the floor of congress, and the materials contained in the committee reports all demonstrate that the veto provision was a "key provision" and an "integral and necessary" part of the Act. We conclude that, without it, the Act would not have been enacted.

Second, the fifth circuit noted that congress did not consider the issue of severability. But whether or not it did so is beside the point, for the more appropriate inquiry is

whether the veto provision is such an integral part of the law as to compel the conclusion that congress would not have passed the Act without that unlawful provision. *See Buckley v. Valeo*, 424 U.S. at 108-09.

Finally, in further support of its conclusion of severability, the fifth circuit referred to the limitations imposed by the Act on the executive branch, the need for flexibility in the reorganization process, the cost-effectiveness of a one-house veto provision, and the ultimate authority retained by congress over the "substantive operation of the federal government". *EEOC v. Hernando Bank, Inc.*, 724 F.2d at 1192. While these factors may bear on the wisdom of the Act and even on the consitutionality of its legislative veto provision, they do not help much in determining whether congress was willing to turn the reorganization process over to the President unrestricted and unsupervised. It seems clear that congress did not wish to divorce itself from the reorganization process. Indeed, even the fifth circuit acknowledges that one of congress's objectives was to strengthen its own role in reorganizing the executive branch, *id.* at 1191-92, and this fact militates against severability, because it was the veto provision that was seen as essential to congress's control over the process.

B. *RATIFICATION*

The EEOC next argues that even if the entire Act is unconstitutional, the transfer of enforcement authority effected by the Plan has since been ratified by congressional enactments that do satisfy the constitutional requirements of bicameralism and presentment, specifically a number of appropriations acts and § 905 of the Civil Service Reform Act of 1978.

Although congress may ratify otherwise unauthorized actions, *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147-48 (1937); *Swayne & Hoyt v. United States*, 300 U.S. 297, 301-02 (1937), to do so its ratifying legislation must recognize that the actions involved were unauthorized when taken and must also expressly ratify those actions in clear and unequivocal language. *Id.*; *see also Silas Mason v. Tax Commission*, 302 U.S. 186, 208 (1937); *EEOC v. Martin Industries, Inc.*, 581 F. Supp. 1029, 1034 (N.D. Ala. 1984), *appeal filed*, 53 U.S.L.W. 3033 (U.S. May 18, 1984) (No. 83-1893). Mere "acquiescence or nonaction" is not enough for ratification, "because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Greene v. McElroy*, 360 U.S. 474, 507 (1959). *Chadha's* strict interpretation of the principles of bicameralism, presentment, and separation of powers reinforces the need for strong evidence of ratification.

References to the ADEA in relation to the EEOC that are buried in lengthy and comprehensive appropriations acts, *e.g.*, Pub. L. No. 98-166, 97 Stat. 1071, 1088 (1983); Pub. L. No. 97-377, 96 Stat. 1830, 1874 (1982); Pub. L. No. 97-92, 95 Stat. 1183, 1192 (1981), do not suffice under these principles to ratify a specific transfer of enforcement authority from the Secretary of Labor to the EEOC. Appropriation acts "have the limited and specific purpose of providing funds for authorized programs", *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). Legislators are not required to check the background of each authorization before voting on an appropriations measure; they are instead entitled to assume that the underlying substantive programs are valid. *Id.* Since the substantive aspects of appropriations bills are subject

to much less scrutiny than the substantive programs themselves, *see Pacific Legal Foundation v. Goyan*, 664 F.2d 1221, 1226 (4th Cir. 1981); *see also Andrus v. Sierra Club*, 442 U.S. 347, 355-65 (1979), an appropriations bill is a particularly unsuitable vehicle for an implied ratification of unauthorized actions funded therein. *Cf. Fleming v. Mohawk Wrecking and Lumber Co.*, 331 U.S. 111, 116 (1947). This is especially true where, as here, the unauthorized action is an unconstitutional one, rather than merely a technically improper one. *See EEOC v. Martin Industries, Inc.*, 581 F. Supp. at 1035-36.

A reference to the Plan in § 905 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1224, codified at 5 U.S.C. § 1101 (note), is equally insufficient to ratify the President's transfer of ADEA enforcement authority to the EEOC. That act was 117 pages long and was designed to effect a comprehensive reform of the federal civil service system. On page 114, under "miscellaneous", is a provision that states "[a]ny provision in either Reorganization Plan Numbered 1 or 2 inconsistent with any provision in this Act is hereby superseded." 92 Stat. 1224. If anything, this reference to the Plan tends to invalidate, rather than ratify it. There is no reference here to the specific transfer of enforcement authority at issue, nor is this the type of "deliberate" action by congress that would operate to ratify the otherwise unauthorized transfer. *Cf. Silas Mason v. Tax Commission*, 302 U.S. at 208.

For the foregoing reasons, we hold that the Act is unconstitutional in its entirety and that the Plan promulgated thereunder is unconstitutional as well. As a result, the EEOC lacks authority to enforce the ADEA.

C. *RETROACTIVITY*

The EEOC's final argument is that even if the Act is invalid in its entirety and was not thereafter ratified by congress, we should not apply our ruling of unconstitutionality retroactively. The EEOC argues that our decision should be given only prospective effect in order to "avoid the major disruption which can result from invalidating past government actions and in order to avoid undue, inequitable burdens on individuals". Brief for Appellee at 37. We are told that there are currently pending 111 cases brought by the EEOC to enforce the ADEA as well as 69 cases under the Equal Pay Act, whose enforcement responsibility was also transferred from the Labor Department to the EEOC under the Plan. *Id.* at 43. The EEOC argues that dismissal of those suits on the ground that the Plan was invalid could cause severe prejudice to the many innocent victims of discrimination who have relied upon the EEOC's litigation efforts. The EEOC further contends that because the President's authority to promulgate plans under the Act has now expired, and because the Plan has already been implemented, the transfer of enforcement authority is already an accomplished fact and the EEOC should be permitted to continue enforcing the ADEA notwithstanding the unconstitutional genesis of its authority.

To the extent that the EEOC asks us to determine the impact of our present decision on cases that are not now and may never be, before us, we think the request is, at best, premature. We express no opinion as to the impact of this decision on any other ADEA claim, administrative or judicial.

To the extent that the EEOC asks us to ignore in this case, the unconstitutional basis for its authority to en

force the ADEA against CBS, we reject the request. We recognize, however, that immediate, automatic dismissal of the complaint would be an unnecessarily drastic remedy. We think it more appropriate to stay the judgment on this appeal until December 31, 1984, to afford congress an opportunity to take appropriate measures either to validate the EEOC's authority over ADEA enforcement, or to otherwise clarify its requirements for enforcing that statute. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982) We do this so as not to impair the processing and prosecution of ADEA claims unnecessarily, and to better protect the rights of individuals who have such claims. We are encouraged by the fact that the house of representatives has already passed a bill designed to remedy the unconstitutional defects of plans promulgated under the Act, H.R. 1314, 98th Cong., 2d Sess., 130 Cong. Rec. H2519-21 (daily ed. April 10, 1984), and we hope that congress and the President will expeditiously enact that or similar legislation, following the requirements of article I of the constitution, so as to avoid unnecessary disruption in the prosecution of pending and future age discrimination claims.

CONCLUSION

The order of the District Court is reversed and the action is remanded to the district court with a direction to dismiss the complaint. The judgment to be entered on this appeal shall be stayed until December 31, 1984. If prior to that date congress shall pass legislation affecting the authority of the plaintiff to maintain this action, the district court shall then conduct such further proceedings as may be appropriate.

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CONGRESSIONAL CONTROL OF EXECUTIVE ACTIONS IN THE AFTERMATH OF THE *CHADHA* DECISION

Frederick M. Kaiser*

ABSTRACT

By ruling that the legislative veto was unconstitutional, in *INS v. Chadha* and subsequent summary affirmances, the Supreme Court has raised anew a basic problem for the Congress: i.e., how to control specific executive actions based upon necessarily broad, sometimes vague, statutory delegations of authority. This article examines congressional attempts to nullify or neutralize such actions, in the immediate aftermath of the *Chadha* decision as well as in the recent past, and surveys the available statutory and nonstatutory powers. Not only are the techniques varied, ranging from direct legislative negations and changes in agency jurisdiction to oversight hearings, consultations, and informal legislative vetoes; but they also differ in their impact on executive discretion and in their accessibility and political appeal to Members of Congress. A concluding section of the article highlights other statutory or congressional rule changes that have been or might be advanced as further checks on executive actions.

I. INTRODUCTION

In the wake of the Supreme Court's sweeping invalidation of the legislative veto, particularly in *Immigration and Naturalization Service v. Chadha*,[1] Congress has had to consider alternative powers to control

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[1] *Immigration and Naturalization Serv. v. Chadha*, 103 S. Ct. 2767 (1983). For an examination of the decision and its possible impacts, see *The U.S. Supreme Court Decision Concerning*

executive actions, especially those flowing from broad delegations of authority to officials in the Executive Branch and independent agencies.

The immediate congressional responses have been varied and, on occasion, controversial. Reacting expressly to the loss of a legislative veto over Consumer Product Safety Commission (CPSC) regulations, the House approved a bill (H.R. 2668) that would reduce the CPSC reauthorization period to three years, from the previously recommended five years, and that would apply a joint resolution (of approval or disapproval) to the agency's future rulemaking.[2] The Senate, in its first action (following the *Chadha* decision) over a matter that had been previously subject to a congressional veto, removed the President's former discretionary authority, over military pay raises in this case.[3] To complicate any straightforward projections about the impact of the Supreme Court's ruling on other legislative vetoes, twelve new committee vetoes have been included in appropriations acts passed since the Court's rulings;[4] and the House Interior Committee, sustained at least temporarily in Federal District Court, has continued to press its own committee veto over Interior Department coal leasing projects.[5]

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the Legislative Veto: Hearings before the House Comm. on Foreign Affairs, 98th Cong., 1st Sess. (1983); R. B. Smith, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A. J. 1258–62 (1983); and *Supreme Court Review and Constitutional Law Symposium*, 52 U.S. L.W. 2228, 2231–2233 (10/23/83); Gilmour and Craig, *After the Congressional Veto: Assessing the Alternatives*, 3 J. POL. ANALYSIS & MGMT. 373–92 (1984); and *The Legislative Veto after INS v. Chadha*, Congressional Research Service Review (Fall 1983).

[2]H.R. 2668, 98th Cong., 1st Sess. 129 CONG. REC. H4771–84 (daily ed. June 29, 1983).

[3]The Senate Committee on Armed Services action on S. 675 is described in 129 CONG. REC. S9831–32 (daily ed. July 13, 1983). Despite Senate approval, the provision was not included in the final version of the Department of Defense Authorization Act, 1984, Pub. L. No. 98–94, 97 Stat. 614.

[4]Twelve statutory provisions for Appropriations Committee vetoes (along with a committee-activated moratorium), enacted after the *Chadha* ruling, are: Department of Housing and Urban Development–Independent Agencies Appropriations Act, 1984, Pub. L. No. 98–45, 97 Stat. 219, 226, 228, 229, 236, 239, Supplemental Appropriations Act, 1983, Pub. L. No. 98–63, 97 Stat. 301, 312, 319, 328, and Department of Transportation and Related Agencies Appropriations Act, 1983, Pub. L. No. 98–78, 97 Stat. 453, 462. They affect various spending authority of the Environmental Protection Agency, the National Aeronautics and Space Administration, the Federal Home Loan Bank Board, the Army Corps of Engineers, and the Departments of Housing and Urban Development, Interior, and Transportation.

[5]The House Interior and Insular Affairs Committee, on Aug. 3, 1983, voted 27–14 to halt the planned sale of coal leases on certain Federal lands in North Dakota and Montana. Secretary of the Interior Watt considered the Committee's action, in light of the *Chadha* decision, as unconstitutional and proceeded with arrangements for the sale of the leases. A coalition of environmental groups has challenged the Secretary's decision in Federal District Court, which subsequently issued a preliminary injunction against the Department. National Wildlife Federation v. Watt, No. 83–2648, D.D.C.; Wash. Post, Sept. 28, 1983, at A9; 41 CONG. Q. WEEKLY 1640 (Aug. 6, 1983) and 1948 (Sept. 17, 1983).

These congressional actions depict only a few of the variety of available statutory and nonstatutory mechanisms that directly overturn, terminate, prohibit, effectively nullify or discourage specific executive actions. These devices range from explicit statutory overrides of an offending regulation and the removal of an agency's jurisdiction to indirect influences such as critical oversight hearings and directives in committee reports. Each has political assets and liabilities that distinguish one from another, as well as from the legislative veto; each is activated in a different strategic location within Congress. Consequently, the techniques differ in their accessibility and political value to Members of Congress, as well as in their effect on executive behavior.

These legislative controls, moreover, vary in terms of their specificity, scope, directness, and permanency of impact. Limitations on appropriations, for example, are the province of the appropriations committees and subcommittees or, under specified circumstances, of a coalition of Members on the floor of the Chamber. Those very specific restrictions are effective for only the duration or remainder of a fiscal year. By contrast, the removal of an agency's jurisdiction, usually initiated by the authorizing committee, affects a wide range of potential activity permanently unless subsequently modified.

This article surveys and illustrates the major techniques that have been adopted and discusses other options that Congress might pursue in responding to the continuing dilemma that the legislative veto was designed to meet: i.e., Congressional retention of ultimate control over executive actions based upon statutory delegations of authority. The challenge is especially perplexing, since no solution is likely or even advisable, in light of the different vantage points of Members of Congress. Because of the vastly different characteristics and effects of the devices, Congress will probably proceed on a case-by-case basis in replacing defunct legislative vetoes, as it has most recently, and in erecting new controls to nullify or neutralize specific executive actions.

II. UNCONSTITUTIONALITY OF THE LEGISLATIVE VETO

The majority opinion in *INS v. Chadha*, written by Chief Justice Burger, held that the one-house congressional veto violated the Bicameralism and Presentment Clauses of the Constitution, specifically, sections 1 and 7 of Article I.[6] In concurring, Associate Justice Powell predicted that the "Court's decision, based on the Presentment Clauses . . . apparently will invalidate every use of the legislative veto."[7]

[6]103 S. Ct. at 2780–88.

[7]*Id.* at 2788. *See also* White's dissenting opinion at 2792.

That expectation was partially corroborated two weeks later when, in summary affirmances of two judgments of District of Columbia Court of Appeals, the Supreme Court not only confirmed its earlier decision but also extended the ruling to the two-house veto (i.e., by a concurrent resolution of disapproval).[8] In the latter case, the bicameralism clause issue was moot, leaving violation of the presentment clause as the determining argument against the congressional veto. The sweeping potential of the initial *Chadha* ruling caused one commentator to observe that it "stands out as the most significant of the term ended July 6, and probably of the last 10 years."[9]

The Court's fundamental argument in *Chadha* was that the legislative veto was "essentially legislative in purpose and effect" and that all such legislative actions had to be presented to the President, as are all public and private bills and joint resolutions (with the express exception of amendments to the Constitution, which require a two-thirds vote of both Houses and need not be signed by the President).[10] The majority opinion, subscribed to by six members of the Court, adopted a "strict constructionist" view of the Constitution in interpreting congressional actions that excluded the President:

> Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms. These carefully defined exceptions from presentment and bicameralism . . . are narrow, explicit, and separately justified; none of them authorize the action challenged here.[11]

By implication, the Court's decision would declare unconstitutional all types of statutory congressional vetoes; those relying exclusively on Congress through concurrent resolutions of approval or disapproval, simple or single-house resolutions of approval or disapproval, so-called one and one-half house vetoes (whereby a concurrent disapproval resolution from one chamber becomes effective unless it is rejected by the other house), committee or subcommittee votes, joint committee votes, orders of a committee chair, and approval by a congressional agency (for example, the Office of Technology assessment).[12] The ruling of unconstitutionality, however, has been

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[8]The one-house veto was again invalidated in *Process Gas Consumers Group v. Consumer Energy Council of America*, No. 81–2008, and the two-house veto in *United States Senate v. Federal Trade Commission*, No. 82–935, decided July 6, 1983.

[9]Young, *Supreme Court Report: The Court Vetoes the Legislative Veto*, 69 A.B.A. J. 1288 (1983).

[10]103 S. Ct. at 2784.

[11]*Id.* at 2786.

[12]Cooper & Hurley, *The Legislative Veto: A Policy Analysis*, 10 CONG. & THE PRESIDENCY 3, 6–9 (1983); B. CRAIG, THE LEGISLATIVE VETO: CONGRESSIONAL CONTROL OF REGULATION

affirmed only for one- or two-house vetoes, although the other devices appear to be based on even weaker constitutional grounds. Arguably, a congressional action (with a legislative purpose and effect) that excludes both of the full chambers of Congress, as well as the President, would be even more constitutionally suspect than one that relies upon one or both houses of Congress but circumvents the President.

III. STATUTORY MECHANISMS

Congress has adopted a number of statutory mechanisms, along with or instead of the legislative veto, to control current, planned, or proposed executive actions. These formal checks include committee vetoes, overriding or preempting executive actions, modifying agency jurisdiction, approving or disapproving specific actions by joint resolutions, and applying limitations on appropriations and authorizations. Other statutory provisions require prior notice and consultation (either with Congress or with agency officials), which can indirectly affect executive actions.

Usually employed on an ad hoc and piecemeal basis (as were legislative vetoes), these approaches exhibit internal variations and nuances that affect their political attraction. And, on occasion, several different techniques have been applied to the same (usually extremely controversial) policy matter, as with the MX missile, covert operations affecting Nicaragua, Federal Trade Commission regulatory activity, or Interior Department leasing policies.

A. Committee Vetoes

Despite the questionable constitutionality of committee vetoes, Congress continues to enact them. Their appearance in numerous appropriations acts passed after *Chadha*, maintains a well-established heritage that dates to the 1950s[13] and is testimony to political incentives outweighing possible constitutional risks. As with the invalidated legislative vetoes, these prohibitions prevent executive actions such as specified expenditures, reprogrammings, or transfers of public funds—unless and until congressional approval is granted or disapproval withheld. In the twelve committee veto provisions added since the Supreme Court decision, all specifically require prior ap-

(1983); and Gilmour, *The Congressional Veto: Shifting the Balance of Administrative Control*, 2 J. POL. ANALYSIS & MGMT. 13–25 (1982).

[13]Fisher, *Congress and the President in the Administrative Process: The Uneasy Alliance*, in THE ILLUSION OF PRESIDENTIAL GOVERNMENT (H. Heclo and L. Salamon, eds. (1981) 27.

proval from both the House and Senate Appropriations Committees,[14] as had been customary prior to this decision.

Although it is uncertain whether the executive will comply with these requirements, some evidence suggests it will. One indication is the absence of administration opposition to the recent committee vetoes in appropriations acts, in sharp contrast to other previous legislative veto provisions. Moreover, these particular committee checks, under the auspices of the Appropriations Committee, include an obvious disincentive against agency noncompliance: the agency's discretionary power over expenditures could be easily revoked by the committees, given their leverage and the multiple and frequent opportunities available in annual, supplemental, and continuing appropriations.[15] In fact, appropriations committee approval has become so well entrenched as the normal course in certain matters that it also exists through informal legislative vetoes and is even written into some agency operations manuals.[16]

B. Direct Override or Preemption

The most fundamental and compelling way for Congress to override executive action is to enact a statute explicitly revoking the offending matter or preempting the area for congressional determination. The majority opinion in *Chadha* noted, for example, that "[w]ithout the provision for one-House veto, Congress would presumably retain the power . . . to enact a law . . . mandating a particular alien's deportation. . . ."[17] That qualified aside casually minimizes the important difficulties inherent in the passage of legislation (especially when compounded by the number of potentially deportable aliens); but, nonetheless, the technique has been applied to specific executive actions.

Congress has, for instance, approved public laws that directly overturned regulations promulgated by Executive Branch and independent agencies or that preempted an area from further regulation. In the latter case, Congress has stipulated the express language to be used in labelling saccharin products,[18] instead of leaving it to the determination of the Food and Drug Administration (FDA), which might have

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[14]*Supra* note 4.

[15]A. Schick, *Politics through Law: Congressional Limitations on Executive Discretion*, in BOTH ENDS OF PENNSYLVANIA AVENUE: THE PRESIDENCY, THE EXECUTIVE BRANCH, AND CONGRESS IN THE 1980s (A. King, ed. 1983) 170–74; *See generally* R. Fenno, THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS (1966).

[16]*Infra* note 127.

[17]103 S. Ct. at 2776 n.8.

[18]21 U.S.C. § 343 (1976 & Supp. V. 1981).

required more cautionary language. This legislative prerogative has been reasserted most recently in 1983, extending congressional language for another two years.[19]

In the 98th Congress, the Senate Labor and Human Resources Committee drafted specific wording for cigarette packages and advertisements that, if approved by statute, would replace the present statutory language with more explicit and harsher warnings.[20] The committee had requested that the tobacco industry and Department of Health and Human Services draft a stronger warning but rejected their proposal in favor of its own more stringent substitute.[21]

Perhaps the classic instance of congressional preemption occurred with passage of the Tarriff Act of 1930,[22] commonly referred to as the Smoot-Hawley Tariff. Proceeding for 173 pages in the Statutes at Large and listing tariff levels item by item, the Act minimized executive discretion not only in its administration but also in policymaking. The protective tariff, as a general principle, and this example in particular (coming at the beginning of the Great Depression), was roundly criticized by the economists of the day and President Hoover considered vetoing the legislation.[23] It nonetheless prevailed, in large part because of the one-sided pressure exerted on Congress by the benefited American industries. E. E. Schattschneider's definitive account of the process also identified former Customs and Tariff Commission officials who lobbied for the potential beneficiaries as well as Tariff Commission personnel who temporarily served on the staff of the congressional committees with jurisdiction.[24] In the analysis, Schattschneider illustrated types of political alliances that have been called "cozy little triangles," "iron triangles," or, non-metaphorically, "subgovernments". The phrases refer to the mutual interests and consequent reinforcements among the three protagonists that dominate a particular policy arena—viz., the organized interest group, the congressional committee or subcommittee with jurisdiction, and the government bureau, office, or other subunit responsible for developing or administering the policy.

This system, which effectively excludes (or preempts) the President and the full Congress from actually determining policy, relegates them

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[19]An Act to amend the Saccharin Study and Labeling Act P.L. 98–22, 97 Stat. 173 (1983).

[20]S. REP. No. 177, 98th Cong., 1st Sess. 2 (1983).

[21]*Id.* at 22.

[22]Ch. 497, 46 Stat. 590.

[23]E. E. Schattschneider, POLITICS, PRESSURES AND THE TARIFF vii (1935).

[24]*Id.* at 59–63 and 197–203.

to ratifying decisions made elsewhere. Some analysts have determined that the legislative veto was symptomatic of such "iron triangles,"[25] a finding that has been disputed in all but so-called "pork barrel" projects.[26] Whatever the verdict on the legislative veto's subsystem, it is worth remembering that these "iron" or "cozy" triangles predated the congressional veto and that other types of legislative action or policy-making are not immune to them.

A public law may also be applied to negate a specific executive action, as Congress did in 1976 to overturn a motorcycle helmet safety standard,[27] and in 1978 (extended in 1979) to prohibit the Internal Revenue Service from issuing regulations or other forms of nationwide guidance with respect to the taxation of fringe benefits.[28] A present example is H.R. 3621,[29] a bill which would cancel the Federal Communications Commission's access charge decision regarding, among other things, long-distance telephone service.

In an earlier episode, Congress relied upon a public law to negate part of a Presidential reorganization plan that it had failed to disapprove via a one-house veto only a short while before. In 1973, President Nixon proposed the establishment of the Drug Enforcement Administration (DEA) in the Department of Justice, in order to consolidate relevant enforcement programs that were scattered among a number of agencies and departments.[30] (At the time, Presidential reorganization plans were subject to a one-house veto but Congress could not amend them.) A second part of the reorganization plan involved a controversial and politically risky side of the plan's *quid pro quo*: i.e., a proposed shift of authority and personnel from the INS Border Patrol in the Department of Justice to the Customs Service in the Treasury Department, which had lost a prominent part of its own authority and force to the new DEA. Congress did not disapprove the full Reorganization Plan, but the House had accepted it only with the understanding that the part augmenting the Customs Service would be repealed by separate legislation. That was accomplished early in the next Congress.[31] The new legislation, which resulted in the still-birth of the

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[25]W. P. Schaefer and J. Thurber, *The Legislative Veto and Policy Subsystems*, paper presented at the Southern Political Science Association Annual Meeting (1980).

[26]Cooper & Hurley, *supra* note 12, at 15.

[27]Federal-Aid Highway Act of 1976, Pub. L. No. 94–280 § 208, 90 Stat. 452, 454.

[28]26 U.S.C. § 3401 (1976 & Supp. V. 1981).

[29]H.R. 3621, 98th Cong., 1st Sess. (1983). After hearings on it, the House Energy and Commerce Subcommittee on Telecommunications forwarded to the full Committee a clean bill, H.R. 4102, 98th Cong., 1st Sess. (1983).

[30]Reorganization Plan No. 2 of 1973, 87 Stat. 1091.

[31]Act of March 16, 1974, Pub. L. No. 93–253, 88 Stat. 50.

transfer to the Customs Service was described in a later congressional report as a needed corrective to a "hastily-formed" proposal: the plan had lacked "adequate preparation . . . and in consequence, awkward arrangements had to be made for concessions and compromises."[32]

Direct statutory nullifications or preemptions have the advantages of clarity, specificity, and relative permanency. They also have a solid consensual foundation, because they are agreed to by both Houses of Congress and the President, or, if vetoed, by extraordinary majorities in both chambers. Yet despite these impressive assets, their liabilities are costly. Passing legislation to accomplish even a comparatively narrow purpose makes extensive demands on legislative resources requires review and approval of the entire Congress (by extraordinary majorities in the case of a Presidential veto), and necessitates the expenditure of scarce "political capital" in matters of conflict and controversy, since they usually run counter to an agency's position.

C. Modifications of Agency Jurisdictions

In addition to directly overruling executive decisions and actions, statutes may be used to modify an agency's jurisdiction in order to halt or prevent an objectionable action. Several distinct ways to accomplish this end are: limiting or abolishing a specified jurisdiction, deregulating and decontrolling, transferring jurisdiction from one agency or from Federal to State authorities, imposing a moratorium on certain actions, and providing for waivers of or exemptions from an agency's authority. Many of these statutory changes, and especially deregulation, affect a broad range of executive actions permanently; but some, such as moratoriums on regulatory rulemaking or implementation, may be extremely specific and short-term.

These alterations have been used frequently, especially in regulatory matters during the recent past,[33] and may assume greater importance in the wake of the legislative veto rulings. To varying degrees, they also meet some of the objections from critics of the legislative veto who contended that Congress had delegated authority too broadly to the Executive and to independent commissions (thus necessitating such a check). The jurisdictional modifications respond to those charges,

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[32]H. REP. No. 1630, 93d Cong. 2d Sess. 4 (1974). For further description and documentation, see Kaiser, *Federal Law Enforcement: Structure and Reorganization*, 5 CRIM. JUST. REV. 105–7, 111–13 (1980).

[33]*See* Kaiser, *Congressional Action To Overturn Agency Rules*, 32 AD. L. REV. 673–87 (1980).

often on a patchwork basis albeit, by clarifying and refining agency powers and jurisdiction.

Examples of these alternatives abound. A prominent one was the 1959 amendment to Section 315(a) of the Communications Act—the "equal time" provision—that exempted four kinds of election news programs from Federal Communications Commission regulation.[34] Other highly specific regulatory matters have been similarly affected. In the late 1970s, Congress placed a moratorium on FDA regulation of the shellfish industry,[35] granted exemptions to Title IX regulations regarding sex discrimination in educational programs receiving Federal funds,[36] and transferred authority for specified water pollution regulatory activities from the Environmental Protection Agency (EPA) to the states with approved programs.[37] In a different area, Congress has periodically barred the FDA from banning saccharin in products, most recently in 1983.[38]

Probably the most notable and controversial recent example of congressional control through jurisdictional modification is the Federal Trade Commission Improvements Act of 1980.[39] In addition to applying a legislative veto provision to proposed regulations, it prohibited the FTC from regulating trade groups that set product or industry standards and limited its rulemaking with regard to television advertising aimed at children, the latter by temporarily establishing a new standard of "deceptiveness" in place of the former exclusive reliance on "unfairness" to determine improper advertising.

These restrictions paralleled other assaults on the FTC—including its temporary but highly symbolic demise, when Congress failed to approve its continuing appropriations resolution—that were designed to curtail the Commission's activities. The FTC, once considered a "captive" of the industries it was supposed to regulate, had become an assertive and independent regulator, in part, ironically, because of the expanded authority and mandates acquired only a few years before from a supportive Congress. By 1980, however, its perceived "alliance" with pro-regulation consumer groups and the aggressive style of its chairman encountered strenuous opposition from a significantly changed Congress.[40]

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[34]Act of Sept. 14, 1959, Pub. L. No. 86–274, 73 Stat. 557.

[35]Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94–370 § 16, 90 Stat. 1013, 1032–33.

[36]Education Amendments of 1976, Pub. L. No. 94–482, 90 Stat. 2081.

[37]33 U.S.C. § 1318, 1319, 1328, 1341, 1342, and 1344.

[38]An Act to Amend the Saccharin Study & Labeling Act, Pub. L. No. 98–22, 97 Stat. 173 (1983).

[39]Pub. L. No. 96–252, 94 Stat. 374 (1980).

[40]For an overview of the developments and changes leading to the new statutory

Deregulation and decontrol (or even their opposites in certain cases) have often been advanced as means of challenging and containing executive action. In the controversial field of natural gas pricing, the Reagan Administration's decontrol proposal has been countered by several congressional bills aimed at "recontrol" through price freezes and other techniques to curtail administratively sanctioned reductions.[41] Other examples of the same phenomenon—eliminating or reducing administrative discretion—but which rely upon the more common deregulation, are in enactments affecting the airlines, intercity bus transportation, and the railroad industry.[42]

Although used extensively in regulatory matters, statutory modifications of agency jurisdictions and powers may be applied to a variety of other fields to enhance legislative control. In 1976, the House Select Committee on Intelligence recommended a time limit on all CIA covert operations and a prohibition against foreign assassinations, except in time of war[43] (a prohibition, incidentally, which was incorporated in Executive Order 12333 but which can be revoked or changed by the President without congressional concurrence). The Senate Select Committee to Study Undercover Activities (the Abscam Committee), reporting in 1982, likewise, proposed legislation that would establish threshold requirements for FBI undercover operations and would specifically create an affirmative defense of entrapment.[44]

Recent congressional initiatives in the Omnibus Defense Authorizations for FY 1984 demonstrate the utility of jurisdictional alterations for other purposes, here to rescind authority or place a moratorium on executive discretion.[45] In the aftermath of the *Chadha* decision, the Senate's first action on a bill with a preexisting legislative veto occurred in the Armed Services Committee. Reacting specifically to the loss of "the tool of the legislative veto, the committee agreed . . . to remove the President's ability to offer an alternative pay plan" for military person-

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controls, see, *inter alia*, Boyer, *Too Many Lawyers, Not Enough Practical People: The Policy-Making Discretion of the Federal Trade Commission*, 5 LAW & POL'Y. Q. 9–33 (1983); Gellhorn, *The Wages of Zealotry: The FTC Under Seige*, 4 REG. 33–43 (1980); Calvert and Weingast, *Runaway Bureaucracy and Congressional Oversight: Why Reforms Fail*, 1 POL'Y. STUD. REV. 557–64 (1983). Mahaney and Tschoegl, *The Determinants of FTC Antitrust Activity*, 35 AD. L. REV. 1–32 (1983).

[41]Poling, *The Natural Gas Dilemma: Decontrol or Recontrol*, 30 FED. BAR NEWS J. 206–11 (1983).

[42]Airline Deregulation Act of 1978, Pub. L. No. 95–204, 92 Stat. 1705, Bus Regulatory Reform Act of 1982, Pub. L. No. 97–261, 96 Stat. 1102, Staggers Rail Act of 1980, Pub. L. No. 96–448, 94 Stat. 1895.

[43]H. REP. No. 833, 94th Cong., 2d Sess. 2–3 (1976).

[44]S. REP. No. 682, 97th Cong., 2d Sess. 27 (1982).

[45]S. 675, 98th Cong., 1st Sess. (1983).

nel, a power he now has but which had been subject to a one-house veto.[46]

In the same bill, the Senate also advanced two separate moratoriums on then-forthcoming administrative actions. One of these occurred because of concerns about the planned use of polygraph examinations (to prevent unauthorized disclosures of classified information) under new Defense Department guidelines that were to take effect on August 15, 1983. Questioning the reliability and utility of such tests to prevent leaks, the Senate approved instead an amendment that postponed the effective date of the guidelines for eight months.[47] Behind this delay was an evident annoyance, among some legislators, that an earlier "fundamental change" in DoD polygraph testing had been "made quietly without any notice to the Congress."[48] That was coupled with the prospect that President Reagan's directive on safeguarding national security information, permitting punishment of certain federal employees for simply refusing to take an examination, added significant enforcement mechanisms that affected a far greater number of personnel in Defense than in any other agency.[49] These specific developments coupled with the stated concerns about polygraph testing in general prompted "compromise language . . . to allow for hearings looking into implementation of the guidelines presently being drafted, and to insure that there will be no abuse of this security tool."[50]

A second moratorium, also initiated in the Senate version of S.675, lengthened the grace period (from July 31 through September 30, 1983) for implementing regulations pertaining to students receiving Federal educational assistance who had failed to file necessary forms about their draft registration.[51] Although the Department of Education had extended the deadline previously, Senate sponsors of the extra time argued that there was no guarantee the Department would do so again, even though the additional two months appeared necessary. Supported by statements from the American Council on Education and other educational organizations, the amendment's proponents argued that students were uncertain about compliance requirements, due to conflicting Federal court rulings, and that the intervening summer vacation period had made it difficult to comply.[52]

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[46]*Supra* note 3 at S9831–32.
[47]129 CONG. REC. S10144–48 (daily ed. July 15, 1983).
[48]*Id.* at S10146.
[49]*Presidential Directive on Safeguarding National Security Information*, March 11, 1983.
[50]129 CONG. REC. S10145 (daily ed. July 15, 1983).
[51]Provision included in Pub. L. No. 98–94, 97 Stat. 700 (1983). 129 CONG. REC. S10543–52 (daily ed. July 21, 1983).
[52]*Id.* at S10544 and S10550.

One Senate critic, however, took exception to imposing any further delays by statute, insisting that "it is not the job of the U.S. Senate to tinker with and fine tune administrative provisions issued by the Department of Education."[53]

D. Joint Resolutions of Approval or Disapproval

Presumably meeting the Court's stated constitutional objections in *Chadha*—violation of the Presentment and Bicameralism Clauses—joint resolutions have already become a favored substitute for some members of Congress to replace the true legislative veto. The House included both types of joint resolutions in the CPSC bill, as a direct response to the *Chadha* decision;[54] and the House Government Operations Committee had reported, even before the Court's ruling, Presidential reorganization authority that includes a joint resolution of approval (under expedited procedures) for such plans.[55] Anticipating the likely popularity of joint resolutions, the House Rules Committee has issued instructions regarding their format, designation of committees, and automatic discharges, expedited procedures, as well as floor amendments. The Committee, however, expressed serious reservations about enacting laws that would curtail Congress' customary powers to consider (at its own pace) and amend legislation advanced by the executive. Its rationale was premised on the Court's ruling:

> . . . since the terms of *Chadha* appear to require Congress to carry out review of executive delegations and recommendations only by statutory affirmation or nullification, there is little justification for continuing such limitations on the scope and nature of congressional review.[56]

A joint resolution of approval, in fact, is the functional equivalent of a one-house veto. Under this joint resolution, an executive action could not commence unless and until both Houses of Congress expressly approved it (and the President signed the resolution, or his veto overridden). Thus, failure to obtain an affirmative vote in either chamber would annul the proposed action.

Despite their appeal, joint resolutions may be viewed by some members of Congress with skepticism.[57] This may hinge on the joint

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[53]*Id.* at S10546.

[54]*Supra* note 2.

[55]H. REP. No. 98–128, Part 1, 98th Cong., 1st Sess. 2 (1983).

[56]H. REP. No. 98–257, Part 3, 98th Cong., 1st Sess. 4, 3–7 (1983). Of course, such restrictions—time limitations, automatic discharges, and, in effect, "closed rules" for joint resolutions—intrude on the Rules Committee's authority over the subsequent floor procedures and rules so severely that they may virtually preclude its participation.

[57]For a discussion of the pros and cons of joint resolutions in this context, *see* 129 CONG. REC. H4771–84, H4795–803, H4824–27 (daily ed. July 29, 1983).

approval resolution's similarities with the one-house veto and on its impact on the rules of the House and Senate, if time restrictions and expedited procedural requirements are attached. Others might object to the joint resolution approach because it appears to offer only a Hobson's choice between two undersirable alternatives. On the one hand, the joint resolution of disapproval might well require an extraordinary majority in both Houses of Congress, since the President would presumably veto a congressional rejection of a planned action emanating from his own Administration. On the other hand, a joint resolution of approval may be perceived by some as a device that too easily annuls an executive action, because of this control's equivalency to a one-house veto. Moreover, once an executive action is sanctioned by the joint resolution of approval, it becomes a public law. This feature, according to critics of its application to regulations, does violence to Administrative Procedure Act (APA)[58] requirements for agency rulemaking. It arguably would make such standards moot, since agencies would no longer be promulgating rules but would become "advisory bodies," issuing proposals for legislative action and eventually for public laws. This characteristic would have an adverse impact, therefore, on subsequent court challenges to such statutory "rules," based both on the merits of the regulation as well as on the APA procedural requirements.

E. Limitations in Appropriations

Limitations in appropriations may prevent agencies from embarking on or implementing particular actions. By expressly denying the use of funds for a specific activity (e.g., enforcement, rulemaking, issuing grants or leases, covert operations abroad) or for a specific category of expenditure (e.g., economic assistance to a particular country, specific military construction or research), the provision effectively nullifies or severely restricts an agency's operating authority in specialized areas. This increasing use of Congress' power of the purse, initiated either by the Appropriations Committees or on the floor,[59] attests to its appeal. Each is straightforward, unambiguous, direct, and virtually self-enforcing.

Yet the frequent opportunity to curtail executive action through regular, continuing, or supplemental appropriations is a two-edged sword. An inherent constraint on their impact is that they are effective

[58] 5 U.S.C. § 551 *et seq.* (1976).

[59] *See, e.g.*, Schick, *supra* note 15 at 170–74; Murray, *House Funding Bill Riders Become Potent Policy Force*, 38 CONG. Q. WEEKLY 3251–55 (1980); 129 CONG. REC. H5–20 (daily ed. Jan. 3, 1983).

only for the duration of the appropriation—one fiscal year or less—and thus require periodic reenactment. Moreover, the effort to use appropriations bills to propose new or general legislation or amendments to existing legislation conflicts with House and Senate rules. (Those injunctions are mute, however, if there is a failure to call for a point of order against such amendments.)[60]

Beginning with the 98th Congress also, the House, in Rule XXI, has erected a new procedure for floor amendments to appropriations bills that is designed to limit the number of "riders." These riders and attempts to attach them have proliferated in emotionally charged and controversial areas, such as abortion funding and school busing for desegregation purposes. They were also perceived by many as another unwelcomed manifestation of single-issue politics that directly challenged the congressional leadership, the hegemony of the Appropriations Committees in the process, and responsible policymaking.[61] The controversial nature of some appropriations limitations, particularly those imposed by floor amendments, either incurred a Presidential veto for the entire bill or jeopardized full funding for operations, resulting even in the temporary, partial closing of some of agencies.[62] Such momentous impacts, it might be argued, were out of proportion for this relatively modest procedure.

Their perceived shortcomings notwithstanding, limitations have become standard qualifications in most appropriations. And in expansive acts, such as the Department of Defense Appropriation Act of 1983, the numerous constraints range from the miniscule (e.g., one wig only

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Historically, appropriations limitations were used in 1855 by the "Anti-Nebraska" Congressmen to forbid the President to use the army to enforce the acts of the proslavery legislature in Kansas, in 1867 to restrict President Andrew Johnson's command of the army, and in 1879 to attempt to disable the Federal Election Law supervising the control of elections in the Southern States. *See* J. A. Woodburn, THE AMERICAN REPUBLIC AND ITS GOVERNMENT 307–11 (1903).

[60]House Rule XXI and Senate Rule XVI govern the process. For an examination of their use, circumvention, and impact, *see especially* Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U.L. REV. 68 (1979).

[61]*Supra* note 59.

[62]President Carter vetoed the FY 1981 appropriations bill for the State, Justice, and Commerce Departments (H.R. 7584, 96th Cong. 2d Sess.), because it contained an amendment preventing the Justice Department from initiating lawsuits that could lead to court-mandated school busing for desegregation purposes. Congress did not attempt to override his veto. President Carter, *Appropriations Bill for the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies: Message to the House of Representatives*, 16 WEEKLY COMP. PRES. DOC. 2809 (Dec. 13, 1980).

The FTC suspended normal activity on May 1, 1980, when congressional disputes over controversial appropriations amendments prevented agreement on even a temporary funding bill before the previous temporary extension expired. 36 CONG. Q. ALMANAC (for 1980) 233 (1981).

for individuals affected by alopecia that resulted from treatment of a malignant disease) to the monumental (e.g., cuts in MX missile funding and restrictions on CIA or military operations in Nicaragua).[63] Moreover, because of the *Chadha* ruling, which may prompt reconsideration of the House's new curbs on floor amendments, appropriations limitations may gain in importance as direct checks on executive action.

A prominent example of their use is the 1982 limitation on Defense Department and Central Intelligence Agency (CIA) activities affecting Nicaragua. This restraint, intended principally to curtail covert operations, was added initially as a House floor amendment to the Defense Department appropriations for FY 1983, by an overwhelming vote of 411 to 0. The ban was later incorporated by conferees into the FY83 Continuing Appropriations Resolution and signed into law.[64] In the debate, House Intelligence Committee Chairman Boland, the amendment's sponsor, emphasized its preexisting consensus (vis-à-vis another and more restrictive amendment before the House). The language of the Boland amendment had already been included in the classified annex to the conference managers' statement on the FY83 Intelligence Authorization Act and was agreeable not only to the House and Senate Select Intelligence Committees but also to the Executive Branch.[65]

This particular battle (over Nicaragua) has since shifted to new ground—the authorization process—because the consensus appropriations limitation, about which its sponsor had "some misgiving," had not achieved the end that its supporters in Congress had intended.[66] One reason for that failure was probably inherent in the provision's wording: It disallowed U.S. involvement and assistance only "for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras,"[67] a loophole that conceivably permitted support to the anti-Sandinistas for other purposes.

This language contrasts with that adopted by an earlier Congress in a similar situation; i.e., halting CIA covert activities in Angola in 1976, the first time Congress officially and publicly ended a covert operation.[68] In both cases, large bipartisan majorities in each chamber

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[63]Pub. L. No. 97–377 §§ 742, 792, 96 Stat. 1833, 1858, 1846, 1865 (1982).

[64]128 CONG. REC. H9159 (daily ed. Dec. 8, 1982). Provision incorporated at Dept. of Defense Appropriations Act, 1983, Pub. L. No. 97–377 § 793, 96 Stat. 1833, 1865 (1982).

[65]128 CONG. REC. H9156 (daily ed. Dec. 8, 1982).

[66]H. REP. No. 122, Part 1, 98th Cong., 1st Sess. 8 (1983).

[67]Department of the Defense Appropriations Act, 1983, Pub. L. No. 97–377 § 793, 96 Stat. 1833, 1865 (1982).

[68]For a thorough discussion of congressional response to CIA covert operations in

approved floor amendments to continuing or late Defense appropriations bills; and the votes followed heated debate that relied upon highly sensitive, classified information. Also in both cases, the restraints were added for much the same reason. Their proponents questioned the effectiveness and implications of the covert activities, which the Administration had insisted were necessary supports to indigenous groups; and those groups were combating a relatively new regime that, in both instances, received assistance from Cuba and the Soviet Union.

But Angola, further removed from United States' proximate interests, differed from Nicaragua in other respects. The former predicament occurred during a different political climate, following shortly after a vivid reminder (i.e., the fall of Saigon) of the disastrous consequences of U.S. intervention in Vietnam. Moreover, Congress was then in the midst of special, unprecedented investigations of the intelligence community that were critical of prior CIA covert operations; the Presidency was still in need of revitalization after "Watergate"; and the Ford Administration lacked party control of even one chamber of Congress. The result was that the limitation affecting covert operations in Angola was not only more stringent than in Nicaragua but was, in fact, absolute: "none of which [funds], nor any other funds appropriated in this Act may be used for any activities involving Angola other than intelligence gathering. . . ."[69]

The MX missile, whose controversies extend from its projected impact on strategic arms control negotiations to tactical questions about its basing mode, has also been subject to appropriations limitations. The lame-duck session of the 97th Congress, reacting adversely to the Administration's proposed "dense pack" basing method, deleted the entire $988 million requested for production of the first five missiles and included two (now-defunct) congressional vetoes over future basing mode proposals.[70] The issue later moved into the authorization process, but future appropriations provide additional opportunities for continual checking.

Other significant restraints on executive discretion have occurred with regularity in appropriations acts, including continuing resolutions. One of the most visible, and controversial, has been the periodic

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Angola, *see* Crabb and Holt, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 148, 202 (1908); and Franck and Weisband, FOREIGN POLICY BY CONGRESS 46–57 (1979).

[69]Department of Defense Appropriations Act, 1976, Pub. L. No. 94–212, 90 Stat. 153, 166.

[70]Department of the Defense Appropriations Act, 1983, Pub. L. No. 97–377, 96 Stat. 1833, 1846–48 (1982); H. REP. No. 980, 97th Cong., 2d Sess. (1982).

restrictions on federal funding of abortions.[71] Others, though less visible or narrower in their scope of impact, still are likely to reflect the important political influence of constituency or clientele groups. In the 98th Congress, for example, appropriations bills have been vehicles for easing Transportation Department car-pool restrictions on an interstate highway near Washington, D.C., thus aiding local commuters, and for overriding OMB's review and clearance powers over agricultural marketing orders, thereby benefiting certain producers.[72]

The Interior Department's controversial leasing policies have also been prime targets for appropriations limitations. Importantly, Interior's FY83 appropriations countered the Department's decision to allow oil and natural gas leasing in wilderness areas.[73] Another conflict over Department leasing policies has focused on Federal coal reserves. As passed by both the House and Senate, an amendment to the Department's FY 1984 appropriations would place a moratorium on them, until a specially created commission could report on the matter and Congress review it.[74] This delay, in a bill that also provides for Appropriations Committee vetoes over reprogramming proposals from Interior, demonstrates another dimension of appropriations restraints, as temporary postponements rather than absolute bans for the full fiscal year.

These various appropriations limitations interestingly coincide with a different congressional attempt to curtail the Department's practices. The House Interior Committee has invoked a committee veto in this regard, based upon congressional powers in Article IV of the Constitution "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Since that particular legislative veto is pending in Federal Court,[75] the proposed moratorium (and committee vetoes) in the FY84 appropriations takes on added significance.

Using appropriations to impose a moratorium of less than the fiscal

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[71]Department of Health and Human Services Appropriations Act, 1983, Pub. L. No. 97–377 § 204, 96 Stat. 1884, 1894 (1982).

[72]For congressional action on the Transportation Department funding, H.R. 3103, 98th Cong., 1st Sess. (1983), *see* 129 CONG. REC. S14580–2 (daily ed. Oct. 25, 1983) and H8929–32 (daily ed. Nov. 1, 1983). When this appropriations bill became stalled, supporters of the provision hitched it to H.R. 1551, a bill to name a Federal building. 129 CONG. REC. H10551–4 and S16887–8 (daily ed. Nov. 18, 1983). For action affecting OMB, through H.R. 4139, 98th Cong., 1st Sess. (1983), *see* 129 CONG. REC. H8718–27 (daily ed. Oct. 27, 1983).

[73]Act of Dec. 30, 1982, Pub. L. No. 97–394 § 308, 96 Stat. 1966, 1996.

[74]H. REP. No. 399, 98th Cong., 1st Sess. (1983); 129 CONG. REC. H7982 (daily ed. Oct. 5, 1983) and S12486 (daily ed. Sept. 20, 1983).

[75]*Supra* note 5.

year, rather than to prohibit the executive action outright for the full appropriation period, is evident in other instances as well. In the Transportation Department Appropriations Act for FY 1984, Congress delayed for sixty days Federal Aviation Administration adjustments (i.e., lowering) of the annual passenger ceiling at Washington's National Airport, the most convenient airport to the Capitol.[76]

The same appropriations act, which does not normally cover the Office of Personnel Management (OPM), also delayed for two months implementation of new OPM performance standards (that Federal employee unions have actively opposed) for civil service pay raises, promotions, and retirements.[77] Senate debate on this provision offers reasons for adopting a short-term moratorium, vis-a-vis a ban for the entire fiscal year, and for utilizing this particular enactment. Those reasons have to do with substantive disagreements over the planned executive action as well as with procedural difficulties that resulted from OPM's actions (which some perceived as precipitous), strained executive-legislative relations in the matter, and the unavailability of other, more appropriate legislative devices.[78]

OPM's FY 1983 appropriations had specifically prohibited implementation of its original (and even more controversial) regulations in this regard, which the Office then redrafted. The second-generation regulations were not subject to the prior ban because of their new date of issuance and were scheduled to take effect while Congress was in recess. That, as its opponents saw the matter, would have denied the Governmental Affairs Civil Service Subcommittee "a chance to work with the OPM on legislation it [the Subcommittee] has drafted which takes a reasonable and rational approach to the problems OPM wants to address."[79] In addition to implying that OPM's own approach was not reasonable and rational, supporters of the postponement also noted that their attempts "with employee and management groups and OPM to try to reach a consensus on an alternative to the OPM regulations" had been stymied and that "OPM's decision to move ahead without consensus [was] an unfortunate one."[80]

Sponsors of the moratorium, most of whom are on the Senate Governmental Affairs Committee, include four of the five members of

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[76]Department of Transportation and Related Agencies Appropriations Act, 1983, Pub. L. No. 98–78 § 314, 97 Stat. 453, 472 (1983).

[77]*Id.* § 323 at 474–75.

[78]129 CONG. REC. S11431–6 (daily ed. Aug. 3, 1983). For a review of the subsequent developments, *see* Washington Post, Oct. 21, 1983, at C2 and Oct. 31, 1983, at B2; 19 FED. TIMES 5 (Nov. 7, 1983); and 41 CONG. Q. WEEKLY 2517 (1983).

[79]129 CONG. REC. S11432 (daily ed. Aug. 3, 1983).

[80]*Id.*

its Civil Service Subcommittee, which has jurisdiction for OPM. They used the only vehicle that was immediately available—the appropriations bill for the Transportation Department and related agencies—at the risk of the amendment being declared nongermane. A more appropriate supplemental appropriations bill had been available the week before. But in order to prevent delay in that bill's passage, they deferred their proposal, with "the assurance of all concerned that we would be able to raise the amendment . . . on this conference report, even though we recognized that there could be a problem of germaneness."[81]

On occasion, appropriations limitations may lay out a course that goes beyond any immediate prohibition or postponement. One such example was implicit in a reprieve granted to the Bureau of Alcohol, Tobacco, and Firearms (BATF) in FY 1982 funding.[82] The Reagan Administration's plan to dismantle the Bureau, in part because of opposition to its enforcement practices from the National Rifle Association (NRA), encountered unexpected opposition—the NRA itself—among more predictable critics. The Administration's planned termination of the Bureau was perceived by the NRA as overkill. Counterproductively, from the NRA viewpoint, BATF's jurisdiction over firearms, arson, and explosives laws would have been transferred to a conceivably more aggressive and potent enforcer, the U.S. Secret Service.[83]

BATF, to balance the record, has not always been the beneficiary of congressional largess. A prior appropriations act, as one illustration, not only reduced its requested budget but also prohibited any expenditures for consolidating and centralizing Treasury records of the receipt and disposition of firearms, as it had proposed.[84]

Numerous other limitations have been attached to appropriations in order to restrict regulatory agencies' discretion in implementing policy. These restraints may prohibit funds from being used for inspection or other enforcement activities and for promulgating new rules in specified instances, or may even exempt specific areas or groups from an agency's jurisdiction. Over the recent past, a number of agencies have been targeted through appropriations. Among many other examples, the Occupational Safety and Health Administration has been

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[81] *Id.*

[82] Act of Dec. 15, 1981, Pub. L. No. 97–92 § 109, 95 Stat. 1183, 1194 (1981).

[83] Keller, *NRA, Liquor Industry Seek To Save BATF*, 40 CONG. Q. WEEKLY 730 (1982); Thornton, *Senate Panel, NRA Join To Defeat Plan To Abolish Treasury Firearms Agency*, Washington Post, March 26, 1982 at A4.

[84] Treasury Department Appropriations Act, 1979, Pub. L. No. 95–429, 92 Stat. 1001, 1002 (1978).

prevented from imposing civil fines for certain violations and from inspecting small farms;[85] Housing and Urban Development found that Congress had, in effect, nullified one of its regulations (unintentionally permitting homosexual couples, as a "stable family relationship," to be eligible for public housing);[86] and EPA lost its possible jurisdiction, albeit unactivated, over automobile parking lots.[87]

F. Limitations in Authorizations

Similar to appropriations limitations, Congress may restrict executive discretion or nullify actions through authorizations. Although they are less commonly used to control specific actions, authorization restraints have served as important controls in notable areas, especially military construction and foreign affairs.[88] Furthermore, the substantial and increasing number of program or agency budgets already under frequent authorizations (compared to the predominance of permanent or long-term authorizations until the 1970s) make these limitations more feasible now than in earlier periods.[89] The shortened time period increases opportunities to review and influence agency behavior (either formally through authorization limits or informally in hearings) and adds congressional leverage over executive actions.

Illustrative of the increase in annual authorization requirements, especially as a by-product of agency abuses and lack of accountability to Congress, was their application to the Federal Bureau of Investigation, which had been under permanent authorization since its 1908 establishment, and to the entire Justice Department.[90] Commenting on the adoption, House Judiciary Committee Chairman Peter Rodino later reminded his colleagues that "the Congress enacted the 1976 statute largely because the Judiciary Committee believed it could not adequately or responsibly discharge its oversight responsibilities without the lever of budgetary authorization."[91] The same rationale was used for mandating annual authorizations for the U.S. intelligence community, when the House and Senate created their respective Select Committees on Intelligence.[92]

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[85]Department of Labor Appropriations Act, 1979, Pub. L. No. 95–480, 92 Stat. 1567, 1569–70 (1978).

[86]Act of Oct. 4, 1977, Pub. L. No. 95–119 § 408, 91 Stat. 1073, 1089.

[87]Act of Oct. 17, 1975, Pub. L. No. 94–116, § 407, 89 Stat. 581, 600.

[88]Fisher, *Annual Authorizations: Durable Roadblocks to Biennial Budgeting*, 3 PUB. BUDGETING & FIN. 26–29 (1983).

[89]*Id.*

[90]28 U.S.C. § 501 (1976 & Supp. V 1981).

[91]124 CONG. REC. H13020 (daily ed. Oct. 14, 1978).

[92]S. Res. 400, 94th Cong., 2d Sess. (1976); H. Res. 658, 95th Cong., 1st Sess. (1977).

Reducing agency authorization periods may become even more appealing in the wake of the Supreme Court's invalidation of the legislative veto. In the immediate aftermath of the *Chadha* decision, for instance, the House approved a provision to reduce the authorization term of the Consumer Product Safety Commission (CPSC) from five years, as recommended in the reporting committee's bill, to only three years.[93] This substitute amendment, along with others subjecting future CPSC rules to joint resolutions, would impose new constraints on an agency formerly under a congressional veto requirement.

A variety of recent examples, especially in military and foreign policy matters, demonstrates the use of authorization limits to restrain specific executive actions. Because of concerns that the FY83 appropriations limitations on CIA covert operations regarding Nicaragua had "proven ineffective as moderate curbs on . . . U.S. policy,"[94] the House Select Committee on Intelligence proposed an amendment to the Intelligence Authorization Act for the 1983 fiscal year that contained even stricter prohibitions. Also endorsed by the Foreign Affairs Committee and later approved by the House,[95] it would have prevented funds from being used to support any military or paramilitary operations in Nicaragua and would strike funds requested for that purpose.

Coincidentally, this particular authorization limit contrasted with the Senate Intelligence Committee's option on the same subject; i.e., a modified committee approval. Before authorizing FY 1984 funds for covert activities in Nicaragua, the Senate Committee required the Administration to report on certain new findings and proposals about the region. The Administration, according to the Intelligence Committee Vice Chairman, scaled back its initial goals to ones that were "more precise and much more limited," because of expressed committee concerns.[96] New funds were then approved for these CIA operations.

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[93]*Supra* note 2.

[94]H. REP. No. 122, Part 1, 98th Cong., 1st Sess. 3 and 13–18 (1983).

[95]H. REP. No. 122, Part 2, 98th Cong., 1st Sess. 1–2 (1983).

[96]129 CONG. REC. S15282 (daily ed. Nov. 3, 1983). The Senate Select Committee on Intelligence, according to Senator Moynihan, the Vice Chairman, required the administration to "articulate in a clear and coherent fashion its policy objectives in a new Presidential finding . . . before we approve any more funding." As a result of that May, 1983 instruction, CIA Director Casey outlined a proposed finding on Aug. 3, to the Committee, which it found to be "much too broad and ambitious." On Sept. 20, Casey and Secretary of State Shultz appeared before the Committee with new findings that "reflected the concerns the committee had raised with Director Casey in the prior meeting" and with new goals that were "more precise and much more limited. . . ." For further information and speculation of what transpired during these executive sessions, *see* Washington Post, May 7, 1983 at A1, New York Times, May 18, 1983, at A8, 41 CONG. Q. WEEKLY 2010, 2138 (1983).

But since the funding would reportedly be available for less than the fiscal year, the Reagan Administration would conceivably be compelled to renew its request for further funding, in order to continue the operations (unless CIA contingency funds and reprogramming authority remain available). Somewhat ironically, since it has approved the CIA covert activities here, the Senate Intelligence Committee has established precedents for two new checks on such sensitive, secret executive actions: the Committee's necessary prior acceptance of specified Administration findings and plans plus time limits on the funding authority that might require the Administration to renew its appeal to Congress (including the more critical House counterpart), before the end of the fiscal year.

Even though the Sanate did not approve the House funding conditions for FY 1983 and President Reagan could have vetoed a bill containing such an amendment, if passed, authorization limitations are not mere exercises in futility. By encouraging debate and votes on legislative provisions, these attempts may galvanize opposition, demonstrate the breadth of support in Congress for a particular viewpoint or side, help to determine the agenda for future legislative efforts (e.g., the House repeated its ban on covert operations in Nicaragua in the FY 1984 intelligence authorization),[97] influence public opinion and activism, and possibly set boundaries for future executive plans.

Where they are enacted into law, authorization limitations may establish completely new checks on executive action or may modify, strengthen or stabilize controls that had existed only in appropriations. When successful, they solidify or broaden political support. In 1976, for example, the legislative controls over CIA covert operations in Angola, added to the appropriations act through floor amendments, were refined in the International Security Assistance and Aims Export Control Act of 1976[98] later, based upon recommendations from the foreign policy committees.

The MX missile issue presents a variation on the theme of curtailing executive discretion. The narrow approval for the Administration's position in the House and Senate votes on the Department of Defense Authorization Act, 1984, for instance, came only after White House

[97]Initial House debate on the FY 1984 Intelligence Authorization Act is recorded at 129 CONG. REC. H8389–428 (daily ed. Oct. 20, 1983). Eventually, however, House and Senate conferees included covert operations funding, but with a ceiling (*i.e.*, $24 million) that would compel the Administration to return to Congress for additional funding during the fiscal year, if the operations were to continue. 129 CONG. REC. H10543, S16858 (daily ed. Nov. 18, 1983).

[98]Pub. L. No. 94–329 § 404, 90 Stat. 729, 757–58 (1976).

assurances that it was making a strenuous effort in the Strategic Arms Reduction Talks[99] and, in the House, only after a string was attached that tied MX procurement and deployment to the development of a single-warhead missile.[100]

In addition to these maneuvers surrounding MX authorizations, the missile had been linked to an attempt to thwart renewed production of chemical weapons. The Senate, at the request of the Reagan Administration and through the tie-breaking vote of Vice President Bush, agreed to end the moratorium (since 1969) on binary nerve gas artillery shells.[101] The conferees on the Defense Authorization Act accepted the Senate provision, even though it had been disapproved, 256–161, by the full House (which, incidentally, had initiated the original moratorium). Because of the difference between the Senate and House versions on the resumption of chemical weaponry, several House leaders were expected to use the leverage of their support for the MX to delete the provision for nerve gas. These expectations came to naught, however, in part because of intervening events. The House, voting in aftermath of the Soviet attack on a civilian Korean Airliner, approved the conference report with this controversial provision decisively, and thereby precluded any effective bargaining on the issue of chemical weaponry.[102]

In other action on the same bill, Congress curtailed OMB and DoD authority by extending for an additional two years the existing statutory ban against contracting to private firms for security and firefighting at military bases.[103] Emphasizing that these functions should be under the absolute command of base officers, congressional opponents of contracting insisted that they were sustaining the security needs that "base commanders have privately pointed out," even though that viewpoint countered the official position of DoD and OMB.[104]

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[99]129 CONG. REC. H5395–98 (daily ed. July 21, 1983).

[100]Provision in Pub. L. No. 98–94 § 1231; 97 Stat. 614, 693–94 (1983).

[101]129 CONG. REC. S9804 (daily ed. July 13, 1983).

[102]Washington Post, Aug. 9, 1983 at A3; 41 CONG. Q. WEEKLY 1920–21 (1983); and 129 CONG. REC. H6937–41 (daily ed. Sept. 15, 1983). However, funding for such weapons had been rejected in the FY 1984 Defense Appropriations by House and Senate conferees. H. REP. No. 567 (1983); 129 CONG. REC. H10433–59 (daily ed. Nov. 18, 1983).

[103]129 CONG. REC. S9825 (daily ed. July 13, 1983); provision in Pub. L. No. 98–94; 97 Stat. 691–92 (1983).

[104]*Id.* at S9822.

G. Prior Notification to and Consultation with Congress

Separate from preexisting legislative vetoes, Congress has often required that executive officials notify Congress in advance of an action or, as a further step, consult directly with committees. Although these prior notice and consultation provisions do not permit formal rejection of a proposed action, they do enable congressional committees with relevant jurisdiction to be more readily aware of a planned action than otherwise.

Assuming a reasonable time delay before the proposed action can commence, these devices provide an opportunity for congressional scrutiny and comment upon it. Through advance notice or especially consultation, Congress may be able to influence, modify, or even secure withdrawal of an executive proposal. Nonetheless, there is no guarantee, or course, of any impact; and in some cases, a consultation requirement may be perceived quite differently by the Administration and Members of Congress, as in the case of the War Powers Resolution.[105]

The most comprehensive current example of advance notification is found in the Intelligence Authorization Act for Fiscal Year 1981.[106] Maintaining the language of the House and Senate resolutions that established their respective Select Committees on Intelligence, it directs that they be kept "fully and currently informed of all intelligence activities . . . including any significant anticipated intelligence activity. . . ."[107]

The enactment also added provisions that accommodate both legislative and executive interests in modifying the previous reporting requirements for covert activities under the 1974 Hughes-Ryan Amendment.[108] The 1980 version reduced the number of committees to which the President would normally report from eight to two—the House and Senate Select Committees on Intelligence—as the executive had requested; but it mandated advance notice of such activities, as

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[105]Pub. L. No. 87–148, 87 Stat. 555 (1973); for a review of the differing perceptions of the War Powers requirement, *see, e.g., War Powers: A Test of Compliance: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 1st Sess. (1975); Craig, *The Power to Make War: Congress' Search for an Effective Role*, 1 J. POL'Y ANALYSIS & MGMT. 320–22 (1982).

[106]Pub. L. No. 96–450, 94 Stat. 1975 (1980).

[107]*Id.* § 501 at 1981–82.

[108]*Id.* For a discussion of the changes, see the conference report on the legislation, H. REP. No. 1350, 96th Cong., 2d Sess. 15–16 (1980).

Congress had wanted, in place of the vague Hughes-Ryan requirement to report "in a timely fashion." Even when "extraordinary circumstances affecting vital interests of the United States" preclude prior notice to the Intelligence Committees, the Act directs the President to notify leaders in Congress, including the chairmen and ranking minority members of the Select Committees, and later to "fully inform the intelligence committees in a timely fashion" about these operations and the reasons why prior notice had not been given.

Although the President is not required to seek either Committee's approval for covert operations, the currently unique mandate "does open up a dialogue between the Director of Central Intelligence . . . and Committee members, who provide their reactions, supportive and negative."[109] And when that dialogue reaches an impasse, as in the case of Nicaragua, the reporting requirements can provide a foundation for further committee or congressional action, whether it is a committee report directive or appropriation or authorization limitation.

Consultation and advance notice requirements aften emanate from congressional oversight inquiries and continuing concerns about particular executive operations or activities, especially controversial, new, or previously uncontrolled ones. The FY84 Defense Authorization contains several such reporting directives that reflect these characteristics. One arose from revelations about inadequate DoD controls over spare parts procurement and the resulting exorbitant payments and cost overruns, and another, about inadequate DoD operational testing of weapons systems before it obligated production funds.[110] In both cases, prior notice was attached to new strictures on the Department. In the first, Defense was instructed to promulgate new regulations governing spare parts purchases. In the second, conferees erected a "compromise" office—a Director for Operational Testing and Evaluation—and applied a prior notice requirement: "A final decision . . . to proceed with a major defense acquisition . . . may not be made until the Director has submitted to the Secretary of Defense [his report on it] and the Committees on Armed Services and on Appropriations of the House and Senate have received the report."[111] By this arrangement, the tandem requirements attempt to transform departmental practices without resorting to further and even more restrictive statutes.

Prior notice provisions have also gained currency in other gov-

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[109]H. REP. No. 973, 97th Cong., 2d Sess. 5 (1982).

[110]129 CONG. REC. S9680–81 (daily ed. July 12, 1983), S10585 (daily ed. July 21, 1983), and S12085 (daily ed. Oct. 13, 1983).

[111]*Id.* Provisions included in the Department of Defense Authorization Act, 1984, Pub. L. No. 98–94 § 1216 and 1211; 97 Stat. 688–89 and 685–45 (1983), respectively.

ernmental pursuits, having been directed at regulations in controversial or untested programs. These report-and-wait provisions have been applied to a variety of agencies, including CPSC, NRC, HUD, ICC, and Transportation Department.[112]

H. Inter-Agency Consultation and Review

Analogous to these provisions requiring consultation with Congress or report-and-wait periods are statutory provisions that direct one agency to submit proposals to or consult with another. In these cases, no direct or legally binding nullification is imposed over the initial executive action (unless, of course, additional specific language permits that disapproval). However, the intent of these statutory provisions may be to interject alternative priorities, perspectives, and recommendations into the process, thereby retarding or delaying the development of the proposed action, changing its direction, mitigating its impact, or conceivably even terminating it.

Perhaps the clearest examples of inter-agency consultation requirements for these purposes have involved the Environmental Protection Agency (EPA), in fields where its jurisdiction overlapped intimately with other regulatory agencies or where its regulatory actions were controversial. EPA has been required to submit proposed and final regulations for pesticides to the Secretary of Agriculture, whose comments on them are published in the *Federal Register*. In support of this consultation requirement, the reporting Senate Committee noted EPA's "unenviable position" of choosing between environmental protection and the pesticides' economic benefit; but it determined that "EPA has not always given adequate consideration to agriculture in its decisions [and] there is clearly a need to consider the impact . . . if balance is to be achieved."[113]

EPA has also been directed, in another statute, to consult with the NRC about radioactive pollutants under the former's jurisdiction.[114] In addition to requiring joint EPA-NRC agreements for specified matters, the legislation also granted NRC the unusual power to "disapprove any EPA, State or local standard [or emission limitation] promulgated under the Clean Air Act if the Commission finds . . . that the application of such standard would endanger public health and

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[112]15 U.S.C. § 2076 (1976 & Supp. V 1981), Act of Nov. 6, 1978, Pub. L. No. 95–601 § 1, 92 Stat. 2947, 2948, 42 U.S.C. § 3535 (1976 & Supp. V 1981), and 49 U.S.C. § 1 (1976 & Supp. V 1981), respectively.

[113]S. REP. No. 94–452, 94th Cong., 1st Sess. 5, 9 (1975).

[114]42 U.S.C. § 7422 (1976 & Supp. V 1981).

safety."[115] The President, however, was given authority to overturn the NRC disapproval within ninety days.

IV. NONSTATUTORY TECHNIQUES

Congress possesses a panoply of nonstatutory techniques, overlapping with its oversight powers, that can be used to control executive actions. And as with statutory devices, these nonstatutory mechanisms of control vary in political potency and in the ease with which they may be put into operation. Although their impact is indirect, several studies have demonstrated that such instruments can be effective, if used diligently and under conducive circumstances.[116] Yet because of their own informal operation and because they are likely to occur along with other influences, it is often difficult, if not impossible, to assess their specific impact, or, on occasion, to isolate them from other factors.

One nonstatutory device for controlling executive action is the committee report accompanying legislation, a relationship that lends credibility and significance to the informal technique. Regarding that credibility, at least so far as the legislative history of an act is concerned, Associate Supreme Court Justice Jackson had urged that the Court "should not go beyond Committee reports, which presumably are well considered and carefully prepared."[117] Beyond this, they may contain directives that represent a committee's majority opinion and provide guidance and expectations for future executive actions under the legislation. Even though these directives do not necessarily obligate an agency to act, in most instances, they carry the imprimatur of an important congressional unit—the committee which has authorizing or appropriating jurisdiction for the agency—that is politically risky to ignore.

The most assertive and confident committee report statement is issued by the Senate Select Committee on Intelligence, which, like its House counterpart, issues two separate reports, a public and a classified one. Because of the Committee's unique powers and authorizing responsibilities (for the secret intelligence community budget), it can

[115]Described in the accompanying committee report and cited at 123 CONG. REC. H8547 (daily ed. Aug. 3, 1977).

[116]*See inter alia*, M. Ogul, CONGRESS OVERSEES THE BUREAUCRACY: STUDIES IN LEGISLATIVE SUPERVISION (1976); Kaiser, *Oversight of Foreign Policy*, 2 LEGIS. STUD. Q. 255–79 (1977); Fisher, *supra* note 13; and FRANCK and WEISBAND, *supra* note 68.

[117]*Schwegmann Brothers v. Calvert Corp.*, 341 U.S. 384, 395 (1951). For a contrasting interpretation with regard to some committee reports, *see* Griswold, *The Explosive Growth of Law Through Legislation and the Need for Legislative Scholarship*, 20 HARV. J. ON LEGIS. 273 n.10 (1983).

insist that "the classified report . . . will have the full force of any Senate Report, and that the Intelligence Community will fully and completely comply with the recommendation, guidelines, directions, and limitations contained therein."[118] Since the details of the intelligence budget are not publicly disclosed, the classified report to the annual authorization takes on an added significance. It is the equivalent of the act itself and is expressly referred to in the authorization statute.

Appropriations committee reports regularly incorporate a number of urgings, directives, and expectations for agency action. A recent House Appropriations report, on the FY 1984 energy and water development appropriations, contains at least seven specific directives, instructions, and "concerns" for which action is advised. Included is the following illustration of this type of informal pressure on an agency: the Committee "directs the NRC to report" about when it expects to take action on a particular rule, promulgation of which the "Committee considers . . . to be of highest priority."[119]

Where committee directives are ignored or intentionally violated by an agency, this may invite more direct checks in the future. For example, in the mid-1970s, the House Appropriations Committee had been critical of OSHA enforcement agents, especially their inspections of "small businesses and agricultural enterprises," and had cautioned the agency to "make every effort to insure that compliance officers . . . are equipped with a sufficient degree of expertise and competency in the activities of the establishments which they are undertaking to inspect."[120] Despite this implicit warning, the complaints about OSHA continued. A short while later, the Committee and Congress found it advisable to exempt agricultural operations with ten or fewer employees from OSHA's jurisdiction and to prohibit it from assessing certain civil penalties.[121]

In a much earlier episode, a committee report helped to transform executive practices without resorting to legislative mandates. In 1842, the House Committee on Public Expenditures was especially harsh in its criticisms of the Revenue Cutter Service (a forerunner of the U.S. Coast Guard) and its direction. The Committee found the Service to be a "source of great and extravagant expenditure . . . controlled by the Secretary of the Treasury, accountable to no one but him, extended at will by him. . . ."[122] That situation could have been remedied by statute.

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[118]S. REP. No. 77, 98th Cong., 1st Sess. 2 (1983).
[119]H. REP. No. 217, 98th Cong., 1st Sess. 138 (1983).
[120]H. REP. No. 305, 93d Cong., 1st Sess. 7 (1973).
[121]The exemptions, via appropriations limitations, commenced in fiscal year 1977. Act of Sept. 30, 1976, Pub. L. No. 94–439, 90 Stat. 1418, 1421 (1976).
[122]H. REP. No. 756, 27th Cong. 2d Sess. 6 (1842).

Instead, the Secretary, partially compelled by the condemnation, instituted several major reforms and reorganizations of the Service,[123] and thereby staved off direct legislative changes.

Two interrelated, prominent nonstatutory checks on executive actions are committee oversight hearings and investigations, reinforced by the power to issue subpoenas. Criticisms about EPA's implementation of its "Superfund" for toxic waste cleanup, charges of political manipulation, and other objectionable practices brought about extensive hearings in 1982 and 1983 that, in part, have resulted in new administrators and some changes in policy direction.[124] So far, no new legislation modifying EPA authority or its Executive Branch status has been adopted. Whatever transformations have occurred in this archetypal executive-legislative confrontation have been due to nonstatutory devices, in concert, of course, with other political factors.

Highly visible, specialized investigations, sometimes conducted by a select committee, give further evidence that such oversight devices may have an impact on executive behavior, under certain circumstances. Investigations of the U.S. intelligence agencies by House and Senate select committees in 1975–1976 substantiated findings about abuses of authority, illegalities, and improper and unethical conduct. These investigations not only helped to justify new legal checks, as with the Foreign Intelligence Surveillance Act, and the creation of permanent Select Committees on Intelligence with legislative powers, but also have been credited with preventing or curtailing the recurrence of improper conduct.[125]

Informal techniques alone rarely produce an immediate, dramatic impact. More commonly, they must be exerted over a lengthy period of time, reinforced by similar efforts elsewhere in Congress, or used in league with new or modified statutes, if they are to be effective. The House Judiciary Committee, for example, has had little success in convincing Attorney General Smith to withdraw or suspend implementation of his domestic security guidelines (that revised a set issued in 1976 by Attorney General Levi). As a next step, the committee attached an amendment of the FY 1984 Justice Authorization, in order

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[123]U.S. Sec. of the Treasury, *Annual Report, 1844*, H. Doc. 45, 28th Cong., 1st Sess. 1 (1844).

[124]For a review of the criticisms and charges, *see* the Senate confirmation hearings for EPA Administrator Ruckelshaus, in *Nomination of William D. Ruckelshaus: Hearings before the Senate Comm. on Environment and Public Works*, 98th Cong., 1st Sess. passim (1983).

[125]*See, e.g.*, CRABB and HOLT, *supra* note 68, at 137–60; FRANCK and WEISBAND, *supra* note 68, at 115–34; and J. ELLIFF, *Congress and the Intelligence Community* in CONGRESS RECONSIDERED 193–206 (Dodd and Oppenheimer, eds. 1977).

"to send a message to the Department regarding the depth of its concern" about the new guidelines and so that a consultation and clarification process can be completed."[126]

Another informal technique with the potential for changing executive action is direct contact (outside committee activity) between members of Congress and executive officials, especially agency and bureau heads as well as Executive Office staff and the President himself. These numerous contacts may provide opportunity to advocate a position directly or to aid a group or organization in gaining access to executive decisionmakers.

As an example of the latter, the Reagan Administration abandoned a prospective change in a regulation governing access for handicapped individuals; according to press accounts, that decision followed a meeting between the White House Chief of Staff and representatives of affected organizations, a meeting that House Republican Leader Robert Michel helped to arrange.[127] Illustrating direct contact, members of the Senate Governmental Affairs Committee have negotiated with the Office of Personnel Management, in order to modify OPM's proposed rules over federal salaries, promotions, and layoffs. Part of their ability to persuade OPM derives from their strategic location in Congress—as members of the committee with jurisdiction over the Office and including the assistant Senate majority leader—as well as their demonstrated legislative success in delaying implementation of earlier OPM rules in the matter.[128] And in another recent case, HUD reportedly issued a "compromise" version of its rent-subsidy formula, because of "strong protests from congressional Democrats," among others.[129]

As with other informal techniques used to check executive actions, direct contacts have no guarantees. A concerted effort by GOP legislators, including Senator Dole and Republican Congresswomen, for instance, had failed to change the Reagan Administration's decision to file a brief with the Supreme Court over Federal funding to educational institutions that discriminate against women.[130]

Nonstatutory legislative vetoes—informal devices whereby a congressional committee effectively clears proposed executive actions—comprise yet another mechanism for controlling specific executive

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[126]H. REP. No. 181, 98th Cong., 1st Sess. 19 (1983).

[127]Washington Post, April 12, 1983, at A15.

[128]*Supra* note 77 and 78.

[129]Washington Post, Sept. 19, 1983, at A11.

[130]*See* press accounts in Washington Post, Aug. 3, 1983, at A2, Aug. 6, 1983, at A5, and Aug. 9, 1983, at A2.

actions. Prominent in reprogramming of appropriations, these operate, as do their statutory counterparts, to bring executive actions into compliance with legislative objectives and have even been written into the operating manuals of some affected agencies.[131]

Studies or investigations by congressional staff, outside consultants, and congressional support agencies, especially the General Accounting Office (GAO), may themselves help to induce changes in administrative behavior, challenge questionable conduct, or provide substantiation and recommendations for further congressional efforts to check executive action. GAO reports, for instance, may cite administrative developments that have been initiated at its suggestion;[132] or executive officials may identify GAO as a source for policy or administrative changes. In the latter, the Attorney General's 1976 guidelines for "Reporting on Civil Disorders" established new and more difficult procedures for FBI assistance to the Secret Service, especially in sharing intelligence; as a partial justification for that change, the guidelines noted that a prior "draft report of the General Accounting Office indicates that very little information reported by the FBI is actually retained by Secret Service."[133]

V. OTHER CONGRESSIONAL ACTIONS

The Supreme Court's ruling in *Chadha* (and implicitly, the summary affirmances that followed) found the legislative veto unconstitutional because it violated the Presentment Clauses of the Constitution, a holding that presumably invalidates all types of statutory congressional vetoes (i.e., those relying exclusively on Congress). Since that time, the House Rules Committee, which "has always had reservations about 'legislative veto' laws . . . ," has established a policy of returning bills that

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[131]Fisher, *supra* note 13, at 27. For the Treasury Department, *Reprogramming of Appropriated Funds: Memorandum from the Secretary of the Treasury* (March 9, 1977); for the Department of Agriculture, *Guidance for Reprogramming Proposals: Memorandum from USDA Office of Budget, Planning and Evaluation* (April 5, 1978); and for the Public Health Service, *Request for Reprogramming of Funds*, PHS Financial Management Manual, Part 2, Chapter PHS: 2–6 (June 19, 1980).

[132]For example, in the midst of a General Services Administration scandal involving corruption, bribery, and kickbacks, a 1979 GAO report identified several GSA correctives that had been advanced by that GAO investigation and earlier ones, in *The General Services Administration Should Improve the Management of Its Alterations and Major Repairs Program: Report by the U.S. General Accounting Office* (LCD–79–310) 16–18, 29–30 (July 17, 1979).

[133]*Reporting on Civil Disorders and Demonstrations Involving a Federal Interest: Guidelines Issued by the Attorney General* (Part III. A.) (March 10, 1976).

contain such provisions to the authorizing committees for redrafting.[134]

Yet certain legislative veto provisions may remain in force; and some may elicit compliance, because it is in the executive's own vested interest to do so. Moreover, as described above, certain types of congressional vetoes, especially committee vetoes in appropriations acts, have been ratified statutorily since *Chadha*.

These possibilities notwithstanding, Congress still has other options for controlling specific executive actions, in addition to the statutory and nonstatutory mechanisms detailed above. What follows is neither a comprehensive listing of alternatives—although they range from major statutory initiatives to House rules changes—nor a ranking of them. As the Court noted in *Chadha*, Congress has been inventive in developing its powers;[135] and the perceived benefit or feasibility of any particular approach depends upon many different factors that cannot be explored in depth here.

One often-cited remedy, however, is likely to languish or be of only marginal utility, because of practical and philosophical concerns underlying its assumptions. That is the all-purpose prescription that the establishing statutory authority for agencies and programs should be unambiguous, precisely and narrowly defined, and with clear, straightforward objectives. Otherwise, Congress, lacking will and resolve, so the reasoning goes, has abdicated its lawmaking responsibilities by "passing the buck to the executive. . ."[136]

The noble intent behind this solution, however, minimizes the reality behind contemporary laws: the changing nature and characteristics of political parties, the frequent split party control at the national level (in all but one of the past four Presidencies), the increase in number and political sophistication of organized interests and so-called "single issue" groups, the complexity and intense controversy surrounding many current issues, the truncated distribution of governmental authority under the Constitution, and the internal competing power structures within Congress and the executive. All of these conspire against such an over-arching solution and in favor of broad delegations of authority, vague language, and generalized statements of purpose in public laws. It may also be that proponents of such comprehensive solutions somewhat naively recall earlier periods that exhibited clear

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[134]H. REP. No. 257, Part 3, 98th Cong., 1st Sess. 4 (1983).

[135]*See* the majority opinion at 103 S. Ct. at 2781, and dissenting opinion of Justice White. *Id.* at 2795.

[136]R. Cohen, *Passing the Buck*, NAT. J. 1461 (July 7, 1983). *See also* H. Bruff, *Ban on Legislative Veto Could Lead to Less Lawmaking*, Los Angeles Times, June 28, 1983, Part II at 5.

and precise legislation—e.g., the 1930 Smoot-Hawley Tariff or that from the 1880s, which Woodrow Wilson described as "Congressional Government"[137]—while forgetting the serious problems of those systems and the criticisms of specific pieces of legislation. Finally, some may uncritically assume that those previous systems could be resurrected in the contemporary era.

The operating premise is that vague and broad delegations of statutory authority will continue as the rule, for a variety of reasons. Therefore, Congress will remain dependent upon a variety of means to nullify or neutralize specific executive actions, as it has in the past. But now Congress has the added incentive of replacing congressional vetoes by some of the following methods:

Formal legislation may be required before commencement of specific executive actions. Statutes might be drafted to incorporate a requirement that certain future actions shall not commence unless and until a regular bill, possibly under expedited procedures, is approved by both Houses of Congress and then signed by the President or his veto is overriden. Many of the same pro and con arguments applied to joint resolutions of approval apply here also.

Regular and frequent authorization periods may be mandated for agencies that are not already under a short cycle, thus improving Congress' ability to review, monitor, and clear executive actions, by providing more numerous opportunities for periodic review and leverage to ensure agency compliance. The House, in the immediate aftermath of the *Chadha* decision, did this when it reduced the CPSC reauthorization period from five to three years.[138]

Official "sunset" requirements, where a program, agency, or authority terminates after a specified time unless it is expressly reauthorized, may be advanced as control techniques. In fact, a "super sunset" bill, as termed by its sponsor, has been introduced in the House in the 98th Congress; it would repeal all authority previously delegated to the executive with a legislative veto after 180 days, unless Congress specifically reinstates such authority.[139]

Time limitations on executive actions themselves might also be explored. The War Powers Resolution, as a prominent example, imposes a time limit on the commitment of U.S. Armed Forces into hostilities abroad, unless Congress has specifically authorized it to continue.[140]

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[137]W. WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1885).

[138]*Supra* note 2.

[139]H.R. 4535, 98th Cong., 1st Sess. (1983). *See* remarks of its sponsor, Elliott Levitas, in 129 CONG. REC. H10589–91 (daily ed. Nov. 18, 1983).

[140]Pub. L. No. 148, 87 Stat. 555, at 556 (1973).

The controversy and political difficulties in operationalizing such authority regarding Lebanon (in contrast to Grenada), however, demonstrates its weaknesses when applied across-the-board to foreign military ventures.[141] There, the President's own constitutional authority expressly exceeds that granted by statute and his political power, at least in the short-run, exceeds that of Congress. But in other areas, such as regulations from independent commissions or contracting for specific construction or maintenance projects, Congress may impose time limits without encountering the same challenges.

Authorizations for less than a fiscal year are a variation of the same theme that "sunset" requirements and regular authorization periods score. In this case, the time permitted for a specific activity is shortened and the executive must seek supplemental authority from Congress during the fiscal year, if the activity is to continue.

The House Select Committee on Intelligence has held hearings on proposals, introduced by Rep. Fowler, that would halt funding for covert operations at a specified dollar amount without the express approval of both House and Senate Select Committees.[142] And the House and Senate, following the recommendation of the conferees from the Select Committees on Intelligence, approved funding for CIA covert operations in Nicaragua for less than the fiscal year (if such expenditures remain at their current rate). This limitation in the FY 1984 Intelligence Authorization, by setting an absolute ceiling and prohibiting transfers from other accounts, has compelled the Agency to seek congressional approval for additional amounts to continue its activities.[143]

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[141]With regard to Lebanon, Congress for the first time (on Sept. 29, 1983) invoked the War Powers Resolution, based upon a negotiated compromise with the President. It allowed U.S. Armed Forces to remain in Lebanon for 18 months without further congressional action, thus superseding the Resolution's normal 60-day limit. President Reagan, upon signing the measure (Multinational Force in Lebanon Resolution, Pub. L. No. 98–119, 97 Stat. 805 (1983)), however, asserted that he did "not necessarily join in or agree with some of these expressions" of congressional findings incorporated in the statute. Furthermore, he insisted, his signing should not "be viewed as any acknowledgment that the President's constitutional authority can be impermissibly infringed by statute, [or] that the congressional authorization would be required if and when the period specified in section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired. . . ." 41 CONG. Q. WEEKLY 1923–24, 1963–65, 2015–20, 2095–96, and 2142 (1983); 15 NAT. J. 1931–32 (1983); and 129 CONG. REC. H7724–28 and S13125–71 (daily ed. Sept. 29, 1983).

With regard to Grenada, no compromises or negotiated arrangements have yet occurred; and both Houses voted, in the immediate aftermath of the U.S. involvement, to invoke the War Powers Resolution time limit without extending it (as in Lehanon). 41 CONG. Q. WEEKLY 2221–4 (1983); Washington Post, Nov. 2, 1983, at A1, A14; and 129 CONG. REC. H8933 (daily ed. Nov. 1, 1983) and S14874–77 (daily ed. Oct. 28, 1983).

[142]H.R. 3114, 98th Cong., 1st Sess. (1983).

[143]*Supra* notes 96 and 97.

House Rule XXI was changed in the 98th Congress to make it more difficult to offer floor amendments to appropriations.[144] If they are perceived as overly restrictive, the current rules might be eased or removed in order to facilitate appropriations limitations, via floor amendments, to check executive actions.

Other House and Senate rules affecting standing committee powers might be amended to preclude appropriating funds for a specific executive action unless and until the authorizing committee has expressly approved the planned action itself or a specified related contingency. The prior approval requirement could be under expedited procedures. Despite having the evident impact of a legislative veto, this change would directly affect only the internal Chamber Rules and, arguably, would be immune from judicial scrutiny.

Private laws, despite their "onerous burdens" (as characterized by the majority opinion in *Chadha*),[145] might be reactivated to control some deportation cases, as they are now in other immigration matters and for claims relief.

Sense of Congress resolutions—non-binding concurrent or simple resolutions that indicate a sense of Congress or of a single House—can be used to express a congressional opinion or view about a (proposed) specific executive action. In so doing, they also alert officials to the possibility of future legislative sanctions, if that sentiment is violated, but have no legal effect themselves.

Oversight powers in statute or in chamber rules may be modified to strengthen congressional control or at least provide further opportunity for it. In addition to the standard oversight powers that congressional committees now possess, their authority could be amended to require that committees be kept "fully and currently informed," even with regard to "significant anticipated activities," by heads of agencies under their jurisdiction. This would enhance their ability to monitor planned executive actions, by granting standing committees the same authority that the Select Committees on Intelligence hold exclusively. (Committees on their own, of course, may expand the consultation or prior notification directives in their reports on bills; and although these would not be legally binding on an agency, they may still elicit compliance.)

Select study committees or subcommittees (in House Government Operations and Senate Governmental Affairs) may be established jointly or in each House to be responsible for monitoring, reviewing, and com-

[144] *Supra* note 59.
[145] 103 S. Ct. at 2775.

menting upon a range of (proposed) executive actions, such as "significant" regulations or foreign arms sales above a threshold dollar amount.

In so doing, the study panel could conduct oversight of executive actions under a specific and express mandate, similar to the "vigilant oversight" directive of the Select Committees on Intelligence. Since the panel's membership would not be identical to the appropriating or authorizing committees which have jurisdiction, it would not have previously sanctioned the powers, authority, duties, or officials (as Senate authorizing committees do for Presidential nominees) of the agencies whose actions they would oversee. By commenting upon proposed rules or regulations, for instance, the panel could alert Congress about suspect or objectionable ones and suggest options for corrective legislation, similar to a proposal that the House Rules Committee had advanced (in lieu of an across-the-board legislative veto).[146]

The Senate confirmation power, frequently criticized for being perfunctory, may be used to solicit pledges from Presidential nominees with regard to taking (or not taking) specific action and notifying or consulting with congressional committees in the future.

The likelihood of this approach being adopted by committees as a normal part of confirmation or being acceptable to the President, however, is remote. Recently, for instance, a number of Senators sought to require that William P. Clark, the successor to Interior Secretary Watt, pledge to change specified Department policies, prior to his confirmation. The attempt was made through an amendment to the FY 1984 Supplemental Appropriations Act, a day before Clark's scheduled confirmation vote, but was tabled, 48 to 42. In an analogous case, a Senate Appropriations subcommittee tried to obtain a commitment from the new head of the Agency for International Development to clear future plans about diverting economic aid to military purposes. The Administrator, intent on improving relations with Congress, was agreeable. Since the President and the Justice Department were not, however, the informal clearance procedure was abandoned and replaced by a formal provision in a later appropriations act.[147]

Despite the evident disincentives against specific pledges from nominees, the confirmation hearings of EPA Administrator Ruckels-

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[146]RECOMMENDATIONS ON ESTABLISHMENT OF PROCEDURES FOR CONGRESSIONAL REVIEW OF AGENCY RULES: PREPARED FOR CONSIDERATION BY THE HOUSE COMM. ON RULES, 96TH CONG., 2D SESS. 26–47 (Comm. Print 1980).

[147]For the 1983 attempt concerning William Clark, *see* 129 CONG. REC. S16565–71 (daily ed. Nov. 17, 1983); and for the AID Administrator, *see* Fisher, *supra* note 13, at 25–26.

haus in 1983,[148] and of FBI Director Webster in 1978,[149] demonstrate that there are circumstances and conditions, albeit rare, that permit committees to be insistent about obtaining certain commitments from them.

Increased judicial involvement may serve as a means of improving controls over executive action indirectly. Congress may enact legislation to ease standing to bring civil suits against an official action, grant broader review powers to Federal courts, or, in narrow areas, even establish new lower courts with the authority to rule directly on requests for planned or proposed action.

Some comprehensive regulatory reform bills include new judicial review procedures, as with the so-called Bumpers' Amendment;[150] and the Foreign Intelligence Surveillance Court, operating under a 1978 enactment, is empowered to issue (or withhold) warrants for certain electronic surveillance operations requested by the Attorney General.[151]

Offices of inspector general may be given statutory authority to halt certain executive actions or projects and indirectly implement congressionally determined controls. Although none of the current 18 statutory IGs possesses such power, a former inspector general (for Foreign Assistance) did hold "authority to suspend all or any part of any project or operation (but not a country program)" that the office was inspecting, auditing, or reviewing.[152]

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[148]*Supra* note 124. As a follow-up, EPA Administrator Ruckelshaus has reportedly fulfilled one prominent pledge, by making "significant revisions" in the water-quality rules proposed by his predecessor. Washington Post Nov. 1, 1983, at A9.

[149]S. REP. No. 14, 95th Cong., 2d Sess. (1978).

[150]The major current bills containing the Bumpers' Amendment, calling for *de novo* judicial review of rules and regulations, are H.R. 220, H.R. 2327, and S. 1080, 98th Cong., 1st Sess. (1983).

[151]50 U.S.C. § 1804 (1976 & Supp. V 1981).

[152]22 U.S.C. § 2384 (1976). For a discussion of the Inspector General for Foreign Assistance, current inspectors general, and their relationship with Congress, *see* Novotny, *The IGs—A Random Walk*, 12 THE BUREAUCRAT 35–9 (Fall, 1983); Tiefer, *The Constitutionality of Independent Officers as a Check on Abuses of Executive Power*, 63 B.U.L. REV. 59–103 (1983); and Fountain, *What Congress Expects from the New Inspectors General*, 28 GOV'T. ACCT. J. 8–13 (1979).

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D.C. Superior Court

CONSTITUTIONAL LAW
LEGISLATIVE VETO

Invalidation of unicameral veto provision also serves to invalidate D.C. City Council's authority over local criminal law.

UNITED STATES v. COLE, Sup.Ct., D.C., Crim. No. F-5111-82, May 9, 1984. *Opinion* per Donald S. Smith, J.

DONALD S. SMITH, J.: This matter is before the Court on defendant's motion to arrest judgment following his conviction for Carnal Knowledge. Defendant's sole contention is that the statute under which he was indicted, tried and convicted, D.C. Code §22-2801 (1981),[1] was effectively repealed prior to the initiation of proceedings against him by §13(a) of the District of Columbia Sexual Assault Reform Act of 1981 (D.C. Act 4-69) [hereinafter referred to as Sexual Assault Act].[2]

I.

Sylvester E. Cole was indicted on January 12, 1983 and charged with one count of Kidnapping under D.C. Code §22-2101, two counts of Rape under D.C. Code §22-2801, and two counts of Carnal Knowledge under D.C. Code §22-2801. Trial was held before a jury and on December 12, 1983 defendant was found guilty of one count of Carnal Knowledge.

On December 19, 1983, prior to sentencing, defendant filed the present motion. On February 13, 1984, due to the nature of the issues raised, this Court granted the District of Columbia's motion to intervene and on March 16, 1984 oral arguments were held.

The validity of defendant's argument rests upon the effect to be given §602(c)(2) of the District of Columbia Self-Government and Governmental Reorganization Act [hereinafter referred to as Home Rule Act], in light of the recent decision in *INS* v. *Chadha*, 103 S.Ct. 2764 (1983).[3]

Section 602(c)(2) allows either House of Congress to pass a resolution negating any act of the District of Columbia City Council, affecting Titles 22, 23 or 24 of the District of Columbia Code, within thirty days after such act is transmitted to Congress. On September 9, 1981, the House of Representatives timely exercised this power, passing a resolution disapproving of the Sexual Reform Act. H.R. Res. 208, 97th Cong., 1st Sess. (1981). Relying on the propriety of this "veto," neither Congress, the City Council nor the United States Attorney's Office had any reason to believe that the Sexual Reform Act's repeal of §2801 went into effect. Instead, those prosecuted for sexual offenses in the District continued to be charged under prior existing law.

On June 23, 1983, however, the Supreme Court decided *INS* v. *Chadha*. In that case, the Court found that efforts by Congress to retain control over delegations of legislative power, through the use of negative resolutions by one House, violate the Presentment Clauses, Art. I, §7, cls. 2, 3, and the bicameralism requirement, Art. I, of the Federal constitution. The Court held that the only correct method by which Congress may disapprove of actions taken pursuant to properly delegated authority is through the enactment of legislation; to wit, the passage of a bill by a majority of both Houses of Congress followed by presentment to the President. *See* 103 S.Ct. at 2787.

In the present case, it is uncontested that the provision used by the House of Representatives to strike down the Sexual Reform Act, §602(c)(2), is exactly that type of "legislative veto" prohibited by *Chadha*. Instead, the only issues which face this Court are: 1) Whether *Chadha's* prohibition against the use of legislative vetoes applies in the unique context of legislation involving the District of Columbia?; and, 2) If *Chadha* does apply, how would that finding affect both the status of the Sexual Reform Act and the defendant's conviction?

The Court addresses each question in turn.

II.

By the express terms of the Constitution, Congress has the power to "exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States . . . ." Art. I §8, cl. 17.

At first glance, it might be tempting to argue that the word "exclusive" in the above clause serves two purposes; that it not only describes the scope of Congress' power but also the means by which such power shall be exercised. To engage in this temptation, however, is to ignore both the plain meaning and past interpretation of cl. 17.

The wording of the clause is clear and unambiguous. It states that Congress, as opposed to any other entity, has the exclusive power to legislate in regard to District affairs. It does not say, nor make provision for, Congress to enact such legislation free and clear of those restraints carefully prescribed in the Constitution.

This position is made unequivocal by examining the placement of cl. 17 in §8 of Art. I. Section 8 lists seventeen separate areas in which the power of Congress to act was made explicit.

(Cont'd. on p. 1120 - Veto)

1. §22-2801 reads as follows:
Whoever has carnal knowledge of a female forcibly and against her will or whoever carnally knows and abuses a female child under 16 years of age, shall be imprisoned for any term of years or for life.

2. §13(a) of the Sexual Reform Act reads as follows:
Sections 808, 818, 871, 873, and 874 of an Act to Establish a Code of Law for the District of Columbia, approved March 3, 1901 (31 Stat. 1332; D.C. Code, Secs. 22-2801, -2304, -3002, -3001 & -301) are repealed.

3. The present form of §602(c)(2) reads, in relevant part, as follows:

In the case of any such act transmitted by the Chairman with respect to any act codified in Title 22, 23, or 24, such act shall take effect at the end of the 30-day period beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate only if during such 30-day period 1 House of Congress does not adopt a resolution disapproving such act. D.C. Code §1-233 (1981).

D.C. Superior Court

ADOPTION
SURROGATE MOTHER

Motion to dispense with investigation, report and interlocutory decree is denied in case involving surrogate mother.

IN RE: PETITION OF R.K.S. FOR ADOPTION, Sup.Ct., D.C., Fam. Div. No. _____, April 13, 1984. *Opinion* per Salzman, J.

SALZMAN, J.: This adoption proceeding comes before the Court on the petitioner's motion under 16 D.C. Code Sec. 308(2) (1981) to dispense with the investigation, report and interlocutory decree. The statute gives the Court discretion to do so where the prospective adoptee is a minor and "the petitioner is a spouse of the natural parent of the prospective adoptee and the natural parent consents to the adoption."

This adoption petition was filed February 6, 1984. It alleges that petitioner's husband is the natural father of the prospective adoptee, that the child has resided with the petitioner since his birth on June 18, 1983, and that his natural mother is M.P., "whose residence and address are unknown to the petitioner."

Papers filed with the adoption petition disclose, however, that this is not the usual circumstance of one spouse seeking to adopt the other's natural child. Rather, this is a "surrogate mother" situation. Petitioner's husband entered into a $25,000[1] contract with "Miracle Program, Inc.," a Maryland corporation and "surrogate mother service." Pursuant to that contract, Miracle Program arranged for Mrs. P. to be artificially inseminated with petitioner's husband's sperm. Mrs. P., the "surrogate mother," had contracted with Miracle Program for a $10,000 fee to bear petitioner's husband's child and to surrender custody of the infant at birth to petitioner's husband. He in turn agreed to become legally responsible for the child's care and support. Mrs. P.'s child is the prospective adoptee in this case and this child is in petitioner's husband's custody under the contractual arrangement just described.

Because this is apparently one of the first—if not the first—"surrogate mother" adoption case to come before it, the Court set the matter down for hearing and requested the Corporation Counsel to appear as *amicus curiae*.[2] After hear-

(Cont'd. on p. 1120 - Mother)

1. The contract provided that $10,000 would be paid to Mrs. P. and the balance would be dispersed by Miracle Program for medical expenses, psychological and medical evaluations, counselling, legal fees, administrative costs, maternity clothing allowances, transportation costs and insurance.

2. The Court did so after determining, pursuant to 16 D.C. Code Sec. 311 (1981), that the child's welfare will be promoted with the aid of such counsel and that the petitioner's papers and records of this proceeding may be inspected by the Corporation Counsel.

TABLE OF CASES

D.C. Superior Court

MOTHER

(Cont'd. from p. 1117)

ing argument from petitioner's counsel and the Corporation Counsel, the Court exercised its discretion to deny petitioner's motion to dispense with the investigation and report.

The Court had a number of reasons for this action. First, because this is a matter of first impression, the Court believes the legal as well as the factual ramifications of the adoption should be fully explored. It is noted that "surrogate mother" adoption procedures have been held invalid in other jurisdictions.[3]

Moreover, while the papers filed with the court represent that petitioner's husband is the father of the child, they do not conclusively establish that fact. Those papers also indicate that the surrogate mother was married and apparently living with her husband at the time in question and that the prospective adoptee was born in wedlock. There is a legal presumption (albeit a rebuttable one) in Maryland[4] as well as the District of Columbia[5] that such a child is the offspring of the married parents. While the unsworn documents filed with this case suggest that petitioner's husband and not Mr. P. is the father of the prospective adoptee, that evidence is not conclusive. Confirmation of parentage, however, is now easily attainable by the relatively simple medical procedure known as the human leukocyte antigen (H.L.A.) test.[6] Such tests are not merely for convenience but a matter of reasonable prudence. There have been reported occasions when procedures such as those purportedly followed under the contract for surrogate motherhood in this case have in fact not been followed with the result that the child was not that of the purported natural father but of the surrogate mother's husband.[7] Any such possibility should be set to rest. First, the child's genetic makeup may affect his health and predisposition to certain illnesses. It is obviously in the child's best interest that his custodians be fully apprised of his background.

Second, if the prospective adoptee is not in fact petitioner's husband's natural child, petitioner's right to adopt him is problematic. The Court notes in this regard the absence from the papers supporting the petition of any consent by Mrs. P. to the adoption of her child.[8] Violations of District of Columbia and Maryland laws might also be involved in such circumstances.[9] Since, as previously mentioned, the question of the child's parentage is now easily confirmable, the Court sees no reason why an appropriate H.L.A. test should not be performed prior to adoption in this case if one has not already been done. Moreover, notwithstanding petitioner's representation that the whereabouts of the natural mother are "unknown," the nature of the arrangement suggests that this information should be ascertainable with little difficulty.[10]

Nothing in this memorandum should be understood as questioning the good faith of the petitioner and her husband in using the "surrogate mother" procedure in obtaining custody of the prospective adoptee. In this Court's judgment, however, the considerations outlined warrant a full investigation into the circumstances of the proposed adoption, including a careful inquiry into the background of the surrogate mother, child, and prospective parents, under 16 D.C. Code Sec. 307.

Accordingly, it is this 13th day of April, 1984,

ORDERED that petitioner's motion to dispense with the investigation, report and interlocutory decree is *denied;* and it is

FURTHER ORDERED that the Corporation Counsel is appointed *amicus curiae* and shall investigate the legal ramifications of the prospective adoption and report the results of that investigation to the Court and the petitioner in 30 days. In addition to any other matters thought relevant by *amicus*, the Court wishes to be advised of the following:

1. Is Miracle Program, Inc., a child placing agency licensed by the District of Columbia or any state?

2. Is Miracle Program, Inc., a profit or non-profit corporation?

3. Has Miracle Program, Inc., performed psychological and medical evaluations of the natural mother, and if so, have the petitioner and her husband seen the results?

4. Is there evidence of record sufficient to rebut the presumption that a child born during marriage is the offspring of the husband and wife?

5. Should the Court require that Mr. and Mrs. P. and petitioner's husband submit to H.L.A. testing in aid of establishing adoptee's paternity?

6. Is the natural mother's "Direction and Release by Surrogate Mother and Surrogate Mother's Husband" sufficient evidence of her consent to adoption under 16 D.C. Code Sec. 304 (1981)?

7. Does the natural mother's surrendering of her child to petitioner's husband under the conditions described constitute "abandonment" under 16 D.C. Code Sec. 304(d) in light of the entire transaction?

8. Are the "surrogate mother" procedures followed in this case in conformity with the laws of the District of Columbia and Maryland?

It is

FURTHER ORDERED that the District of Columbia Department of Human Services be and hereby is directed to make a thorough investigation for the purpose of ascertaining if the adoptee is a proper subject for adoption and if the home of the petitioner is a suitable one for the adoptee, and to report to the Court within a period of not in excess of ninety days its findings and recommendations.

VETO

(Cont'd. from p. 1117)

These include such diverse powers as the ability to regulate commerce, borrow and coin money, collect taxes and declare war. Yet, in none of these areas has it ever been seriously contended that Congress might avoid the Constitution's requirements for the passage of legislation.

In *Chadha*, the Court made it clear that these requirements not only apply to direct legislation regarding §8 powers, but to delegations of such power as well. Faced with a challenge to the delegation of the power of Congress under the naturalization clause, Art. I, §8, cl. 4, the Court stated: "It is not disputed that this choice to delegate authority is precisely the kind of decision that can be made only in accordance with the procedures set out in Art. I . . . .; bicameral passage followed by presentment to the President." 103 S.Ct. at 2786.

Instead, the Court posited that the Founding Fathers rarely, and then only in the most unambiguous of terms, created exceptions to the normal requirements for the passage of legislation. Indeed, the Court was able to find "but four provisions in the Constitution . . . by which one

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3. *E.g., Doe* v. *Kelley*, 106 Mich.App. 169, 307 N.W.2d 438 (1981); *Surkowski* v. *Appleyard*, 9 Fam.L.Rep. (BNA) 2260 (Mich.App., Jan. 19, 1983); Op. Ky.Atty.Gen. No. 81-18 (1981).

4. Art. 16 Md.Code Ann.Sec. 66F(b) (1981).

5. 16 D.C. Code Sec. 909(a)(1) (1981).

6. *See Catchember* v. *Payne*, 466 A.2d 1240 (D.C. 1983).

7. See, Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 Va.L.Rev. 465 at 476, n.48 (1983).

8. Mr. and Mrs. P. signed a "Direction and Release by Surrogate Mother and Surrogate Mother's Husband," consenting to surrendering their custodial rights of the child to the child's biological father. No document is presented, however, consenting to the adoption of the child.

Petitioner's counsel argues that Mrs. P. has "abandoned" her child to petitioner and petitioner's husband. In light of the actual arrangements described, *supra*, the Court is doubtful that the term abandonment is appropriate to the circumstances of this case.

9. *E.g.*, 32 D.C. Code Sec. 1005 (1981) (no placing of children for adoption permitted except by licensed child-placing agency); Art. 88A, Md.Code Ann. Sec. 20(b)(2) (1981) (placing of child by parent permitted only after petition for adoption filed with court and court's issuing order consenting to same); 32 D.C. Code Sec. 1011 (1981) and Art. 16, Md. Code Ann. Sec. 85 (1981) (no fees for placing child except by non-profit, licensed child-placing agency); 32 D.C. Code Sec. 1009 (1981) and Art. 88A, Md. Code Ann. Sec. 31 (1981) (penalties for violating requirements for placing children for adoption).

10. The surrogate mother contract requires Mrs. P. to provide Miracle Program with any change of her home, employment address or telephone number.

use may act alone with the unreviewable ce of law, not subject to the President's veto." 3 S.Ct. at 2786. The four provisions are:

(a) The House of Representatives alone was given the power to initiate impeachments. Art. . § 2, cl. 6;

(b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. 1, §3, cl. 5;

(c) The Senate alone was given final unreviewable power to approve or to disapprove presidential appointments. Art. II, §2, cl. 2;

(d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art II, §2, cl. 2.

3 S.Ct. at 2786.

It is clear, then, that the word "exclusive," if it not surplusage, serves a purpose other than at of granting Congress sole power over the strict of Columbia. Fortunately, we need not sort to conjecture in this regard, for the story of cl. 17 clearly reveals the intention hind its existence.

Inasmuch as the new seat of the Federal vernment was to be created from lands ceded States already in existence, it was necessary at jurisdiction over such area be clearly lineated. As Madison stated:

> Without it not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of the government for protection in the exercise of their duty might bring on the national councils an imputation of awe or influence equally dishonorable to the government and dissatisfactory to the other members of the Confederacy.

he Federalist No. 43, at 272 (J. Madison) (Menor ed. 1961). Or, as the Supreme Court more uccinctly expressed the proposition: "[I]t is ear from the history of the provision that the ord 'exclusive' was employed to eliminate any ossibility that the legislative power of Congress ver the District was to be concurrent with that f the ceding states. *See* The Federalist, No. 43; Elliott's Debates (2d ed. 1876), pp. 432-433; 2 tory, Commentaries on the Constitution of the nited States (4th ed. 1873), §1218." *District of olumbia* v. *Thompson Co.*, 346 U.S. 100, 109 953).

This, of course, is not to say that the relationhip of Congress to the District is not exceptional. Due to the unique status of the Federal apital, Congress not only continues in its role as he Federal legislature, it also assumes a rule nalogous to that of a State government in egard to one of its municipalities. *See Palmore United States*, 411 U.S. 389, 397 (1973); *istrict of Columbia* v. *Thompson Co.*, 346 U.S. 00, 108 (1953); *O'Donoghue* v. *United States*, 89 U.S. 516, 539 (1933). Thus, in dealing with he District, Congress is permitted to legislate in a manner with respect to subjects that would xceed its powers, or at least would be very nusual, in the context of national legislation nacted under other powers delegated to it nder Art. I, §8." *Palmore*, 411 U.S. at 398 (citaons omitted).

It cannot be over emphasized, however, that his unique status only extends itself to the efinition of the scope of Congress' power. It oes not grant Congress a special license to hort-circuit the Constitution simply because it is cting within the boundaries of an otherwise imermissible zone.

This view has been expressed time and again y the Supreme Court. While taking note of the pecial relationship of Congress in regard to the District, the Court has nevertheless been careful to assert that the Federal constitution must always guide Congress' actions. *See Palmore*, 411 U.S. at 397 ("Congress 'may exercise within the District all legislative powers that the legislature of a state might exercise within the State, . . . so long as it does not contravene any provision of the constitution of the United States.' *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 5 (1899)"); *Thompson*, 346 U.S. at 109 ("[T]here is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, subject of course to constitutional limitations to which all lawmaking is subservient . . . ."); *O'Donoghue*, 289 U.S. at 541 ("The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution.").

Given these expressions, this Court is constrained to rule that the holding of *Chadha* applies in the present case. As stated earlier, the Founding Fathers knew how to exclude grants of Congressional power from the normal limitations on the passage of legislation. *See* 103 S.Ct. at 2786. Yet, they failed to do so when delineating the scope of such power in regard to the District of Columbia. Therefore, inasmuch as the Court in *Chadha* was concerned with the process and not the scope of legislation, *See* 103 S.Ct. at 2779, the holding in that case necessarily must apply to all exercises of legislative power not specifically exempt from the presentment and bicameralism requirements of the Constitution.

In reaching this result, the Court has carefully considered the recent holdings by two Judges of the Superior Court in *United States* v. *McIntosh*, F4892-83, memo. op. (D.C. Super.Ct. March 27, 1984) (Shuker, J.) and *United States* v. *Langley*, F3666-82, memo. op. (D.C. Super.Ct. March 28, 1984) (Moultrie, C.J.), which also dealt with the applicability of the *Chadha* decision to legislation affecting the District. As demonstrated above, the holding in *Chadha* compels this Court to a contrary result.

In both *Langley* and *McIntosh*, the holding in *Chadha* was viewed as not applying to the District due to the unique nature of Congress' plenary power under Art. I, §8, cl. 17. *See McIntosh* at 6, 8; *Langley* at 5-8. This view ignores, however, that *Chadha* also dealt with a plenary power of Congress under Art. I, §8, that of establishing uniform rules of naturalization. Art. I, §8, cl. 4. Yet, in taking note of this power, the Court in *Chadha*, unlike the Courts in *Langley* and *McIntosh*, did not focus on a differentiation between Congressional authority which is exercised locally as opposed to nationally, nor upon power which is plenary as opposed to that which is qualified. Instead, the Court was concerned solely with the proper exercise of legislative authority no matter what its scope or source.

In *Chadha*, the Supreme Court expressed this proposition as follows:

> The plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power. As we made clear in *Buckley* v. *Valeo*, 424 U.S. 1 (1976); "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, *M'Culloch* v. *Maryland*, 4 Wheat 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction." *Id.*, 424 U.S., at 132.

103 S.Ct. at 2779.

That the Court in *Chadha*, as the above quotation illustrates, necessarily meant its holding to extend to all exercises of legislative authority is made even more clear by examining the tortured results of those attempts to create artificial exceptions to applicability. In *McIntosh*, it is stated that "Congress, in exercising its plenary powers over the District of Columbia, may eschew" the Presentment Clauses and bicameralism requirement of Art. 1. *McIntosh* at 12; *See also Langley* at 5, 7. Yet, if this claim be true, then Congress, acting alone, and free of the President, would have complete authority to "legislate" on matters affecting the District.[4] In effect, the President would be reduced to the role of an interested, but impotent, party. Even his signature on the Home Rule Act would be nothing more than a gratuitous adornment.[5]

Quite simply, this position is untenable.

To remove the power of the Executive from the process of enacting legislation affecting the District poses two dangers. First, while it is true that Congress is often compared to a State legislature when it deals with District affairs, it should be noted that "[t]he object of the grant of exclusive legislation over the district was . . . national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation." *O'Donoghue*, 289 U.S. at 539-40 (quoting *Grether* v. *Wright*, 75 F. 742, 757 (6th Cir.

4. The intervenor, the District of Columbia, has unambiguously adopted this position. *See* Response of Intervenor District of Columbia to the Constitutional Issues Raised in Cole's Motion to Arrest Judgment at 4 (D.C. Super.Ct. filed January 27, 1984). Indeed, it has gone so far as to state that "Congress may wholly exclude the President from any role with respect to the local government, in a way that could not be done with respect to national affairs." Memorandum of Points and Authorities in Support of Motion of Defendants District of Columbia, Marion S. Barry, Jr., Margurite C. Stokes, John Touchstone and Maurice Turner to Dismiss Plaintiffs' Second Amended Complaint or in the Alternative for Summary Judgment at 57, *Dimond* v. *District of Columbia*, Civil Action No. 83-1938 (D.C.D.C. filed December 29, 1983).

5. It is stated in *Langley* that: "It is clear that Congress, by *legislation presented to the President*, may constitutionally establish a system of local governance that does not involve the President . . . ." *Langley* at 7 (emphasis added).

Aside from placing the Court in the position of attempting to have it both ways (the President's signature is not necessary, but if it is given, it signals approval), this position was rejected in *Chadha*. There, the Court stated: "The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review." 103 S.Ct. at 2779 n.13 (citations omitted).

1896)). Given this national interest, to now claim that the President plays no part in these affairs would be to exclude from this area of legislative endeavor the one branch of government which is elected by the nation as a whole and who, as a result, best assumes a national perspective. *See* 103 S.Ct. at 2782-83.

Of even greater concern, however, is that the above position would also remove that most salutary of checks upon the excesses of an untethered legislature; the Presidential veto. *See* 103 S.Ct. at 2782. This result would leave the citizens of the District subject not only to a legislature they did not elect, but one totally free of any restraint on its authority. While the former condition is necessitated by the special federal interest in preserving the national character of the capital, the latter condition stands barren of any rationale.

"The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed." 103 S.Ct. at 2782. It would be a strange thing indeed if these same Framers did not believe that this check on legislative authority should not apply with equal force to matters concerning the governance of the nation's capital.

Therefore, for the reasons stated above, the Court holds that §602(c)(2) of the Home Rule Act is unconstitutional and that, as a result, the Congressional attempt to negate the Sexual Reform Act was invalid.

III.

This finding does not end the inquiry, however, for when a limitation on a power is found to be invalid, it must be determined whether the creators of such power would have allowed the grant of authority to exist absent the restraint. *See INS* v. *Chadha*, 103 S.Ct. at 2774; *Consumer Energy Council* v. *FERC*, 218 U.S.App.D.C. 34, 49, 673 F.2d 425, 440 (1982), *aff'd sub nom. Process Gas Consumers Group* v. *Consumer Energy Council of America*, 103 S.Ct. 3556 (1983). In the context of the present case, this requires a determination of whether Congress would have granted the City Council the power to alter the District's criminal code without the oversight mechanism provided by §602(c)(2).[6]

In making this determination, this Court notes that the Home Rule Act lacks a severability clause to prevent an invalid provision, such as §602(c)(2), from affecting the rest of the statute. However, it is also noted that there is a great deal of confusion as to whether a presumption can be drawn, one way or another, from the lack of such a clause. Regarding this confusion, the Court adopts the view set forth in *Consumer Energy*:

> We think the question where the presumption lies is mostly irrelevant, and serves only to obscure the crucial inquiry whether Congress would have enacted other portions of the statute in the absence of the invalidated provision. This is fully in accord with *United States* v. *Jackson*, [390 U.S. 570, 585 N.27 (1968)], in which the Supreme Court refused to place significance on the absence of a severability clause: "[W]hatever relevance such an explicit clause might have in creating a presumption of severability, . . . the ultimate determination of severability will rarely turn on the presence or absence of such a clause." Rather, the question is whether Congress would have enacted the remainder of the statute without the unconstitutional provision. We do not view the imposition of any unspecified burden of persuasion on either side as beneficial to the inquiry.

218 U.S.App.D.C. at 51, 673 F.2d at 442; *See also Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312 (1936) ("[U]nder either rule, the determination . . . is reached by applying the same test—namely, What was the intent of the lawmakers?").

In any case, the legislative history of the Home Rule Act speaks clearly enough that any presumption as to the legislators' intent is unnecessary.[7] For unlike the situation posed in *Chadha* and *Consumer Energy*, where the courts found that there was little debate as to the role of Congressional oversight in the passage of the challenged statutes, *See* 103 S.Ct. at 2775; 218 U.S.App.D.C. at 51-53, 673 F.2d at 442-44, Congress in debating and amending the Home Rule Act demonstrated that it viewed the issue of federal retention of power as a vital part of any plan to delegate authority over the criminal code.

Throughout the debates on the various Home Rule bills, members of both Houses of Congress made it plain that they viewed themselves as engaged in a process of compromise involving two competing interests. On the one hand, they wished to grant to the citizens of the District all the rights of self-determination traditionally employed by citizens of the United States. Balanced against this, however, was their concern over the preservation of the unique national role that the Federal capital was created to fulfill.[8]

In present times, it is perhaps easy to forget that the preservation of the latter interest was viewed as a precondition to the indulgence of the former. While it is true that "the core and primary purpose of the Home Rule Act . . . was to relieve Congress of the burden of legislating upon essentially local matters." *McIntosh* v. *Washington*, 395 A.2d 744, 753 (D.C. 1978), the delegation of such authority was explicitly made "[s]ubject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by article I, §8 of the Constitution . . . ." D.C. Code §1-201 (1981).

This concern for the protection of the Federal government has roots as deep as the existence of the District of Columbia itself. Indeed, the impetus for the creation of a special federally controlled area in which to house the nation's capital had its origin in a concern for security:

> According to the records of the Constitutional Convention, the Founding Fathers sought the establishment of a federally controlled permanent set [sic] of government separate from the jurisdiction of any State or locality in order to protect national officials from potential harassment, coercion, or arbitrary arrest by local courts and law enforcement officials. There was, moreover, a reluctance to rely on local officials for protection from potential mob violence or attempts by groups of persons to interfere with or otherwise harass or impede the conduct of the Federal Government's constitutionally prescribed duties. This concern stemmed from an incident which occurred on June 21, 1783, involving the Continental Congress and mutinous Revolutionary Army troops not yet deactivated. On that date from 80 to 250 armed troops—accounts vary on the number—marched on and surrounded Independence Hall in Philadelphia where the Continental Congress was in session. These troops had, disobeying orders of their officers, come to Philadelphia to petition the Congress for many months of pay due them. The troops were intoxicated, leaderless, and threatening to the assembled Members of Congress who had barred the doors and shutters of the Legislative Chamber. Congress requested police or militia protection from the Pennsylvania authorities, but such protection was denied. By evening the mutinous troops retired to their barracks and the Congress voted immediately to move to Princeton where local authorities promised protection from such an incident. This example was brought to the attention of the Delegates to the Constitutional Convention in 1787 and aided in carrying the argument for the "exclusive legislation" clause of article I, section 8 establishing a seat of government under the ultimate jurisdiction of the Federal Government.

Legislative History at 2797-98 (statement by Sen. Mathias). *See also Id.* at 1605; Congressional Research Service, Library of Congress, *The Constitution of the United States* at 352 (1973).

This concern for security not only continued to exist in 1973, it also specifically included the substance of the city's criminal code. As will presently be shown, at all three major stages of the Home Rule Act's development, in the House, the Senate and at Conference, Congress required that stringent safeguards by attached to any delegation of power over this vital area.

This requirement was first made evident when the House of Representatives Committee on the District of Columbia revealed the content of its proposed bill, H.R. 9682, to the House Rules Committee for the purpose of setting the terms for the upcoming floor debate. At that time, the proposed bill divided the authority of the City Council into two spheres. Certain areas such as the organization, administration and jurisdiction of the courts, were totally isolated from Council authority. *See* Legislative History at 1316 (§602(a)(4)). All other areas, including the criminal code, were subject solely to Congress'

6. This test was approved by the Supreme Court in *Chadha*. There, the Court stated:

> Only recently this Court reaffirmed that the invalid portions of a statute are to be severed " '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932).

103 S.Ct. at 2774.

7. Home Rule for the District of Columbia: Background and Legislative History of H.R. 9056, H.R. 9682 and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act, House Comm. Print, 93 Cong., 2d Sess. (1974) [hereinafter referred to as Legislative History].

8. These two concerns were mentioned time and time again, often in the same sentence, by those members of the House of Representatives who spoke during the floor debate of H.R. 9682. *See* Legislative History at 2106 (statement of Rep. Diggs); *Id.* at 2114 (statement of Rep. Adams); *Id.* at 2120 (statement of Rep. Nelsen); *Id.* at 2153 (statement of Rep. McKinney); *Id.* at 2156 (statement of Rep. Broyhill); *Id.* at 2167 (statement of Rep. Gude); *Id.* at 2168 (statement of Rep. Fauntroy); *Id.* at 2174 (statement of Rep. O'Neill); *Id.* at 2176 (statement of Rep. Mann); *Id.* at 2189 (statement of Rep. Mazzoli); *Id.* at 2191 (statement of Rep. Stark); *Id.* at 2194 (statement of Rep. Whalen); *Id.* at 2216 (statement of Rep. Cleveland); *Id.* at 2218 (statement of Rep. Tiernan); *Id.* at 2220 (statement of Rep. Mink). *See also Id.* at 1746 (statement of Rep. Diggs).

Statements by members of the Senate, during the much shorter debate of S. 1435, reflect the same concerns. *See Id.* at 2755 (statement by Sen. Eagleton); *Id.* at 2758 (statement of Sen Mathias); *Id.* at 2760 (statement by Sen. Scott); *Id.* at 2761-62 (statement of Sen. Beall).

ultimate power to enact overriding legislation. Legislative History at 1315 (§601).[8]

In reviewing these provisions, a member of the Rules Committee, Congressman Latta of Ohio, raised several questions. The following colloquy took place:

Mr. Latta: One further question.

I think we ought to nail this down because I think every citizen in the District of Columbia ought to be aware of this.

What you are saying is if we pass this legislation proposed by the committee that this council and the mayor could pass legislation amending the District of Columbia Criminal Code?

Mr. Hogan: There is no question about it in my mind.

Mr. Latta: So then they could let up on some of these acts that we pass as far as the criminal [sic] is concerned?

Mr. Hogan: The only thing they are prevented from doing are certain specific things listed in title VI, which are very limited. But as far as the code is concerned, basically what they are limited from doing as relates to the courts is [listed in] artitle XI of the District of Columbia Code which has to do with reorganization . . . . But Title[s] XXII, XXIII and XXIV of the District of Columbia Code they could amend, repeal or supersede.

Mr. Latta: Will the substitute by Mr. Nelsen permit this?

Mr. Hogan: The Nelsen bill would leave the courts as they are.

Mr. Latta: I am talking about the criminal code.

Mr. Hogan: It would not permit them to amend the criminal code whatsoever.

I don't think the people who live in this city want to see that tampered with.

Mr. Murphy: Would the gentleman yield?

Mr. Latta: Yes.

Mr. Murphy: If it could be amended, it could be made tougher, too, could it not?

Mr. Hogan: Yes.

Mr. Murphy: You are presupposing that the people who would be in charge of this would be making the code and sanctions more lenient than they are now?

Mr. Latta: There is no doubt about it.

Legislative History at 1778-79.

While Congressman Latta's comments were perhaps unfair, they evidently reflected the attitude of many of his peers. Within seven days of his comments, and just before the bill was to be taken up on the floor, the Chairman of the Committee on the District of Columbia, Congressman Diggs, issued the following "Dear Colleague" letter which stated, in part:

> [T]he undersigned Members of the D.C. Committee will offer an amendment in the nature of a substitute during the Floor debate.
>
> The Committee substitute contains six important changes which were made after numerous conversations and sessions with Members of Congress and other interested parties. These changes clarify the intent of H.R. 9682 and accommodate major reservations expressed since the bill was reported out. They are as follows:
>
> . . . .
>
> 6. Reservations of Congressional Authority —*Additional* limitations on Council:
>
> . . . .
>
> (b) [The] City Council is prohibited from making changes in Statutes Under Titles 22, 23, and 24, of the D.C. Code—the Criminal Code.

Legislative History at 2084-85.

As was made clear in subsequent debate, this removal of authority over the criminal code, and the changes proposed by the other amendments, were the product of a realistic reappraisal of what guarantees would be necessary to convince a majority of the House to vote in favor of the bill. *See* Legislative History at 2906 (statement by Rep. Fraser); *Id.* at 2110 (statement by Rep. Diggs); *Id.* at 2155 (statement by Rep. McKinney). Significantly, as the following comment made by a member of the District of Columbia Committee demonstrates, these guarantees concerned the preservation of the federal interest:

> Every change in the bill that the Members will see in the "Dear Colleague" letter they received today from many of us on the committee, are changes that have been considered by the committee. Testimony has been heard by the committee, and the fact is that the committee did not put those into the bill, because we did not feel they were necessary, and now we feel that for the pragmatic political passage of a home rule bill they are. And I would claim to the Members that they protect our Federal interests, and the Presidential interests in this city without doubt.

Legislative History at 2155 (statement by Rep. McKinney).

These amendments evidently assuaged the concerns of those who opposed H.R. 9682 in its original form. With the criminal code now moved into that section of the bill which directly prohibited Council action, *See* Legislative History at 2318 (§602(a)(8)), the House of Representatives passed the measure by a vote of 343 to 74. *See Id.* at 2455.

The second stage in the Home Rule Act's evolution demonstrates that the same concerns which worried House members also played on the minds of the members of the Senate. There, however, an alternative means of control was proposed. Whereas H.R. 9682 opted for the inflexible measure of total prohibition, the Senate bill, S. 1435, mixed increased delegation of authority with an elastic system of Congressional review and disapproval. The City Council was to be granted the ability to alter the criminal code, but this ability was to be limited by the power of either House of Congress to veto such legislation within thirty days after such act had been transmitted to Congress.[10] *See* Legislative History at 2646 (§325(g)(2)(A)).

This difference in methods, however, should not be confused with any disparity as to motivation. As was true with the House of Representatives, the Senate wished to strike a balance between the delegation of what it viewed as cumbersome duties and the protection of the national interest in the security of the Federal capital. As the Report of the Senate Committee on the District of Columbia expressed this proposition: "It is [the] committee's view that this type of veto of Council actions will ensure to the Congress the continued ultimate control of the affairs of the District while relieving it of some of the burdens of having to pass every piece of legislation itself." Legislative History at 2726.

This congruence of intentions between the House and Senate, regarding the delegation of authority over the criminal code, was most concretely demonstrated in the third, and final, stage of the Home Rule Act's development, the Conference Committee. There, the two Houses compromised, moving the criminal code out from under the prohibitory terms of H.R. 9682 to a specifically tailored legislative veto provision modeled on that of the Senate bill. This produced the provision presently in question, §602(c)(2). *See* Legislative History at 2984.

While it is true that this evolution of the oversight control was not openly debated in Conference, this does not mean that it went unexplained. Given that the Conference Committee adopted the Senate's mechanism of restraint, Chairman Diggs evidently felt it necessary to explain to his fellow Representatives the Senate's rationale behind the use of legislative vetoes and how the adoption of such a provision to govern the Council's power over the criminal code might alter the balance between the two competing interests of self-determination and the maintenance of the Federal capital's security.[11]

The explanation as to the first matter took place in a statement by Diggs on the floor of the House:

> In the give and take of this conference report . . . Mr. Speaker, we note that some of the strongest feelings on the part of some of us have been set aside. For example, on congressional veto, the Senate was very strong on that and as a matter of fact I think I learned for the first time the real reason the Senate has been able to pass home rule in the past so expeditiously is because it was just felt in the other body that as long as there is a veto apparatus, as long as there is a congressional process to correct what they might consider to be a misaction on the part of a local legislative body, then they were inclined to be generous

9. Amendments to the proposed Charter were placed in a special category. *See* Legislative History at 1244 (§303(b)), which allowed Congress to veto any proposal. *See Id.* at 1320 (§604).

Budget matters were also specifically prescribed. *See Id.* at 1317 (§603).

10. This same veto provision was to apply to all Council legislation not directly prohibited. Legislative History at 2643 (§325(d)). *See also Id.* at 2645 (§325(f)(2)) (regarding budget matters).

11. Of course, the House of Representatives already had a sophisticated knowledge of the use of legislative vetoes, as witnessed by the extensive use of such provisions in prior legislation. *See INS v. Chadha*, 103 S.Ct. at 2811 (White, J., dissenting), and in the original form of H.R. 9682, regarding charter amendments. *See supra*, n.9.

about it.

Legislative History at 3050.

As to the second matter, Diggs, in his role as Chairman of the House of Representatives Committee on the District of Columbia, let it be known that he viewed the placement of the criminal code under the terms of a legislative veto as an acceptable method of balancing the two paramount interests presented by the Home Rule Act. In a "Dear Colleague" letter explaining a provision whereby the Council's authority over criminal matters would be delayed two years, pending a revision of the criminal code, he stated in part:

> [U]nder the Conference Report, the Council is prohibited from making changes in the criminal code for two years after it takes office. Subsequent to that, the Council may make changes subject to a veto by either House of Congress within 30 days after the transmittal of the act . . . .
>
> I feel that this procedure sets the best combination for protecting the Federal interest while keeping the local Council involved in the process of making the laws which will govern.

Legislative History at 3041-42.

At all three stages of the legislative process, then, Congress was concerned with erecting sufficient safeguards against the possible erosion of the capital's security following a delegation of authority over the criminal code. Clearly, at least in Congress' eyes, this concern was not adequately answered merely by relying on the ultimate ability of Congress to override Council actions through the passage of federal legislation. The amending of H.R. 9682 makes that point undeniable.

Instead, the Congress settled on a position somewhat less drastic than the total prohibition of delegation adopted by the House of Representatives. This position, the use of a legislative veto, allowed greater flexibility while nevertheless imposing a quickly implemented restraint as to any changes in the criminal law which might prove incompatible with the federal interest. The veto provision thus became the keystone to the delegation of authority over the criminal code; the restraint and the power becoming so inextricably intertwined that the removal of one would necessarily cause the downfall of the other.

Given this mutual interdependence, it is not enough to assert, as does the intervenor, the District of Columbia, either that Congress retains the ultimate ability to override Council actions even absent the veto provision, or that the present Congress might find such ability sufficient in and of itself.[12] The fact remains that Congress has been precluded from exercising its power to repeal Council legislation due to its reliance on the continued viability of §602(c)(2). To now argue that the existence of such an unused alternative disapproval mechanism might somehow serve as a rationale to justify upholding the Sexual Reform Act, an act which was deliberately and unambiguously repudiated by one House of Congress, would take an act of judicial legerdemain of which this Court is incapable.

In sum, to view the restraining mechanism of 602(c)(2) as somehow ancillary to the delegation of authority over the criminal code would not only "mutilate the section and garble its meaning," but enlarge the scope of power of the City Council far beyond the intention of Congress. *Davis* v. *Wallace*, 257 U.S. 478, 484 (1922) (quoting *State ex rel. McNeal* v. *Dombaugh*, 20 Ohio St. 167, 174 (1870)). *See Mills* v. *United States*, 713 F.2d 249, 1254-55 (7th Cir. 1983); *McCorkle* v. *United States*, 559 F.2d 1258, 1261-62 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *Quinn* v. *Commissioner of Internal Revenue*, 524 F.2d 617, 626 (7th Cir. 1975); *U.T., Inc.* v. *Brown*, 457 F.Supp. 163, 170 (W.D.N.C. 1978).

Thus, for the reasons stated above, the invalidation of §602(c)(2) also serves to invalidate the delegation of authority over the criminal code to the City Council. Hence, the City Council had no authority to enact the Sexual Reform Act and, therefore, the defendant was prosecuted under the proper statute.

IV.

The Court would have preferred to resolve defendant's motion on alternative grounds as it is well aware of the grave implications of its holding to the governance of the District of Columbia. Unfortunately, after extensive research and deliberation, the Court feels compelled to agree with Justice White that the analysis in *Chadha* "appears to invalidate all legislative vetoes irrespective of form or subject." 103 S.Ct. at 2796 (White, J., dissenting). Thus, unless the Supreme Court chooses to revise and limit Chadha, which is an unlikely prospect, the scope of today's holding was unavoidable.

Accordingly, defendant's motion to arrest judgment must be, and it hereby is, denied.

SO ORDERED.

12. *See* Response of Intervenor District of Columbia to the Constitutional Issues Raised in Cole's Motion to Arrest Judgment at 7-8, 11-13 (D.C. Super.Ct. filed January 27, 1984)

LEGAL NOTICES

GOVERNMENT

GORDON, Jernevieve — Deceased

[Filed May 8, 1984. Register of Wills, Clerk of the Probate Division.] Superior Court of the District of Columbia. Probate Division. In Re: Estate of Jernevieve Gordon, Deceased. Administration No. 518-83. ORDER. Application having been made to this Court by the District of Columbia for a finding that the above-named decedent a resident of said District, died intestate and was not survived by a spouse or any heirs-at-law or next of kin within the degree of relationship recognized by applicable law, and for a decree that the surplus of the estate of said decedent escheat to the District of Columbia; it is, by this Court, this 8th day of May, 1984, ORDERED, That the unknown heirs-at-law and next of kin of Jernevieve Gordon, deceased, if any, and all others interested appear in said Court before the Fiduciary Judge at 9:30 a.m. on the 8th day of August, 1984, and show cause, if any they have, why said application should not be granted. Let notice hereof be published twice a month for three consecutive months prior to the aforesaid date in the Washington Law Reporter and in the Washington Afro-American. /s/ CARLISLE E. PRATT, Judge. [Seal.] A True Copy. Attest: CONSTANCE B. GOULD, *Deputy Register of Wills for the District of Columbia, Clerk of the Probate Division.*

Edmund L. Browning, Jr. Assistant Corporation Counsel, Room 4450, Superior Court.

May 24, 30, June 6, 20, July 4, 18.

FIRST INSERTION

ADDEI, Frank

Renee I. Fox, *Attorney*
1707 N Street, N.W., Washington, D.C. 20036

[Filed May 24, 1984. Superior Court of the District of Columbia. Washington, D.C.] Superior Court of the District of Columbia. Family Division. Domestic Relations Branch. Frank Addei, 7307 Riggs Rd., Hyattsville, MD 20783, Plaintiff vs. Varnada Addei, 1465 Columbia Rd., N.W., Washington, D.C. 20009, Defendant. Jacket No. D674-84. ORDER PUBLICATION—ABSENT DEFENDANT. The object of this suit is to obtain an absolute divorce from defendant Varnada Drakeford Addei. On motion of the plaintiff, it is this 24th day of May, 1984, ordered that the defendant, Varnada Addei, cause her appearance to be entered herein on or before the fortieth day, exclusive of Sundays and legal holidays, occurring after the day of the first publication of this order; otherwise the cause will be proceeded with as in case of default. Provided, a copy of this order be published once a week for three successive weeks in the Washington Law Reporter, and the Afro American before said day. /s/ JOSEPH N. HANNON, *Judge.* [Seal.] Attest: THOMAS A. DUCKENFIELD, *Clerk of the Superior Court of the District of Columbia.* By Harold Keye, *Deputy Clerk.* June 6, 13, 20.

DAVIS, Carter G. — Deceased

Superior Court of the District of Columbia
Probate Division
Administration No. 1099-84 S.E.
Carter G. Davis, deceased
Notice of Appointment, Notice to Creditors and Notice to Unknown Heirs

Ray Davis, whose address is 12 Summit Street, East Orange, New Jersey 07017, was appointed Personal Representative of the estate of Carter G. Davis, who died on May 3, 1984 with a Will. All unknown heirs and heirs whose whereabouts are unknown shall enter their appearance in this proceeding. Objections to such appointment (or to the probate of decedent's Will) shall be filed with the Register of Wills, D.C., 500 Indiana Avenue, N.W., Washington, D.C. 20001, on or before July 9, 1984. Claims against the decedent shall be presented to the undersigned with a copy to the Register of Wills or to the Register of Wills with a copy to the undersigned, on or before July 9, 1984, or be forever barred. Persons believed to be heirs or legatees of the decedent who do not receive a copy of this notice by mail within 25 days of its publication shall so inform the Register of Wills, including name, address and relationship. RAY DAVIS. Name of Newspaper: Washington Law Reporter. TRUE TEST COPY. Henry L. Rucker, Register of Wills. [Seal.] June 6.

DUNHAM, Johnny C. — Deceased

Superior Court of the District of Columbia
Probate Division
Administration No. 1096-84 S.E.
Johnny C. Dunham, deceased
Notice of Appointment, Notice to Creditors and Notice to Unknown Heirs

Willie N. Dunham, whose address is 4104 18th Place, N.E., Washington, D.C. 20018, was appointed Personal Representative of the estate of Johnny C. Dunham, who died on May 3, 1984 without a Will. All unknown heirs and heirs whose whereabouts are unknown shall enter their appearance in this proceeding. Objections to such appointment shall be filed with the Register of Wills, D.C., 500 Indiana Avenue, N.W., Washington, D.C. 20001, on or before July 11, 1984. Claims against the decedent shall be presented to the undersigned with a copy to the Register of Wills or to the Register of Wills with a copy to the undersigned, on or before July 11, 1984, or be forever barred. Persons believed to be heirs or legatees of the decedent who do not receive a copy of this notice by mail within 25 days of its publication shall so inform the Register of Wills, including name, address and relationship. WILLIE N. DUNHAM. Name of Newspaper: Washington Law Reporter. TRUE TEST COPY. Henry L. Rucker, Register of Wills. [Seal.] June 6.

GOODE, George A., Sr. — Deceased

Superior Court of the District of Columbia
Probate Division
Administration No. 1089-84 S.E.
George A. Goode, Sr., deceased
Notice of Appointment, Notice to Creditors and Notice to Unknown Heirs

George A. Goode, Jr., whose address is 1111 Mt. Olivet Road, N.E., Washington, D.C. 20002, was appointed Personal Representative of the estate of George A. Goode, Sr., who died on May 8, 1984 without a Will. All unknown heirs and heirs whose whereabouts are unknown shall enter their appearance in this proceeding. Objections to such appointment shall be filed with the Register of Wills, D.C., 500 Indiana Avenue, N.W., Washington, D.C. 20001, on or before July 10, 1984. Claims against the decedent shall be presented to the undersigned with a copy to the Register of Wills or to the Register of Wills with a copy to the undersigned, on or before July 10, 1984, or be forever barred. Persons believed to be heirs or legatees of the decedent who do not receive a copy of this notice by mail within 25 days of its publication shall so inform the Register of Wills, including name, address and relationship. GEORGE A. GOODE, JR. Name of Newspaper: Washington Law Reporter. TRUE TEST COPY. Henry L. Rucker, Register of Wills. [Seal.] June 6.