

# ***INS v. CHADHA*: THE FUTURE DEMISE OF LEGISLATIVE DELEGATION AND THE NEED FOR A CONSTITUTIONAL AMENDMENT**

During the past fifty years, Congress has increasingly delegated its power to the President and administrative agencies, authorizing them to act where Congress cannot legislate efficiently.<sup>1</sup> Over time, these delegations have increasingly invested non-legislative parties with broad legislative discretion. To oversee the use of these delegated powers, without curtailing the breadth of the delegations, Congress began conditioning them on prior legislative review. Known as the legislative veto,<sup>2</sup> this review was especially used to oversee agency rulemaking authority, and thereby retain control of and accountability for legislative policymaking in the Congress.

When the Supreme Court decided *Immigration and Naturalization Service v. Chadha*<sup>3</sup> in the summer of 1983,<sup>4</sup> it invalidated the legislative veto and effectively invalidated all direct congressional review of agency rulemaking during the pre-enactment stage.<sup>5</sup> In addition, by characterizing the veto as formal legislation, and requiring its invocation to follow article I procedures,<sup>6</sup> the Court opened the door to redefining the delegation doctrine.<sup>7</sup>

Although the Court could have narrowly construed the delegation doctrine, and reversed its historical endorsement of liberal congressional delegations, it declined to do so. Narrowing the doctrine through judicial action would be painfully slow, necessitating a case-by-case review of challenged legislation. Instead, by broadly invalidat-

1. See generally J. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 127-54 (1981).
2. The terms "legislative veto" and "congressional veto" refer to a procedure requiring the President or administrative agencies to notify Congress of proposed actions, such as agency rulemaking, pursuant to a statutory grant of authority. If Congress so desires, it may disapprove the proposed action within specified statutory periods. See, e.g., STAFF OF HOUSE COMM. ON RULES, RECOMMENDATIONS ON ESTABLISHMENT OF PROCEDURES FOR CONGRESSIONAL REVIEW OF AGENCY RULES, 96th CONG., 2d SESS. 1 (1980) [hereinafter cited as HOUSE RECOMMENDATIONS]. See also *infra* note 98.
3. — U.S. —, 103 S. Ct. 2764 (1983).
4. *Id. Chadha* was originally argued on February 22, 1982, reargued on October 7, 1982, and ultimately decided on June 23, 1983.
5. "Pre-enactment" refers to the time before which a legislative delegate has formally enacted a rule. "Post-effective" refers to the time after which the rule takes effect. "Before-the-fact" and "after-the-fact" are used synonymously.
6. U.S. CONST. art. I, § 1, cls. 1, 2, 7.
7. The "delegation doctrine" is a judicial device that permits Congress to delegate some of its powers, short of its lawmaking authority, to non-legislative officials. The parameters of the doctrine require Congress to establish some clear policy framework within which its delegate will act to effect such policy. Nevertheless, many consider the modern delegation doctrine merely a *pro forma* review of broad congressional delegations. See HOUSE RECOMMENDATIONS, *supra* note 2, at 3-4.

ing the veto, the Court has directly forced Congress to consider cutting back its liberal delegations in order to retain primary control over legislative policy.

The doctrine's history, however, clearly demonstrates that delegation is a necessary political tool. Its necessity was realized in the nineteenth century, expanded in the 1920's, and firmly established in the 1970's.<sup>8</sup> Given this history, the need for some efficient and direct pre-enactment check by Congress on the misuse of delegated powers seems undeniable.<sup>9</sup> Yet when the Court made sweeping declarations condemning the congressional veto in *Chadha*, it removed this power entirely and left direct pre-enactment checks contingent on presidential concurrence under article I.

This note first reviews the rise and establishment of legislative delegation solely through political necessity and judicial endorsement, rather than through constitutional ordination. Second, it argues that to retain primary legislative power, Congress should have authority to directly oversee various aspects of its delegates' rulemaking powers. Reviewing the *Chadha* decision against this backdrop, this note then suggests that modern delegations are in jeopardy of being drastically cut back by the Court.<sup>10</sup> Finally, in light of the veto's wholesale demise, this note argues that Congress should adopt a two-house legislative veto amendment to preserve broad delegations without totally abdicating congressional oversight to non-legislative officials. Such an amendment would force Congress to tailor very broad delegations and legislate as far as practicable before delegating legislative power and discretion. Moreover, under this scheme, article I policies, rather than formalities, would balance the necessity of legislative delegation with the constitutional spirit of direct congressional review.

## DELEGATION OF LEGISLATIVE POWER

### *Judicial Approval of Legislative Delegations*

While the United States Constitution clearly divides the Federal Government into three branches (the Legislature,<sup>11</sup> the Executive,<sup>12</sup> and the Judiciary<sup>13</sup>), Congress explicitly holds *all* legislative power of

8. See generally 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 157-66 (2d ed. 1978).

9. See *id.* at 166.

10. *Chadha* highlights the great tension between agency rulemaking which is functionally equivalent to lawmaking but which need not follow article I procedures, and formal congressional legislating which is bound by article I. The arguments used by the Court to impeach the veto appear equally valid to impeach legislative delegation. Moreover, *Chadha* removed the legislative veto from over 200 pieces of legislation without invalidating Congress' delegations. Thus, inordinate power has devolved to administrative agencies and the executive. This devolution probably violates the delegation doctrine by abdicating legislative power to other departments, and may signal the Court's next step: cutting back broad delegations. See discussion *infra* notes 183-197 and accompanying text.

11. U.S. CONST. art. I.

12. U.S. CONST. art. II.

13. U.S. CONST. art. III.

the government.<sup>14</sup> Nowhere does the Constitution permit legislative power to reside in other offices or branches; nor does it explicitly allow Congress to delegate such power.<sup>15</sup> Nevertheless, the history of American Government is replete with examples of congressional delegations to non-legislative officials since the earliest days of the republic.<sup>16</sup>

Strictly speaking, the concept of a "fourth branch" of government is foreign to the Constitution.<sup>17</sup> Yet, while not theoretically consonant with strict constitutional interpretation, delegation was permitted by the Supreme Court as early as 1813.<sup>18</sup> By 1825 the Court formally validated legislative delegations in *Wayman v. Southard*.<sup>19</sup> There, Chief Justice John Marshall upheld Congress' power under the necessary and proper clause<sup>20</sup> to delegate authority to the judiciary to determine the practices and procedures used in the federal courts. Addressing the power of delegation, he stated:

Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . .

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.<sup>21</sup>

Although Marshall gave little indication of how much power Con-

14. U.S. CONST. art. I, § 1.

15. The Constitution fails to address delegation in any way. This was the argument adopted by the defendants in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 14 (1825). Since the power of legislative delegation was not expressly granted in the Constitution, it consequently could not exist. Considering the need for delegation, however, Justice Marshall upheld Congress's power to delegate authority. *Id.* at 42-43. See also K. DAVIS, *supra* note 8, at 157.

16. See *infra* note 18.

17. See discussion, *supra* note 15; see also *infra* note 166.

18. The first Supreme Court case to sanction legislative delegation was *The Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813). There, the Court permitted conditional use of legislative power predicated on the executive's determination of a condition precedent to invocation of the non-intercourse acts of March 1, 1809. *Id.* at 387-88. Moreover, the first Congress, made up largely of the delegates to the Constitutional Convention in Philadelphia, freely delegated without standards to parties outside of the legislative branch. See, e.g., K. DAVIS, *ADMINISTRATIVE LAW TEXT* 34-35 (3d ed. 1972) (citing Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83; Act of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95; Act of April 30, 1790, ch. 10, § 11, 1 Stat. 119, 121; Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 123; Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137). See also *Chadha*, 103 S. Ct. at 2800 & n.18 (White, J., dissenting); K. DAVIS, *supra* note 8, 67-70, 158.

19. 23 U.S. (10 Wheat.) 1 (1825). Chief Justice Marshall had no explicit constitutional authority from which to extract the delegation concept. However, it appears that several reasons may underlie this decision. First, there was no explicit constitutional prohibition against delegation. Second, the first Congress, comprised mostly of delegates to the Philadelphia Convention freely delegated its powers. See, e.g., *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412 (1928). Third, these early delegations involved the mere ascertainment of some contingency by the delegate and did not rise to actually legislating. See 23 U.S. (10 Wheat.) at 46; see also discussions, *supra* note 16. Finally, Congress was permitted to exercise its best judgment on how to execute its legislative powers under the "necessary and proper" clause of article I, § 8 of the Constitution. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415-16, 420 (1819).

20. 23 U.S. (10 Wheat.) at 22.

21. *Id.* at 43. Marshall further noted that the difference among the branches is made apparent because of their separate powers. However, these powers are, to some extent, blended, and

gress could delegate,<sup>22</sup> by 1892 the Court began formulating some standards for delegation. In *Field v. Clark*,<sup>23</sup> the Supreme Court determined that while the Tariff Act of 1890<sup>24</sup> permitted the President to suspend trade in foreign commerce at his discretion, it did not invest him with the power to legislate.<sup>25</sup> Under the Act, the suspension was to take effect upon a named contingency.<sup>26</sup> According to the Court, the President merely executed the law as an "agent of the law-making department," authorized to ascertain "the event upon which [Congress'] . . . expressed will was to take effect."<sup>27</sup>

Such limited delegations were permissible because Congress did not abdicate power to another branch.<sup>28</sup> Recognizing the fundamental need for delegations of legislative power, Justice Harlan observed:

To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know. . . . The legislature . . . can . . . delegate power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. *To deny this would be to stop the wheels of government.*<sup>29</sup>

Under this view, it is apparent that because Congress cannot reasonably legislate on all matters with which it must deal, it may delegate legislative power, short of making law, to other branches of government. The only limitation is that the delegate act pursuant to some "expressed will" or policy of Congress.

This judicial view of delegation continually evolved throughout the nineteenth century and into the 1920's.<sup>30</sup> Finally, in 1928, the

the Court must be sensitive to this aspect of the Constitution in analyzing legislative delegations:

The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.

*Id.* at 46.

22. Marshall's only proscription against legislative delegations was that Congress could not delegate powers, "exclusively legislative," to the courts. *Id.* at 42-43. Arguably he meant to permit broad delegations when he counseled the judiciary to intervene only when necessary. See quotation *supra* note 21. See also K. DAVIS, *supra* note 8, at 159 ("[B]oth the framers and Chief Justice Marshall's Court would probably uphold the delegations. . . common today").
23. 143 U.S. 649 (1892).
24. Act of October 1, 1890, ch. 1244, § 1, 26 Stat. 567.
25. *Field*, 143 U.S. at 692.
26. *Id.* at 693.
27. *Id.* (emphasis added).
28. Quoting Judge Ranney of the Supreme Court of Ohio, Justice Harlan noted, "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution . . ." *Id.* at 693-94.
29. *Field*, 143 U.S. at 694 (emphasis added) (quoting from *Locke's Appeal*, 72 Pa. 491, 498 (1873)).
30. See *infra* notes 87-88 and accompanying text.

Supreme Court evidenced how very broad *Wayman's* "general provisions" and *Field's* "expressed will" had become. In *J. W. Hampton, Jr & Co. v. United States*,<sup>31</sup> the Court approved a law authorizing the President to regulate customs duties. Citing *Field v. Clark* to support the specific delegation involved,<sup>32</sup> the Court established a constitutional standard of delegation so vague as to be virtually meaningless.<sup>33</sup> It noted: "If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized [to act] . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power."<sup>34</sup>

Despite the Court's history of requiring congressional standards to limit delegated powers, *Hampton's* language indicated that the Court recognized the inefficacy of rigid limitations.<sup>35</sup> Flexible standards must exist to enable the delegate to deal effectively with a variety of factual circumstances.<sup>36</sup> This underlying purpose of delegation<sup>37</sup> dissuaded the Court from placing narrow limitations on Chief Justice Marshall's concept of "general provisions."<sup>38</sup> To do so would, as a practical matter, destroy the whole concept of modern legislative government by making its representative body impotent. Thus, it is apparent that wisdom and necessity, not formal constitutional theory, moved the Court to adopt the vague delegation standard of "an intelligible principle" in order to foster appropriate growth of American government and still reserve a flexible judicial check on administrative excess.

### *The Non-delegation Doctrine*

The delegation doctrine, however, did not evolve as smoothly as this early history might suggest. Broad delegations of legislative power continued without impediment only until 1935.<sup>39</sup> In that year the

31. 276 U.S. 394 (1928).

32. *Id.* at 410.

33. See K. DAVIS, *supra* note 8, at 160.

34. *Hampton*, 276 U.S. at 409.

35. This matter of broad delegation was addressed in *Locke's Appeal*, 72 Pa. 491 (1873), from which Justice Harlan so favorably quoted. There, it was observed that the "public trust" demanded wise and judicious exercise of legislative power appropriate to fit the needs of the matter addressed. "A judicious exercise of power in one place may not be so in another," however, and thus unique standards of delegation must be avoided. *Id.* at 496.

36. See, e.g., *Yakus v. United States*, 321 U.S. 414, 424 (1944) where the Court noted:

The Constitution as continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.

See also *infra* note 54 for Justice Cardozo's view on delegation.

37. See discussion, *supra* note 35.

38. See discussion, *supra* note 19.

39. Until 1935, the Court had been able to distinguish all other legislative delegations as sufficiently limited to pass constitutional muster. See discussion in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 424-28 (1935).

Court, for the first and only time,<sup>40</sup> invalidated two delegations as unconstitutionally overbroad. In *Panama Refining Co. v. Ryan*,<sup>41</sup> the Court held that a delegation to the President under section 9(c) of the National Industrial Recovery Act (NIRA)<sup>42</sup> failed to establish appropriate guidance for the Executive's use of discretion. Thus, the NIRA allowed the President to act with "unlimited authority" to determine legislative policy as he saw fit.<sup>43</sup>

Despite *Hampton's* broad language, the Court refused to find that the Act's general policy statement in section 1<sup>44</sup> passed constitutional muster.<sup>45</sup> And despite a recent decision<sup>46</sup> upholding delegations to the Radio Commission which seemed indistinguishably vague from the NIRA's policy limitations,<sup>47</sup> the Court inexplicably asserted:

The Congress left the matter to the President without standard or rule, to be dealt with as he pleased. . . .

If [the delegation] . . . were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function. . . . Instead . . . , Congress could at will . . . transfer that function to the President or other officer of the administrative body.<sup>48</sup>

Several months later the Court decided *A.L.A. Schechter Poultry*

40. See *Chadha*, 103 S. Ct. at 2801-02 (White, J., dissenting). See also K. DAVIS, *supra* note 8, at 175; McGowan, *Congress, Court and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127 & n.32 (1977).

41. 293 U.S. 388 (1935).

42. National Industrial Recovery Act, ch. 90, § 9(c), 48 Stat. 195, 200 (1933).

43. See *Panama Refining*, 293 U.S. at 415. On July 11, 1933, President Franklin D. Roosevelt issued Executive Order No. 6199, pursuant to section 9(c) of the NIRA. This order prohibited the transportation in interstate or foreign commerce of petroleum and related products made therefrom which, according to state law, was illegally withdrawn from oil storage facilities. 293 U.S. at 406. The delegation question rested on whether, in the Court's opinion, proper standards were provided by Congress to limit and appropriately qualify the delegation. Turning its attentions to section 9(c), the Court found no clearly delimiting standard to guide either the states or the President. *Id.* at 418-19.

44. The National Industrial Recovery Act, ch. 90, § 1, 48 Stat. 195 (1933) states:

It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restrictions of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

45. According to the Court in *Panama Refining*, the section one policy statement of the NIRA was too broad and too general to qualify as a proper standard of delegation. The statement's general outline failed to sufficiently delimit the circumstances or conditions in which transportation of petroleum, or related products, should be allowed. See *Panama Refining*, 293 U.S. at 417-19. But see Justice Cardozo's dissent, *infra* note 54.

46. *Federal Radio Commission v. Nelson Brothers Co.*, 289 U.S. 266 (1933).

47. In *Nelson Brothers*, the Court allowed standards such as "as public convenience, interest, or as necessity requires" and "equality of radio broadcasting" to pass constitutional muster. Apparently, these standards were not considered so indefinite as to confer unlimited power on the delegate. *Id.* at 285. Compare section one of the NIRA, *supra* note 44.

48. *Panama Refining*, 293 U.S. at 418-19, 430.

*Corp. v. United States*,<sup>49</sup> which has been described as involving the "most sweeping congressional delegation of all time."<sup>50</sup> In that case, the President was authorized to approve certain "codes of fair competition"<sup>51</sup> under section three of the NIRA. The issue presented was whether Congress had established proper standards for the use of delegated power, or whether it had attempted to transfer its legislative function by the failure to enact such standards.<sup>52</sup> Reviewing the Act's section one policy provision<sup>53</sup> as it had in *Panama Refining*, the Court found that the executive was free to "roam at will,"<sup>54</sup> effectively becoming a lawmaker directly.<sup>55</sup> Thus, because Congress had transferred its legislative function to the President without meaningful standards, the Court held the delegation unconstitutional.<sup>56</sup>

### *Failure of Non-delegation and the Need for a Broad Mandate*

The opinions of *Schechter Poultry* and *Panama Refining* were anomalies in the law developed up to 1935, and after the New Deal was entrenched they quickly faded from view.<sup>57</sup> According to Professor

49. 295 U.S. 495 (1935).

50. K. DAVIS, *supra* note 8, at 176.

51. *Schechter Poultry*, 295 U.S. at 521 & n.4.

52. *See id.* at 530.

53. *See* discussion, *supra* note 44.

54. *Schechter Poultry*, 295 U.S. at 538; *see also id.* at 551 (Cardozo, J., concurring). But note Justice Cardozo's dissent in *Panama Refining*:

I am persuaded that a reference, express or implied, to the policy of Congress as declared in section 1 is a sufficient . . . standard to make the statute valid. Discretion is not unconfined and vagrant. It is canalized within the banks that keep it from overflowing . . . . Under [prior Court decisions] . . . the separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be a sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee to-day the developments of tomorrow in their nearly infinite variety.

*Panama Refining*, 293 U.S. at 440 (Cardozo, J., dissenting) (citations omitted).

55. *See Schechter Poultry*, 295 U.S. at 539.

56. "Section 3 of the . . . [NIRA] . . . is without precedent. It prescribes no standards . . . . Instead of prescribing rules of conduct . . . [for the delegate] . . . , it authorizes the making of codes to prescribe them." *Id.* at 541. "[T]he discretion of the President in approving or prescribing codes, and thus enacting laws . . . is virtually unfettered. . . . [T]he code-making authority thus conferred is an unconstitutional delegation of legislative power." *Id.* at 542.

57. *Schechter Poultry* was not relied on again until 1974 when the Court invalidated the Federal Communication Commission's authority to charge franchise cable television operators fees for administrative services. In *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336 (1974), Justice Douglas, writing for a seven-member majority, cited both *Schechter Poultry* and *Hampton* to support a narrow reading of the delegation in issue. Although he did not explicitly determine whether the delegation involved met the *Panama* and *Schechter* tests, the question was addressed in a dissent by Justices Marshall and Brennan. They felt that the majority's narrow reading was unwarranted in light of the Court's prior history of allowing broad delegations.

The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's has been virtually abandoned by the Court for all practical purposes. . . . This doctrine is surely as moribund as the substantive due process approach of the same era—for which the Court is fond of writing an obituary—if not more so. It is hardly surprising that, until today's decision, the Court had not relied upon *Schechter Poultry Corp. v. United States* almost since the day it was decided.

Davis,<sup>58</sup> the doctrine of non-delegation is a failure.<sup>59</sup> "To reconcile *Panama Refining* with earlier or later cases seems impossible."<sup>60</sup> The practical reality is that the United States Government functions through dozens of administrative agencies.<sup>61</sup> Created by Congress, these agencies have power to propose and authority to enforce federal rules and regulations.<sup>62</sup> Even in 1935, the Court paused in *Panama Refining* long enough to acknowledge the vital importance of delegation:

Undoubtedly legislation must often be adapted to complex conditions involving . . . details with which the national Legislature *cannot* deal directly. The Constitution has never been regarded as denying . . . Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies . . . , while leaving to selected instrumentalities the making of subordinate rules . . . . *Without capacity to give authorization of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be a futility.*<sup>63</sup>

Experience shows that legislative delegations, while outside the strict constitutional framework, are nonetheless necessary adjuncts to sound government.<sup>64</sup> Congress is called upon time and again to deal with matters beyond its political expertise. It must act prospectively<sup>65</sup> on matters for which it is frequently ill-equipped to do more than paint with a broad brush,<sup>66</sup> leaving the details to others more adept and technically expert.<sup>67</sup> The law developed by the Court, allowing broad dele-

*Id.* at 352-54 (citations and footnotes omitted). For a further discussion on this point, see McGowan, *supra* note 40, at 1130 n.44 (1977).

58. Kenneth Culp Davis is professor of law at the University of San Diego and a renowned authority on administrative law.

59. See K. DAVIS, *supra* note 18, at 34.

60. See K. DAVIS, *supra* note 8, at 34.

61. In 1982, over 13 executive departments and 51 independent agencies existed within the Federal Government's bureaucracy. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83 266-67 (103d ed. 1982).

62. See, e.g., *infra* note 73.

63. *Panama Refining*, 293 U.S. at 421 (emphasis added).

64. See Cardozo's dissent in *Panama Refining*, 293 U.S. at 440 (Cardozo, J., dissenting), *supra* note 54.

65. Legislation is a prospective act. See *infra* note 143.

66. See McGowan, *supra* note 40, at 1128 & n.38 (citing L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 37 (1965)).

67. Two major weaknesses are endemic to Congress: the incapacity to act quickly and the inability to develop and coordinate comprehensive policies. Over time, as the President assumed more and more power in areas where fast action was required, the Congress developed the alternative virtue of deliberation. This was the intent of the Founding Fathers: that a numerous, bicameral legislature temper and refine the dangerous differences among the country's diverse and distant regions. The deep-seated fear was not of obstruction but of "quick majoritarian decisions." Committees, and later subcommittees, were created in order to spread out the congressional workload. Each committee tightly controlled its area of expertise, to thoroughly consider legislation at its own unhurried pace.

This fragmented structure has enabled Congress to develop considerable expertise, both in its members and their staffs. This has proven "indispensable . . . for reviewing the specific proposals of the executive branch, for acting as a prod to the executive . . . , for hammering out legislative compromises, and for overseeing the executive in the administration of the laws." However, specialized bodies are, by definition, too narrow in scope to provide "the

gation of rulemaking power to administrative agencies is clear law, sound law, and necessary law.<sup>68</sup> It is practical, and without it the evolution of modern American government would cease.<sup>69</sup>

### DIRECT CONGRESSIONAL CHECKS AGAINST DELEGATIONS

In addressing the evolutionary problems of society and government, Congress delegated legislative power to various administrative agencies; and recognizing the wisdom of Congress' endeavor, the Supreme Court permitted the broadest of delegations to prevail.<sup>70</sup> Indeed, not only did it permit such delegations, the Court occasionally went further—boldly finding authority endorsing a variety of administrative practices, despite legislative histories clearly to the contrary.<sup>71</sup> Against this backdrop, the need for administrative bodies with specialized understanding, technical expertise, power to implement and, within certain bounds, power to make public policy cannot be ignored. Administrative agencies now comprise an institution firmly rooted in the federal bureaucracy.<sup>72</sup>

Nevertheless, this governmental form is foreign to the established constitutional scheme. It embodies attributes of both the legislative and administrative branches<sup>73</sup> in a manner which the Framers never foresaw, and thus could not plan for or prevent.<sup>74</sup> But the failure of

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grand strategy" needed to coordinate their individual endeavors. Thus, both its inability to act quickly and to plan comprehensively has virtually compelled Congress to delegate to the executive branch and independent agencies. See J. SUNQUIST, *supra* note 1, at 153, 155-60.

68. K. DAVIS, *supra* note 8, at 150.

69. *Id.* at 150, 157; see also *id.* at 18-20 (Supp. 1982).

70. For a comprehensive historical discussion see K. DAVIS, *supra* note 8, §§ 3.5-7 (1978 & Supp. 1982).

71. See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), allowing the FCC to change its administrative policy and acquire jurisdiction over community antenna television (CATV) in 1960, despite Congress's prior refusal to authorize the change; *American Trucking Ass'n, Inc. v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397 (1967), upholding a reversal of administrative policy by the ICC to acquire jurisdiction over specific railroad operations which Congress had previously refused to grant. See generally K. DAVIS, *supra* note 8, at 166-70. In these cases, "the Supreme Court was free to hold that because Congress had not specified that it was delegating power with respect to the particular subjects before the Court, the agency was without power on those subject." But instead, "it liberally interpreted each statute to allow the agency to exercise power that had not been clearly delegated and power that was not guided by meaningful standards." *Id.* at 170.

72. In the opinion of Sen. Jacob Javits, R-N.Y., it is too late to debate the merits of the delegation doctrine. The complex necessities of modern government have motivated Congress to legislate broadly, leaving the choice of policy options to the delegate's discretion, or that of its agent. Since these parties do not participate in the development of congressional policies, a reversing of the constitutional scheme may result without safeguards: Congress proposes, the Executive disposes. Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U.L. REV. 455, 460 (1977). See also discussion, *supra* note 61.

73. Agencies have the power to make rules and regulations, thereby acting in a legislative capacity. In addition, they have the power to administer these rules through executive and adjudicatory powers. See LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. REP. NO. 248, 79th Cong., 2d Sess., III, 295, 304-05 (1946) (describing early congressional concerns over excessive agency powers). See generally Javits & Klein, *supra* note 72, at 465-73.

74. See Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 329 (1977). See also *infra* note 76.

their foresight in the summer of 1787<sup>75</sup> should not prevent modern statesmen from recognizing the necessities of political evolution.<sup>76</sup> If this "fourth branch"<sup>77</sup> is to be condoned in the American constitutional scheme, it should comport with that scheme's prudent system of internal checks and balances<sup>78</sup> to avoid, as Montesquieu<sup>79</sup> feared, the tyrannous nature of absolute power.<sup>80</sup> To retain a consistent theoretical deference to the Framers' intent and the Constitution's spirit, legislative powers delegated by Congress should be limited, as far as practicable,<sup>81</sup> to balance the clear necessity of broad delegation with the Constitution's theoretical safeguards of checks and balances.<sup>82</sup>

75. See, e.g., A. MILLER, SOCIAL CHANGES AND FUNDAMENTAL LAW, AMERICA'S EVOLVING CONSTITUTION 241 (1979); see also *infra* note 76.
76. Professor Miller argues that constitutional issues should not be viewed statically, in the context of their adoption, or from the perspectives of only a few of the drafters. Rather, they should be viewed in light of the overall *system* of governmental operations and in the context of political evolution. Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 368 (1977). "The men who met in Philadelphia in the summer of 1787 were *practical* statesmen, *experienced in politics*, who viewed the principle of separation of powers as a vital check against tyranny." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (emphasis added).
77. See *infra* note 166 and accompanying text.
78. See Miller & Knapp, *supra* note 76, at 367-70.
79. Charles Secondat, Baron de Montesquieu was perhaps *the* French social and political philosopher of the eighteenth century. His political sympathies were for a monarchy limited by some *corps intermédiaire*, i.e., some intermediary power comprised of the Parliaments and the aristocracy. He also desired an independent judiciary. This basic concept of structuring the government with separate divisions, though arguably influenced by Aristotle, gave the framers of the American Constitution a modern theory from which to work. Although Jefferson and Madison would later change Montesquieu's hierarchy of power, placing the Legislature ahead of the Executive, his political theories exerted a profound influence on the Constitution's drafters. See MONTESQUIEU, THE SPIRIT OF THE LAWS xxiv, xxxii, xl, 12, 16-20 (T. Nugent ed. 1949).
80. Addressing Montesquieu's separation of powers principle, Madison noted:  
The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous *tendency to such an accumulation*, no further arguments would be necessary to inspire a universal reprobation of the system.  
THE FEDERALIST NO. 47, at 336 (J. Madison) (B. Wright ed. 1961) (emphasis added).
81. This concept is reminiscent of the Court's language in *Buttfield v. Stranahan*, 192 U.S. 470 (1904), upholding a delegation to the Secretary of the Treasury to "fix and establish" tea import standards. *Id.* at 471-72 n.1. The Court observed that "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result. . . ." *Id.* at 496. See also *Yakus v. United States*, 321 U.S. 414, 424 (1944).
82. The concept here does not hinge exclusively on those explicit checks within the Constitution. Because the Framers did not foresee the rise of delegation and agency powers, they simply did not provide a check against it. The better view addresses the legislative veto issue in light of the conceptual framework of checks and balances. See Miller & Knapp, *supra* note 76, at 368. See also discussion, *supra* note 76. The constitutional checks applicable against Congress were designed to temper a presumptively aggressive and overbearing legislature. See, e.g., THE FEDERALIST NO. 51 (J. Madison) and No. 73 (A. Hamilton). The Framers feared active encroachment *by* the legislature; they never feared active encroachment *against* the legislature as the result of its voluntary surrender of legislative powers to other branches. Thus, when the legislative power is assumed by a nonlegislative branch or official, the *spirit* of a check should not be forgotten merely because the Constitution's framers never provided for a wholly unforeseen development. See also *Abourezk, supra* note 74, at 328-30; discussion, *supra* note 81; *infra* note 141.

*Formation of the Veto*

When the Framers assigned the legislative power to the Congress and the executive power to the President, they wisely failed to define the boundary between them. This "borderland"<sup>83</sup> is the nebulous area of policy development and coordination.<sup>84</sup> It is an area historically within the congressional domain, but rapidly evolving into that of the executive.<sup>85</sup> With these concepts in mind, the congressional veto must be viewed in light of the historical power redistributions within the government.<sup>86</sup>

In the earliest years of the republic, Congress followed the executive's policymaking lead,<sup>87</sup> and the original congressional delegations were carefully tailored with this in mind. During the nineteenth century, however, Congress assumed a more definitive policymaking role. It became the dominant force in government. Yet by that century's close Congress' power began slipping, and by the 1930's the President's ascendancy to "chief legislator" was complete.<sup>88</sup>

Over the next forty years, Congress willingly allowed this shift of power and influence from the legislature to the executive.<sup>89</sup> In the

83. See J. SUNDQUIST, *supra* note 67, at 37.

84. Although our system of government has placed the formal policymaking powers in the hands of the legislature, it has not relied on that branch exclusively for policy determinations. The modern social structure requires institutions capable of establishing and maintaining the legal order, determining governmental policies, and adapting prior rules of society to evolutionary conditions. The legislature comprises only a part of the apparatus for making authoritative social decisions. The executive and judicial branches are and must be coordinated branches not only for carrying out legislative policies, but also for *determining* basic policy. See, e.g., K. DAVIS, *supra* note 8, at 174; W. KEEFE & M. OGUL, *THE AMERICAN LEGISLATIVE PROCESS* 3 (5th ed. 1901).

85. See J. SUNDQUIST, *supra* note 1, at 1-12, 127, 148, 153; see also W. KEEFE & M. OGUL, *supra* note 84, at 159-61, 169.

86. See, e.g., Miller & Knapp, *supra* note 76, at 369; Abourezk, *supra* note 74, at 325. See also discussion, *supra* note 76.

87. The executive and Congress vied for preeminence in the earliest years of the republic. During George Washington's tenure, the executive branch was the immediate focal point of government and the center of leadership. By 1795, however, this focus began to shift as congressional committees appeared, bringing with them the power to initiate policy. Still, John Adams and Thomas Jefferson held their own with Congress. Jefferson, the dominant figure of his time, exercised his leadership subtly, within the limits of congressional norms and the executive remained stable. But by 1825 the committee system was in full flower, covering the whole range of congressional business, and when Andrew Jackson became President the executive-legislative balance radically shifted. His brand of leadership was combative and intolerant, and his rise caused a reactionary political establishment to advocate a strong Congress. See J. SUNDQUIST, *supra* note 1, 19-26.

88. Theodore Roosevelt echoed in the executive's resurgence of power within the government, and in 1913 the Democratic Party, under Woodrow Wilson, fully accepted the President as leader. Reacting to the executive's power, Sen. John Works, R-Cal., complained, "Never in the history of the country has the Congress been so submissive or subservient to a power outside itself . . ." 54 CONG. REC. 865 (1917) (address by Sen. John Works, R-Cal.). The trend had begun, however, and except for some doubts during the Depression years under Herbert Hoover, the form of a dominant executive leadership launched by Franklin Roosevelt in 1932 was overwhelmingly endorsed. "During the entire period from Roosevelt through the early Nixon years, there is no record of congressional resistance to the institutional development of the president as legislative leader." See generally J. SUNDQUIST, *supra* note 1, at 30-38, 127-33, 136-43.

89. See Javits & Klein, *supra* note 72, at 459-60.

1970's, however, Congress began to reverse the trend and strongly reassert itself.<sup>90</sup> This reassertion was precipitated by several events. First, the administrative state had grown well beyond that ever envisioned in the 1930's when the modern bureaucracy first arose.<sup>91</sup> Second, Congress' distrust of the Executive had peaked in 1972-73 in response to the impoundment controversy, the Vietnam War, executive privilege, and reorganization of the executive branch.<sup>92</sup> Third, Congress increasingly realized that its policymaking role had been eroded through reduced pre-enactment oversight of legislative delegations,<sup>93</sup> and broad judicial deference to agency powers.<sup>94</sup> Finally, Congress realized that not only had its power been eroded but, as a direct consequence, its great republican virtue—representation of a broad constituency in a single forum<sup>95</sup>—had been sacrificed to unelected and unaccountable bureaucrats.<sup>96</sup> To regain control of policymaking and properly represent its constituencies, Congress began overseeing agency rulemaking before agency administrators placed their own policies into effect.<sup>97</sup>

The primary oversight mechanism employed was the legislative

90. See J. SUNDQUIST, *supra* note 1, at 35-36; see generally *id.* at 47-51.

91. See, e.g., HOUSE SUBCOMM. ON THE RULES AND ORGANIZATION OF THE HOUSE, 95TH CONG., 2D SESS., EXCERPTS FROM HEARINGS ON CONGRESSIONAL PROCEDURES, 47 (Subcomm. Print No. 96-01, 1978) [hereinafter cited as SUBCOMM. EXCERPTS].

92. See, e.g., *Chadha*, 103 S. Ct. at 2793-94 (White, J., dissenting). See generally J. SUNDQUIST, *supra* note 1, at 1-2, 315. The Congress and President Nixon were at an impasse in the early 1970's for several reasons. First, Nixon impounded upwards of \$8.7 billion previously appropriated by Congress to various programs. This action unilaterally repealed laws passed by Congress with presidential approval. Second, he intensified the bombing of North Vietnam and mined Haiphong Harbor during a congressional recess, without consulting Congress. Third, he abused executive privilege to withhold information from Congress. Finally, despite explicit congressional rejections, President Nixon implemented the basic features of a plan to reorganize the executive department. Reviewing these "four principal issues," Rep. Carl Albert, D-Okla., counseled Congress to actively retain its "Constitutional prerogatives" and "command the respect of the Executive . . . as representatives of the people." 119 CONG. REC. 3240 (1973) (remarks from speech by Rep. Carl Albert, D-Okla.).

93. Congress has virtually unlimited authority to effect administrative oversight after an agency has promulgated rules. However, these after-the-fact mechanisms are slow and cumbersome. The methods are informal, and if administrators resist, Congress is powerless to react except through new legislation, which is always subject to executive veto. See remarks of Rep. Elliot Levitas, D-Ga., SUBCOMM. EXCERPTS, *supra* note 91, at 51. See also J. SUNDQUIST, *supra* note 1, at 317-18, 326 & n.23; HOUSE RECOMMENDATIONS, *supra* note 2, at 10-11.

94. See remarks of Rep. Elliot Levitas, D-Ga., who complained, "The nature of judicial review . . . is always *ex post facto*, and all presumptions favor the agency rule. A mere scintilla of supporting evidence can justify a rule in court even in face [sic] of overwhelming evidence to the contrary." SUBCOMM. EXCERPTS, *supra* note 91, at 51. See also J. SUNDQUIST, *supra* note 1, at 327.

95. This is the spirit of the Constitution as so clearly evidenced by Madison's commentaries. See, e.g., THE FEDERALIST NOS. 10 & 47 (J. Madison).

96. See, e.g., remarks of Sen. Max Baucus, D-Mont., that no greater challenge presented itself to Congress than that of controlling the Federal bureaucracy. According to him, Congress' constituents were "fed up with the Federal Government," believing it too large, insensitive to their regional and individual needs, and unaccountable to them or their representatives. 125 CONG. REC. 14,409 (1979).

97. It is not unreasonable to conclude that as elected representatives of the people, members of Congress should control policy. Although the President is also elected, he is remote and inaccessible and "too easily becomes the captive of his bureaucracy." See J. SUNDQUIST, *supra* note 1, at 324, 344.

veto.<sup>98</sup> This device enabled Congress to rely on the delegate without fear of totally abdicating legislative power.<sup>99</sup> To use the veto Congress passes an enabling statute authorizing agency formation. Pursuant to this authorization, the agency must submit to Congress its proposed rules or regulations through which it intends to implement congressional policy. After Congress receives these proposals, a waiting period of usually between thirty and ninety days<sup>100</sup> follows, during which the provisions are reviewed to determine whether they comport with congressional policy. If so, Congress need not act further, thereby freeing itself from intricate details beyond its political expertise. Where administrative proposals conflict with congressional policies, however, Congress may intercede and veto the agency rules before they become legally effective. Failure to disapprove these proposals within the specified period results in their passage into "law."<sup>101</sup>

The veto power, however, should be limited to overseeing administrative rulemaking.<sup>102</sup> According to one view, Congress' veto authority should only extend to the outer limits of policymaking actions properly reserved to the Legislature as a legislating body, leaving the courts to oversee administrative practices and procedures.<sup>103</sup> Once the veto extends to situations outside the legislative domain, it would be *ultra vires*

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98. Congress developed two broad approaches to legislative review in the 1970's. The first was to intensify its traditional after-the-fact review of delegation through the appropriations process, congressional investigations, and legislative activities. The second was to expand the use of the legislative veto device. J. SUNDQUIST, *supra* note 1, at 324. The veto customarily takes one of three forms: (1) action by one or more congressional committees (the committee veto); (2) action by either House of Congress (the one-house veto); or (3) action by both Houses of Congress (the two-house veto). See Abourezk, *supra* note 74, at 324. In addition the veto may require Congress to affirmatively approve or to disapprove a delegate's proposal. See Javits and Klein, *supra* note 72, at 456 & n.4. See generally J. SUNDQUIST, *supra* note 1, at 344-66; J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 204-38 (1964).
99. By reserving the right to review and disapprove contemplated administrative action, Congress can "launch a program with broad discretionary powers but make midcourse corrections." This permits Congress to exercise administrative control before agency regulations are promulgated. J. SUNDQUIST, *supra* note 1, at 344.
100. See, e.g., Abourezk, *supra* note 74, at 324; Javits & Klein, *supra* note 72, at 456.
101. For practical views of administrative rules and regulations as "rules of law," see, e.g., INS v. Chadha, 103 S. Ct. 2764, 2802 & n.19 (1983) (White, J., dissenting); American Trucking Ass'n Inc. v. United States, 688 F.2d 1337, 1341 (11th Cir. 1982); Joseph v. United States Civil Serv. Comm'n., 554 F.2d 1140, 1153 & n.24 (D.C. Cir. 1977); McGowan, *supra* note 40, at 1156 n.166; *Regulatory Reform: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 108 (1979) (testimony of Rep. Elliott Levitas, D-Ga.) [hereinafter cited as *Regulatory Reform Hearings*] ("[t]he fact of the matter is that regulations are laws; they have the force and effect of law."). Compare 5 U.S.C. § 551(4) (1982) which currently defines "rule" as did the original Administrative Procedure Act, ch. 324, § 2(c), 60 Stat. 237 (1946) (repealed during revision of title 5, U.S.C., Pub. L. No. 89-554, 80 Stat. 381, 382 (1966)): "'rule' means the . . . agency statement of future effect designed to . . . prescribe law or policy. . . ." But see *Chadha*, 103 S. Ct. at 2785 n.16.
102. Pursuant to its article I powers, Congress holds *all* the legislative powers of the government. U.S. CONST. art. I, § 1. To effect legislative policy, Congress' veto power should be limited to checking congressional delegates only when they perform functions which Congress might have undertaken itself—that is, power which is legislative in character. See generally Javits & Klein, *supra* note 72, at 476-79.
103. Although the judiciary has a strong oversight mechanism in the non-delegation doctrine, this check is difficult to apply effectively. In light of the need for broad delegations, the non-

and subject to judicial scrutiny.<sup>104</sup> Therefore, where the veto effects an adjudicatory function or an executory function, even though protecting Congress' power to set policy, it should be held unconstitutional as violating the separation of powers doctrine.<sup>105</sup>

Under the foregoing view, inquiry into the veto's constitutionality depends on the context in which it is used.<sup>106</sup> Avoiding this approach casts the veto in a broader, and perhaps less critical light. Yet when the Supreme Court recently analyzed the one-house veto as employed in the Immigration and Nationality Act,<sup>107</sup> it totally avoided this contextual inquiry. Instead, it decided the issue according to formal procedures outlined under article I of the Constitution.

delegation doctrine should be used only where broad delegations are unnecessary and irresponsibly attempt to shift policymaking power to agencies.

Still, the judiciary formally holds a considerable check in its ability to control both discretionary power and discretionary standards inhering in administrative agencies. Judicial focus should shift to administrative standards governing practice and procedure (*i.e.*, quasi-executory and quasi-adjudicatory agency functions). This is the position of Professor Davis who suggests the following five reforms of the non-delegation doctrine:

- (a) the purpose of the non-delegation doctrine should no longer be either to prevent delegation or to require meaningful statutory standards; the purpose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power; (b) the exclusive focus on standards should be shifted to an emphasis more on safeguards than on standards; (c) when legislative bodies have failed to provide standards, the courts should not hold the delegation unlawful but should require that the administrators must as rapidly as feasible supply the standards; (d) the non-delegation doctrine should gradually grow into a broad requirement extending beyond the subject of delegation—that officers with discretionary power must do about as much as feasible to structure their discretion through appropriate safeguards, principles, and rules; (e) the protection should reach not merely delegated power but also such undelegated power as that of selective enforcement.

K. DAVIS, *supra* note 8, at 207-08. See also McGowan, *supra* note 40, at 1130-32 & n.46. See, e.g., *Amalgamated Meat Cutters & Butcher Workmen v. Connolly*, 337 F. Supp. 737, 758 (D.D.C. 1971) (three-judge court), for an application of this approach. Judge McGowan of the District of Columbia Court of Appeals, however, seems to harbor some reservations regarding this approach:

[T]he question inevitably recurs as to whether judicial review is an adequate protection against the abdication by Congress of substantive policy making in favor of broad delegation of what may essentially be the power to make laws and not administer them. If it be concluded that it is not feasible for Congress to function without some broad delegation, should judicial review of agency action thereunder seek to do more than to assure that the procedures prescribed for implementing such delegated authority afford the fundamentals of procedural due process, and have been followed?

If it does not do more, of course, the logical outcome of such review will be that, in the absence of procedural defect, the agency action . . . is left undisturbed.

McGowan, *supra* note 40, at 1126 & n.28 (citations omitted). However, the appropriate use of the non-delegation doctrine to check congressional abdication of legislative powers in extreme cases, coupled with both Professor Davis's suggestions and a proper legislative veto check on agency policymaking, should fill in all the oversight gaps. In this way both the Court and Congress are ready to interdict excesses by the "Administrative Branch." The judiciary, acting in its traditional role, will curb administrative excesses through normal after-the-fact adjudication. The legislature, on the other hand, also acting in its traditional role, will check rulemaking excesses through before-the-fact policy decisions. See generally Javits & Klein, *supra* note 72, at 476-79.

104. See discussion *supra* notes 102, 103.

105. *Id.* See, e.g., K. DAVIS, *supra* note 8, at 63-65; Miller & Knapp, *supra* note 76, at 369; McGowan, *supra* note 40, at 1119-21.

106. See generally Javits & Klein, *supra* note 72.

107. See *Chadha*, 103 S. Ct. at 2770-71; see also *infra* note 113.

**INS v. CHADHA: INVALIDATION OF THE VETO**

On June 23, 1983, the Court handed down a 7-2 decision in *INS v. Chadha*<sup>108</sup> which constitutionally invalidated the one-house legislative veto when used to affect an individual's legal status.<sup>109</sup> The case was highly publicized because it seemed to sweep away all of the 200-plus legislative veto provisions which Congress had enacted to date.<sup>110</sup> Although the Court could have adopted a very narrow view of the veto,<sup>111</sup> and carefully disposed of the issue, it failed to make that election. Instead, it broadly equated the veto with actual legislation, and held that the veto must comport with the article I requirements of bicameral procedure and executive presentment.<sup>112</sup> According to the Court, because the one-house veto fails to comply with these requirements, it necessarily fails to pass constitutional muster.

*The Law*

The *Chadha* case hinged on section 244 of the Immigration and Nationality Act, enacted by Congress in 1952.<sup>113</sup> Under section 244(a)(1),<sup>114</sup> Congress gave the Attorney General power to suspend deportation proceedings against an alien. This power, however, was contingent upon specific factual findings by the Immigration and Naturalization Service (INS),<sup>115</sup> a complete and detailed statement of which was to be reported to Congress under section 244(c)(1), along with the reasons for the suspension.<sup>116</sup> If within the statutory time<sup>117</sup> a House of Congress disapproved the suspension, the Attorney General would be ordered under section 244(c)(2) to deport the alien or authorize the alien's voluntary departure.<sup>118</sup> Thus, the Attorney General's power was conditioned upon approval by the Congress.

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108. 103 S. Ct. 2764 (1983).

109. *Id.* at 2784-85.

110. *Id.* at 2792 (White, J., dissenting).

111. This was Justice Powell's view in *Chadha*. When Congress decided that Chadha did not satisfy the statutory criteria for permanent residence in the United States it "assumed a judicial function," thereby violating the separation of power principle. 103 S. Ct. at 2789 (Powell, J., concurring). See generally *id.* at 2792 (White, J., dissenting). See also Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 800-01.

112. *Chadha*, 103 S. Ct. at 2784.

113. The Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952), was passed on June 27, 1952. For a legislative history, see generally 1952 U.S. CODE CONG. & AD. NEWS 1653.

114. Immigration and Naturalization Act, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101-1557). Section 244 of the Act was codified at 8 U.S.C. § 1254, and amended by Act of Oct. 24, 1962, § 4, 76 Stat. 1247, 1247-48. However, the amending language retained the one-house veto provision virtually as originally enacted.

115. The Attorney General was authorized to discharge his responsibility through the Immigration and Naturalization Service division of the Department of Justice. See *Chadha*, 103 S. Ct. at 2770 n.8 (citing 8 U.S.C. § 1103(a)). See also 1952 U.S. CODE CONG. & AD. NEWS 1653, 1687.

116. *Chadha*, 103 S. Ct. at 2770.

117. The statutory time period is established by section 244(c)(2). It extends through the end of the session following that in which Congress was engaged at the time of suspension. See *Chadha*, 103 S. Ct. at 2771.

118. *Id.*

### The Facts

On October 11, 1973, the District Director of INS ordered Jagdish Rai Chadha<sup>119</sup> to show why he should not be deported for having overstayed his nonimmigrant student visa.<sup>120</sup> Appearing before an immigration judge in January of 1974, Chadha conceded his deportation status, but pursuant to section 244(a)(1), he applied to the Attorney General for relief. On June 25th relief was granted and the immigration judge suspended Chadha's deportation.<sup>121</sup> Nevertheless, on December 12, 1975, pursuant to section 244(c)(2), the House passed a resolution<sup>122</sup> vetoing the suspension order. Subsequently, on November 8, 1976, after appeal to INS, Chadha was ordered deported.<sup>123</sup>

On appeal to the Ninth Circuit, however, Chadha prevailed.<sup>124</sup> Holding that the legislative veto violated the separation of powers doctrine, the Court of Appeals declared section 244(c)(2) unconstitutional. Thereafter, the Supreme Court assumed jurisdiction under 28 U.S.C. § 1252 to review the declaration of unconstitutionality.<sup>125</sup> It is the nature of the veto in this particular circumstance which the Court used as a model to subsequently decide the fate of *all* congressional veto mechanisms.

### The Opinion

The majority opinion in *Chadha* is divided into several parts and Chief Justice Burger spent considerable time addressing such questions as the severability of section 244(c)(2),<sup>126</sup> standing, jurisdiction, and

119. See *infra* note 122.

120. See *Chadha*, 103 S. Ct. at 2770.

121. *Id.* at 2771.

122. H. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,800 (1975).

123. *Chadha*, 103 S. Ct. at 2772.

124. See *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *aff'd*, *INS v. Chadha*, — U.S. —, 103 S. Ct. 2764 (1983).

125. See *Chadha*, 454 U.S. 812 (1981).

126. According to the Senate, the veto provision of section 244(c)(2) is indispensable to the Act. While section 244 might be severable from general sections of the Act, the severability clause of section 406 is not dispositive in cases where severability of *particular subsections* is in dispute. Because subsection 244(c)(2) is "so interwoven" with the Act, Congress could not have intended its severability. See Brief of Senate at 24-28, 25 & n.40, *Chadha*, 103 S. Ct. 2764 (1983) [hereinafter cited as Senate Brief]; see also *Chadha*, 103 S. Ct. at 2816-17 (Rehnquist, J., dissenting). The Court, however, viewed the subsection as "a 'particular provision' of the Act as that language is used in the severability clause." *Id.* at 2774. While Congress might have been reluctant to delegate final authority over deportation questions, the Court found this reluctance insufficient to overcome severability under section 406. *Id.*

Under this view, the Court neglected the veto's practical function of ameliorating the political differences between Congress and the President. "[T]he legislative veto has been the key to getting the very delegation of authority the executive wants." See Senate Brief *supra*, at 26 (citing J. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 356 (1981)). Congressional review is inextricable from the delegated authority to which it is tied, and they "must stand or fall together." Senate Brief *supra* at 27 (citing Attorney General William Mitchell's opinion to President Herbert Hoover when the legislative veto was originally conceived, 37 Op. Att'y Gen. 56, 66 (1933)).

In view of the legislative veto's history as a careful and deliberate reservation of congressional power, Attorney General Mitchell's opinion seems unassailable. And the Court's failure to view the veto in the broader legislative scheme suggests an intent to quench the veto

justiciability.<sup>127</sup> Only after dispensing with these threshold questions did the Court finally address the veto's constitutionality.<sup>128</sup> Then, in fewer words than it took to reach the veto issue, it disposed of the case in almost summary fashion.<sup>129</sup>

The Court began its analysis in *Chadha* with the "legislative prescription" of article I: bicameralism and presentment.<sup>130</sup> Calling forth selected records from the Philadelphia convention, and drawing support from *The Federalist*, it observed how the Framers placed the power of government in the Legislature, subject to an appropriate system of checks and balances.<sup>131</sup> The great virtue of bicameralism assured full deliberation in the lawmaking process by the nation's elected representatives.<sup>132</sup> In addition, the separate election procedures for each House offered an intrinsic check, fostered by independent interests,<sup>133</sup> to refine<sup>134</sup> the process.<sup>135</sup> Presentment, of course, assured that the President—the second party in the lawmaking process<sup>136</sup>—would always have the "effectual check" of self-defense<sup>137</sup> against an overbearing legislative partner.<sup>138</sup> Moreover, in the Court's view, present-

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forever. See generally Strauss, *supra* note 111, at 804-05 & n.63. See also *infra* text accompanying note 151.

127. See *Chadha*, 103 S. Ct. at 2772-80.

128. *Id.* at 2780.

129. After introducing the veto issue and discussing article I, the Court handled the veto in section IV of its opinion. See *id.* at 2784-87. Reacting to the brevity of the Court's analysis, Mr. Justice White complained, "If the legislative veto were as plainly unconstitutional as the Court strives to suggest, its broad ruling today would be more comprehensible. But, the constitutionality of the legislative veto is anything but clear-cut." *Id.* at 2797 & nn.12-14 (White, J., dissenting).

130. *Id.* at 2782-84.

131. *Id.*

132. *Id.* at 2784-88. See generally THE FEDERALIST NOS. 10 & 51 (J. Madison).

133. See *Chadha*, 103 S. Ct. at 2783-84 & n.15.

134. THE FEDERALIST NO. 10, 133-34 (J. Madison) (B. Wright ed. 1961). Delegation of governmental power to an elected, representative body refines the public views by passing them through a chosen body. "The regulation of . . . various . . . interest forms the principal task of modern legislation." *Id.* at 131.

135. See generally THE FEDERALIST NO. 51 (J. Madison).

136. See *Chadha*, 103 S. Ct. at 2782.

137. See *id.* (quoting THE FEDERALIST NO. 73 (A. Hamilton)).

138. The propriety of the executive's check under article I originally flowed from what the Framers thought to be a clear principle of legislative aggression. See *Chadha*, 103 S. Ct. at 2784; see also THE FEDERALIST NO. 51 (J. Madison); THE FEDERALIST NO. 73 (A. Hamilton). But their fears of Congress overbearing the other branches—especially the executive—never materialized. Instead, influenced by the necessity of delegation, Congress voluntarily surrendered its powers. While the Framers feared active encroachment *by* the legislature, they never feared active encroachment *against* the legislature as a result of this voluntary surrender of power.

Despite the Court's characterization, the veto never enacts positive law. See *Chadha*, 103 S. Ct. at 2784. No positive force flows directly from the legislative veto to oppress the electorate, in contravention of article I's spirit. Rather, the congressional check *blocks* administrative rulemaking excesses. The positive force of law in these circumstances actually flows from the administrative body. See *supra* note 101 and accompanying text. The veto negates this functional equivalent of law, thereby standing as a check whose spirit and purpose comport with the presentment clause of article I. See also *Chadha*, 103 S. Ct. at 2803 n.20, 2810 (White, J., dissenting); Bruff & Gellborn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1372-73 (1977); Abourezk, *supra* note 74, at 328-30; *infra* notes 141, 243.

ment effectively tempered final decisionmaking by granting veto power to a national executive who was not partisan to regional interests.<sup>139</sup>

By addressing these constitutional elements the *Chadha* Court initially demonstrated a wise deference to the policies behind them, and had the Court developed its decision along these lines it might have decided the case more narrowly.<sup>140</sup> Unfortunately, it never considered whether the congressional veto gave rise to the *same* fear of legislative usurpation against which these article I provisions were designed to check.<sup>141</sup> Instead of applying the reasons behind the rules, the Court first "equated" the veto with legislation, then mechanically applied the Constitution's article I "prescription for legislative action."<sup>142</sup>

This decision to formally apply article I seems unusually rigid. Presumably, an appropriate article I analysis would follow a simple two step inquiry: first, determine whether congressional action falls within an established definition of legislation;<sup>143</sup> second, determine whether that action follows the proper constitutional prescription. Neglecting this inquiry, however, the Court instead proceeded by assertion. It stated that actions by the Legislature which had "the purpose and effect of altering the legal rights, duties, and relations of persons. . . outside the legislative branch," are, by definition, equal to legislation.<sup>144</sup>

Thus, the Court never reasoned to a conclusion from a basic constitutional premise; rather, it made a conclusory statement and then tried to reason out the result.<sup>145</sup> It first declared that the constitutional powers of the three branches of government were "functionally identifiable."<sup>146</sup> The Court then asserted that the Executive presumptively executes, the Judiciary presumptively adjudicates, and the Legislature

139. *Chadha*, 103 S. Ct. at 2782-83.

140. See *supra* note 111 and accompanying text.

141. According to Sen. Jacob Javits, R-N.Y.:

In delegating . . . authority . . . and reserving the right to limit thereafter the use of that authority, Congress is not exercising power that it would have been unable to exercise in the first instance. . . . It is doing what it regards as "necessary and proper" to effect its legislative will and to share the lawmaking power by the most efficient mechanism available. *The proper use of the veto neither reduces the power of the executive branch nor increases that of Congress.*

Javits & Klein, *supra* note 72, at 473 & n.80 (citations omitted) (emphasis added). See also *supra* notes 82, 103, 138 and accompanying text. In the veto context "not only has the initial enactment been submitted to the President for his approval, but the subsidiary lawmaking subject to the legislative veto has been proposed by the President or his appointees." Presumably then, "any formal legislation containing the same proposal would have received the President's signature." Javits & Klein, *supra* note 72, at 483. But see *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 465, 469-70 & n.182 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, — U.S. —, 103 S. Ct. 3556 (1983).

142. *Chadha*, 103 S. Ct. at 2784.

143. See, e.g., Justice Holmes, writing for the majority in *Parentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908), stating that legislation "looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." See also Strauss, *supra* note 111, at 798 & nn. 34-36.

144. See *Chadha*, 103 S. Ct. at 2784.

145. See *id.* at 2785-88.

146. *Chadha*, 103 S. Ct. at 2784.

presumptively legislates.<sup>147</sup> Under this analysis, any use of legislative power by Congress which affects the legal status or relations of nonlegislative parties, becomes subject to article I procedures.<sup>148</sup> According to the Court, because the House veto altered Chadha's status vis-a-vis the Attorney General's determination,<sup>149</sup> the veto automatically equalled legislation. This "equation," however, while apparently result-oriented, did not rest solely on the veto's effect,<sup>150</sup> for actions by the Attorney General which had similar consequential effects were not equally proscribed by the Court. Rather, the dispositive inquiry became the identity of the actor.<sup>151</sup>

In the first of several subsequent arguments to support its conclusion, the Court stated that the veto's "legislative character" was "confirmed" by the action which it supplanted.<sup>152</sup> The Court reasoned that, absent the veto, Congress would have to legislate anew to override the Attorney General's suspension.<sup>153</sup> The Court determined that the veto effectively took the place of legislation and therefore it equalled legislation for article I purposes.

This inquiry, however, rather tenuously connects two radically different procedures. By conditioning<sup>154</sup> the Attorney General's action on subsequent congressional approval, Congress' veto action *maintains* the status quo<sup>155</sup> of INS deportation decisions. The veto thus never "affects" anyone. Had Congress made the Attorney General's decision final, only then would subsequent congressional action assume the character suggested by the Court. Legislating anew, Congress would *change* the status quo by actively deporting an individual. Congress, however, did not adopt this latter format, and by radically equating the veto with legislation, the Court totally ignored these functional differ-

147. *Id.* It should be noted that this language flows directly from Chief Justice Marshall's opinion in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, discussed, *supra* notes 19, 22. The irony is that *Wayman* gave rise to broad delegation, see discussion, *supra* note 22, and broad delegation gave rise to the legislative veto, see discussion *infra* note 184.

148. *Chadha*, 103 S. Ct. at 2784. See also *supra* note 147 and accompanying text.

149. *Id.* at 2785 (emphasis in original).

150. Actions by non-legislative officials, especially those in administrative departments, impact on the "rights and relations" of third parties just as the legislative veto did in *Chadha*, yet their actions are not deemed legislative. See Strauss, *supra* note 111, at 795, 797-98; see also *supra* note 101 and accompanying text.

151. See Strauss, *supra* note 111, at 800.

152. See *id.* at 2785.

153. *Id.*

154. The conditionality of the Attorney General's power was emphasized by the Senate in its brief to the Court. "Since 1940, the Congress has repeatedly reaffirmed that congressional review is indispensable . . ." Senate Brief *supra* note 126, at 26. In 1947, the Justice Department requested that Congress dispense with review of administrative deportation decisions. The Senate Judiciary Committee, however, refused, and decided that the best interests of the country would be served by limiting the proposed extended powers. *Id.* at 13 & n.15. See generally the Senate's historical review of Congress' disposition towards this matter. *Id.* at 9-17.

155. This "status quo" argument rests on the fact that by not effecting change, the veto does not effect legislation. Rather, it merely achieves the same result as if no legislation were passed, say, by one House withholding affirmance in the normal legislative process. See, e.g., McGowan, *supra* note 40, at 1157 & n.172.

ences. Moreover, new legislation to override a final deportation suspension might itself be unconstitutional,<sup>156</sup> leaving Congress with no options except to not delegate at all.

In its second argument, the Court equated the legislative veto with actual legislation through the concept of policymaking.<sup>157</sup> Congress' original delegation of authority to the Attorney General to suspend deportation orders was made to relieve itself from the cumbersome process of enacting private immigration bills.<sup>158</sup> Under the Court's analysis, this delegation decision was an article I "policy judgment."<sup>159</sup> Accordingly, since Congress's decision to deport Chadha through the veto was also a policy judgment, the Court required the veto to comport with article I.<sup>160</sup>

This argument is unpersuasive, however, because it highlights *Chadha's* constant reliance on the identity of the acting party.<sup>161</sup> If the Court regards decisions suspending immigration requirements tantamount to article I policy determinations, then the Court should logically consider the Attorney General's suspension decision a policy determination of the same magnitude. As with congressional determinations, once the Attorney General acts, his decision, if unconditional, has the same purpose, force, and effect<sup>162</sup> of law as does legislation by private bill. Coming full circle, and applying *Chadha's* first "test," one must inquire whether the Attorney General's action becomes legislation by taking on the legislative "character of the action" which his delegation supplanted.<sup>163</sup> Logically, this inquiry invalidates more than the veto; it invalidates the whole delegation.

Finally, the Court observed that although the veto was a very convenient political tool in purely practical terms, there was an unmistakable expression by the Founding Fathers that legislation by the national Congress be a "step-by-step, deliberate and deliberative process."<sup>164</sup> At this point the opinion evidences its greatest substantive weakness, for decisions by the Attorney General certainly do not comport with this step-by-step process. In fact, no decision by a delegate of legislative power comports with article I policies or its prescriptions.<sup>165</sup>

The problem with *Chadha* is the problem of legislative delegation: it is the tension between the reality of modern government and the the-

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156. Such new legislation might invite challenges under *ex post facto* or bill of attainder concepts. See *Chadha*, 103 S. Ct. at 2785 n.17, where the Court declined to express any opinion "whether such legislation would violate any constitutional provision." See also *id.* at 2776 n.8.

157. *Id.* at 2786.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* & n.19. See also discussion, *supra* text accompanying note 151.

162. See *id.* at 2785 where the Court treated the Attorney General's action as final. See also *id.* at 2802 (White, J., dissenting).

163. See *id.* at 2803 (White, J., dissenting).

164. See *id.* at 2784, 2788.

165. *Id.* at 2803-04 & n.20 (White, J., dissenting).

oretical scheme of the Constitution.<sup>166</sup> This tension becomes apparent in the Court's reliance on article I formalities, rather than policies. Although it addressed the spirit of article I throughout its opinion, the Court ultimately based its decision on the identity of the party exercising legislative power. Congress' veto action constituted "legislation" solely because of Congress' legislative identity.

Dwelling on the actor's identity, however, highlights the very weak distinction between actions which are functionally equivalent to legislation but not so defined, and what the Court "characterizes" as legislation for constitutional purposes. While legislative delegates engage in functional legislation<sup>167</sup> through their rulemaking authority, the Court determined that they were beyond article I requirements. The reason, according to the Court, is simple: the Constitution does not require that they be included.<sup>168</sup> Yet the failure of the Constitution to address delegation does not impliedly endorse it. Indeed, the Constitution's silence and its reservation of all legislative power in Congress makes delegation constitutionally suspect.

### Aftermath

Since the Court failed to narrowly address the veto's constitutionality according to its use, and held that the veto took on the character of the legislation which it supplanted, a broad repudiation of the legislative veto must be inferred.<sup>169</sup> The *Chadha* analysis suggests that a two-house veto would also be invalid because it fails to comport with the presentment clause of article I. This appraisal is consistent with the Court's recent summary affirmations of two cases authored by the District of Columbia Court of Appeals.

In *Consumer Energy Council of America v. FERC*,<sup>170</sup> the Court of Appeals invalidated the one-house veto when used to review a proposed rule<sup>171</sup> of the Federal Energy Regulatory Commission (FERC).

166. As early as 1952 Justice Jackson observed the incongruity between the reality of modern governing and the theoretical constitutional scheme.

The rise of administrative bodies probably has been the most significant legal trend of the last half century and perhaps more values today are affected by their decisions than by those of all the courts . . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.

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

167. See *supra* note 101 and accompanying text.

168. See *Chadha*, 103 S. Ct. 2785 & n.16, where the Court addressed the Senate's concern that actions by the Attorney General are exempt from bicameral review. According to the Court, such executive action "might resemble 'legislative' action in some respects" but "is not subject" to the legislative prescription of article I, "for the reason that the constitution does not so require." *Id.*

169. In his dissent, Justice White lamented, "[T]he apparent sweep of the Court's decision today is regrettable. The Court's Article I analysis appears to invalidate all legislative vetos irrespective of form or subject." *Chadha*, 103 S. Ct. at 2796 (White, J., dissenting).

170. 673 F.2d 425 (D.C. Cir. 1982), *aff'd sub nom.* Process Gas Consumers Group v. Consumer Energy Council of America, — U.S. —, 103 S. Ct. 3556 (1983).

171. *Consumer Energy Council*, 673 F.2d at 435.

The opinion held that vetoing the proposal was a "social policy judgment. . . peculiarly legislative in nature,"<sup>172</sup> and since it had the effect of altering the delegate's legislatively granted discretion, it altered the original legislative policy as well.<sup>173</sup> According to the Court of Appeals, such an alteration is the kind of decision the Constitution envisions will be made only under article I.<sup>174</sup> In *Consumers Union v. FTC*,<sup>175</sup> the court used the same analysis<sup>176</sup> to invalidate a two-house veto.<sup>177</sup> Again, the agency involved had placed a proposed rule before Congress pursuant to its conditional authority under the enabling act.<sup>178</sup> This use of the congressional veto to check proposed actions of legislative delegates was precisely that envisioned by its creators in 1932,<sup>179</sup> and supported by Justice White in his *Chadha* dissent.<sup>180</sup> But the Court of Appeals determined that conditioning a grant of agency power on subsequent congressional review, even with presidential approval, was not alone sufficient to make the condition constitutional.<sup>181</sup>

Although *Chadha* only formally invalidated the one-house legislative veto when used to affect an individual's legal status, these summary affirmations quell whatever hope<sup>182</sup> existed that other veto uses would be found constitutional. The legislative veto, in all its forms, appears dead.

## REPERCUSSIONS: QUESTIONING THE DELEGATION DOCTRINE

### *Abdicating Legislative Power*

The repercussions of *Chadha* and its progeny are not yet clear. In all three cases, however, the courts were forced to address arguments that the policy reasons invalidating the legislative veto might also in-

172. See *id.* at 468 (quoting Congressional Amici Brief at 43-45).

173. *Id.* at 468-69.

174. *Id.* at 468. See also *id.* at 448 & n.82, 469-70.

175. 691 F.2d 575 (D.C. Cir. 1982) (en banc), *aff'd sub nom.* United States Senate v. FTC, 103 S. Ct. 3556 (1983).

176. See *Consumer's Union*, 691 F.2d at 577. The Court of Appeals noted that all the issues in *Consumer's Union* were thoroughly considered in *Consumer Energy Council*. The Court then disposed of the three issues in the case, citing *Consumers Energy Council* as direct precedent. *Id.* at 577-78.

177. *Id.* at 576.

178. *Id.* at 577.

179. The veto was introduced in 1932 after President Hoover requested power to reorganize the executive branch, subject to congressional approval. The veto was an institutional invention which arose because the normal legislative process was politically inefficient to the reorganization task. See generally J. SUNDQUIST, *supra* note 1, at 344-46, 346 n.3.

180. See *Chadha*, 103 S. Ct. at 2799 (White, J., dissenting). "The power to exercise a legislative veto is not the power to write new law . . . . The veto . . . may only negative what the Executive department or an independent agency has proposed" *Id.* See also discussion, *supra* note 138.

181. *Consumer's Union*, 691 F.2d at 578, (relying on *Consumers Energy Council*, 673 F.2d at 465, 469-70).

182. See *Chadha*, 103 S. Ct. at 2796 n.11 (White, J., dissenting).

validate administrative rulemaking.<sup>183</sup> Moreover, by condemning the veto, the Court may impliedly condemn the veto's root cause: delegation.<sup>184</sup> Without the veto, many government bureaucrats acquire constitutionally unchecked power to formulate policy expressions having the force and effect of law.<sup>185</sup>

First, the *Chadha* decision shatters Congress' reliance<sup>186</sup> on the veto as a check against administrative abuses when it broadly delegated. Moreover, by invalidating the veto the Court gives total policymaking power to congressional delegates under previously enacted delegations. Although informal congressional oversight mechanisms remain,<sup>187</sup> and the judiciary's power of review is unimpaired, no formal before-the-fact review exists.<sup>188</sup> Absent this power to check rulemaking authority *before* it affects the status of others, the legislative power fully devolves to the delegate. Without some formal congressional control over policy, unconstitutional abdication clearly results.

Second, the *Chadha* decision requires Congress to directly oversee delegation in a manner comporting with the "legislative prescription" of article I.<sup>189</sup> This procedure, however, presents two problems. Not only must Congress must obtain majorities in both Houses rejecting an

183. See *Chadha*, 103 S. Ct. at 2785 n.16; *Consumer Union*, 691 F.2d at 578; *Consumers Energy Council*, 673 F.2d at 448-49 n.82.

184. The legislative veto has been a means of self-defense to protect the legislature from encroachment by the non-legislative branches, to which Congress delegated power. Absent such delegations, the veto would be unnecessary. See *supra* notes 82, 138 and accompanying text. It may be "viewed as a mechanism to . . . fill the void left by the decline of the delegation doctrine." Bruff & Gellhorn, *supra* note 138, at 1373.

185. See *supra* note 101 and accompanying text.

186. See, e.g., J. SUNDQUIST, *supra* note 1, at 344. A device historically used by the Court to differentiate between legislative lawmaking and administrative rulemaking was to classify the latter as an act of "subordinate character." Administrators were given legislative power to enact rules pursuant to delegation, but never assumed the same degree of power as the legislative branch itself. Were that to occur, an unconstitutional abdication of legislative power would result, and the delegation would be void. Under this view, Congress freely delegated power to non-legislative parties, secure in the belief that the veto would be a final check against administrative abuses. The *Chadha* decision, however, shatters this reliance.

187. Absent the legislative veto, Congress must rely on indirect after-the-fact oversight mechanisms. Congressmen can "threaten to hold up the president's appointments, or legislation he most desires, or to cut budgets of his favorite programs." J. SUNDQUIST, *supra* note 1, at 322; see generally *id.* at 321-30. Oversight may include review or investigation of executive branch action, direct statutory control over appropriations, formal reporting requirements, and hearings. However, none of these methods affords Congress the "opportunity for ongoing and binding expressions of congressional intent." Javits & Klein, *supra* note 72, at 462; see generally *id.* at 460-65. See also *Chadha*, 103 S. Ct. at 2795 & n.10 (White, J., dissenting); HOUSE RECOMMENDATIONS, *supra* note 2, at 10-11.

188. One major problem with judicial review is that it is always after the fact. "It occurs after the regulation has gone into effect, after it has been imposed upon the public, and it is generally at the instance of those persons or interests that have substantial financial resources." Moreover, "every presumption is in favor of the validity of the regulation." *Regulatory Reform Hearings*, *supra* note 101, at 109-10 (testimony of Rep. Elliott Levitas, D-Ga.). See also HOUSE RECOMMENDATIONS, *supra* note 2, at 11-13.

189. See *supra* text accompanying notes 142, 148. Apparently the only form of pre-enactment oversight still available to Congress is the "report and wait" procedure, reserved by the Court in a footnote. This procedure permits Congress time to review proposed rules before they become effective. If it disapproves them, Congress may pass prohibitive legislation blocking the rules. See *Chadha*, 103 S. Ct. at 2776 n.9.

agency proposal, but it must also gain presidential approval. Thus, under *Chadha*, direct congressional oversight of agency rulemaking is contingent on presidential concurrence, or on Congress' ability to muster a two-thirds majority in each House,<sup>190</sup> and the President obtains extraordinary control over legislative policy formations in areas where Congress has already broadly delegated.

It is apparent that by invalidating the veto on formal grounds, the Court may subsequently invalidate modern delegations on policy grounds. Severing the veto from legislation which Congress originally drafted in reliance on the veto places inordinate legislatively-delegated power in the hands of agency administrators and the President. This shift of power is clearly inapposite to the constitutional spirit,<sup>191</sup> and highlights the tension which results when an evolution occurs in American government for which the Framers failed to provide.<sup>192</sup>

### *Cutting Back Delegation*

The article I policies addressed in *Chadha* now come back to haunt the delegate. To harmonize the delegation doctrine with *Chadha*'s implications, the Court might substantially cut back the broad delegations which it has permitted for over fifty years. The Court of Appeals for the District of Columbia referred in passing to this possibility in a footnote.<sup>193</sup> It observed that *Schechter Poultry*<sup>194</sup> and *Panama Refining*<sup>195</sup> apparently had neither been abandoned by the Supreme Court nor commentators.<sup>196</sup> And indeed, it appears from a dissent in *American Textile Manufacturers Institute Inc. v. Donovan*,<sup>197</sup> that *Chadha*'s author, Chief Justice Burger, agrees.

In *American Textile*, the Court addressed the issue of delegation to OSHA<sup>198</sup> under the Occupational Safety and Health Act of 1970. Under section 6(b)(5) of the Act, the Secretary of Labor was to promulgate occupational health standards, "to the extent feasible,"<sup>199</sup> to assure that no employee would suffer material health impairment. Textile manufacturers brought suit against the Secretary when OSHA promulgated a strict standard limiting occupational exposure to cotton dust.<sup>200</sup> They claimed that the Act required OSHA to perform a cost-benefit analysis and determine whether the standard was economically "feasi-

190. See Black, *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROB. 87, 93 (1977) who argues that under the best political scenario the likelihood of Congress overriding the President's veto is about one in 16.

191. *Id.*

192. See *supra* note 166 and accompanying text.

193. *Consumer Energy Council*, 673 F.2d at 448-49 n.85.

194. 295 U.S. 495 (1935).

195. 293 U.S. 388 (1935).

196. See, e.g., McGowan, *supra* note 40, at 1127 & nn. 29-31, 1130 & n.44.

197. 452 U.S. 490 (1981).

198. OSHA is the acronym for the Occupational Safety and Health Administration.

199. *American Textile*, 452 U.S. at 508.

200. *Id.* at 494-95.

ble.”<sup>201</sup> Rejecting this view, the Court read the statutory language as requiring OSHA merely to promulgate health standard “with which employers were capable of complying.”<sup>202</sup> In the Court’s opinion, had Congress meant for cost-benefit analysis to predominate over technological analysis, it would have so stated.<sup>203</sup>

Joined by Chief Justice Burger, Justice Rehnquist dissented in *American Textile*. He found section 6(b)(5) to be a standardless, and therefore unconstitutional, delegation.<sup>204</sup> In his view, the “hard policy choices” belonged to the legislature.<sup>205</sup> When Congress adopted the “feasibility” standard in the Act, it rendered the delegation “vague and precatory.”<sup>206</sup> Congress made no decision other than to give OSHA the power to make policy.<sup>207</sup> Nothing in the Act’s operative language provided the delegate with any guidance; it merely required the Secretary to do that which was “capable of being done.”<sup>208</sup>

In an explanatory footnote,<sup>209</sup> Justice Rehnquist stressed that he was not invoking the non-delegation doctrine simply because several plausible statutory interpretations existed. Rather, he was invoking the doctrine because “Congress failed to *choose* among those plausible interpretations,”<sup>210</sup> thus abdicating its legislative responsibilities to the OSHA bureaucracy.<sup>211</sup> It is important to note, however, that Justice Rehnquist did not require Congress to resolve all legislative ambiguities.<sup>212</sup> He clearly recognized the foolishness of such a demand.<sup>213</sup> Nevertheless, because fundamental policy decisions are “quintessential legislative” choices, they “must be made by the elected representatives of the people, not by unelected officials. . . .”<sup>214</sup>

This non-delegation philosophy appears to lay at the heart of the *Chadha* decision. Certainly the Court could have viewed the veto as a usurpation of the adjudicatory function, as Justice Powell suggested.<sup>215</sup> But such a position would leave overly-broad delegations intact and still permit Congress to avoid making the hard policy choices it should. Instead, by invalidating all legislative vetoes, the Court has directly forced Congress to consider cutting back broad delegations itself. Thus, in one broad move the Court could indirectly rejuvenate the

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201. *Id.* at 495.

202. *Id.* at 508-09.

203. *Id.* at 510-12.

204. *Id.* at 545, 546-47 (Rehnquist, J., and Burger, C.J., dissenting).

205. *Id.* at 543.

206. *Id.* at 545.

207. *Id.* at 548.

208. *Id.* at 546.

209. *Id.* at 548.

210. *Id.* at 548 (emphasis in original).

211. *Id.* at 547.

212. *Id.* at 546-47.

213. *Id.* at 547. “Even the neophyte student of government realizes that legislation is the art of compromise, and that an important, controversial bill is seldom enacted by Congress in the form in which it is first introduced.” *Id.*

214. *Id.*

215. *Chadha*, 103 S. Ct. at 2788-89. See also discussion, *supra* note 111 and accompanying text.

non-delegation philosophy without the embarrassment of formally invoking that long discarded doctrine.

Moreover, because *Chadha* apparently abdicated legislative powers to non-legislative officials, the Court has a ready-made situation for invoking the non-delegation doctrine if Congress fails to act as expected. Thus, the *Chadha* decision might evidence the Court's intent to eventually retreat well beyond the current judicial standards in future delegation cases. Viewed in this light, *Chadha* both provides Congress with a motive for curtailing its delegations, and the Court with an excuse to subsequently invoke the non-delegation doctrine.

### REGAINING CONGRESSIONAL CONTROL: AMENDMENT PROPOSALS

Radically cutting back the modern delegations, however, would be disastrous. "Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be a futility."<sup>216</sup> Succinctly stating the issue, Justice White observed in his *Chadha* dissent:

The prominence of the legislative veto mechanism in our political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures accountability of executive and independent agencies. Without the legislative veto Congress is faced with a Hobson's choice: either to refrain from delegating the *necessary authority*, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances . . . , or in the alternative, to abdicate its lawmaking function to [administrative] . . . agencies. To choose . . . the latter risks unaccountable policy making by those not elected to fill that role.<sup>217</sup>

Given that broad delegation is a necessary legislative response to the task of modern governing, Congress can neither afford to lose its power to delegate broadly nor its power to preemptorily oversee these delegations. It must preserve unto itself the ability to effect national policy through controlled delegation, without losing the ability to steer policy through control of the delegate. Under the *Chadha* decision, however, Congress lost this power when it lost the veto. In order to reclaim this authority Congress should carefully consider amending the Constitution to incorporate the legislative veto as a check analogous to that of presentment.

#### *Current Proposals*

Proposals for a constitutional amendment were introduced in both the Senate and the House soon after the *Chadha* decision. Within a month after *Chadha*, Senator Dennis DeConcini (D-Ariz.) introduced

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216. See *Panama Refining*, 293 U.S. at 421. See also *supra* text accompanying notes 63-69.

217. *Id.* at 2792-93 (emphasis added).

Senate Joint Resolution 135 (S.J. Res. 135),<sup>218</sup> and Representative Andrew Jacobs (D-Ind.) introduced House Joint Resolution 313 (H.J. Res. 313).<sup>219</sup> In pertinent part, the Senate Resolution states:

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

Similarly, the House Resolution states:

The legislative Power vested in the Congress shall include the authority of either House to veto rules and regulations issued by the Executive Department pursuant to laws passed by the Congress.

The Congress shall have the power to enforce this article by appropriate legislation.

According to Senator DeConcini (D-Ariz.), S.J. Res. 135 encompasses those executive actions taken to execute laws pursuant to legislative delegations of authority.<sup>220</sup> Under this view, Congress can neither subject constitutionally<sup>221</sup> nor congressionally<sup>222</sup> authorized executive powers to legislative review. Moreover, in his opinion a "properly constructed . . . disapproval provision . . . is a rejection by Congress of a recommendation" which the executive branch is "authorized or *directed*" to make,<sup>223</sup> and review of these recommendations is permitted.

In the same passage, however, the Senator notes that the executive action subject to review "essentially is a proposal for *legislation*."<sup>224</sup> Such language appears contradictory when compared to an earlier statement that "'Executive action' " under S.J. Res. 135 "includes both action and failure to act."<sup>225</sup> This latter phrase suggests that more than legislative proposals will be subject to congressional review under S.J. Res. 135; indeed, it suggests that Congress expects to *direct* the President *how* to act. Such congressional authority would violate the spirit of separations of power within the government, and undermine the discretion of the Executive.

Another inconsistency in his analysis is the suggestion that S.J. Res. 135 comports with bicameralism. By calling the executive recommendations proposals for legislation, Senator DeConcini argues that the one-house veto blocks proposals as would single House disapproval of

218. S.J. Res. 135, 98th Cong., 1st Sess., 129 CONG. REC. S11015-17 (daily ed. July 27, 1983) (to Judiciary Committee).

219. H.J. Res. 313, 98th Cong., 1st Sess., 129 CONG. REC. H4895 (daily ed. June 20, 1983) (to Judiciary Committee).

220. DeConcini & Faucher, *The Legislative Veto: A Constitutional Amendment*, 21 HARV. J. ON LEGIS. 29, 37-38 (1984).

221. *Id.* at 38.

222. *Id.* at 39.

223. *Id.* (emphasis added).

224. *Id.* (emphasis added).

225. *Id.* at 38.

any legislation.<sup>226</sup> Nonetheless, the Senator subsequently notes that S.J. Res. 135 permits Congress to employ whatever means it desires to approve executive actions.<sup>227</sup> According to his analysis, “[t]he committee veto<sup>228</sup> thus remains a viable option . . . .”<sup>229</sup> Yet giving a single committee power to veto “proposed legislation” clearly fails to comport with bicameralism. While disapproval of legislation by a single House might conclusively prevent its passage, disapproval by a single committee certainly would not.

House Resolution 313, on the other hand, pertains only to rules and regulations issued by the executive department, rather than to other executive actions. This resolution appropriately limits the veto’s use to overseeing “legislative powers,” rather than pure “executive powers.” As former Senator Jacob Javits (R-N.Y.) has forcefully argued, “the constitutional scheme of checks and balances does not bar Congress . . . from asserting a *legislative* check over its agents when they are performing functions Congress might have undertaken itself.”<sup>230</sup>

The problem with both H.J. Res. 313, however, is that it fails to check the administrative excesses of independent agencies. This limitation unnecessarily limits the veto’s purpose, for as Representative Elliott Levitas (D-Ga.) has observed, rules and regulations made by unelected bureaucrats are, by their force and effect, functional equivalents of law.<sup>231</sup> Thus, Congress should oversee more than executive agencies. It should oversee all of its administrative “agents”—both the executive and the so-called independent agencies.<sup>232</sup>

### *Accountability*

The veto’s main purpose is to achieve administrative accountability by removing the regulatory power from the hands of an unelected bureaucracy and investing it in the legislature.<sup>233</sup> Yet if Congress is to assume this policymaking power on the theory that it is the elected legislative voice of the people, then it should be held politically accountable to its constituents for the effects of administrative regulation.<sup>234</sup>

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226. *Id.* at 39.

227. *Id.*

228. See discussion, *supra* note 98 and accompanying text.

229. DeConcini & Faucher, *supra* note 220, at 39.

230. Javits & Klein, *supra* note 72, at 479 (emphasis in original). See also discussion, *supra* notes 102, 103.

231. *Regulatory Reform Hearings*, *supra* note 101, at 108.

232. *Id.* at 109. See also, e.g., Chadha, 103 S. Ct. 2795-96 (White, J., dissenting); discussion, *supra* note 101 and accompanying text.

233. *Regulatory Reform Hearings*, *supra* note 101, at 108, 117 (testimony by Rep. Elliott Levitas, D-Ga.); *id.* at 121 (prepared statement of Rep. Elliott Levitas).

234. See *id.* at 117 (testimony by Rep. Elliott Levitas, D-Ga.). “There needs to be some mechanism . . . where we can restore Government to the people.” *Id.* (testimony by Sen. Sam Nunn, D-Ga.) The veto is “not a magic solution, but it does put the onus on the elected representatives of the people.” Rep. Levitas, D-Ga., has noted that a common complaint has surfaced against Congress’ broad delegations of legislative power to agencies. The complaint alleges that Congress shifts legislative responsibilities to the agencies and then vetoes their work, heaping criticism upon them without offering any guidance or proposals of its own.

Indeed, this accountability was Justice Rehnquist's primary concern in *American Textile*<sup>235</sup> when he required Congress to make the "quintessential legislative" policy choices in drafting legislation.<sup>236</sup> While broad delegations may be necessary, their breadth should be reasonably limited to retain fundamental policy choices in legislative hands. These limitations, of course, cannot be defined statically, for lawmaking is a prospective act<sup>237</sup> often "relating to a state of affairs not yet developed or to things future and impossible to fully know."<sup>238</sup> Therefore, the appropriate judicial standard for delegations should also be prospective. Congress should have the duty to legislate as far as is "reasonably practicable,"<sup>239</sup> and broadly delegate only where wisdom and necessity require. Judicial enforcement of such a policy, however, may prove difficult, if not vexatious. Thus, the following proposal is suggested as a constitutional, rather than judicial, means to foster appropriate legislative delegations.

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*Id.* at 126. This has been called the luxury of being negative. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 267 (1982). Such wholesale shifting of the legislative burden by Congress is the effective abdication of its fundamental responsibilities. According to Rep. John Anderson, R-Ill., Congress is often to blame for some of the rules and regulations the electorate complains about. "[W]e too often lack the foresight to consider some of the practical ramifications of the bills we pass. . . . We too often give the regulation writers a blank check and then . . . blame them when it bounces off its intended victims." 122 CONG. REC. 31,638 (1976) (remarks by Rep. John Anderson, R-Ill.). Regarding this accountability issue, the veto's supporters claim that "it will introduce a new era of congressional responsibility by adding the members imprimatur to all effective regulations." McGowan, *supra* note 40, at 1147-48. These supporters further contend that Congress, sensitive to constituency criticisms, will more carefully draft legislation in the first instance. *See id.* *See also Regulatory Reform Hearings, supra* note 101, at 123 (prepared statement of Rep. Elliott Levitas, D-Ga.).

The veto's opponents, however, argue that the incentive to carefully delegate evaporates with the veto precisely because the fear of run-away administrative action no longer exists. *See McGowan, supra* note 40, at 1148 & n.128. *See also Congressional Review of Administrative Rulemaking: Hearings on H. 3658, H. 8231, and Related Bills Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 381-82* (1975) (testimony of Asst. Att'y Gen. Antonin Scalia).

Indeed, one study suggests that because the non-delegation doctrine has been ineffective in limiting broad grants of legislative power, delegations with the veto have been more standardless than ever. *See Bruff & Gellborn, supra* note 138, at 1426-28.

Such arguments, while seemingly persuasive, should not be dispositive. The veto should not live or die according to the Court's prior decisions allowing broad delegations. "The problem, in brief, is that 'a gradual concentration . . . of powers in the same department' has in fact occurred, with the consequent need for institutional invention to cope with the unforeseen development." Miller & Knapp, *supra* note 76, at 385 (quoting THE FEDERALIST No. 51 (J. Madison)). The "modern reality" of a "fourth branch" of government should not be ignored merely because the Framers addressed the problems of government in a three-branch scheme. *See* related discussions, *supra* notes 36, 54, 166. According to Sen. Harrison Schmitt, R-N.M., the current "legislative mandate is a mere skeleton; what is left to the delegate are not minor details, but the formulation of many . . . essential principles in law . . ." *Legislative Veto Proposals: Hearings on S. 890 and S. 684 Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 5* (1981) (statement of Sen. Harrison Schmitt, R-N.M.).

235. 452 U.S. 490 (1981).

236. *Id.* at 547.

237. *See, e.g., Parentis*, 211 U.S. 226 (1908), and Mr. Justice Holmes' statement, *supra* note 143.

238. *Field*, 143 U.S. at 694. *See also* text accompanying notes 22-29, *supra*.

239. *See supra* note 76 and accompanying text.

*Amendment Proposal*

To retain its policymaking authority without losing the ability to broadly delegate, Congress must exercise some responsibly-limited veto power. First, Congress should legislate as far as possible on a particular topic before delegating powers. Broad delegations should be permitted as wisdom and necessity require, and the Court should invoke the non-delegation doctrine only where Congress has failed to adequately *choose* the legislative policy to be advanced. Second, since Congress is powerless to intervene in the executory or adjudicatory process, it should also be powerless to intervene in administrative discretion.<sup>240</sup> The veto should only check abuses of legislative power. Thus, only agency rules and regulations should be subject to the veto power. Finally, because Congress necessarily adopts some original policy expression in its initial delegation act, the majority will of Congress should determine that policy's meaning.

In order to effectuate these several purposes, the following constitutional amendment is suggested.

Rules or Regulations made pursuant to legislatively delegated authority may be subject to approval or disapproval by both Houses of Congress pursuant to laws passed by the Congress, without presentment to the President.

The Congress shall have power to enforce this article by appropriate legislation.

Under this proposal any rule or regulation of a legislative delegate is subject to congressional veto if Congress so provides by law, without subsequent presidential review. Thus, Congress retains superior power over its delegate to oversee the implementation of legislative policy to the extent that the delegate acts in a legislative fashion. Once Congress expresses a policy in the original enabling act, however, it is incumbent on *both* Houses of Congress to determine whether agency rules or regulations are promulgated in conformity with that policy.

Furthermore, if Congress recognizes that the use of its veto power requires considerable energies necessary to raise a two-house majority,<sup>241</sup> then it will naturally refrain from delegating away more power than it can easily control. To control policy formation, Congress will alternatively minimize its delegations to be only as broad as the subject matter and legislative wisdom reasonably require.

*Conclusion*

This proposed congressional veto amendment comports with bicameralism by tempering the legislative will and assuring that national

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240. See discussion, *supra* note 103.

241. See, e.g., Javits & Klein, *supra* note 72, at 462-63.

policy flows from both Houses of Congress.<sup>242</sup> Although it fails to formally comport with presentment, the veto nonetheless retains a constitutional spirit by requiring presidential approval of the veto-containing legislation. Moreover, it provides Congress with a constitutional and effectual power of self defense<sup>243</sup> against encroachment from non-legislative branches. By ensuring Congress the power of negotiation with the other lawmaking parties, the veto modernizes the separation of powers doctrine—maintaining that constant ebb and flow which operates to contain and ameliorate the inevitable tensions” among them.<sup>244</sup>

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242. These concerns were expressed by the Supreme Court in *Chadha*. See *supra* text accompanying notes 132-39.

243. Discussing the reasons for the President's veto over Congress, Alexander Hamilton observed that even had the Framers not “discovered” the legislature's propensity to overbear the executive, “the rules of just reasoning and theoretic propriety would of themselves teach. . . that one ought not be left at the mercy of the other, but ought to possess a . . . power of self defense.” THE FEDERALIST No. 73, 469 (A. Hamilton) (B. Wright ed. 1961). In light of the shifting relationships of power in the government Hamilton's words validate the need for a legislative veto. See also discussion, *supra* note 138.

244. See McGowan, *supra* note 40, at 1119. Losing the veto neither serves the purposes of the Congress nor the President. In too many cases the veto has been the bargaining tool for the President to get his policies passed. Without the veto, Congress is faced with a “stark, no-compromise choice of giving the executive either an absolute delegation of power or none at all.” J. SUNDQUIST, *supra* note 8, at 356. See also Senate Brief, *supra* note 126, at 26; see generally Strauss, *supra* note 111.

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