Re-Separating the Powers: The Legislative Veto and Congressional Oversight after Chadha

Kim I. Moses

Follow this and additional works at: https://engagedscholarship.csuohio.edu/clevstlrev

Part of the Constitutional Law Commons, and the Legislation Commons

How does access to this work benefit you? Let us know!

Recommended Citation


This Note is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.
I. INTRODUCTION

There is no body of precedents by which we are bound, and which confines us to logical deductions from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose.¹

The technological growth of twentieth century American society correspondingly demanded that the government expand to deal with these innovations. Yet, as the complexity of the government increased, it became

---


* The author extends sincere thanks to Karen Cooper, Michael T. Rae, and Daniel Domozick, whose help was invaluable.

apparent that in order to effectively implement the new legislative policies, Congress would have to delegate quite extensive authority. It is the doctrine of the delegation of powers that allowed one branch of the government to transfer authority to another branch or administrative agency, and which laid the foundation for the proliferation of administrative agencies and governmental bureaucracy. Subsequently, however, a need for some control over this delegated authority developed. In response, Congress adopted the procedure which has come to be known as the legislative veto.

In its most simple terms, the legislative veto is a process, short of enactment of full legislation, by which the legislature requires the executive or an agency to refrain from taking a proposed action. Usually, Congress will enact a statute that requires implementation by the executive or by an administrative agency. Pursuant to the delegation of authority in the enabling statute, the affected agency will be required to submit to Congress whatever rules, orders, regulations, or directives it intends to implement. If the legislature does not concur with the administrative determination, the legislative veto may be exercised to approve, disapprove, amend, or terminate the proposed action. In this manner, Congress was able to control the authority it had delegated by precluding objectionable administrative determinations from becoming law.

Embodied in literally hundreds of statutes, the use of the legislative veto traces back to the Hoover administration. Yet, despite its longevity, the veto has not been overwhelmingly approved. In fact, its use has pro-

---


3 See Abourezk, The Congressional Veto: A Contemporary Response to Executive En- croachment on Legislative Prerogatives, 52 IND. L.J. 323 (1976-77); Javits & Klein, Congress and the Legislative Veto: A Constitutional Analysis, 52 N.Y.U. L. Rev. 455 (1977). The legislative veto most commonly assumes one of two forms: one is a simple resolution passed by either House of Congress (the one-House veto) and the other is the concurrent resolution which is passed by both Houses (the two-House veto). For the purposes of this Note, these two types of vetoes will be the only ones considered in depth. For a detailed explanation of the different forms of congressional vetoes, see Miller & Knapp, The Congress-ional Veto: Preserving the Constitutional Framework, 52 IND. L.J. 367 (1976-77).

4 For a detailed history of the development of the legislative veto, see Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 CALIF. L. Rev. 983 (1975). It should be noted that despite its importance the legislative veto was not used frequently. Between 1930 and 1982, Congress exercised an approximate total of 230 vetoes. A rough breakdown of this total shows that 111 of these terminated suspensions of deportation orders, 65 were exercised under the Budget Control and Impoundments Acts, 24 disapproved of a few of the many reorganizations for the government proposed by various presidents, and the remaining 30 were exercised in the areas of foreign relations, international commerce or defense, or in regulatory matters. See Comment, Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision, 1983 D UKE L.J. 789, 790-91 (1983).
voked bitter debate throughout the government. The thrust of the controversy has concerned whether the congressional veto is an unconstitutional attempt by Congress to interfere with the execution of the laws, or whether it is a permissible device that protects against the usurpation of congressional power by another branch of the government.

No satisfactory resolution of the debate had been proffered until June of 1983, when the Supreme Court rendered its decision in *Chadha v. Immigration and Naturalization Service*.

The Court sustained a decision of the Ninth Circuit Court of Appeals which held unconstitutional a one-House veto that had cancelled a decision of the Attorney General to suspend the deportation order of Chadha and five other aliens. Broadly holding that the one-House veto contravened the bicameral and presentment clauses of the Constitution, the Court's decision appeared to leave little room for speculation that the legislative veto might still be a viable congressional tool.

This Note will initially trace the historical setting in which *Chadha* was decided. In light of the staunch defense of and radical opposition to the veto, the Court's decision will then be analyzed in terms of its scope as well as its potential ramifications. The major focus will concern the future of existing laws which presently embody legislative vetoes, whether they are valid despite these provisions, and how the future of congressional oversight may be affected by the potential demise of the legislative veto. Finally, this Note will recommend a proposal by which the legislature may monitor delegated power in the wake of this landmark decision.

### II. The Historical Debate

At one time, the delegation doctrine raised fears and doubts in the minds of those legislators who believed that they were unconstitutionally abdicating their own power. Yet, with the growth of a complex technical society and the advent of the "knowledge explosion," smaller bodies, more able and better equipped to deal with these changes were required.

As the New Deal era passed, the constitutional question concerning the validity of the delegation of power was ultimately resolved in Congress' favor. As a result, delegation has become commonplace and the "fourth branch" has become a powerful and integral element of the American system of government. Administrative and executive agencies are virtually indispensable in today's society. However, the fact exists that the agencies have distorted the tripartite balance of government originally contem-
plated by the Framers of the Constitution. Not only was their existence not envisioned, but as they developed, the agencies essentially have come to exercise powers originally destined for other branches of government.

While broadly sweeping delegations have enabled agencies to promulgate rules that bear the effect of law, the technique utilized falls somewhat short of the legislative scheme particularized in the Constitution. Furthermore, unlike the executive and the legislative branches, agencies are not comprised of elected officials and consequently, lack the accountability to the electorate that is maintained by the other branches. Delegated and unchecked power is unequivocally dangerous. The legislative veto had supplied the missing link. The veto had been utilized to provide the needed check and to establish a harness of accountability between the agencies and Congress. By vesting the final authority for an administrative decision back with the legislature, the agencies could not function

---

* See Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 Va. L. Rev. 253 (1982). This lack of equilibrium has not been eagerly accepted: American attitudes toward the agencies have always demonstrated a fundamental ambivalence. On one hand, administrative agencies are viewed as necessary vehicles for the development of policy and are often created to resolve issues that Congress is unwilling or unable to decide. They are expected to develop experience and specialized knowledge and to provide efficient administration of complex and burdensome tasks. On the other hand, Americans are suspicious of delegation of lawmaking authority to agencies, which seems inconsistent with the Constitution's allocation of the responsibility for lawmaking to Congress. Bruff & Gelhorn, *supra* note 8 at 1372. See J. Bolton, *The Legislative Veto: Unseparating the Powers* (1977).

10 While the constituents of elected officials have recourse against elected officials who have pursued an "inappropriate" course of action through the next election, the constituents are powerless in this respect as far as agency administrators are concerned. See Newman & Keaton, *Congress and the Faithful Execution of the Laws—Should Legislators Supervise Administrators?*, 41 Calif. L. Rev. 565 (1953).

11 Representative Elliot H. Levitas reiterated the sentiment that some degree of control over the agencies by the legislature is necessary:

The federal bureaucracy has evolved into a fourth non-constitutional branch of government, with a thick tangle of regulations that carry the force of law without the benefit of legislative consideration. I frankly do not believe that the precepts of a free society are compatible with the situation whereby Congress contrives to permit civil servants or appointed officials to conjure up thousands upon thousands of far reaching laws that can put citizens in jeopardy of liberty or property without having anyone elected by the people involved in the process. *Hearings Before the Subcomm. on Admin. Law and Gou't Relations of the House Comm. on the Judiciary on H.R. 3658, H.R. 8231, and Related Bills, 94th Cong., 1st Sess. 141 (1975)* (Statement of Representative Elliot H. Levitas). Through the use of the veto, Congress had been able to approve or disapprove of proposed administrative regulations. Therefore, final authority for the implementation of a rule remained with the legislature which is ultimately responsible to the constituents. While it is a disconcerting thought to realize that the voters are powerless to directly remove administrators who are making the laws, there is consolation in that redress may be pursued through Congressmen who may be held liable for the acts of appointed officials. *See Schwartz, The Legislative Veto and the Constitution—A Reexamination*, 46 Geo. Wash. L. Rev. 351 (1978).
independently without regard for the will of Congress and thus, ultimately, the electorate. Rather Congress, itself definitively answerable to its constituency, would be responsible for the final determination of an administrative decision. The legislative veto, then, was a tool to ensure enactments consistent with Congressional intent. The delegation of power was no longer an ominous alternative, for by retaining the final authority, the idea of full relinquishment of power was but a hollow fear.

The glory of the delegation doctrine is reflected in the legislature's ability to delegate broad powers and policy directives to the agencies. Since Congress often lacks the skill and knowledge to direct specific agency action, general delegations allow the agencies to examine problems in detail and then issue rules based on their findings. The problem with such delegation, however, is that if Congress delegates nonspecific policy directives and legislative mandates for the agencies to implement, it runs the risk that decisions will be promulgated which are inconsistent with the will of the legislature as a whole. When used as an oversight mechanism, the legislative veto insured that the Congress would be able to monitor agency action: it provided a "check" against the possibility of abused or misused powers, and it guaranteed continued congressional participation in the legislative process. As a result, Congress was able to delegate with ease.

The necessity of a device to oversee the activities of the agencies is clear. The question which had plagued the constitutional law experts was whether the legislative veto was a legitimate means by which to achieve this goal.

---

13 The delegation of powers doctrine does require that Congress promulgate reasonable standards by which the agencies are to act. While these standards were once extremely strict, they have since been relaxed thus allowing broader, relatively nonspecific delegations. See, e.g., Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry v. United States, 295 U.S. 495 (1930).

14 In general, oversight mechanisms allow Congress to monitor the implementation of policy to insure compliance with "Congress's current interpretation of the public interest." Javits & Klein, supra note 3, at 472-73.

15 The legislative veto may be an appealing alternative to check agency action when compared with other possibilities.

When the delegator is the legislature, it has the power to specify that some actions are within the scope of the delegate's power and that others are not. If the delegate pursues an impermissible action, the legislative power would be an empty one indeed if the legislature lacked the simple power to constrain the delegate's action within the scope of the delegation. It has been argued that the legislature should, at such a time, enact a new law to more specifically define the scope of the delegation. Such a course, however, would subject the legislative act to executive veto, requiring a two-thirds vote of the legislature to override. This means that a two-thirds vote of the legislature is needed to define more precisely the scope of a delegation, where the original delegation requires but a majority vote. . . . Abourezk, supra note 3, at 332.

16 It may help . . . to think of the legislation [delegation] as unfinished law which the
A. The Advocates of the Legislative Veto

The efficiency and the effectiveness of the legislative veto as an oversight device was not doubted. However, the thrust of the historical debate concerning the legislative veto had focused on whether it was a constitutionally permissible means to achieve these ends. The veto is neither specifically sanctioned nor prohibited in the Constitution and, therefore, if it were to be sustained, it would have to have been as an implied power.

Proponents of the veto had attempted to justify its use under the necessary and proper clause of the Constitution. According to this theory, the veto is but a legitimate means to make the agencies accountable to Congress, and, since it does not violate any specific clause of the Constitution, the use of the veto is facially valid. Furthermore, not only does the veto serve as a means to effectuate the legislative will, but it also functionally preserves the separation of powers: by returning the final policymaking authority to the Congress, it is assured that the lawmaking administrative body must complete before it is ready for application. In a very real sense the legislation does not bring to a close the making of the law. The Congress is not able or willing to finish the task of presenting a positive and precise legal right or duty by eliminating all further choices between policies.

Javits & Klein, supra note 3, at 475 (quoting FTC v. Ruberoid Co., 343 U.S. 470, 485-86 (1956) (Jackson, J., dissenting) (holding that the Court would not interfere with orders relating to the Clayton Act except when the remedy has no rational relation to the unlawful practice)); see also Abourezk, supra note 3, at 334-55 (the veto allows continued congressional participation in the legislative process); Javits & Klein, supra note 3, at 478-79 (Congress maintains authority as long as the control remains legislative in nature); Pearson, Oversight: A Vital Yet Neglected Congressional Function, 23 U. Kan. L. Rev. 277, 281 (1975) (via the veto, Congress continues to participate in the legislative process); Schwartz, supra note 11, at 374 (the overriding need for the veto may give force to an argument for its validity).

See J. Bolton, supra note 9; Abourezk, supra note 3; Cooper & Cooper, The Legislative Veto and the Constitution, 30 Geo. Wash. L. Rev. 467 (1962); FitzGerald, Congressional Oversight and Congressional Foresight: Guidelines from the Founding Fathers, 28 Ad. L. Rev. 429 (1976); Henry, The Legislative Veto: In Search of Constitutional Limits, 16 Harv. J. on Legis. 735 (1979); Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983 (1975).

Even as an implied power, the veto must still be consistent with the Constitution. If it is, then its use ought to be sanctioned. "Any means that violate no Constitutional provision and are reasonably calculated to benefit the exercise of legislative power should be sustained." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 326 (1819); see also Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam) (sustaining a challenge to the Federal Election Campaign Act of 1971).

"The Congress shall have the Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18.

See supra note 13.
powers will not be exercised by any other branch of the government.\footnote{See U.S. Const. art. I, § 1. The analysis becomes clearer when you categorize the agencies as a division of the executive branch. Under this theory the agencies would be accountable to the executive, rather than to Congress, who initially delegated the power. Absent the veto, the executive could possess the final authority for administrative decisions. This would allow executive encroachment on the legislative powers. But through the use of the veto, the legislative power is ultimately returned to the Congress and all powers are exercised in conformity with the Constitution. For a discussion of the Supreme Court's opinions concerning the continued vitality of the division of powers, see Abourezk, \textit{supra} note 3, at 329-34.}\footnote{See Dixon, \textit{The Congressional Veto and Separation of Powers: The Executive on a Leash}, 56 N.C.L. Rev. 423 (1978).}

Without this check, certain congressional powers would be lodged outside of the legislative branch in violation of the doctrine of the separation of powers. This is the legitimate "end" which the veto sought to serve.

While the legislative veto may return the final determination of an administrative decision to Congress, it is still the agencies that are promulgating the rules; Congress is merely legitimizing the conduct. Thus, the advocates urged that in its operation as a check on agency action, the legislative veto essentially functioned as a condition precedent to the final implementation of an administrative directive. That is to say, that before a particular regulation could gain the force and effect of law, it must first pass congressional muster. Even if it were not exercised, the presence of a legislative veto in the enabling legislation of an agency ensured that the legislature could approve, disapprove, or amend administrative proposals. Congressional consideration was not only a condition precedent to final action, but it also allowed Congress, as noted above, to retain the final authority. In this manner, when an agency rendered a decision, the status quo remained unchanged.\footnote{Currin v. Wallace, 306 U.S. 1, 12 (1939); \textit{but see} 41 Op. Att'y Gen. 230 (1955) (although a condition may be valid, it may not be exercised if it is unconstitutional; the doctrine of unconstitutional conditions demands as much).} Furthermore, since Congress, at the outset, had the choice whether or not to delegate any power to the agency, advocates stressed that the legislature could attach any condition or contingency to the execution of that power.\footnote{See Buckley, 424 U.S. at 286.} Although Congress was not compelled to act, the condition precedent provided for legislative involvement, when necessary, to insure administrative compliance with Congressional mandates.

Though the legislative veto was not specifically provided for in the Constitution, proponents of the device assert that it is compatible with the procedural standards for lawmaking prescribed in the Constitution.\footnote{See Dixon, \textit{The Congressional Veto and Separation of Powers: The Executive on a Leash}, 56 N.C.L. Rev. 423 (1978).} While the President may not be involved in the execution of the veto, by passing the enabling legislation which delegated the power to the agency, he has technically sanctioned the review (and veto) process. The expectation that a legislative veto could be used, if necessary, to demand compli-
ance with the enabling statute, constituted an "integral part of the original policy decision." Therefore, the lack of executive involvement in the ultimate determination is theoretically immaterial.

B. The Arguments in Opposition

The weakness of the proponents' arguments lies in the fact that they are primarily based on policy. In their search for justifications, the advocates have basically sideswiped the constitutional arguments. Assertions that the veto is a valid exercise of legislative power stumble when balanced against the constitutional construction urged by the proponents. While the supporters of the veto rely on the necessary and proper clause to bolster their position, it must be remembered that powers exercised under this portion of the Constitution may not contravene any other provision. Those opposing the use of the legislative veto urge that a strict reading of the Constitution must yield the determination that the legislative veto violates the doctrine of the separation of powers. Therefore, not even the necessary and proper clause can breathe life into this unsound mechanism.

The Framers of the Constitution embraced the idea that "power corrupts" and that individuals must be protected against its tyrannical exercise. This power was especially threatening when wielded by one body, and it was felt that only a separation of powers could protect against a concentration of power which could threaten liberty. The separation of powers was therefore adopted by the Framers to protect against the possible abuses which could result from unchecked power.

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distri-

---

24 Cooper & Cooper, supra note 16, at 476. See Abourezk, supra note 3, at 338; Ginnane, The Control of the Federal Administration by Congressional Resolution and Committees, 66 Harv. L. Rev. 569 (1953). However, presidential acquiescence in a major policy decision or in the execution of a law is immaterial if the proposal (in this case the veto) is unconstitutional. If the veto device is invalid, presidential approval of the enabling legislation is irrelevant. J. Bolton, supra note 9, at 129-30. See also Watson, supra note 16 at 995-1016 (presidents have acquiesced to enabling legislation embodying a legislative veto, but they have generally not approved).

25 See infra text accompanying notes 80-92.

26 See supra note 17.

27 The proponents of the legislative veto do not deny the vitality of the doctrine of the separation of powers. Rather, they urge that since the veto does not constitute a "legislative act," it is incompatible with the doctrine. See infra notes 32-34 and accompanying text.

The separation of powers is not specifically mentioned in the Constitution, but rather is implied from the enumerated powers of the three branches. If and when one branch exercises a duty properly belonging to another, a violation of the doctrine occurs. 30

The Constitution specifically prescribes guidelines for the legislative process. The requirements for lawmaking mandate that a law passed by a bicameral legislature with presidential approval (or a two thirds majority to override a presidential veto). 31 Opponents of the veto argue that it violates the separation of powers doctrine because it is the equivalent of a legislative act which does not conform to the constitutional standards. 32

---

29 Myers v. United States, 272 U.S. 52, 293 (1926) (holding that Congress may not deprive the President of the power to remove certain subordinate officials from office). The doctrine was one to which the Framers had given extensive consideration at the Constitutional Convention and in the Federalist Papers. See infra notes 40-43 and accompanying text. But see Buckley, 424 U.S. at 121: “Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government.”

30 Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 433 (1977) (determining that the Presidential Recordings and Materials Preservation Act did not prevent the Executive from accomplishing his constitutionally assigned functions and did not violate the presidential privilege of confidentiality); United States v. Nixon, 418 U.S. 683 (1974) (no branch of the government may share powers that are the exclusive domain of another); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (deciding that the President had violated the separation of powers doctrine by seizing the steel mills to avert a nationwide strike); O'Donoghue v. United States, 289 U.S. 516 (1933) (each of the three departments should be completely independent of each other and should not be controlled directly, indirectly, or by influence by another); Springer v. Government of the Philippine Islands, 277 U.S. 189 (1928) (the separation and consequent exclusive character of the powers conferred upon each of the three departments is basic and vital).

31 See infra note 34.

32 The proponents of the legislative veto assert that the use of the device does not constitute “legislating” in the sense intended by the Constitution and, therefore, is not subject to the procedural constraints of the Constitution. The rationale that supports this argument is twofold. First, the veto does not have the “force and effect” of law because Congress is only reviewing an administrative action, not passing new laws. Congress is merely ensuring compliance with the enabling legislation. See H.R. Rep. No. 1014, 94th Cong., 2d Sess. 10 (1976). Second, if the veto is merely a condition precedent to the final implementation of an administrative proposal, it does not constitute “legislating” because the regulation in question has not yet taken effect. Therefore, a veto does not change the status quo. See Abourezk, supra note 3, at 336-37. However, once Congress has created an agency and defined its powers, it is argued, “any attempt to alter that original legislation, as by specific restrictions on the agency’s exercise of its powers, is a legislative act equivalent to repeal or amendment which can be properly accomplished only through the full legislative process.” Conley, Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge, 1976 Duke L.J. 285, 288-89 (1976) (footnote omitted).

[T]he fact that a legislative veto does not modify existing law, but merely maintains it as unaltered, does not mean that the veto is not of legislative character.
This distinction forms the crux of the constitutional debate: is the legislative veto an act of Legislating? If it is, it must conform to the enumerated standards. The opponents of the veto urge that by approving or disapproving of an administrative proposal, Congress may change or amend a law affecting the substantive rights and duties of individuals. To categorize the veto as a condition precedent, or as a proposal without the "force and effect" of law, is to inherently preserve form over substance. By utilizing the veto to prescribe standards, alter administrative proposals, and ultimately, change the law, Congress impermissibly steps outside of the legislative process designated by the Constitution.33

Opponents of the legislative veto assert that it specifically contravenes the Constitution in several ways. First, all proposed legislation, before becoming law, must be presented to the President for his approval.34 Through the use of the veto, Congress was able to make substantive deci-

The Constitutional measurement of Article I is concerned with who ultimately determines the content of prevailing law rather than whether other statutes are modified. Under such [a] statutory scheme, executive proposals for change are more than mere recommendations, because at the expiration of the waiting period they become law in the absence of Congressional disapproval. Since the proposals themselves are the embodiment of legislation that has already been passed by Congress, their nullification aborts law that would otherwise take effect. Can Congress, in effect, change the ordinary constitutional requirement for repeal by 'bootstrapping,' by reserving the right to repeal by less than full legislation?


38 See Watson, supra note 16, at 991. Furthermore, it is possible that the avoidance of constitutional procedures is "purposeful." That Congress "should chose to act by legislative veto rather than statute, suggests that far more is operating here than a mere desire for streamlining. It suggests instead that the legislative veto permits different substantive outcomes through a more comfortable avoidance of direct legislative responsibility for the crucial policy choices." Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 VA. L. REV. 253, 290 n.101 (1982). This is unfortunately true although the possibility for this sort of streamlining is an appealing one. Re-legislating every time an agency promulgates a rule inconsistent with legislative intent is time consuming and impractical. But, as stated, efficiency is a weak argument when balanced against constitutional construction.

34 The U.S. CONST. art. I, § 7, cl. 2 and 3 provides:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; if he approves he shall sign it, but if he shall not he shall return it, with his objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law . . . . Every Order, Resolution, or Vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives . . . .
sions without any presidential involvement. For example, an agency could render a decision that was consistent with an executive directive which Congress could then dismiss, thus effectuating an ironic turn of events: in essence, it was the executive branch which was making the law and the legislature that was exercising the veto power. If this premise is accepted, then not only does Congress violate the constitutionally prescribed requirements, but it also encroaches on executive functions. The veto usurps the President's power to execute the laws by monitoring their implementation. Even though the President was involved in the passage of the enabling legislation, he was not consulted with respect to those later congressional determinations that were rendered via the legislative veto. Advocates of this position maintain that this exercise constitutes a unilateral reversal of a presidential decision while bypassing the constitutional guidelines.

The opponents assert that the Constitution is further violated by the avoidance of both Houses of Congress in the lawmaking process. The

---

30 See supra note 20. Furthermore, the legislative encroachment on the powers of other branches is potentially two-fold:

If [these provisions] envision Congress' setting regulations aside on the basis of its own notions as to what constitutes desirable enforcement policy, they intrude upon the Executive's functions [execution of the laws]. If, on the other hand, they mean only to permit congressional review of the Executive's compliance with statutory intent, they intrude upon the province of the Judiciary. Either way, they carry Congress beyond its proper function of making laws under Article I of the Constitution.

FitzGerald, supra note 16, at 432 (quoting Hearings on H.R. 8231, H.R. 3658, and Related Bills before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 373 (1975) (Statement of Assistant Attorney General Antonin Scalia)).

31 Just as Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), held that the legislative sphere of power cannot permissibly be invaded by the executive, so the executive sphere may not be invaded by Congress. See Nathanson, Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies, 75 NW. U.L. Rev. 1064 (1981).

32 Presidential assent to substantive alternations, approval, or disapproval cannot render the use of the veto valid if it is unconstitutional—the formality of presentment will still be required. Failure to follow the requirement will not be tolerated.

Although the Framers of the Constitution justifiably expected that the two elected branches would solve most separation of powers questions politically, they did not intend that the judicial branch should stand by while one of the elected branches acted beyond its constitutional limits. Nor does the fact that the legislative veto has been frequently employed make it valid. "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."


33 Even if the use of the veto is viewed as amending or repealing a statute, that too categorically constitutes lawmaking and should be subject to Article I.

34 This violation pertains primarily to the one-House veto. See supra note 3 and accom-
Constitution requires that any act of legislation must be passed by both a House of Representatives and a Senate. Assuming that the legislative branch was the most likely to take on powers more properly entrusted to another branch, the Framers clearly provided for bicameral approval as a check on the potential abuses of power by one House: bicameralism would protect against hasty, ill-advised, and misconsidered action. The conclusion that the concurrence of both Houses and presentment to the President are required with respect to all exercises by Congress of its legislative powers finds further support from the Constitution itself. For the situations in which the Framers did intend a departure from these requirements, they expressly so provided. Therefore, the constraints and procedures specified by the Framers cannot be regarded as mere formalities that may be ignored in the lawmaking process. To avoid these standards would sacrifice the ideals that the Framers struggled to preserve.


This opinion was specifically embraced by the Framers of the Constitution: “The Constitution lodges legislative authority in a bicameral legislature in part as an internal check against the aggrandizement of Congressional Power.” THE FEDERALIST No. 49, at 315-16 (J. Madison) (New American Library ed. 1961).

Congress steps outside of the legislative process when it passes and acts according to a statute authorizing later action by resolution or committee vote, thereby retaining jurisdiction over the subject matter of legislation. Such a statute creates a new role for Congress, ambiguously situated between the legislative and executive functions. While the text of the Constitution provides no clear boundaries to Congressional activity, however, it does provide several specific checks to Congress' power.

Watson, supra note 16, at 991-2. See Buckley, 424 U.S. at 129; see also Dixon, supra note 21, at 441 (quoting H.R. REP. No. 105, 95th Cong., 1st Sess. 1, 10 (1977) (comments of Congressman Drinan) (The Great Compromise, indicative of the Framers’ mandate for bicameralism, is undermined by the legislative veto)).

The Constitution specifies when one House may act without the other. E.g., U.S. CONST. art. I, § 2, cl. 6 (the House of Representatives has the sole power of impeachment); U.S. CONST. art. I, § 3 cl. 5 (the Senate alone has the power to convict following impeachment); U.S. CONST. art. II, § 2, cl. 12 (the Senate alone may pass presidential appointments); U.S. CONST. art. I. § 5, cl. 2 and § 7 cl. 2, 3 (each body may pass on their own rules of proceedings). See also Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (presidential approval is not necessary for constitutional amendments).

While the Farmers may not have believed in a “hermetic sealing” off of the three branches, Buckley, 424 U.S. at 121, it is clear that they did not condone the use of devices to circumvent the Constitution. “It may be stated then, as a general rule inherent in the American Constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power . . .” Springer, 277 U.S. at 201.

The Framers were not only concerned with creating a government free of the tyrannies that had faced them previously, but they were also solicitous of the fact that the only way that this could be prevented would be to anticipate the possible infirmities of their design.

The Framers' concern over the conflict between public and private interests was directed at the human tendency to favor both local interest over national interest,
The assailants of the legislative veto further contend that it violates the Constitution by allowing Congress to become involved in the daytoday administration of the laws. Through the enabling legislation, Congress will have already defined the goals, method, and scope of agency action; however, through the use of the veto, Congress may be essentially administering the law by determining which regulations shall take effect and which shall not. When Congress originally delegates, specific relevant facts are not available which may guide agency activity. The legislative veto allows substantive manipulation of administrative determinations as such relevant factors do become known. This is no more sanctioned by the Constitution than are the legislative aspects of the veto.

and self-interest over the general interest. These tendencies were dealt with by assuring that representational interests would be expressed only through the institutional filter of bicameralism and by placing limitations on the powers of individual legislators.

Watson, supra note 16, at 1033.


See Watson, supra note 16, at 1037-42. A related concern is that this administrative function conflicts with article I, § 6 of the Constitution which holds broadly that a congressman may not hold a federal public office. To allow a congressman to “administer” the laws would subject him to a conflict of interest. See supra note 44. By permitting a congressman to manipulate laws as they are formed by agencies would subject the government to the susceptibility of a self-interested legislature, which would further limit the power of individual Congressmen. Therefore, it becomes necessary to demand that separate individuals perform these functions. See The Federalist No. 51 (J. Madison).

The question which arises in relation to these constitutional questions is whether, through the use of the legislative veto, Congress is really usurping powers properly reserved for another branch, or whether the legislature has merely retained a portion of the power it has delegated. Once Congress delegates power to the executive branch, the determination must be made whether it can interfere with subsequent tasks that stem from that power. Theoretically, this would mean that Congress was redelegating power back to itself. Henry, supra note 10, at 753. See also E. Corwin, The President—Office and Powers 1787-1957 (4th ed. 1957) (if Congress can delegate power to others, there is no persuasive reason why it cannot redelegate it to itself). It is questionable, indeed, whether this course of action is actually permissible. On one hand, as long as “the power” (to deal with any particular area) remains in congressional hands, it is “legislative” in character. However, once it is delegated, that power ceases to be legislative and becomes executive, and any subsequent congressional attempt to interfere with the execution and administration of that power constitutes a blatant violation of the Constitution. But see Cooper & Cooper, supra note 16, at 493 (nothing happens substantively or qualitatively to the power once delegated by Congress which renders it improperly legislative; whatever the subject, it was, and remains, a proper subject for legislative action). However, it seems that whether the legislature is exercising a power properly theirs is essentially irrelevant as, either way, according to the veto’s opponents, Congress is exercising a lawmaking function without following the guidelines set down in the Constitution.
C. Prior Decisional Law

The answer to the debate is curious, at best. While the advocates of the veto fought to preserve a device which they perceived as indispensable, the opponents were equally unrelenting. Both arguments have their merits. Though the constitutional arguments are persuasive, for a great length of time they were inadequate to mandate the destruction of a device so necessary to deal with the growth of the bureaucracy.

Until June of 1983, the courts were loath to render a decision on the issue. When confronted with the issue, courts twice had disposed of cases challenging the veto without deciding the merits, and twice they had severed the veto provision from the challenged statute. Only once has the Supreme Court neared a decision as to whether the legislative veto was constitutionally permissible. Although the issue was not decided directly, Justice White, in dissent, commented on the veto's validity in Buckley v. Valeo:

I would be much more concerned if Congress purported to usurp the functions of law enforcement, to control the outcome of particular adjudications, or to preempt the President's appointment power; but in the light of history and modern reality, the provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto.

Justice White would prove to be in the minority when the issue was

---

48 See, e.g., McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (In a constitutional challenge of a provision of the Federal Pay Comparability Act of 1967, where one House had vetoed presidential recommendations for executive schedule salaries, it was determined that the veto provision was not severable and therefore recovery was precluded. Based on this conclusion, the court declined to consider the constitutionality of this veto); Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) aff'd mem. sub nom., Clark v. Kimmitt, 431 U.S. 950 (1977) (A challenge to the one-House veto of certain statutory provisions allowing legislative review of Federal Election Commission decisions was dismissed as unripe since Congress had not yet exercised the veto).

49 See e.g., Atkins v. United States, 556 F.2d 1028 (Cl. Ct.), cert. denied, 434 U.S. 1009 (1977) (determining that certain federal judges were not entitled to additional compensation claimed under the Constitution); Pacific Legal Found. v. Watt, 529 F. Supp. 982 (D. Mont. 1982) (challenging both a clause authorizing unilateral action of a House Committee and an order of the Secretary of the Interior purporting to withdraw wilderness areas from mineral exploration and leasing).

50 424 U.S. at 1. This challenge concerned an attack on powers delegated to the Federal Election Commission as well as certain rules which were subject to a one-House veto. While the constitutional question was considered not to be ripe, the Court limited its decision to the propriety of the Commission and thereby determined that the defective appointment of the members of the Commission precluded them from exercising the challenged rulemaking powers, including the one-House veto.

51 Id. at 285-86.
RE-SEPARATING THE POWERS

squarely confronted for the first time in Chadha v. Immigration and Naturalization Service. Though the Chadha decision finally resolved the longstanding controversy, it is doubtful that the issues have been laid to rest once and for all. The decision was predictable only to the extent that it mimicked the arguments repeatedly set forth by the veto’s opponents. Yet, Chadha is thought-provoking. Throughout the analysis of the decision, the question continuously must be addressed as to whether the decision should have been made.

III. THE TURNING POINT: Chadha v. Immigration and Naturalization Service

Only twice has the Supreme Court determined that an act of Congress trespassed upon the scope of executive powers; both cases were based upon violations of specific clauses of the Constitution. Only once has the Court considered the issue absent the violation of a specific clause. Chadha falls under neither one of these rigid classifications. While the legislative veto is neither specifically sanctioned nor particularly prohibited, the Court did rely on precise constitutional language in order to rationalize its decision. However, Chadha must be perceived as a novelty, for the Court has gone beyond the four corners of the Constitution to resolve a dispute which easily could have been left alone.

A. The Facts and Circumstances

Chadha was a challenge to the constitutionality of section 244(c)(2) of the Immigration and Nationality Act “authoriz[ing] either House of Congress, by resolution, to invalidate the decision of the Executive branch, pursuant to authority delegated by Congress to the Attorney General [of the United States] to allow a particular deportable alien to remain in the United States.”

Chadha, a native of Kenya and holder of a British passport, was lawfully admitted into the United States in 1966 on a nonimmigrant student visa which expired in June of 1972. Deportation proceedings were initi--
ated by the Immigration and Naturalization Service (INS) and a deportation hearing was held before an immigration judge in early 1974. Chadha admitted he was deportable, but was permitted an adjournment to allow him time to file an application for suspension of the deportation pursuant to section 244(a)(1) of the Immigration and Nationality Act. Subsequently, the immigration judge determined that Chadha met the statutory requirements for the suspension: he had resided in the United States for over seven years, was of good moral character, and would suffer extreme hardship if he were returned to his native land. A report of the deportation suspension was forwarded to Congress. Pursuant to the Immigration and Nationality Act, one House of Congress could, by resolution, overrule the Attorney General's deportation suspension; absent a vote to this effect, Chadha's deportation proceedings would have been formally cancelled and he would have gained the status of a permanent resident. In December of 1975, a resolution which opposed the granting of relief to Chadha and five other aliens was introduced in the House of Representatives. The resolution was successful, proceedings were re-

he should not be deported for overstaying his visa. Id. at —, 103 S. Ct. at 2770.


89 The Immigration and Nationality Act § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1982) provides in part:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—(b) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

61 Id.

62 Id. § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1982), allows one House of Congress to veto the decision of the Attorney General:

In the case of an alien specified in paragraph (1) of subsection (a) of this subsection—if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

(emphasis added).

opened to implement the decision, and Chadha was ordered deported.\textsuperscript{65}

Chadha protested to the immigration judge and appealed to the Board of Immigration Appeals contending that section 244(c)(2) was unconstitutional.\textsuperscript{66} Both responded that they lacked the power to evaluate the constitutionality of an act of Congress. Chadha then filed a successful petition for review with the Ninth Circuit Court of Appeals.\textsuperscript{67} The court espoused Chadha's position that Congress was, in fact, without authority to deport Chadha.\textsuperscript{68} Specifically, Congress' determination was not valid because of the means (the veto) by which its will was effectuated. Certiorari was granted by the Supreme Court to consider the constitutionality of section 244(c)(2), a legislative veto.

\begin{itemize}
\item \textbf{B. Preliminary Issues}
\end{itemize}

Initially, the Court quickly disposed of a number of procedural issues challenging its authority to reach a decision on the merits of the case. The preliminary issues in this case deserve particular scrutiny for they make it apparent that the case need not have been decided. This case could have been dismissed based upon a contrary resolution of one of these issues, thereby leading to the inexorable conclusion that the Court believed that the controversy surrounding the legislative veto had to be dispelled.

Congress, defending the validity of the veto provision, first asserted that review was precluded because the provision authorizing the one-House veto was not severable from the remainder of the statute.\textsuperscript{69} Therefore, as a consequence, it was argued that if the veto provision failed, so must the entire statute. If the entire statute is invalid, then the Attorney General is initially without the authority to suspend Chadha's deportation: Chadha, even if successful, could not gain the relief he desired. The Court explained that while a provision may be stricken unless it is apparent that the legislature would not have enacted the statute without it,\textsuperscript{70}

\begin{itemize}
\item Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, stated that it was his Committee's belief that these aliens did not satisfy the statutory requirements entitling them to the relief desired. 121 Cong. Rec. 40800 (1975).
\item The resolution was passed without debate or a recorded vote. Chadha, __ U.S. at __, 103 S. Ct. at 2771.
\item Id. at __, 103 S. Ct. at 2772.
\item The INS agreed with Chadha's contention that the Immigration and Nationality Act § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1982) was unconstitutional. Id.
\item Chadha v. INS, 634 F.2d 408, 436 (9th Cir. 1980).
\item If the provision is not severable, then as Congress maintains, the entire statute would fail. If it fails in its entirety, then the Attorney General lacks the initial authority to suspend Chadha's deportation under § 244(c)(1). Therefore, this would lead to the conclusion that Chadha has no standing to challenge this provision since, even if he were successful, he would not be entitled to any relief.
\item Chadha, __ U.S. at __, 103 S. Ct. at 2774-75. See Buckley, 424 U.S. at 108 (quoting Champion Ref. Co. v. Corporation Comm'n, 286 U.S. 210).
\end{itemize}
the presence of a severability clause in the Immigration and Nationality Act created a presumption that the validity of the statute was not contingent upon the application of any particular provision. The Court stated that the clause was unambiguous: the legislature had intended the continued vitality of the Act even if certain provisions were nullified.

Congress further opposed consideration of the case maintaining that there existed no case or controversy which would give the Supreme Court the jurisdiction to hear the case. Since the Immigration Board of Appeals, the INS, and the Ninth Circuit all espoused Chadha’s position, Congress asserted that the proceeding was nonadversarial. The Court summarily determined that there was sufficient adverseness in that Chadha’s residential status would be affected by the outcome of the case. While true from a theoretical standpoint, the Court’s resolution of this issue is attenuated, at best. Certainly Chadha’s status would be

71 A severability clause states that if any particular provision of a named statute is held to be invalid, then the remainder shall still be enforceable. E.g., Immigration and Nationality Act § 406, 8 U.S.C. § 1206 (1982): “If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.”

72 The Court justified the presumption of legislative intent in this case by deducing that Congress had fully intended to delegate authority to the Attorney General to control deportation suspensions because it was too “onerous and time consuming” to consider all of the private deportation bills themselves. The Court interpolated that the legislative history of this bill manifested a conclusive inference that Congress did not want to carry this burden of responsibility. Furthermore, the Court surmised that there was “insufficient evidence” that Congress would have desired otherwise. See Chadha, ___ U.S. at __, 103 S. Ct. at 2774-75. While the history may have indicated that Congress unequivocally intended to abdicate this duty to the Attorney General, it seems doubtful that Congress intended to relinquish complete authority in this area with absolutely no avenue of recourse against a decision with which it disagreed.

73 Chadha, ___ U.S. at __, 103 S. Ct. at 2778.

74 In order for the Supreme Court to hear any case, there must first exist a genuine case or controversy. This is especially true when the case before the Court is challenging the validity of an act of Congress. See e.g., Congress of Indus. Orgs. v. McAdory, 325 U.S. 472 (1945)(the Court will not pass on the constitutionality of legislation in a suit which is not adversarial); Coffman v. Breeze Corp., 323 U.S. 316 (1945) (the Court will not pass upon the constitutionality of an act of Congress unless the suit is truly adversarial); Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932) (the Court must only deal with substantial distinctions and real injury); Chicago v. Wellman, 143 U.S. 399 (1892) (decisions of constitutional questions about an act of the legislature should not be invoked by means of an amicable suit; an “earnest and vital” controversy is necessary). This doctrine is reinforced by numerous suits that have been dismissed on this basis. See e.g., Arizona v. California, 283 U.S. 423 (1930); Liberty Warehouse Co. v. Grannis, 273 U.S. 70 (1926); New Jersey v. Sargent, 269 U.S. 328 (1925); Texas v. Interstate Commerce Comm’n, 258 U.S. 158 (1921).

75 The Court also discarded a congressional challenge that the case presented a nonjusticiable controversy since Chadha was merely challenging the congressional authority to regulate aliens. The Court responded that while Congress does have plenary authority over aliens in this country under article I, § 8, clause 4 and article I, § 8, clause 18 of the Constitution, the means chosen to achieve such ends may nevertheless be scrutinized. Further-
RE-SEPARATING THE POWERS

considered and affected, however, that is not the thrust of this controversy. The Court granted certiorari to determine the constitutionality of the one-House veto. For this issue, there was no opponent. This adds to the inescapable conclusion that the Supreme Court did not want to dismiss this case on the basis of a preliminary issue, but rather, sought to render a decision on the merits.

The last critical preliminary issue was whether Chadha had available to him alternative forms of relief. Chadha had married a United States citizen in August of 1980 thus possibly earning him the classification as an immediate relative. Furthermore, Chadha may also have been entitled to relief under the Refugee Act of 1980. The Court ruled that these alternatives were merely "speculative" and were therefore insufficient to deny Chadha the right to challenge the veto provision. Again, such a

more, merely because this question involves constitutional issues, the political question doctrine is not automatically invoked. See Chadha, U.S. at 2778. For a complete discussion of the situations in which a political question most frequently arises, see Baker v. Carr, 369 U.S. 186, 217 (1962). One critic has asserted that the Court's decision in Chadha was jurisdictionally barred on the basis that it undermined the prohibition against the issuance of advisory opinions. By merely ratifying the Attorney General's determination, the Court violated this tenant and expanded its own power. See Wallace, Ad Astra Sine Aspera: Chadha Transcends Adversity, 1 BENCHMARK 13 (1984).


Immigration and Nationality Act §§ 201(b), 204, 245, 8 U.S.C. §§ 1251(b), 1253, 1255 (1982).

Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (1982)). The Act provides that the Attorney General is authorized to grant asylum and permanent residence to any alien who is unable to return to his country because of a "well-founded fear of persecution on account of race." Chadha contended that due to his Kenyan nationality and British citizenship, return to his native land would in fact, produce undue hardship. See Appellant's Brief at 5, Chadha v. INS, U.S. 103 S. Ct. 2764 (1983).

Chadha, U.S. at 2776. Note, however, that while this decision is favorable and sympathetic to Chadha's position, it ignores the tenant that constitutional adjudication should be avoided whenever possible. In fact, there is no evidence in the opinion which reveals whether Chadha even attempted to pursue any other forms of relief. Given the fact that three years had passed between Chadha's marriage and the Court's decision, one begins to wonder whether the alternative forms of relief were really as speculative as the Court might have us believe.
cursory disposition of an issue which could have precluded a decision on the merits, deserves consideration. Although these other forms of relief may have been "speculative" as stated by the Court, it is surprising that Chadha was not compelled to pursue these remedies before resorting to the Supreme Court for assistance.

When this decision of the Court is compared with the earlier cases which challenged the veto and which were all dismissed without a decision on the merits, it becomes obvious that the Court, in this instance, did not want to avoid this determination. Though the resolution of the preliminary issues may not always be dispositive of the outcome of a particular controversy, they may affect the future treatment of this decision. If the Supreme Court strained to find that this case was properly before the Court, it may be possible that this decision is limited to these particular facts. If this is true, then perhaps the rationale for striking down the legislative veto may be confined to this case. Furthermore, if there did, indeed, exist an alternative, narrower ground upon which to decide this case, then it is conceivable that future litigation concerning the legislative veto could be resolved by reliance upon these narrower grounds without consideration of the central constitutional issue. That is to say, a court faced with the same facts could dismiss a case based upon a stricter application of jurisdictional bars and could thereby allow a challenged veto to stand.

C. The Majority Opinion

Chief Justice Burger's solution to the puzzle of the one-House veto is quite simple and basically traditional, adhering to the arguments set forth by the opponents of the veto since its inception. While acknowledging that the legislative veto is a frequently used and an efficiently employed device, Chief Justice Burger rejected the argument that convenience or utility could sustain the veto in the face of explicit and unambiguous constitutional provisions which proscribe its use. "[P]olicy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised." 80

The heart of the majority opinion relies heavily upon the construction of the doctrine of the separation of powers. 81 The Constitution delineates specific procedural guidelines to be respected when exercising the powers conferred. These are not intended to be circumvented; "The principle of separation of powers was not simply an abstract generalization in the

80 Chadha, ___ U.S. at ___, 103 S. Ct. at 2780-81.
81 See U.S. CONST. art. 1, § 1 and § 7, cl. 2 and 3. These provisions enumerate the basic legislative powers conferred. While the doctrine of the separation of powers is not specifically mentioned in any provision of the Constitution, it is implied from the duties which are enumerated.
minds of Framers." Any extra-legislative procedure utilized in contra-
vention of the doctrine would be thoroughly unjustifiable.

Article I, Section 7 of the Constitution provides that one of the funda-
mental requisites to the enactment of a law is presentment to the Presi-
dent. The Court declared that the legislative veto was inconsistent with
this requirement since it avoided involvement of the President in the leg-
islative process after the veto had been exercised. The intent of the Fram-
ers of the Constitution gives meaning to this procedural design. The ra-
tionale behind the presentment clause that the President must retain a
defensive weapon against potential legislative abuses of power, that his
involvement serves as a check against "oppressive, improvident, or illcon-
sidered measures," and that it assures the input of one elected by a na-
tional constituency bolsters the meaning behind the language of the Con-
stitution. Since the legislative powers were those most easily and apt to
be abused, the principle of presentment was "uniformly accepted" by the
Framers.

The Court determined that the veto also contravenes the bicameral re-
quirements of the Constitution; specifically, no law may be passed with-
out the approval of a majority of both Houses of Congress. Bicamera-

**Chadha, __ U.S. at ____, 103 S. Ct. at 2781 (quoting Buckley, 424 U.S. at 124).** The Court emphasized that although the separation of powers was originally adopted by the Framers as a reaction against the despotism which they had previously experienced, the doctrine continues to maintain it vitality.

The choices we discern as having been made in the Constitutional Convention imposes 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 the President.

**Chadha, ____ U.S. at _____, 103 S. Ct. at 2768.** However, it is argued that even though the separation of powers is a vital doctrine deserving of respect, it is nonetheless not a rigid concept devoid of any flexibility. "But [the Framers] likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." Buckley, 424 U.S. at 122. *See also Youngstown Sheet & Tube Co.*, 434 U.S. at 635 (Jackson, J., concurring) ("The actual art of go-

erning under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contem-
plates that practice will integrate the dispersed powers into a workable government. It en-
joints upon its branches separateness but interdependence, autonomy but reciprocity.").

**Springer, 277 U.S. at 209 (Holmes, J., dissenting) ("The great ordinances of the Constitution do not establish and divide fields of black and white.").** It therefore should be asked whether the legislative veto is truly violative of the separation of powers or whether it is really compatible with them. *See infra* note 101.

---

**Chadha, ____ U.S. at ____, 103 S. Ct. at 2782. See supra note 34.**

**Chadha, ____ U.S. at ____, 103 S. Ct. at 2782.**

**Id. at ____, 103 S. Ct. at 2783.**
lism assures careful and concerted consideration by the legislature, it satisfies the "need to divide and disperse power in order to protect liberty", and it serves to protect the respective interests of the large and small states, as well as local and national constituencies.86

The Court concluded that the bicameral and presentment requirements are interrelated and essential constitutional functions. Both were exhaustively considered and were determined to be indispensable to the American system of government. While not every legislative action of each House is subject to bicameralism and presentment, when intended specific exemptions are enumerated in the Constitution.87 Essentially, however, it is the type of action sought to be exercised that defines the need for adherence to the constitutional procedures. Since only "legislative" acts demand conformity,88 the critical question before the Court was whether the legislative veto constituted a legislative act.89 The true determination will depend on whether the veto has the purpose and effect of legislation. The Court concluded that since the exercise of the veto fundamentally altered the "legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials, and Chadha," it was essentially legislative in nature.90 Such an effort must be effected through the constitutionally prescribed process. Absent the one-House veto provision, neither House, acting alone or together, could have required the Attorney General to deport Chadha after he had determined that Chadha could remain; it could only have been performed through a legislative enactment.91 One House cannot, therefore, be permitted to do what two together would be prohibited from carrying out. Such "legislating," according to the Court, surely does not conform to the Constitution and congressional authority cannot be implied to this extent.92

86 For support that the bicameral clauses were an integral part of the scheme of the separation of powers, the Court relied on the words of Alexander Hamilton.

It [bicameralism] establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitency, or of any impulse unfriendly to the public good which may happen to influence a majority of that body. . . . The primary inducement to conferring the power in question upon the Executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad law through haste, inadvertence, or design.

Chadha, ___, U.S. at ___, 103 S. Ct. at 2783 (quoting THE FEDERALIST No. 73, at 458 (A. Hamilton) (H. Lodge ed. 1888)).

87 Chadha, ___, U.S. at ___, 103 S. Ct. at 2786. See supra note 42.

88 See supra notes 32-33 and accompanying text.

89 Chadha, ___, U.S. at ___, 103 S. Ct. at 2785.

90 The Court explained that "whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in character and effect." Id. at 2784 (quoting S. REP. No. 1335, 54th Cong., 2d Sess. (1897)). See supra note 32.

91 Chadha, ___, U.S. at ___, 103 S. Ct. at 2784-86.

92 Id.
RE-SEPARATING THE POWERS

Chief Justice Burger's majority opinion has a solid traditional cast, encompassing all of the conventional arguments set forth by the opponents of the veto. In this respect, it is the perfect vehicle for the invalidation of the legislative veto. Nevertheless, such an argument may not be quite so flawless when applied to the facts of Chadha. The day-to-day use of the veto usually operates as a legislative mechanism. The veto generally affects potential rules of general applicability. This sort of rulemaking is certainly circumscribed by the Court. However, the veto which was utilized in Chadha was not one that yielded a "legislative" effect. The veto utilized in Chadha involved a limited group of individuals whose rights and duties as potential citizens would be altered: the decision of the House constituted an essentially adjudicatory function. As a result, the concurring opinion of Justice Powell is a sounder basis for the Chadha decision.

D. The Powell Concurrence: The Better Basis

Justice Powell's concurrence parallels the opinion of the majority in that they both derive their conclusions from the doctrine of the separation of powers. Justice Powell stated that while the Constitution does not delineate the precise boundaries for the exercise of powers, the doctrine may be functionally violated in one of two ways: one branch may "impermissibly interfere" with a constitutionally assigned function of another, or one branch may "assume a function more properly entrusted...

93 The Court emphasized the legislative character of the veto in this case by pointing out that in the absence of § 244(c)(2) (the veto provision), neither the Senate nor the House acting alone or together, could require the Attorney General to reverse a decision allowing an alien to remain in the United States. After the Attorney General, pursuant to his delegated authority, has made such a decision any attempt to overturn it cannot be accomplished by anything less than full legislation. The legislative nature of the veto was further substantiated by the fact that Congress chose to delegate the authority to the executive branch to allow deportable aliens to remain in the country. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way: bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

Id. at —, 103 S. Ct. at 2786.

94 Id. at —, 103 S. Ct. at 2789.

95 See supra note 28.

96 Justice Powell asserted that by determining that one particular individual does not satisfy the statutory criteria for permanent residence in the United States, the legislature had assumed a judicial function in violation of the separation of powers. Since the determination of Chadha's status as a deportable alien was specific, limited to unique facts, involved a closed class of individuals, concerned liability based on past conduct, and imposed sanction without further proceedings, this proceeding was essentially adjudicatory as op-
to another." The legislative veto is characteristic of the latter example. Essentially, the veto provision in the Immigration and Nationality Act allowed Congress to usurp a judicial function by allowing the legislature to adjudicate individual rights. Therefore, while the veto at issue does violate the separation of powers doctrine, it is not because the legislature encroached on executive powers. Rather, it is because Congress exercised a function that was more properly placed within the province of the judiciary.

While the majority opinion seems to circumscribe any veto that contravenes the bicameral or presentment clauses of the Constitution, Justice Powell's concurrence does not sweep so broadly. This concurrence is narrowly confined to the invalidity of the veto exercised in Chadha: nowhere does Justice Powell state that all legislative vetoes are invalid. Rather, he is careful to point out that adherence to this narrower ground for decision could have avoided the breadth of the majority opinion.

As expressed in Justice Powell's concurrence, this case could have been decided on narrower grounds and thus could have avoided the majority's sweeping condemnation of the legislative veto. Justice Powell's opinion reinforces the conclusion that the majority ignored one of the "cardinal principle[s] of statutory construction" that is "to save and not to destroy," and that the Court should avoid passing on questions of the constitutionality of acts of Congress whenever it is possible to reach a decision on alternative grounds. The hasty resolution of the preliminary issues further confirms this conclusion. Though this deduction may not appear critical to the issue of this case, it may influence future controversies that take this decision into account. When these principles of constitutional construction are taken in conjunction with Justice Powell's narrower grounds for decision, future decisions may not be so broad. That is, courts may abide by the above-stated rules and extrapolate that the Court did not intend to "destroy," but to "save," and that since the Court did not state the breadth of the opinion and its applications, Chadha, as stated by Justice Powell, was limited to the particular facts at issue. This analysis is not quite as distasteful as the conclusion that the Supreme Court in Chadha purposefully avoided these "cardinal principles" in or-

posed to legislative. A legislative proceeding would have prescribed rules of general applicability for future conduct as well as relative certainty for future expectations. See also Comment, supra note 4, at 798 (discussing the traditional distinctions between legislation and adjudication).

In support of this proposition, Justice Powell stated: "Their [the Framers] concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person... provides still another reason not to ignore the separation of powers." Chadha, ___ U.S. at ___, 103 S. Ct. at 2789 (Powell, J., concurring).

Id.

Id. at ___, 103 S. Ct. at 2793.

der to render a broad and overwhelming annihilation of all legislative vetoes.

Despite the unmistakable conclusions that the majority purposefully rendered a decision on the constitutionality of the veto, the fact still remains that use of the legislative veto may no longer be allowed.\textsuperscript{101} Dissatisfaction with the Court’s decision will not resolve the troublesome question that now faces the legislature—where do we go from here?

IV. After Chadha

A. The Ramifications of the Decision

A preliminary examination of Chadha could conceivably yield the conclusion that it was a narrow decision that proscribed merely the use of a one-House veto in deportation cases. Such an attitude however, may be misplaced. Although the majority opinion never explicitly states the intended applications of the decision, both Justice Powell and Justice White left no room for doubt that the Chadha decision “not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a ‘legislative veto.’”\textsuperscript{102} Undeniably, the first unanswered question is whether all legislative veto provisions are truly invalid. Since the majority avoided a direct determination of this issue, the possibility still existed that the two House vetoes could survive.\textsuperscript{103} Seemingly,
the debate was quickly resolved when, shortly after the decision, the Court summarily affirmed two lower court decisions, one of which struck down the two-House veto of a Federal Trade Commission regulation.104

Initially, these decisions would seem to indicate that all legislative veto provisions are inoperative. Yet, it cannot be forgotten that the majority did not address this issue; perhaps this leaves a gray area still ripe for resolution. If the Chadha decision was tenuously resolved after an inadequate determination of the preliminary issues, then the Court may have left open avenues of recourse. If the Court strained to make sure that this case was properly before them, then perhaps it is because the decision was peculiarly limited to the facts of this particular case. Thus, the Court may have purposefully left the determination of the validity of other veto provisions to the courts in order that they apply the Chadha rationale in a case-by-case method.

Such an alternative would be unexpectedly appealing to the legislature. Were the courts to apply the Chadha decision in a case-by-case method, several possibilities for avoiding the decision could arise. First, the decision could be limited to the particular facts of Chadha (and the subsequent decisions). Second, challengers could be denied access to the courts based on a contrary resolution of the preliminary issues. If the legislative veto, or a device similar in operation, were to be exercised in the future, any individual challenging its use could be limited by problems of standing, alternative relief, or existence of a true case or controversy. The majority's decision would probably not be overturned solely on the basis of the resolution of the preliminary issues, yet its force could be diminished. Since constitutional issues should not be resolved unless no adequate grounds for alternative decision exist, any future determination could show that a narrower option did exist as asserted by Justice Powell. Finally, a future decision could circumscribe the rationale asserted by the majority in favor of that utilized by Justice Powell in order to narrow the breadth of the decision. When this possibility is coupled with the cursory resolution of the preliminary issues, it raises the distinct possibility that Chadha might not be able to survive future scrutiny.

If the Court's decision in Chadha does invalidate all use of any legislative veto, then the problems that the Court has engendered are essentially twofold. First, there exists literally hundreds of statutes with legislative veto mechanisms. It is unclear what will happen to these laws now. It is both impractical and impossible for Congress to reconsider each and every statute to determine whether they remain valid absent the veto...
provision. So, the question to be answered is whether the veto provision is severable from its statutory framework while allowing the remainder to survive. However, even if the vetoes are severable, "[t]he fact that the Supreme Court has handed down its opinion that the veto is unconstitutional does not alter or dilute the original rationale which persuaded Congress to adopt and utilize the veto in the first place. The . . . issue is, who shall write the laws of the land?" Hence, the second dilemma posed by the Court's decision: if Congress is to continue to delegate authority to agencies and the executive branch which is both inevitable and imperative how can it continue to retain the degree of control it maintained via the legislative veto?

Congressional response to Chadha generally has not been commendatory. Congress has interpreted the Court's decision to mean that the legislative veto may no longer be enforced. However, in a curious turn of events Congress has passed statutes since the decision that have embodied legislative vetoes. Such a paradox creates more of a quandry. Nevertheless, congressional commentaries have indicated that the legislative veto should be replaced by new ways to monitor delegated power. To date, no uniform solution has been accepted.

The problems are complex. First, we do not know conclusively whether all uses of the legislative veto are invalid. Second, if they are, there are no solutions at hand. Finally, it is not at all clear whose problem it is now. It is quite conceivable that the problem has been returned to the legislature in order that it both decide what to do with the existing statutes and how

106 The Chadha decision was assaulted most harshly by Stanley Brand, Counsel for the House of Representatives: "It took the Court 18 months to screw up what it took the Congress 50 years to set up." 1983 CONG. Q. 1327 (weekly report July 2, 1983).
107 See infra note 109.
109 See 1983 CONG. Q. 1264 (weekly report June 25, 1983). "The Court's decision drew a mixed reaction in Congress, but most members agreed that they will have to re-examine and probably rewrite laws that contain legislative veto provisions." As a result, [t]he Court's [sic] ruling set off an across-the-board inventory of existing laws with veto provisions. Congressional committees were expected to sit down to review the laws within their jurisdictions that contain such provisions and to confer with the appropriate executive branch officials to ascertain the practical impact of the Court's [sic] ruling.

Id. at 1263.
to control delegated power in the future. Representative Jacobs most probably voiced the opinion of congressmen generally by stating: "When an unelected Supreme Court decides that an unelected bureaucracy has more to say than Congress in determining what Congress means when it passes a law, it is time for Congress . . . to clear things up on behalf of the people."\footnote{1983 CONG. Q. 1328 (weekly report July 2, 1983)(statement of Representative Andrew Jacobs).

Yet, the courts may not be helpless. They may be able to evaluate on a case-by-case basis whether particular vetoes are severable or whether, absent the veto, the entire statute must fail. Furthermore, if no Congressional response is forthcoming, the courts may have no choice but to individually determine the validity of the statutes in question. The only thing that remains clear at this point is that nothing is clear.

B. Severability and the Future of the Existing Statutes

The unconstitutionality of a part of an act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.\footnote{United States v. Jackson, 390 U.S. 570. 585 (1968) (quoting Champion Ref. Co. v. Corporation Comm’n, 286 U.S. 210, 234 (1932)). See Dorchy v. Kansas, 264 U.S. 286, 289-90 (1924).}

The Court has, in the past, determined that certain portions of a statute are unconstitutional while allowing the remainder of the law to remain effective. However the Court has never before invalidated a provision in a multitude of laws. While the Court has been amenable to excising certain provisions in the past, the problem now exists whether every legislative veto provision (if they are, in fact, all invalid) may be severed from its statutory framework. No previous decision has legitimized so comprehensive a scheme.

The traditional test for severability takes two factors into account. First, if a provision is deleted, what remains must be fully operative as law.\footnote{See Jackson, 390 U.S. at 570 (declaring that a death penalty clause imposed an impermissible burden on the exercise of a constitutional right and was therefore severable); Champion Ref. Co., 286 U.S. at 210 (determining that a price fixing law was void under the fourteenth amendment and was severable).} Laws that embody a legislative veto comply with this requirement. When Congress exercises its veto power, it is essentially barring a law from taking effect. Absent the legislative prerogative, a law would be enacted. The presence of the veto provision (or its absence) does not leave the original legislative scheme incomplete. The veto is merely an adden-

\[\text{[Vol. 33:145} \]
dum to the scheme, not to the law that the agency is seeking to promul-
gate. While the veto mechanism may have been included to effectuate a
congressional preference, its absence does not render the original delega-
tion, or the laws promulgated pursuant to it, a nullity.\textsuperscript{113} Severing the
veto from the enabling legislation of a delegation would parallel a delega-
tion of power that never had a veto provision in the first place. In other
words, its presence does not alter the manner in which an agency exer-
cises its power and its absence does not affect the statute's ability to
function as a law.

The second facet of the severability test may not be so easily dismissed.
A statute will generally be allowed to stand after a portion of it has been
severed only if the legislature would have enacted it absent the objection-
able provision.\textsuperscript{114} Courts dictate that the best way to resolve this is to
examine the legislative history of each particular statute in order to de-
termine how critical to the enactment the provision was viewed to be. By
so requiring an examination of the legislative history of a statutory
scheme, a solution will be, at best, guesswork. Rather than an analysis of
legislative intent, such speculation would be better classified as an exer-
cise in statutory construction. It is impractical to believe that an ad hoc
examination by the judiciary could determine exactly which portions of a
statute Congress intended to be indispensable.

Usually the most persuasive indicator of Congressional intent of this
sort is gleaned from the presence or absence of a severability clause.\textsuperscript{115} Since
this clause is woven into the framework of the statute, a presump-
tion is created that "the legislature would have been satisfied with what
remained and that the scheme of regulation derivable from the other
provisions would have been enacted without regard to [the deleted por-
tions]."\textsuperscript{116} Such an interpretation is both logical and expedient in deter-
mining legislative intent; however, such language is not always conclusive.
The existence or the nonexistence of a severability clause does not always
dictate the disposition of a statute that has been declared partially inva-
lid.\textsuperscript{117} Certainly, on occasion, courts have been predisposed to make their

\textsuperscript{113} See supra note 16.
\textsuperscript{114} Jackson, 390 U.S. at 586.
\textsuperscript{115} A severability clause states that if any portion of the statute is invalid, then the re-
mainder shall continue to be operative. See supra notes 69-72 and accompanying text.
\textsuperscript{116} Champion Rel. Co., 286 U.S. at 235. See also J. Cooley, \textit{Constitutional Limitations}
(1st ed. 1868) (the test for severability is whether the legislature would have enacted the law
absent the clause).
\textsuperscript{117} The Court has often allowed a statute to remain valid despite the fact that a provision
has been excised in the absence of a severability clause. See Tilton v. Richardson, 403 U.S.
672 (1971) \textit{reh'g denied}, 404 U.S. 874 (1971); Jackson, 390 U.S. at 585 n.27. Therefore, while
the presence of such a clause creates a presumption of severability, its absence does not neces-
sarily do so. If in the Court's discretion, the elimination of the clause in no way alters
the substantive reach of the statute and further does not alter its basic operation, the ab-
scence of the clause may be ignored. Jackson, 390 U.S. at 586. But see Carter v. Carter Coal
own interpretations, regardless of the language of the statute. Judges may evaluate the merits of a particular statute and so decide whether or not to sustain its validity, rather than applying "the principles which are always said to determine severability." 9 Regardless of any well established rule, the decision is fundamentally a matter of judicial discretion.

Previous applications of the "severability test" are unavailing when employed to solve the dilemma at issue. In all previous situations, the Court was examining individual provisions of statutes in particular adjudications, such as Chadha. In each, the courts were able to scrutinize the legislative histories of the statutes in question and therefore render a decision which was consistent with the facts of each case. However, it is conceivable that the Supreme Court's decision in Chadha has rendered hundreds of provisions in a variety of statutes invalid. If the severability test were to be applied to the issue at hand, it could mean that all legislative vetoes across the board would be blindly severed. To say that the legislative veto is no longer valid, and therefore all such provisions heretofore shall be disregarded, is untenable. Some statutes most certainly would not have been enacted absent a veto provision 10 and a determination of this breadth could not take these individual differences into account.

Furthermore, if it were to be decided that all existing vetoes were to be eliminated while allowing the remainder of the legislation to continue, it is unclear who would make this determination. Since the Court left it uncertain exactly how far-reaching the decision is in the first place, it

Co., 298 U.S. 238, 322 (1936) ("[W]hen Congress states that the provisions of the Act are not inseparable and that the invalidity of any provision shall not affect others, we should not hold that the provisions are inseparable unless their nature, by reasons of an inextricable tie, demands that conclusion.").

10 Stern, Separability and Separability Clauses in the Supreme Court, 51 HARv. L. REV. 76, 114 (1937). For a partial listing of specific statutes in which the Court has and has not allowed a provision to be severed, see id. at 106-108.

110 Two such examples include major tools of foreign policy. Although the Congress has never utilized either of these "tools," their existence has been used to force the President both to consult with the legislature and to accept compromises. These two statutes which embody the veto provisions are the War Powers Resolution, 50 U.S.C. § 1541 (1973), and the International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. § 2776(b) (1981). The War Powers Resolution allows Congress, via a concurrent resolution, to force the withdrawal of U.S. troops who are engaged in foreign hostilities without congressional authorization. The Arms Control Act allows the Congress to veto major arms sales, by a concurrent resolution, within thirty days of receiving notification from the President. Although no use of the veto has been occasioned by either one of these statutes, it is questionable whether either would have been enacted absent the provision. This is well-illustrated by the War Powers Resolution. Enacted primarily in response to the war in Vietnam, it indicated a pervasive legislative intent not to allow the President to avoid the "war power." See 1983 CONG. Q. 1265 (weekly report June 25, 1983). For a discussion of whether the War Powers Resolution is currently valid, see Moore, The War Powers Resolution... of Doubtful Constitutionality, 70 A.B.A. J. 10 (1984); Tipson, The War Powers Resolution... Is Constitutional and Enforceable, 70 A.B.A. J. 10 (1984).
would be inconsistent to extrapolate that Chadha meant to sever all veto provisions. Yet to expect the legislature, the defender of the veto, to exercise all legislative vetoes when the necessity of such an exercise is as yet unclear, is unrealistic. Therefore, while severance of all existing veto provisions would lend a quick and easy solution to a difficult problem, such an option is doubtful and impractical, at best.

C. Judicial Resolutions of Severability

The answer to the questions raised by Chadha could be resolved by the judiciary. Rather than disposing of all veto provisions by expeditiously severing them from their statutory frameworks, it is conceivable that each provision could be dealt with on a case-by-case basis. An individual who seeks relief by way of a particular statute that embodies a legislative veto could resort to the courts in order to determine whether the veto is severable or whether the whole statute must fail.

Consider hypothetically Mr. Jones who is entitled to monetary compensation by Agency A because he produced twice the quota of wheat in a farming incentive program. The enabling legislation of agency A states, however, that all determinations by the agency, including monetary rewards, are subject to a final determination by the legislature, i.e., a legislative veto. Therefore, Mr. Jones seeks compensation under a statutory scheme that contains a (presumptively) invalid provision. Mr. Jones now does not know whether only that provision is ineffective or whether the entire compensation scheme is invalid. When an individual, such as Mr. Jones, seeks relief under a statute that presently embodies a veto, there exist two alternatives. Agency A may refuse to grant the relief, contenting that the mere presence of a veto renders the entire statute invalid. Mr. Jones could then resort to the courts to determine whether, in fact, the veto is severable and relief is available nonetheless. Due to the individualized nature of this challenge, the particular legislative history could be examined to determine the viability of the statutory scheme absent the veto. The other possibility is that agency A may ignore the veto provision and grant the relief. Mr. Jones will surely not complain to the courts and the statute may, in effect, be operating as if there were no veto present at all. In essence, no decision will have been rendered as to the viability of the particular statutory scheme and certain statutes may be unaffected by any ramifications of Chadha. Thus, if this hypothetical follows, the severability of legislative vetoes will only be determined when challenged by injured parties.

The disadvantages of the option of a case-by-case adjudication, however, far outweigh its utility. It is unavoidable that inconsistent decisions will result. A statute may be sustained in one court, while in the next jurisdiction, the very same law is being limited. The absence of any guidelines given the Court leave lower courts to formulate their own tests.
which inevitably will differ. 120 Furthermore, the process of reviewing individual cases under statutes which contain legislative vetoes will be costly, time-consuming, and inefficient. 121 The endless appeals to higher courts challenging these inconsistent decisions would not only inundate an already overburdened judiciary, but would also indefinitely postpone any expedient relief to otherwise eligible litigants.

This unappealing alternative raises the question of whether the judiciary is the proper body to handle this problem. Should Chadha invalidate all use of the legislative veto, the breadth of the decision could be overwhelming. The risks attendant to a judicial solution for a problem of this scope emphasize its drawbacks. Perhaps, then, it is the legislature that would be the proper body to solve this problem. Logic dictates that if Congress originally incorporated the legislative veto into a statutory scheme to render the agencies accountable, 122 it would be quite reluctant to relinquish this privilege. By allowing the courts to determine the viability of the existing statutes embodying the veto provision, Congress runs the risk that it may lose this control. Congress may be best suited to make the next move in order to minimize this danger, to maximize consistency, and to expedite and answer.

D. A Congressional Response

Immediately following the Court's decision, Congress commenced its search for an answer. 123 The invalidation of all veto provisions creates two questions that the legislature will have to settle: (1) what should be done with the existing statutes; and (2) how Congress can maintain a suitable method of accountability with the agencies for the future. The solution

120 The first decision rendered subsequent to Chadha manifested a radical reaction. In Allstate Insurance Co. v. EEOC, 570 F. Supp. 1224 (S.D. Miss. 1983), the Mississippi District Court ruled that a one-House veto in a reorganization act was unconstitutional even when not exercised. The court held that the one-House veto was not severable and therefore determined that the entire act was unconstitutional. The Court rationalized that Chadha "sweeps with a broad stroke." Id. at 1229. This ruling is demonstrative of the problems that the Court's decision may have propagated. Not only did this court invalidate an entire statute, but it is conceivable that while it did, other courts similarly situated might uphold it, thereby giving rise to a statute of overall questionable status. Identical treatment of other laws could create havoc. See Smith & Struve, Aftershocks of the Fall of the Legislative Veto, 69 A.B.A. J. 1261 (1983).

121 Inconsistent lower court decisions or ruling which invalidate entire statutes invariably will be subject to a long and burdensome appeals process. Resolution could take years, during which time litigants could be totally barred from relief. Furthermore, this could stalemate the administrative process as well since the agencies may be operating under statutes of dubious validity, a "let's wait and see" attitude does not appear to be the appropriate course of action in this situation. There must be some sort of specific guidance given to the agencies and the lower courts to assist in the resolution of the questions. Without it, lower court decisions and administrative functioning could be erratic, inconsistent, and unavailing.

122 See supra note 118.

may be axiomatic. Assuming that it is not an agreeable alternative to sever all veto provisions from every existing statute while allowing the remainder to stand, 124 Congress must devise a suitable alternative to the veto. Therefore, the most palpable solution is for the Congress to find a substitute "mechanism" that comports with the constitutional mandates as expressed by the Chadha decision to replace the legislative veto in all existing statutes and future delegations. 125 By technically repealing en masse all legislative vetoes and simultaneously replacing them with a legitimate device, the original legislative intent will be preserved. A detailed and explicit enactment specifying every provision which was to be replaced may be required initially. While such a procedure may be unorthodox as well as somewhat overbearing, its practicality may justify its novelty.

The search has begun for a statutory or nonstatutory mechanism that may directly overturn, prohibit, amend, or terminate proposed executive or administrative actions. The task is not as overwhelming as it seems because the legislative veto was only one of many oversight mechanisms considered in the past. 126 Yet, while proposals for alternative oversight devices abound, 127 none have been accepted and no resolution has been reached.

1. Direct Override or Preemption 128

The simplest mechanism by which Congress could overturn an objectionable executive or administrative rule is by the enactment of a statute which specifically revokes the proposed rule or preempts the area from consideration. Such a procedure would require review and approval of the reversal (or preemption) by both Houses of Congress as well as present-

---

124 A bill was proposed in the Senate on July 12, 1983 suggesting that a commission be formulated to deal with this question. S. 1591 is designed to alleviate that concern by clearing away the confusion that has followed in the wake of the Court's decision. This legislation will create a commission to study the full consequences of Chadha and suggest procedures under which Congress may continue to exercise adequate oversight of action by the executive branch.

This legislation is by no means an attempt to subvert either the authority of the Court or the separation of powers as set forth in the Constitution. Instead, it is designed to help Congress act within the parameters the Constitution sets and the Court recently defined.


125 See supra note 109.

126 For an overview of the history of congressional oversight, see Dixon, supra note 21.

127 See infra text accompanying notes 128-143.

ment to the President (or in the event of a presidential veto, an override by the legislature). Since this is the constitutionally prescribed procedure for enacting law, the defects inherent in the legislative veto would be avoided.

The benefits of this option are self-evident; "direct statutory nullifications or preemptions have the advantage of specificity, clarity, and relative permanency" as well as "a solid consensual foundation" that results from consideration by both Houses and the President. This will further allow the operation of administrative and executive agencies to remain unaffected in their routines. While theoretically, congressional interference will be rare, on the occasions where it is imperative that the legislature should intervene, this process assures well considered and specific mandates.

This alternative, unfortunately, is fairly impractical. At the outset, its extensive demands on Congress are costly in terms of both resources and time. Furthermore, this theory partially defeats one of the major advantages of the delegation doctrine. If one theory supporting the delegation of power is that the agencies are better able to efficiently render technical and complex decisions, then requiring the legislature to reconsider administrative decisions is an unnecessary duplication of effort. Congress could have reached the same result by submitting such proposals to highly specialized subcommittees, while avoiding the costs of the bureaucracy. It is possible that efficiency could be better realized by not delegating the power at all. Still, efficiency is not a truly forceful argument when counterbalanced against the demands of the Constitution.

2. Statutory Modification of an Agency's Jurisdiction

Statutes may be utilized to modify the jurisdiction of an agency in order to prevent an objectionable rule from being enacted. By the use of this method, Congress may progressively and effectively clarify and refine agency jurisdiction and power. By redelineating the scope of permissible administrative activity, the legislature may dictate that a proposed course of action is beyond the granted authority. Not only would this prescription comply with the Chadha demands, but it would also appease those

---

128 This alternative is essentially the legislative procedure delineated in Article I of the Constitution. See supra note 34.
129 For examples of statutes that evidence this type of oversight procedure, see Congressional Action, supra note 128, at 670-672.
131 Kaiser, supra note 128, at 3.
132 See supra text accompanying note 80.
133 See Congressional Action, supra note 128, at 673-87; Kaiser, supra note 121, at 4.
134 Methods of accomplishing this include: a) limiting or abolishing a specified area of jurisdiction; b) transferring jurisdiction from one agency to another or from the federal agency to state authorities; c) by deregulating an area; and d) by imposing a moratorium on certain activities. Kaiser, supra note 128, at 4.
critics of the legislative veto who contend that the authority delegated to the agencies is much too broad and vague.

Although this proposal could conceivably assist Congress in rectifying errors that were made in the initial enabling legislation, this procedure does not answer the need for a replacement mechanism for the legislative veto. The strength of the veto stemmed from its force in regulating agency activity specifically and efficiently. It is neither practical nor wise to consider modification of an agency's jurisdiction every time it promulgates an objectionable rule. Similarly, deregulating the area (an alteration of an agency's jurisdiction) does not solve the problem. Additionally, from a technical perspective, this procedure is as objectionable as the legislative veto. By preventing a proposed administrative rule from taking effect, Congress would still be "legislating" outside of the prescribed constitutional procedure.\(^{138}\) Although labeled as a statutory modification of jurisdiction, its functional effect still remains the same. Congress is interfering with a rule that would otherwise gain the force and effect of law by way of an unsanctioned procedure. Therefore, this alternative does not completely solve the problems at hand even though it could be a permissible manner in which to rectify delegation errors.

3. Limitations in Appropriations Statutes\(^{136}\)

Limitations in appropriations may prevent agencies from implementing particular decisions. "By expressly denying the use of funds for a specific purpose, such as enforcement or rulemaking, a statute, in effect, nullifies or severely restricts the broad (and possibly vague) authority under which an agency is operating in highly specialized area."\(^{137}\) One such proposal would allow a change in the rules of the House of Representatives which would allow prohibitions in appropriations bills to block the spending of money to implement a particular agency regulation.\(^{138}\) This process would inject clarity and specificity into the legislative process by determining on an individual basis which promulgations would receive congressional support. This option could also reinforce the integrity of the Court's rationale in *Chadha*. While the same overall effect would result from these "purse-string prohibitions" as from the legislative veto, that Congress would be determining after an administrative decision has been rendered which proposals shall not gain approval, the means by which this could be accomplished are acceptable. Congress had always controlled the dispersal of appropriations. The choice of which agencies

---

\(^{138}\) See supra note 32.


\(^{137}\) *Id.*

\(^{138}\) The House rules would have to be revised to accommodate this proposal since at the present time, it is difficult to attach riders to appropriations bills. See 1983 *Cong. Q.* 1321, 1328 (weekly report July 2, 1983).
would receive funding and how much they would receive has always de-
pended on what sort of policies the legislature wanted implemented and
which were perceived as necessary. Limitations in appropriations to pre-
vent agencies from implementing particular decison would accomplish the
same objective, except that, in this instance, the directives would be more
specific.

There exists one flaw in this proposition; although Congress may legiti-
mately control the appropriations process, its use in this context may not
entirely comport with the rationale asserted in Chadha. Congress would
still be legislating outside of the manner prescribed in the Constitution;
the legislature would be approving or disapproving of administrative pro-
posals and, in effect, "legislating." Since the Court objected to the legisla-
tive veto because it did not mesh with the constitutional framework, it is
questionable whether the "same device by another name" would be any
more acceptable. This solecism may be further exacerbated by the fact
that this decision could rest with one House of Congress, an enterprise
thoroughly inconsistent with both Chadha and the Constitution.

4. Sunset

Under the "sunset" concept, agencies and their programs are periodi-
cally reviewed under the threat of termination. Administrative author-
ity automatically ceases after a certain period of time specified in the
enabling legislation (approximately every four to ten year depending on
the nature of the agency). The impetus behind this mechanism as a
means of oversight is primarily motivational: since agency jurisdiction
would have to be systematically reviewed and renewed before its author-
ity could continue, the agencies would presumably comply more closely
with congressional policy directives for fear of permanent termination.
Thus, any activity inconsistent with legislative forethought might be
discouraged.

139 See Adams, Sunset: A Proposal For An Accountable Government, 28 Ad. L. Rev. 511
(1976).

140 Adams cynically expressed the rationale supporting this practice: "It has taken years
for some government programs and agencies to evolve to their present levels of mediocrity
and inefficiency. It was not the work of a day. It will not be undone in a day. Periodic
review is necessary." Id. at 529.

141 A concept compatible with that of sunset legislation is that which would require notifi-
cation and consultation with Congress by the agency before the implementation of a pro-
gram or a rule. While such a provision would not allow for formal rejection of a proposed
action, it would allow the appropriate congressional committees to be more aware of a
planned action. Congressional scrutiny (and input) would not only have the effect of direct
influence, but it would further allow Congress time to enact legislation to the contrary if the
proposal is objectionable. By allowing for the expression of legislative intent at this stage of
the process, actions taken by the agencies which blatantly defy "congressional authority"
may be noted. See Kaiser, supra note 121, at 9. This idea is compatible with sunset for
when these concrete violations of legislative intent do occur, later termination of agency
This process would be eminently effective in maintaining the degree of control over the agencies that the Congress possessed via the legislative veto. Yet one major drawback enures to this theory. With the legislative veto, Congress was able to prohibit specific administrative proposals from taking effect. If the suggestion were inconsistent with legislative policy or if it were merely a distasteful rule, Congress had immediate recourse. With sunset, Congress would have no alternative but to wait and assume that administrative determinations complied with legislative directives. As far as individual decisions were concerned, Congress would be essentially impotent. For a Congress that so staunchly defended the veto based upon this very factor, acquiescence to the sunset proposal as the sole means by which to monitor agency activity would appear to be implausible.

V. AN INTEGRATED APPROACH TO THE FUTURE OF OVERSIGHT

The proposals discussed above by no means exhaust the possible solutions to the problem left by the Supreme Court after Chadha. While all are effective in regard to specific purposes, none of the proposals to date, in and of themselves, seem to accomplish the function which the legislative veto so efficiently performed. By use of the veto, Congress was able to quickly and cleanly reject very specific proposals while avoiding the “cumbersome” process of full legislation. In order to effectively replace the legislative veto as the predominant mechanism of congressional oversight, any proposal must not only be able to ensure overall compliance with congressional policy, but it must also possess the ability to halt particular offensive proposals.

[W]e must not only be able to rifleshot particular regulations, though that should be one important weapon in our arsenal, but we must also reform the agencies’ internal rulemaking procedures authority is available.

143 But see supra text accompanying notes 39-41.
144 See, e.g., The Bumper’s Amendment, S. 1766, 98th Cong., 1st Sess., 129 Cong. Rec. 114 (1983)(This proposal would enlist the courts in agency rulemaking by removing the presumption of the validity for any rule. This recommendation would amend the Administrative Procedure Act in order to impose a more rigorous standard of judicial review for agency rulemaking.) Future delegations may also be accompanied by “report and wait” provisions. See Sibbach v. Wilson & Co., 312 U.S. 1 (1941)(validating such a provision that established set period of time after an administrative rule is promulgated before it takes effect, thus providing the legislature with adequate time to enact legislation to the contrary, if necessary). Also proposed is the Levin-Boren Amendment, S. 1650, 98th Cong., 1st Sess., 129 Cong. Rec. 103 (1983)(proposing that a legislative veto, by joint resolution be applied to all rules under the Administrative Procedure Act that are now subject to public notice and comment. The sponsors of the bill assert that this solves the constitutional problems because this proposal utilizes a joint resolution, which requires the concurrence of both Houses and the President).
to make them more accountable, and we should improve our own overall oversight efforts in order to determine how well the laws, agencies, and programs we put in place are working.\textsuperscript{144}

Although the legislative veto procedure was an effective means by which to accomplish these goals, a “one-step procedure” such as the veto is not likely to provide the most suitable solution. The veto did not ensure congressional oversight of all administrative activity, it was only a “last-minute” alternative to prevent objectionable proposals from taking effect. Congress did not truly oversee, evaluate, or criticize the agencies’ performances. The fact that the legislative veto is so essential suggests that the present system of congressional oversight is inadequate: the need for the legislature to be able to strike down particular proposals, no matter how infrequent, demonstrates that Congress is no longer intimately involved in the process of the development of far-reaching laws and policies. The possibility that decisions may be rendered that defy congressional mandates solidifies the argument that Congress has lost control in areas which it intended to regulate. Although through the use of the veto, Congress was able to make a “last ditch” effort to become involved in the formulation of administrative policy, progressive cooperation with the bureaucracy was clearly lacking. The legislative veto was a device to counteract or destroy policy, not to develop it. Congressional participation was not fulfilled by use of the veto, for even in its exercise, full congressional consideration was a rare occurrence and specific rationale justifying its use was scarce.\textsuperscript{145} Such cursory examinations of administrative activity do not even justify congressional consideration. This last minute, one-step procedure is, therefore, not an adequate means by which to oversee administrative activity. Any future oversight proposal should pierce the administrative process and mandate careful and thorough examination, conviction, and scrutiny. Only through continuous legislative participation in the process can we be assured that Congress has not technically abdicated complete authority to the bureaucracy.

Before considering any proposals to correct the system of congressional oversight, it is important to determine whether a judicial solution aside from determination of the severability of vetoes may be conceivable.\textsuperscript{146} The authority to reject administrative undertakings could be vested in the judiciary; when particular proposed rules are challenged, the courts could determine, if appropriate, that the regulations could not stand.

\textsuperscript{144} 129 CONG. REC. 121 (1983)(Floor statement of Representative Lott).

\textsuperscript{145} In Chadha, the House resolution was passed without debate or recorded vote. In fact, the statements by Representative Eilberg were basically the only authority upon which the one-House veto was exercised. See supra note 64. If vetoes may be utilized after such cursory examinations of the issues at hand, then it becomes clear that “lawmaking” decisions are essentially being made with far less than bicameral consideration, if that.

\textsuperscript{146} See supra notes 120-122 and accompanying text.
This would be accomplished because in response to an individual litigant who seeks to enjoin the enforcement of an administrative rule, the judiciary has the power to strike down rules and regulations as *ultra vires* of the congressional delegation of power to the agency. Congressional participation perhaps could be ensured by allowing intervention on behalf of the litigant who is challenging the rule.

It is not doubted that an agency may not exercise powers beyond the authority granted in its enabling legislation. Yet, as a means of oversight, this theory is not especially pertinent to the situation confronting the legislature today. To vest the power to ensure agency compliance in the judiciary is inexpedient and inefficient. First, unless challenged by an injured party, an administrative error may remain unrectified. Next, before any complaint could even be heard in a court, the entire administrative process would have to have been exhausted, the controversy would have to be "ripe," and the individual would have to prove that he had the requisite standing. Though striking down agency activity as *ultra vires* of the delegation may be acceptable in the practice of administrative law, it by no means solves the problems of inadequate congressional oversight. Furthermore, this procedure may also present the same difficulties as the legislative veto: it allows only an ad hoc determination that agency activity is inconsistent with congressional intent. Legislative participation in the administrative process would be nonexistent. By allowing only the judiciary to "veto" an agency's determination, then the legislature would, in fact, be abdicating all of its power in particular areas since there would exist no means by which administrative activity could be controlled. In order to avoid this loss of power, the oversight of administrative and executive agencies ought to be exercised by the legislature.

The legislative veto only allowed Congress to pass on a final decision of an agency. It did not provide for involvement in the entire administrative process. However, through the creation of a multifaceted process, Congress could ensure not only compliance with general policy, but could also assure that particular regulations could be struck down if necessary. The process is by no means simple. Yet, a more structured and detailed strategem of congressional oversight could alleviate the need for a device as "lethal" as the legislative veto. The chance of unacceptable results could be diminished by streamlining the entire administrative process and simultaneously expanding it so that continuous congressional participation would be ensured.

Congessional involvement in the administrative process should be encouraged at the outset, starting with the original delegation of power. Initially, delegations of power to the administrative and executive agencies

---

147 Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940); NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318 (1940); American Tel. & Tel. v. United States, 299 U.S. 232 (1936).

148 See supra notes 74 and 76.
should be created with more explicit, specific, and narrow standards. After all, it was the broad, unspecific conferral of power that fashioned the need for the legislative veto. More meticulous instructions could narrowly confine the delegated exercises within the intended parameters and thus, could prevent deviations from the predominating intentions at the onset.19

Although narrower delegations may eliminate some of the unanticipated deviations from legislative intent, this stage alone is insufficient as a sole means by which to ensure compliance. Part of the rationale behind broad delegations was that specificity was impossible. Agencies are often created to handle particular technical problems, ones with which Congress is not equipped to deal. In these cases, Congress may not even have the expertise to narrowly specify policies. It is not until the area has been developed by the agency that the legislature is able to pass judgment. Thus, while in some respects it may be ideal to confine the scope of an agency's activity at the outset, it may not always be possible or practical. It is in these instances where Congress cannot be precise that a more comprehensive scheme is necessary.

Following the delegation of power to the agency, the legislature ought to be involved in the development of policy from its inception. Congressional participation could best be accomplished in two ways. First, the agency, as it formulates both rules and policy, could be required to confer with a congressional committee (or subcommittee) which has appropriate jurisdiction in the agency's area of expertise. The other option is to provide for congressional input during the agency's rulemaking proceedings. In both situations, the legislative contribution would be continuous. Since members of Congress would be actively involved in every stage of the development of administrative policies, the agency would have constant feedback from the committees involved as to whether the proposed measure comport with legislative intent. By virtue of this constant source of interchange and advance notice, the agency could alter its design to comply more ably with congressional mandates and wishes. This benefit is further augmented when taken in conjunction with the nature of the delegation of powers. Often, as stated, enabling legislation is unduly broad and vague because the legislature does not yet possess the specific knowledge and singular expertise with which to delegate specifically. Until the agency has had an opportunity to explore and develop an area of potential legislative regulation, Congress is unable to narrow its mandates. Since these initial policy directives may not be possible, by al-

19 While narrower delegations may solve part of the problem, they are by no means a panacea. Though they may enable the agencies to comply more closely with congressional mandates (because those instructions are now more lucid), the problem still exists that Congress is not always able to delegate with such specificity. Often Congress lacks the skill and the knowledge (which the agency may be expected to develop). See supra notes 7-15 and accompanying text.
lowing continued congressional participation in the rulemaking processes of the agencies, the legislature would be able to develop policies as the information becomes known. At this stage, Congress could refine its mandates, immediately communicate this to the agency and thereby diminish the chance occurrence of deviations. This would, in turn, give rise to an atmosphere of cooperation with the agencies.

Additionally, a proposal of this nature would not manifest one of the shortcomings which made the legislative veto so objectionable. The veto procedure only allowed Congress to approve, disapprove, terminate, or amend administrative action after the agency had rendered its decision. As noted, congressional participation was a virtual nullity. This theory, on the other hand, injects strength into these earlier stages, and the need for the veto could be lessened for, theoretically, proposed administrative schemes would already reflect legislative pursuits.

While congressional participation in administrative processes may be cumbersome and demanding in terms of both time and limited resources, involvement at this stage is most critical. The very essence of oversight would be realized by allowing Congress to truly oversee administrative activity. Thorough examination would reinforce the assertion that through the delegation of power, Congress is not relinquishing its legislative authority. Yet even at this stage of the process, it is still evident that less than the full legislature is participating in the formulation of policy. Although continued congressional participation is inherent in this scheme, additional and full legislative participation ought to be allowed in order to assure that administrative policies are not dictated by smaller committees involved in the rulemaking process. Outside influences are more likely to work effectively in small arenas; by permitting full congressional consideration of all administrative proposals, these forces will be diminished and the chance for a decision by a nationally-elected, well-balanced quorum could be maximized.

To allow for full legislative involvement in the process of developing administrative rules, the agencies should then be required to submit the proposed regulation to both houses of the legislature. Pursuant to a “report and wait” provision, no administrative rule would gain the effect of law until a specified period of time had elapsed. This precept would not become “law” only if the rule were vetoed by a joint resolution. This determination would require the concurrence of both Houses of Congress as well as the President, thus alleviating the constitutional shortcomings manifested by the legislative veto. Fundamentally then, the

See supra note 143.

While the reverse of this is possible—that no administrative rule shall take effect unless a joint resolution of approval is passed—it cannot survive the constitutional restraints enumerated in Chadha. If both Houses are required to pass a regulation if it is to take effect, the failure of one House to concur essentially operates to the effect of a one-House veto.
denunciation of the rule will have been overwhelmingly recommended and the decision will have been wellconsidered and carefully analyzed.\textsuperscript{182}

Although this stage could be construed as burdensome and inefficient, this effect will be diminished since the proposals will have been scrutinized in advance of their submission to the legislature. The possibility that the joint resolution will be necessary becomes minimal. This option would exist primarily as an "emergency" measure for those occasions on which an objectionable course of action has passed beyond the administrative stage.

It is possible that the joint resolution could be utilized to replace the legislative veto, without adding the other suggested reforms. In some instances, this would be advisable. The proposals previously noted are particularly geared to rulemaking proceedings of administrative agencies, yet they do not operate as effectively in adjudicatory areas, as was the case in \textit{Chadha}. In these more specific areas where continuous congressional involvement would be but a pipe dream, the joint resolution may be necessary. Unlike the rulemaking proceedings, specific rules are not being promulgated in adjudications and neither can specific canons always be applied. In fact, each decision is based upon only the individual facts of each case. Therefore, to require continued legislative participation in a proceeding which is applying rules, rather than making them, would serve no useful function. However, since these decisions are being made pursuant to the delegation of authority to an agency, there still ought to be a check over the decisions. The joint resolution could serve this purpose. In those instances, such as \textit{Chadha}, both presidential and congressional consideration would be assured.

In other instances, the joint resolution should be utilized in conjunction with the other phases of this proposal. Although through the joint resolution, we are assured of full congressional participation and evaluation of administrative proposals, its use alone avoids one of the basic problems underlying congressional oversight today. If it were the only means of oversight used, \textit{continued} congressional participation in the administrative procedures would be lacking. Oversight should not merely encompass the opportunity to strike down specific administrative rules, but it should guarantee that those individuals who are directly responsible to the constituents would be formulating the law rather than merely determining approval or rejection. Therefore, the comprehensive scheme is more palatable, as it gives strength to the meaning of congressional oversight.

One final step would complete the scheme of comprehensive congressional oversight. All agency activity ought to be subject to "sunset." In a complex technical society where agencies may be created to deal with a complex albeit transient, problem, continued existence of all agencies may not be practical, desirable, or required. Periodic review performed by

\textsuperscript{182} See supra text accompanying notes 81-86.
the congressional committees with appropriate jurisdiction would evaluate agency performance, particularize agency strengths and infirmities, and guide future action. By this evaluation Congress will then be able, when necessary, to alter an agency’s jurisdiction, preempt an area of authority, modify its appropriations, or terminate its existence altogether. Pragmatically, agencies should be reviewed frequently. Furthermore, continued administrative vitality should not be renewed unless expressly reauthorized. In this way, careful evaluation is assured and agency jurisdiction is certain not to be continued merely due to congressional neglect.

Though this juncture may not allow the legislature to “rifleshot” particular offensive administrative proposals, it does seem necessary to an efficient integrated scheme of delegated authority. Total revocation of the power of an agency may seem dramatic when viewed as a reaction against misuse of delegated power. However, sunset is not intended to function solely as a mechanism to replace the legislative veto: sunset alone cannot guide the formulation of administrative policy so that it complies with legislative intent. The threat of termination of an agency’s existence afforded by sunset does not give the legislature the ability to disapprove of administrative proposals. Rather, it operates more as a threat or punishment after the fact. However, though the threat of termination may not have a great effect on the day-to-day decisionmaking process of an agency, such a tool may be a reliable gauge by which to evaluate overall functioning. Through periodic review of administrative activity, continuous refining of the enabling legislation or working guidelines of an agency will ensure a carefully wrought administrative system.

Sunset may seem to be a burdensome process. To encumber the legislature with yet another duty might appear impractical. Yet, it would be necessary for the legislature to “clean house” in order to streamline the bureaucracy. Continuous reorganizatin of the administrative system could lead to an efficient process. By periodically allowing Congress to refine the enabling legislation of the agencies, it would become less likely that agencies could be rendering decisions inconsistent with congressional policies.

This scheme for refinement of the system in which delegated power is exercised may be berated for its breadth. After all, it was not the entire system of administrative law and the delegation of power that was disapproved in Chadha: the legislative veto was the only device whose soundness was being questioned. While this may be true, this criticism ignores part of the basic rationale underlying the use of the veto in the first instance. The legislative veto was instituted to protect against unchecked administrative power which was difficult to control as a result of broad nonspecific delegations. Used as a last resort to prevent misuses (and abuses) of authority, the legislative veto was efficient, but it by no means streamlined the administrative system. This proposal starts at the root of the problem, rather than merely curing the symptoms. By demanding legislative involvement from the inception of the enabling legislation.
through to the promulgation of various and particular rulings, Congress will be better able and equipped to monitor agency activity. As a result of continued participation, not only will the risks of a total abdication of congressional power to the agencies by unfounded, but so will the virtues of the delegation doctrine be reinforced. The agencies would still be able to investigate complex and technical problems. Furthermore, the agencies could still promulgate opinions, proposals, and rules. The only major change would be the increased force of legislative input. Ideally, the need for the legislative veto would be nearly nonexistent. The fact that the legislative veto was ever necessary at all suggests that perhaps the system of delegation was out of control.

VI. Conclusion

While it may not be altogether clear from the Court's opinion in Chadha whether all legislative vetoes are invalid, subsequent decisional law and congressional response make it appear likely that this is, in fact, the case. Whatever the outcome, it is clear that the decision has propagated serious reconsideration of congressional oversight. This process of evaluation is sure to be as controversial as was the neverending debate concerning the validity of the legislative veto. The proposals proffered are not the first nor will they be the last solutions to the questions left open by the Supreme Court. All that is self-evident now is that there is no agreement.

The suggestions that will now be presented to alleviate the gap in congressional oversight mechanisms will undoubtedly take the Chadha decision into account. Any future device will have to fit within the guidelines carefully prescribed by the Court. However, the Chadha decision must not only be analyzed for what effect it will have one the future of oversight, but it must also be rationalized in terms of its wisdom. From a theoretical perspective, this was quite a precarious decision. Putting all technical arguments aside, it must be asked whether this case should have been decided. Specifically, at one time the delegation of power was challenged on constitutional grounds, and while not surviving initial scrutiny, eventually it was overwhelmingly accepted. Yet, the fact remains that these agencies are not specifically sanctioned or prohibited in the Constitution. Since they were not authorized, neither were any means with which to control them. Perhaps, these "extraconstitutional" bodies mandated the use of an extraconstitutional device. If the Framers had anticipated the growth of the "fourth branch" then perhaps they would have devised an oversight mechanism such as the legislative veto. It is this setting in which the veto should be evaluated. Strict reliance on the Constitution cannot take the development of agencies into account and there-

155 See supra note 12.
fore, when the legislative veto is examined, it ought to be in the context of the government as a whole and not in isolation. History cannot and should not be examined in a vacuum.

The force and effect of the Supreme Court’s decision may diminish over time. It may be weakened by subsequent judicial determinations or by an alternative mechanism that renders the need for the legislative veto obsolete. However, until a choice is made one way or another, the status of congressional oversight is unclear. It is evident that the same question is facing everyone now, the lower courts, the legislature, the President, and the agencies: where do we go from here?

Kim I. Moses