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Effect of Immigration & Naturalization Service v. Chadha on Executive Reorganization

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COMMENTS

EFFECT OF *IMMIGRATION AND NATURALIZATION SERVICE v. CHADHA* ON EXECUTIVE REORGANIZATION

I. INTRODUCTION

Three recent decisions by the United States Supreme Court, *Immigration and Naturalization Service v. Chadha*,[1] *Consumer Energy Council v. Federal Energy Regulatory Commission*,[2] and *Consumers Union v. Federal Trade Commission*,[3] have altered the balance of power between Congress and the executive branch, invalidating a congressional check on executive power which had been in use for over fifty years. In an opinion in *Chadha* and by affirmance in the other cases, the Court held that under the separation of powers doctrine[4] the legislative veto violated the presentment[5] and bicameral[6] requirements of the Constitution and thereby intruded on the province of the executive branch. The effect of these decisions extends far beyond the legality of the immigration, natural gas, and trade commission acts considered by the Court. There is every indication in *Chadha* and in the memorandum opinion affirming

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1. 103 S. Ct. 2764 (1983).

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

3. 691 F.2d 575 (D.C. Cir. 1982) (en banc), *aff'd mem. sub nom.* United States Senate v. Federal Trade Comm'n, 103 S. Ct. 3556 (1983).

4. *See, e.g.*, Consumer Energy Council v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 470-71 (D.C. Cir. 1982) ("There is a common 'recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another.' ") (quoting Buckley v. Valeo, 424 U.S. 1, 120 (1976)), *aff'd mem. sub nom.* Process Gas Consumers Group v. Consumers Energy Council, 103 S. Ct. 3556 (1983).

5. U.S. CONST. art. I, § 7, cls. 2, 3 provide, in pertinent part:

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

(emphasis added).

6. U.S. CONST. art. I, §§ 1, 7. In addition to the references to joint action by both houses of Congress found in § 7, § 1 provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* House of Representatives." (emphasis added). *See Chadha*, 103 S. Ct. at 2781.

the other two cases that some 320 legislative veto provisions in approximately 210 laws[7] are now invalid. The specific impact of *Chadha* and its progeny on the executive reorganization acts and possible congressional alternatives to the legislative veto for controlling administrative agency discretion are the subjects of this comment.

A. *Definition and Purpose of the Legislative Veto*

The term "legislative veto" encompasses a class of statutory mechanisms designed to subject presidential and administrative agency action to some additional form of legislative consideration and control.[8] The types of agency actions reviewable by Congress through the veto mechanism have included rulemaking procedures,[9] simple adjudicative matters,[10] and other discretionary acts by administrative agencies.[11] Congressional adoption of veto provisions has extended beyond the executive branch agencies to encompass actions by independent regulatory agencies and commissions.[12]

Legislative veto provisions often include a required waiting period before a rule or order can take effect, and have been used by Congress

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7. Smith & Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A. J. 1258, 1258 (1983). Smith and Struve, together with Judge Antonin Scalia, prepared the ABA amicus brief in *Chadha*. The authors present a cogent analysis that addresses in general terms two themes developed in this comment: what effects the unconstitutional legislative veto provisions have had on other statutory directives, and what alternative mechanisms of administrative agency control are left unscathed for Congress to employ.

8. Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 467 (1962).

9. Administrative Procedure Act, 5 U.S.C. § 551(5) (1982), defines rulemaking as an "agency process for formulating, amending or repealing a rule. . . ."

10. The adjudicative proceedings in *Chadha*, 103 S. Ct. at 2770-71, are a prime example of the use of a legislative veto to block the decision of an administrative law judge. *See infra* notes 47-65 and accompanying text.

11. Presidential restructuring of the federal bureaucracy through use of the executive reorganization power delegated by Congress in the various reorganization acts is a case in point. *See infra* notes 91-114 and accompanying text.

12. The Federal Energy Regulatory Commission (FERC) is a pseudo-independent agency vested by Congress with a degree of institutional autonomy and funded through separate appropriations. However, it functions within the Department of Energy, an executive branch agency. In contrast, the Federal Trade Commission (FTC) is situated outside of the executive branch and is more typical of the independent agency mold. One of the prime advantages of the independent agency is greater policy discretion and insulation from executive branch control. The drawbacks of the independent agencies, including such problems as "agency failure" and lack of presidential or congressional policy coordination, are addressed by numerous commentators. *See, e.g.*, Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973); Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969). *See generally* R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS (1941). The question of how to control administrative agency action has been the major impetus behind development of the legislative veto. *See infra* notes 20-21 and accompanying text.

either to ratify agency action or to amend proposed actions presented for approval.[13] The waiting period, by itself, does not render the legislative review mechanism unconstitutional.[14] However, in the past, the submission of an agency decision for review was generally coupled with congressional authority to disapprove the proposed action. If Congress failed to act during the waiting period, the agency proposal became effective, unless affirmative approval by Congress or its committees was required by statute.[15]

The method of congressional ratification pursuant to the veto has varied considerably over 50 years of use. The most common types of control mechanisms have been the simple, or "one-House," resolution and the concurrent, or "two-House," resolution. Neither simple nor concurrent resolutions are submitted to the President for approval or veto.[16] Since the mid-1940s, Congress has also delegated the veto power to its standing committees.[17] The three methods and their possible variations[18] do not allow Congress to amend actions subject to the veto. Congressional power has generally been limited to disapproval of the proposed agency action as presented.[19]

Public perceptions of uncontrolled agency discretion have apparently influenced many members of Congress to seek stricter controls over agency accountability.[20] Congressional leaders must balance the conflicting pressures to, on the one hand, pass legislation with dispatch, and, on

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13. Schauffler, *The Legislative Veto Revisited*, 8 PUB. POL'Y 296, 300-05 (1958).

14. *See, e.g.*, Consumer Energy Council v. Federal Energy Regulatory Comm'n, 673 F.2d at 474 & n.206; Clark v. Valeo, 559 F.2d 642, 681 n.4 (D.C. Cir.) (MacKinnon, J., dissenting), *aff'd mem. sub nom.* Clark v. Kimmitt, 431 U.S. 950 (1977).

15. J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 204 (1st ed. 1964). An example of a statute where affirmative action by Congress was required is found in the 1948 amendments to the Immigration Act of 1917, ch. 783, 52 Stat. 1206, a precursor of the disputed veto provision in the Immigration and Nationality Act of 1952. The 1948 amendment prohibited the Attorney General from suspending deportation in all cases unless both houses of Congress affirmatively approved the suspension request. *See* Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 583 (1953). The 1952 Act provided for both congressional approval *and* disapproval, depending on the class in which each suspension request belonged. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 216-17 (codified as amended at 8 U.S.C. § 1254 (1982)).

16. Ginnane, *supra* note 15, at 570 & n.l.

17. J. HARRIS, *supra* note 15, at 204-05.

18. Another possible method is to vest the veto power in a congressional committee chairman. *See* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 987 & n.6 (1975).

19. J. HARRIS, *supra* note 15, at 204-05.

20. *See, e.g.*, J. CARTER, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING HIS VIEWS ON THE USE OF THE LEGISLATIVE VETO, H.R. Doc. No. 357, 95th Cong., 2d Sess. 3 (1978); 128 CONG. REC. H8719 (daily ed. Dec. 1, 1982) (statements of Reps. Quillen and Levitas).

the other hand, control the extent to which administrative agencies "fill in the gaps." The fact that agency rules and orders may "carry the force of law without legislative consideration" means that Congress should not abandon forever to agency discretion the promulgation of agency rules that put citizens "in jeopardy of losing liberty or property without having anyone elected by the people or answerable to them involved in the process."[21]

Prior to *Chadha* other commentators questioned the persuasiveness of these arguments.[22] Congress, after all, does have alternative oversight and control devices to curb agency abuse.[23] Furthermore, aside from its constitutional defects, the legislative veto mechanism may be inappropriate in those areas where members of Congress lack the expertise or time required to make informed judgments.[24] In addition, Congress may improve control over agency action by setting out a clear statement of congressional intent in the enabling acts, and by insisting upon suitable qualifications for administrators whose appointments are subject to congressional approval.[25]

Constitutional questions surrounding the veto have led executive branch officials, presidents, and even some influential members of Congress to suggest less suspect, if not more effective, methods of agency control.[26] As Chief Justice Burger indicated in his *Chadha* opinion, some eleven presidents since Woodrow Wilson have gone on record at some point during their administrations challenging the constitutionality of legislative vetoes.[27] Despite this impressive opposition, no judicial decision challenging the legitimacy of the veto had ever been rendered.[28] Without adverse judicial precedent, the legislative veto remained a much

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21. 128 CONG. REC. H8719 (daily ed. Dec. 1, 1982).

22. *See, e.g., id.* at H8717-19 (statement of Rep. Moakley). *See generally* Watson, *supra* note 18, at 1048 *et passim.*

23. *See infra* note 125.

24. Schauffler, *supra* note 13, at 309.

25. *Id.*

26. *See, e.g.*, Watson, *supra* note 18, at 988-89 & nn. 9-12 (containing an abridged list of challenges and alternatives to the veto offered by presidents and members of Congress); J. CARTER, *supra* note 20, at 3.

27. *Chadha*, 103 S. Ct. at 2779 & n.13.

28. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (challenge to veto provision in Federal Election Campaign Act decided on ripeness grounds); *accord*, Clark v. Valeo, 559 F.2d 642 (D.C. Cir.), *aff'd mem. sub nom.* Clark v. Kimmitt, 421 U.S. 950 (1977) (challenge to a legislative veto in Federal Election Campaign Act dismissed as unripe); *see also* McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977) (challenge to veto in Federal Salary Act dodged by court on severability and right to relief grounds), *cert. denied*, 434 U.S. 1011 (1978); *cf.* Sibbach v. Wilson, 312 U.S. 1, 14-16 (1941) (validity of "laying over" requirement, where proposed Federal Rules of Civil Procedure remain before Congress for six months before becoming effective, upheld). *But see* Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977) (challenge to Federal Salary Act veto dismissed on necessary and proper clause grounds), *cert. denied*, 434 U.S. 1009 (1978).

debated, yet often used, device in Congress' effort to control administrative agency discretion.[29]

One of the most celebrated debates on the constitutionality of the veto took place between President Franklin Roosevelt and Attorney General (soon to be Supreme Court Justice) Jackson, prompting President Roosevelt to render a legal "opinion" on a two-House veto provision in the Lend Lease Act of 1940.[30] The opinion, later revealed by Justice Jackson,[31] was unprecedented. But in Justice Jackson's own view, the constitutionality of the veto "depend[ed] on whether the provision was to be considered as a reservation or limitation by which the granted power would expire"[32] upon congressional action or whether it "was to be regarded as authorizing a repeal by concurrent resolution."[33] This underlying issue of the definition of the legislative veto mechanism is precisely what subsequent courts have wrestled with in addressing the constitutionality issue.[34] If the veto is seen as expiration of statutory authority for agency proposals, then the delegation of decision making power to the agency is based on continued congressional support. Administrative agency action would thereby lack the force of law unless Congress approved or failed to disapprove a particular action by resolution. The extent to which the Supreme Court addresses this view will be discussed later.[35]

B. *Use of the Legislative Veto*

The modern day veto first appeared in the Legislative Appropriations Act of 1932,[36] following President Hoover's request for authority to reorganize executive agencies.[37] After the 1933 repeal of the veto provision in

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29. *See, e.g.*, 128 CONG. REC. H8719-40 (daily ed. Dec. 1, 1982) (discussion of veto in relation to congressional reauthorization of the FTC).

30. Ch. 11, 55 Stat. 31 (1941).

31. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953).

32. *Id.* at 1355.

33. *Id.*

34. *See* Buckley v. Valeo, 424 U.S. 1, 257 (1976) (White, J., concurring); Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

35. *See infra* notes 65-66 and accompanying text.

36. Ch. 314, 47 Stat. 413-14 (1932).

37. J. HARRIS, *supra* note 15, at 207. President Hoover's attempt to reorganize the executive branch was in vain, however, as the lame-duck House of Representatives disapproved all of Hoover's proposals. *See* H.R. Res. 334, 72d Cong., 2d Sess. (1932). Note that the Tennessee Valley Authority Act, ch. 32, § 4, 48 Stat. 60 (1933) (codified as amended at 16 U.S.C. § 831c (1982)) established discretionary removal powers in Congress by concurrent resolution in addition to presidential authority to remove TVA board members for cause. The Sixth Circuit discusses this provision in Morgan v. Tennessee Valley Auth., 115 F.2d 990 (6th Cir. 1940) in light of the President's authority to hire and fire. The method of removing executive officers is tangential to the discussion here and is thus beyond the scope of this comment.

the Legislative Appropriations Act,[38] Congress did not use the device again until 1939 when it granted limited authority for executive reorganization.[39]

Justice White's dissenting opinion in *Chadha*[40] discussed the wide-scale use of the veto provision in 56 current statutes, some of which included multiple veto provisions.[41] Other commentators seeking to develop a comprehensive list of the statutes containing veto provisions[42] have noted the increasing prevalence of the vetoes in recent legislation.[43] In addition, in the last four years, both the Senate[44] and the House of Representatives[45] have considered expanding of the veto mechanism to cover *all* agency rulemaking.

The increasing use of the veto provision and the lingering questions over its constitutionality may have prompted judicial intervention by the Court in *Chadha*. But whatever the underlying rationale for its sweeping decision, the political questions regarding control of administrative agencies still remain,[46] as do the questions regarding the legitimate methods of control left available to Congress.

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38. Amendments to the Legislative Appropriations Act of 1932, ch. 3, 48 Stat. 16 (1933).

39. Reorganization Act of 1939, ch. 36, 53 Stat. 561.

40. 103 S. Ct. at 2811-16.

41. The statutes containing legislative vetoes cover 1) foreign affairs and national security, 2) budget, 3) international trade, 4) energy, 5) rulemaking, and 6) miscellaneous. *Id.* at 2811-16.

42. *See, e.g.*, C. NORTON, 1976-77 CONGRESSIONAL ACTS AUTHORIZING PRIOR REVIEW, APPROVAL, OR DISAPPROVAL OF PROPOSED EXECUTIVE ACTIONS and INTERIM REPORT ON THE EXERCISE OF CONGRESSIONAL REVIEW, DEFERRAL, AND DISAPPROVAL AUTHORITY OVER PROPOSED EXECUTIVE ACTIONS, 1960-1975 (Congressional Research Service Studies), *reprinted in Administrative Procedure Act Amendments of 1978: Hearings Before the Subcomm. on Agency Administration of the Senate Judiciary Comm.*, 95th Cong., 2d Sess. 808-50 (1978) [hereinafter cited as *APA Hearings*]; Watson, *supra* note 18, at 1089-94 (partial compilation since 1932).

43. *See, e.g., Chadha*, 103 S. Ct. at 2781 (citing Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977) (finding the frequency of veto use increasing)); *APA Hearings*, *supra* note 42, at 837 (1976 Congressional Research Service study identifying 351 resolutions of congressional approval or disapproval between 1960-1975. Sixty-three of these became effective, and nearly two-thirds took effect in 1975 alone).

44. *Legislative Veto Provisions, Hearing on S. 890 and S. 684 Before the Subcomm. on Agency Administration of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. (1981).

45. *Staff of House Committee on Rules, 96th Cong., 2d Sess., Recommendations on Establishment of Procedures for Congressional Review of Agency Rules* 1, 35 (Comm. Print 1980).

46. *See* 129 CONG. REC. S9670-71 (daily ed. July 12, 1983) (remarks by Sen. Goldwater on the continuing validity of the War Powers Resolution).

II. THE *Chadha* DECISION

A. *Factual and Procedural Considerations*

Jagdish Rai Chadha petitioned the Court of Appeals for the Ninth Circuit for review of a deportation order issued by the Immigration and Naturalization Service (INS).[47] The INS order was made pursuant to a House of Representatives resolution[48] disapproving an earlier INS suspension order which had granted Chadha's request to remain in the United States. The Ninth Circuit heard arguments on the case in April 1978, reassigned the case to a new panel in August 1980, and finally rendered its decision on December 22, 1980.[49] The court held that the one-House veto of the INS suspension order was an unconstitutional violation of the separation of powers principle unjustified by Congress' article I power over aliens.[50]

In its review of the INS deportation proceedings, the Ninth Circuit found that Chadha, a native of Kenya and of East Indian descent, lawfully entered the United States in 1966 via a British passport and obtained a nonimmigrant student visa. Following completion of his studies, Chadha's visa expired. In 1974 the INS issued Chadha an order to show cause why he should not be deported.[51]

At a deportation hearing, Chadha conceded that he was deportable[52] but requested a suspension of deportation pursuant to section 244(a)(1) of the Immigration and Nationality Act (INA).[53] Section 244(a)(1) vests

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47. Chadha v. Immigration and Naturalization Service, 634 F.2d 408, 411 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983).

48. H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40800 (1975).

49. 634 F.2d at 408.

50. *Id.* at 433, 434. As Judge Kennedy indicated, article I of the Constitution provides in pertinent part: "The Congress shall have Power . . . To establish a uniform Rule of Naturalization, . . . [and] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . . U.S. CONST. art. I, § 8, cls. 1, 4, 18. Note how the Supreme Court addressed this same issue, i.e., Congress' apparent plenary power over immigration questions and Congress' exclusive powers under the necessary and proper clause, in its discussion of the political question doctrine. The Court did not dispute the congressional authority; instead it focused on "whether Congress [had] chosen a constitutionally permissible means of implementing that power." 103 S. Ct. at 2779. In essence, this approach sidestepped the question raised by the congressional amici: why should the courts have jurisdiction over a political balancing of power between the executive and Congress? *See* 128 CONG. REC. H8728 (daily ed. Dec. 1, 1982) (excerpts from an amicus brief filed by Eugene Gressman for the House of Representatives and an article by James Sundquist on the veto). The Court's handling of the political question doctrine eliminated the major stumbling block to jurisdiction; it also foreshadowed the formalistic approach taken by Chief Justice Burger in his majority opinion.

51. 634 F.2d at 411.

52. Section 241(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1251(a) (1982), defines the classes of aliens who are deportable.

53. 8 U.S.C. § 1254(a)(1) (1982).

authority in the Attorney General to suspend deportation and adjust the status of an alien to allow him or her to apply for permanent residence. Such suspensions are allowed where the alien

> is deportable . . .; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or [to his other legally resident family members].[54]

The hearing officer found that Chadha met the requirements listed above and ordered suspension of the deportation order pending review and disapproval by Congress.[55] On December 12, 1975, Representative Eilberg, Chairman of the House Judiciary Committee's Subcommittee on Immigration, Citizenship, and International Law, initiated legislative review by introducing, as required by statute, a resolution opposing the suspension for Chadha and five other aliens. The unprinted resolution denying the grant of suspension was passed four days later without debate or recorded vote.[56]

Following exercise of the veto, Chadha's deportation proceedings were reconvened and a final deportation order was entered.[57] Chadha objected to the proceedings on the ground that the one-House veto provision in section 244(c)(2)[58] of the INA was unconstitutional. Both the immigration judge and the Board of Immigration Appeals (BIA) refused to consider the constitutionality question, and the BIA dismissed Chadha's appeal from the immigration judge's order.[59]

The House of Representatives and the Senate were the adverse parties in Chadha's successful petition to the Ninth Circuit and defense before

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54. *Id.*

55. 634 F.2d at 411.

56. H.R. Res. 926, *supra* note 48, at 40800. Chief Justice Burger questioned whether the House generally, or Subcommittee Chairman Eilberg in particular, understood the action being taken. His comment was based on review of a resolution introduced a year earlier by Rep. Eilberg. *Chadha*, 103 S. Ct. at 2771-72 n.3.

57. 103 S. Ct. at 2772.

58. Section 244(c)(2) provides, in pertinent part:

> [I]f during the session of the Congress at which a case is reported [pursuant to § 244(c)(1)], or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien. . . . If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

8 U.S.C. § 1254(c)(2) (1976).

59. 103 S. Ct. at 2772.

the Supreme Court.[60] While the INS was the named party respondent before the Ninth Circuit and the appellant to the Supreme Court, the agency in fact sided with Chadha on the unconstitutionality of the veto mechanism.[61] Before reaching the merits, both courts raised and then disposed of the procedural questions of jurisdiction and justiciability which had led to the dismissal of previous cases challenging the veto.[62]

Chadha presented to the courts a particularly strong example of why Congress should not have the power to veto administrative agency action. The evidence of minimal congressional understanding or consideration of the veto used in Chadha's case was particularly damning, because Chadha's right to remain in the United States was at stake. The convenience of delegating the decision to the INS as a means of doing justice in particular cases had led Congress to grant the INS authority to suspend deportation.[63] Congress, however, reluctant to leave the deportation determinations entirely to administrative discretion and expertise, included a veto provision in the INA.[64] Some veto provisions, including those in the executive reorganization acts, fall into Justice Jackson's category of proposals lacking the force of law absent congressional approval. The INA veto mechanism, however, combined with the dearth of congressional consideration exemplified in *Chadha*, fits Jackson's alternative characterization, i.e., an arbitrary repeal of administrative determinations through an intrusive legislative oversight.[65]

B. *The Majority Opinion in* Chadha

Mr. Chadha's situation gave the Supreme Court the ideal case to test the constitutionality of the legislative veto. The arbitrariness of the veto was clear, and Chief Justice Burger rejected as "arcane" the idea that Chadha's suspension order was a mere proposal to Congress.[66] At each step the Chief Justice declined to decide the case on non-constitutional

60. *Id.* at 2774 n.6.

61. *Chadha* illustrated yet another case in which the interests of "the United States" are ambiguous. Professor Miller properly questioned the propriety of the Attorney General in taking sides during a dispute between the executive branch and Congress over use of the legislative veto. Although it is beyond the scope of this comment, this issue is one that will probably linger long after Congress has forgotten the legislative veto. *See* Miller, Dames & Moore v. Regan: *A Political Decision by a Political Court*, 29 U.C.L.A. L. REV. 1104, 1121-23 (1982). *See also* Miller & Bowman, *Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 OHIO ST. L.J. 51 (1979).

62. *See* cases cited *supra* note 28.

63. Mansfield, *The Legislative Veto and the Deportation of Aliens*, 1 PUB. AD. REV. 281, 284-86 (1941). Mansfield discusses the pre-1940 burden imposed on Congress by private relief legislation. The volume of private immigrations bills before Congress reached a peak of 526, but declined sharply following enactment of the Alien Registration Act of 1940.

64. *Id.* at 286.

65. *See* Jackson, *supra* note 31, at 1353, 1355.

66. 103 S. Ct. at 2787-88 & n.22.

grounds, labelling the effect of changes in the law and in Chadha's marital status as speculative avenues of relief.[67] This position is contrary to the typical posture of the Court to construe statutes narrowly and thereby avoid constitutional issues.[68]

The Court's analysis of INA section 244(c)(2) centered upon a strict reading of the bicameral and presentment clauses in article I.[69] The Chief Justice emphasized the concern expressed during the Constitutional Convention debates that the legislative power be restrained by a system of checks and balances. He argued that the procedural requirements for enacting a law, i.e., passage of a bill by both houses of Congress and presentment to the President, have served "essential constitutional functions."[70] Finally, he concluded that the two clauses clearly embody "a prescription for legislative action [which is limited to] a single, finely wrought and exhaustively considered, procedure."[71]

Chief Justice Burger considered these procedural requirements in light of the "legislative character" of section 244(c)(2).[72] He examined the "carefully defined exceptions" to presentment and bicameralism and found that none applied to the one-House veto.[73] In holding congressional exercise of legislative power to strict limits of form and function, the Chief Justice avoided the issue of independent constitutional grounds for reaching the opposite result.[74]

C. *Justice Powell's Concurrence*

Although he concurred in the judgment in *Chadha*, Justice Powell expressed concern over the breadth of the decision and sought to limit the holding.[75] He interpreted the framers' intent behind the procedural requirements as a general safeguard against assumption of judicial power by the legislature.[76] Justice Powell indicated that Congress may assume

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67. *Id.* at 2776-77. Chief Justice Burger began his constitutional review with a presumption of statutory validity, which he summarily abandoned in the next sentence. *Id.* at 2780.

68. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936). *See also* Clay v. Sun Ins. Office, 363 U.S. 207 (1960); Peters v. Hobby, 349 U.S. 331, 338 (1956).

69. *See supra* notes 5-6.

70. 103 S. Ct. at 2782-84.

71. *Id.* at 2784.

72. *Id.* at 2784-86.

73. The explicit extra-legislative functions available to Congress are 1) the impeachment powers, 2) the review of presidential appointments, and 3) the treaty ratification power. *Id.* at 2786-87.

74. *See, e.g.*, Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) (veto in Salary Act valid under Congress' necessary and proper clause powers); *see also supra* note 50.

75. The Court of Claims applied a similar rationale in Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

76. 103 S. Ct. at 2789.

some executive and judicial functions but may not impair or assume a power central to one of the coordinate branches.[77] In looking at the veto exercised in *Chadha*, Justice Powell found the House of Representatives' action "clearly adjudicatory."[78]

As Chief Justice Burger pointed out, this characterization of the legislative veto is not perfect.[79] There are certain conceptual difficulties in defining judicial, legislative, and executive powers.[80] Determining whether Congress has assumed a "central power" under Justice Powell's test is even more difficult.[81] Nonetheless, Justice Powell would not hold invalid the legislative veto on purely procedural grounds, and his flexible standard offered some hope for congressional advocates of the veto. Unfortunately for the veto advocates, Justice Powell failed to participate in the subsequent review and affirmance of *Consumer Energy Council*[82] and *Consumers Union*,[83] and his test was neither clarified nor rejected.

D. *Dissenting Opinions*

Two dissenting opinions were filed. Justice White objected to the breadth of the decision[84] as well as to the procedural basis for the opinion, which he claimed ignored the overriding purpose of the constitutional requirements.[85] The doctrine of separation of powers, he argued, was not violated where the veto served as a check on the growth of administrative agency power.[86]

Justice Rehnquist, joined by Justice White, argued that the veto was not severable from the rest of the clause in INA section 244 which grants

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77. *Id.* at 2790. *See also* Buckley v. Valeo, 424 U.S. 1, 123 (1976) (flexible limit in separation of powers doctrine expressed).

78. 103 S. Ct. at 2790-91.

79. *Id.* at 2787 n.21.

80. Cooper & Cooper, *supra* note 8, at 480-87. In a previous separation of powers case, the Court attempted to draw a distinction between executive and legislative powers. According to the Court, "Legislative power, as distinguished from executive power, is the authority to make the laws, but not to enforce them or appoint agents charged with the duty of such enforcement. The latter are executive functions." Springer v. Philippine Islands, 277 U.S. 189, 202 (1928). As Harris indicates, the line between these functions cannot be drawn sharply, and it changes over time. However, as Powell suggests in his opinion, the application of laws to an individual case, e.g. INA § 244 to Chadha, is clearly *not* a legislative function, whether or not one characterizes it as executive or judicial. J. HARRIS, *supra* note 15, at 243.

81. Justice Powell recognized this problem and stated "[T]he more helpful inquiry, in my view, is whether the act in question raises the dangers the Framers sought to avoid." 103 S. Ct. at 2791 n.7.

82. 103 S. Ct. 3556 (1983).

83. 103 S. Ct. 3556 (1983).

84. 103 S. Ct. at 2796.

85. *Id.* at 2796-98.

86. *Id.* at 2809-11

the Attorney General the power to suspend deportation.[87] Chief Justice Burger's majority opinion interpreted the words and legislative history of INA section 406[88] as allowing the suspension power to stand without the veto.[89] But in Justice Rehnquist's view, severing the veto provision would also sever the suspension power provision. Justice Rehnquist theorized that Congress would not have intended the executive branch to retain the power to suspend deportation without congressional review.[90] He concluded that the effect of finding the veto unconstitutional would be to deny the Attorney General the power to suspend deportation.

III. Impact of *Chadha* on the Reorganization Acts

A. *Validity of the Reorganization Act Authority*

The executive branch reorganization acts contained the first examples of the legislative veto. Until passage of the Legislative Appropriation Act of 1932,[91] the executive branch lacked authority except during wartime[92] to create and alter executive agencies. A growing need was seen, however, for increasing congressional delegation to promote administrative flexibility, while retaining congressional oversight to prevent administrative abuse.[93] The 1932 Act provided President Hoover the first opportunity to exercise this jealously guarded congressional power. The veto provision in this Act, and in each of the executive reorganization acts since 1932, assured Congress that some control over the structure of executive organization would remain with the members of Congress.[94] The use of the veto in executive reorganization acts thus was seen as a valid sharing of congressional powers with the executive branch.[95]

After the 1932 Act, Congress granted the President reorganization au-

87. *Id.* at 2816-17. The general rule for determining severability is "that the invalid parts of a statute are to be severed '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" Buckley v. Valeo, 424 U.S. 1, 108 (1976), *quoted in* EEOC v. Allstate Ins. Co., 570 F. Supp. 1224, 1230 (S.D. Miss. 1983).

88. Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (1982) (severability clause).

89. 103 S. Ct. at 2774-76.

90. *Id.* at 2816-17.

91. Ch. 314, 47 Stat. 413, 414 (1932).

92. For a discussion of how Congress assumed this power, see J. Harris, *supra* note 15, at 16.

93. *See supra* notes 20-21 and accompanying text.

94. J. Harris, *supra* note 15, at 204, 206-07.

95. *See, e.g.*, Consumer Energy Council v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 458-59 & n.138 (D.C. Cir. 1982) (veto power under reorganization statutes seen as potentially valid under "reverse legislation theory"), *aff'd mem. sub nom.* Process Gas Consumers Group v. Consumers Energy Council, 103 S. Ct. 3556 (1983); J. Carter, *supra* note 20, at 1 (veto avoids congressional intrusion into administration of ongoing substantive programs and preserves presidential authority).

thority in 1939, 1945, 1949, and 1977.[96] The 1949 Act was extended eight times before lapsing in 1973.[97] While the 1939 and 1945 Acts provided for rejection of reorganization plans within 60 days by concurrent resolution,[98] later acts in 1949 and 1977 gave Congress the right to reject plans by simple resolution within a 60 day period.[99] A 1980 survey showed that Congress rejected 23 presidential reorganization plans out of 114 submitted between 1939 and 1979.[100]

The effect of *Chadha* and its progeny has been to call this entire process into question. Although *Chadha* does not explicitly prohibit use of the veto in executive branch reorganizations, it certainly raises a presumption of invalidity.[101] The opinion of the Circuit Court for the District of Columbia in *American Federation of Government Employees v. Pierce*,[102] a case following its opinions in *Consumer Energy Council*[103] and *Consumers Union*,[104] casts further doubt on the validity of the veto provisions in the reorganization acts.[105] Although *Pierce* involved a committee veto over appropriations,[106] and not a one-House veto, the D. C. Circuit dismissed without comment the "reverse legislation" theory it had suggested in *Consumer Energy Council*, apparently closing the loophole for executive branch reorganization acts.[107]

Another post-*Chadha* decision, *EEOC v. Allstate Insurance Co.*,[108]

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96. Reorganization Act of 1977, 5 U.S.C. §§ 901-912 (1982); Reorganization Act of 1949, ch. 226, 63 Stat. 203; Reorganization Act of 1945, ch. 582, 59 Stat. 613; Reorganization Act of 1939, ch. 36, 53 Stat. 561. *See also* CONGRESSIONAL RESEARCH SERVICE, STUDIES ON THE LEGISLATIVE VETO, REPORT TO THE SUBCOMM. ON RULES OF THE HOUSE COMM. ON RULES, 96th Cong., 2d Sess. 164, 245 (Comm. Print 1980) [hereinafter cited as CRS 1980 STUDY].

97. Schwartz & Webb, *Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351, 355 (1978). See discussion of first four extensions in J. HARRIS, *supra* note 15, at 209.

98. Reorganization Act of 1945, ch. 582, § 6, 59 Stat. 613, 616; Reorganization Act of 1939, ch. 36, § 5, 53 Stat. 561, 562-63. *See generally* R. MOE, EXECUTIVE REORGANIZATION: A HISTORIC OVERVIEW 23 (Congressional Research Service Pub. No. 77-4G, 1977).

99. Reorganization Act of 1977, 5 U.S.C. § 906 (1982); Reorganization Act of 1949, ch. 226, § 6, 63 Stat. 203, 203.

100. CRS 1980 STUDY, *supra* note 96, at 245.

101. *See supra* notes 73-74 and accompanying text.

102. 697 F.2d 303 (D.C. Cir. 1982) (per curiam).

103. 673 F.2d 425 (D.C. Cir. 1982).

104. 691 F.2d 575 (D.C. Cir. 1982).

105. In *Pierce* the Secretary of HUD (Pierce) appealed from an injunction prohibiting him from carrying out a reduction-in-force within HUD. The HUD Appropriation Act precluded departmental reorganizations without the prior approval of the Committees on Appropriations. In the course of reversing the district court injunction, the D.C. Circuit affirmed the invalidity of the legislative veto device. 697 F.2d at 304, 306-08.

106. *Id.* at 305-06.

107. *Id.* at 306.

108. 570 F. Supp. 1224 (S.D. Miss. 1983) (The 1977 Reorganization Act, found invalid in its entirety by the District Court for the Southern District of Mississippi, in part transferred Equal Pay Act enforcement from the Department of Labor to the EEOC.).

found the entire 1977 Reorganization Act invalid because its legislative veto provision violated the strict interpretation of bicameralism and presentment in article I. The court rejected any notions of independent support for reorganization act veto provisions and confirmed the broad applicability of *Chadha*.[109]

The invalidation of the INA legislative veto in *Chadha* left the courts with the question of severability. The question also arises in the context of the executive reorganization acts. If the veto provisions are not severable from the reorganization statutes, then past application of vetoes to executive proposals may be challenged. Even if the veto was not exercised, past executive reorganization plans might be challenged on the basis that the statutory authority for such action was not severable from the legislative veto.[110] This would call into question the statutory authority of the Environmental Protection Agency, the Office of Management and Budget, and ACTION, among others.[111]

One commentator has indicated that the absence of the veto will increase tension and conflict between the branches of government.[112] He predicted that Congress will react by refusing to authorize broad delegations of power to the President in the future.[113] The loss of the veto reduces legislative oversight. It could also lead to a loss of administrative flexibility and slower responsiveness to urgent problems.[114]

B. *Possible Alternatives to the Veto*

The initial reaction to *Chadha* among members of Congress was predictable. There were some initial statements in the *Congressional Record* favoring and some denouncing the decision.[115] Several immediate propos-

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109. *Id.*

110. *See, e.g., id.* The court there found that the legislative veto provision in the 1977 Reorganization Act was not severable from the remainder of the Act because Congress had evidenced an intent to couple the delegation of reorganization authority with a one-House veto provision. The absence of a severability clause and other evidence in the Congressional Record were used by the court to justify holding the entire Act invalid. For further discussion of the severability rule, see *supra* note 87.

The court in *Allstate* also found that considerations of retroactivity did not prevent the court from invalidating a past reorganization plan submitted by President Carter and "approved" by Congress through non-exercise of the veto. *Id.* at 1232-33.

111. R. MOE, *supra* note 98, at 25.

112. Sundquist, *Legislative-Veto Issue: Will it End in a Logjam?*, Los Angeles Times, Feb. 26, 1982, at II7, col. 1.

113. *Id.*

114. *Id. See infra* notes 118-19 and accompanying text.

115. For statements generally favorable, see, *e.g.*, 129 CONG. REC. S10326-27 (daily ed. July 19, 1983) (statement of Sen. Ford); 129 CONG. REC. S9670-71 (daily ed. July 12, 1983) (statement of Sen. Goldwater). For statements made in opposition, see, *e.g.*, 129 CONG. REC. S11015-17 (daily ed. July 27, 1983) (statement of Sen. DeConcini).

als to alleviate the problem were made, including a constitutional amendment to authorize one- or two-House approval of administrative agency action[116] and a proposal to submit all agency rules to Congress, where adoption by joint resolution followed by presidential signature would be necessary before the rules could take effect.[117] Although the proposed constitutional amendment would attempt to restore the status quo before *Chadha*, the joint resolution devised to approve agency rulemaking would, in effect, reduce the administrative agency to an advisory board.[118] A joint resolution requirement for executive reorganization authority would require the enactment of each reorganization proposal by Congress through the traditional legislative process.[119] This method would reduce executive branch flexibility and could seriously lengthen the process for adopting such reforms.

Another and more promising alternative is the "report and wait" method. The majority opinion in *Chadha* mentioned this alternative and reiterated the Court's approval, based on previous case authority.[120] Senators Levin and Kasten have taken Chief Justice Burger's advice by proposing a report and wait provision in an amendment to the Federal Trade Commission Act[121] and in a bill[122] requiring review of agency rulemaking under the Administrative Procedure Act.[123] Levin's proposal would allow a 30-day review period by congressional committees. If either the House or the Senate voted to submit a joint resolution of disapproval to Congress, then the entire Congress would have 60 days to pass the joint resolution. The President's signature would also be required before revoking the rule.[124] The bicameral approval and presentment steps that are, by definition, required for passage of a joint resolution would satisfy the procedural objections to the current legislative veto; the disapproval mechanism would enable Congress to maintain a close watch over agency rulemaking without requiring a lengthy, affirmative passage of each rule.

The application of the report and wait methodology to executive reorganization proposals, in conjunction with other congressional review

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116. S.J. Res. 135, 98th Cong., 1st Sess., 129 CONG. REC. S11015-17 (daily ed. July 27, 1983) (proposal by Sen. DeConcini).

117. 129 CONG. REC. S10326-27 (daily ed. July 19, 1983) (Sen. Ford's discussion of Consumer Product Safety Comm'n authorization legislation passed by the House).

118. *Id.*

119. *See* 129 CONG. REC. E3765 (daily ed. July 26, 1983) (statement by Rep. Levitas supporting adoption of a regulatory calendar).

120. Immigration and Naturalization v. Chadha, 103 S. Ct. 2764, 2776 n.9 (1983) (citing Sibbach v. Wilson, 312 U.S. 1, 15-16, *modified*, 312 U.S. 655 (1941)).

121. See discussion of proposal at 129 CONG. REC. S11862 (daily ed. Aug. 4, 1983) (suggestion by Sen. Kasten).

122. S. 1650, 98th Cong., 1st Sess., 129 CONG. REC. S10474-75 (daily ed. July 20, 1983) (Agency Accountability Act of 1983).

123. 5 U.S.C. §§ 551-706 (1982).

124. S. 1650, 98th Cong., 1st Sess. § 4, 129 CONG. REC. S10474 (daily ed. July 20, 1983).

methods,[125] would remove any constitutional objections from the exercise of congressional control over executive reorganization. The executive reorganization plans already have presidential support; to defeat the reorganization plan any joint resolution of disapproval would require Congress to override the President's veto. This would be an obvious shift in Congress' ability to control executive branch organization, and it is not clear whether Congress is willing to give up its past control over reorganization. The report and wait method offers the compromise of continued congressional oversight while preserving the flexibility necessary for effective presidential coordination of the executive branch.

IV. Conclusion

The *Chadha* opinion appears to have settled a 50 year dispute over congressional authority to disapprove administrative action by legislative veto. Chief Justice Burger's formalistic interpretation of the presentment and bicameral requirements of the Constitution effectively eliminated any use of the veto mechanism in future legislation. In addition to invalidating provisions in 56 current statutes, the *Chadha* opinion and subsequent cases also raise the possibility of retroactive challenges to prior legislation containing the veto.

The rationale followed in *Chadha* should greatly affect the method by which executive reorganization takes place in the future. The veto provision in the Reorganization Act of 1977 is apparently invalid. Congress must now find an effective substitute in order to oversee executive action. Whether Congress reacts to *Chadha* by limiting the President's authority to reorganize the executive branch or by adopting a report and wait mechanism will likely depend on Congress' willingness to leave executive branch organization to presidential discretion.

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125. *See generally* Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto,"* 32 Ad. L. Rev. 667 (1980) (survey of nonstatutory and statutory controls). Kaiser lists several alternatives, including 1) statutory modification of agency jurisdiction over a subject matter through a) removal of jurisdiction, b) exemptions to rulemaking authority, c) moratoriums on rulemaking, d) deregulation; 2) authorization restrictions on agency budgets; and 3) requirements for inter-agency consultation and review before promulgation of new rules. *Id.* at 673-74, 687-89, 696.