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THE CHADHA DECISION: A NEW WEIGHT IN THE CONSTITUTIONAL BALANCE

Murray Snow*

Introduction

In the past decade, there has been an interesting argument in American legal circles concerning the constitutionality of the legislative veto. This type of veto is a provision included in legislation (and in some cases making up the legislation itself) which allows Congress to cancel executive actions. Some scholars argue that since such vetoes take place and have the force of law without receiving the signature of the President, nor in many cases the approval of the other House of Congress, they are unconstitutional. Others point out, however, that for the Congress to exercise a legislative veto both Houses of Congress must have already agreed to, and the President have signed, a bill containing a legislative veto provision. Therefore, they argue, such propositions are indeed constitutional.

Since the first use of the legislative veto in 1932, Congress has devised several different methods to achieve a cancellation of executive action. They have all subsequently come to be known as legislative vetoes. The first is the one-house negative veto. A veto of this nature authorizes either the House or the Senate to cancel an executive action if a majority of its members oppose it. This is the most common legislative veto device. The second method is the

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one-house positive veto. In this case, before an executive action can be made permanent, at least a majority of one House of Congress must approve it. Though this type of veto action has been considered by Congress, it has not yet been used. Other veto provisions which have been frequently used are those requiring either approval or disapproval of executive acts by concurrent resolutions of both Houses of Congress such as the War Powers Act. Still other veto provisions permit approval or disapproval of executive actions by the majority vote of a House or Senate committee. Finally, other such propositions permit Congress to approve part of an executive action while disapproving another part.

Many cases have been brought to court challenging the constitutionality of the legislative veto, but only two have been decided on their merits. In the first, Atkins vs. U.S., the U.S. Court of Claims ruled that the legislative veto was a proper congressional exercise of authority under the Necessary and Proper clause. In the second, INS vs. Chadha, the Ninth Circuit Court of Appeals ruled that the legislative veto provision in the Immigration and Nationality Act was unconstitutional. The Supreme Court, shortly after the Ninth Circuit Court's decision, agreed to review the Chadha case and ultimately upheld that court's opinion. The decision reached in this case should prove to play a significant role in balancing the power between the executive and legislative branches of government in the near future. My research question is then, what will be the public policy implications of the Supreme Court's decision in INS vs. Chadha?

To answer this question it will be necessary to first examine the Chadha case and the resulting opinion of the Supreme Court. It will then be necessary to determine the breadth of the court's decision. Notably, does the reasoning expressed in this opinion invalidate all legislative
vetoes or merely one-house vetoes such as the one found in the Immigration and Nationality Act upon which the Chadha case was based? Or, was the decision sufficiently narrow so as to strike only the legislative veto provision in the Immigration and Nationality Act? Once these questions have been answered, it will be possible to evaluate some of the public policy implications of this decision and to suggest methods through which Congress might be able to continue to constitutionally pursue its oversight function in light of the Court's reasoning.

The Chadha Case

Jagdish Rai Chadha, an East Indian born in Kenya, was admitted to the U.S. in 1966 with a non-immigrant student visa. The visa expired on June 30, 1972, but Chadha remained in the country. In October of 1973, he was summoned before the district director of the National Immigration Service to show cause why he should not be deported. Chadha, under Section 244 (a) (1) of the Immigration and Nationality Act, requested a suspension of deportation. This section of the act gave the attorney general of the United States the discretion to suspend deportation of aliens who met three conditions established in the act: First, the alien must have been in the United States continuously for a period of seven years. Second, he had to be of good moral character, and third, his deportation would have to result in extreme personal hardship.

The following June after an investigation, it was determined by an immigration judge that Chadha met all the requirements; consequently, his deportation was suspended. In accordance with the Immigration and Nationality Act, Congress was advised of the suspension. The act then gave either House of Congress the right to veto the attorney general's decision and invalidate
the suspension anytime within eighteen months after it was notified of the suspension. If Congress failed to act within this time period, the alien's status would be permanently changed to that of permanent resident alien.

In late December 1976, the House of Representives, upon the recommendation of the House Judiciary Committee, voted to veto the suspension of Chadha and five others. The following January, Chadha's original immigration judge re-opened proceedings to deport Chadha. Chadha moved to block the hearing on the grounds that the section of the Immigration and Nationality Act which granted Congress the legislative veto was unconstitutional. The immigration judge refused to rule on the motion since he had no authority to rule on the constitutionality of the sections involved. The Board of Immigration Appeals also refused to respond to the motion for the same reasons. Chadha finally filed a petition with the Ninth Circuit Court of Appeals for a review of his deportation order. The court, after hearing arguments, dismissed the deportation action on the grounds that the legislative veto contained in the act violated the constitutional doctrine of separation of powers.

The Supreme Court's Decision

The Chadha case was accepted by the Supreme Court on a writ of certiorari shortly after the Ninth Circuit Court had ruled. The case was first argued in the court in February 1982, but at the end of the term no decision was announced.

Rearguments were held in the 1982-83 term, and a decision upholding the Ninth Circuit Court was released on June 23, 1983. Before addressing the question of the constitutionality of the legislative veto in his opinion written for the
court, Chief Justice Warren Burger established that Chadha had standing, and that the case was a justiciable one. Then, he began to examine the constitutionality of the legislative veto. According to the Court, Article One of the Constitution establishes several different requirements for all legislative actions:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives. Art. I, s.1. (Emphasis added)

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; . . . Art. I, s.7, cl.2. (Emphasis added)

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 passed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill. Art. I, s.7, cl.3. (Emphasis added) 7

According to the Court, the intent of the founders concerning these sections of Article One is clear. The legislature, in the view of the founders, was inherently the most powerful branch of government. It was therefore most necessary to contain the power of that branch. As one limitation, it was decided to require that legislation
pass through both Houses of Congress to ensure that the implications of all legislative acts would be carefully evaluated before being sent to the President for his signature. The next requirement, that of presentment of the legislation to the President, would constitute the second check on congressional power. The President, in effect, would represent the national interest and not the factionalized smaller interests one could find represented in Congress. If the President objected to a bill, he could veto it and thus prevent its implementation. If he approved a bill, he could sign it, and it would become law. It is clear that the founders intended for all congressional initiatives to pass by this process when it is noted that Madison, in debate over Section Seven Clause Three of Article One, when the section applied only to bills, suggested the idea that the legislature might try to escape the requirements imposed in the section by substituting the word resolution or vote in place of the word bill. Consequently, the Constitutional Congress changed this clause to its present reading.

To prevent the President from arbitrarily blocking Congress and deadlocking the government with his veto power, the founders provided that if two-thirds of both houses voted to do so, they could override the President and implement the legislation over his veto.

Does the legislative veto action taken in the Chadha case amount to a legislative act that would be subject to the bicameral and presentment requirements established by the Constitution for all legislative actions? First, the Court holds that when any branch of government acts, "it is presumptively exercising the power the Constitution has delegated to it." The power the Constitution has assigned to either House of Congress is that of legislation. Although there are express powers granted to the separate Houses of Con-
gress which are not legislative in nature, and thus not subject to the bicameral or presentment requirements of the Constitution, they are included in the Constitution in explicit and unambiguous terms. These powers are those of the House to bring impeachment charges against officials, and of the Senate to ratify treaties, judge in impeachment cases, and approve or disapprove presidential appointments included in Sections Two and Three of Article One and Section Two Clause Two of Article Two. The very explicit nature of these provisions provides support for the Court's conclusion that "congressional authority cannot be implied," and that powers that are not specifically granted to Congress, and are unobtainable through the Necessary and Proper Clause, are denied. Therefore, all legislative actions apart from these special cases specified in the Constitution are required to meet the specifications of bicameralism and presentment.

Second, whether a matter is in fact an exercise of legislative power depends upon the subject of the actions taken. In the Chadha case, it is clear that the action taken has been legislative "in purpose and effect." The House of Representatives has altered "legal rights, duties, and relations of persons including the Attorney General, Executive branch officials, and Chadha, [all of whom] are outside the legislative branch." What this veto decision amounts to is a policy decision by Congress which, in absence of the veto provision of the Immigration and Nationality Act, would have required that a bill be passed by a majority of both Houses of Congress and be presented for the President's signature to become law.

The Court acknowledges that the legislative veto is "efficient, convenient, and useful in facilitating functions of government." But the mere fact that it is useful does not mean that it
is constitutional. The Court in fact rules that the congressional veto provision in Section 244 (c) (2) of the Immigration and Nationality Act is unconstitutional.

The Breadth of the Court's Decision

The Court in this decision has obviously not only ruled on the constitutionality of one legislative veto provision, but has established requirements for all actions of a legislative nature which seem to preclude virtually any form of the legislative veto. Although there was some speculation after this decision concerning the status of legislative vetoes by concurrent resolution, a reading of the decision reveals that even vetoes passed in both Houses still fail to meet the presentment requirements established in the opinion, and thus would presumably also be unconstitutional.

Justice Powell, though agreeing with the opinion of the court in the Chadha case, expresses the view in his concurring opinion that the decision should have been based on narrower grounds. He finds that Congress, in its determination that Chadha does not meet the criteria established for permanent residency, has assumed a judicial function and thus violated the principle of separation of powers. This alone, according to Powell, would be sufficient to decide the case in Chadha's favor. Instead, he notes that "The court's decision . . . apparently will invalidate the use of the legislative veto. The breadth of this holding gives one pause."

Justice White, although agreeing with Powell that the case could be decided on narrower separation of powers issues, dissents in the case. He does not, however, seem to have any arguments about the resolution of the Chadha case itself. He is rather dissenting from the prece-
dent which in his opinion destroys the legislative veto.

Today the Court not only invalidates s. 244 (c) (2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a legislative veto. . . . [The] decision strikes down in one fell swoop provisions in more laws enacted by Congress than the court has cumulatively invalidated in its history. 16

Though White in a footnote to his dissent expresses the hope that perhaps some form of a legislative veto will eventually be held as constitutional, (he suggests that a resolution of disapproval might not have legal effect in its own right, and thus not be subject to bicameral and presentment requirements)17 in light of the Court's decision it seems unlikely, even to him.

Assuming, then, that the reasoning in the Court's opinion, as well as the concurring and dissenting opinions of Powell and White indicate that, at least for the moment, all legislative vetoes can be held unconstitutional, what will be the consequences for Congress?

The History of the Legislative Veto

To answer the above question, it will be necessary to determine what statutes containing legislative vetoes were in force when the Chadha decision was made. The history of legislation containing the veto goes back to 1932, when Congress authorized President Hoover to reorganize the executive branch subject to the disapproval of either House of Congress. 18 During the remainder of the 1930s and 1940s, twenty-three other veto provisions were passed. 19
Several of these bills were again grants to the President to reorganize the executive branch subject to the approval of Congress. The majority of the remainder of the veto legislation passed during this period was special grants of authority to the President to cope with World War Two. An example of such legislation would be the Lend-Lease Act. In this act Congress authorized the President to trade destroyers to Britain for leases on British military bases, but the Congress retained the power, through a legislative veto, to strip him of this authority at any time. Roosevelt thought at the time that the veto proposition in the Lend-Lease Act was unconstitutional, but, he did not veto the bill because it was necessary to his foreign policy. Though Roosevelt's failure to veto the legislative veto in the Lend-Lease legislation did not put an end to its use, as it might have done, none of the statutes from this time period are affected by the Chadha decision since the subject matter of that legislation is no longer relevant to any ongoing governmental program.

During the fifties and sixties, the legislative veto became much more commonly used. In fact, eighty-three statutes containing such provisions were passed during these two decades. In the early fifties the veto began to be used to regulate immigration processes and government construction contracts. The Immigration and Nationality Act, which was the legislation under question in the Chadha case, was first passed in 1952 and then revised in 1967. The Congress found that delegation of such matters as immigration to executive or independent regulatory agencies, subject to a veto of disapproval by Congress, was a convenient way to discharge their growing responsibilities. With the continued growth of government during this period, it soon became a necessity for Congress to delegate many matters other than immigration and government construction to executive departments and regulatory
agencies for administration. The rules that these agencies made in the process of enforcing congressional legislation consequently had the same force of law as did congressional statute.

But often the rules made by these agencies went far beyond, or actually conflicted with, the intent of Congress in this legislation. The honorable Edith Green, congresswoman from Oregon and author of Title IX of the Secondary and Higher Education Act of 1972, gave a striking example of just such an occurrence to students at BYU. In a forum address delivered at BYU in the midst of that institution's struggle with the housing regulations issued by HEW subsequent to Title IX, Ms. Green identified the original intent of that section in The Secondary and Higher Education Act. The thirty-six words that make up the title were intended, according to Ms. Green, to "promote equality of opportunity among the sexes by eliminating admissions restrictions, scholarship discriminations, and providing female professors with the same pay as male professors." Unfortunately, HEW manufactured over 20,000 words of regulations to enforce Title IX alone, which, among other things, had the effect of "eliminating intercollegiate sports, co-ed physical education classes, all male-choirs, the Boy Scouts, the Girl Scouts," and many other organizations. This "illegitimate progeny" of Ms. Green's legislation has often tempted her to deny original authorship.

Ms. Green also mentions in her address other Congressional problems in the regulation of administrative agencies. For instance, the speed with which these agencies make rules pursuant to legislation, compared to the time it takes Congress to overturn objectionable rules by specific statute, is an overwhelming obstacle for Congress. One month after the passage of the bill authorizing OSHA in April 1971, a special 250-page edition of the Federal Register was pub-
lished imposing new federal regulations derived from the original OSHA legislation which was only a few pages long. In the face of regulating such prodigious regulatory activity, many Congressmen argue that the legislative veto is the only acceptable alternative. With the veto provision included in legislation, Congress could eliminate the objectionable regulation by a majority vote of one House. Such a procedure was much easier than the passage by both Houses of Congress and submittal to the President for approval of a change of agency rules.

The increase in regulatory activity and the desire of Congress to oversee such regulation would have been enough to ensure the growth of the legislative veto in the 1970s. But legislative vetoes began to be used as well during this period to exercise direct checks on presidential initiatives. Over the course of America's history, Presidents had gradually usurped, or been freely granted by Congress, powers that were not originally granted to that office in the Constitution. For instance, the evolution of the executive agreement allowed the President to make agreements with other countries without submitting to the approval process of the Senate which seemed to violate the intent of the founders. As well, America had fought in the Korean and Vietnam wars without ever receiving any declaration of war from Congress which the Constitution seemed to require.

The Congress, sensing the growing "imperial" nature of the Presidency, determined to subject several of the presidential prerogatives to the legislative veto. Consequently, Congress passed bills which were in essence legislative vetoes, giving it the right, among other matters, "to approve executive agreements to sell arms to foreign nations, to veto import relief decisions made by the executive, to determine which nations could have most-favored nation treatment in
trade matters, and to determine which countries are eligible or ineligible for military or economic assistance." Some of these bills were measures such as the War Powers Act, the Budget and Impoundment Control Act, and the International Security Assistance and Arms Control Act. These acts, while leaving the President some degree of discretion in such areas as war powers, budget management, and international arms sales, still required the consent of at least one, and often both Houses of Congress before his actions could be fully carried out.

The legislative veto, then, has been used as a congressional device to control the executive in two broad areas. First, it is an attempt to control or at least oversee the administration of legislation by executive and independent regulatory agencies. Second, it attempts to control the initiatives of the President himself in the pursuit of his policies. Due to its newfound dual use, the Congress passed eighty-one laws containing legislative veto provisions in the first half of the 1970s.

In light of the amount of legislation passed in the last three decades containing legislative vetoes, the Court's decision in INS vs. Chadha could have enormous implications. Justice White, as an appendix to his dissent, added a selected list of different statutes containing legislative vetoes which, as a consequence of the court's decision, will be affected. These statutes regulated areas in almost every field of government, but especially in the areas of "governmental reorganization, budgets, foreign affairs, war powers, regulation of trade, safety, energy, the environment, and the economy."
The Effect of the Legislative Veto and Its Cancellation

Despite the fact that the legislative veto has been widely used in legislation in the past several years, if it has not been an effective method to fulfill the congressional oversight function, there will be few, if any, implications for public policy.

There seems to be little debate, however, regarding the efficacy of the legislative veto in regulating agency rule making. Its cancellation should therefore prove to have the potential to return a considerable amount of regulatory "power" to the administrative agencies of the executive branch. The effect of such a power transfer is currently an item of some controversy.

Proponents of the legislative veto claim that this power now returns to a mass of fourth, fifth, and seventh level bureaucrats, who are responsible to no one. Such bureaucrats, these veto proponents claim, are only trying to build their domain of influence, and have no electoral check, as does the Congress. To deny the legislative veto to Congress, as Chadha has done, is to invite a return to the regulatory abuses of the OSHA regulation and Title IX.

Opponents of the veto, however, applaud the decision of the Court. They contend that the veto device placed too much power in the hands of Congress, and that this power would be more dangerous vested in Congress than in the administrative agencies. First, they claim, the probability of governmental deadlock is much lessened by the Chadha decision. An agency trying to execute its statutory responsibilities before Chadha could be continually frustrated by legislative vetoes. When issuing a veto, the Congress is not required to indicate on what grounds they find a particular rule objectionable. Instead of offering suggestions for possible alternatives, it
merely issues rejections. Congress can, consequently, easily hide responsibility for failure of implementation on the "governmental bureaucracy" when, in reality, the failure is its own. Second, the legislative veto tends to permit sloppy legislation. Since Congress, with the veto, has been able to implement its will regardless of the statute's actual content, legislation tends to be less carefully written. This invites litigation and waste, and is the cause of some confusion in the regulatory agencies themselves. Third, special interest groups exercise a large influence in Congress. When special interest groups find certain administrative rules objectionable, as some certainly do, they can exercise considerable pressure on Congress to veto the rule. This, veto critics point out, is hardly in the public interest. Also, the veto's presence in statutes regulating industry allows Congress to be constantly revising rules which regulate that industry and consequently deprive those who are concerned of any sense of permanency in the rules regarding their industry.

The striking of the veto will result then, according to the opponents of the Court's decision, in an increase of "red tape" and a power grant to an unelected and uncontrollable bureaucracy. Proponents of the decision find that it will result in the elimination of the potential for governmental deadlock, and the end of sloppy legislation which could result in increasing litigation. Also limited, according to those who favor the decision, will be the power of special interest groups to regulate government, and the past impermanency of governmental regulation.

Both opponents and proponents of the Court's decision seem to conclude that, with Chadha, the Court has concluded that once Congress has delegated the power to make laws to regulatory agencies, it is limited in its control of the rules that those agencies make.
The legislative vetoes intended to place limits on presidential power have had a far more ambiguous effect. Some of them such as the International Security Assistance and Arms Control Act, which requires the President to gain approval of the Senate for all arms sales to other countries, have been undeniably effective. Note, for example, the rather extended Senate hearings regarding the sale of AWACS radar planes to Saudi Arabia.

Others, however, have not been so successful. For example, the Budget Impoundment and Control Act provides, among other things, that if the President impounds already budgeted funds, either House of Congress, acting within forty-five days of the receipt of such information, may require the President to spend those funds. In 1976, the General Accounting Office reported that President Ford had violated the act by failing to report the impoundment of 126 million dollars budgeted for child nutrition and education programs until after the adjournment of the annual session of Congress. By the time Congress had reassembled, the government had entered a new fiscal year, and thus lacked any power to force him to spend funds in the previous year's budget.

It has also been asserted by Miller and Knapp that the War Powers Act, which allows Congress to remove troops placed in combat situations by the President, if, after 60 days, a majority of both houses of Congress do not consent to the deployment of the troops, is actually an empty shell which would never be invoked in the case of a Presidential commitment of troops to a combat situation. This is partly due to the fact that, as in the Mayaguez incident, often the military action in question would be terminated long before the time limit in which the President could freely act would be reached.

Second, the need and tendency for national unity in crisis situations seems to suggest that it
would be rather unlikely for Congress to override the President should any conflict last over the sixty-day limit. The War Powers Act thus seems to be another Congressional veto provision which has had little effect in practice in spite of its theoretical goal.

In short, though the Chadha decision has the potential to return the power to the President to institute freely his foreign and domestic policy, it is doubtful, in at least the instances cited above, that the President had ever lost it.

**Legislative Remedies**

Not long after the Chadha decision was reached, then Secretary of the Interior, James Watt, wrote a letter to Representative Morris Udall informing him that due to the Supreme Court's recent Chadha decision, Udall's House Interior Committee no longer had the authority to ban the Interior Department's controversial Montana coal sales. Although this legal opinion may have been technically correct, the executive departments and regulatory agencies would do well not to assume too much power as a result of the Chadha decision.

F. M. Kaiser, a senior research analyst for the Congressional Research Service, in seeming anticipation of the Chadha decision, wrote an article detailing the techniques that Congress has successfully used in the past to overturn agency rules, and suggests them as possible alternatives to the legislative veto. Interestingly enough, Kaiser suggests five statutory methods and six nonstatutory methods which Congress has at its disposal to regulate administrative agencies other than the veto. All, of course, are not equally efficacious.
The first method is the statutory rejection of a regulatory rule. This is a difficult and time-consuming procedure requiring the agreement of both Houses of Congress and the signature of the President. It has, however, the advantage of being a very effective method of overturning agency rules. In fact, the definition and clarity which necessarily accompany a statute make the statutory rejection a much more powerful refutation of an agency rule than a legislative veto.\(^{42}\)

Second, Congress has the authority to cut off funding for any regulatory program or, if it chooses, for the enforcement of a particular rule. Though this is an undeniably effective method for enforcing the legislative will regarding the enforcement of regulatory agency rules, it too has its drawbacks. For this method to be effective, it is necessary for Congress to reimpose the budget restriction on an annual basis. Besides the fact that yearly action is necessary, some regulatory activities, unfortunately for Congress, fall under budget allocations which are virtually indivisible.\(^{43}\)

Third, the bill which originally authorizes agency regulation in a certain area could require that specified agencies consult on possible regulations pursuant to the legislation. The establishment of this or other procedural requirements, could provide new insights and perspectives on possible rules and, in any case, would slow down the rule-making process which would make Congressional oversight easier.\(^{44}\)

Fourth, Congress could also require that agencies submit their proposed rules for congressional review before implementation. Though Congress no longer has the power to veto any objectionable rules that it might find, the fact that an agency's proposed regulations would be reviewed might result in more careful drafting of agency regulations.\(^{45}\)
The final statutory method which Kaiser suggests has been the most popular to date in regulating agency functions. Congress, it must be remembered, holds the ultimate trump of altering the authority of regulatory agencies. This could be accomplished in a variety of ways. First, Congress can grant exemptions of authority to the agency head. Second, it can remove areas from the jurisdiction of the entire agency. Third, it can, by statute, end regulatory rule making activities in certain areas. Fourth, it can provide certain organizations subject to agency regulations with waivers from such agency regulations. Fifth, it can transfer the regulatory authority from one agency to another more apt to comply with Congress. And sixth, Congress can, if it wishes to do so, completely deregulate the industry in question.

Although this method can be effective, it can also be dangerous.

Sometimes the change of agency jurisdiction to frustrate the implementation of objectionable regulation causes confusion as to which, if any, regulatory agency is concerned with which regulatory activity. This confusion tends to leave some areas which need regulation completely unregulated and, in the case of waiver provisions, leaves some businesses completely free from all regulation under a particular agency in what seems to be a discriminatory practice.

The nonstatutory methods which Kaiser suggests, would also seem to have considerable potential to regulate agency rules. First, pursuant to its legislative oversight, investigative, and confirmation functions, Congress could instigate an embarrassing oversight hearing into the regulatory actions taken by a particular agency. Second, it could establish permanent subcommittees to oversee agency rule making in general. Third, it could include with each bill which authorizes agency rule making Congressional instructions regarding such implementation.
Fourth, members of Congress could make floor statements critical of ongoing or proposed regulatory programs. Finally, congressional offices concerned with the implementation of a particular piece of legislation could enter into direct contact with the regulatory agency assigned to administer the bills implementation to offer their input.

Kaiser points out that due to the nature of politics, these nonstatutory methods may prove to be more effective in the long-run in overseeing agency activities than the statutory methods he has cited above. However, it should be noted that they offer no direct effect on the rules made by agencies. They are only attempts to pressure the agency in question into conforming with the congressional will concerning implementation of its legislation.

The main reason Congress opted to use the legislative veto so extensively was due to the relative ease it provided Congress in dealing directly with specific agency functions. All of the options mentioned above by Kaiser have their relative strengths and weaknesses, but it should be noted that to achieve the same result, virtually all of them require considerably more effort on Congress's part than did the legislative veto.

Senator Jacob Javits, a proponent of the veto, points out that the policy of congressional delegation of legislative authority to the executive branch is too deeply imbedded in governmental policy to be reversed. But, if Congress now has to spell out to the regulatory agencies with each bill just exactly what regulations they can and cannot make, or if it has to go through strenuous machinations to negate the effectiveness of one rule without damaging the regulation of others, it will be little advantaged by such a policy.
In light of the many methods offered by Kaiser through which Congress can control regulatory agencies, the question raised by the Chadha decision is not whether Congress has the power to regulate administrative agencies. Rather, the question seems to be whether or not, in view of the time requirements which such action would cost an already overburdened Congress, the legislative branch will have the will to impose its power on such agencies.

It is my conclusion that Congress, while not relinquishing the power to regulate administrative agencies, will find that the loss of the legislative veto will require the use of methods which are not nearly as efficient. Consequently, Congress will probably continue to regulate what are, in its opinion, the most serious administrative abuses of legislative authority, but it will not have the time to regulate as completely the implementation of its legislation as it has in the past. The result should prove to be a return of substantial initiative to the executive and independent regulatory agencies in the administration of legislation.

Though the legislature, in spite of the Chadha decision, retains the power to exercise control over regulatory agencies, should they decide to use it, it is not at all clear that in the absence of the veto it will be able to retain much, if any, of its authority over presidential initiatives.

Although Kaiser's suggestions would seem to be a powerful congressional tool in overseeing administrative agencies, it is doubtful that many of these techniques can be used successfully to regulate presidential initiatives. Administrative agencies, for the most part, owe their existence to Congress; therefore, Congress can manipulate their jurisdiction as it chooses. However, the President can claim authority from the Constitution, which puts him on a coequal basis with
Congress. As Kaiser suggests, the legislature does have the final trump of refusing to finance any presidential actions it opposes. But, it is not nearly so easy to cut off the funding of presidential programs as it is to restrict the budgets of administrative agencies. In the first place, it is the President himself who submits the budget to Congress. Theoretically, this does not affect the power of Congress to alter the presidential budget, but practice seems to indicate that the executive preparation of the budget can be a large advantage to the President in the preservation of his programs. Besides this fact, the Congress, except in rare circumstances, is not unified against the President. The President, whoever he may be, can count on at least minimal support from those who are in his party, and from those who support his spending programs. Consequently, though it is not impossible, it is very difficult to withhold appropriations from a spending program which the President truly desires to implement.

In the past, congressional attempts to control the President through the legislative veto have suffered from the failure of Congress to clarify just what was meant by certain terms used in the veto provisions or by the failure of the veto to really propose an acceptable remedy to the presidential action in question. The President has often used these ambiguities to his advantage. Note, for instance, the funds for child nutrition and education which were successfully impounded by Ford in spite of the Budget Impoundment and Control Act, and the failure to invoke the War Powers Act in the recent crisis in Lebanon due to Reagan's refusal to acknowledge that the Marines had entered into "hostilities."

It is probable that Congress will attempt to gain some say over the acceptability of presidential initiatives which it has apparently lost through the invalidation of the legislative veto. I
would suggest that in doing so, Congress repeal any veto legislation such as the War Powers Act which contains possibly ambiguous terms behind which the President could hide. Then, it should replace such vetoes with statutes which either define constitutional terms or require that certain presidential actions be carried out subsequent to the Constitution. For instance, if Congress desired to regain the power to declare war, it could repeal the War Powers Act, and in its place pass a statute defining exactly what a state of war is. Since the Constitution gives to Congress the power to declare war, should a President continue to carry on hostilities after he has surpassed the congressional definition of what a state of war is, he would be subject to impeachment by the House of Representatives. It is interesting to note that, in such a proceeding, the jury would be the Senate, and would presumably recognize the validity of its own legislation. The President would, of course, have recourse to the courts to challenge the statute, but, it seems to be a strong possibility in view of past cases involving war powers, that the court would find that the question was a political one, and would not accept the case for argument. However, if the Court were to accept the case, the Congress could note that the Supreme Court has held in *Gibbons vs. Ogden* that the power granted to Congress to regulate commerce is also the power to decide what commerce is. It does not seem to me to be a great leap of logic to assume, then, that the power to declare war is the power to decide what war is. It would, in any case, be seemingly difficult for the Supreme Court to declare such a statute unconstitutional and still maintain that Congress had any meaningful power to declare war. Nonetheless, if the courts were to hold the statute unconstitutional, Congress would still have recourse to the nonstatutory method of an oversight hearing which, though time-consuming and im-
practical in the long-run, could bring some political pressure to bear on the President.

Using this same method, and with a little imaginative legislation, Congress might regain much of the authority over presidential initiatives that it seemingly lost through the Chadha decision. For instance, Congress might pass a statute which required that all arms negotiations be conducted by treaty. If such a method were to be held constitutional, or if the courts refused to hear the case due to its nature, Congress would regain the power they seemingly lost through the invalidation of the legislative veto provision in the International Security Assistance and Arms Control Act.

It might be noted, however, that some serious disadvantages accompany this method of action. First, Congress must try to regain control over presidential initiatives in a piecemeal fashion. There appears to be no blanket method through which Congress could regain the control over the President it has apparently lost through the Chadha decision. If Congress cannot stake a valid constitutional claim in areas in which it desires to regain some control over presidential initiatives, it will probably never regain it. Second, any definitional statutes passed by Congress are bound to be somewhat arbitrary; they cannot, consequently, constitute a cure-all in terms of regaining for Congress the discretionary powers it desires. Third, and most significantly, any such measures would almost certainly have to be passed over presidential vetoes. The super-majorities required to pass such legislation, in light of party and other allegiances, would be most difficult to obtain.

It is an inescapable conclusion, considering these obstacles, that the Chadha decision has given to the President the unique power over much of the U.S. foreign and domestic policy he
enjoyed before Congress began to restrain the Presidential office through legislative vetoes. Though there are methods through which Congress could reassert its check on presidential power, it is doubtful, given the political considerations involved, that it would ever be able to successfully implement them. And, even if it were to successfully implement some such legislation, it would probably be impossible, without the President's acquiescence, to reobtain the broad control over the President which Congress enjoyed before INS vs. Chadha.

Conclusion

The Supreme Court, in its Chadha decision, effectively invalidated all legislative actions which are not subjected to bicameral approval and presentment to the President for his signature, other than those specified in the Constitution. This decision seems to have effectively invalidated all uses of the legislative veto.

This veto has been an effective tool for Congress in controlling administrative agencies and, to some degree, presidential initiatives. Its invalidation will require Congress to use less efficient means for overseeing regulatory activity. This will have both positive and negative results. For instance, Congress will probably be more careful in the content of its legislation and will be less able to change agency regulations subject to pressure from special interest groups. As well, Congress will probably introduce procedural barriers to slow down immature regulatory activity. However, as congressional oversight costs Congress more time, it is apt to engage in less of it. This will return a considerable degree of discretion to the appointed agency officials of the executive branch who are likely, in some instances, to frustrate the legislation's original intent. Due to the lack of checks on government bureau-
cratic personnel, and the time-consuming methods left to Congress to regulate their activity, probably only the more serious misapplications of legislative intent will be rectified by Congress.

With the Chadha decision, Congress also loses considerable ability to control presidential initiatives. Though again, theoretically, Congress is not left without recourse; political realities seem to suggest rather strongly that Congress will fail to regain, in any significant measure, its former control over the President.

Despite the fact that the legislative veto has been a useful tool to Congress, its utility has not, and perhaps should not have, saved it from being declared unconstitutional and thus void. But, in its refusal to acknowledge the practical application of the veto, the Court has refused to consider the alternatives left to Congress in its absence. In so doing, it has, in my opinion, promoted the ascendancy of the executive branch over the legislative, which, in the intent of the founders, would probably have been at least as unconstitutional a concept as the legislative veto.
ENDNOTES


4. Ibid., p. 124.

5. INS vs. Chadha, No. 80-1832, slip op. at 2-7 (U.S. June 23, 1983).

6. Ibid., pp. 7-22.

7. Ibid., p. 25.


9. Ibid., p. 31.

10. Ibid., pp. 35-36.

11. Ibid., p. 32.

12. Ibid., p. 34.

13. Ibid., p. 39.


15. Ibid., p. 1.
16 Ibid., p. 1.
17 Ibid., pp. 9-10.
20 White, Dissent in INS vs. Chadha, pp. 3-4.
25 White, Dissent in INS vs. Chadha, p. 21.
26 Ibid.
27 Edith Green, "The Road is Paved with Good Intentions," Forum Address given at Brigham Young University, January 25, 1977.
28 Ibid.
29 Ibid.
30 Jacob K. Javits and Gary J. Klein, "Congressional Oversight and the Legislative Veto:


33 White, Dissent in INS vs. Chadha, p. 3.


35 White, Dissent in INS vs. Chadha, p. 3.

36 Green, "The Road is Paved with Good Intentions."


40 Ibid., p. 392.


42 F. M. Kaiser, "Congressional Action to Overturn Agency Rules: Alternatives to the

43 Ibid., p. 688.

44 Ibid., p. 670.


46 Ibid., pp. 673-74.

47 Ibid., p. 669.

48


52 22 U.S. (9 Wheat) 1, 6 L. Ed. 23.
BIBLIOGRAPHY

Books


Periodicals


**Supreme Court Slip Opinions**

**INS v. Chadha,** No. 80-1832, slip op. (U.S. June 23, 1983).


**Magazines and Newspapers**
