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1. memo	John G. Roberts ro Fred F. Fielding re :Revised Draft OMB Statement Concerning Legislative Veto, 6p. (2-p. memo, + 2 copies of a 2-p memo from Fielding to Brandon Blum)	5/7/84	~~P5~~ dls 12/14/00

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36 ADMINISTRATIVE LAW REVIEW 41 (Winter 1984)

HOLDING THE INDEPENDENT AGENCIES ACCOUNTABLE: LEGISLATIVE VETO OF AGENCY RULES*

Michael Saks

Administrative agencies have occupied a position of independence from political control since the case of *Humphrey's Executor*[1] in the mid 1930s. In that case, the Court rejected claims of executive control and established the Federal Trade Commission as an independent agency.[2] A few years previously, Congress had passed the first legislative veto statute.[3] Since then, Congress has enacted three hundred post-enactment review laws.[4] The typical statute requires the president or some agency to report its action to Congress and allows Congress to overrule the agency action.[5] The normal requirement for a congressional override is action by at least one House, but there are statutes which require action by both Houses,[6] by committee of either one or both Houses[7] and in one case by the action of a single committee chairman.[8] Some statutes require that one or both Houses approve executive action for that action to become effective.[9]

*EDITOR'S NOTE: This article was written and submitted for publication prior to the United States Supreme Court decision in the case of *Immigration and Naturalization Service v. Chadha*. The editor feels, however, that the article still serves a useful purpose in addressing the issue of independent agency accountability.

[1]295 U.S. 602 (1935).

[2]*Id.* at 629. *See also* STUDY ON FEDERAL REGULATION, SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95th Cong., 2d Sess. 32 (1977) (hereinafter cited as 5 SENATE COMM.).

[3]Pub. L. No. 72–212, Legislative Appropriations for Fiscal Year 1933, 47 Stat. 382 (1932).

[4]*See* S. REP. No. 96–184, 96th Cong. 2d Sess. (1980) *reprinted in* U.S. CODE CONG. & AD. NEWS at 1073, 1091 (hereinafter cited as F.T.C. Report), *See also* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1089 (1975).

[5]*See* Watson, *supra* note 4, at 984–987.

[6]Reorganization Act of 1977, 5 U.S.C. Sec. 901 (1976).

[7]Futures Trading Act of 1978, 7 U.S.C. Sec. 6c(c) (1981 Suppl. V).

[8]Supplemental Appropriation Act of 1953, Ch. 758, 66 Stat. 637, gave certain powers over military housing regulations to the Chairman of the House Appropriations Committee.

[9]Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. Sec. 1402 (1976).

Congress has turned to the legislative veto device increasingly in recent years. Over half of the legislative veto statutes were enacted in the past decade.[10] Most of the early statutes dealt with relatively noncontroversial matters such as immigration,[11] reorganization of the federal government,[12] disposal of government property[13] and government construction.[14] More recently, Congress has given itself review powers over more substantive areas such as war powers,[15] foreign military sales,[16] federal salaries,[17] energy policy[18] and the Federal Trade Commission's rulemaking.[19] Throughout the period of this expansion, Congress has asserted a need to review the agencies or the president so as to retain its power to determine policy.[20] Presidents ever since Woodrow Wilson[21] have opposed the legislative veto both on constitutional and policy grounds. Scholarly opinion has also opposed the legislative veto.[22] This paper takes the position that the legislative veto, in certain forms, is both constitutional and also wise policy. The justification for this acceptability is a belief that there is a need for the administrative agencies to be held politically accountable. Since this

[10]F.T.C. Report, *supra* note 4, at 1091–1102.
[11]Alien Registration Act of 1940, 8 U.S.C. Sec. 1254(c)(2) (1976).
[12]Reorganization Act of 1939, Pub. L. No. 76–19, 53 Stat. 561 (1939).
[13]Act of Aug. 7, 1946, Pub. L. No. 79–649, 60 Stat. 897 (1946).
[14]Act of April 4, 1944, Pub. L. No. 78–289, 58 Stat. 189 (1944).
[15]War Powers Resolution, 50 U.S.C. Sec. 1541 (1976 and 1981 Suppl. V.).
[16]22 U.S.C. Sec. 2755(d) (1976).
[17]Postal Revenue and Federal Salary Act of 1967, 2 U.S.C. Sec. 359(1) (1976).
[18]Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Sec. 757 (1976).
[19]Federal Trade Commission Improvements Act of 1980 Sec. 21(a)(1), 15 U.S.C. Sec. 57(a)–1 (1980).
[20]*See* Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. J. 323, 330–331 (1977); Javits and Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 458–460 (1977). *See also*—CONG. REC. H 11, 202-206 (daily ed. Nov. 27, 1979) and H 3, 856–873 (daily ed. May 20, 1980). (Congressional debate on the F.T.C. Improvements Act).
[21]59 CONG. REC. 7026–27, 8609 (1920) (remarks of Rep. Wilson); 76 CONG. REC. 2445 (1933) (Remarks of Rep. Hoover); 83 CONG. REC. 4487 (1938) (remarks of Rep. Roosevelt); Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357–1358 (publishing an opinion by President Roosevelt) (1953); Truman: PUB. PAPERS 280 (1951); Eisenhower: PUB. PAPERS 507 (1954), Public Papers of the President at 688 (1955), Public Papers of the President at 648 (1956), Public Papers of the President at 49 (1960); Kennedy: Public Papers of the President at 6 (1963); Johnson: Public Papers of the President at 861, 1249 (1963–1964); Nixon: Public Papers of the President at 893 (1973), Ford: Public Papers of the President at 294 (1974); Carter: Public Papers of the President at 1146 (1978), 16 WEEKLY COMP. OF PRES. DOC. 4 (1980).
[22]*See* Watson, *supra* note 4; McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977); Cutler and Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975); Dixon, *The Congressional Veto and Separation of Powers: The Executive On a Leash?*, 56 N.C.L. REV. 423 (1978); Bruff and Gelhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetos*, 90 HARV. L REV. 1369 (1977).

factor is not present, at least not in the same way, the cases and critiques involving relations between Congress and the president are not fully applicable. The courts and commentators, however, use the same separation of powers analysis in both situations. There is also such a paucity of cases dealing with the legislative veto that none can afford to be overlooked.

Shortly after the passage of the first legislative veto provision, Congress passed the statute allowing the Supreme Court to promulgate the Federal Rules of Civil Procedure.[23] The statute contained a lay over provision requiring that the rules be submitted to Congress to allow Congress the opportunity to review them before they became effective.[24] The Supreme Court, in *Sibbach v. Wilson*[25] upheld this provision as a legitimate means of ensuring that the action under the delegation squares with the result.[26] Although a regular law[27] would have been required to overrule a Court promulgated rule, the Court noted with approval the legislative veto provisions applying to territories and to government reorganization in which full legislative action was not required.[28] Thereafter, courts generally dismissed cases involving legislative vetos[29] or refused to reach the issue.[30] Justice White in a concurring opinion in *Buckley v. Valeo*[31] approved the legislative veto provision under which the Senate had disapproved Federal Election Commission regulations.[32] He argued that the initial law encompassing the legislative veto had satisfied the requirement of presentation to the president.[33] Justice White also dismissed the argument of legislative encroachment on the grounds that the regulation ordinarily became effective without presidential approval, so that the president lost nothing.[34] He also found a critical distinction between a legislative veto provision in which congressional action was necessary to give the regulation effect[35] and a provision in which disapproval by one House

[23]*See* Sibbach v. Wilson & Co., 312 U.S. 1, 8 (1941).
[24]*Id.*
[25]*Id.*
[26]*Id.* at 15.
[27]*Id.*
[28]*Id.* at 15 n. 17.
[29]*See, e.g.*, Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976); Pacific Legal Foundation v. DOT, 593 F.2d 1338 (D.C. Cir. 1978).
[30]*See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 140 n. 176 (1976) (hereinafter cited as Buckley). The Court in a footnote reserved the question as unnecessary to decide.
[31]*Id.*
[32]*Id.* at 284–286.
[33]*Id.* at 284.
[34]*Id.*
[35]*Id.* at 286.

blocked a regulation from becoming effective.[36] Although Justice White's analysis was hardly a thorough one (it consumed barely two pages in the official reports), since it was (prior to the Supreme Court's opinion in *INS. v. Chadha*)[37] the first opinion from a Justice of the Supreme Court, subsequent cases and commentary have analyzed it heavily.[38]

In *Clark v. Valeo*[39] the D.C. Circuit, in a per curiam opinion, dismissed Ramsey Clark's attack on the Federal Election Campaign Act's one House veto as moot[40] (since Clark had been defeated in his election bid) and unripe[41] (since neither House had vetoed any FEC rules since the agency had been reconstituted after the *Buckley* case).[42] The Court took note of the *Sibbach* case[43] and the long history of legislative veto provisions[44] and followed the Supreme Court in avoiding discussion of the legislative veto's constitutionality. Judge MacKinnon, in dissent, would have held the legislative veto unconstitutional.[45] Dealing with Justice White's argument that neither House need approve an F.E.C. rule for it to become effective, Judge MacKinnon said what that "really means . . . is that, for an F.E.C. regulation to become effective *both* houses *must* approve it by voting *not* to veto it" (emphasis by MacKinnon).[46] Giving Congress any power to review would not be "nonaction" according to Judge MacKinnon because there is inherently an approval somewhere in the congressional action.[47] The action of any committee or subcommittee somewhere in the legislative process blocking a veto resolution was viewed as not only affirmative action but also the action of a potentially small minority.[48] The use of the *Sibbach* case was criticized as improper since *Sibbach* dealt only with delaying the effectiveness of a rule.[49] The analogy by Justice White of a legislative veto to merely one House passing and the other rejecting ignored "the basic rule of the Constitution: laws must first pass *both* Houses of Congress *and* be signed by the President" (emphasis by MacKinnon).[50]

[36] *Id.* at 284–285.
[37] 103 S.Ct. 2764 (1983).
[38] *See* Dixon, *supra* note 22, at 458–469; Watson, *supra* note 4, at 1046–1057.
[39] 559 F.2d 642 (D.C. Cir. 1977) (hereinafter cited as Clark).
[40] *Id.* at 647.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 648–649.
[44] *Id.*
[45] *Id.* at 681.
[46] *Id.* at 685.
[47] *Id.* at 686.
[48] *Id.* at 688.
[49] *Id.* at 680–681.
[50] *Id.* at 689.

Atkins v. United States[51] involved the provisions of the Salary Act. Under this Act, the president submitted recommendations for increases in judicial salaries.[52] The Act contained a one House veto provision and the Senate vetoed the increases.[53] The House and Senate submitted briefs, since the Justice Department conceded the statute's unconstitutionality.[54] The Court of Claims upheld the statute. It found that while the statute delegated initial authority to the president, Congress wished to retain ultimate responsibility itself.[55] The Court found that the delegation to the president of pay-setting powers was unobjectionable,[56] and the only potential problem was congressional review. Similar to Justice White's analysis, the Court held that the action of a single House was "not making new law".[57] Since the action of a single House only blocked the president's recommendations, it merely preserved the status quo.[58] Since one House action did not change anything, the Court held that the action of both Houses was unnecessary.[59] The presidential veto problem was overcome by the president's opportunity to veto the initial legislation authorizing the legislative veto.[60] Congress' ability to veto presidential recommendations was also defended against an encroachment attack.[61] The president was acting under powers delegated from Congress, and Congress could retain the power to overrule its "agent".[62] Finally, the congressional power was upheld under the necessary and proper clause of Article I Section 8, since it was merely a means of doing what Congress could do directly.[63] The *Atkins* dissent saw the case turning on separation of powers.[64] The Congress was seen as encroaching on an executive matter.[65] The presidential salary adjustment had the force of law without any action by Congress.[66] The action by one House was either legislative or nonlegislative.[67] If legislative, then both Houses must act

[51] 556 F.2d 1028 (Ct. Cl. 1977) (hereinafter cited as Atkins).
[52] *Id.* at 1057.
[53] *Id.*
[54] *Id.* at 1058 n. 15. The Court dismissed this as irrelevant since the Justice Department would naturally mirror the consistent pattern of presidential disapproval.
[55] *Id.* at 1059, 1063–1064.
[56] *Id.* at 1060–61.
[57] *Id.* at 1063.
[58] *Id.*
[59] *Id.* at 1063–1064.
[60] *Id.* at 1065.
[61] *Id.* at 1065–1068.
[62] *Id.* at 1067–1068.
[63] *Id.* at 1061.
[64] *Id.* at 1076 (Skelton, J. dissenting).
[65] *Id.* at 1076–77, 1080.
[66] *Id.* at 1080.
[67] *Id.* at 1080–81.

before their action becomes law.[68] If not legislative, then the action was impermissible per se[69] and an encroachment on the executive.

In *Chadha v. Immigration and Naturalization Service*,[70] the legislative veto mechanism served as a means of reviewing the agency's individual adjudications. Chadha's deportation was suspended by the attorney general.[71] The House, acting under a 1940 law, passed a disapproval resolution overruling the attorney general's action and requiring Chadha's deportation.[72] The 9th Circuit Court of Appeals overturned the statute as a legislative intrusion on the executive and judicial branches.[73] The Court viewed separation of powers as a means of limiting the overreaching of any one branch.[74] The framers' particular intent was to restrict legislative overreaching.[75] The long history of congressional involvement with immigration was dismissed.[76] The veto device reviewed the executive in a particular action.[77] Congress, in deciding paticular cases, was also displacing the judiciary.[78] Since Congress' action and its reasons could not be reviewed, the potential for selective abuse was enhanced.[79]

The D.C. Circuit also struck down the legislative veto in *Consumer Energy Council of America v. Federal Energy Regulatory Commission*.[80] Pursuant to the 1978 Natural Gas Act, the FERC adopted a set of incremental pricing regulations covering the period until natural gas price decontrol would become effective. The House of Representatives passed a disapproval resolution, and the FERC revoked the regulations.[81] The Court held that the House's action was an attempt to make policy. The only constitutional means of doing so was via the full legislative process with presidential opportunity to veto.[82] The Court stressed the concerns about legislative dominance and the constitutional checks of bicameralism and presidential veto.[83] The Court read

[68] *Id.*
[69] *Id.* at 1081.
[70] 634 F.2d 408 (9th Cir. 1980) (hereinafter cited as Chadha).
[71] *Id.* at 411.
[72] *Id.*
[73] *Id.* at 435–436.
[74] *Id.* at 421–423.
[75] *Id.* at 433–434, citing, The Federalist Nos. 51 (J. Madison); and 71 (A. Hamilton) (J. Cooke ed. 1961).
[76] Chadha, 634 F.2d at 434.
[77] *Id.* at 431–433.
[78] *Id.* at 430–431.
[79] *Id.* at 431.
[80] 673 F.2d 425 (D.C. Cir. 1982).
[81] *Id.* at 433–434.
[82] *Id.* at 448–471.
[83] *Id.* at 456–471.

delegation very broadly and effectively insulated the independent agencies from legislative review.[84]

The Supreme Court recently ruled on the legislative veto in *INS v. Chadha*.[85] The Court focused strongly on the legislative procedure necessary to pass a law.[86] The Court noted the framers' fear of legislative tyranny.[87] The Court's strict separation of powers analysis led it to conclude that the legislative veto constituted improper overreaching.[88]

AN EVALUATION OF THE TRADITIONAL ARGUMENTS

Most of the judicial and scholarly analysis of the legislative veto[89] attacks it as contrary to separation of powers. The defenders of the legislative veto also concentrate on a textually-oriented defense.[90] Both of these views are based, in my belief, on a rigid classificatory constitutional analysis. Since this analysis is based on the tripartite structure of the federal government, it will be referred to hereafter as structural analysis.

The structural attack on the legislative veto is premised on a strictly compartmentalized view of separation of powers.[91] The legislative veto must fit into either the legislative category or in a nonlegislative category.[92] If it is a legislative act, it falls afoul of two constitutional provisions. First, it (usually) does not require action by both Houses of Congress.[93] A legislative veto provision which allows action by one House (or by a committee) grants that House (or committee) power which the Constitution vests in both Houses.[94] Second, a legislative veto

[84] *Id.* at 471–479. The D.C. Circuit reaffirmed its decision that the legislative veto is unconstitutional in Consumers Union of the United States, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982). This case involved the two House veto in the FTC Improvements Act of 1980, Sec. 21(a)(1), 15 U.S.C. Sec. 57a–1(a) (1980). The Court held that its analysis in CECA was sufficient and stated that it adhered to that analysis. It therefore held the two House veto was also a violation of separation of powers and a violation of the full legislative procedures necessary for passing a law.
[85] 103 S. Ct. 2764 (1983). The decision affects legislative review previsions in approximately 200 laws, *id.* at 2792 (White, J. dissenting).
[86] *Id.* at 2781–2787.
[87] *Id.* at 2783–2784.
[88] *Id.* at 2788.
[89] *See* Watson, *supra* note 4; Dixon, *supra* note 22.
[90] *See generally* Javits and Klein, *supra* note 20; Abourezk, *supra* note 20; Cooper and Cooper, *Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962).
[91] *See, e.g.*, Atkins, 556 F.2d at 1080–1081 (Skelton, J. dissenting).
[92] *Id.* at 1080–1081.
[93] *Id.* at 1077, *see also* Clark, 559 F.2d at 683 (MacKinnon, J. dissenting), Chadha, 634 F.2d at 433–434, Watson, *supra* note 4, at 1030–1036.
[94] The purported violation is of U.S. CONST. art. I, Sec. I vesting all legislative powers in a Congress of both Houses, Atkins, 556 F.2d at 1080–1081 (Skelton, J. dissenting).

avoids the possibility of a presidential veto.[95] This gives Congress greater power in relation to the president than it normally possesses.[96] Even a two House veto would be inappropriate, since the president has no opportunity to check Congress.[97] In *Chadha*, the Supreme Court adopted this structural view of the legislative veto.[98]

The structuralist criticism against the legislative veto as a nonlegislative act is an analysis based on encroachment.[99] When the resolution is considered nonlegislative, it must be either an executive or judicial act. Since Congress is excluded from those areas, the legislative veto is necessarily an intrusion into the spheres of the other branches.[100] This anti-encroachment doctrine is considered particularly appropriate to cases of legislative overreaching.[101] According to this doctrine, separation of powers exists to limit the natural tendency of each branch, particularly the legislative branch, to overreach and intrude on the other branches.[102] This structural analysis draws its impetus from the *Springer*[103] opinion. In *Springer*, the legislature of the Philippines attempted to control the governor's power of appointment.[104] The Supreme Court analogized the Philippines statute to the United States Constitution.[105] It constructed a model of three branches "forever separate and distinct from each other".[106] Every power must belong to one branch and the other branches could not exercise that power without encroachment.[107]

The structural argument is essentially dependent on the watertight category separation model of *Springer*. This rigid separation analysis has been generally repudiated by the Supreme Court[108] since *Springer*. Current separation analysis allows for more flexible categories.[109] Delegation of legislative functions by Congress to the executive is routine, even though it contravenes the *Springer* doctrine of the branches remaining distinct.

[95]Clark, 559 F.2d at 689–690 (MacKinnon, J. dissenting).

[96]*See* Watson, *supra* note 4, at 1051–1053. *See also* the presidential material cited in note 21 *infra*. The presidential opposition to the legislative veto is a natural response to a congressional attempt to empower itself.

[97]Clark, 559 F.2d at 689–690 (MacKinnon, J. dissenting).

[98]103 S. Ct. 2764, 2784 (1983).

[99]Atkins, 556 F.2d at 1080–1081 (Skelton, J. dissenting).

[100]*Id.* at 1080.

[101]*See* Chadha, 634 F.2d at 433–434; Watson, *supra* note 4, at 1030–1043.

[102]Chadha, 103 S. Ct. at 2784.

[103]Springer v. Government of The Philippine Islands, 277 U.S. 189 (1928). Judge Skelton cited this case as support for his structuralist argument. Atkins, 556 F.2d at 1081.

[104]277 U.S. at 199.

[105]*Id.* at 200.

[106]*Id.* at 201.

[107]*Id.* at 201–202.

[108]*See e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–638 (Jackson, J. concurring) (1952); Nixon v. Adm'r. of Gen. Services, 433 U.S. 425 (1977) (hereinafter cited as Nixon).

[109]*See* Nixon, 433 U.S. at 441–443, which criticizes the rigid structural separation analysis of Springer and of Humphrey's Executor.

The structural defense of the legislative veto does not address itself to the problems of using a rigid separation analysis. Instead, it argues that the solution is found in the initial act encompassing the legislative veto provision.[110] Subsequent actions by one House are seen as merely conditions subsequent to the initial act.[111] This triggering approach really avoids the issue, for if it is accepted, Congress could initially authorize anything. The triggering action itself is the controversy, since it is some form of congressional action and not merely the occurrence of an outside event.[112]

Supporters of the legislative veto rely principally on two lines of analysis directly contrary to the opponents' structural arguments. First, they view the legislative veto as less than a full legislative act.[113] The action of one House is not considered to be a law, since it does not change anything.[114] While it does not change any law, it clearly does have the effect of preventing a regulation (or some executive action) from taking effect.[115] The implicit argument must be that altering an agency regulation (or an executive action under power delegated from Congress) does not require full legal action, since the agency or executive action is not fully "law".[116] This implicit argument runs directly counter to both accepted administrative law doctrine and actual practice that agency or executive action under proper delegation does indeed have the effect of law.[117] The need for approval by both Houses and presentation to the president is obviated, since only full legislative acts must follow this procedure.[118] Support for the belief that not all action is constitutionally required to be full legislative action is found in the powers granted to a single House by the Constitution.[119] Since these exceptions to the general requirement of full legislative procedure are explicitly authorized by the Constitution, any broader reading of them is inappropriate. The investigatory power[120] of subunits of Congress supports the position that subunits of Congress can legitimately act to

[110]Abourezk, *supra* note 20, at 338–339; Atkins, 556 F.2d at 1065.

[111]Atkins, 556 F.2d at 1067–1068.

[112]Atkins, 556 F.2d at 1077, 1081–1082 (Skelton, J. dissenting).

[113]Abourezk, *supra* note 20, at 336–338.

[114]*Id.*; Atkins, 556 F.2d at 1062–1063.

[115]Clark, 559 F.2d at 685–688 (MacKinnon, J. dissenting).

[116]Atkins, 556 F.2d at 1062–1063.

[117]*Id.* at 1080 (Skelton, J. dissenting).

[118]U.S. CONST. art. I, Sec. 7.

[119]Atkins, 556 F.2d at 1062.

[120]*See* McGrain v. Daugherty, 273 U.S. 135 (1927) (hereinafter cited as McGrain); Atkins, 556 F.2d at 1062; Cooper and Cooper, *supra* note 90, at 473–474.

review implementation of laws. However, the investigatory power is distinguishable from a legislative veto power. The investigatory power may stimulate action but does not legally require it. The legislative veto by itself is legally effective.

The second structural support of the legislative veto is a form of consent doctrine. Since the president signed the initial bill authorizing the legislative veto (or it was passed over his veto), he had his opportunity.[121] The weakness of this argument is that it focuses too much on the president as an individual. While an individual can consent to restrictions on himself, the president cannot consent to a reduction in his constitutional role.[122] Certainly, he cannot bind future presidents. The acceptance of the legislative veto on consent grounds would allow one president to restrict the powers of future presidents.[123] It would also allow Congress to institutionalize its powers for if it once obtained a two-thirds majority (in a moment of political passion), legislative control could be preserved since, after the two-thirds majority broke up or was reduced electorally, the necessity of presenting bills to the president (in the legislative veto provision's area) would be circumvented. Supporters also point to the long history of legislative veto provisions.[124] While there is a long history, the reach of legislative vetos has been considerably broadened in recent years.[125] The actual exercise of the legislative veto power has been relatively infrequent until very recently.[126]

An additional argument against the legislative veto is based on bicameralism.[127] I have not classified this argument as structural, since I believe its primary focus is not rigidly textual. This "constitutional averaging"[128] argument is that a primary purpose of the framers was to overcome local, parochial interests.[129] These interests were to be overcome through the means of a broadly representative two-chambered

[121]Abourezk, *supra* note 20, at 338–339.
[122]Watson, *supra* note 4, at 1066–1067.
[123]*Id.*
[124]*See* F.T.C. Report, *supra* note 4, at 1088.
[125]*See* text accompanying notes 10–19 *infra*.
[126]Only 63 of 351 resolutions (less than one-fifth) introduced became effective, SENATE COMM. ON GOVERNMENTAL OPERATIONS, 2 STUDY ON FEDERAL REGULATIONS, 95th Cong., 1st Sess. 161–164 (1977) (hereinafter cited as 2 SENATE COMM.).
[127]*See* Watson, *supra* note 4, at 1034–1037. There is also an additional argument against the legislative veto based on art. 1, Sec. 6 making congressmen ineligible for offices. Watson, *supra* note 4, at 1037–1043, identifies the main purpose of the clause as prevention of corruption. I consider it inapplicable to the legislative veto since no officers are created, and there is little corruption potential aside from the self interest problem below.
[128]Watson, *supra* note 4, at 1051–1052.
[129]*Id.* at 1034–1037.

legislature. No one faction would be able to dominate by itself, and the accommodations required to gain political power would protect individuals.[130] This argument is a strong one against any lessening of the requirement for legislative action. It is strongest against the committee veto where the possibility of local interest is greatest.[131] It is far less effective in relation to a one House veto.[132] Each House is constitutionally representative per se. The constitutional averaging argument is wholly inapplicable where a resolution of both Houses is required.

The structural arguments both for and against the legislative veto appear to me to have serious flaws. Both tend to attempt to solve the question by definition. Both have a categoristic approach. Opponents are using a rigid model of the Constitution which would prohibit not only legislative vetos but also most modern administrative practice.[133] Supporters would establish a new form of "semi-law" which does not have to go through the full constitutional procedures.[134] There would naturally be a desire by Congress to take the easier means of effecting substantive changes in the law. The traditional American belief has been to the contrary, that the constitutional restrictions are desirable safeguards against governmental overreaching.[135]

THE ACCOUNTABILITY PROBLEM

Under the structuralist approach to separation of powers, Congress makes the laws. The agencies which implement the laws simply follow the legislative plan and lack any independent policy-setting role.[136] Even under the most flexible separation analysis, policymaking is at the core of the congressional function.[137] The real situation differs drastically. The administrative agencies not only exercise a ministerial role; they also decide policy.[138] Far from being under the policy setting direction of Congress, agencies have directly opposed the general

[130]*Id.* at 1036–1037. *See also* The Federalist Nos. 51,62 (J. Madison) (J. Cooke ed. 1961).
[131]*See* Fiorina, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 72–31 (1977). *See also* Watson, *supra* note 4, at 1053–1057.
[132]Watson, *supra* note 4, at 1075–1076.
[133]*See* F.T.C. v. Ruberoid Co., 343 U.S. 470, 481–488 (1952) (Jackson, J. dissenting). The Court failed to apply its separation analysis to the agencies' right to issue binding regulations. *See also Chadha*, 103 S. Ct. 2764, 2801–2803 (White, J., dissenting).
[134]Watson, *supra* note 4, at 1071–1078.
[135]*See* Myers v. United States, 272 U.S. 52, 292 (1927) (Brandeis, J. dissenting) (hereinafter cited as Myers).
[136]Dixon, *supra* note 22, at 449–450.
[137]Chadha, 634 F.2d at 424.
[138]Ruberoid, 343 U.S. at 487–488 (Jackson, J. dissenting).

policy directive of their enabling statute.[139] The need in a democratic society to have all political, socio-economic policy decisions made by (or at least ratified by) a representative institution will be referred to hereafter as accountability.[140] This notion of accountability stems from basic principles of American constitutional democracy. Accountability's original premise is that ultimate political power resides in the people, and the people, through duly elected legitimate bodies, should decide the policies which will govern them.

The core notion underlying the legitimacy of administrative agencies is quite different. It is a belief in expertise.[141] This notion holds that if agencies are to effectively set the best policy, they must be insulated from political pressure or influence.[142] The underlying premise is that efficiency conflicts with popular desires, and efficiency is the higher value.[143] The notion of efficiency requiring independence from political control pervades administrative law. For example, the administrative agencies are set up to enforce a particular policy in the public interest.[144] The independent administrative agency commissioners may not be removed for political reasons but only for cause.[145] The move for a time towards imposing due process-like requirements reflects the view that the agencies are modeled after the courts[146] and, like the courts, must not be influenced by outside concerns.[147]

This view of administrative agencies does not comport with a substantial portion of their real activities. Agencies function not only like courts but also like legislatures.[148]Since they set policy, accountability requires that the agencies be subordinate in some manner to popular control. A structural analysis should severely limit the degree of control over administrative agencies. In *CECA*, supra, the Court struck down a legislative veto review over the FERC, an independent

[139]*See* Kelleher, *Deregulation and the Practicing Attorney*, 44 J. of AIR LAW AND COMMERCE 261 (1978). Kelleher, as a proponent of deregulation, refers to it positively as the agency leading the way. Merits aside, the C.A.B. was clearly leading the way against the intent of the 1938 enabling act.

[140]*See* Javits, *supra* note 20, at 460.

[141]5 SENATE COMM. at 26–36; Cutler, *supra* note 22, at 1401–02.

[142]Cutler, *supra* note 22, at 1402–1404.

[143]*Id.*

[144]5 SENATE COMM. at 26–36.

[145]*See, e.g.*, 15 U.S.C. Sec. 41 (FTC); 49 U.S.C. Sec. 11 (ICC).

[146]*See* Cutler, *supra* note 22, at 1402–1404; Pillsbury Co. v. FTC., 354 F.2d 952, 963–964 (5th Cir. 1966) (hereinafter cited as Pillsbury).

[147]Pillsbury, 354 F.2d at 963–964. *See also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 53–54 (D.C. Cir. 1977).

[148]*See* Ruberoid, 343 U.S. at 487–488 (Jackson, J. dissenting); Cutler, *supra* note 22, at 1399.

agency.[149] The Constitution intended Congress to set policy but the result in *CECA*, supra, is that Congress is excluded, and an unelected agency determines national policy.[150] Structuralism is based on a compartmentalized reading of the Constitution.[151] Accountability, I believe, serves the higher goal of ensuring popular control of government. Accountability is much closer to the roots of the democratic tradition. Where it conflicts with a structural reading, structuralism must fall. Seen properly, there need not be any conflict between accountability and separation of powers. A better view of separation of powers is that one branch may not intrude on the core functions of another branch.[152] By preserving the core role of Congress as policy determiner, a legislative veto enhances rather than diminishes the purpose of separation of powers.

The major failing of the structural critique of the legislative veto is that it is focused only on that subject. It does not apply the same structural critique to the power of administrative agencies to make rules and thereby set policy. The power of quasi-legislative bodies to set policy would violate all the criticisms which are also directed against the legislative veto.[153] The mere long time acceptance of administrative policymaking is an insufficient response. This too applies equally to legislative vetos. The distinction is rooted in a belief that the agencies are only acting within legislatively defined parameters and, consequently, are merely selecting means to achieve congressionally defined ends. The fullest expression of this belief is the nondelegation doctrine.

The nondelegation doctrine developed in the early years of the twentieth century.[154] It arose in response to congressional action delegating power to the president.[155] Initially, it only allowed the executive to take specific action when the executive independently determined the existence of certain facts.[156] Later it expanded to allow executive or agency policymaking under the general standards set by Congress.[157] The executive policymaking was merely a modification of the general

[149]673 F.2d at 425.

[150]*Id.* at 472–479.

[151]Atkins, 556 F.2d at 1080–1081 (Skelton, J. dissenting).

[152]Nixon, 433 U.S. at 442–443; Chadha, 634 F.2d at 421–423.

[153]The Supreme Court failed to apply the bicameralism and presidential presentment requirements to rules issued by administrative agencies, Chadha, 103 S. Ct. 2764, 2786.

[154]Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

[155]*Id.* at 398.

[156]*Id.* at 398–399.

[157]Panama Refining Co. v. Ryan, 293 U.S. 388, 428–430 (1935).

congressional policy.[158] If Congress allowed the agency power without limits, it was essentially abdicating its policymaking function.[159] This was an excessive and, hence, invalid delegation. The Supreme Court in the mid 1930s invalidated two New Deal acts on grounds of excessive delegation. In *Schechter*[160] and *Panama Refining*,[161] the principal evil was "unfettered discretion to make whatever law he thinks (desirable)".[162] There must be limits on the executive's discretion so the Court can ensure that the executive is following legislative policy, not making its own.[163] The Court since has allowed such extremely broad delegations as determinations of "excess profit,"[164] fair rates in the bituminous coal industry[165] and license fees for cable television.[166] The broadest example of permissible delegation and the governing law[167] in the field is the wage and price controls case, *Amalgamated Meat Cutters v. Connally*.[168] This case upheld the nationwide wage and price restrictions imposed by President Nixon.[169] The Supreme Court had previously upheld such a broad delegation only in time of war[170] or when restricted to a single industry.[171] Nevertheless, the D.C. District Court sustained the delegation. It noted one limitation in the statute—that prices and wages were to be no lower than existed on a certain date.[172] The Court also read in a requirement of reasonableness into the statute.[173] So long as *Amalgamated* remains good law,[174] virtually any delegation can be upheld.

[158]*Id.*

[159]*Id.* at 430–432. *See also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–531 (1935).

[160]295 U.S. 495 (1935).

[161]293 U.S. 388 (1935).

[162]295 U.S. at 537–538.

[163]*Id.* at 537–539.

[164]Lichter v. United States, 334 U.S. 742 (1948).

[165]Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940).

[166]National Cable Television Ass'n. v. United States, 415 U.S. 336 (1974). The Court held that if the language of the act (allowing the Federal Communications Commission to impose taxes) were read literally, there would be Schechter-type delegation problems. The Court solved the problem by a narrow reading of the Act. *See also* Federal Energy Adm'n v. Algonquin SNG, Inc., 426 U.S. 548 (1976) upholding the president's authority to impose oil import fees "as he deems fit" by a similar restrictive reading of the statute.

[167]337 F. Supp. 737 (D.D.C. 1971) (hereinafter cited as Amalgamated).

[168]*Id.*

[169]*Id.* at 745.

[170]Lichter, 334 U.S. 742.

[171]Sunshine Coal, 310 U.S. 381.

[172]Amalgamated, 337 F. Supp. at 747.

[173]*Id.* at 755. The Court also noted the short duration of the statute.

[174]Although National Cable and Algonquin raised the delegation issue, they rather easily construe around it. Amalgamated itself raised the delegation issue. The end result in all three cases was upholding very broad delegation.

A weak nondelegation standard allows Congress to create agencies to deal with a particular problem without defining the basic policy the agency is to follow. Authorizing statutes requiring the agencies to act "fairly" have been upheld.[175] Such a limitation provides little real guidance relating to policy, and the agency necessarily must make policy on its own. The agency is not thwarting the legislative will in such a case, since Congress has abdicated its role as policy determiner to the agency.[176] The political demands made on congressmen are a major reason why Congress opts to hand over policy-setting power to administrative agencies.[177] The creation of a government agency is a traditional method of responding to a demand for governmental action.[178] The creation of the agency is easier if the agency is given general rather than ambiguous authority over a particular area.[179] If the agency is given a more specific role, it usually will generate a more bitter ideological battle.[180] Once the agency has been created, the congressman's main interaction with it[181] is the area of constituent complaints.[182] The congressman wins political credit by intervening to solve minor bureaucratic snarls with the administrative agencies.[183] Since the political credit is earned by constituent service and not by policy determination, the political incentive is to concentrate on the former and not to make enemies by engaging in the latter.[184] While this pattern of conduct has proven beneficial to individual congressmen, it has deleterious effects upon Congress as an institution. Congress is encouraged to avoid the policymaking role which is its core function. A legislative veto provision would re-inject Congress into the policymaking sphere. Congressmen can and do currently disavow responsibility for administrative agency action.[185] They can do so successfully since they lack the power to effectively supervise[186] agencies except in certain egregiously unpopular agency actions. In those cases,[187] Congress will occasionally

[175]Sunshine, 310 U.S. 381.

[176]Abourezk, *supra* note 20, at 334–335.

[177]Cutler and Johnson, *supra* note 22, at 1400.

[178]Fiorina, *supra* note 131, at 43–44.

[179]*Id.* The more ambiguous the agency's power and mission, the less any group will feel threatened.

[180]*Id.*

[181]*Id.* at 41–48.

[182]*Id.* at 72–81.

[183]*Id.* at 46.

[184]*Id.* at 46–47.

[185]*Id.*

[186]Javits and Klein, *supra* note 20, at 460. The legislative veto's primary justification is that it is the only effective means of supervision.

[187]*See* text accompanying notes 245–250, *infra*.

overrule the agency by statute. Both the agency and the congressman normally avoid political responsibility for the agency action. The accountability value is denied under these circumstances. A legislative veto clearly makes the agency accountable to Congress (and thereby to the people). It also increases the accountability of Congress. Since Congress would now possess the power to review agency rules, individual congressmen could no longer disclaim responsibility for agency rules. They could be held electorally accountable for unpopular rules they allowed to become effective or equally for desirable rules which they blocked. Since the political incentive would now be to more closely supervise agency rules, the degree of congressional involvement on agency policymaking would increase. Congressional policymaking would increase, a desirable result from an accountability standpoint.

In addition to the accountability benefit, there would be the value of limiting agency authority. I will refer to this as the "check" principle. The administrative agencies are relatively free in deciding policy matters. They must, however, conform to the constitutional requirements against arbitrariness.[188] The means of promulgating policy must conform to the requirement of the Administrative Procedure Act.[189] Aside from these minor limitations, agencies set policies subject to review by no one. The principle of check opposes any unlimited power given to any branch or agency. It resembles separation analysis in this respect. The check principle is more far-reaching, since it is directed against concentrations of power without any restraints upon them.[190] It is directly opposite to the structural analysis, in some respects, since structuralist doctrine allows the branches to remain largely autonomous.[191] As applied to administrative agencies, the check principle demands that limits be placed on the policymaking power of agencies. The need to limit agencies is greater because the constitutional branches are limited by each other, while the "fourth" administrative branch is not limited by any of the other three. The combination of the check principle with the accountability principle (since the two run parallel in this circumstance) requires that limits be placed on the administrative agencies through a politically responsible branch.

A legislative veto would promote other goals as well. Since affirmative congressional action (in the form of a disapproval resolution) would be required, the process would be public. The current congressional attacks on various aspects of agency action would become either

[188]5 U.S.C. Sec. 706(2)(A), (B).
[189]5 U.S.C. Sec. 551 *et. seq.*
[190]Nixon, 433 U.S. at 441–443.
[191]Buckley, 424 U.S. at 120; Springer, 277 U.S. at 201–202.

more restrained or more sincere. Since there is no current congressional responsibility for agency action, there is an incentive to speak for public effect.[192] Congress might well be less critical of agencies if it bore actual responsibility.

The legislative veto responds to the accountability and check problems. The structural approach is based on an overly rigid model and is also artifically limited to the legislative veto problem. However, the constitutional provisions requiring full legislative action demand at least that if a different procedure is to be allowed in some circumstances, all other means of achieving the desired result must first be exhausted.

ALTERNATIVE MEANS OF POLITICAL SUPERVISION

An alternative to vesting review powers in Congress, through the mechanism of a legislative veto, is to vest review powers in some other branch. Faithfulness to accountability goals requires considering the presidency, since it is the only other politically responsible branch. Executive review of administrative agencies has both executive[193] and scholarly[194] support. This support takes two major forms. The first would give the president a greater degree of indirect control over the independent agencies. The principle means of accomplishing this would be to expand the presidential power of removability.[195] The second form would grant the president power[196] to control agencies (both executive and independent) directly. Under this proposal, the president could revise agencies' rules directly.[197]

The president's existing powers to control agencies is dependent on the nature of the agency. The agencies regarded as executive agencies are most fully responsive to the president. His powers of control include the power to remove subordinates[198] and review powers over the agency's rules.[199] Within the executive branch, there are also execu-

[192]Fiorina, *supra* note 131, at 42, 48.
[193]*See* the President's Committee on Administrative Management (1937—"The Brownlow Committee"), Commission on Organization of the Executive Branch of the Government (1947–1949 ("Hoover Commission"), President's Advisory Council on Executive Organization (1971—"Ash Council")
[194]Cutler, *supra* note 22.
[195]This proposal would allow removal at pleasure.
[196]Cutler, *supra* note 22, at 1414–1417.
[197]Cutler would limit the revisory power to balancing conflicting statutory goals. The president would be required to state his reasons and his revision would be subject to a one House veto.
[198]Myers, 272 U.S. 52.
[199]Javits, *supra* note 20 at 488.

tive branch independent agencies.[200] The presidential powers of removal[201] and review[202] over these agencies are restricted. Finally, there are independent agencies that are not part of the executive branch.[203] The president has power to remove only for cause[204] and has no power to review agency rules.[205] The president's powers over the independent agencies are his power of initial nomination,[206] budgetary review[207] and political influence. He, of course, has these minor powers over both forms of executive agencies as well. By gaining the additional powers of removal and revision over the independent agencies, the president seeks to eliminate their distinguishing characteristics of independence.

Presidential attempts to gain supervisory power over the independent agencies began as a reaction to the *Humphrey's Executor*[208] case. The Court rejected the president's attempt to dismiss an FTC commissioner.[209] The president sought dismissal for political incompatibility.[210]

[200]*E.g.*, the Environmental Protection Agency.

[201]The president's power to remove Commissioners of the Federal Energy Regulatory Commission is limited to cause, 42 U.S.C. Sec. 7171(b).

[202]The president has revisory powers over FERC rules only in an "emergency situation of overriding national importance", 42 U.S.C. Sec. 7172(c)(2).

[203]*E.g.*, FTC, ICC.

[204]15 U.S.C. Sec. 41 (FTC); 49 U.S.C. Sec. 11 (ICC).

[205]The following are the minor exceptions of direct presidential authority over independent agencies:

Presidential approval of certificates for foreign air transportation issued by the Civil Aeronautics Board (49 U.S.C. Sec. 1461).

Suspension by the president of certain statutory provisions of the Federal Maritime Commission relating to the carriage of goods by sea (46 U.S.C. Sec. 1313).

Commencement of investigations of violations of antitrust laws by the Federal Trade Commission at the direction of the president (15 U.S.C. Sec. 16).

Presidential approval of the laying of certain submarine cables in the United States under the authority of the Federal Communications Commission (47 U.S.C. Sec. 34, 35). Assignment by the president of frequencies to government radio stations and authorization by the president of the operation of foreign government radio stations in the United States (47 U.S.C. Sec. 305).

Limitation by the president of certain construction permits for radio stations during national emergency or time of war (47 U.S.C. Sec. 308).

Presidential direction of the International Trade Commission to investigate injuries caused to domestic industries by imports (19 U.S.C. Sec. 2251).

Certain presidential determinations relating to trade policies following the investigation by the International Trade Commission under 19 U.S.C. Sec. 2251 (19 U.S.C. Sec. 2252).

[206]Buckley, 424 U.S. at 124–129, 133.

[207]5 SENATE COMM. at 43–52.

[208]295 U.S. 602 (1935).

[209]*Id.* at 628–629.

[210]*Id.* at 618.

The Court restricted the removal power for the FTC to "for cause only." It was unwilling to restrict the president's removal power over executive branch subordinates.[211] It harmonized the two results by establishing the FTC as an agency independent of executive supervision. The Congress has since created many other independent agencies. When an agency is made independent, it is made *independent of the president*.[212] Congress evinces a strong desire not to allow presidential control.[213] Despite repeated executive attempts to regain removability power, Congress has not in the past and likely will not in the future agree to a general presidential removal power over independent agencies.[214] That being the case, review powers over the independent agencies, at least, must be sought by congressional means.

Presidential control over the executive branch agencies is stronger. *Myers*[215] announced and *Humphrey's*[216] reconfirmed an absolute presidential removal power.[217] This gives the president significant control over the actions of executive branch agencies[218] and satisfies the accountability goal. However, dismissal is an inefficient (and not universal[219]) method of control. The particular action might not be important enough to warrant dismissal. In such cases, the president must rely on a power of direct revision.

The power to directly revise rules is occasionally but rarely given statutorily.[220] Supporters of the power see it springing from the presi-

[211]*Id.* at 629–631.

[212]5 SENATE COMM. at 26–33.

[213]*Id.* at 25.

[214]*But cf., id.* at 38, concerning the removal of Robert Timm, chairman of the Civil Aeronautics Board. Timm resigned under pressure of presidential removal for cause.

[215]Myers, 272 U.S. at 135, also gave the president removal power over members of executive adjudicatory commissions. This was probably intended to include agencies such as the ICC and FTC.

[216]295 U.S. at 629–631.

[217]Presidential removal power ensures that the president can ultimately control his subordinates.

[218]*See* Morgan v. TVA, 115 F.2d 990 (6th Cir. 1940); Lewis v. Carter, 436 F. Supp. 958 (D.D.C. 1977) (EEOC), upholding presidential power to remove executive branch independent agency commissioners. *But cf.* Weiner v. United States, 357 U.S. 349 (1958), and Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973) restricting presidential removal power. *Nader* held that President Nixon's dismissal of Special Prosecuter Cox was illegal. *Nader* points up the weakness inherent in attempting to limit presidential removal powers. After declaring the removal invalid, the court did not order reinstatement. Cox himself had not sought reinstatement, and it is doubtful whether the president could be forced to accept a subordinate against his wishes.

[219]The president may well allow secondary issues to be decided contrary to his wishes because he values the agency head more than a secondary policy.

[220]*See* note 205 *supra*.

dent's constitutional position as the head of the executive branch.[221] Since the power comes directly from the Constitution, Congress could not restrict it.[222] Congress by placing rulemaking power in an executive branch agency has accepted potential presidential modification.[223] This does not accord with Congress' action however. Congress often specifically directs that the secretary of a cabinet department promulgate rules.[224] This indicates an intent that the secretary, not the president, decides. Congress also has granted the president review powers over certain executive agencies,[225] an unnecessary act if the president possesses plenary review power. Finally, the exercise of review power by the president has been relatively rare.[226] To the degree that the president does have review powers over the executive branch, a legislative veto would be unnecessary. However, where the president lacks such power [and possibly where he fails to exercise it[227]] the principles of accountability and check may require some legislative review.[228]

Granting the president revisory power or removal power would restrain the agencies satisfying the principle of check. It might not fully satisfy the accountability principle because the president and the individual congressmen are politically accountable in different ways.[229] The president is elected by the entire nation. This gives him political legitimacy to address national issues that a congressman or senator with their narrower constituencies lack.[230] The president has a claim to supervising agencies to ensure they comply with his electoral mandate.[231] However, there are also significant problems connected with

[221] *See* Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980); Note, *Delegation and Regulatory Reform: Letting the President Change the Rules*, 89 YALE L.J. 561 (1980). *See also* Javits, *supra* note 20 at 486–488.

[222] Verkuil, supra note 221, at 956–962.

[223] *Id.* at 956–958.

[224] *See, e.g.*, 7 U.S.C. § 602 *et. seq.*, the various Agricultural Adjustment Acts. These Acts give the Secretary of Agriculture broad powers over commodity pricing.

[225] *See* 42 U.S.C. § 7172(c)(2), allowing presidential revision of FERC rules under certain circumstances.

[226] *But see* Javits, *supra* note 20, 488, noting President Ford's revocation of an HEW ruling regarding father-son, mother-daughter activities in public schools; *see also* Exec. Order No. 12,291 3 C.F.R. ____ 1981 (President Reagan's Regulatory Review order), and Exec. Order 12,287 46 Fed. Reg. 9909 (1981) revoking petroleum price and allocation rules.

[227] Javits, *supra* note 20, at 486–488.

[228] Note, *supra* note 221, at 578–581 suggests a solution to the problem of agency nonaccountability by creating a new Board of Regulatory Appeals. The Board would balance competing statutory goals and have the power to revise agency rules. This seems to me to be creating a new problem. The proposed Board would have greater powers than do current agencies, yet it would be accountable to no one.

[229] *Id.* at 582–583; Cutler *supra* note 22, at 1411–1412.

[230] Cutler, *supra* note 22, at 1410–1411; Fiorina, *supra* note 131, at 41–49.

[231] Note, *supra* note 221, at 582–583; Cutler, *supra* note 22 at 1410–1411.

the accountability of the president. The president faces the electorate twice at most.[232] This automatically limits the popular control over a president's action. This is particularly so in his second term, since he can no longer face the electorate. Once elected, the president often grows out of touch with the electorate.[233] The national nature of the issues dealt with by the president has an adverse impact on his political accountability for any particular action.[234] The president is elected or re-elected on basic issues such as the state of the economy or foreign policy.[235] It is highly unlikely that a significant number of people will vote for or against a president because they disagree with his revision (or lack of revision) of an agency rule. The principle of check is observed, since there are limits on the agency, but the president is not really reviewing agency rules in line with accountability because there is not a realistic threat of electoral defeat even if he makes an unpopular choice. The individual congressman is more likely to be held politically accountable, since the public can always defeat him at the next election and the public is less likely to judge their congressman on national issues.[236]

Congress is the preferable branch to restrain the agencies but the legislative veto is only one method of doing so. The other means of limiting agencies will be reviewed next. First, it is important to note that Congress itself has judged these alternatives as inadequate.[237] The increasing inclusion of legislative veto provisions is itself a congressional judgment that the alternatives, at best, are insufficient and a new tool is required.

The simplest means of restricting agency freedom is to do so initially. A clearer delegation of power would limit the agency freedom to make policy contrary to congressional and public opinion.[238] This would indeed restrict agency ability to set policy but it would also restrict agency ability to effectively implement congressional policy. The virtue of flexibility to different circumstances would be lost.[239] If the agency is not going to apply a "checklist" of congressional options, it is either

[232] Note, *supra* note 221, at 582–583.

[233] *Id.* at 582.

[234] *Id.*

[235] *Id.* at 582 n. 122.

[236] Fiorina, *supra* note 131, at 12–28.

[237] *See* Javits, *supra* note 20, at 456–458. The increasing passage of legislative veto provisions indicates a congressional judgment that the other means of legislative oversight are insufficient.

[238] Note, *supra* note 221, at 574–578; Verkuil, *supra* note 221, at 964–966.

[239] Note, *supra* note 221, at 569–570.

going to ignore related but uncovered abuses[240] or it is going to have to have a certain policy-setting role.[241]

The most legitimate means of control is through amendatory legislation. This has no constitutional problems[242] and is the traditional means of restricting agencies from pursuing unpopular policies.[243] The amendatory legislation solution has two serious problems which undermine its effectiveness as a restraint. First, the amendatory legislation is definitely a reaction to a perceived agency error. It, therefore, is only a corrective and has little impact on the agency's general policymaking. The legislative approach will solve only the particular problems engendered by a specific agency error.[244] This problem is compounded by the more serious second problem of the legislative solution.

The success of amendatory legislation as a means of limiting agency action is dependent on its effectiveness in doing so. The difficulty of the legislative process can be illustrated by the case of the seatbelt interlock rule issued by the Department of Transportation.[245] This rule mandated the installation of a system preventing operation of the automobile unless the seatbelt was properly fastened.[246] There was widespread popular antipathy to the rule, as well as rampant public disregard.[247] Since the agency refused to rescind the rule, Congress repealed it through the normal legislative process.[248] This process took over a year.[249] Clearly, Congress cannot effectively restrain agencies through the threat of the normal legislative process.[250] Legislative amendment provides little relief even when there is an extremely unpopular agency action. The relief is presumably even less for less egregiously unpopular actions, and, hence, there is a gap left that cannot be filled by the normal legislative process.[251]

[240] *Id.*

[241] In Chadha, 103 S.Ct. at 2786 n. 1, the Supreme Court suggested that Congress delegate its authority more clearly. While this is obviously desirable, a great deal of flexibility in policy determination will necessarily remain with administrative agencies.

[242] Since it is passed by both Houses and signed by the president.

[243] Javits, *supra* note 20, at 460.

[244] *Id.* at 460–462.

[245] 38 Fed. Reg. 16,073 (1973) (amending 49 C.F.R. § 571.208 (1973)).

[246] *Id.*

[247] Javits, *supra* note 20, at 463.

[248] Motor Vehicles and Schoolbus Safety Amendments of 1974, 15 U.S.C. § 1410(b).

[249] Javits, *supra* note 20, at 463.

[250] *Id.* at 462–464. *See also* Cutler *supra* note 22, at 1400.

[251] The Supreme Court in *Chadha* failed to consider this effect of voiding legislative review. The administrative agencies have been freed from the only legal restraint that had a real impact on their actions. The paradoxical result of an attempt to prevent overreaching is that unelected, irremovable (and for these reasons, unresponsive) officials can determine policy.

A variation of the legislative approach has been put forward as a means of restricting agency actions. The appropriations approach amends the agency's appropriations bill and prevents it from taking certain action.[252] This has the advantage of saving a great deal of time, since appropriations riders can be added on the floor of either House and need not undergo the lengthy committee process. There is another side to this advantage, since it often means the appropriations restraint will be insufficiently flexible. The history of lawmaking through appropriations riders evinces a tendency towards extremely broad solutions, for example, the Hyde Amendments[253] restricting abortion and the restriction on the Internal Revenue Service's regulations on fringe benefits.[254] The form of the limits is usually a restriction on how the agency may spend its money.[255] The I.R.S. is, for example, forbidden to spend appropriated funds on issuing new regulations on fringe benefits.[256] This has the undesirable result of freezing the status quo with the effect of agency inability to effectively respond to new situations.[257] The legality of such appropriations limits is at least questionable. While Congress may directly amend the law, it is uncertain whether it can order an agency not to enforce the law. The enforcement of legislative policy is traditionally considered an executive/administrative[258] province. Congress is relatively poorly equipped to effectively force the agency to comply. It can reduce the total level of agency funds available, but if the agency chooses to spend its money on the particular area, Congress' means of reversing the offending rule must be to either go through the normal legislative process with the problems which that process entails (and the additional risk of a presidential veto) or resort to the courts.[259] The appropriations method is also flawed.

The Congress may use its investigatory powers to hold hearings.[260] The true purpose of such hearings is to summon up enough political support to embarrass or harrass the agency into acquiescing to the

[252] Javits, *supra* note 20, at 464.

[253] Pub. L. No. 94–439, c.209, 90 Stat. 1418 (1976), Pub. L. No. 95–205, c.101, 91 Stat. 1466 (1977), Pub. L. No. 95–480, c.210, 192 Stat. 155 (1978), Pub. L. No. 96–123, c.109, 193 Stat. 923 (1979), Pub. L. No. 96–369, c.101(c), 194 Stat. 1351 (1980).

[254] Pub. L. No. 95–427, c.1, 192 Stat. 976 (1978), Pub. L. No. 96–167, c.1, 93 Stat. 1275 (1979) amending 26 U.S.C. § 61.

[255] Appropriations limits forbid an agency from using appropriated funds to enforce a particular regulation or forbid it from writing new regulaitons on a particular subject.

[256] *See* note 254, *supra*.

[257] Note, *supra* note 221, at 569–570.

[258] Chadha, 634 F.2d at 431–432.

[259] *See* Clarkson and Muris, *Constraining the Federal Trade Commission: The Case of Occupational Regulation*, 35 U. MIAMI L.REV. 77,90–93 (1980).

[260] *Id.* at 93–99; Javits, *supra* note 20, at 460–462.

congressional demand and into revising or revoking its rule.[261] This also has the merit of being constitutionally unimpeachable.[262] The principal drawback is its lack of ensured effectiveness. The agency will in most cases submit to congressional pressure.[263] It need not do so, and if it does not choose to do so, the investigatory hearing cannot force it to alter its decision.[264] The investigatory hearing solution is least effective where the agency is most resistant to congressional or popular opinion. The investigatory hearing is an inadequate solution (although a useful complement to other solutions) both in terms of accountability and check.

There is another method of control which is constitutionally sound. The Senate has the power of confirmation of appointees.[265] It was thought by the framers that the Senate would be able to exert significant control over policy through its confirmation power.[266] There are some accountability problems with relying on the Senate, since it is more remote from the people by virtue of its longer term and wider political constituency than the House. (Congressional Representatives, represent only one district while Senators represent an entire state.) This is less important, since confirmation has proved to be an ineffective means of control. The appointee once confirmed is no longer subject to control by the confirming body. The appointee concerns himself with following the dictates of the institution which can remove him.[267] Since *Myers*, the president has exclusive removal power,[268] and the appointee cannot be removed by the Senate and need not submit to that body.[269] The confirmation process has therefore become relatively routinized, and appointees for senior executive and administrative positions are rarely rejected.[270]

The failure of the traditional methods of legislatively restraining agencies led Congress to attempt other means of reasserting itself. Congress had tried to obtain for itself the power of appointment (and presumably the related power of removal which subordinates the chosen nominee). In *Buckley v. Valeo*, the Supreme Court held that a

[261] *See* Pillsbury, 354 F.2d 952.
[262] McGrain, 273 U.S. 135.
[263] Fiorina, *supra* note 119, at 65–68.
[264] Since by definition it lacks coercive power, McGrain 273 U.S. at 160–161.
[265] U.S. CONST. Art. II Sec. 2.
[266] Federalist No. 77 (Hamilton).
[267] Verkuil, *supra* note 209, at 945–946, 953.
[268] Myers, 272 U.S. at 117.
[269] Buckley, 424 U.S. at 124–129.
[270] 69, 806 of 69,929 nominations received in 1980 were confirmed (more than 99%) CONG. REC. D 1594 (1980).

congressionally appointed Federal Elections Commission was an unconstitutional usurpation of the executive power of appointment.[271] The FEC had six members, four of them appointed by the senior members of the House and the Senate.[272] The FEC at that time dealt solely with the conduct of the presidential election.[273] The congressional fear of improper executive influence was the justification for congressional appointment.[274] Nevertheless, the Court held the case was controlled by *Springer* and that the power of appointment was inherently executive.[275] Direct congressional appointment, even under the most plausible circumstances, is foreclosed by *Buckley*.

Another variant is direct congressional administration of the agency. *Chadha* involved such a congressional attempt to directly administer the deportation of aliens.[276] The attorney general could suspend deportations if he made certain findings. The House, acting under the authority of a 1940 immigration statute, passed a resolution disapproving the attorney general's action.[277] The House action required that the aliens be deported.[278] The committee chairman read off a list of names, including Chadha's and the resolution was adopted on a unanimous consent motion with no debate.[279] Congress is poorly equipped to directly administer programs. In attempting to do so, it disrupts the relatively orderly administrative process which is better handled by the executive branch.[280] Congress need not supply reasons for its actions (the congressional action may often be based on political influence as much as reasoned judgment), and the executive is therefore unable to alter its actions to conform with the congressional will.[281] The D.C. Circuit Court also found that the congressional attempt to decide cases encroached on the judicial responsibility to interpret and apply the law.[282]

The opponents of the legislative veto view it as another form of direct congressional administration of programs.[283] While this is true of

[271] Buckley 424 U.S. at 124–129.
[272] *Id.* at 113.
[273] *Id.* at 109–113, 134.
[274] *Id.* at 134.
[275] *Id.* at 124.
[276] Chadha, 634 F.2d at 431–433.
[277] *Id.* at 411.
[278] *Id.*
[279] 121 CONG. REC. 40,800 (1975).
[280] Chadha, 634 F.2d at 431–432.
[281] *Id.* at 431.
[282] *Id.* Justice Powell would have decided *Chadha* solely on the basis of the encroachment on the judicial function. He expressed apprehension at the breadth of the majority opinion, 103 S.Ct. at 2791–2792 (Powell, J. concurring).
[283] Watson, *supra* note 4, at 1081–1082.

the form of the legislative veto used in *Chadha*, it is not true of legislative review of agency rules. Review of rules allows Congress to control the policies followed by the agency without interfering with the actual implementation of the policies.[284]

THE SPECIAL INTERESTS PROBLEM

The problem of special interests and committee influence is the most serious objection to the legislative veto proposal.[285] It involves the accountability principle. This principle requires that the administrative agencies be subject to popular control. A legislative veto provision allows for popular control through the supervision of Congress. However, the existence of a legislative veto gives the committee chairman a great deal of leverage in negotiating with agencies over proposed rules.[286] The enhanced negotiating position of the chairman will avoid the constitutional balancing out of special interests obtained through the action of one or two Houses.[287] The chairman is more likely to be beholden to the special interests regulated by the agency.[288] The special interests will not be balanced out on the floor as normally happens in the legislative process. Instead, through the mediation of the chairman, they will exert pressure on the agency indirectly.[289] The agency will be conscious that its bargaining position is weak, since a legislative veto requires that it be responsive to congressional pressure.[290] The agency can respond in two ways. It may choose not to bow to the pressure and present its regulations unmodified. Congress will usually respond by supporting the challenged committee and vetoing the regulations.[291] Congress will also block regulations perceived as insufficiently responsive to the congressional concerns. The result will be a deadlock, and no regulations will be implemented. The other alternative is that the agency may yield to pressure too easily.[292] This

[284]The similarity of the independent agencies to judicial bodies might support vesting review power in the courts, McGowan, *supra* note 22, at 1163. The courts could constitutionally exercise the power of appointment and removal. *See ex parte* Siebold, 100 U.S. 371 (1879); *ex parte* Hennen, 38 U.S. 230 (1839); Hobson v. Hansen, 265 F.Supp. 902 (D.D.C. 1967). However, since the judiciary is itself constitutionally irremovable, vesting it with review powers would violate accountability principles.

[285]Watson, *supra* note 4, at 1034–1037; Cutler, *supra* note 22, at 1408–1409.

[286]Watson, *supra* note 4, at 1060–1063.

[287]*Id.*

[288]Fiorina, *supra* note 131, at 62–70.

[289]Watson, *supra* note 4, at 1060–1063.

[290]Bruff and Gelhorn, *supra* note 22, at 1378.

[291]*Id.* at 1417–1420.

[292]*Id.*

allows the chairman and special interest groups to determine the substantive policies. Further, the ready acquiescence to small group pressure circumvents some of the major virtues of the legislative veto. The public on the record vote is avoided. The congressional responsibility for the rule may become perceived to be lessened, since the actual influence occurred privately. The agency may even frustrate the popular will, since it may accommodate the chairman when the general congressional opinion may be significantly different.[293] This threat of agency accommodation would, if accurate, undermine the accountability feature of the legislative veto, since accountability is directed towards popular control, not special interest control.

The initial problem of agency regulatory deadlock is less important.[294] Factually it has usually turned out to be only delay.[295] The agency does eventually arrive at a rule to which Congress at least acquiesces or accepts. The process of an agency submitting proposed rules and Congress responding by legislatively vetoing them can last for a considerable period of time. In a case study done on the legislative veto, Professors Bruff and Gelhorn found that the risk of deadlock was significant.[296] However, all the situations of deadlock they cite have since been successfully resolved by the implementation of new regulations.[297] If Congress allows the new rules to become effective by not disapproving, it signals that there is no longer a sufficient degree of congressional dissatisfaction. If the agency abandons the attempt and refuses to attempt to issue unpopular rules, one must ask, where is the harm. If it is that the rules are not adopted, then one is implicitly saying that regulatory deadlock is inherently bad. Deadlock in a politically accountable institution occurs when the proposed change lacks enough popular support to win approval. Democratic theory accepts that a proposed change should not occur until it can win majority approval.

Although the accommodation argument appears more compelling, it reflects an inaccurate view of American politics. The initial inaccuracy is compounded by a somewhat utopian theoretical view of the legislative process. The legislative veto will of course increase the influence of committees and their chairmen. This is not surprising.

[293]*See, e.g.*, Clarkson and Muris, *supra* note 259, at 99.

[294]2 SENATE COMM. at 117–119.

[295]*See* note 297 *infra*.

[296]Bruff and Gelhorn, *supra* note 22, at 1414–1415.

[297]*Id.* at 1382–1409. Federal Election Commission Rules 11 C.F.R. § 100 *et seq.*, General Service Administration Rules regarding Nixon documents 41 C.F.R. 105 Part 63.101 *et seq.*, Federal Energy Administration 10 C.F.R. 210 (gradual decontrol by President Carter) superceded by Exec. Order No. 12,287, 46 Fed. Reg. 9909 (1981) (immediate decontrol by President Reagan).

Since Congress does most of its work in committees,[298] any legislative action of a continuing nature will result in enhanced committee influence. The committees have this influence, since the whole of either House is too large to efficiently handle the tremendous amount of business. The committee influence critique is in reality an objection to any effective legislative action. Furthermore, the committees have a dual check upon them. They consist of individual members who are accountable to the people through the election process. These members do not face the entire electorate and may represent local interests to a certain extent. They do face an electorate in contrast to a commission which faces no local pressure because it faces no election. The members, once elected, face the House or Senate which organizes itself into committees.[299] The members are accountable to their House as a whole, since their House places them on the committees. The House and Senate, by organizing into committees, approve the increased influence that the members of a committee will gain on certain matters by virtue of their position on a committee that deals with those matters.

The potential for agency submissiveness towards powerful chairmen depends on a number of implicit assumptions. The device must be frequently used or it lacks credibility. The actual practice is that the overwhelming majority of legislative vetos are exercised (or even attempted) in a few well defined areas.[300] For example, the Congress recently imposed a legislative veto restraint on the FTC's rulemaking power.[301] The supporters claimed that it was a last resort to restrain the FTC.[302] Opponents of the provision said that the agency would become totally malleable to congressional and special interests pressure.[303] The first attempt to exercise the legislative veto provision was not made for over a year after Congress granted itself the power.[304] It is

[298] *See generally* WILSON, CONGRESSIONAL GOVERNMENT (1879); Fiorina, *supra* note 131, at 62–65.

[299] U.S. CONST. art. I, Sec. 5.

[300] Between 1960 and 1975, 351 resolutions of approval (and disapproval) were introduced. Over 300 dealt with only five areas—(1) disposal of materials from the national stockpile (2) executive reorganization plans (3) federal employee pay levels (4) proposed Budget expenditure deferrals and recissions (5) foreign assistance. More than half of the resolutions enacted dealt with Budget deferrals and recissions, 2 SENATE COMM. at 163–164.

[301] 15 U.S.C. § 57(a)–1.

[302] 128 CONG. REC. H3856–3873 (daily ed. May 20, 1980) (See particularly the remarks of Representatives Fenwick and Frenzel).

[303] 128 CONG. REC. S5676–5690 (daily ed. May 21, 1980) (See particularly the remarks of Senators Ford and Metzenbaum).

[304] The FTC's proposed rule on used car dealer warranties was overturned by the vote of both Houses. The Senate passed the veto resolution on May 18, 1982 by a vote of 69 to 27, 128 CONG. REC. S5402 (daily ed.). The House of Representatives fully discussed

unlikely that the mere potential for congressional action will have anything more than a minor impact. The leverage which the committee chairman has is based on the realistic likelihood of one House passing a disapproval resolution. If no or few prior resolutions have passed, the agency will have no reason to bend to legislative pressure, unless its proposed rule is likely to be very unpopular. Those highly unpopular rules are legitimate targets for congressional pressure.

The dynamics of the political process make it improbable that the committee chairmen or special interest groups will have a decisive impact on significant new rules. The influence of committee chairmen is always less significant on more important, more controversial issues. On these issues, members are less willing to defer to the chairman's influence or expertise. This is true for all of the more visible congressional activities. The recent congressional action defeating a disapproval resolution against the sale of A.W.A.C.S. planes and other military equipment to Saudi Arabia is an apt example. The political passions broke down the normal congressional willingness to defer to the chairmen.[305] Instead, each member made his own choice. A legislative veto on an important rule will be highly visible, and the member will be held accountable since the legislative action is dispositive. The congressman will likely follow popular pressure or follow what he believes to be best for the country. On the less important issues, the committee chairman's and the special interests' influence will be greater. In *Chadha*, the committee chairman merely read off a list of names to whom the resolution would apply.[306] There was no debate, and the measure was carried on unanimous consent. On important issues, the matter is more fully debated. The responsibility for agency mistakes that the legislative veto would place on Congress will tend to encourage greater independence and questioning by the congressmen. However, on a great number of the more routine, less generally controversial issues, the congressmen will probably go along with their chairman. The danger is that these less visible issues may be less important to the general public, but may be very important to a narrow specific group. To a degree, this is a danger inherent in any elected

both the substantive merits and the constitutional implications before it also vetoed the rule by a vote of 286 to 133, 128 CONG. REC. H2882–83 (daily ed.) (See particularly the remarks of representatives Dingell and Glickman at 2856–83). In a *per curiam* decision relying wholly on its earlier decision in *CECA*, the D.C. Circuit in Consumers Union of the United States, Inc. v. FTC, 691 F.2d 575, 577–78 (D.C. Cir. 1982) held this legislative veto of the FTC's rule unconstitutional. *See* note 84 *supra*.

[305] *See, e.g.*, 128 CONG. REC. S9673–9675 (daily ed. Sept. 15, 1981). Sor H9926–9928 (daily ed. Sept. 17, 1981), H7236–7307 (daily ed. Oct. 14, 1981).

[306] 121 CONG. REC 40,800 (1975).

body. Intensity of concern about an issue can substitute for general popularity. However, the congressman who defers to the special interest is gambling that the results will not be so bad that at the next election he will be held responsible. This will tend to make congressmen hesitate before acquiescing to any call to veto an agency's rules.

The agencies themselves are not likely to be overaccommodating towards Congress.[307] They were created to be independent. They now act independently.[308] There will be a certain amount of behind the scenes bargaining.[309] The agencies will not go too far in accommodating congressional pressure out of a sense of bureaucratic self-interest. Agencies will not allow Congress to totally dominate them. These predictions which I have developed are supported by the Bruff and Gelhorn case study. The study showed that although negotiations generally did occur, the agencies were willing to make concessions only up to a certain point. When this point was reached, the agencies were in some cases able to issue regulations, while deadlock occurred in other cases.[310] One agency was an exception to this pattern, and in drawing up rules it caved in to congressional pressure.[311] This agency was the Office of Education (which has since become the Department of Education) in the Department of Health, Education and Welfare. The legislative veto concerned Basic Educational Opportunity Grants, a politically popular measure.[312] An executive agency may be willing to accede to congressional pressure on such a politically popular measure. The executive agency can always rely on presidential support to halt congressional encroachment, if necessary. The agencies in the case study generally were willing and able to resist congressional pressure.[313] Since continued agency independence is desirable from the agency's perspective, this willingness to resist makes accommodation unlikely.

LIMITATIONS

Certain legitimate limitations should be imposed on the legislative veto. The purpose of these measures will be to ensure that Congress is

[307]Four of the five agencies in the case study resisted congressional pressure, Bruff and Gelhorn, *supra* note 22, at 1382–1409.

[308]Clarkson and Muris, *supra* note 259, at 98–101, 104–105.

[309]The Supreme Court's decision in *Chadha* will have the effect of driving agency accommodations behind closed doors. Since the bargaining will occur in secret, Congressmen will be able to avoid political responsibility for their impact on administrative regulations.

[310]Bruff and Gelhorn, *supra* note 22, at 1382–1409. But on deadlock, *see* note 297 *supra*.

[311]*Id.* at 1382–1385.

[312]*Id.* at 1383.

[313]*Id.* at 1409–1411.

limited to reviewing agencies. The legislative veto should deal only with policy determination. The actual administration of policies is not properly within Congress' role.[314] The legislative veto should not be used to impinge on presidential prerogatives.[315] The Constitution allows the president few areas of broad power. Broad powers exist in such areas as military and foreign affairs precisely because such areas require quick decisions and flexibility.[316] Only an egregious error that would command two-thirds support in both Houses should enable Congress to override the president in such matters.

A legislative veto mechanism should require a positive vote of disapproval by at least one House. Accountability requires that if Congress truly disapproves of a regulation, it should be forced to vote it down openly.[317] The alternative of allowing the rule to become effective only if Congress approves it gives factions within Congress too much power. It explicitly invests each rule with congressional approval, but it also makes it too easy for factions within Congress to block a proposed rule (by delay for example).

The resolution of disapproval should be an up or down vote without opportunity to amend the proposed rule. A danger of the legislative veto device is that Congress may use it to enact substantive law.[318] A non-amendability requirement would prevent Congress from rewriting the regulation through the form of amendment. This would be impermissibly similar to enacting substantive law.

Similar reasons demand that at least one House take action. A committee veto gives too much authority to a relatively small unrepresentative body. The reality of the legislative veto may well be that on many routine matters there will be a committee veto in fact.[319] But the form of action by the whole body is important. On many routine laws, the committee is also deferred to. The one House resolution allows for the opportunity of action by the entire House. This opportunity sufficiently distinguishes the one House veto from the committee veto.

The use of certain forms of the legislative veto in certain narrow areas has been approved by some opponents of the legislative veto.[320]

[314]Chadha, 634 F.2d at 431–432.

[315]The War Powers Act, 50 U.S.C. § 1541 and the Arms Export Control Act, 22 U.S.C. § 2755(d) are examples of invalid encroachments on clearly presidential prerogatives. *See also* Nixon, PUB. PAPERS 893–895 (1973) (veto message on the War Powers Act).

[316]Cutler, *supra* note 22, at 1410–1411.

[317]*Cf.* Watson, *supra* note 4, at 1071–1078. Allowing one House to block the actions of the other House is said to preserve the principle that there be no substantive change in the law without the consent (or acquiescence) of each House.

[318]Atkins, 556 F.2d at 1080 (Skelton, J. dissenting).

[319]*See, e.g.* 121 CONG. REC. 40,800 (1975).

[320]*See, e.g.*, Watson, *supra* note 4, at 1071–1072; Cutler, *supra* note 22, at 1414; Dixon, *supra* note 22, at 484.

The use of legislative vetos in areas such as governmental reorganization is acceptable, since the organizational structure of government does not affect substantive rights.[321] The form of legislative veto approved is initial presidential submission with one or both Houses required to disapprove the presidential submission to block it from becoming effective.[322] This so-called "reverse legislation" is a reversal of the normal process, since the president acts first but is substantively similar to normal legislation.[323] The legislative veto upheld in *Atkins* was a reverse legislation-type of legislative veto.[324] While this form is acceptable, it does not address itself to the real problem of making agencies accountable.[325] It is therefore inadequate as a solution to the problem of restraining agencies.

There are also a variety of relatively minor problems connected with the effective implementation of the legislative veto. These include a lack of effective scrutiny by Congress, an increased workload making it difficult for Congress to deal with other matters, the possibility of agencies using adjudication to avoid legislative review and the judicial interpretation to be placed on regulations not blocked by Congress. The responsibility for agency action which a legislative veto will impose on Congress will encourage congressional scrutiny. The fear of increased workload causing a congressional backlog has not materialized in the actual exercise of legislative veto responsibility.[326] The agencies can be prevented legislatively from using adjudication to promulgate policies. The courts will insist that a legislative veto is limited to policy approval (as it is or should be) and has no impact on the legality or constitutionality of the regulation or the law.[327]

SUMMARY

The legislative veto is an attempt by Congress to restrain the independent agencies.[328] The congressional action represents a certain disenchantment with independent agencies.[329] Independence from

[321]Dixon, *supra* note 22, at 484.
[322]Watson, *supra* note 4, at 1071–1072.
[323]*Id.*
[324]Atkins, 556 F.2d at 1057, 1070–1071.
[325]Watson, *supra* note 4, at 1081–1082 explicitly rejects this form as inapplicable for congressional review of agencies.
[326]2 SENATE COMM. at 120–122.
[327]The legislative veto of rules is purely a policy control device, Javits, *supra* note 20, at 494–495.
[328]Abourezk, *supra* note 20, at 327; Javits, supra note 20, at 462–465.
[329]Cutler, *supra* note 22, at 1399, 1409.

politics can and has meant independence from popular control.[330] American democratic principles are resolutely based on the belief that power is ultimately derived from the people. The enhanced supervision of agencies by a body that, for all its imperfections, is electorally responsible furthers this principle of accountability. Such accountability is not only constitutionally legitimate, it is sound policy as well.

[330]*Id.* at 1399.

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COMMITTEE PRINT

SERIAL No. 13

SPECIAL REPORT

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

IDENTIFYING

COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS

THE LEGISLATIVE VETO:
Immigration and Naturalization Service v. Chadha and Related Cases

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

30-424 O

WASHINGTON : 1984

FOREWORD

On June 23, 1983, the U.S. Supreme Court issued a landmark decision, *Immigration and Naturalization Service v. Chadha.* At issue was the so-called legislative veto—a device by which Congress reserves unto itself the power to override Executive branch decisions without passing a formal law. In holding the legislative veto unconstitutional, the Court declared that Article I of the Constitution clearly sets forth the process by which Congress may exercise legislative power. The legislative veto, said the Court, simply does not comport with that process.

Currently there are fifty-six legislative vetoes scattered throughout the U.S. Code. These deal with matters ranging from the provision of foreign assistance to countries that violate human rights (the International Development and Food Assistance Act of 1975) to the legitimacy of rules published by the Federal Trade Commission (the Federal Trade Commission Improvements Act of 1980). It is therefore no exaggeration to state that the *Chadha* decision has significantly affected the distribution of powers among the three branches of government.

This special report, which was written and compiled pursuant to the Speaker of the House's directive that the Committee on the Judiciary identify and report on "court proceedings and cases of vital interest to the Congress," traces the history of the *Chadha* case. Included herein are the various briefs, documents, and decisions concerning the litigation, as well as our own synopsis of the case. In addition, this volume contains synopses of several other legislative veto cases, along with all the major judicial decisions rendered in those cases.

It is my belief that the publication of this comprehensive compilation of decisions, pleadings, documents, and synopses will serve to heighten understanding of the Supreme Court's decision and will prove to be an invaluable aid to Congress as it attempts to reexamine its role within the American system of government.

PETER W. RODINO, Jr.,
Chairman, House Committee on the Judiciary.

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legis veto file

After the Congressional Veto:

ASSESSING THE ALTERNATIVES

Robert S. Gilmour
Barbara Hinkson Craig

Abstract *Congressional choice of effective replacements for the recently banned legislative veto will require an accurate understanding of the actual results of the now unconstitutional device. The impact of the veto varied strikingly depending on, among other things, the type and target of the veto and on the principal sites of review in Congress itself. No single mechanism will suffice. Rather a variety of devices are available and under consideration. The underlying question raised by this analysis is which effects of the veto are worth perpetuating in light of past results and stated congressional objectives.*

The U.S. Supreme Court, in its historic *Chadha* decision[1] of June 23, 1983, appeared, in one stroke, to overrule virtually every variety of more than 200 congressional vetoes enacted over the span of 50 years.[2] Statutory provisions requiring the president or his subordinates to submit proposed orders, regulations, and plans to Congress for review and potential veto by majority vote of one or both houses of that body had, in the court's view, impermissibly altered the constitutional process. Once Congress has made the original choice to delegate to the executive, Chief Justice Burger wrote for the majority, it may change the implementation of delegated authority "in only one way; bicameral passage followed by presentment to the President." Lest any doubt remain about the court's meaning, just two weeks later it ruled legislative vetoes unconstitutional in the Natural Gas Policy Act of 1978 and in the Federal Trade Commission Improvements Act of 1980.

"Congressional veto," however, is one phrase for many devices. Applied in different forms to a wide range of policy areas, the congressional veto has produced varied results. If precise replacements are now to be adopted, an assessment of those results is the necessary first step.

Journal of Policy Analysis and Management, Vol. 3, No. 3, 373–392 (1984)

Published by John Wiley & Sons, Inc. CCC 0276-8739/84/020373-20$04.00

A MULTITUDE OF RESULTS

Although Congress has made increasing use of the veto process during the past decade, debate has persisted over its desirability. Congressional proponents assert that the veto returns lawmaking power to "our democratically elected representatives," who thereupon curb the excesses of "lawless" and "overzealous" bureaucrats or cut short the adventures of an "imperial" president. Furthermore, it is said, the legislative veto "opens up" the administrative process and makes it more democratic.

In actual fact, only a small number of executive actions have been overturned by vetoes of one or both houses. Since the first legislative veto provision was adopted in a 1932 executive reorganization act, Congress has approved only 125 resolutions vetoing presidential or agency actions.[3] Of those more than half (66) have been rejections of presidential spending deferrals. Of the remaining 59 vetoes actually exercised, 24 were disapprovals of presidential reorganization plans. In sum, during 50 years of experience there were no vetoes of presidential initiatives in foreign affairs and only 35 vetoes of agency regulations, projects, or decisions. However, the threat of a veto as well as the application of veto reviews by Congress have had a potent influence on policy decisions.

Careful analysis shows that the effect of the congressional veto depends not only on its form and the policy area involved, but also on the intended target of the veto power and on the effective site of review in Congress. Depending upon the intended target of veto review—specified in law as either presidential or agency action—and the subject matter under review, the critical action in a veto review process could involve any of four principal relationships: the president and congressional leadership, often involving many or most members of Congress in open debate; the president or executive office staff and individual standing committees; independent commissions or executive regulatory agencies and congressional leadership as well as many or most members at large; and regulatory agencies and their oversight committees, subcommittees, and staff.

Compelling Consultation

The primary result of congressional vetoes applied directly to the president and his highest advisors has been to compel leveraged and visible consultation with the Congress. Historically, Congress has not played an important role in foreign policymaking. However, throughout the 1970s, as domestic and foreign policy became increasingly entwined, particularly in reaction to the Vietnam war, Congress began to assert its long-neglected authority. In act after act—nearly a dozen in all—the legislative veto became a primary means by which Congress sought to control the power of the president in foreign affairs. And while no presidential initiative has ever been vetoed under these laws, in some cases, such as those involving arms sales, the final policy decisions have been demonstrably altered. In other cases, the veto has had no discernible impact on either the decision-making process or the outcomes. The War Powers Act veto, for example, has proven an

ineffectual check on presidential actions. A brief analysis of the application of foreign policy veto provisions brings to light some of the reasons for these varied results.

Congressional support for a veto provision over arms sales, for instance, came in response to the exponential growth of foreign military sales and the recognition that these arms transfers had become a major instrument of U.S. policy. To redress what many in Congress saw as a serious deficiency in the decision-making process governing arms sales, a formal procedure was devised to promote congressional participation in the deliberations on arms sales. As modified by subsequent amendment and practice, the law now requires the president to report to Congress sales of $14 million or more for single items and $50 million or more for packages. Congress has 30 days to veto such a sale by concurrent resolution. Nevertheless, the president has statutory power to waive this review period by declaring that "an emergency exists which requires the proposed sale in the national security interest of the United States."[4]

As exercised by Congress, the procedure has not been used to thwart arms sales proposed by the president; rather, the threat of a veto has forced the president on several occasions to make proposals more acceptable by adjusting numbers, eliminating components, or attaching stipulations on use of the weapons. The result has been a consultation and negotiations process between the president and Congress.

There have been only five arms sales proposals since 1974 that have become the subjects of debate because of veto threats. In each case the president has been willing to modify his proposal to make it more acceptable, thereby forestalling every veto so far. For example, in 1976 President Ford cut the number of Maverick and Sidewinder missiles to be sold to Saudi Arabia; and in 1978 President Carter provided various assurances to Congress that Saudi fighter aircraft purchased from the U.S. would have limited offensive capabilities and would be stationed out of striking distance of Israel.

All five veto threats concerned nations in or near the Middle East or the Persian Gulf. Four involved a powerful, vocal, and well-organized domestic constituency. Through its American Israel Public Affairs Committee (AIPAC), whose purpose is to "nurture the U.S. alliance with Israel and to prevent alliances with Arab nations from jeopardizing Israel's security," the Israel lobby has been instrumental in focusing congressional attention on these arms sales proposals.[5]

Although these five sales represent billions of dollars, they constitute only a small proportion of the value and number of arms sales proposals submitted to Congress by presidents since 1974. Moreover, the record does not show that Congress has used the veto as a means to exercise sustained oversight. In those instances when Congress has seriously challenged an arms sale proposal, threatening a resolution of disapproval, it has been able to effect significant changes in the president's plans. However, such com-

promise by the president has not resulted when Congress failed to make a convincing show of force. For example, when President Reagan notified Congress of his proposed sale of 40 F-16 warplanes to Pakistan less than a month after a major battle over the Saudi AWACS sale, no resolutions of disapproval were reported, despite the fact that the sale threatened the delicate balance of power between two traditional enemies.[6] Absent a powerful domestic constituency, as in the Israel protection cases, or the high visibility provided by media focus on the issue, Congress was not moved to involve itself significantly in this arms sale proposal. Predictably, the administration was not inclined to negotiate.

Since pressure from the media and powerful constituencies also has an impact on the president, he will often prefer to include Congress in controversial decision-making. Then any political damage resulting from his proposals will be shared. In forgoing the emergency waiver option in the Saudi AWACS sale,[7] for example, Reagan was forced to expend an enormous amount of political influence in bargaining with Congress. When he succeeded in fending off a legislative veto his political credibility was strengthened.

As with arms sales, War Powers legislation consists of three devices to compel presidential consultation with Congress in decision-making: a requirement that the president consult with Congress before introducing armed forces into hostilities; a requirement that the president make a formal report to Congress within 48 hours of the deployment of troops in hostile areas; and a 60-day time limit extendable by 30 days on presidential action without congressional approval. This last stipulation includes a concurrent-resolution veto enabling Congress to terminate presidential use of the armed forces during that period.

Congress has not used its veto power under the War Powers Resolution to stop the presidential use of armed forces or even to compel consultation. Indeed, there is no evidence that the War Powers veto has had any effect whatsoever. Despite opposition by members of Congress, U.S. military advisors have been in El Salvador since March 1981, and Marines have been in Lebanon since August 1982. No member has tried to force withdrawal through the introduction of a veto resolution. In fact, until recent efforts to limit the use of American troops in Lebanon, no withdrawal effort of any sort has made headway in Congress. When an amendment requiring military advisors to depart El Salvador within 30 days after the bill's enactment was defeated (11 to 19) in the House Foreign Affairs Committee, losing members took the issue to court. Dismissing the case, the judge declared that Congress, "must either take action to express its views that the War Powers Resolution is applicable to the situation and that a report is required, or, if it desires immediate withdrawal of forces, pass a concurrent resolution directing removal of the forces. . . ."[8] In effect, the only major impact of the War Powers Act has been to afford congressional leadership and committee members a vehicle for presenting their views to the media.

Assessment of the effects of veto reviews applied to foreign trade and aid legislation is difficult because Congress has attempted few such actions. Of the several efforts made, none has been successful, and there is little evidence that the attempts themselves have prompted presidential consultation with Congress or modification of ultimate decisions. A veto designed to protect industry from injurious imports went unused for two decades until 1978. Then resolutions to override President Carter's denial of protectionist action died in committee.[9]

Protecting Presidential Plans

The basic legislative model for presidential reorganization of government was established in 1949. It authorized "plans" proposed by the chief executive to take effect, subject to a one-house veto. Although reorganization was always justified in part as an effort to achieve savings, realists recognize that primary benefits are managerial and political.

The alteration of prior organizational arrangements threatens the interests of agencies and their congressional overseers, arousing jurisdictional jealousies. If such feelings find expression through the traditional legislative process, the coherence of an organizational plan is likely to be comprised if not destroyed. Thus, delegation of organizing power to the president, subject to the legislative veto, offered a way of preserving the integrity of a total plan in the interest of worthwhile, if controversial, change. If protest is raised to the plan, the president can, within a stipulated time, appeal directly to the full membership of either house for support of the total package. He can bypass both the leadership and the legislative committee seniors if they are unsympathetic.[10]

The integrity of presidential reorganization plans was not preserved without complications. Presented with a nonamendable plan, Congress was faced with an all-or-nothing choice so that entire programs were sometimes defeated. For example, when Congress turned down a new department of urban affairs in 1962, it was widely regarded as a debilitating blow to President Kennedy, casting a pall over prospects for his entire legislative program. In fact, nearly a fifth of all presidential reorganization plans submitted between 1949 and 1980 were vetoed. Reorganization by presidential plan presents difficulties from a congressional perspective as well. Time limitations constrain investigation of the plan's merits and defects, and coveted agency–committee relationships may be imperiled.

With passage of reorganization acts subsequent to the prototypical 1949 act, there has been "a gradual, yet persistent, erosion of the President's reorganization authority."[11] His flexibility has been curtailed in establishing or abolishing departments or independent agencies, in dealing with more than "one logically consistent subject matter," and in eliminating enforcement functions or agency programs. Agencies such as the Legal Services Corporation and the Synthetic Fuels Corporation have been exempted altogether from presidential organization authority.

The presidential plan approach has also been applied to the development of a national gasoline rationing program. In 1979, just as the gas lines began forming, President Carter submitted to Congress a contingency rationing plan in compliance with the Energy Policy and Conservation Act of 1975. The entire plan fell to a veto widely described as "a severe political setback" to the president.[12] Carter then called upon the legislative branch to develop its own proposals. Instead, Congress passed a law that would make future vetoes of rationing plans unlikely. The Emergency Energy Conservation Act of 1979 altered the previous procedure so that presidential rationing plans could be disapproved only by a joint resolution and within 30 days of submission. Under this authority, a revision of Carter's 1979 plan was adopted on July 30, 1980. Still, activation of the plan is predicated on a 20% shortfall in fuels and is subject to a one-house resolution of disapproval.

Influencing Management

During the 1976 presidential campaign, candidate Carter promised a drastic reorganization of the federal bureaucracy. However, the 1977 Act passed by Congress substantially diminished presidential reorganizing power that had been routinely granted in the past. By permitting the president to amend organization plans after submission to Congress, the 1977 Act in effect precluded passage of a total, coherent plan. With the threat of a legislative veto in the near background, "Congress may now recommend amendments requested by interest groups, and the president may be obliged to submit them as a price for passage. The amendment option itself is now one of the bargaining chips in the negotiations between Congress and the President."[13]

In fact, five of the ten reorganization plans submitted by Carter were amended. Because of other statutory limitations on presidential reorganization by plan, the most significant organizing efforts of the Carter administration—creation of the Departments of Energy and Education and (for the most part) the reorganized civil service system—were accomplished by the ordinary legislative process.

A more telling exercise of congressional veto control over presidential management has occurred in the budget process. Impoundment provisions of the Budget Reform Act of 1974 oblige the president to submit proposals for "rescissions," the reduction or repeal of appropriations items, which will take effect only upon passage of a joint resolution of approval. Proposed rescissions have no effect unless Congress completes affirmative action within a 45-day period. However, if a recommendation to "defer" appropriated expenditures is made, it will take effect automatically unless vetoed by either house.

For the most part, deferrals represent "housekeeping" proposals, short-term economies in ongoing programs; often construction projects with long lead times. Less than 10% of all deferrals from 1975 through 1979 have been refused. Of those refused over 90% involved highway funding,[14] an issue salient for virtually every district.

Facilitating Congressional Decision

Perhaps the most significant use of the legislative veto in recent years has been to expedite congressional agreement—or at least the appearance of agreement—on important and highly visible policy issues where no genuine consensus exists. In the midst of crisis or at the crest of a groundswell of popular sentiment, the legislative veto has offered a flexible means to shortcut the laborious process of data gathering and assessment, and to symbolize congressional decisiveness in the absence of adequate knowledge or resolve. Put in its best light, in addition to assisting Congress in adapting to the "strains" and "challenges of modern government," the veto "provides a means of securing majority support in highly divisive and politicized policy areas without imposing unbearable political costs on individual members or ceding ultimate control."[15] From a less flattering perspective, the veto allows individual voting members to clasp lofty ideals that disguise deep divisions in Congress and to escape responsibility for the specific consequences of the embrace.

The Energy Security Act of 1980 is a prime example of the legislative veto used to delegate policymaking to an agency when Congress itself lacked adequate technical knowledge. Enacted just after the second "oil shock," and during an intense presidential campaign, the act symbolized a national commitment to energy self-sufficiency. Long on policy mandates, procedural restrictions, and administrative details, the legislation is short and vague on substantive standards and specifics. These are left to an administratively cumbersome, off-budget enterprise, the U.S. Synthetic Fuels Corporation. Although responsibility for the substance of alternative energy policy has been delegated to the corporation, its programs, projects, and regulations are contingent upon a greater number and variety of constitutional and unconstitutional veto devices than those in any other statute. Clearly, many critical aspects of synthetic fuel development, such as the cost and location of specific types of projects, as well as the question of congressional commitment to the enterprise, were not resolved but put off to another day.

Similarly there is little doubt that the veto played a decisive role in allowing Congress to reach a semblance of agreement on legislation governing the authority of the Federal Trade Commission (FTC). By accepting a two-house, 90-day legislative veto in May 1980, FTC supporters were able to ensure a compromise allowing the commission to continue its rulemaking in several areas that had been expressly eliminated in either the House or Senate versions of authorization bills. For example, the House bill contained restrictions preventing the FTC from regulating the funeral home industry or from investigating the insurance industry for the purpose of developing regulations. The Senate bill contained a similar restriction on FTC action aimed at the insurance industry; did not forbid regulation of the funeral home industry; but targeted used-car sales as specifically off limits for FTC rulemaking activities. The legislative veto provided Congress a means to avoid the controversial decision on what the FTC should regulate.

When, in the fall of 1981, the FTC issued a final rule regulating the used-car industry, it was decisively vetoed in both houses.

The Natural Gas Policy Act of 1978 offers an example of the way in which the veto was used both to mask political disagreement and to enable legislative action well before relevant economic data could be evaluated. Initially, congressional debate on the subject centered on the fundamental conflict between the need to deregulate prices of natural gas as a means to stimulate new production and the limited ability of consumers to pay significantly higher prices for heat. In order to protect consumers without inhibiting the development of new supplies, an incremental pricing mechanism was proposed that would require industrial consumers to bear the cost of the more expensive new gas until the price of gas was comparable to that of coal and oil. However, incremental pricing at the time was merely a theoretical idea and the legislative veto was a way to circumvent the technological complexities of the concept. It satisfied members who insisted on consumer protection as a prerequisite for supporting the phased decontrol of gas prices, yet it allowed Congress to postpone a thorough delineation of incremental pricing.[16]

The monumental task of calibrating incremental pricing was awarded to the Federal Energy Regulatory Commission (FERC), a body whose proposals were ultimately vetoed by the House of Representatives. Ironically, after having worked for over a year on the rules, FERC commissioners appeared to welcome the outcome.[17] Consumer groups at once challenged the decision and underlying procedure in federal court.

Ensuring Committee Influence

When congressional vetoes have been applied generically to the rulemaking and planning of an agency and when the policies involved have not attracted widespread attention, the presence of the veto power has almost uniformly enhanced the influence of committee and subcommittee members and their staffs. To be sure, even when such veto power did not exist, members and staff have always been able to participate in agency rulemaking and there is little question that their views have been given due deference. Yet Congress has typically been inactive in agency rulemaking. The legislative veto structures this involvement, however, setting definite committee timetables for regulatory review and putting other participants on notice of a new forum. So too with veto reviews of agency plans for programs and projects. Oversight that was once optional and sporadic has been scheduled by statute.

Particularly where agencies are responsible for the promulgation of numerous grant-in-aid or subsidy regulations, operating characteristically under tight deadlines, the legislative veto confers powerful leverage to congressional oversight committees. To avoid protracted, often debilitating, battles involving hearings and floor votes brought on by a full veto review process, regulatory agencies are inclined to follow committee guidance.

Committee–agency consultation and negotiation over the development of regulations is nowhere more evident than between the House Committee on Education and Labor and the Department of Education. Bilateral relations between the two bodies have been institutionalized as a result of a series of vetoes by the Education and Labor committee that sent a powerful message to the Department of Education. Congressional concerns are now incorporated through meetings between a representative of the Department of Education and committee staff after enactment of any major legislation affecting the department. Information gathered in this process is integrated into rulemaking at the earliest stages and is used as a check to ensure that the proposed and final regulations are acceptable to the committee.[18]

Another vivid illustration of committee leverage conferred by the veto is reflected in the action of the committees that oversee the Federal Election Commission (FEC). In the aftermath of the Watergate scandal, the FEC was created in 1974 to develop appropriate regulations governing campaign financing. In one instance, after the FEC had failed to follow Senate committee guidance, the committee recommended disapproval and a veto followed. After subsequent FEC hearings and meetings with House and Senate staff, committee and staff recommendations were adopted in the regulation.[19]

Veto reviews of agency planning have similar effects. The legislative veto provision in the Resource Planning Act of 1974 was used, for example, to further cement ties between the U.S. Forest Service and the House and Senate agricultural committees. In an era of "belt tightening," one veteran staffer observed, "the agencies have increasingly turned to the committees and subcommittees in an attempt to pry more dollars out of OMB" (the Office of Management and Budget).[20] In this instance, closer relations were sought both by the committees and by the agency.[21]

Legislative veto reviews at the committee and subcommittee levels also provide opportunities for members to negotiate regulatory changes favoring constituent interests. Here universalized goals may be shaped to reflect more parochial concerns. Such was the case when the Office of Education liberalized the eligibility rules for the granting of financial aid under a 1972 program. Constituent pressure on oversight committee members had prompted a veto threat of the agency's proposed regulations. Agreement was finally reached because all parties understood that the entire program was in jeopardy.[22]

The Results Summarized

In sum, the impact of legislative vetoes has varied substantially, not only with the institutional target of review (the president or an agency) and with the congressional site of review (plenary session and leadership, committee, or subcommittee), but also with the specific variety of veto applied to any given situation. The structure of the veto device, as with other structural arrangements, is not unimportant. The initiative of a presidential reor-

ganization plan that will take effect unless both houses of Congress vote it down is more powerful than that of a plan that may be defeated by the majority of only one house. A change in rules to make such plans amendable during the committee review period blunts presidential initiative still further and affords greater influence to the reviewing committees.

Congressional willingness to exercise its enacted veto review power is also critically relevant to the impact of legislative veto provisions. Even when a veto effort has failed, a determined congressional veto review can influence policy outcomes, as in the case of several arms sales proposals. When Congress has not demonstrated a strong intention to use its veto power, as in most foreign trade and war powers situations, policies have not been affected. Where agency-level action is the target of a veto threat, however, far less congressional investment is required to produce an effect on policy decisions. Yet, even at this level committee members and staff must exhibit some determination to oversee agency actions if they are to have influence.

In addition, legislative vetoes may be understood to have different effects depending upon the situations in which they are applied. The insertion of legislative vetoes, of whatever sort, as a check on congressional delegations in highly visible policy areas where technical knowledge is inadequate and political divisions run deep yields far different results than the application of vetoes to less highly charged issues. In the one the appearance of decision may be assured and the underlying controversy postponed. In the other subcommittee oversight of and direct involvement in agency decisions may be markedly enhanced. Clearly, no single substitute will now take the place of the legislative vetoes apparently lost to the Supreme Court's review.

ASSESSING THE ALTERNATIVES

The Proposed Substitutes

Proposed substitutes for unconstitutional varieties of the legislative veto are relatively numerous. Although some analysts have suggested such measures as a constitutional amendment to undo the *Chadha* decision, most consideration is being given to legislative alternatives. Among these is the *report-and-wait* device which requires that proposed regulations or executive actions be reported to Congress for a specified period prior to implementation. The interval period offers time for Congress to revoke or alter the proposals through the normal legislative process. Committees may be granted authority to waive or extend the waiting period, a prerogative which could strengthen their negotiating position.

Another alternative to the banned measures is a *joint resolution of disapproval,* which requires a majority vote of both houses and presentment to the president in order to negate executive branch or independent agency proposals. By constitutional design, presidential rejection of this "constitutional veto" would be returned to Congress where two-thirds majorities could carry the measure, nonetheless. This raises the unlikely but cumbersome prospect of a veto of the veto of a veto. However, presidential vetoes of joint resolutions of disapproval would be unlikely and, as additional

protection from presidential rejection, such disapprovals could be attached as amendments to important authorization or appropriation bills.

The *joint resolution of approval* is yet another device that could promote congressional influence in executive and agency policymaking. Executive proposals would require affirmative action by both houses of Congress and presentment to the president before they could be implemented. When applied to the regulatory process, "final rules" promulgated by the agencies could be treated as mere proposals for subsequent congressional action, enhanced, perhaps, by procedures that would command speedy congressional attention.

A *nonbinding two-house resolution* expressing the majority sentiment of Congress could serve to encourage presidential deference to congressional views. Such resolutions are unlikely to be ignored, either by president or press. In order that comity might prevail between the branches, and in view of other policy objectives, presidential accession to congressional will expressed in this manner is more probable than commonly supposed.

With regard to agency activities, certain *informal procedures* based on the established relationships with oversight committees would probably be perpetuated. The congressional practice of requiring agencies to obtain prior approval from their oversight committees for certain actions is widespread. Though sometimes specified in statutes, committee reports, or hearings, these directives are often based on informal "gentlemen's agreements" among the agencies and committees involved. Deference to committee veto power is so ingrained in agency behavior that it is likely to continue, especially where funding is involved and the committees concerned are appropriations subcommittees. Faced with the annual necessity of securing appropriations for the agency from the same subcommittees, an agency is unlikely to abandon a prior approval mechanism regardless of its questionable validity.

In the House of Representatives *rules changes* might be adopted to permit consideration of "no appropriations" riders barring agency spending to enforce a particular regulation under review. A variation of this procedure would permit amendments to limit spending only after an agency's authorizing committee had voted to disapprove an agency action or regulation.

Some analysts have also suggested the creation of *special select committees* to review proposed presidential actions in foreign or military affairs or to coordinate agency regulations. Such committees could facilitate presidential–congressional communications and regulatory oversight divorced from the more isolated and parochial subcommittee jurisdictions.

Finally, Congress always has the option of withholding delegations of legislative power until it is able to do so with precision. It may also extend the use of manifold oversight tools already available and widely used. These include statutory techniques such as removing express areas from agency regulatory authority,

establishing moratoriums on rulemaking activities, or transferring regulatory jurisdictions from one agency to another. They also include nonstatutory techniques such as the initiation of investigations or the assertion of directives in committee reports and hearings.[23]

Compelling Consultation

If in attaching veto provisions to foreign affairs legislation Congress meant to insure its regular involvement in a coherent and deliberative review of foreign policy decisions, then its goal has not been realized. Replacement of these veto devices with similar, constitutionally acceptable alternatives is equally unlikely to achieve such a goal. The legislative vetoes have, however, afforded Congress negotiating power with the executive on specific issues, and Congress can reproduce this leverage in similar situations.

With regard to the two-house arms sales veto, for example, Congress successfully used the device to modify some arms sales decisions while at the same time members avoided other arms sales controversies when they so desired. Furthermore, the veto provided national media opportunities for congressional leaders and individual members. Replacing this veto with either joint resolutions of disapproval or nonbinding concurrent resolutions might appear to weaken congressional ability to achieve even these limited goals. After all, a joint resolution requires the president's signature or a two-thirds override vote to be binding and a nonbinding resolution is just what the name implies—advice, not direction. However, the manner in which Congress actually used its arms sales veto power mitigates these concerns. Congress never exercised the concurrent veto to reject an arms sale and in those instances when the veto was used to initiate negotiations, the president would very likely have made concessions anyway, given the determined attitude of Congress.

A president's willingness to involve Congress in specific arms sales proposals seems to stem as much from his need to gain acceptance for controversial sales as from the threat of a legislative veto. Since there is mutual advantage to the negotiations, Congress is in a strong position to bargain for a gentlemen's agreement obliging the president to debate the issues and to respect a concurrent resolution of disapproval. A relationship built on such cooperation and mutual advantage is far more likely to produce positive results than the adversarial relationship inherent in the design of the veto process.

If, however, Congress is now determined to develop a system of regularized participation in the arms sales program it will need to devise a comprehensive procedure for scheduling arms sales discussions on the congressional agenda and for providing Congress with current and accurate information on the sales under consideration. Moreover, members require such information when arms sales proposals are tentative, not after an American offer has been finalized.[24] Setting the agenda could be achieved through imposition of a joint resolution of approval, but assuring the timely flow of arms sales information is a far more compli-

cated objective. It entails an enormous increase in the workload of Congress and it raises questions about the desirability of such deep congressional involvement in sensitive foreign policy decisions.

In the area of foreign trade and aid, Congress has, over the past decade, gradually resorted to other means than the legislative veto to control presidential authority. These measures have included congressional approval of presidential proposals before they can become effective and formal presidential certification of subject–nation compliance with detailed conditions. For example, any agreements permitting nontariff trade barriers negotiated by the president with foreign nations under provisions of the Trade Act of 1974 require ratification by passage of a statute (no amendments permitted). The Trade Act also requires the president to certify a country's full compliance with freedom-of-emigration requirements as a condition of granting nondiscriminatory treatment and other trade benefits. Similarly, Congress has conditioned the release of foreign aid funds upon specific accomplishments of the nations in question and has placed ceilings on total aid by country and by intended use. Judging from the past usage of the veto provisions in foreign trade and aid cases, a joint resolution of disapproval or a nonbinding concurrent resolution should serve adequately as substitutes. Either would allow Congress to object visibly to presidential actions and either would also enable Congress to choose only those cases in which it wished to be involved.

Congress could resort to a joint resolution of approval if it wanted to be assured of ultimate control over trade and aid decisions. Recently, the House Foreign Affairs Committee chose this route. Moved by the outcries of agricultural interests suffering severe financial burdens as the result of President Carter's grain embargo against the Soviets, the committee ensured that similar future actions could not be taken without positive congressional support. The significant flaw in such an approach is that it reduces presidential flexibility in difficult foreign policy situations. Given the limited variety of nonmilitary options available to a president, as well as the reluctance of Congress to impose burdens on vocal domestic constituencies, the wisdom of any widespread use of this alternative is open to serious question.

Since the veto provision in the War Powers Resolution has never been used by Congress, there seems little reason to replace it. Nevertheless, the Senate has already moved to amend the resolution so that Congress can force immediate withdrawal of troops from hostilities by passage of a joint resolution of disapproval. This substitute will probably not alter Congress' ability to influence troop deployment. In fact, legislators have acted decisively only in response to strong public pressure, and they are very unlikely to move against the commander-in-chief unless spurred to do so by overwhelming popular sentiment. Similarly, a president is unlikely to veto majority bicameral action that is firmly backed by the public. There are, however, sound reasons for Congress to

strengthen its involvement in decisions to use the armed forces. At a minimum Congress could establish a body within its own membership to receive and evaluate the sensitive information necessary to forming judgments about military issues.[25]

Protecting Presidential Plans

The only major presidential planning authority subject to a congressional veto, and still in effect, concerns the imposition of a contingency plan for gasoline rationing. The one-house resolution of disapproval involved here, as elsewhere, is not easily replaced. There is no precise substitute. However, substitution of a joint resolution of approval would protect the prerogatives of each chamber while making difficult the imposition of so drastic a measure as nationwide gasoline rationing. The likelihood of a presidential veto would, of course, be nil.

Any revival of now-lapsed presidential authority to reorganize the executive branch would also require a substitution for the one-house congressional veto check. Legislation concerning presidential reorganization plans could require an affirmative joint resolution of approval for adoption. In this way, the particular concerns of each house would be protected, but the president would find himself in the difficult position of having to bargain for support from both houses in a short time period. A less demanding approach would permit presidential reorganization plans to take effect subject to a joint resolution of disapproval. Congress would ensure its role by requiring annual reauthorization of presidential authority in this regard, by exempting certain agencies from reorganization plans, and by proscribing the creation or dissolution of departments.

Influencing Management

Loss of the one-house veto provision to review and occasionally defeat the president's proposals to defer congressional appropriations has been regarded as a serious setback for legislative control of financial management. The effect of the one-house veto held over presidential deferrals is not only difficult to reproduce, but complete legislation required in response to the dozens of deferral proposals submitted by the chief executive each session is onerous and unduly time consuming. Yet virtually everyone recognizes the need for managerial flexibility to create spending reserves and to withhold disbursements of funds that could not or should not reasonably be spent.

Perhaps the simplest solution is not to replace the deferral veto at all. Delaying expenditures of appropriated funds was an authorized practice for many years—with no veto attached. Until abused during the Nixon administration, the system had worked well. In addition, Congress has recently adopted a useful and constitutional alternative to the deferral veto—the inclusion of deferral disapprovals in regular and supplemental appropriations bills. These bills have, of course, gone to the president for his signature or rejection.[26] However, the problem of extended delays

in financial oversight via complete legislation remains. Perhaps the most expeditious means of accommodating both Congress and the chief executive in this matter is an informal agreement between the parties that a nonbinding, single-house resolution to disapprove deferrals would be honored.

Facilitating Congressional Decision

Some members of Congress have been reluctant to delegate broad powers to agencies when the veto is no longer available to serve as a constraint on agency actions. For example, after a House committee reported the Consumer Product Safety Commission (CPSC) authorization of 1983, including a congressional veto just before the *Chadha* decision, one of the most consistent proponents of the veto suggested: "if that decision had come down prior to marking up this bill, the . . . committee would have looked very closely at the delegations of authority given to the Consumer Products Safety Commission to make a determination as to whether or not you wanted that broad delegation to continue without the legislative veto."[27]

Nonetheless, a functional equivalent to the now unconstitutional varieties can be found in the joint resolution of disapproval. Where appropriate, the threat of a presidential veto may be minimized by attaching an amendment disapproving a specific agency action to "must" legislation or by substituting a nonbinding concurrent resolution combined with the addition of a "no appropriations" rider to pending appropriations legislation. These procedures offer no guarantee that policy will not be settled at the committee or subcommittee level.

A joint resolution of approval, on the other hand, would necessitate plenary action by both chambers. The danger of widespread use of this approach, of course, is that the congressional agenda would be inundated with trivial matters, scheduled by outsiders.

The difficulty of selecting among these alternatives is also illustrated by House floor action on the recent CPSC bill. In the absence of either time or inclination to abandon the symbol of broad-gauge consumer protection in favor of specific statutory targets and standards, the House attached the two veto substitutes to the bill. The selection of which veto device should appear in the final act was left to the conference committee.

No one knows just which consumer products problems (or which issues in other areas of broadly delegated legislative power) will attract regulatory attention in the years ahead. It seems nonetheless certain that initially acceptable symbols will be reduced to narrowly defined and hotly contested issues once regulatory policies become more pointed and the specific costs and impacts of the regulations are known. Difficult choices will remain. If those choices are dependent upon joint resolutions of approval, they will ultimately be made in the voting body of Congress for submission to the president. Regulatory agencies operating under such constraints will be recast, in part, as "study commissions" which will have far greater ability to set the congressional agenda. Such

agencies will also become primary initiators of legislation for which Congress will have ultimate and inescapable responsibility. Congress, for its part, particularly if such joint resolutions are made amendable, will regain some measure of its original role as national legislator.

If, instead, such choices are made contingent upon joint resolutions of disapproval, only highly visible proposals will be likely to involve the full voting membership of Congress. Less visible regulations would probably never get beyond the subcommittee level, if indeed they were acted upon at all. As was pointed out during the recent debate over CPSC veto provisions, "The problem is that the resolution of disapproval which a Member of this body might introduce would be referred to the subcommittee . . . , and there is a strong likelihood that if the [chairman] liked the rule, and did not like the resolution of disapproval, this House would never even have the opportunity of expressing itself on the matter."[28]

Use of congressional veto devices to synthesize legislative majorities where there are known to be deep underlying policy divisions does not avoid the "strains" of decision-making; it merely postpones them, possibly at some considerable cost to Congress. So long as significant controversy remains, it matters little what form of veto mechanism is applied—affirmative or negative, constitutional or unconstitutional. Moreover, the timing of each returning conflict and the terms of renewed debate are determined by the delegated agency, not by Congress. Parties who lose in veto reviews simply take their appeals elsewhere: to the appropriations process; to the courts; to the White House; or to the press.

The substantially weakened FTC used-car rule, for example, could hardly be said to create an onerous burden for dealers. They had merely to list major *known* defects in the used cars they offered for sale. Under terms of the regulation, there was no inspection requirement, and dealers could disclaim liability for any *unknown* defects. In these circumstances, the particular window-sticker lists required could hardly be acclaimed a great victory for car buyers either. Nonetheless, both dealers and consumer advocates acted as if sizable stakes were at issue. After sustaining an overwhelming veto favoring the dealers, consumer groups immediately appealed to the judiciary and to the public. They won at law, and Congress lost decisively in the communications media. Newspapers and television stations headlined a Congress that had "knuckled under" to powerful dealership interests. Long and prominently featured lists correlated campaign contributions of auto dealer political action committees with member votes on the veto. Arguably, it would have been much more straightforward and far less costly for Congress to have set its own targets for FTC regulation in the first place. Shortly thereafter, when the FTC submitted its regulations on funeral homes and children's television advertising, Congress evidenced little interest in a repeat performance. The aftermath of the FTC veto implies the common result that as public interest or, for that matter, generalized

congressional interest in an issue abates, plenary oversight of new regulations reverts to committee.

Ensuring Committee Influence

A report-and-wait strategy can serve much the same function as a veto with regard to oversight of agency rulemaking or planning. Agencies have commonly responded to committee objections by revising their proposals in accord with the wishes of their congressional overseers.[29] Nonetheless, the joint resolution of disapproval is actually the most precise replacement for a congressional veto intended to enhance committee influence over established agencies.

Two examples from the Department of Housing and Urban Development make it clear that a potential joint resolution of disapproval may offer committee leverage over agency rulemaking that is just as powerful as the veto devices now constitutionally prohibited. As the result of an intense lobbying effort by representatives of the masonry industry who were resisting new construction standards, a resolution of disapproval was introduced in the House that triggered a 90-day waiting period as required by the Housing and Community Development Amendments of 1978. This and subsequent maneuvers made it possible for masonry interests to escape imposition of the new standards for two building seasons before the rule could be implemented. About the same time, HUD issued its fair housing rule to comply with equal opportunity requirements. A resolution of disapproval was used to insure an airing of constituent concern that preferences for local residents would not be honored in HUD-subsidized "Section 8" housing. Even though the regulation did nothing to jeopardize the concept of "local preference" in admissions to the program, HUD withdrew the fair housing rule in order to get on with the bulk of its regulatory program. It was not reintroduced.[30]

At first glance the veto may seem to endow committees with power unencumbered by responsibility. While the agencies appear to bear responsibility for the development of policies and programs, congressional committees wield authority over implementation. Ultimately, at least in a legal sense, Congress cannot so easily escape its responsibility. If agencies are deflected from their statutory mandates by committee negotiations, the responsibility for such alterations will be deferred to upon judicial review. The tradeoff for such a process is to render impotent agency decision-making requirements based upon fairness, openness, reasoned decision, and substantial evidence, requirements that have been developed by the judiciary, and by Congress, over a number of years.[31]

Should Congress become dissatisfied with the devolution of regulatory policymaking to the secrecy of the committee anteroom environments, resurrection of a "constitutionalized" veto will not correct the situation. Here the special select committee approach to centralized congressional review of proposed agency regulations holds far greater promise for alerting Congress to regulatory duplication and overlap and to *ultra vires* bureaucratic acts.[32] In

addition, such a select committee, if properly staffed, could offer a counterweight to the centralized and powerful regulatory review program undertaken by the Reagan administration's Task Force on Regulatory Relief and the Office of Management and Budget.[33]

CONCLUSION

The congressional veto, in the various forms and contexts of its application, has had different results both for policymaking and for policy. Curiously, the veto has accomplished few if any of the goals promoted in the slogans of its sponsors. In part it is simply another device for traditional administrative oversight; yet it has also been a powerful means to facilitate some manner of congressional decision and delegation. Functional replacements for the abolished vetoes will likely be varied as well. Being "the first one out of the bag"[34] with a generic substitute for vetoes lost in the *Chadha* decision may be good politics but mistaken policy. Clearly the veto's multiple effects argue against application of a generic veto of any sort. The adoption of a required joint resolution of approval, for example, might be a useful device to postpone congressional decision on the specifics of particular programs. But applied to prolific regulation writers, such as the Department of Education, EPA, and HUD, Congress would be inundated by the required affirmative passage of voluminous and highly detailed legislation. By the same token, generic application of a joint resolution of disapproval not only fails to protect the interests of any one chamber of the Congress upon review but it also encourages the tendency to allow critical decisions to gravitate to committee or subcommittee without plenary review by either chamber. Furthermore, since legislative vetoes applied to presidential war powers and foreign aid yielded insignificant results, constitutional replacements for them are unnecessary. The need to address other congressional concerns—adequate presidential consultation and communication—seems far more pressing.

ROBERT S. GILMOUR is professor of political science at the University of Connecticut and a member of the Vermont bar.

BARBARA HINKSON CRAIG is assistant professor of government at Wesleyan University and author of The Legislative Veto: Congressional Control of Regulation.

NOTES

1. *Immigration and Naturalization Service v. Chadha, et al.* (80-1832, 80-2170, 80-2171—Dissent), _____U.S_____ (June 23, 1983).
2. For a complete summary of all legislative veto provisions adopted since the first in 1932, see: Norton, Clark F., *Congressional Review, Deferral and Disapproval of Executive Actions: A Summary and an Inventory of Statutory Authority*, Report 76-88G; *1976–1977 Congressional Acts Authorizing Prior Review, Approval or Disapproval of Proposed Executive Actions*, Report 78-117 (Gov.); *Congressional Veto Pro-*

visions and Amendments: 96th Congress, Issue Brief 79044; *Congressional Veto Legislation: 97th Congress,* Issue Brief 11381138 (Washington, DC: Library of Congress, Congressional Research Service, 1976, 1979, 1981, 1983).

3. Figures on resolutions of disapproval overturning presidential or regulatory actions are drawn from Cohen, Richard E., "Life Without the Legislative Veto—Will Congress Ever Learn to Like It?" *National Journal* (July 2, 1983): 1379; and Rothman, Robert, "Congress' Long Conflict with the President Led to the 1974 Impoundment Control Law," *Congressional Quarterly* (July 2, 1983): 1333.
4. Arms Export Control Act, 22 U.S.C. 2776.
5. See *Congressional Quarterly* (August 22, 1981): 1524.
6. "Sale of F-16s to Pakistan Approved in Spite of Questions in Congress," *Congressional Quarterly* (December 5, 1981): 2413.
7. See Whittle, Richard, "President Can Waive Arms Veto," *Congressional Quarterly* (October 17, 1981): 2008.
8. *Crockett, et al. v. Reagan,* 558 F. Supp. 893 (1982): 899. The case was brought by 29 congressmen and senators. Twenty-eight other members of the House and Senate were granted intervener status and filed an *amicus curiae* brief in opposition to the plaintiffs' case.
9. In this case, involving industrial fasteners, the resolution of disapproval could have been reported unfavorably by the Ways and Means Committee, to be decided by the full House. Instead, the Carter administration worked out a compromise with the committee, which resulted in a new investigation of import relief. Subsequently, some relief was granted. What role the veto effort played in this remains unclear. Pregelj, Valdimer N., "Legislative Veto or Positive Approval of Executive Action Under the Trade Act of 1974 and Related Legislation," in Congressional Research Service, *Studies on the Legislative Veto,* pp. 719–720.
10. Mansfield, Harvey C., "Federal Executive Reorganization: Thirty Years of Experience," *Public Administration Review, 29* (July–August 1969): 341.
11. Fisher, Louis, and Moe, Ronald C., "Presidential Reorganization Authority: Is It Worth The Cost?" *Political Science Quarterly, 96* (Summer 1981): 314.
12. Quoted in Davis, David H., "Legislative Vetoes in Energy Policy," in Congressional Research Service, *Studies on the Legislative Veto,* p. 108.
13. Fisher and Moe, p. 312.
14. Schick, Allen, *Congress and Money: Budgeting, Spending and Taxing* (Washington, DC: The Urban Institute, 1980), pp. 401–412.
15. Cooper, Joseph, and Hurley, Patricia A., "The Legislative Veto: A Policy Analysis," *Congress and the Presidency, 10* (Spring 1983): 16–17.
16. Craig, Barbara Hinkson, *The Legislative Veto: Congressional Control of Regulation* (Boulder, CO: Westview Press, 1983), pp. 103–110.
17. See U.S. House of Representatives, Subcommittee on Energy and Power of the Committee on Interstate and Foreign Commerce, *Hearing on the Phase II Incremental Pricing of Natural Gas,* 96th Cong., 2d Sess., April 3 and May 6, 1980.
18. U.S. Department of Education, "Department of Education Regulation Process Memorandum," internal memorandum for Deputy General Counsel for Regulation and Legislation Stewart A. Baker, September 25, 1980, p. 4; see Craig, *The Legislative Veto* . . . , pp. 67–97.
19. For a more complete account of this and related FEC cases, see Bruff, Harold H., and Gellhorn, Ernest, "Congressional Control of Admin-

istrative Regulation: A Study of Legislative Vetoes," *Harvard Law Review, 90* (May 1977): 1403–1409.

20. Interview with U.S. Senate Committee on Agriculture and Forestry staff, Washington, DC, July 13, 1979.
21. In addition to a concerted House and Senate campaign to pass the act, the Forest Service was a consistent lobbyist on behalf of resource planning. Earlier long-range planning efforts had been torpedoed by OMB, but the disarray of the late days of the Nixon administration made possible the passage of the Resource Planning Act with legislative veto intact. Although OMB "violently opposed" the bill and urged newly installed President Gerald Ford to exercise his own veto power, in the particular circumstances of 1974, he declined to do so. Interviews with U.S. Forest Service senior staff, Washington, DC, July 12, 1979.
22. Bruff and Gellhorn, p. 1384.
23. See Kaiser, Frederick M., "Congressional Action to Overturn Agency Rules," *Administrative Law Review, 32* (1980): 667.
24. Congress has already moved in this direction to the extent of requiring the president to provide it with quarterly and annual reports projecting potential arms sales thought "most likely to result in the issuance of a letter of offer" (Pregelj, pp. 721–726).
25. See Craig, Barbara Hinkson, "The Power to Make War: Congress' Search for an Effective Role," *Journal of Policy Analysis and Management, 1* (Fall 1982): 325–328.
26. See Fisher, Louis, "*Chadha's* Impact on the Budget Process," *Congressional Research Service Review* (Fall 1983): 12.
27. Remarks of Representative Elliott Levitas, (D-GA), *Congressional Record*, 98th Cong., 2d Sess., 1983, 129, p. H4474.
28. *Ibid.*, p. H 4772.
29. Gilmour, Robert S., "The Congressional Veto: Shifting the Balance of Administrative Control," *Journal of Policy Analysis and Management, 2* (Fall 1982): 13; Harris, Joseph P., *Congressional Control of Administration* (Garden City, NY: Doubleday and Co., 1964), pp. 258–259.
30. Craig, *The Legislative Veto . . .* , pp. 45–66; "The Congressional Veto and Rulemaking," *Public Administration Quarterly, 7* (1983): 24.
31. Gilmour, pp. 20–22.
32. See U.S. House of Representatives, Committee on Rules, *Recommendations on Establishment of Procedures for Congressional Review of Agency Rules*, 96th Cong., 2d Sess., 1980 (Committee Print).
33. See Viscusi, W. Kip, "Presidential Oversight: Controlling the Regulators," *Journal of Policy Analysis and Management, 2*(2) (Winter 1983): 157–173; Gilmour, Robert S., "Presidential Clearance of Regulation," a paper presented at the National Conference of the American Society for Public Administration, New York, April 17, 1983.
34. Statement of Representative Elliott Levitas, quoted in Pressman, Steven, "Congress Considers Choices in Legislative Veto Aftermath," *Congressional Quarterly* (July 2, 1983): 1327.

THE WHITE HOUSE

WASHINGTON

May 14, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft DOJ Report on S.J. Res. 135, "Proposing an Amendment to the Constitution of the United States for the Establishment of a Legislative Veto"

OMB has asked for our views by close of business May 15 on a draft Department of Justice report opposing S.J. Res. 135, a proposed constitutional amendment to overturn the Chadha decision. The report notes that the Chadha decision was based on constitutional provisions reflecting the Framers' concern with separation of powers. It was not the result of technicalities that need to be corrected but rather a corollary of the basic structure of our Government.

Chadha struck down legislative vetoes because they contravened the bicameralism requirement and the presentment clause. As the Justice report notes, the bicameralism requirement was consciously devised to provide a check to flawed legislation that might pass one House. By the same token, the presentment clause was added to the Constitution to provide a check against legislative encroachments on the power of the Executive, and to insert the Executive -- the only official (other than the Vice President) elected by all the people -- into the legislative process. The Justice report concludes by rejecting many of the policy arguments in favor of legislative veto, including the argument that such vetoes serve to make agency action more politically accountable. The Justice report argues that the underlying problem is vague delegation by Congress, a problem not effectively cured by retention of veto authority.

I have no objection to the proposed report. On page 10, line 42, the report states that "Congress can adopt resolutions expressing views, which may not be legally binding upon the Executive Branch...." It is unclear whether "may" is used in the permissive sense or to express likelihood. Only the former is correct, since concurrent resolutions are never binding on the President, yet readers could well suppose the latter was intended. I would change "may not be" to "are not."

THE WHITE HOUSE

WASHINGTON

May 14, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Draft DOJ Report on S.J. Res. 135, "Proposing an Amendment to the Constitution of the United States for the Establishment of a Legislative Veto"

Counsel's Office has reviewed the above-referenced draft report, and finds no objection to it from a legal perspective. On page 10, line 42, however, I recommend changing "may not be" to "are not." As now written it is unclear whether "may" is used in the permissive sense or to express a likelihood. Only the former is correct in this context, since resolutions expressing the views of Congress are never binding on the President.

FFF:JGR:aea 5/14/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 14, 1984

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LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

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COUNSEL TO THE PRESIDENT

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FFF:JGR:aea 5/14/84
cc: FFFielding/JGRoberts/Subj/Chron

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

May 9, 1984

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

SEE DISTRIBUTION

SUBJECT: Draft DOJ report on S.J.Res. 135, "proposing an amendment to the Constitution of the United States for the establishment of a legislative veto."

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

Please provide us with your views no later than

COB Tuesday, May 15, 1984

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

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: B. Bedell
M. Horowitz
F. Fielding
E. Strait
J. Hill
M. Uhlmann

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U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Strom Thurmond
Chairman, Committee on the
Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to your request for the views of the Department of Justice on S.J. Res. 135, "proposing an amendment to the Constitution of the United States for the establishment of a legislative veto." The Department of Justice believes that the constitutional amendment proposed by this resolution would substantially eliminate the carefully drawn checks on the exercise of legislative power that were included in the basic constitutional framework of our Nation, and would drastically and unnecessarily alter the existing relationships between the three coordinate Branches of the federal government. Consequently, the Department of Justice recommends against adoption of S.J. Res. 135 and transmittal of it to the states for ratification.

The language of the constitutional amendment proposed by S.J. Res. 135 reads as follows:

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

The clear intent of the proposed amendment is to abrogate the Supreme Court's decision in INS v. Chadha, 103 S. Ct. 2764 (1983), holding "legislative veto" devices to be unconstitutional. In Chadha, the Court made clear that under the "carefully designed limits" imposed by the Framers on the powers of the coordinate Branches, Congress must exercise its legislative power in strict conformity with the require-

ments of Art. I, §§ 1 and 7 of the Constitution: passage by a majority of both Houses and presentment to the President for approval or veto. 103 S. Ct. at 2786-87. S.J. Res. 135 would nullify the Chadha decision by amending the Constitution to allow Congress to take action that alters the authority of the Executive to exercise statutorily delegated responsibilities by vote of either one or both Houses, without presentment to the President. 1/

We believe that the proposed constitutional amendment would be a wholly unwarranted and unwise alteration of the "enduring" and "carefully designed limits" imposed by the Framers on the powers of the coordinate Branches, INS v. Chadha, 103 S. Ct. at 2787. As the Court emphasized in Chadha, those limits were no accident of history. The debates surrounding adoption of the Constitution leave no doubt that the procedure established in that document for the exercise of legislative power was not a mere formality or unintended limitation on legislative authority. To the contrary, the constitutional requirements that power be divided among the Legislative, Executive, and Judicial Branches, and that all measures having the effect of a law must receive the concurrence of both Houses and must be presented to the President for approval or disapproval were intended to be fundamental checks against oppressive, improvident, or precipitate action by the Legislative Branch and encroachment by that Branch upon the Executive.

The legislative process devised by the Framers in Article I of the Constitution reflects three underlying structural components: separation of powers, bicameralism, and presentment. As discussed below, each of these components is vitally important to the functioning of our constitutional system.

Separation of Powers

The powers of the national government were deliberately divided by the Framers among three coordinate Branches,

1/ The proposed amendment would authorize legislative vetoes by action of one or both Houses, but would not authorize approval or disapproval of Executive actions by one or more congressional committees. Accordingly, we would not read the proposed amendment to alter the effect of the Chadha decision insofar as committee approval, disapproval, or waiver mechanisms are concerned.

because they considered the concentration of governmental power to be the greatest threat to individual liberty. "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122 (1976). The principle of separation of powers is based on the premise that if one Branch of government could, on its own initiative, merge legislative, executive, or judicial powers, it could easily become dominant and tyrannical. In such circumstances, it would not be subject to the checks on governmental powers that the Framers considered a necessary protection of freedom. The three Branches of the Government are not "watertight compartments" acting in isolation of each other. Springer v. Government of the Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting); see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Rather, the Framers conceived of national government as involving the dynamic interaction between the three Branches, with each "checking" the others and "balancing" the powers conferred on the others with its own assertions of power.

The separation of powers principle, intended to be a "vital check against tyranny," 2/ and "essential to the preservation of liberty," 3/ is a bedrock principle of our constitutional system, and should not be disregarded. At the core of the principle is the precept that no single Branch can usurp or arrogate to itself the essential functions of other Branches. Since the brilliant men who created our Constitution believed that the concentration of power in any one individual or group was the very definition of tyranny, we would regard any alteration in this separation of powers, mandated by the Constitution, to be a very serious departure from the principles that have guaranteed our liberties for nearly two hundred years.

2/ Buckley v. Valeo, 424 U.S. 1, 121 (1976); see, e.g., The Federalist No. 47 (J. Madison), at 324.

3/ The Federalist No. 51 (J. Madison), at 348; see Youngstown Sheet & Tube Co. v. Sawyer, 348 U.S. 579, 635 (1952) (Jackson, J., concurring).

Bicameralism

Despite the careful separation of powers between the three Branches, the Framers recognized that the Legislature, with the authority to make all laws and to appropriate all money, was the Branch with the greatest potential powers. The Framers were acutely aware that "[i]n republican government the legislative authority, necessarily, predominates." The Federalist No. 51 (J. Madison), at 350. While there was general agreement that the Legislative Branch should set policy, there was also agreement that an internal check was necessary on the power of the Legislature. One of the checks the Framers fashioned against this potential was to require that legislative action receive the approval of both Houses of Congress. James Wilson, later a Justice of the Supreme Court, observed during the debates of the Constitutional Convention:

> Despotism comes on mankind in different shapes. Sometimes in an Executive, sometimes in a military, one. Is there no danger of a Legislative despotism? Theory and practice proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it.

1 M. Farrand, The Records of the Federal Convention of 1787 254 (1966) (emphasis added). Madison, expounding upon the necessity of the Senate, noted "the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions." The Federalist No. 62 (J. Madison), at 418. This propensity would be checked, he maintained, by providing a greater opportunity for due deliberation in the course of consideration by the two differently constituted Houses. Id. at 417-19. See also The Federalist No. 63 (J. Madison), at 426-27. The dangers posed by a Congress comprised of a single House were thus clearly apparent to the Framers. Alexander Hamilton warned that, were the Constitution to provide for only one legislative organ:

> we shall finally accumulate, in a single body, all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived. Thus we should create in reality that very tyranny which the adversaries of the new Constitution either are, or affect to be, solicitous to avert.

The Federalist No. 22 (A. Hamilton), at 135, quoted in INS v. Chadha, supra, 103 S. Ct. at 2783.

Presentment

Yet another check fashioned by the Framers against the possibility of encroachment by the Legislative Branch upon the independence of the Executive was the requirement of Art. I, § 7, that all legislative measures be presented to the President for approval or disapproval. The Presentment Clauses were intended by the Framers as a "self-executing safeguard" against abuse of legislative power, 4/ and as a "guard[] against ill-considered and unwise legislation." 5/ As the Court pointed out in Chadha, presentment to the President and the presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. See 2 M. Farrand, supra, at 301-02, discussed in INS v. Chadha, 103 S. Ct. at 2782.

There was virtual unanimity at the Constitutional Convention that the President should participate in the legislative process by exercising a veto over proposed legislation. The purpose was threefold. First, presentment to the President would check, as Chief Justice Burger stated in INS v. Chadha, "whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered

4/ Buckley v. Valeo, 424 U.S. 1, 122 (1976). See The Federalist No. 51, supra, at 350; see also The Federalist No. 73 (A. Hamilton) at 497; The Federalist No. 66 (A. Hamilton), at 445-46; 1 M. Farrand, supra, at 97-106; id. at 139-40 (remarks of George Mason).

5/ The Pocket Veto Case, 279 U.S. 655, 678 (1929); see also id. at 677-78 n.4; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952); United States v. Rumely, 345 U.S. 41, 46 (1953).

measures." 6/ Second, it would ensure that the legislative process included a national perspective. As the Supreme Court aptly noted in Myers v. United States, 272 U.S. 52 (1926):

> The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide . . . .

272 U.S. at 123, quoted in INS v. Chadha, supra, 103 S. Ct. at 2782-83. 7/ Third, the presentment requirement is necessary to enable the President to defend the powers of the Executive from legislative encroachments. Without the veto power, as Alexander Hamilton observed, the President "would be absolutely unable to defend himself against the depredations of the [Legislative Branch.] He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote." The Federalist No. 73 (A. Hamilton), at 494.

The protections of bicameralism and presentment to the President, derived from the underlying principle of separation of powers, were thus no accident of history or lightly considered procedural requirements, but rather a "finely wrought and exhaustively considered procedure" intended to serve what the Framers believed to be essential constitutional functions. INS v. Chadha, 103 S. Ct. at 2784. While compliance with this procedure may result in some inefficiencies or inconveniences, see id. at 2781, those inefficiencies and

6/ INS v. Chadha, 103 S. Ct. at 2782; The Federalist No. 73 (A. Hamilton), at 495-96; see generally 1. J. Story, Commentaries on the Constitution of the United States, §§ 884-893; at 614-21 (3d ed. 1858).

7/ See also INS v. Chadha, 103 S. Ct. at 2784; II Elliot's Debates on the Federal Constitution 448 (1836).

inconveniences are a small price to pay for maintaining an appropriate balance between the coordinate Branches of the Government. The Court's observations in Chadha are particularly relevant:

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L.Ed. 1153 (1952). With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

103 S.Ct. at 2788.

The constitutional amendment proposed by S.J. Res. 135 would substantially eliminate these carefully drawn checks on the exercise of legislative power and would drastically -- and unnecessarily -- alter the existing relationships between the Executive and Legislative Branches. We believe strongly that any fundamental alteration of these limits would amount to seriously ill-advised tampering with the carefully constructed and tested constitutional scheme.

Even aside from our grave concerns about the wisdom of making fundamental changes in our constitutional structure governing the lawmaking and lawexecuting processes, we fear that authorization of one- and two-House legislative vetoes would have a substantial adverse impact on both the Legislative and Executive Branches and would in fact impede, rather than facilitate, the making and execution of laws. Granting one or both Houses of Congress the authority to veto Executive Branch decisions would inevitably introduce additional -- and often excessive -- delay into the decisionmaking process, would place a massive new burden on already scarce congressional

and Executive Branch resources and would decrease the impact of public participation and political accountability in the decisionmaking process. In addition, in those cases in which judicial review is available for particular Executive decisions, a provision for congressional approval or disapproval would introduce considerable uncertainty into the carefully structured relationship between administrative decisionmaking and judicial review, because the courts would be faced not only with administrative judgments, based on statutory criteria, but political judgments of Congress -- judgments courts have been generally reluctant to review. See, e.g., Perkins v. Lukens Steel Co., 310 U.S. 113, 130 (1940); Panama Canal Co. v. Grace Lines, 356 U.S. 309, 318-19 (1958); Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 930-31 (D.C. Cir. 1955), cert. denied 350 U.S. 884 (1955).

We see little merit to the argument that has generally been advanced in support of legislative veto authority -- that such devices are necessary to maintain a proper balance between the Executive and Congress in the face of the vast delegation of policymaking power that has accompanied the phenomenon of modern regulation. Even if the premise were correct that Congress cannot, through legislation, deal with the many details of modern regulatory schemes, we see no reason to believe that Congress's inability to master detail through the formal legislative process would disappear if Congress were faced with the task of reviewing agency rules and the thousands of other Executive Branch decisions. The review by Congress of detailed rules, policies, and decisions made on a daily basis by the Executive Branch may well in practice be avoided for the same reasons that Congress tends to avoid enactment of detailed legislation, resulting in Congress's giving piecemeal attention to particularly sensitive or visible decisions, an approach that would be destructive of the stability and fairness of the laws and would be vulnerable to special interest political pressure.

This danger has been apparent since the earliest days of the Republic. In a letter in August 1787 regarding the proposed structure of the national government, Thomas Jefferson described the problem in these terms:

> Nothing is so embarrassing nor so mischievous, in a great assembly, as the details of execution. The smallest trifle of that kind occupies as

long as the most important act of legislation and takes the place of everything else. Let any man recollect, or look over, the files of Congress; he will observe the most important propositions hanging over, from week to week, and month to month, till the occasions have past them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small subjects . . . . "

6 T. Jefferson, The Writings of Thomas Jefferson 228 (A. Bergh, ed. 1903) (letter to E. Carrington, Aug. 4, 1787).

Furthermore, S.J. Res. 135 would authorize legislation giving one or both Houses the power to veto actions taken by the President pursuant to statutory power which deeply implicates the President's conduct of the foreign policy of our Nation. Such power would have the predictable impact of preventing the President from implementing a coherent foreign policy that could be depended upon for its consistency, by friend and foe alike.

Moreover, there is considerable and compelling evidence that legislative vetoes simply have not served the purposes for which they were intended, and have, in fact, been counterproductive. 8/ Rather than fostering more participation in the policymaking process by members of Congress, legislative vetoes have provided Congress with a convenient excuse for excessive, overly-broad delegations of authority, have fostered nonaccountable decisionmaking and evasion of politically controversial decisions by the Legislative Branch, and have tended to undermine respect for the rule of law in that Congress may appear to use its authority in an arbitrary and capricious manner.

The fundamental problem that has given impetus to legislative veto provisions in the past is not that the allocation of power under our Constitution is skewed in favor of the

8/ See, e.g., American Bar Association Commission on Law and The Economy, "Federal Regulation: Roads to Reform" (1979); Antonin Scalia, "The Legislative Veto: A False Remedy for System Overload" Regulation (November/December 1979).

Executive, but rather that the statutory standards pursuant to which the Executive Branch -- particularly the regulatory agencies -- operate are in many cases not well-defined, are too broad, and provide only limited guidance to the Executive in its execution and enforcement of the laws. In many cases Congress has asked the Executive Branch to make basic, vitally important policy choices that, at least in theory, are more properly for the legislature to make. This underlying problem would not in reality be addressed by giving Congress a "second shot" at reviewing Executive actions through a legislative veto process; the problem can only be fully addressed by Congress's giving the Executive Branch clear and precise guidance as to how, and to what ends, discretion should be exercised.

Finally, we see no compelling need for use of legislative veto devices to oversee or restrain Executive Branch decisions. Through Executive Order 12291, the President has been able to maintain oversight over the process of rulemaking by the non-independent Executive Branch agencies, both to ensure that the agencies scrutinize carefully the legal and factual basis for major rules in order that those rules maximize social benefits and minimize costs to the extent permitted by law, and to ensure a consistent, well-reasoned, Administration-wide approach to policies for which the Executive Branch is responsible. In addition, there are many effective and fully constitutional oversight and law-making mechanisms whereby Congress can carry out its constitutional functions. Particularly in the domestic area, Congress can limit its need to review the Executive's execution of the law by placing more specific and precise limits on the authority, for example, of agencies to issue rules. Congress, with participation by the President, can override unwise, inappropriate, or excessively burdensome rules or decisions made pursuant to statutorily delegated authority, by enactment of legislation. The use of expediting mechanisms for consideration of such legislation could facilitate speedy review, and would not have to be tied to the legislative veto devices with which they have so often been associated. Congress can also adopt sunset provisions that require agencies to return to Congress periodicially for reenactment of generic authority. Congress can hold oversight hearings, at which members of Congress may demand explanations for Executive Branch decisions. Congress can adopt resolutions expressing views, which may not be legally binding upon the Executive Branch, but which may be useful from a policy standpoint in the Executive Branch's implementation of the law. Ultimately, Congress can exercise the power of the purse, through the appropriations process, to shape Executive action, although

that process should be viewed as one of last resort because it often bypasses or fails to make maximum use of Congress's full expertise on a particular issue and it overburdens an already complex appropriations process.

The Administration is deeply interested in addressing concerns about the sharing of power within the federal government, and the need to improve or reform the process by which laws are made and executed -- concerns that are not necessarily new, but that have reemerged in the wake of the Chadha decision. However, we do not believe that a constitutional amendment to allow for legislative vetoes would either address those concerns adequately or would avoid a real danger of paralysis in the decisionmaking process in both the domestic and foreign affairs arenas. Even more importantly, we do not believe the Chadha decision should be the occasion for a fundamental alteration of the constitutionally mandated legislative process.

Accordingly, the Department of Justice opposes adoption of S.J. Res. 135 and transmittal of it to the states for ratification.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report to Congress and that it is in accord with the program of the Administration.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

May 7, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Revised Draft OMB Statement Concerning Legislative Veto

OMB has asked for comments by close of business today on a revised version of legislative veto testimony to be delivered on May 10 by Chris DeMuth. The memorandum we prepared noting several objections to the earlier version of DeMuth's testimony had not been sent when we received this revised version. Accordingly, I advised Pat not to send it, in order that we could send one memorandum on the latest version.

The only substantive change in the revised version of the testimony is the last page, which is entirely new. This new page expresses Administration willingness to work with Congress in devising a proposal to "gain experience" with one or more of the legislative veto proposals through a carefully controlled "test period." The test legislation must (1) be consistent with Chadha, (2) apply for two years or less to only a few important and representative agencies, (3) provide the President an opportunity to "oversee" the rules promulgated under the proposal, and (4) be drafted in a way to maximize the lessons from the experiment.

I am not aware that this dramatic addition has been approved at any level, and I do not think the Administration should commit to such an experiment without more careful deliberations by all those affected. As I advised you some time ago, DeMuth is enamored with the idea of requiring that all major rules be approved by Congress. He believes this will do away with judicial review of agency rulemaking, essentially putting the D.C. Circuit out of business. This sudden revision, tucked away on the very last page, appears to be his opening salvo in an effort to establish his position as that of the Administration. We should object and insist that the matter be reviewed at the highest levels before the Administration agrees to DeMuth's "experiment." We should also reiterate the objections noted in our earlier, unsent

memorandum. The first paragraph in the attached memo for your signature is new; the remainder has been changed only so that the page and line references correspond to the revised version of the testimony.

Attachment

THE WHITE HOUSE

WASHINGTON

May 7, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Revised Draft OMB Statement
Concerning Legislative Veto

Counsel's Office has reviewed the above-referenced revised draft testimony. The principal revision is the addition of a new concluding paragraph on page 21. That paragraph expresses Administration support for enactment of one or more of the post-Chadha regulatory veto proposals on a limited, experimental basis. I object to the inclusion of this paragraph in the testimony. Administration support for such an experiment must be considered at the highest levels by all affected departments before it can be endorsed. I for one am not presently persuaded that such an "experiment" is advisable; the question certainly has not been adequately debated within the Administration.

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

On page 7, lines 7-8, "members of the President's immediate office" should be changed to "the Office of Management and Budget." The phrase "the President's immediate office" is imprecise and would generally suggest something other than OMB.

On page 9, lines 6-7, the proposed testimony dismisses as "vain" the hopes that Chadha will compel Congress to act more responsibly in drafting laws. Again, this is inconsistent with previous Administration statements that made

the precise point that is rejected. Furthermore, I do not consider it accurate to dismiss the hope as unfounded. It is entirely reasonable to suppose -- certainly to hope -- that Congress will be more circumspect in delegating law-making authority now that it will not have a ready opportunity to review agency action in specific cases. This paragraph should be rewritten to make its point without altogether dismissing the argument that, as the Attorney General stated in his press release the day Chadha was decided, the long-term effect of the decision "will be a better and more effective Congress as well as a more effective Presidency."

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

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

FFF:JGR:aea 5/7/84
cc: FFFielding/JGRoberts/Subj/Chron

cc: Richard G. Darman

THE WHITE HOUSE

WASHINGTON

May 7, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

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

FFF:JGR:aea 5/7/84
cc: FFFielding/JGRoberts/Subj/Chron

ID #_____ CU

WHITE HOUSE
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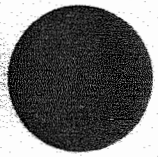

Name of Correspondent: James C. Murr

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Subject: Revised draft OMB statement concerning legislative veto

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5/81

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

SPECIAL

May 7, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

SEE DISTRIBUTION

SUBJECT: REVISED draft OMB statement concerning legislative veto

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

Please provide us with your views no later than COB Monday, May 7, 1984
(NOTE: An earlier version of OMB's testimony was circulated 5/2/84. The hearing is scheduled for May 10, 1984.)

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

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: B. Bedell
F. Fielding
E. Strait
J. Frey
J. Hill
M. Horowitz
C. DeMuth
K. Wilson
M. Uhlmann

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Federal Emergency Management Agency
United States Postal Service
Central Intelligence Agency
Administrative Conference of the United States

DRAFT (5/4/84)

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

May 10, 1984

Chairman Pepper and members of the Committee:

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

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

defunct legislative vetoes over some or all agency rules, while avoiding their constitutional pitfalls? Recent "regulatory veto" proposals 1/ offered by Members of both Houses and both political parties urge an affirmative response--while differing significantly on what those procedures should be. Moreover, both Houses are either considering attaching, or have attached, specific "regulatory veto" provisions to the authorizations of individual regulatory agencies.

The Administration has not yet adopted a position on any of these proposals. Our hesitation regarding the various across-the-board regulatory veto proposals is not, however, due to lack of interest. We believe these proposals are of profound importance, and therefore worthy of the most careful deliberation.

We are following the Congressional debates with close and keen interest, and hope to have a more definite position concerning universal regulatory veto requirements in the near future. But I do not want to leave the impression that we will ultimately conclude by supporting some provision. It may well be that, given existing forms of oversight and the complexities of adding new, constitutional procedures for Congressional review of individual rules, a universal regulatory veto requirement is not

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

the best solution. At the same time, properly constructed regulatory veto requirements, applicable for specific time limits to selected agencies, may be suitable on an experimental basis.

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

* * * * *

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

The growth of the pre-Chadha legislative veto was roughly coincident with the rise of the large administrative state. Over the past half-century, Congress has extended the Federal government's reach into one new territory after another previously the domain of the states, private markets, or other voluntary arrangements--highways, education, medical care, the design of automobiles and other products, pollution abatement, and so forth. With Congress injecting the Federal government

more and more deeply into private markets and local governance, Congress has increasingly lacked the resources--chiefly time and information--to enact into law all of the discrete judgments and compromises necessary to guide these interventions. As a result, Congress has increasingly hedged, enacting vague or even contradictory statutory standards that have effectively transformed Executive officials (and, derivatively, judges) into de facto lawmakers.

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

The success of informal rulemaking, however, has been problematic at best. While it has provided a means for high-volume decisionmaking in the large modern state, it has done

so at a very high cost in policy coherence and political accountability. While the regulatory bureaucracies have never exactly been "out of control," the locus of that control, and its relationship to any publicly articulated conception of the national interest, have been increasingly difficult to discern.

Judicial preoccupation with "due process" has led to an increasing migration of large areas of policymaking to an unelected judiciary. This is not, as is often supposed, the result of the growth of "activist" judicial doctrines among modern judges; rather it is a direct corollary of the increasing economic importance of regulatory lawmaking. With freewheeling discretion delegated to administrative agencies, and with large stakes riding on the results of their proceedings, private groups have strong incentives to invest in litigating thoroughly every conceivable aspect of their decisions--and the courts must attend to these arguments. The reach of the Judicial branch is not determined simply by views of appellate judges, but also by the ingenuity of litigants in devising persuasive arguments within the context of whatever legal precedents may exist.

There can be little debate that the scope and detail of judicial review is today of an altogether different order than Congress envisioned in adopting the "arbitrary, capricious, or abuse of discretion" standard of the Administrative Procedure Act of 1946. Indeed, the courts' use of these words today bears no

resemblence to their normal, everyday meaning. While everyone, regardless of political viewpoint, is pleased with some court decisions under the current standards, it can hardly be said that the result has been greater agency accountability. This would be so only if the agencies had been ignoring clear Congressional mandates until the courts suddenly brought them into line. Instead, the usual case is that Congress does not issue the clear mandates in the first place, or else does not foresee the issues its laws will raise in specific instances--leaving the courts as well as the agencies adrift regardless of the "strictness" of judicial review.

The general public acceptance of judicial policymaking has been much remarked upon. One reason for this acceptance is surely that the political legitimacy afforded agency rules by public notice-and-comment procedures is itself such a thin substitute for lawmaking by two representative majorities plus the President. Indeed, the rulemaking process is inherently far less representative than the constitutional lawmaking procedures for which it substitutes. Rulemaking proceedings are closely attended only by organized groups with immediate stakes in the decisions. Their arguments, of course, are usually couched in terms of the broad public interest. But in fact the interests of organized lobbying groups frequently conflict with the general public interest--whether this interest is defined by a vote of the Congress or suggested by the conclusions of an economic

cost-benefit analysis.

The legislative veto has been, of course, just one of a variety of devices developed to increase the accountability of the regulatory bureaucracies. Presidents Ford, Carter, and Reagan have issued increasingly explicit Executive orders requiring agencies to assess the benefits and costs of their rules and to consult with members of the President's immediate office. President Reagan's Executive Order 12291 requires regulatory agencies, to the extent permitted by statute, to fashion rules that will produce the greatest net social benefits; it seeks to guide administrative discretion towards decisions that are in the broadest public interest--which may, as I have said, be different than the interest of any notice-and-comment petitioner. The Order further directs agencies to report on their proposed and final rules to the Office of Management and Budget, and thus seeks to increase the accountability of the regulatory process by ensuring that individual rules are in harmony with the President's policies.

The pre-Chadha legislative vetoes put the legislative branch directly "in the loop" of Executive branch decisions, and thus made Congress, at least in theory, more accountable to the public for agency actions. Although these were the Congress' most conspicuous response to the problems of galloping lawmaking-by-rulemaking, they were not Congress' only response.

In fact, they were of much less practical significance than other forms of Congressional influence. Legislative vetoes of agency rules were exercised on only a few occasions. When Congress was strongly opposed to a regulatory decision, it was more likely to override that decision by statute, as in the cases of the saccharin ban and the automobile seatbelt-ignition interlock rule. In some cases where vetoes were exercised, as in the 1982 override of the FTC's used-car labelling rule (nullified by the Supreme Court shortly after Chadha), a statutory override with the President's signature was probably available. And appropriations riders barring or directing agency action have come into increasing use in recent years. They have (I am sorry to say!) been used or threatened on a number of occasions to prevent the Reagan Administration from undertaking important regulatory reforms.

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

the Office of Technology Assessment.

Many observers have expressed the hope that Congress will respond to the challenge of Chadha by becoming "more responsible"--by writing "better" laws that make the tough policy choices Congress avoided by relying on legislative veto provisions instead. The analysis above suggests that this is a vain hope. The problem of modern lawmaking is not a matter of legislators avoiding their responsibility. It is rather an institutional problem, inherent in the size and ambitions of today's Federal government and the intentional, incorrigibly (and intentionally) ponderous nature of legislative decisionmaking. The Congress remains a diverse, collegial body of individuals representing a wide variety of differing and often conflicting interests and viewpoints. Congress is best suited to making broad decisions requiring the achievement of a consensus. So long as Congress feels that it is under such great pressure to write and finance so many laws, it is unlikely to write "better" and even more detailed laws that, through statutory language, reclaim substantial lawmaking authority from the Executive branch.

The Congressional advocates of the new, post-Chadha regulatory veto procedures clearly recognize this dilemma. They also recognize that, for purposes of practical impact and accountability to the public, there is no substitute for having

Congress stand up and be counted on a concrete proposition--not whether one is for or against clean air or for or against cancer, but whether one is for or against a specific level of control for a specific pollutant, or for or against banning a specific product. What remains to be determined is whether the regulatory veto advocates have identified not only the correct problem but a workable solution as well.

* * * * *

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

Pre-Chadha, there were a variety of institutional reasons why

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

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

Under the second procedure--"statutory approval"--a law would

provide that agency rules could go into effect only after a "report-and-wait" period, and then only if Congress had approved the rule by joint resolution before the end of the period. This would be a considerable change from the status quo, and would permit a simple majority of either House to "veto" any agency "rule"--which would no longer be a rule in the traditional sense but rather a proposal to enact legislation. This regulatory veto would "solve" the regulatory problem by virtually abolishing regulation itself, converting rules into statutes and regulatory agencies into proposers of legislation; it would also flood Congress with thousands of minute decisions that could bring the legislative process as well to a screeching halt.

Of course, the major proposals to establish a regulatory veto would modify these pure approval or disapproval procedures. The proposal sponsored by Senators Levin and Boren adopts the statutory disapproval approach--but features expediting procedures to move disapproval resolutions promptly to the floors for votes of the entire Houses without delay by committees or subcommittees. The authorizing committees are often champions of "their" agencies' programs, and can--through scheduling and other devices--block. By making program implementation more often subject to votes by floor majorities, the expediting procedures could make regulatory programs more responsive to majority sentiment. The proposal sponsored by Senator Grassley and Congressman Lott adopts the statutory approval approach (with

expediting prooedures)--but only for "major" rules (fifty or sixty a year), leaving the large majority of less significant rules covered by a statutory disapproval procedure similar to that in Levin-Boren.

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

First, the President could "veto the veto" under the Levin-Boren procedure. If the President favors a rule issued by agencies, and vetoes a joint resolution presented to him which would disapprove it, a two-thirds majority in both Houses would be required to override his veto. On the other hand, the Grassley-Lott approach for "major" rules is closer to a one-House simple majority veto. Either House could refuse to enact into law a proposed major regulation by not approving the joint resolution of approval. Note that there is constitutional form

of the pre-Chadha two-house legislative veto. That the currently available forms are extreme ones--one-House simple/majority versus two-House supermajority--may make it more difficult to forge a majority consensus behind any regulatory veto.

The second difference is that the President's role in the legislative process could change significantly. Under Grassley-Lott, once a major rule is proposed, at least one House will be obliged to vote on it; if the first House to vote approves, the other House will then be obliged to vote as well. This stronger form of regulatory veto risks the current prerogatives of both the Executive and Legislative branches. The Executive would be obliged to persuade a majority of both Houses to put a proposed major new regulation into effect, or to make major change in an existing regulation. But, at the same time, the Congress would lose some control over its calendar, and could not avoid voting on controversial issues it might prefer to avoid or delay. The President would be able to determine, several times each session, when and in what context Congress would have to stand up and be counted.

These are not arguments against the regulatory veto. They merely emphasize that, with the options properly limited by Chadha, we are faced with very different dynamics for Congressional and Executive review. No constitutional regulatory veto could simply augment the power of one political branch at

the expense of the other, so adopting one would involve risks and demand statesmanship at both ends of Pennsylvania Avenue. The new procedure also would affect the Judiciary. Indeed, to the extent agency rules were adopted as statutory law, the courts could be removed altogether from review except on constitutional grounds.

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

1. Administrative Burdens for Congress. The opponents of regulatory veto proposals have good cause for concern over the potential volume and technical detail of the issues that would be coming into the Congress. These could require a great deal of time and attention under any of the regulatory veto proposals. Grassley-Lott in particular would entail a substantial increase in Congressional workload. Under Executive Order 12291, OMB

reviews 40 to 50 "major" (over $100 million in impact) final rules and about 1,500 "non-major" final rules a year.2/ OMB does not review the rules of most "independent" regulatory agencies, which could involve an additional dozen "major" rules each year. Neither does OMB review most of the rules issued by the Internal Revenue Service.

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

2. Executive Accountability. Although the President and officials of the Executive Branch must work closely with Congress, there can be only one Executive. The President, like Congress, is accountable to the public. With so much execution of Federal law taking place through regulation, traditional Executive oversight mechanisms--budget and accounting controls--no longer suffice, and have been supplemented in recent by regulatory oversight procedures (currently under Executive

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

Order 12291). Any reform of the rulemaking process acceptable to the President must provide the President--the official charged by the Constitution to see to the execution of the laws of the United States--the means to coordinate and direct executive policymaking, including rulemaking.

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

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

The effect upon subsequent judicial review of a joint resolution approving--or even disapproving--a regulation is a matter that must be squarely addressed. We are unaware of any experience with requirements that rules take effect only if approved by a joint resolution, and do not know what effect such

a procedure might have on judicial review. Similarly, we do not have experience with joint resolutions of disapprovals of agency rules that are passed by Congress but are not signed by the President. Both of these possibilities are presented by the proposed regulatory veto provisions. Unfortunately, this absence of experience further compounds the difficulty of assessing with confidence appropriate mechanisms for a regulatory veto.

The statutes providing for a regulatory veto could provide that the effect of a joint resolution of approval is to preclude further judicial consideration of the rule, except, of course, for constitutional challenges. This would treat an "approved" rule like a statute. At the other extreme, the statute could provide that Congressional and Presidential approval has no effect on subsequent judicial review--that a rule so approved could then be overturned by a court for record inadequacies, procedural defects, or on any other ground provided by the Administrative Procedure Act or authorizing statute. A question worth deep reflection is whether the courts would fee comfortable doing this--or, if they did, the procedure would be constitutionally appropriate. These questions must be addressed in developing any regulatory veto statute.

4. Agency Efficiency. Just as the regulatory veto process should not stymie Congress in its other legislative work, it should not stymie the ability of agencies to implement existing

statutes. Any regulatory veto mechanism should contain emergency procedures allowing agencies to take prompt and lasting agency regulatory action, without the necessity of prior Congressional review. Any provision authorizing legislative veto must also state how changes to rules approved by a joint resolution can be altered by subsequent agency action. Must minor changes to such a rule also be approved by a joint resolution?

5. Scope. A statute establishing a joint resolution procedure either to disapprove or approve a regulation needs to define the regulatory statutes to which it will apply. Some existing proposals limit Congressional review to rules issued through the informal rulemaking provisions of the APA. However, rulemaking to implement certain regulatory statutes are not clearly subject to the APA and may not, therefore, be subject to the current regulatory veto bills. This includes most rules under the Clean Air Act, and possibly the hybrid rulemaking procedures of the Consumer Produce Safety Commission and the Federal Trade Commission. It is not only necessary to determine which agencies should be subject to the legislative veto mechanism, but also which statutes administered by those agencies should be.

6. Procedures and Review Periods. The administrative details of the regulatory veto bills are also important, and can seriously affect whether or not the proposal would work. Both

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

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In summary, then, the Congressional advocates of regulatory review procedures believe that Congress must stand up and be counted on specific regulatory proposals. It is also clear, however, that any new, post-Chadha regulatory veto procedure presents some very different dynamics for Congressional and Executive relationships. The details of these new procedures may increase administrative burdens for Congress, affect Executive accountability, change the reach of judicial review, and affect agency efficiency.

The Administration agrees that the problems sought to be addresssed by the various regulatory veto procedures are very important. And yet there are many uncertainties with these new proposals. The consequences of misjudging the effect of one of these proposals could be severe. We may need to gain experience with one or more of these proposals through a carefully controlled test period. We could agree to work with Congress to devise such a proposal, with four conditions. First, any such procedures must be consistent with the Chadha decision. Second, the procedures should be applicable to the regulations issued by only a few important and representative rulemaking agencies, and should be strictly limited in time--a maximum of two years. Third, the Chief Executive--the President--should be provided the means to coordinate and oversee the rules promulgated under these procedures. And fourth, the legislation to do this should be written in a manner to maximize the chances of knowing after the test period whether the procedures have been an improvement. We would look forward to working with you in the development of such legislation.

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