

OF TRAIN WRECKS, TIME BOMBS, AND SKINNED CATS: THE CONGRESSIONAL RESPONSE TO THE FALL OF THE LEGISLATIVE VETO

Michael J. Horan*

INTRODUCTION

This article deals with the aftermath of what may well be considered the most important non-civil liberties decision of the Burger Court: *Immigration and Naturalization Service (INS) v. Chadha*.¹ In this case, the Supreme Court struck down the "legislative veto" as an unconstitutional exercise of congressional authority. The "legislative veto" was a procedural device which Congress had included in a sizable number of statutes delegating rule-making or other types of administrative authority to executive agencies or officers. Through this veto provision, Congress simultaneously reserved the power to block specific exercises of this authority by passage of resolutions which were not submitted for presidential review, such as a concurrent resolution of disapproval (two-house veto) or a simple resolution of disapproval by either house (one-house veto). Chief Justice Burger's opinion for the Court found that insofar as the exercise of the one-house veto affected the legal rights and duties of persons outside the legislative branch, it lacked conformity with those provisions of Article I of the Constitution requiring that such "legislative" actions receive the assent of both houses of Congress, and be presented to the President for approval or disapproval.² Subsequent rulings by the Court³ left little doubt that the lack of presidential review also rendered the two-house veto constitutionally infirm.

The first reports of the Court's nullification of the legislative veto varied considerably in terms of the decision's projected impact. National news media discussed the likely effect of the *Chadha* decision upon congressional-executive relationships,⁴ though it is doubtful that public interest in what superficially resembled a mere procedural matter could ever compare to the

* Professor of Political Science, University of Wyoming. B.S., Georgetown University, 1960; Ph.D., Georgetown University, 1966. The author would like to thank William A. "Doc" Syers of the Carl Albert Congressional Research and Studies Center at the University of Oklahoma, and currently Assistant to the Director of the Republican Policy Committee of the U.S. House of Representatives, for his helpful comments concerning the revision of this article.

1. *INS v. Chadha*, 462 U.S. 919 (1983).

2. *Id.* at 952.

3. *Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983), *aff'g* *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425 (D.C. Cir. 1982); *United States Senate v. FTC*, 463 U.S. 1216 (1983), *aff'g* *Consumers Union of the United States v. FTC*, 691 F.2d 575 (D.C. Cir. 1982).

4. Anderson, *An Epic Court Decision*, *TIME*, July 4, 1983, at 12; Press, *The Court Vetoes the Veto*, *NEWSWEEK*, July 4, 1983, at 16; *Supreme Court Decision that Stunned Congress*, *U.S. NEWS & WORLD REP.*, July 4, 1983 at 14-15; *N.Y. Times*, June 25, 1983, at 1, col. 4; *Wash. Post*, June 24, 1983, at 1, col. 4.

reception given such dramatic Burger Court decisions as those dealing with abortion⁵ and affirmative action.⁶ Scholarly circles in government and the legal world recognize the great importance of the Court's ruling, commentary on which became obligatory in law reviews as well as monographs and textbooks in the fields of government and public administration.⁷ The shock waves of the *Chadha* decision impinged most strongly, however, upon the branch of government which was the apparent loser in the case, the Congress. It is easy to sympathize with the dismay which echoed from the House and Senate over the fall of the legislative veto. Variations of this device had been inserted into legislation for over fifty years,⁸ and indeed had been utilized on an ever-increasing scale since the early 1970's.⁹ Resort to the legislative veto was one of the principle means by which a resurgent Congress had sought to counter the growth of executive and administrative dominance in the areas of domestic policy and, particularly, foreign affairs. While figures vary slightly from one source to another, it is no exaggeration to say that the *Chadha* decision cast grave doubt upon 300 separate provisions of 200 past and present statutes,¹⁰ including sixty laws then in effect.¹¹

Clearly, Congress needed to respond to fill the gap in its power apparently created by *Chadha*. The existing vast delegations of authority to the President, executive agencies, and independent regulatory commissions,

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5. *Roe v. Wade*, 410 U.S. 113 (1973).
 6. *E.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
 7. *E.g.*, Brayer, *The Legislative Veto after Chadha*, 72 GEO. L.J. 785 (1984); DeConcini & Faucher, *The Legislative Veto Decision: A Law by any other Name?*, 21 HARV. J. ON LEGIS. 29 (1984); De Seife, *Legislative Delegation of Powers: A Hobson's Choice?*, 17 J. MAR. L. REV. 279 (1984); McMannon, *Chadha and the Non-delegation Doctrine: Defining a Restricted Legislative Veto*, 94 YALE L.J. 1493 (1985); Strauss, *Was there a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto*, 35 SYRACUSE L. REV. 685 (1984); ANNUAL EDITIONS: AMERICAN GOVERNMENT 59-64 (B. Stinebrickner ed. 1985).
 8. Economy Act of 1932, Pub. L. No. 72-212, §§ 401-408, 47 Stat. 382, 413-15 (Act repealed) (President enabled to reorganize federal administrative departments and agencies by executive order unless Congress blocked the actions by simple resolution of either house within 60 days); Navy Construction Authorization Act of 1944, Pub. L. No. 78-289, 58 Stat. 189, 190 (Act repealed) (required the Secretary of the Navy to "come into agreement with" the House and Senate Naval Affairs Committees before entering into real estate transactions acquiring, disposing of, or leasing land or facilities for naval installations); Taft Anti-Inflation Law, Pub. L. No. 80-395, § 7, 61 Stat. 945, 947 (1947) (codified at 50 U.S.C. § 1911-1919 (1982)) (Commodity Credit Corporation authorized to implement projects to stimulate food production in non-European countries, such programs to be submitted to Congress which could disapprove them by concurrent resolution within 60 days); National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, § 302(c), 72 Stat. 426, 433 (codified at 42 U.S.C. § 2453(c) (1982)) (President's transfer to National Air and Space Administration of functions of other departments and agencies may be disapproved by concurrent resolution); Trade Expansion Act of 1962, Pub. L. No. 87-794, § 351, 76 Stat. 872, 899 (codified at 19 U.S.C. § 1981(a) (1982)) (tariff on duty recommended by Tariff Commission may be imposed by concurrent resolution of approval); War Powers Resolution, Pub. L. No. 93-148, § 5, 87 Stat. 555, 556-57 (1973) (codified as amended at 50 U.S.C. § 1544(c) (1982)) (absent declaration of war, President may be directed by concurrent resolution to remove United States' armed forces engaged in foreign hostilities); Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, § 12, 94 Stat. 2060, 2067 (codified at 16 U.S.C. § 1463a(2) (1982)) (rules proposed by the Secretary of Commerce may be disapproved by concurrent resolution). *See generally* J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 217-38 (1964).
 9. "Well over half the acts containing vetoes and over two thirds of the individual provisions have been passed since 1969." West & Cooper, *The Congressional Veto and Administrative Rule-making*, 98 POL. SCI. Q. 285, 286 (1983).
 10. *Chadha*, 462 U.S. at 967 (White, J., dissenting). *See generally* West & Cooper, *supra* note 9.
 11. *See* N.Y. Times, June 24, 1983, at 1, cols. 4-5; *Rules Sets Policy on Legislative Veto*, 41 CONG. Q. WEEKLY REP. 1564 (1983); *Panel Skirts Legislative Veto Ban*, 41 CONG. Q. WEEKLY REP. 1576 (1983).

now likely freed from congressional inhibition through the exercise of a legislative veto, *per se* seemed to call for attention from the lawmakers. Assuming the need for some kind of response, what alternatives were practically—and legally—available to Congress in place of the lost veto authority? Should this response be swift or measured? Comprehensive, or on a case-by-case basis? Was the legislative veto itself completely dead, or might it still be legally viable in particular contexts? How would the secondary issues left pending by the *Chadha* decision be settled, and should Congress—or the courts—be responsible for this task? Finally, who really would gain from *Chadha*—the Executive, the Congress, or some other group inside or outside government?

Over two years have elapsed since *Chadha* and its progeny were decided, and at least some of the dust stirred up by the matter has begun to settle. Congress, the executive branch, and the judiciary have each in different ways begun to sort out the details of the new definition of the separation of powers formula spelled out by the court in *Chadha*. This article examines the principle developments of the post-*Chadha* period in this regard. It inquires whether any patterns have begun to emerge and suggests the possible directions these patterns may follow in the near future. This article focuses primarily upon the legislative branch although, as will become evident, the nature of the congressional response to *Chadha* cannot be understood without reference to attitudes and positions taken by members of the other branches of the federal government.

THE SCOPE OF THE CHADHA RULING

The breadth of the majority opinion in *INS v. Chadha* appears to leave little doubt that the legislative veto, whatever its form, is in deep constitutional trouble. The veto struck down in *Chadha* was contained in a provision of the Immigration and Nationality Act of 1952¹² qualifying the Attorney General's discretionary authority to suspend deportation proceedings against aliens illegally staying in the United States.¹³ The law required the Attorney General to report each such suspension to Congress,¹⁴ which could overturn this officer's decision in any particular case by a simple resolution of either the Senate or the House of Representatives.¹⁵ This was a "one-house" veto provision, since disapproval of the suspension by either house was legally conclusive, the matter requiring neither concurrence by the other chamber nor presidential review.

Eschewing policy considerations as well as narrower constitutional grounds, the *Chadha* majority found that when the exercise of this one-house veto had a *legislative* effect,¹⁶ it must comply with the ordinary law-

12. Immigration and Nationality Act § 101, Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. § 1101 (1982)).

13. *Id.* at 8 U.S.C. § 1254(a)(1). The Attorney General's authority applied only in specified circumstances.

14. *Id.*

15. *Id.*

16. The one-house veto had a legislative effect upon *Chadha* in that by virtue of the resolution of disapproval passed by the House of Representatives, he was immediately deportable.

making procedures spelled out in Article I of the Constitution,¹⁷ including passage by *both* houses¹⁸ and presentment to the President for approval or disapproval.¹⁹ Failure to comply with either of these steps in the "single, finely wrought and exhaustively considered, procedure"²⁰ for making laws devised by the framers of the Constitution meant that the exercise of the one-house veto in *Chadha* was without constitutional foundation.²¹ The reasoning used by the majority in *Chadha* plainly extends to the two-house legislative veto found in those statutory provisions where Congress has given itself authority to review and stop administrative moves through concurrent resolution of both houses, again without presidential review. Although bicameral, this procedure still circumvented the presentment requirements of Article I.

A third form of congressional veto device, known as the "committee veto," was on even shakier grounds as a result of *Chadha*. Used increasingly after 1945 to oversee executive agency actions in the realms of contracts, public works, and the disposal of surplus federal property,²² this type of statutory provision enabled Congress to confer veto powers upon either or both of the relevant committees of the House and Senate, and occasionally solely upon the chairmen of those committees. Like the one-house veto, the committee veto fails to meet the bicameral and presentment requirements of Article I. Chief Justice Burger's majority opinion also vitiating another form of the legislative veto by noting that statutory provisions enabling Congress to repeal or terminate statutes or administrative actions taken pursuant to delegated authority by simple or concurrent resolution were similarly invalid.²³ Finally, any lingering hope that the Court might limit *Chadha* to the legislative veto of decisions of purely executive agencies (such as the Immigration and Naturalization Service) was erased by the Court's summary affirmation of a United States Court of Appeals judgment striking down a section of the Federal Trade Commission Improvements Act of 1980 which provided for a two-house veto over any rule issued by the FTC.²⁴

The sheer number of legislative vetoes for which *Chadha* sounded the death knell reflects the far-reaching effects of the Court's decision.²⁵ Congress enacted most of these vetoes after 1969 on a progressively wider basis in order to hold the President and the bureaucracy more accountable to what legislators felt was the law, particularly in the area of foreign affairs.²⁶ Thus, the legislative veto became a common mechanism by which Congress sought to reserve for itself a check upon such executive actions as the termi-

17. *Chadha*, 462 U.S. at 948-51, 954-55.

18. U.S. CONST., art. I, § 1, 7.

19. *Id.* § 7, cl. 3.

20. *Chadha*, 462 U.S. at 951.

21. *Id.* at 944-59.

22. J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 205, 217-32 (1964).

23. *Chadha*, 462 U.S. at 253-54, 255, n.18.

24. United States Senate v. FTC, 463 U.S. 1216 (1983), *aff'g* 691 F.2d 575 (D.C. Cir. 1982).

25. See *supra* notes 10-11 and accompanying text.

26. See generally West & Cooper, *supra* note 9; Zeidenstein, *The Reassertion of Congressional Power: New Curbs on the President*, 93 POL. SCI. Q. 393 (1978).

nation of national emergencies²⁷ and military operations,²⁸ the impoundment of appropriated funds,²⁹ the export of nuclear materials,³⁰ major arms sales abroad,³¹ foreign trade,³² and space exploration.³³ Congress also found the legislative veto a useful tool for overseeing the domestic bureaucracy. During the 1970's Congress gave itself the right to disapprove, by vote of one or both houses, regulations issued by a variety of administrative bodies, including certain independent regulatory commissions.³⁴ Until *Chadha* brought these developments to a halt, it seemed possible that Congress might extend the legislative veto across-the-board to nearly all agency regulations.³⁵ By any measure, *Chadha* invalidated what Congress itself viewed as an important technique for redressing the balance of political power which had tilted away from it in the previous half-century.

As straightforward as it seemed, the Court's decision was not entirely without its loose ends. A few observers raised the possibility that the Court might reconsider the legislative veto if the policy context were special (e.g., concerning foreign affairs or the disposal of federal property)³⁶ or if the veto were implemented by means of the appropriations power (e.g., through legislation barring the expenditure of money to enforce administrative actions disapproved by a congressional committee).³⁷ Nothing in the majority opinion suggested this, however, and prospects for salvaging some of the legislative vetoes currently on the books seemed remote. Aside from this, the main legal questions unanswered in *Chadha* relate to the issues of retroactivity³⁸ and severability.³⁹ The first of these turns on the question of how the Court's ruling would be applied in post-*Chadha* lawsuits challenging

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27. National Emergencies Act of 1976, Pub. L. No. 94-412, § 202, 90 Stat. 1255 (codified at 50 U.S.C. § 1622 (1976)).
 28. War Powers Resolution of 1973, Pub. L. No. 93-148, § 5, 87 Stat. 555, 556-57 (codified at 50 U.S.C. § 1544(c) (1973)).
 29. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1013, 88 Stat. 297, 334-35 (codified at 20 U.S.C. § 684 (1974)).
 30. Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, §§ 104(f), 303(a)-(b), 306-308, 401, 92 Stat. 120, 123, 130-31, 134-35, 137-39, 144 (codified at 22 U.S.C. § 3223(f); 42 U.S.C. §§ 2153c-d, 2155(b), 2157(b), 2158-2159, 2160(f) (Supp. 1985)).
 31. International Security Assistance and Arms Control Act of 1976, Pub. L. No. 94-329, §§ 211(a), 301(a), 302(a)-(b), 90 Stat. 729, 743, 748, 751-752 (codified at 22 U.S.C. §§ 2304(c)(3), 2314(g)(4)(c), 2755(d), 2776(b) (1979)).
 32. Trade Act of 1974, Pub. L. No. 93-618 §§ 203(c), 331(a), 402(d), 405(c), 407, 88 Stat. 1978, 2015, 2049, 2051-52, 2056-59, 2061, 2063 (codified at 19 U.S.C. §§ 1303(e), 2253(c), 2432(d), 2435, 2437 (1980)).
 33. National Aeronautics and Space Administration Act of 1984, Pub. L. No. 98-361, §§ 103-104, 98 Stat. 422, 424-25 (1984).
 34. See, e.g., The Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21(a), 94 Stat. 374, 393 (formerly codified at 15 U.S.C. § 57a-1), *repealed by* Pub. L. No. 98-620, § 402(13), 98 Stat. 3358 (1984) (FTC rules were disapproved by concurrent resolution).
 35. Bills to this effect passed the Senate in 1982 but died in the House Rules Committee. See S. 1080, 97th Cong., 2d Sess. (1982); H.R. 746, 97th Cong., 2d Sess. (1982).
 36. See, e.g., *Hearings on the U.S. Supreme Court Decision Concerning the Legislative Veto Before the House Comm. on Foreign Affairs*, 98th Cong. 1st Sess. 229 (1983) (statement of Eugene Gressman, Professor, University of North Carolina) [hereinafter cited as *Hearings I*]. For an application of this theory to Congress' proprietary powers, see *National Wildlife Federation v. Watt*, 571 F. Supp. 1145, 1157 (D.D.C. 1983).
 37. *Hearings I*, *supra* note 36, at 115 (statement of Eugene Gressman). Bills currently before Congress which would rely upon the appropriations power to deny funding to congressionally disfavored administrative actions include S. 1145, 99th Cong., 1st Sess. (1985) and H.R. Con. Res. 2, 99th Cong., 1st Sess. (1985).
 38. See, e.g., Baker, *Chadha and the Public Lands: Is FLPMA Affected?*, 5 PUB. LAND L. REV. 55

governmental actions taken prior to the Supreme Court's decision. Would the nullification of the legislative veto extend only to future attempts by Congress to wield the veto, or could plaintiffs now seek judicial invalidation of successful past veto resolutions, thus "reviving" administrative actions thought dead for years? The second unresolved question of *Chadha* involves the problem of severability; whether a legislative veto clause qualifying some congressional grant of authority can be held unconstitutional without at the same time nullifying the grant of authority. Did the mere presence of the unconstitutional legislative veto in the law delegating to an agency the power to take the particular administrative action "taint" the constitutionality of the law on the grounds that the delegated authority and Congress' reservation of veto power over it were inseparable?

The answer to the severability question depends in large part upon a judicial case-by-case (or veto-by-veto) reading of Congress' *intent* concerning the severability of the offending clause from the remainder of the law. In *Chadha*, the majority held that Congress wanted the courts to excise any invalid parts of the 1952 Immigration and Nationality Act and leave the rest standing, including the Attorney General's authority to suspend the deportation of aliens in specified circumstances.⁴⁰ The Court's decision to sever the unconstitutional legislative veto from the remainder of the law was supported by an express wish of Congress to this effect in the severability clause of the 1952 law.⁴¹ However, as the presence or absence of a severability clause is rarely dispositive of the question, the Court in *Chadha* had to engage in the highly speculative process of estimating whether Congress would have granted the Attorney General suspension of deportation power without reserving a veto for itself. An examination of the legislative history of the 1952 law convinced the seven majority Justices that Congress would have done just that.⁴² The same legislative history, however, led Justices Rehnquist and White to the opposite conclusion.⁴³ The Court addressed severability again two weeks after *Chadha* was handed down, when it summarily affirmed⁴⁴ a United States Court of Appeals decision striking down a provision of the Natural Gas Policy Act of 1978 which gave either house of Congress power to veto certain gas pricing rules issued by the Federal Energy Regulatory Commission (FERC).⁴⁵ The Court of Appeals had found

(1984). This article focuses on a particular statute that might be affected by the *Chadha* decision because it contains a legislative veto provision.

39. See, e.g., Note, *Severing the Legislative Veto Provision: The Aftermath of Chadha*, 21 CAL. W.L. REV. 174 (1984).

40. *Chadha*, 462 U.S. at 931-35.

41. 8 U.S.C. § 101 (1976). The words of this section under the "Separability of Provisions" subheading clearly state the intent of Congress: "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." *Id.*

42. *Chadha*, 462 U.S. at 934.

43. *Id.* at 967-1016 (White, J. and Rehnquist, J., dissenting).

44. *Process Gas Consumers Group v. Consumers Energy Council of Am.*, 463 U.S. 1216 (1983), *aff'g* *Consumer Energy Counsel of America v. Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982). The court discussed the severability issue in a footnote which suggested that the legislative history of the Act and the omission of a severability clause within the Act might indicate that the legislative veto clause was not severable.

45. 15 U.S.C. § 3342(c)(1) (1982).

the veto severable from the provision of the act granting FERC the relevant rulemaking authority, this time without benefit of a severability clause, and where the act's legislative history "arguably" suggested nonseverability.⁴⁶

In other statutes containing legislative vetoes, the question of severability has to be examined on a case-by-case basis. Would Congress have permitted the President to make major weapons sales to other countries—in the form that authority now takes—without retaining power to veto any particular sale by concurrent resolution?⁴⁷ Would Congress have authorized the President to temporarily defer expenditures of appropriated funds without having reserved the power to block particular deferrals by a resolution of disapproval passed in either house?⁴⁸ Answering critical questions of this type requires an examination of each legislative veto in the light of its statutory context, purpose, and history. The courts—as well as Congress—would soon have to confront these often imponderable matters.

THE INITIAL REACTION TO *CHADHA*

The legislative veto never reached deep into the public consciousness. While specific attempts by Congress to use the device (as in the 1981 effort to stop the sale of Airborne Warning and Control [AWAC] planes to Saudi Arabia⁴⁹) could momentarily catch public attention, the legitimacy of the veto itself had been fought out among public officials, academics, and lawyers. The reception accorded the Supreme Court's decision in *Chadha* reflects this pattern. Major newspapers and broadcast media proclaimed the significance of the case for presidential-congressional relations,⁵⁰ particularly in light of major recent attempts by Congress to rein in presidential powers in the fields of warmaking, arms sales, and impoundment.⁵¹ Also covered were the immediate reactions to the decision by officials in the gov-

46. *Hearings on the Supreme Court Decision in INS v. Chadha and Its Implications for Congressional Oversight and Agency Rulemaking Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary.*, 98th Cong., 1st Sess. 5-6 (1983) (statement of Edward C. Schmults, Deputy Attorney-Geneneral) [hereinafter cited as *Hearings II*].

47. See International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. §§ 2304(c)(3), 2314(g)(4)(c), 2755(d), 2776(b) (1979).

48. See Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified at 31 U.S.C. § 1301 (1974)).

49. See HOUSE COMMITTEE ON FOREIGN AFFAIRS, 97TH CONG., 1ST SESS., CONGRESS AND FOREIGN POLICY-1981 (Comm. Print 1982).

50. See, e.g., N.Y. Times, June 24, 1983, at 8, col. 5; Wash. Post, June 24, 1983, at 1, col. 1; Wall St. J., June 26, 1983, at D8, col. 1; Wall St. J., July 27, 1983, at 28, col. 1.

51. In all of these fields, the President is given a limited delegation of authority due to the inclusion of veto provisions which allow Congress to reverse his decisions. The respective acts with regard to each field are as follows: (A) The War Powers Resolution of 1973. This act controls the extent to which the President may engage in military operations without a congressional declaration of war. In such instances Congress may, by concurrent resolution, direct the President to remove U.S. troops from a foreign conflict. (B) The Military Appropriations Act of 1975. This act controls the extent to which the President can export defense goods, technology or techniques. Congress may curtail the President's activity in this area by concurrent resolution. For a recent example of Congress' attempt to utilize the veto provision of this bill, see *supra* note 49. (C) The Congressional Budget and Impoundment Control Act of 1974. This act controls the extent to which the President may refuse to spend money Congress has appropriated. The President's proposed deferral of budget authority may be disapproved by a resolution of either chamber. See N.Y. Times, June 24, 1983, at 5, col. 1 and Wash. Post, June 24, 1983, at 15, col. 1 for a short summary of these and other bills containing legislative veto provisions.

ernment, including the House and Senate.⁵² It was not long, however, before the issue faded from public attention.

The *Chadha* decision, however, remained in the minds of the policy elites most concerned with the legislative veto, particularly within the legislative branch. The sharpest reaction to the Court's decision came from those members of Congress who championed the legislative veto as a necessary means of checking the power of the Executive and the bureaucracy. Representative Elliot H. Levitas (D-Ga.), the unacknowledged leader of this group, branded *Chadha* a "train wreck" in the governmental process⁵³ and called for immediate action by Congress to replace the veto with an equally effective way of "skinning the same cat."⁵⁴ Stanley M. Brand, General Counsel to the House of Representatives (and one of the counsel on the losing side in *Chadha*), noted that it "took the Court 18 months to screw up what it took Congress 50 years to set up."⁵⁵ Brand saw the only way of coping with this loss of the means to check the bureaucracy was for Congress to repeal and rewrite more narrowly the legislation delegating rulemaking power in the first place.⁵⁶ Many congressmen viewed *Chadha* as taking away one of the major tools by which Congress had been able to influence foreign policy in the previous ten years, while a senior congressional aide warned that the President's victory in the case would eventually be overshadowed by the passage in Congress of much more restrictive laws controlling executive authority.⁵⁷ Indicative of this type of initial response was the approval by the House of Representatives of a Levitas-sponsored amendment to the Consumer Product Safety Commission reauthorization bill⁵⁸ which prevented the expenditure of funds to enforce any major CPSC regulation until Congress had enacted a *joint* resolution (which would go to the President for review) *approving* the regulation. Failure by either house to pass such a resolution would effectively kill the proposed regulation.⁵⁹

Perhaps most noteworthy about this initial reaction of Congress, however, was the refusal of the leadership of either house to be stampeded into precipitous action. Many members who had opposed the legislative veto on

52. See, e.g., N.Y. Times, June 24, 1983, at 1, col. 6; N.Y. Times, June 25, 1983, at 8, col. 5; Wash. Post, June 24, 1983, at 1, col. 3; Wash. Post, June 25, 1983, at 3, col. 3.

53. Witt, *Legislative Veto Shrunk Down; Congress Moves to Review Dozens of Existing Statutes*, 41 CONG. Q. WEEKLY REP. 1263, 1264 (1983) (quoting Representative Elliot H. Levitas (D-Ga.)): "There is a train wreck if this decision is broadly read. Congress will have to work quickly to circumscribe rulemaking."

54. *Hearings II*, *supra* note 46, at 319. See also Levitas & Brand, *Congressional Review of Executive and Agency After Chadha: The Son of Legislative 'Veto' Lives On*, 72 GEO. L.J. 801 (1984).

55. *Regulatory Reform Act of 1983: Hearings on H.R. 2327 Before the Subcomm. on Administration Law and Government Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 698 (1983) [hereinafter cited as *Hearings III*]. Similar to this was the reaction of House Foreign Affairs Chairman Clement J. Zablocki (D-Wis.): the Court "by the stroke of a pen has negated everything Congress has done in the past 10 years." Felton, 41 CONG. Q. WEEKLY REP. 1265 (1983).

56. *Hearings I*, *supra* note 36, at 7-9, 26-28; *Hearings II*, *supra* note 46, at 209, 215.

57. See Felton, *supra* note 55, at 1265: "A senior aide to the Foreign Relations Committee predicted the decision would give the [P]resident more flexibility 'in the short term,' but that eventually Congress could make life 'much more complicated' for the [P]resident by passing even more restrictive laws."

58. H.R. 2668, 98th Cong., 1st Sess. (1983).

59. See 129 CONG. REC. H4781-84 (daily ed. June 29, 1983); Sarasohn, *House Votes New Oversight Methods for Safety Agency; Severely Cuts Authorization*, 41 CONG. Q. WEEKLY REP. 1365 (1983). The bill died in the Senate.

constitutional or policy grounds welcomed the Court's decision and were likely to be less than enthusiastic about rushing to find a substitute for it.⁶⁰ More typical of the leadership's initial reaction, however, was a recognition that something needed to be done about the likely invalidity of legislative veto clauses in a large number of important statutes across the policy spectrum, but that a "quick fix" in this regard, such as a constitutional amendment, was neither necessary nor desirable. They felt that Congress should approach the problem in an orderly, methodical fashion.⁶¹ One result of this determination was the announcement by four congressional committees and subcommittees that they would soon hold hearings on the effects of the *Chadha* decision, as well as on the appropriate congressional response.⁶² In the same vein, the House Rules Committee announced it would not act on any bill containing a legislative veto referred to it after June 23, 1983, the day *Chadha* was announced.⁶³ The Committee would consider bills containing legislative vetoes sent to it for a rule before this date only if the originating committee removed the veto, or changed it to conform to *Chadha*.⁶⁴

Much of the explanation for this go-slow approach by the congressional leadership can be attributed to the real uncertainty as to the precise impact of *Chadha* upon Congress' role and influence, especially in the area of congressional oversight. Realization of the numerous other sources of power that the legislative branch could draw upon in its relations with the Executive and administrative agencies relieved some of the sting of the Court's decision. The essentially moderate tone of the leadership's response would not have been possible, however, had the Reagan administration not adopted a conciliatory posture with respect to the powers accruing to it as a result of *Chadha*. Although Attorney General William French Smith and White House spokesmen praised the Court for ruling what the Executive had "known" to be true all along, there was little official gloating over the dead legislative veto, at least in public. Top officials disavowed any attempt on the part of executive branch agencies to take advantage of the now non-vetoable grants of authority they had been given by Congress⁶⁵ and promised to "observe scrupulously" the still-viable provisions of those laws obligating the agencies to give Congress advance notification of any intended action (such as a major arms sale, the export of nuclear materials, or the deferral of appropriated expenditures), and to defer such action until any required "waiting period" had expired. This would allow Congress the opportunity to stop any particular action from going into effect, as long as Congress subsequently proceeded in accordance with Article I of the Constitution. Deputy Secretary of State Kenneth W. Dam's statement before a

60. See, e.g., Witt, *supra* note 53, at 1264.

61. See Sarasohn, *supra* note 59, at 1327-28.

62. *Id.*

63. *Rules Sets Policy on Legislative Veto*, 41 CONG. Q. WEEKLY REP. 1564 (1983); *Panel Skirts Legislative Veto Ban*, 41 CONG. Q. WEEKLY REP. 1576 (1983).

64. *Id.*

65. See, e.g., *Hearings II*, *supra* note 46. But see the position taken by Interior Dep't Secretary James Watt, *infra* note 175.

subcommittee of the House Judiciary Committee downplaying the impact of *Chadha* was reassuring:

[L]ittle of practical significance need in fact change as a result of the Supreme Court decision. The Department of State will continue to work closely with the members and committees of Congress and to take their concerns into account in reaching decisions on issues of policy. If anything, I believe *Chadha* will make the . . . Executive Branch more, not less, conscious that they are accountable for their actions.⁶⁶

This evidently sincere desire on the part of the Administration to avoid anything resembling a grab for power clearly played an important role in the ability of the congressional leadership to defuse any sentiment in Congress to fashion an immediate and comprehensive substitute for the legislative veto.

THE CONGRESSIONAL HEARINGS

The next phase of the aftermath of *Chadha*, at least in the political realm, unfolded in the hearing rooms of the House and Senate. Various committees and subcommittees of each chamber conducted hearings on the *Chadha* case and its impact both generally and upon particular laws within the committees' areas of concern. Subcommittees of the House⁶⁷ and Senate⁶⁸ Judiciary Committees, as well as the Foreign Affairs⁶⁹ and Rules⁷⁰ Committees of the House conducted the widest-ranging of these hearings. During the course of the hearings, held primarily in the summer and fall of 1983, various witnesses submitted statements (both oral and written) concerning the effects of *Chadha* and how Congress might respond. Most of these persons held federal governmental positions of various kinds, including members of Congress and the judiciary, higher-echelon executive department officers, independent regulatory commissioners, congressional counsel, and specialists from within the Congressional Research Service. The "outside" witnesses consisted almost exclusively of academic experts (law and political science professors) and representatives of bar associations and other interested lobbying groups.

Several themes characterized the views expressed during these hearings. Regardless of the witnesses' positions on the legal or political merits of the legislative veto, they generally agreed that the majority rationale in *Chadha* had either struck dead the legislative veto or pronounced it a case of terminal unconstitutionality. The Chief Counsel to the House asserted that the Court's decision wiped out all legislative veto provisions wherever they ex-

66. *Hearings II*, *supra* note 46, at 136.

67. *See Hearings II*, *supra* note 46; *Hearings III*, *supra* note 55.

68. *Hearings on S. 1080, a Bill to Amend the Admin. Procedure Act to Require Fed. Agencies to Analyze the Effects of Rules to Improve Their Effectiveness and for other Purposes Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984); *Hearings on the Effects of the Supreme Court's Decision in Immigration and Naturalization Service v. Chadha on [the] Legislative Veto Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) [hereinafter cited as *Hearings IV*].

69. *Hearings I*, *supra* note 36.

70. *Hearings on the Impact of the Supreme Court Decision in the Case of Immigration and Naturalization Service v. Chadha Which Found the Legislative Veto Unconstitutional Before the House Comm. on Rules*, 98th Cong., 2d Sess. (1984) [hereinafter cited as *Hearings V*].

isted in the statutes,⁷¹ and analyses of particular statutes submitted by legal specialists from the Congressional Research Service concurred.⁷² A few witnesses professed to see possible signs of life in those vetoes relevant to matters of foreign relations,⁷³ but they could cite nothing in *Chadha* or the Court's summary rulings on July 6, 1983⁷⁴ which would support this possibility.⁷⁵

Much more problematic were the questions the Court itself had left for future resolution, i.e. retroactivity and the "ticking time bomb" of severability. From Congress' point of view, House Counsel Brand expressed the most pessimistic forecast, predicting that the Executive would pick up all the pieces after *Chadha*. Assuming that the decision would be applied retroactively, Brand remarked:

[I]t is doubtful how far the [c]ourts will actually need to go to find the evidence of severability identified in *Chadha*. In very few instances does the legislative history reveal the kind of pervasive and abiding concern with delegating any power at all to the executive without making it entirely dependent on a legislative reservation. Mere reluctance to delegate final authority is not enough.

While we in Congress may feel in our hearts that much of this authority would not have been delegated without a reservation, I believe the [c]ourts will find severability in many cases absent an overwhelming record that establishes that fact.⁷⁶

While Brand's assertion found some corroboration in the analyses of other legal experts,⁷⁷ most witnesses preferred to approach the severability issue with caution. All could agree that the problem would ultimately have to be faced, either by the courts or by Congress, but most expected that the courts would confront severability on a statute-by-statute basis, with each veto provision considered in the light of its own context and background.⁷⁸

71. *Hearings I, supra* note 36, at 4. "The scope of the ruling is, in my view, as broad and as sweeping as the dissenting Justice noted in his separate opinion, conjecturing that the decision 'also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a legislative veto.'" *Id.* (statement of Stanley M. Brand, Chief Counsel to the House).

72. *See, e.g., Hearings I, supra* note 36, at 231, 243, 296, 302-15, 333-34, 357, 365-66. "Thus it may be presumed that all congressional veto provisions are now constitutionally suspect notwithstanding the manner in which they are exercised or the subject matter they cover." *Id.* at 243.

73. *Hearings I, supra* note 36, at 115, 157, 229-30 (statement of Eugene Gressman).

74. *See supra* note 3.

75. One authority has testified that *Chadha* may not apply in matters of foreign relations.

I also suggested at the July 21 hearing that, while it is safer and perhaps more prudent to adopt the joint resolution of approval device in light of *Chadha*, there is a possible exception to *Chadha*, particularly in the foreign affairs area of legislation. It seems to me that when Congress deals with (a) the authorization and appropriation of money for use in (b) the conduct of foreign affairs, Congress is at the height of its constitutionally exclusive powers. We are then in the area of "political question" functions textually committed by the Constitution to the Congress. In addition, when Congress conditions the Executive's use of public funds (or disposal of government property) upon possible congressional disapproval by concurrent resolution, it is arguable that Congress, if it disapproves, is not thereby affecting the "legal rights, duties and relations" of the Executive in the *Chadha* sense.

Id. at 229 (statement of Eugene Gressman).

76. *Hearings I, supra* note 36, at 5.

77. *Hearings II, supra* note 46, at 221 (statement of Harold Bruff, Univ. of Texas School of Law); *Hearings IV, supra* note 68, at 21, 54 (statement of Michael Davidson, Legal Counsel to the Senate).

78. *See, e.g., Hearings I, supra* note 36, at 244-45, 263-70, 327-56. *See also Hearings V, supra* note 70, at 346, 348 (statement of Rep. Hamilton Fish, Jr. (R.-N.J.)).

The probability of a judicial finding of severability was arguably high in many instances (e.g., the concurrent veto provisions of the War Powers Resolution and the National Emergencies Act),⁷⁹ too close to call in others (e.g., the one-house veto in the Motor Vehicle Information and Cost Savings Act⁸⁰), and in some instances, not likely to be found. Most frequently cited in this third category were the legislative vetoes in statutes dealing with executive branch reorganization, presidential deferral of appropriated expenditures, and District of Columbia self-government.⁸¹

Two divergent views emerged from the hearings regarding *Chadha's* impact, especially upon the regulatory process, and what response, if any, was needed. Critics of the decision⁸² reiterated their previous warnings that the effect of the ruling was to add to the already swollen powers of an unaccountable bureaucracy, and that Congress had no choice but to search for other equally effective ways of "skinning the cat."⁸³ A crisis loomed, and Congress had to move decisively if it was to preserve its basic role as policymaker in the governmental system. Representative Levitas prophesied the coming struggle:

I am satisfied that we are going to see a major restructuring of the relationship between the Executive Branch and the agencies and the Congress as a result of the legislative veto decision. This restructuring is going to take place over a long period of time, I'm afraid. It will be fraught with confrontation, there will be some bitterness, and there will be a great deal of difficulty in where we go from here.⁸⁴

It was repeatedly predicted that broadly phrased authorizing statutes would become a thing of the past, and the powers that Congress delegated to the bureaucracy would in the future be much narrower and specific in the discretion they permitted administrators.⁸⁵

As for the immediate problem of the power-vacuum created by *Chadha*, solutions varied. Amending the Constitution to authorize certain forms of the defunct legislative veto was suggested,⁸⁶ and there was also the usual talk about depriving the federal courts of their jurisdiction to hear certain cases; specifically, any further challenges to the constitutionality of the legislative veto.⁸⁷ House Counsel Brand, dismissing the possible alternatives

79. *Hearings I*, *supra* note 36 at 317-18.

80. Motor Vehicle Information and Cost Savings Act § 947, Pub. L. No. 92-513, 86 Stat. 947 (codified at 15 U.S.C. § 1901 (1972)). *Cf.* the statements referred to *supra* in note 72.

81. *See, e.g., Hearings II supra* note 46, at 247-48 (statement of Rep. John J. Moakley (D-Mass.)); *Hearings I, supra* note 36, at 244-45.

82. *See Witt, supra* note 53, at 1284 (comments of Sen. Charles E. Grassley (R-Iowa); Sen. Carl M. Levin (D-Mich.); Rep. Elliott H. Levitas (D-Ga.)).

83. *See id.* (comments of Rep. Levitas).

84. *Hearings II, supra* note 46, at 319.

85. *See Witt, supra* note 53, at 1264-65; *Hearings II, supra* note 46, at 104, 247, 281, 319; *Hearings IV, supra* note 68, at 10.

86. H.R.J. Res. 313, 98th Cong., 1st Sess. (1983); S.J. Res. 135, 98th Cong., 1st Sess. (1983). Both were referred to the respective judiciary committees of each chamber. No action was taken on the House resolution. A Senate subcommittee began hearings on the Senate resolution, but the matter eventually died in committee. H.R.J. Res. 32, 99th Cong., 1st Sess. (1985), the latest effort to write one-house veto authority into the Constitution, has also been referred to the Judiciary Committee, where action has yet to be taken.

87. *See Granat, Legislative Veto Replacements Considered*, 41 CONG. Q. WEEKLY REP. 1501 (1983). Rep. Charles Pashayan, Jr. (R-Calif.) offered the suggestion. Pashayan also proposed giving mem-

to the legislative veto as all “in one way or another, unsatisfactory,” repeated his earlier call for wholesale repeal of those statutes delegating administrative authority subject to check by legislative veto, and called for reformulation of those laws from the beginning.⁸⁸ Representative Levitas urged that Congress, by law, insert into the authorizing bills for regulatory agencies and executive departments a general requirement, promptly dubbed “son of legislative veto,” whereby every “major” rule or action contemplated by an agency would be regarded as no more than a proposal until Congress had *affirmatively adopted* it by joint resolution, followed by referral to the President.⁸⁹ A more moderate and certainly less cumbersome way of skinning the cat was exemplified in the Levin-Boren bill.⁹⁰ Under this bill, Congress would legislate a general requirement that agencies give Congress thirty days’ advance notification of all “significant” rules, during which time the relevant committee of either house could extend this “waiting period” an additional sixty days by voting to report a joint resolution of disapproval of the intended rule.⁹¹ If, within this waiting period, both houses approved a joint resolution of *disapproval* of the rule—and the President concurred—the rule would be permanently barred from taking effect.⁹² The Levin-Boren bill also contained special procedures to expedite floor consideration of such disapproval resolutions, by preventing them from being bottled up in committee or filibustered to death.⁹³

A second, rather different estimate of the impact of *Chadha* and the appropriate congressional response also emerged during the course of these

bers of Congress weight in federal appeals court if they challenged the validity of rules that were disapproved by concurrent resolution. *Id.*

88. See *Hearings I, supra* note 36, at 8-9, 26-27, 33. Brand testified:

My own view is, as an advocate for the House of Representatives, that we “wipe the slate clean” and repeal all delegations which were enacted under the now erroneous assumptions made before *Chadha*. Justice White has framed the dilemma Congress must now confront in stark terms: “Congress is faced with a Hobson’s choice: either to refrain from delegating the necessary authority, leaving itself with the hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, abdicate its lawmaking function to the executive branch and independent agencies.”

For me the choice is clear. I can conceive of no supportable argument that we should abdicate legislative responsibility. It was, after all, an emboldened executive which attacked these statutes as unconstitutional on every front to provide a “vital check against tyranny.”

Id. at 8-9.

89. *Hearings III, supra* note 55, at 321-22, 333-34; H.R. 3939, 98th Cong., 1st Sess. (1983). See also H.R. 82, 99th Cong., 1st Sess. (1985); H.R. 1339, 99th Cong., 1st Sess. (1985).

90. S. 1650, 98th Cong., 1st Sess. (1983); H.R. 4119, 98th Cong., 1st Sess. (1983). S. 1145, 99th Cong., 1st Sess. (1985) is to the same effect. See also *Hearings II, supra* note 46, at 244-45; *Hearings IV, supra* note 68, at 7-12. The bill was named for its chief Senate sponsors, Carl Levin (D-Mich.) and David Boren (D-Okla.).

91. *Id.*

92. S. 1145 provides that a recommended “final major rule” (one that is likely to cost \$100 million or more per year, or one that is likely to cause either substantial increases in costs or significant adverse effects on the economy) would become effective unless a joint resolution disapproving the rule is enacted within 90 days of receipt of the rule by the Secretary of the Senate and the Clerk of the House of Representatives. A “final nonmajor rule” would become effective in 45 days unless a joint resolution is enacted. See S. 1145, *supra* note 90, at 8, 9, 11.

93. S. 1145 allows senators and representatives to move to discharge a committee from further consideration of a joint resolution and bring the matter to full chamber consideration. When a joint resolution is placed on the House or Senate calendar, S. 1145 allows a motion for immediate consideration of the joint resolution with a maximum two-hour debate. See S. 1145, *supra* note 90, at 17, 18.

hearings. Largely passed over during the initial period of reaction to the Supreme Court's decision, this view regarded the *Chadha* ruling with far more equanimity, perhaps even with a sense of relief. Of the Administration officials testifying at the hearings, political astuteness and a sincere desire to avoid confrontation undoubtedly contributed to their efforts to play down the overall effects of the *Chadha* ruling. These witnesses were joined by academics,⁹⁴ lawyers,⁹⁵ and interest group spokesmen⁹⁶ who had long argued⁹⁷ that the legislative veto badly distorted the policy-making process in both Congress and the administrative agencies. Arguing that *Chadha* "clears the air" for dealing with the "real problems of regulatory reform," a witness from the American Bar Association told one subcommittee that he thought the reactions to *Chadha* had been "substantially overstated" by the press and the proponents of the legislative veto.⁹⁸ Supporting his view were the off-the-bench remarks of a respected federal court of appeals judge, submitted into evidence,⁹⁹ who concluded that in terms of its effect upon the regulatory process, *Chadha* would have no substantial impact because the legislative veto *itself* had had no such impact.¹⁰⁰ Many witnesses stressed that Congress retained an impressive array of weapons for dealing with an unresponsive bureaucracy as well as the Executive, including the traditional techniques of oversight, investigations, appropriations, durational limits on delegations of power, and, ultimately, legislation.¹⁰¹ These reminders, combined with the oft-repeated assurances of consultation and cooperation by the Administration, even led House Foreign Affairs Committee Chairman Clement J. Zablocki (D-Wis.) to recede from his earlier position:

I . . . agree that the *Chadha* decision has not really blown everything to

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94. *Hearings II*, *supra* note 46, at 214-33 (statement of Harold H. Bruff, University of Texas School of Law); *id.*, at 234-45 (statement of Neil H. Cogan, Professor of Constitutional Law, Southern Methodist University).
95. *Id.* at 197-214 (statement of Richard B. Smith, Chairman, Coordinating Group on Regulatory Reform, American Bar Association).
96. *Id.* at 142 (statement of Alan B. Morrison, Director, Public Citizen's Litigation Group).
97. See, e.g., Gilmour, *The Congressional Veto: Shifting the Balance of Administrative Control*, 2 J. POL'Y ANAL. & MGMT. 13 (1982); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977). Both articles analyze the controversy over the legislative veto dating back to the early 1970's. Gilmour discusses the impact upon Congress of 555 provisions of 335 federal statutes requiring congressional review. Bruff and Gellhorn review five federal programs subject to the legislative veto: the Office of Education's establishment of family contribution schedules for its program of basic grants for post-secondary legislation (1971); the Department of Health, Education and Welfare's rules issued under the General Education Provision Act (1974); the Federal Energy Administration's exemptions from price and allocation controls on petroleum products (1973); the General Services Administration's regulation on access to the Nixon papers and tapes (1974); and the Federal Election Commission regulations (1974).
98. *Hearings II*, *supra* note 46, at 209-10 (statement of Richard B. Smith, Chairman, Coordinating Group on Regulatory Reform, American Bar Association). See also *id.* at 245 (statement of Rep. John J. Moakley (D-Mass.), accompanied by John J. Dooling, Counsel, House Committee on Rules).
99. *Id.* at 322 (remarks of Hon. Antonin Scalia, Judge, United States Court of Appeals for the District of Columbia Circuit).
100. *Id.*
101. See *Hearings I*, *supra* note 36, at 115 (statement of Eugene Gressman); *Hearings II*, *supra* note 46, at 320 (remarks of Rep. Levitas); *Hearings III*, *supra* note 55, at 659-60 (statement of Patricia P. Bailey, Commissioner, Federal Trade Commission); *Hearings IV*, *supra* note 68, at 10 (statement of Sen. Carl M. Levin (D-Mich.)); *Hearings V*, *supra* note 70, at 6 (statement of Rep. John D. Dingell (D-Mich.)), 311-12 (statement of Rep. Jack Brooks (D-Tex.)).

hell. In one sense the *Chadha* decision has been of some service to Congress because I think it is going to make Congress more aware of its legislative responsibilities.

In the final analysis we have the last word. During these hearings . . . we were assured that the executive branch is not going to exploit their position versus the Congress that may emerge from this decision.¹⁰²

This second view did not deny that the Court's decision was of great importance, or that it called for appropriate action by Congress to fill the gaps in the laws opened up by the judicial abolition of the legislative veto. It did, however, reject the "train wreck" analogy¹⁰³ and saw *Chadha* as registering disparate effects at different points in the relationships among Congress, the Executive, and the independent regulatory agencies. This view carried with it the implication that the appropriate legislative response was itself likely to be selective, dependent upon what was prudential, as well as constitutional, in each situation. The conciliatory tone adopted by the Administration joined with this belief in an individualized, measured response, to dispel any sense of urgency about the situation in the minds of many in Congress.¹⁰⁴ Those who shared this general attitude, however, were by no means unanimous as to the best legislative strategy for carrying forward these guidelines. Given the extreme decentralization of power in Congress, it is not surprising that a comprehensive "package" of tailored remedies for the fallen legislative veto has yet to emerge from Congress. What *has* emerged is the subject of the next section of this article, but there seems little doubt that the impact of the congressional hearings on the subject vitally influenced what was to occur in this regard.

CONGRESSIONAL ACTION SINCE *CHADHA*

Over two years have elapsed since the *Chadha* decision. It is now possible to examine in retrospect not only the issues created by the case, but also the means selected by Congress to adjust whatever imbalance of power has resulted.

In the first place, it is instructive to note what has *not* happened, or at least what Congress has failed to do up to now. Perhaps most apparent has been the unwillingness of Congress to pursue any comprehensive approach to the questions raised by *Chadha*. Congress has given no serious consideration to proposed constitutional amendments to reverse the decision, or to suggestions about removing court jurisdiction to hear such cases.¹⁰⁵ Early recommendations that Congress repeal and then rewrite all existing laws containing legislative vetoes have not been acted upon, nor have measures calling for a thorough examination of all such laws, either by the relevant

102. *Hearings I*, *supra* note 36, at 156-57.

103. *See supra* note 53 and accompanying text.

104. *See supra* text accompanying notes 64-66. *See also* Tate, *High Court Decision Reopens Dispute Over Impoundments; Congress Loses Spending Tool*, 41 CONG. Q. WEEKLY REP. 1331-34 (1983); *Hearings I*, *supra* note 36, at 98 (statement of Kenneth W. Dam, Deputy Secretary of State); *Hearings V*, *supra* note 70, at 286 (statement of Professor Morris S. Ogul, University of Pittsburgh).

105. *See generally* resolutions, *supra* note 86; Granat, *supra* note 87.

committees¹⁰⁶ or a special commission charged with this responsibility.¹⁰⁷ Wholesale resort to the appropriations power to prohibit spending for implementing congressionally disfavored administrative actions has not been pursued. Questions pertaining to the "ticking time bomb"¹⁰⁸ severability issue have been left to the courts to decide, and acted upon by Congress only when judicial pressure made it impossible to avoid them any longer.

Although Congress has examined the possibility of subjecting proposed agency regulations to a joint resolution of *approval* or possible joint resolution of *disapproval*, either *en masse* or on a more individualized basis, Congress still shows no signs of turning to either as a cure-all for the problems of *Chadha*. Sentiment for a joint resolution of approval may well have peaked in November, 1983 when the House of Representatives approved, then narrowly rejected, a Levitas-sponsored floor amendment to the Hazardous and Solid Waste Amendments bill¹⁰⁹ which sought to prevent the Environmental Protection Agency from enforcing certain applications of hazardous waste regulations until approved by Congress through joint resolution.¹¹⁰ There was strong opposition to this type of approach, both on the House floor as well as in previous hearings on the *Chadha* case.¹¹¹ This opposition stemmed from the real concern that across-the-board resort to such a device, even if constitutional, would ultimately swamp the legislative process with the need to study each of the approximately 7000-8000 separate rules issued each year by the agencies.¹¹² Moreover, Reagan adminis-

106. H.R. 4535, 98th Cong., 1st Sess. (1983) The bill died in the Judiciary Committee.

107. S. 1591, 98th Cong., 1st Sess. (1983) The bill died in the Governmental Affairs Committee. See also H.R. Con. Res. 2, 99th Cong., 1st Sess. (1985); 131 CONG. REC. H137-45 (daily ed. Jan. 24, 1985).

108. See *supra* notes 39-48 and accompanying text.

109. H.R. 2867, 98th Cong., 1st Sess. 129 CONG. REC. H9168-83 (daily ed. Nov. 3, 1983) (codified at 42 U.S.C.A. § 6901 (b)(5)-(8) (West Supp. 1985)).

110. See 129 CONG. REC. H9168-83 (daily ed. Nov. 3, 1983). In summarizing his amendment, Representative Levitas said, "All I am asking, consistent with the Supreme Court's *Chadha* decision, is that the Congress, you and I, have the opportunity to look at those regulations before we impose a \$100 million a year burden on the American public." *Id.* at 9170.

111. See *id.* at H9168-83. Strong opposition to the proposed amendment was voiced by several members of the House. Representative Don Edwards (D-Cal.) stated:

It seems to me that passage of such a resolution by Congress would inevitably create a presumption of validity in the court. It would become nearly impossible for a petitioner to demonstrate in a court of law that a regulation was outside the scope of agency authority or that it was arbitrary and capricious.

Id. at 9170. Representative James J. Florio (D-N.J.) also objected to the amendment, saying that: "It is my opinion that [the proposed approval process] is clearly unconstitutional. The Court has already said that it is unconstitutional. So what we are being asked to do is acquiesce in a process that has clearly been ruled unconstitutional." *Id.* at 9173. Representative Howard L. Berman (D-Calif.) also had harsh words for the proposal:

I do not believe that it is the role of this body to be a giant appeals court for dissatisfied industries looking for a way to overturn Agency regulations they find objectionable. Anyone wishing to challenge an agency rule on the grounds it does not conform to a law passed by Congress can go to court. If we pass this amendment, we are either admitting we should not have given EPA the responsibility in the first place or we do not trust judicial review.

Id. at 9174.

112. *Hearings III, supra* note 55, at 659-60. In voicing her concern over the increased workload, FTC commissioner Patricia P. Bailey stated:

There are, by one estimate, some 76,500 full-time employees working in 57 federal regulatory agencies. Moreover, by your own best estimate of several years ago, the federal government issues some 7500 to 9000 rules each year, with the publication of proposed and final regulations filling 74,120 pages of the Federal Register in 1980 alone. The Congress has far too much important work to do than to attempt to duplicate the expertise developed

tration officials and others argued that application of the joint resolution of approval mechanism to executive actions in the realm of foreign affairs would inject a considerable amount of uncertainty, inflexibility, and delay into the foreign policy process.¹¹³ The alternative technique of subjecting such rules to possible joint resolution of *disapproval* seems more practicable because Congress would only need to act in situations where it disapproved of the proposed rules. This mechanism, however, is potentially inadequate for reviewing presidential and executive department actions, where the greater likelihood of a presidential veto of such a joint resolution of disapproval would raise the question of whether there was a two-thirds majority of both houses ready to override the President's veto.¹¹⁴

As far as what legislative steps (beyond hearings and the introduction of particular bills) Congress has taken in response to *Chadha*, a distinction may be made between bills which merely made some headway in the congressional process and those finally enacted. Among those enacted, several merit special consideration.

The Legislative Veto Retained

Despite general acknowledgment in Congress that *Chadha* wiped out all forms of the legislative veto, including the committee veto, the 98th Congress saw the enactment of more than a few laws containing a sizable number of provisions giving committees veto powers over certain executive agency actions. Most of these laws were appropriations acts, and the veto provisions therein typically required the funded agency to obtain the approval of both appropriations committees (or other relevant committees)

by these public servants in accomplishing their regulatory mission. Such an effort could, by some measurements, triple your workload.

Id. at 660.

113. *See, e.g., Hearings I, supra* note 36, at 101. Referring to a proposal to present proposed arms sales in a quarterly package, Deputy Secretary of State Kenneth W. Dam stated:

It just reduces the flexibility of the President to, for particular policy purposes, announce a sale at a particular time, or announce his intention to notify. By restricting the President's flexibility in the conduct of foreign policy, one may be limiting some very important opportunities for achievements, say at a time when one was attempting to settle a war or work out a peace treaty.

Id. at 101.

114. *Cf.* discussion in *Hearings I, supra* note 36, at 142-45. In discussing the possibility of presidential veto, Professor David Martin of the University of Virginia School of Law stated:

There is still the possibility that the President will veto disapproval legislation, thus requiring a two-thirds vote by each House of Congress to override. Now that *Chadha* has subjected all Congressional correctives to this requirement, Presidential vetoes definitely will block some legislative disapprovals that otherwise might have taken effect. But in my view, Presidential vetoes are far less likely than some have feared.

- Id.* at 144. *See also Hearings II, supra* note 46, at 216. Professor Harold Bruff of the University of Texas School of Law also discussed the presidential veto stating:

If you decide to respond to *Chadha* by authorizing joint resolutions to disapprove agency actions—that is one of the suggestions that has been brought forward—I think you need to expect that when such a power applies to the executive branch agencies, it will be quite difficult to make it effective. That is that because most regulations that are actually issued by an executive branch agency, as opposed to an independent agency, probably have enough support from the White House that the President would veto a bill overriding the regulation. Not necessarily, of course. But what I am saying is that attempts to use a full statutory override power as a major control on delegated power are made difficult by *Chadha*.

Id. at 216.

before reprogramming appropriated funds from one budgetary category to another. The continued appearance of these clearly unconstitutional vetoes¹¹⁵ is not easy to explain. Related committee reports make no effort to defend their legality, and there is little or no floor discussion of the vetoes. What might have been shrugged off as mere carelessness in legislative draftsmanship¹¹⁶ cannot now be viewed as anything other than intentional in light of the persistent (though occasional) use of these committee vetoes, their number,¹¹⁷ and the fact that repeated calls by the President¹¹⁸ for their elimination have gone unheeded. Behind this evident clash with the principles set forth in *Chadha* may be no more than reluctance of the congressional appropriations committees to yield long-held committee prerogatives in overseeing agency spending without a specific court decision on the point. Despite the apparent need for such a judicial ruling, the jurisdictional and standing barriers blocking a legal challenge to these vetoes are formidable. Moreover, a recent federal court of appeals opinion¹¹⁹ indicates that committee vetoes of agency actions may be retained in substance, if not in appearance.¹²⁰

The Department of State Authorization Bill

Among the more troublesome effects of *Chadha* on the role of Congress in foreign affairs is the likely unconstitutionality of section 5(b) of the War Powers Resolution of 1973,¹²¹ which enables Congress, by concurrent resolution, to order the President to withdraw American troops from hostilities in the absence of a declaration of war or specific statutory authorization.¹²² In one of several deliberate attempts to bring a past act into conformity with *Chadha*, Senate Minority Leader Robert C. Byrd (D-W.Va.) succeeded in adding from the floor an amendment to the 1984-1985 Department of State Authorization bill¹²³ to substitute a joint resolution in place of the concurrent resolution now specified by the War Powers Act.¹²⁴ A House-Senate conference committee later deleted this change, but added a provision stating that "any joint resolution" introduced to implement sec-

115. See Granat, *Legislative Vetoes Are Passed Despite High Court Decision*, 41 CONG. Q. WEEKLY REP. 2235-36 (1983); Rothman, *Despite High Court Ruling, Legislative Vetoes Abound*, 42 CONG. Q. WEEKLY REP. 1797-98 (1984).

116. Granat, *supra* note 115, at 2235-36.

117. Fisher found 30 veto provisions in 11 bills during the 12 months after the Supreme Court's decision in *Chadha*. The list has continued to grow since then. Rothman, *supra* note 115, at 1797.

118. President's Statement on Signing H.R. 5155 Into Law, 20 WEEKLY COMP. PRES. DOC. 1036 (1984); President's Statement on Signing H.R. 5713 Into Law, 20 WEEKLY COMP. PRES. DOC. 1039-40 (1984) (Executive would implement legislation containing legislative veto devices "in a manner consistent with the *Chadha* decision.").

119. *City of Alexandria v. United States*, 737 F.2d 1022 (Fed. Cir. 1984).

120. *Id.* at 1025.

121. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1982)).

122. *Id.* at § 1544(b).

123. S. 1342, 98th Cong., 1st Sess. (1983). See discussion of the Byrd Amendment at 129 CONG. REC. S14,163-65 (daily ed. Oct. 19, 1983) (discussing Amendment No. 2350 to S. 1342); and 129 CONG. REC. S14,255-56, S14,265, S14,267-70 (daily ed. Oct. 20, 1983) (discussing Amendment No. 2363 to Amendment No. 2350).

124. S. 1342, 98th Cong., 2d Sess., 129 CONG. REC. S14,163 (daily ed. Oct. 19, 1983) (debate on Amendment No. 2350 proposed by Senator Byrd).

tion 5(b) would be subject to expediting rules of procedure designed to bring such a resolution to reasonably quick floor consideration in both houses.¹²⁵ Why the House conferees insisted upon this rather oblique way of restoring political credibility to section 5(b), instead of the more straightforward Byrd amendment, was explained by House Foreign Affairs Committee Chairman Zablocki in a delphic floor remark to the effect that the Byrd language would be "unwise" at that point.¹²⁶ This may have meant no more than that the House leadership did not wish to concede the unconstitutionality of section 5(b) in its present form, or that modification of the War Powers resolution to conform to *Chadha* was still under consideration. Either way, the conference committee language recognized the imprudence of leaving the law, a major attempt by Congress to reassert its authority over warmaking, in its existing dubious form. Other sections of the bill authorized the United States Information Agency and the Department of State to reprogram appropriated funds only after fifteen days notice was given to the House Foreign Affairs Committee and the Senate Foreign Relations Committee.¹²⁷ These are not vetoes, of course, but "report and wait" provisions of the kind explicitly approved by the Supreme Court in *Chadha*.¹²⁸ They afford Congress time to block disfavored reprogrammings by constitutional means, such as through joint resolutions.¹²⁹

The Reorganization Act Amendments of 1984

The Reorganization Act Amendments of 1984¹³⁰ offer the first clear example of post-*Chadha* resort to the Levitas-type joint resolution of approval requirement for effectuating administrative actions. On numerous occasions since 1932, Congress has enacted statutes authorizing the President, within a limited period of time, to submit to Congress plans for reorganizing executive departments and agencies. Such plans became legally effective unless within a designated period of time after receiving them (e.g., sixty days) such plans were "vetoed" by Congress by vote of one or both houses.¹³¹ Presidents have used this authority extensively, though not al-

125. Department of State Authorization Act, Fiscal Years 1984 and 1985, Pub. L. No. 98-164, § 1013, 97 Stat. 1017 (1983), H.R. CONF. REP. NO. 563, 98th Cong., 1st Sess. (1983) reprinted in 1983 U.S. CODE CONG. & AD. NEWS 1576, 1608.

126. 129 CONG. REC. H10332 (daily ed. Nov. 17, 1983).

127. Department of State Authorization Act, Fiscal 1984 and 1985, Pub. L. No. 98-164 §§ 123, 214, 97 Stat. 1017 (codified at 22 U.S.C. § 2706, 1477 (1983)).

128. *Chadha*, 462 U.S. at 935 n.9.

129. During the summer of 1985, Congress explicitly substituted report-and-wait requirements for two legislative veto provisions contained in the Energy Policy and Conservation Act of 1975. Energy Policy and Conservation Amendments Act of 1985, Pub. L. No. 99-58, § 102(a)-(b), 99 Stat. 102, 102-03 (amending 42 U.S.C. §§ 6239(e), 6240(e) (1982)). See H.R. REP. NO. 152, 99th Cong., 1st Sess. 4-5, reprinted in 1985 U.S. CONG. & AD. NEWS 86, 87-88.

130. Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (codified at 5 U.S.C. §§ 901-912 (Supp. II 1984)).

131. Examples of prior reorganization laws containing legislative vetoes include: the Economy Act of 1932, Pub. L. No. 72-212, §§ 401-408, 47 Stat. 382, 413-15 (1933); the Reorganization Act of 1939, Pub. L. No. 76-19, § 5, 53 Stat. 561, 562-63 (1940); the Reorganization Act of 1949, Pub. L. No. 81-109, § 6, 63 Stat. 203, 205 (1950). See generally Fisher & Moe, *Delegating with Ambivalence: The Legislative Veto and Reorganization Authority*, in STUDIES ON THE LEGISLATIVE VETO 164-247 (Congressional Research Service Committee Print 1980).

ways with success.¹³² The most recent pre-*Chadha* example of this, the Reorganization Act of 1977¹³³ contained a sixty-day waiting period, and allowed a vote of disapproval by either the House or the Senate (one-house veto) to kill a reorganization plan.¹³⁴ By its own terms, presidential authority under this statute expired April 7, 1981.¹³⁵ Experience under this and earlier statutes made a temporary renewal of such authority desirable, however, and a bill to this effect was introduced early in the 98th Congress.¹³⁶ Action on this bill began a year later (nine months after *Chadha*), and the bill, as amended, was finally signed into law by President Reagan on November 8, 1984.¹³⁷

The Act, which expired on the last day of 1984, substituted for the one-house veto in the 1977 Act a requirement that presidentially-submitted reorganization plans be *approved by both houses* (joint resolution of approval) within ninety calendar days of continuous session of Congress after receiving them from the President.¹³⁸ This more recent statute retained earlier provisions expediting consideration of such joint resolutions in both houses, but specifically stated that failure of either house to act upon such a resolution within the ninety-day period was legally tantamount to disapproval of the resolution by that house.¹³⁹ Other sections of the 1984 statute imposed specific informational requirements¹⁴⁰ and substantive limitations upon proposed reorganization plans.¹⁴¹ Although there was little debate on the bill on the floor of the House or Senate, it was fully supported by the White House¹⁴² and by Representative Levitas, who dubbed it "son of legislative veto" and stated that it "should be a blueprint for [Congress] to follow in frequent future occasions."¹⁴³ Calling attention to the relatively "broad" reorganization authority given the President, as compared to the rulemaking authority delegated to administrative agencies (which contained more congressional "guidelines"), Senator Levin explained why he thought subjecting reorganization proposals to the far more difficult affirmative approval process made "good sense:"

[W]e can't really tell in advance what is appropriate at this time for reorganization activity. It must be done on an individual case by case basis, and we are asking the President to recommend to us, when and what type of reorganization efforts should be taken. There are unforeseeable, unique circumstances which are impossible to identify beforehand. So, in this type of situation—which is, again quite different from agency rulemaking—the

132. See J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 210-13 (1964); S. BAILEY, CONGRESS IN THE SEVENTIES 92-93 (2d ed. 1970).

133. Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (codified as amended at 5 U.S.C. §§ 901-912 (1982 & Supp. II 1984)).

134. 5 U.S.C. § 906(a).

135. *Id.* § 905(b).

136. H.R. 1314, 98th Cong., 1st Sess. (1983).

137. Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3129 (amending 5 U.S.C. §§ 901-912 (1977)).

138. 5 U.S.C.A. § 906(a) (West Supp. 1985).

139. *Id.*

140. *Id.* § 903 (1977 & West Supp. 1985).

141. *Id.* § 905 (1977 & West Supp. 1985).

142. 130 CONG. REC. H2520 (daily ed. Apr. 10, 1984) (statement of Rep. Frank Horton (R-N.Y.)).

143. 130 CONG. REC. H2521 (daily ed. Apr. 10, 1984).

joint resolution of approval is appropriate.¹⁴⁴

As for other existing statutory vetoes which needed revising in light of *Chadha*, as well as new legislation where some kind of veto should be inserted, Levin insisted each should be examined in its own context with "careful thought to the [c]ongressional purpose and the surrounding circumstances."¹⁴⁵

Legislative Ratification of Reorganization Plans

Another action taken by the 98th Congress that should be noted in this regard is the passage in October, 1984 of the extraordinary measure known as H.R.6225 and solemnly entitled "An Act to prevent disruption of the structure and functioning of the Government by ratifying all reorganization plans as a matter of law."¹⁴⁶ The genesis of this bill is to be found in the more than 100 lawsuits brought in the federal courts after *Chadha*, in which the authority of the federal Equal Employment Opportunity Commission (EEOC) to enforce provisions of two major civil rights laws was seriously questioned.¹⁴⁷ Acting by virtue of the authority granted him by the Reorganization Act of 1977, President Jimmy Carter, in 1978, submitted to Congress a plan¹⁴⁸ to transfer from the Department of Labor to the EEOC authority to enforce the Equal Pay Act¹⁴⁹ and the Age Discrimination in Employment Act (ADEA).¹⁵⁰ Although the Reorganization Act subjected such plans to a one-house veto,¹⁵¹ neither the Senate nor the House disapproved Carter's plan and the transfer of jurisdiction took place as scheduled.

In the months after the Supreme Court's decision in *Chadha*, however, EEOC suits to enforce the Equal Pay Act and the ADEA were resisted by defendants who argued that the EEOC had no authority to enforce these laws, inasmuch as the presidential transfer of authority was accomplished by virtue of a law—the Reorganization Act of 1977—that was itself unconstitutional.¹⁵² This argument depended upon a finding that the legislative veto in that act—now likely unconstitutional if *Chadha* were to be applied retroactively¹⁵³—was *not* severable from the remainder of the act, thus ren-

144. 130 CONG. REC. S14536 (daily ed. Oct. 1, 1984).

145. *Id.*

146. Pub. L. No. 98-532, 98 Stat. 2705 (codified at 5 U.S.C. § 906 (1984)).

147. A representative sample of these lawsuits is: *Delta Data Systems Corp. v. Webster*, 744 F.2d 197 (D.C. Cir. 1984); *Muller Optical Co. v. EEOC*, 743 F.2d 380 (6th Cir. 1984); *EEOC v. CBS, Inc.*, 743 F.2d 969 (2nd Cir. 1984); *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311 (D.C. Cir. 1984); *City of Alexandria v. United States*, 737 F.2d 1022 (Fed. Cir. 1984); *Kennedy for President Comm. v. Federal Election Comm.*, 734 F.2d 1558 (D.C. Cir. 1984); *Moore v. United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984); *Wall v. INS*, 722 F.2d 1442 (9th Cir. 1984); *Toolee v. INS*, 722 F.2d 1434 (9th Cir. 1983); *Ghaelian v. INS*, 717 F.2d 950 (6th Cir. 1983); *United States v. Woodley*, 726 F.2d 1328 (9th Cir. 1984); *LeBlanc v. INS*, 715 F.2d 685 (1st Cir. 1983); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713 (2nd Cir. 1983); *Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983).

148. Reorg. Plan No. 1 of 1978, 5 U.S.C.A. app. 1 (Supp. 1986).

149. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206 (1982)).

150. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. § 621 (1978)).

151. *See supra* note 134.

152. *See supra* note 147.

153. *See supra* note 38 and accompanying text.

dering the entire law and all plans carried out under its aegis unconstitutional. The EEOC generally attempted to rebut such arguments by asserting the severability of the veto provision of the 1977 Reorganization Act and/or by arguing that various congressional actions since 1978 had explicitly or implicitly bestowed legislative "ratification" upon President Carter's transfer of law enforcement responsibilities to the EEOC.

For present purposes it is enough to say that the lower federal courts were badly divided in their findings on these claims.¹⁵⁴ In order to "dispel the cloud of uncertainty"¹⁵⁵ surrounding both President Carter's action and all previous reorganization plans assumed to have gone into effect since not vetoed by Congress, Congress was forced to take the corrective action contained in H.R.6225.¹⁵⁶ This bill simply states:

Section 1. The Congress hereby ratifies and affirms as law each reorganization plan that has, prior to the date of enactment of this Act, been implemented pursuant to the provisions of Chapter 9 of title 5, United States Code [the 1977 Reorganization Act], or any predecessor Federal reorganization statute.

Section 2. Any actions taken prior to the date of enactment of this Act pursuant to a reorganization plan that is ratified and affirmed by section 1 shall be considered to have been taken pursuant to a reorganization expressly approved by Act of Congress.

The House Committee on Government Operations sought to make clear in its report accompanying the bill that this remedy for the alleged jurisdictional defects of the EEOC's authority should not be understood to infer any congressional views concerning the legal questions arising out of *Chadha*: "In enacting H.R.6225, the Committee does not intend to take a position on any argument advanced in judicial action involving the effect of the legislative veto on reorganization authority."¹⁵⁷

The District of Columbia Home Rule Law

Pressure of another kind forced Congress to attend to the legal and financial uncertainties created by *Chadha* for local government in the nation's capital. Under the 1973 District of Columbia home rule law, any act of the District of Columbia Council was subject to review by Congress; depending upon the subject of the act, Congress could disapprove it by a vote of one or both houses, without presentment to the President.¹⁵⁸ The shadow of unconstitutionality cast over these legislative veto provisions by the *Chadha* decision raised concern not only for the validity of laws passed by the D.C. Council generally, but in particular for the cash-strapped Dis-

154. The principal rulings were: *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984) (EEOC enforcement authority upheld); *Muller Optical Co. v. EEOC*, 743 F.2d 380 (6th Cir. 1984) (EEOC enforcement authority upheld); *EEOC v. CBS, Inc.*, 743 F.2d 969 (2nd Cir. 1984) (EEOC enforcement authority found lacking).

155. H.R. REP. NO. 1104, 98th Cong., 2nd Sess., reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4423, 4426.

156. Pub. L. No. 98-532, 98 Stat. 2705 (codified at 5 U.S.C. § 906 (1984)).

157. H.R. REP. NO. 1104, *supra* note 155.

158. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 303, 602(c)(1)-(2), 87 Stat. 774, 784, 814 (1973).

strict government's past and future bond issues, whose marketability obviously depended upon their legality. Once again, the questions of retroactivity and severability left in the wake of *Chadha* became of critical and practical importance.¹⁵⁹

On October 4, 1983, the House of Representatives passed H.R.3932 to bring the D.C. home rule law into line with *Chadha* by replacing the unconstitutional congressional review mechanisms with provisions allowing Congress a thirty-day period to block D.C. Council-enacted laws by joint resolution of disapproval, which would then have to be sent to the President.¹⁶⁰ Although reported out of committee with amendments by the Republican-controlled Senate Governmental Affairs Committee on September 13, 1984,¹⁶¹ H.R.3932 was opposed by the Reagan administration, which would have preferred that D.C. Council changes in the District of Columbia Criminal Code be affirmatively approved by joint resolution of Congress. The administration yielded on this demand in exchange for extending the time for Congress' review of changes in the D.C. criminal law from thirty to sixty days, and the essence of H.R.3932 ultimately was incorporated into a broader appropriations bill which Congress passed on October 11, 1984.¹⁶² In addition to retaining the joint resolution of disapproval mechanism, this measure seeks to forestall uncertainty about the legal status of past D.C. Council actions by specifically validating all actions which had not been disapproved by Congress under the terms of the original home rule law. Moreover, the measure confirms the null and void status of Council-enacted laws which had been disapproved through pre-*Chadha* congressional veto resolutions. Neither house of Congress produced much floor debate on these changes to the D.C. home rule law.

Other Congressional Action

At other points during the 98th Congress, the legislative veto gave way to more restrictive legislation. What began as an effort by Congress to reserve the power to suspend military aid to El Salvador through a concurrent resolution of both houses (two-house veto),¹⁶³ finally emerged as a Supplemental Appropriations Act provision which dropped all forms of the veto and substituted a reporting requirement. This provision required the President to report to Congress every sixty days on the progress made in El Salvador toward achieving democratic government, the rule of law, and the protection of human rights as a condition of military aid to the Central American nation.¹⁶⁴ Similarly, a statutory provision¹⁶⁵ limited the amount

159. See 129 CONG. REC. H7903-07 (daily ed. Oct. 4, 1983) (statement of Rep. Walter E. Fauntroy (D-D.C.)); Rothman, *District's South Africa Law Ignites Battle*, 42 CONG. Q. WEEKLY REP. 322 (1984); Tate, *Congress Loads Up Emergency Funding Bill*, 42 CONG. Q. WEEKLY REP. 2355, 2358 (1984).

160. H.R. 3932, 98th Cong., 1st Sess., 129 CONG. REC. H7903-07 (daily ed. Oct. 4, 1983).

161. S. REP. NO. 635, 98th Cong., 2nd Sess. (1984).

162. H.R.J. Res. 648, 98th Cong., 2nd Sess., 130 CONG. REC. H12,283-84, H12,289 (daily ed. Oct. 12, 1984 and Nov. 14, 1984) becoming Pub. L. No. 98-473, § 131, 98 Stat. 1837, 1974-76 (1984).

163. H.R. 2992, 98th Cong., 1st Sess., 129 CONG. REC. H2934, H3029 (daily ed. May 12, 1983 and May 17, 1983).

164. Military Assistance-Funds Appropriated to the President, Pub. L. No. 98-332, 98 Stat. 283, 284-285 (1984).

of American aid to anti-governmental Contras in Nicaragua to \$24 million for fiscal year 1984, replacing earlier efforts to give the intelligence committees of both houses a veto over covert activities of American intelligence agencies in Nicaragua.¹⁶⁶ This was followed during the second session of the 98th Congress by a provision of the Fiscal 1985 Department of Defense Appropriations Act¹⁶⁷ prohibiting all United States intelligence-gathering agencies from expending any appropriated funds to aid anti-government military operations in Nicaragua.¹⁶⁸ Congress could remove this prohibition only through joint resolution, followed by presentment to the President.¹⁶⁹

The relatively few laws enacted do not, of course, exhaust the consideration given by the 98th Congress to possible alternatives to the legislative veto. These and other devices can be found in a number of bills which were sidetracked in the legislative process and eventually died. Also passed over were the many unrecorded instances in the day-to-day negotiations between congressional committees and administrative agencies where the oversight powers of the former kept the presence of the legislative veto alive in spirit, if not quite in law.¹⁷⁰ Finally, the cure-alls which seemed so pressing in June of 1983 were quietly interred in committee.

CONCLUSION

Events and non-events since *Chadha* recall to mind the proverbial tempest in a teapot. Notwithstanding the Court's direct attack upon legislative power in the case, the early tide of criticism by members of Congress quickly receded in the face of considerable uncertainty about how much real damage the decision had actually inflicted upon the position of Congress in the federal constitutional and political system.¹⁷¹ That *Chadha* seems to have produced little in the way of congressional backlash may be attributed to several factors, including support for the Court's decision within elements of Congress itself and the failure of the *Chadha* ruling to stir up any real degree of controversy in general public opinion. Although constitutional issues involving the doctrine of separation of powers on occasion whet the interest of the public,¹⁷² the legislative veto issue never became such an occasion.

Another key to understanding the response of Congress in the wake of

165. Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983).

166. S.1230, 98th Cong., 1st Sess. (1983).

167. Pub. L. No. 98-473, tit. VIII, sec. 8066, 98 Stat. 1837, 1937 (1984).

168. *Id.*

169. *Id.*

170. See *City of Alexandria v. United States*, 737 F.2d 1022 (Fed. Cir. 1984) (In absence of statutory requirement, decision of GSA Administrator to treat committee disapproval of proposed sale of surplus federal property as binding, is properly within administrator's discretion, and not adherence to an unconstitutional legislative veto).

171. In sharp contrast to this was the reaction of Congress to such judicially-imposed limits on legislative power as set down in *Ex parte Milligan*, 71 U.S. 2 (1866); *United States v. Butler*, 297 U.S. 1 (1936); and, of more recent vintage, *Watkins v. United States*, 354 U.S. 178 (1957). See generally C. PRITCHETT, CONGRESS VERSUS THE SUPREME COURT (1961) and W. MURPHY, CONGRESS AND THE COURT (1962) for an analysis of the Court-curbing bills introduced in Congress in the aftermath of *Watkins* and related Warren Court decisions during the 1950's.

172. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1951).

Chadha was the refusal by the leadership of both houses to view the decision in fundamentally apocalyptic terms, and instead to call for a deliberate effort to sort out what the loss of the veto meant in terms of both law and politics. The leadership discouraged an immediate resort to some other surefire way of making the Executive and the bureaucracy more accountable to Congress. The lack of a sense of urgency during the subsequent congressional hearings was underscored by an increasing sense of awareness that Congress may not have lost very much in the *Chadha* ruling that could not be regained by ordinary legislative means. This development was nurtured by a succession of Administration and agency witnesses whose testimony helped to convince many previously apprehensive members that there was no crisis in the offing. By the close of the first session of the 98th Congress it was already clear that the issues raised in *Chadha* had been relegated to the congressional back burner. Legislation relating to these issues since then has been pragmatic and *ad hoc*, evincing a willingness to let the lower federal judiciary pick its way through the minefield of claims of retroactivity and severability. The United States Supreme Court, sitting in silent anticipation of eventually facing these claims, has not accepted a case involving the legislative veto issue since the summary rulings of July 6, 1983.¹⁷³

What is the likelihood that this state of affairs will continue? The 99th Congress, now well into its second session, shows no alacrity for reviving full-scale hearings on the legislative veto, and the handful of bills and resolutions designed to resurrect or provide a comprehensive substitute for what was lost in *Chadha*, have been consigned for the most part to unfriendly committees.¹⁷⁴ The legislative veto lost one of its main spokesmen with the surprise defeat of Representative Elliott Levitas in the 1984 congressional elections. Given the persistent inertia and decentralization of power within the lawmaking process, the apparent defeat suffered by Congress in *Chadha* may lead to no more than an intensification of the veto alternatives currently being experimented with by the legislators. Continued divided party control within the political branches of the federal government, made a feature of the American governmental process by the 1980 elections, could facilitate such experimentation.

173. Indeed, the Court has rejected five opportunities to discuss these claims with respect to specific federal laws. See *EEOC v. Allstate Ins. Co.*, 104 S. Ct. 3499 (1984), *dismissing appeal from* 570 F. Supp. 1224 (S.D. Miss. 1983); *EEOC v. Martin Industries, Inc.*, 105 S. Ct. 63 (1984), *dismissing appeal from* 581 F. Supp. 1029 (N.D. Ala. 1984); *EEOC v. Westinghouse Elec. Corp.*, 105 S. Ct. 63 (1984), *dismissing appeal from* Empl. Prac. Dec. (CCH) ¶ 34,365 (W.D. Pa. 1984); *Dyke v. Gulf Oil Corp.*, 105 S. Ct. 173 (1984), *denying cert. to* 734 F.2d 797 (Temp. Emer. Ct. App. 1984); *Energy Reserves Group, Inc. v. Dep't of Energy*, 105 S. Ct. 576 (1985), *denying cert. to* 690 F.2d 1375 (Temp. Emer. Ct. App. 1982) and three other connected cases.

174. H.R.J. Res. 32, 99th Cong., 1st Sess. (1985) (Referred to the Judiciary Committee); H.R. Res. 82, 99th Cong., 1st Sess. (1985) (Referred to the Judiciary Committee); H.R. Con. Res. 2, 99th Cong., 1st Sess. (1985) (Referred to the Rules Committee); H.R. Res. 340, 99th Cong., 1st Sess. (1985) (Referred to the Judiciary and Rules Committees); H.R. Res. 1339, 99th Cong., 1st Sess. (1985) (Referred to the Judiciary and Rules Committees); S. Res. 1145, 99th Cong., 1st Sess. (1985) (Referred to the Judiciary Committee); S. Res. 1377, 99th Cong., 1st Sess. (Referred to the Governmental Affairs Committee). The Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure approved S. 1145 without amendment on November 9, 1985 but, with this sole exception, no other action was taken on any of these measures during the first session of the 99th Congress. See *supra* related notes 37, 86, 89-90, 107.

There seems little doubt that the lingering presence of the committee veto is a patent evasion of the principles of *Chadha*. It would appear to only be a matter of time before the courts deliver the *coup de grâce* to the committee veto for two reasons. First, the Supreme Court has shown no signs of executing a sudden about-face in the matter. Second, the federal judiciary has shown a willingness, often with the complicity of the legislative branch, to find justiciability in a growing number of cases involving Congress' structure, prerogatives, and processes.

It is difficult to estimate the future trends of Congress in further response to *Chadha*. The principal uncertainties relate to the policies followed by the federal judiciary and executive insofar as they could be viewed as serious threats to the preservation of Congress' traditional roles of bureaucratic oversight and consultant in the realm of foreign policy. Case-by-case judicial determinations of the retroactivity and severability issues noted earlier will likely occasion the same sort of *ad hoc* legislative responses found in the 98th Congress. But significant new judicial separation-of-powers strictures imposed upon Congress could generate irresistible pressures upon the legislative branch to strike back at the judiciary with power-curb-ing measures of its own. Similarly, it is not difficult to predict that actions by the President or cabinet officers,¹⁷⁵ which appear to signify the end of the post-*Chadha* spirit of mutual restraint on the part of Congress and Executive, will provoke another search for a better way to skin the administrative cat. Until then, the recent patterns of cautious experimentation by Congress with a variety of less-than-perfect mechanisms are likely to persist.¹⁷⁶

175. See *National Wildlife Federation v. Watt*, 571 F. Supp. 1145 (D.D.C. 1983). Former Interior Department Secretary James Watt refused to accede to a 1983 request of the House Interior and Insular Affairs Committee that he temporarily withhold from lease certain tracts of coal-bearing public land in North Dakota and Montana on which his department proposed to open bids.

176. Recent evidence of a continuation of these patterns can be seen in the Energy Policy and Conservation Amendments Act of 1985 cited *supra* note 129, and the Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120 (1985). The latter statute reviews the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503, (codified at 50 U.S.C. § 2401 (1979)) by requiring advance joint congressional resolution of approval before the President may implement certain foreign policy powers delegated by Congress. Following the same approach employed in the 1984 Reorganization Act, Congress must now *affirmatively approve* presidential proposals (1) to expand or impose new export controls which lack compliance with certain congressionally-mandated procedures (sec. 108(o)), (2) to impose selective export controls on agricultural commodities (sec. 110(d)), and (3) to join with other nations in cooperative nuclear agreements which the President or Congress believe should be exempted from present statutory criteria for such agreements (sec. 301). The texts of the above laws are reprinted in 1985 U.S. CODE CONG. & AD. NEWS 120, 136-37, 140-41, 159-62.