CONSTITUTIONAL LAW—THE DEMISE OF THE LEGISLATIVE VETO;
THE STRUGGLE FOR POLITICAL ACCOUNTABILITY: Immigration

INTRODUCTION

On June 23, 1983, the United States Supreme Court ruled that
a “legislative veto” provision in the Immigration and Nationality
Act violated the constitutional requirement that legislation be en-
acted by both houses of Congress and presented to the President
for signature or veto. The Supreme Court’s ruling in the deporta-
tion case of Immigration and Naturalization Service v. Chadha swept
aside a fifty-year-old device found in more than two hundred
statutes. Justice White, one of two dissenting Justices, wrote that
the “decision strikes down in one fell swoop provisions in more
laws enacted by Congress than the Court has cumulatively invali-
dated in its history.”

The purpose of this article is to trace the statutory and consti-
tutional history of the legislative veto; to analyze the Supreme
Court’s decision in Chadha; to assess the potential impact of
Chadha on other statutes—most notably the War Powers Resolu-
tion—and ultimately to reach some conclusions relative to the ef-
effect of Chadha upon the constitutional balance of power among
the three branches of the federal government.

HISTORICAL REVIEW OF THE LEGISLATIVE VETO

It has recently been questioned whether Congress, under the
guise of a legislative veto, can do what article I, section 7, clause 3
of the Constitution prohibits. The answer to the question appears
to depend on what power Congress is exercising under a legisla-
tive veto: executive, legislative, judicial—or some combination

1. Immigration and Nationality Act of 1942, § 244(c)(2), 8 U.S.C. § 1254(c)(2)
(1982).
3. Smith & Struve, After Shocks of the Fall of the Legislative Veto, 69 A.B.A.J.
5. See id. at 2811-16 for a list of statutes with provisions authorizing congres-
sional review. The list was attached as an appendix to Chadha and divides statu-
tory veto provisions into six broad categories: foreign affairs and national security,
budget, international trade, energy, rulemaking and miscellaneous. Id. at 2811. See
also Smith & Struve, supra note 3, at 1258.
However, as the Supreme Court of the United States noted in the 1928 case of *Springer v. Philippine Islands*, it is a "general rule inherent in the American constitutional system . . . [that] the legislature cannot exercise either executive or judicial power." Addressing this issue, the Court recently held in *Chadha* that the exercise of a legislative veto, having the effect of legislation, must meet the "presentation" and "bicameral" requirements of article I, section 7, clauses 2 and 3 of the Constitution.

The legislative veto provision is essentially a device used by Congress to review and perhaps veto certain presidential actions without enacting legislation requiring the President's approval. The end result is that the President is vetoed without having the opportunity to veto the veto. Moreover, legislative vetoes have been used in many forms in many statutes: some require action by both the Senate and the House, some by only one house, as the resolution in *Chadha*, and some by congressional committees.

10. 277 U.S. 189, 201 (1928).
11. U.S. Const. art. I, § 7, cls. 2-3. See also *Chadha*, 103 S.Ct. at 2787. "Presentation" is the requirement that legislation be presented to the President before becoming law. *Id.* at 2782. The "bicameral" requirement provides that no law can take effect without the concurrence of the prescribed majority of the members of both Houses. *Id.* at 2783.
14. See e.g., War Powers Resolution § 5(c); Reorganization Act of 1939, ch. 36, § 5(a), 53 Stat. 562-63 (1939).
15. See e.g., Immigration and Nationality Act § 244(c) (2); Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414 (1932) (reorganization simple resolution) [hereinafter referred to as Act of 1932].
16. See, e.g., Act of Nov. 26, 1969, Pub. L. No. 96-126, 83 Stat. 228, 229 (1969) (public buildings—approve construction expenditures, prospects); Regional Action Planning Commission Amendment of 1969, Pub. L. No. 91-123, § 202, 83 Stat. 216 (1969) (direct administrative study regarding alteration of geographic regions). There are three kinds of resolutions, simple, concurrent or joint. See C. Sands, *Statutes and Statutory Construction* (4th ed. 1972). A simple resolution is a formalized motion passed by the members of a single legislative house. Concurrency of the other House is not required. It is an expression of the wish or opinion of the House adopting it. It is commonly used to extend sympathy on the death of a member, to express recognition for meritorious service, to create special committees, to request information from administrative agencies and to express the sense of the legislative house to another governmental body. C. Sands, *supra* at § 29.02 . . . . Joint resolutions are submitted and passed in one House before being sent to the other House. Changes made by one House must be ratified by the other. Presidential action is required. In general, a joint resolution follows the same legislative course as a bill. . . . A duly enacted joint resolution has the effect of law. *Id.* at § 29.04.

A concurrent resolution is essentially a simple resolution which is passed by both Houses of the legislature. Since a concurrent resolution has the force of both Houses, it must be approved by both. It expresses the action of the entire legisla-
The legislative veto, sometimes referred to as the Congressional veto, allows the President or an independent administrative agency to legislate and Congress to veto the legislation.\footnote{Keeffe II, supra note 12, at 1474.} The device thus may shift the balance of government power toward Congress, and allow the legislative branch to dominate the executive branch, a situation greatly feared by the Framers of the Constitution.\footnote{Levi, Some Aspects of Separation of Powers, 76 Colum. L. Rev. 371, 382-83 (1976) (Levi discusses various cases).}

While the encroachment of one branch of our government into another is not a new phenomenon,\footnote{Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983, 990 (1975). See also Hollingsworth v. Virginia, 3 U.S. (1 Dall.) 378, 378-79 (1798) of the powers explicitly granted to the two houses of Congress, only the power to propose constitutional amendments has been interpreted to be not subject to the president's veto.} the use of the legislative veto as an oversight mechanism of administrative action results in a new and ironic reversal of roles—the executive making the laws and the legislature wielding the veto.\footnote{Id. at 372.} Since fear of legislative supremacy goes to the heart of the American tradition, which in fact began in rebellion against prerogative and government without representation, one must ask whether the legislative veto is, in reality, nothing more than another form of congressional supremacy feared by the Framers.\footnote{Id. at 375.} In this vein, it must be remembered that the Constitutional Convention of 1787 was a reaction to the unchecked power of the legislature.\footnote{Id. at 372.} The Constitution itself, beginning with “We, the People,”\footnote{U.S. Const. preamble.} also dramatizes that \textit{each branch} of government was to serve the sovereign people from whom it derived its powers; those powers in turn were to be subject to the limitations imposed by their Constitutional grants of authority.\footnote{Levi, supra note 19, at 376.} Supporting this, Hamilton wrote that “in framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control...
Although history cannot give complete answers to the questions the legislative veto raises, it provides an understanding of the Framers' goal in their attempt to derive an efficient, interdependent government operating within a flexible system of separated powers. In short, the Framers and their successors, at least through the 1800's, envisioned a government with a fairly limited use of bureaucracy.

Early congressional resolutions that directed executive action were restricted to gathering information presumably necessary for legislating. When the history of such resolutions is examined, it can be seen that although Congress developed a number of roles which do not appear legislative, such functions were in fact related to the legislative process. Congress' purpose, then, was to facilitate legislation rather than to execute laws. In this way the new duties did not represent an expansion of Congress' traditional role. This is to be contrasted with extra-legislative control for which it is argued the legislative veto is used today. The early congressional activity gradually developed into techniques for exercising power other than that directed towards legislative ends. An early example is the Act of January 12, 1895, which dealt with printing of congressional documents, but which also gave congressional committees control over agency printing. This practice marked a distinct break with previous legislative behavior in that

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27. Abourezk, The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives, 52 Ind. L.J. 323, 328-29 (1977). The Framers could not anticipate the growth of a huge federal bureaucracy exercising powers delegated by one branch in order to execute the constitutional duty of another [emphasis added]. Matters that are now handled by administrative agencies were able to be drafted in detail in statutes. For example in the Act of April 20, 1818, ch. 87, 3 Stat. 445 (1818) (repealed 1927) specified how many clerks every department and office could employ and set the exact salary for each one. Also, in 4 Annals of Cong. 1504 (1795) Congress directed the route to be taken by a postman in traveling between two cities. Id. at 328-29.
28. Watson, supra note 18, at 1002.
29. Id. Congress directed the executive to obtain and transmit information to it. Congress also controlled the Joint Committee on the Library which administered the Library of Congress and resembled an administrative agency.
30. Id.
31. Id.
32. Id. at 1003.
34. Watson, supra note 18, at 1003, where the author also discusses a series of enactments authorizing a commission with congressional members to either select or approve land for memorials to various historic figures, or to approve the design of certain structures. Id.
it called for substantive congressional decisions not directed toward the enactment of legislation.\textsuperscript{35}

Even though extra-legislative use of the resolution continued, it met with more opposition because of the political differences between various Presidents and the Congress.\textsuperscript{36} Finally in 1938, Congress attempted passage of the Reorganization Act of 1939.\textsuperscript{37} Generally, the Act authorized the President to formulate and to submit to Congress a plan for reorganizing the executive branch of government.\textsuperscript{38} The bill died in committee because of President Roosevelt's opposition to the House of Representative's insistence on including an authorization for disapproval by concurrent resolution.\textsuperscript{39} After much debate and a major Supreme Court decision,\textsuperscript{40} the Reorganization Act of 1939 was finally passed and signed by the President.\textsuperscript{41} This marked the beginning of an almost

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\textsuperscript{35} Id.

\textsuperscript{36} Id. at 1004-13. This opposition was shown in two ways: (1) there was more debate on the constitutional issues as President Wilson's supporters attempted to defeat passages of the offending statutes and (2) President Wilson vetoed two measures which he considered to confer improper powers upon Congress. Id. at 1004. See also, Debate on U.S. membership in League of Nations, 58 CONG. REC. 8075 (1919); Budget and Accounting Bill of 1920, H.R. 9783, 66th Cong. 2d Sess. (1920). Congress resumed attempts at extra-legislative controls over administrative activities in the early part of 1930, with a series of reorganization acts providing for such control. Watson, supra note 18, at 1009. The Legislative Appropriation Act of 1932, ch. 314, § 407, 47 Stat. 414 (1932) led the way. For examples of statutes calling for disapproval by simple or concurrent resolution of reorganization plans submitted to Congress, see Watson, supra note 18, at 1009-10 n.115.

Keeffe I, supra note 8, at 1296. Historically, the concept of the legislative veto came about through a request by President Hoover for authorization to reorganize executive departments. Congress enacted the Executive Reorganization Act of 1932 which allowed Congress to disapprove any reorganization plan presented by the President by action of either House. Id. citing Act of 1932, supra note 15.

Watson, supra note 18, at 1012. The constitutionality of this legislation came under attack by Atty. Gen. Mitchell, see 37 Op. Att'y Gen. 56, 63-64 (1933), when he advised the President to veto the Urgent Deficiency Bill, H.R. 13975, 72d Cong., 2d Sess. (1933). President Hoover's subsequent veto of the bill marked a brief period of congressional retreat. Attempts to include legislative veto provisions in the bill were made in both Houses but failed; debate indicated acceptance of the Attorney General's proposition that such power was not properly exercised without the concurrence of both Houses and opportunity for the president's veto. Watson, supra note 18, at 1012-13.

\textsuperscript{37} Reorganization Act of 1939, § 5(a). See also Watson, supra note 18, at 1013.

\textsuperscript{38} Watson, supra note 18, at 1076-77.

\textsuperscript{39} Id. at 1013. See also 83 CONG. REC. 4487 (1938) for President Roosevelt's statement that "[s]uch a (concurrent) resolution cannot repeal Executive action taken in pursuance of a law."

\textsuperscript{40} Currin v. Wallace, 306 U.S. 1 (1939). The Court upheld a statutory scheme in which Congress delegated to the Department of Agriculture the power to inspect tobacco pursuant to permission given by a vote of tobacco growers allowing their tobacco to be subject to such inspections. Id. at 5-6.

\textsuperscript{41} Id. at 15-16. The provision for a referendum vote of the tobacco growers was not an abdication of Congress' legislative function, but an exercise of its legisla-
explosive increase in the use of concurrent resolution provisions as means of controlling executive powers and actions.\textsuperscript{42}

**SYNOPSIS OF THE OPINION**

The *Chadha* \textsuperscript{43} case involved a constitutional challenge to section 244(c)(2) of the Immigration and Nationality Act, which authorized one House of Congress, by resolution, to invalidate a decision of the Executive Branch.\textsuperscript{44} Jagdish Rai Chadha, joined by the Immigration and Naturalization Service, challenged the constitutionality of this veto provision in the United States Court of Appeals for the Ninth Circuit.\textsuperscript{45} The court of appeals held that section 244(c)(2) violated the doctrine of separation of powers.\textsuperscript{46} The Supreme Court granted certiorari,\textsuperscript{47} and affirmed.\textsuperscript{48} The Supreme Court held that the section authorizing one House of Congress, by resolution, to invalidate a decision of the executive branch was essentially legislative, and thus subject to the Constitution's requirements of passage by a majority of both Houses and

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\textsuperscript{42} Watson, *supra* note 18, at 1014. Concurrent resolution provisions in statutes ranged from Congress' ability to repeal daylight savings time, Act of Jan. 20, 1942, ch. 7, § 2, 56 Stat. 9 (1942), to terminating the President's power under the Lend Lease Act, Act of Mar. 11, 1941, ch. 11, § 3(c), 55 Stat. 31 (1941). Although President Roosevelt had indicated a dislike for such resolutions in his 1938 comments to Congress, see 83 CONG. REC. 4487 (1938), he signed the Lend Lease Act and other provisions in silence. Watson, *supra* note 18, at 1015. But see Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1335 (1953) for an account of Roosevelt's feelings regarding this issue. President Roosevelt's acquiescence in the use of concurrent resolutions during the war was continued by President Truman and his successors with only occasional presidential protest. For a detailed discussion see Watson, *supra* note 18, at 1016-29.

\textsuperscript{43} Immigration & Naturalization Serv. v. Chadha, 103 S.Ct. 2764, 2769-70 (1983).

\textsuperscript{44} Immigration and Nationality Act § 244(c)(2).

\textsuperscript{45} Chadha v. Immigration & Naturalization Serv., 634 F.2d 408 (9th Cir. 1980).

\textsuperscript{46} Id. at 420.

\textsuperscript{47} Chadha, 103 S.Ct. at 2769.

\textsuperscript{48} Id. at 2772.
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of presentation to the President.49

FACTS

Jagdish Rai Chadha was lawfully admitted to the United States in 1966 on a nonimmigrant student visa.50 When his visa expired on June 30, 1972, the District Director of the Immigration and Naturalization Service (INS) ordered Chadha to show cause why he should not be deported.51 A deportation hearing was held before an immigration judge on January 11, 1974, and at this time Chadha conceded that he was deportable for overstaying his visa.52 Chadha filed an application for suspension of deportation pursuant to section 244(a)(1) of the Immigration and Nationality Act.53 A deportation hearing was resumed on February 7, 1974, at which time affidavits were submitted and a character investigation was conducted by the INS.54 On June 25, 1974, the immigration judge ordered that Chadha's deportation be suspended, finding that Chadha met the requirements of section 244(a)(1); "[H]e had resided continuously in the United States for over seven years, was of good moral character and would suffer 'extreme hardship' if deported."55

A report of the suspension was transmitted to Congress pursuant to section 244(c)(1).56 Under section 244(c)(2),57 Congress had

49. Id. at 2785.
50. Id. at 2770.
51. Id.
52. Id.
53. Id. at 2770. Immigration and Nationality Act § 244(a)(1) provides:
(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection, has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Id.
54. Chadha at 2770.
55. Id.
56. Id. Immigration and Nationality Act 244(c)(1) provides:
Upon application by an alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such
the power to veto the decision that Chadha should not be deported. Chadha's suspended deportation order remained outstanding for a year and a half.

On December 12, 1975, Representative Eilberg introduced a resolution to the House Committee on the Judiciary against granting permanent residence in the United States to six aliens, including Chadha. The resolution was discharged from further consideration by the House Committee on the Judiciary and submitted to the House of Representatives for a vote on December 16, 1975. The resolution denying Chadha permanent residence status in the United States was passed without debate or recorded vote. Pursuant to House action, Chadha was ordered deported on November 8, 1976.

The Opinion Regarding the Constitutionality of § 244(c)(2)

The Opinion of the Majority

In its majority opinion, written by Chief Justice Burger, the Court held that the legislative veto provision delineated in section

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57. Id. § 244(c)(2) provides:
In the case of an alien specified in paragraph (1) of subsection (a) of this section—if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien’s voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

58. Chadha, 103 S.Ct. at 2770-71.
59. Id. at 2771.
61. Chadha, 103 S.Ct. at 2771. The resolution had not been printed and was not made available to other members of the House prior to or at the time it was voted on, and so far as the record shows, the House’s consideration of the resolution was based on Representative Eilberg’s, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, statement from the floor that:
   It was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution [Chadha and five others] did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended.

62. Chadha, 103 S.Ct. at 2771.
63. Id. at 2772.
64. Immigration and Nationality Act § 244(c)(2).
244(c) (2) of the Act violated article I, section 7, clauses 2 and 3 of the Constitution. In deciding this issue, the Court was guided by the purposes underlying the Presentment Clause and the bicameral requirements of the Constitution. The legislative action prescribed in article I, sections 1 and 7, according to the Court, represented the Framers' decision that no law could take effect without concurrence of the required majority of the members of both Houses, and presentment to the President. The President's power to veto the legislation was limited by Congress' ability to overrule a veto by two-thirds majority in each House. This system of checks and balances precluded final arbitrary action by one person.

The Court concluded that action taken by one House pursuant to section 244(c) (2) was essentially legislative in purpose and effect, and thus subject to the presentation and bicameralism provisions in the Constitution. The House's action had the purpose and effect of altering the legal rights of persons, including the Attorney General, Executive Branch officials, and Chadha. Absent the House action, Chadha would have been allowed to remain in the United States. Thus, without the aid of the legislative veto provision in section 244(c) (2), Congress could not have ordered Chadha deported—without first passing legislation requiring deportation. The Court stated that amendment and repeal of statutes, as well as enactment of statutes, must conform with article I.

The Concurrence

Justice Powell concurred. He argued that Congress had assumed a judicial function in determining whether Chadha had met the statutory criteria for permanent residence in this country. In this respect, Congress had assumed the role of a court, in violation of the principle of separation of powers. In making a determina-

67. *Id.* at 2782-83.
68. *Id.* at 2784.
69. *Id.*
70. *Id.* at 2784-85. See U.S. CONST. art. I, § 7, cls. 2, 3.
71. *Chadha*, 103 S.Ct. at 2784.
72. *Id.* at 2784-85.
73. *Id.* at 2785.
74. *Id.*
75. *Id.* at 2789 (Powell J., concurring).
76. *Id.*
77. *Id.*
tion whether one branch has unconstitutionally assumed a power central to another branch, the Court should ask whether the act in question raises the dangers the Framers sought to avoid, namely the exercise of unchecked power.\footnote{78} In the instant case the effect on Chadha's personal rights would have been no different in principle had Chadha been acquitted of a federal crime and thereafter found by one House of Congress to have been guilty of that crime.\footnote{79} In this respect Congress exercised unchecked judicial power at the expense of individual liberties.\footnote{80} Thus, the House's assumption of a judicial function raised the danger the Framers sought to avoid and in so doing violated the principle of separation of powers.\footnote{81}

The Dissent

Where the majority of the Court viewed the legislative veto as a violation of the constitutional provisions under article I, Justice White viewed the legislative veto as a means of defense, a reservation of ultimate authority necessary if Congress were to fulfill its designated role as the nation's lawmaker.\footnote{82} Justice White cautioned that courts should be wary of striking statutes as unconstitutional and that "to strike an entire class of statutes based on consideration of a somewhat atypical and more-readily indictable exemplar of the class . . . [was] irresponsible."\footnote{83}

Justice White argued that the constitutional question posed by the legislative veto was one of immense difficulty over which executive and legislative branches, as well as scholars and judges, have disagreed.\footnote{84} The Constitution is silent on this precise question in that it does not directly authorize or prohibit the legislative veto.\footnote{85} In as much as the government today has become an endeavor far beyond the contemplation of the Framers in 1787, Justice White expressed the view that the Court's task should be to determine whether the legislative veto was consistent with the purposes of article I and the principle of separation of power that is reflected throughout the Constitution.\footnote{86}

\footnote{78} Id. at 2791 (emphasis added). See also Id. at 2791-92 n.7.  
\footnote{79} Id. at 2791 n.8.  
\footnote{80} Id. at 2790 n.4.  
\footnote{81} Id. at 2792.  
\footnote{82} Id. at 2796 (White J., dissenting).  
\footnote{83} Id. (emphasis added). See also id. at 2798 (for a listing of the number of statutes and the period of time Congress has used the legislative veto device).  
\footnote{84} Id. at 2797. See also id. at n.12-14 (for a listing of commentaries both favorable and unfavorable).  
\footnote{85} Id. at 2798.  
\footnote{86} Id.
For the Court to find that the challenged action under section 244(c)(2) is legislative in character, it must establish that when Congress exercised its veto power under section 244(c)(2), it was making law. If this were in fact a law-making function, then admittedly the procedural requirements of article I, section 7 would apply. Justice White argued that the legislative veto, on its face, no more allowed one House of Congress to make law than did the President's veto bestow such power upon the President. He further stated that because the legislative veto must be authorized by statute—a law-making function—and could only negate what an executive department or independent agency had proposed, the power to exercise the legislative veto did not become the power to write new law. Thus, the veto power would not be subject to the requirements of article I, section 7 and it is enough that the enabling legislation authorizing the veto complied with the article I requirements. Justice White argued that this analysis was consistent with the Framers' intent and the Necessary and Proper Clause of the Constitution.

When the Convention did turn its attention to the scope of Congress' lawmaking power, the Framers were expansive. The Necessary and Proper Clause, Art. I, § 8, cl. 18, vests Congress with the power "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers (the enumerated powers of § 8), and all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof."

Justice White further stated that the doctrine of separation of powers is concerned with checking each branch's exercise of its characteristic authority. A system which allows delegation of legislative power to the President and his department, but forbids a check on its exercise by that lawmaking body denigrates the separation of powers concerns underlying article I. Justice White argued that if agency activity is "quasi-legislative" in character, and the agencies are capable of making rules having the effect of law, then Congress should be allowed to check this quasi-legisla-

87. Id. at 2799.
88. Id. at 2798-99.
89. Id. at 2799.
90. Id.
91. Id. at 2802.
93. Chadha, 103 S.Ct. at 2801.
94. Id. at 2803 n.20.
95. Id.
tive delegation of power through the use of a legislative veto. 96

Justice White made a persuasive argument that the presentation and bicameralism requirements of article I are not compromised by section 244(c)(2) of the Act. For example, when the executive branch chooses to recommend or not to recommend suspension of deportation, the House and Senate may each veto the recommendations. 97 The effect on the rights of the affected individuals and upon the legislative system is precisely the same as if a private bill were introduced, but failed to receive the necessary approval. 98 A suspension order is only a "deferment of deportation" which can mature into a cancellation of deportation only upon the approval of Congress; nothing in the law is changed absent the concurrence of the President and a majority in each House. 99 Even if the action of the executive branch is considered to be a proposal for legislation, then the disapproval of but a single House is all that is required to prevent its passage. 100 In the instant case, approval could be indicated by the failure to veto; therefore, the one-House veto would in fact satisfy the requirement of bicameral approval, and as such the requirements of article I are not compromised by the legislative veto scheme. 101

In determining whether section 244(c)(2) violated the principle of separation of powers, the test according to Justice White was whether the Act disrupted the proper balance between the coordinate branches of government. 102 In the instant case the question was whether section 244(c)(2) prevented the executive branch from accomplishing its constitutionally assigned function. 103 In addressing this issue, Justice White argued that the Executive Branch had no "constitutionally assigned" function regarding the deportation of aliens. 104 Justice White, quoting earlier Supreme Court opinions, noted that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." 105 Justice White also argued that the inherent function of the executive branch under article II in executing the law was not disrupted by the legislative veto scheme at issue;

96. Id. at 2803-04.
97. Id. at 2806.
98. Id. at 2806-07.
99. Id. at 2807.
100. Id. at 2808.
101. Id.
102. Id. at 2809.
103. Id.
104. Id.
he supported this argument by pointing out that article II is a mandate to the President to enforce the law which Congress has written. This duty to faithfully execute the law does not require the executive branch to achieve more than Congress sees fit to leave within its power; in this case, section 244 granted to the executive branch no more than a qualified suspension authority.

Justice White also disagreed with Justice Powell that section 244 infringed on judicial power. Judicial review is limited to whether the executive has properly applied the statutory standards for denying an alien a recommendation that his deportable status be changed by Congress. Justice White argued that although "government may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend," there is no constitutional obligation to provide judicial review for a failure to suspend deportation.

According to Justice White, the legislative veto device in Chadha was far from legislative tyranny over the executive branch. Rather, it served as a necessary check on the expanding power of the agency.

**Analysis**

**The Legislative Veto Provision In Chadha**

 Presidents and Attorneys General have maintained that legislative veto provisions as oversight mechanisms governing administrative agencies are unconstitutional in that they are offensive to the doctrine of separation of powers. When Congress decides what constitutes "desirable" enforcement policy, as was the situation in Chadha, these mechanisms intrude on the power of the executive branch to execute the laws. Moreover, they become an intrusion upon the province of the judiciary when they allow Congress to review the executive's compliance with the statutory in-

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106. *Id.* at 2809.
107. *Id.* at 2809-10.
108. *Id.* at 2810.
109. *Id.*
110. *Id.*
111. *Id.* (quoting Fong Yue Ting v. United States, 149 U.S. 698, 713-14 (1893)).
112. *Id.*
113. *Id.*
114. *Id.*
116. *Id.* See also notes 60-63 and accompanying text. *supra.*
tent of the legislation. In spite of these criticisms, the Supreme Court had not chosen to decide the constitutionality of the legislative veto until Chada.

The legislative veto provision in the Immigration and Nationality Act of 1952 allowed a single House of Congress to reverse the Attorney General's decision in deportation cases. In this regard, the legislative veto had the effect of blocking administrative action taken under the statute. According to the Court, the effect was basic policymaking by Congress, in nonstatutory form, and in this respect the majority held it violated article I, section 7, clauses 2

117. See Chadha, 103 S.Ct. at 2791-92 (Powell J., concurring).
118. Martin, supra note 42, at 254 n.4. In Buckley v. Valeo, 424 U.S. 1 (1976), the appellant attacked the constitutionality of a part of the Federal Election Campaign Acts as a valid qualification of the Commission's rulemaking authority. Id. at 140 n.176. Federal Election Campaign Act of 1971, § 315(c), 2 U.S.C. § 438(c) (1982). The Supreme Court never addressed the issue because it held that the appointment of the members of the Commission violated art. II, § 2, cl. 2 of the Constitution and as such precluded the Commission from exercising the rulemaking powers in question. Buckley, 424 U.S. at 140-41. In Clark v. Valeo, 559 F.2d 642 (D.C. Cir. 1977) (en banc) aff'd mem., sub. non. Clark v. Kimmitt 431 U.S. 950 (1972), five constitutional questions were certified to the United States Court of Appeals for the District of Columbia pursuant to the judicial review provisions of the Federal Election Campaign Act (FECA) as amended. Valeo, 559 F.2d at 644-45, 645 n.2. One question included a challenge of the constitutionality of § 438(c). The United States Court of Appeals dismissed Clark's claim as unripe since Clark did not get his party's nomination and he failed to show that the facial provisions of FECA inhibited his political activities as a voter. The claim of the United States was dismissed as unripe also because Congress had not yet exercised the one House veto. Id. at 647-48. The Supreme Court affirmed summarily the lower court's decision. Clark v. Kimmitt, 431 U.S. 950 (1977). In Atkins v. United States, 556 F.2d 1028 (Cl. Ct. 1977), a divided court held that the one-House veto in § 225(i) (1)(B) of the Federal Salary Act of 1967, 2 U.S.C. 359(1)(B) (1982), which dealt in part with a matter confined to salaries, an area traditionally within the province of the legislative branch, did not impinge upon presidential function or veto rights and therefore did not fall into the classification of acts requiring affirmative concurrence of both Houses. Atkins, 556 F.2d at 1053. The one-House veto did not alter existing law but only preserved the legal status quo. Id. The Supreme Court denied certiorari. 434 U.S. 1009 (1978). In Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 439 (1977), the Court limited its consideration of the constitutional challenge of the veto to the facial validity of the provisions in the Presidential Recordings and Material Preservation Act, § 104(b), 44 U.S.C. § 2107 (Supp. V 1981). As such it did not address the validity of § 104(b), disapproval of the administrator's regulations by either House of Congress. Nixon, 433 U.S. at 500 n.4. In Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1977), the United States District Court for the District of Columbia upheld the constitutionality of the Postal Revenue and Federal Salary Act of 1967, § 225(i), 2 U.S.C. § 359 (1982). Under the Act pay rates are recommended by the President for members of Congress and these rates become effective 30 days after the budget is submitted to Congress, unless other rates have been enacted by law, or one House of Congress has disapproved all or part of the recommendations. Id. at 303. The Supreme Court affirmed the lower court's decision in a memorandum opinion. Pressler v. Blumenthal, 434 U.S. 1028, 1028 (1978).

119. Immigration and Nationality Act § 244(c)(2).
120. See note 44 and accompanying text supra.
and 3 of the Constitution.\textsuperscript{121} The majority reasoned that Congress was making new law by modifying an extant scheme of delegated power, and therefore had to follow the procedure proscribed by the Constitution, specifically, passage by both Houses of Congress and presentation to the President.\textsuperscript{122}

\textit{Congress' Legislative Power Under Article I, Section 1}

Although the Constitution allocates legislative power under article I, section 1, it fails to define precisely what the power to "legislate" is.\textsuperscript{123} Article I, section 7, clause 3 states that "[e]very Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives \textit{may be necessary} shall be presented to the President of the United States . . . ." However, no guidance is given as to which acts of Congress require such concurrence.\textsuperscript{124} In light of \textit{Chadha}, the ability to define what is "legislation" is critical to an analysis of the enactment of statutes containing legislative veto provisions.\textsuperscript{125} Whether such legislation

\begin{itemize}
  \item \textsuperscript{121} U.S. Const. art. I, § 7, cls. 2, 3. See note 49 and accompanying text supra.
  \item \textsuperscript{122} See notes 70-74 and accompanying text supra.
  \item \textsuperscript{124} Stewart, \textit{Constitutionality of the Legislative Veto}, 13 Harv. J. on Legis. 593, 610 (1976) (emphasis added).
  \item The Constitution prescribes three instances in which the concurrence of both Houses is necessary; the enacting of law, the adjournment of Congress and the proposing of Constitutional amendments. While the meaning of two of these is reasonably clear, the meaning of "the enacting of law" can only be ascertained by considering the history and purpose of the clause. The only congressional actions to which Clause three has been declared applicable have been joint resolutions, which resemble laws and which have the authority of law when approved by the President.
  \item Id. The clearest exposition of this view appears in S. Rep. No. 1335, 54th Cong., 2d Sess., (1897). That report is regarded widely as an authoritative statement of the meaning of art. I, § 7, cl. 3. The committee there stated: We conclude this branch of the subject by deciding the general question submitted to us, to wit, "whether concurrent resolutions are required to be submitted to the President of the United States," must depend, not upon their mere form, but upon the fact whether they contain matter which is properly to be regarded as legislative in its character and effect. If they do, they must be presented for his approval; otherwise, they need not be. In other words, we hold that the clause in the Constitution which declares that every order, resolution, or vote must be presented to the President, to "which the concurrence of the Senate and House of Representatives may be necessary," refers to the necessity occasioned by the requirement of other provisions of the Constitution, whereby every exercise of "legislative powers" involves the concurrence of the two Houses; and every resolution not so requiring such concurrent action, to wit, not involving the exercise of legislative powers, need not be presented to the President. In brief, the nature or substance of the resolution, and not its form, controls the question of its disposition.

\item Id.

\item \textsuperscript{125} See Henry, supra note 123, at 743.
\end{itemize}
must comply with the requirements set forth in article I depends upon whether the veto provision involved can be regarded as legislative in its character and effect. For instance, resolutions involving matters internal to Congress, or matters expressing the “sense of the Senate” or the “sense of the House of Representatives,” are not considered to be legislation.

One commentator believes a clear example of a legislative veto resolution that is “legislative in its character and effect” is one which entirely terminates a statutory delegation. Such a situation would exist if, by passing a concurrent resolution, Congress could end the legal force of a statute without the President’s involvement. This would raise the question of whether the statute had been effectively repealed or modified. If so, Chadha demands that such legislative action conform with article I, section 7 requirements.

In the 1976 United States Supreme Court case of Buckley v. Valeo, the appellants attacked the constitutional validity of the Commission’s rulemaking authority as provided in section 438(c)(1) of the Federal Election Campaign Acts. Justice White, concurring in part and dissenting in part, argued that repeal by legislative veto in certain circumstances is not tantamount to legislation in the constitutional sense. He expressed the view that the retained congressional power to veto regulations carried with it no authority to adopt new regulations. Justice White reiterated this argument in Chadha when he stated that since Congress could only act negatively on the rules, no new rule could emerge on which the presidential veto power could operate.


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126. Id. On what is law and what constitutes legislative policy A. Hamilton said, “A law, by the very meaning of the term, includes supremacy. It is a rule, which those to whom it is prescribed are bound to observe.” The Federalist No. 33, at 257 (A. Hamilton) (J. Hamilton, ed. 1880).
127. Henry, supra note 123, at 744.
128. Id. (emphasis added).
129. Id.
133. Buckley, 424 U.S. at 284-86 (White, J., dissenting).
134. See id. at 284-85.
135. See text at note 90 supra; FitzGerald, supra note 115, at 436. One must consider whether the legislative negation of rules may by attrition change the substance of the statute without following the congressional amendment procedure. At any rate the result is that the administrative agency is not free to execute the law in the normal legislative process. Id.
Valeo,136 which also dealt in part with the constitutionality of section 438(c) of the Federal Election Campaign Act, took issue with Justice White’s position in Buckley.137 Justice MacKinnon argued that:

to assert that Congress does nothing when the vote or action of Congress is to not veto a regulation is merely to play with words and to deny reality. Such interpretation of the legislative situation incorrectly describes what happens when Congress decides to not veto a regulation. That result is definite action—not “nonaction.”138

If one were to agree with Justice MacKinnon, then an unexercised legislative veto that does not modify existing law, but maintains it unaltered, is of a legislative character.139

Reverse Legislation

If the assumption can be made that a legislative veto in some forms is a “legislative act” within the meaning of article I, section 1, then the next question to be raised is whether the bicameral requirement can be satisfied by a legislative veto provision requiring action by either House.140 In this context, consider such legislative arrangements as the Salary and the Reorganization Acts.141 Under the Salary Act, the President’s recommendations to Congress become effective automatically within a specified time, but only to the extent that: (1) there has not been enacted into law a statute which establishes rates of pay other than those proposed; or (2) neither House of Congress has enacted legislation which specifically disapproves all or part of the recommendations submitted by the President.142 Under the Reorganization Act, the President formulates and submits to Congress a plan for reorganizing the ex-

137. Federal Election Campaign Act § 438(c). Clark, 559 F.2d at 685. See also notes 131-34 and accompanying text supra.
138. Id. at 686-87.
139. See Henry, supra note 114, at 747.
140. Id. at 748. U.S. CONST. art. I, § 1. Letter from Griffin Bell to President Carter (Jan. 31, 1977), H.R. REP. No. 105, 95 Cong., 1st Sess. 1, 10 (1977) reprinted in 1977 U.S. CODE CONG. & AD. NEWS 41, 51. With regard to this issue, former Attorney Gen. Griffin Bell stated that in his opinion the one-house veto is functionally equivalent to an affirmative bicameral veto because both Houses have equal power to accept or reject the plan. Id. Such an interpretation dispenses with legislative formalities under Art. I, § 7, cl. 2, 3. Henry, supra note 114, at 748-49.
142. Postal Revenue and Federal Salary Act § 225(i)(1)(B). See also Atkins, 556 F.2d at 1057.
executive branch.\textsuperscript{143} Under both of these Acts, the President submits a proposal for subsequent approval by either one or both Houses.\textsuperscript{144} An argument has been made that the process is constitutional under the theory of "reverse legislation."\textsuperscript{145}

The concept of reverse legislation is to be contrasted with legislation that falls outside of the scope of the Salary and Reorganization Acts, such as the situation in Chadha.\textsuperscript{146} In Chadha, under the Immigration and Nationality Act, the President consents in advance to changes Congress may wish to make in existing law when he makes regulations or recommendations.\textsuperscript{147} This is not the case under the theory of reverse legislation, which relies on article II, section 3 of the Constitution. Article II, section 3 states that the President shall "recommend to their [Congress'] consideration such measures as he shall judge necessary and expedient."\textsuperscript{148} Several commentators have noted that in the reverse legislation situation the President and Congress are exercising power equivalent to that which they exercise in the regular legislative scheme.\textsuperscript{149} For example, when acting under the Salary and Reorganization Acts, the President has ultimate veto power through formulation of the proposals he approves.\textsuperscript{150} In this context, all that "reverse legislation" does is to reverse in time the exercise of power by the President and the Congress.\textsuperscript{151}

According to one commentator, the essential aspect of the potential "reverse legislation" exception are that: (1) the President's
veto power under article I is preserved because of his proposal power at the beginning—instead of a veto power at the end; (2) such statutes as the Salary and Reorganization Acts, that call for a discrete sequence of legislative choices, are not intertwined with program administration and therefore article II considerations are not reached; (3) the Congressional role is preserved in that unless both Houses concur, by withholding a negative vote, the status quo remains unchanged; and (4) the President's role is safeguarded provided that there is no selective veto power in Congress. Thus, the one-house veto, narrowly confined to the four criteria just indicated, would seem to have a high claim for validation.

Also, the concern for truncating the usual legislative process of full deliberation and responsible voting that flows from the exercise of the legislative veto, even in the limited context of the reverse legislation area, is a concern that goes to important considerations relevant to a democratic political system. However, raising these concerns to the level of a general constitutional requirement as a basis to attack the congressional veto may prove too much. Bicameralism does not guarantee use of a full deliberative process in each instance in each house, as advantageous as that might be in the ideal world. It should be difficult to fault a one-house veto provision in the limited context of the Salary and Reorganization Acts where article II considerations are not reached and where the reverse legislation's built-in constraints offer no basis for a vast expansion of the congressional veto device that could threaten our basic separation of powers system.

The situation in Chadha is not the same as reverse legislation where the President proposes a plan to Congress to be accepted or

152. Dixon, supra note 145, at 485.
153. Id. at 486. If Congress can, through the use of an item veto, modify—in essence negate—part of the president's proposal but not all of it, and there is no opportunity for the President to agree or not, then his constitutional parity with Congress in lawmaking is undermined. Id. at 485.
154. Id. at 488. The author stated:
    Attorney General Griffin B. Bell reached a result consistent with a reverse legislation theory in arguing that the new Reorganization Act, with its one-house veto provision as proposed by President Carter and thereafter enacted, would be constitutional . . . . Bell noted that Congress and the President would possess, 'the same relative power as under the normal art. I legislative process' and added: 'the reorganization statute does not involve creation of a new substantive program, or congressional interference with authorized administrative discretion in an ongoing program.'
    Id. at 486 (Dixon quoting Attorney General Bell from his letter to the President).
155. Id. at 488.
156. Id.
157. Id. at 488-89 (emphasis added).
rejected in total by Congress; rather it is an example of Congress assigning broad regulatory authority to an agency directing the executive branch to enforce those regulations, which enforcement is reviewed by Congress.\textsuperscript{158} This raises the question whether this use of the legislative veto infringes the power of the President to "execute the law" under article II, section 3.\textsuperscript{159} That the Framers contemplated an independent executive is clear.\textsuperscript{160} According to Alexander Hamilton, the primary inducement to conferring the veto power upon the President was to enable him to defend himself, that is, to protect his office from legislative encroachment. The secondary inducement was to increase the chances in favor of the community against the passing of bad laws through haste, inadverentence, or design.\textsuperscript{161} Hamilton noted that laws pose the greatest threat to the Executive's authority because they are an extremely forceful means of asserting congressional power.\textsuperscript{162} As one commentator stated:

\begin{quote}
Laws form the basis of all affirmative governmental action and mark the course of national policy. Furthermore, the executive depends upon laws for its very existence: it may not act in the absence of laws, and may at any time be re-organized or restricted — perhaps even eliminated to a large degree — by law. In sum, the authority to make law is the authority to structure and run the government.\textsuperscript{163}
\end{quote}

Thus, when Congress circumvents the presidential veto by way of the legislative veto, it in effect weakens the executive's power under article II, rendering it vulnerable to congressional manipulation.\textsuperscript{164} It is a further invasion of the president's power for Congress itself to seek to execute the law by means of a legislative veto.\textsuperscript{165}

**Delegation of Power by Congress**

Some supporters of the legislative veto argue that the veto is merely a delegation of power by Congress to one or both Houses,
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to a committee, or to a committee chairman, and as such, the veto provides a means of preserving congressional authority over broad delegations of decision-making power to administrative agencies. In this respect, it prevents abdication of Congress' legislative power—which is, of course, forbidden by the separation of powers doctrine.

A combination of article I, section 1 and the Necessary and Proper clause has formed the constitutional underpinning that has sanctioned massive delegation of legislative functions. The Court of Claims stated that the Necessary and Proper Clause can authorize a given method of legislating where there has been no violation of the principle of separation of powers. The clause cannot be read to allow an evasion of the other established provisions of the Constitution; the means used must be reasonably calculated to achieve a constitutionally permissible end. Only Congress may legislate and it may not delegate this power without setting forth standards in the enabling statute that identify the acts encompassed by the delegation.

Assuming that Congress were to draft acceptable standards into enabling statutes containing the legislative veto, it would still be necessary to evaluate whether those standards had been properly applied in order to establish a basis for judicial review. Congress need not follow the fact finding procedures of the Administrative Procedure Act as do executive and administrative agencies. Because Congress is not bound by any fact finding procedures, serious problems are raised concerning the legislative veto under the delegation doctrine: "It may be relevant whether the House of Congress rejecting . . . [a] proposed regulation states

166. Id. at 754 n.60.
167. Id.
168. U.S. CONST. art. I, § 1; id. § 8, cl. 18. Atkins, 556 F.2d at 1070-71. See also Henry, supra note 114 at 752.
169. See Atkins, 556 F.2d at 1071.
171. Henry, supra note 123, at 752-53. Schecter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 431 (1935); Field v. Clark, 143 U.S. 649, 692-93 (1892). See FitzGerald, supra note 115, at 441. Some examples of broad legislative delegations to administrative agencies are: The Interstate Commerce Commission may determine the objectives of the national transportation policy, the Secretary of Interior may make and publish rules regarding the Park Service, and the Federal Reserve Board may make rules to carry out the purposes and prevent evasions of the law. Id. In Chadha the standard was "extreme hardship." Immigration and Nationality Act § 244(a)(1); Chadha, 103 S.Ct. at 2770.
172. Henry, supra note 123, at 754.
its reasons along with its disapproval, so that the 'legislative' foundation of that rejection . . . [can] be presented for court analysis."\textsuperscript{175} This concern was present in \textit{Chadha}, in that no records were made of findings of fact before the exercise of the veto.\textsuperscript{176} Thus, under the legislative veto, Congress ends up formulating legislative policy "as it goes along," without having to compromise with the President under threat of his veto.\textsuperscript{177} It, therefore, appears that the legislative veto is more a reservation of Congress' authority than a delegation of its power.\textsuperscript{178}

\textbf{CONGRESSIONAL EXERCISE OF THE VETO—THE PROCESS}

The process by which the legislative vetoes are exercised is part of a complex legal and political relationship between the agencies and Congress.\textsuperscript{179} The usual procedure for exercising the legislative veto is for one or more committees, or subcommittees, to hold hearings and to report to the full House, which then debates the matter before a final vote.\textsuperscript{180} However, time constraints can lead to omissions of some of these steps, as was the case in \textit{Chadha}.\textsuperscript{181} As a result, the full legislative process, namely, approval by both Houses and presentment to the President, is no longer necessary to alter agency policy.\textsuperscript{182} This aspect of the legislative veto scheme was held unconstitutional in \textit{Chadha}.\textsuperscript{183}

Aside from the constitutional issues that the veto raises, it has several effects: (1) since congressional committees give veto resolutions initial consideration, most of the activity is at the committee or subcommittee level;\textsuperscript{184} (2) to the extent rules already formulated are reviewed by Congress; an agency's consideration of public comment in drafting a rule may be displaced; (3) interest groups dissatisfied with an agency's determinations have a second

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\textsuperscript{175} Clark, 559 F.2d at 659 (Leventhal, J., concurring).
\textsuperscript{176} See 121 CONG. REC. 40800 (1975) and text at notes 60-63 \textit{supra}.
\textsuperscript{177} Henry, \textit{supra} note 123, at 754-55.
\textsuperscript{178} Id. at 753. \textit{See also} FitzGerald, \textit{supra} note 115, at 440. An indispensable part of the delegation doctrine is that the policies and standards that are to guide each administrative agency in prescribing rules of conduct binding the citizens subject to its authority must, at a minimum, be provided by Congress in legislation. \textit{Id.} An argument can be made that because Congress is falling short of enacting standards which indicate the legislative policies governing the administrative agencies, Congress thereby avoids a transfer of its lawmaking power. Henry, \textit{supra} note 123, at 753.
\textsuperscript{180} Id.
\textsuperscript{181} See note 62 and accompanying text \textit{supra}.
\textsuperscript{182} Bruff & Gellhorn, \textit{supra} note 179, at 1381.
\textsuperscript{183} See notes 70-74 and accompanying text \textit{supra}.
\textsuperscript{184} See notes 60-63 and accompanying text \textit{supra}.
\end{flushleft}
opportunity to apply pressure in Congress; and (4) the congres-
sional review process places great demands on the time and en-
ergy of both the agency and Congress.\textsuperscript{185}

A major purpose of the legislative veto is to increase the polit-
ical accountability of administrative regulation, and to insure that
agency rulemaking is consistent with the intent of Congress.\textsuperscript{186} Although legislative veto power was meant to be exercised by one or
both Houses of Congress, floor votes of an entire House on the
merits of any particular veto resolution were infrequent.\textsuperscript{187} Most
of the effective review occurred at the committee or subcommittee
level, focusing often on the concerns of a single chairman or mem-
ber.\textsuperscript{188} This appears to be the situation in Chadha.\textsuperscript{189} In Chadha
the power of review was exercised by a congressional committee
rather than the House as a whole.\textsuperscript{190} Because most of the issues
were debated between Congress and the agency at the committee
level, policy issues were settled in a way in which Congress as a
whole might not have decided those issues if it were asked to do
so.\textsuperscript{191} Despite Congress' attempts to broaden the makeup of its
committees, they are bodies of relatively narrow composition com-
pared to the entire Congress.\textsuperscript{192} Each member of a committee is
only responsible to his or her own constituency and the total con-
stituency of any committee is far from national in scope.\textsuperscript{193} Also,
the practice of "stacking" oversight committees with members of
Congress favorable to the agency it regulates is not unknown—this
practice can forge "agency-committee" alliances; so whenever the
committee does not report a veto resolution to the floor of the
House, the committee, with its narrow constituency, wields all of
Congress' review powers.\textsuperscript{194} In such a case, the ideal of the Fram-
ers of congressional responsibility to a national constituency is not
achieved.\textsuperscript{195}

Without the veto, a committee displeased with an agency rule
can either stage an oversight hearing or propose legislation to rec-
tify the problem it perceives.\textsuperscript{196} Any legislation it proposes must

\begin{itemize}
  \item \textsuperscript{185} Bruff & Gellhorn, supra note 179, at 1382.
  \item \textsuperscript{186} Id. at 1417.
  \item \textsuperscript{187} Id.
  \item \textsuperscript{188} Id. (emphasis added).
  \item \textsuperscript{189} See notes 50-63 and accompanying text supra.
  \item \textsuperscript{190} See notes 60-63 and accompanying text supra.
  \item \textsuperscript{191} Bruff & Gellhorn, supra note 179, at 1418.
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} Id.
  \item \textsuperscript{194} Id. (emphasis added).
  \item \textsuperscript{195} Id. \textit{See also}, THE FEDERALIST No. 10, at 108-10 (J. Madison) (J. Hamilton ed.

1880).
  \item \textsuperscript{196} Bruff & Gellhorn, supra note 179, at 1423.
\end{itemize}
meet the requirements of article I, section 7, clauses 2 and 3, specifically, passage by both Houses of Congress and approval by the President, or a veto override by a two-thirds majority in each House.\textsuperscript{197}

CONGRESSIONAL REVIEW OF AGENCY RULES

The fact that the courts have the ultimate responsibility to interpret the law is fundamental.\textsuperscript{198} To the extent that congressional review of rules duplicates the function of the courts, as Justice Powell argued in his concurring opinion in \textit{Chadha}, there is a violation of the separation of powers doctrine. In addition to the constitutional issue, it does not seem to be a wise use of congressional time.\textsuperscript{199} Furthermore, Congress is not well equipped in either inclination or competence to determine its own former intent with the care and restraint customary in judicial review.\textsuperscript{200} The courts, on the other hand, are bound by expressions of legislative intent voiced in connection with the passage of full fledged legislation.\textsuperscript{201} Courts “need not follow the day-to-day psychology of the current legislators.”\textsuperscript{202} To the extent that legislative vetoes place Congress and the courts in similar roles, the doctrine of separation of powers is violated.\textsuperscript{203}

It is crucial to our system of separation of powers that Con-
gress delegates, agencies execute, and the courts review. As stated by Alexander Hamilton: "It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government. . . ."

THE LEGISLATIVE VETO AND THE WAR POWERS RESOLUTION

In his dissent in Chadha, Justice White argued that whether the legislative veto is unconstitutional should be determined according to whether it is consistent with the purposes of article I and the principle of separation of powers reflected in that article and throughout the Constitution. Restated, the question would be whether in a given context the legislative veto prevented the executive branch from accomplishing its constitutionally assigned functions. In this regard, the War Powers Resolution serves to illustrate Justice White's position in Chadha. The War Powers Resolution is an extremely complicated piece of legislation and as such represents an attempt by Congress to spell out the dividing line between the constitutional powers of Congress to declare war and the constitutional power of the President as Commander-in-Chief.

The War Powers Resolution lays out the following procedure: Before American troops are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," the President is to consult with Congress "in every possible instance." After troops are introduced, in the absence of a declaration of war, the President is to submit a report to Congress within forty-eight hours. Then, within sixty days—or in special circumstances, ninety days—the

204. Id.
205. THE FEDERALIST No. 71, at 532 (A. Hamilton) (J. Hamilton ed. 1880).
206. See notes 102-03 and accompanying text supra.
207. See notes 104-08 and accompanying text supra.
208. War Powers Resolution § 51.
209. The War Powers Resolution is discussed in P. HOLT, THE WAR POWERS RESOLUTION: THE ROLE OF CONGRESS IN U.S. ARMED INTERVENTION (1978). The War Powers Resolution became law on November 7, 1973. Id. at 1. It was the culmination of three years of congressional considerations. President Nixon vetoed the resolution. Id. On November 7, 1973, the House and the Senate overrode the veto. The fact that the resolution became law over President Nixon’s veto destroyed one of the objectives of its principal sponsor in the Senate, Jacob Javits (R-N.Y.). It was his hope that the resulting law would represent a compact between Congress and the President for making the Constitution work in what is admitted to be a gray area—that of sending American troops into combat. P. HOLT, supra note 209, at 1-2.
210. The War Powers Resolution § 3.
211. Id. § 4(a).
involvement of troops is to be terminated unless Congress has taken affirmative action to approve it.\textsuperscript{212} By passing a concurrent resolution, which does not require the President's signature and therefore is not subject to a presidential veto,\textsuperscript{213} Congress can terminate the involvement before sixty days have elapsed.\textsuperscript{214} In light of \textit{Chadha}, it can be argued that this use of the concurrent resolution is unconstitutional.\textsuperscript{215} In this context, the constitutional question posed by the War Powers Resolution is whether the President may, without authority from Congress, take measures which are technically acts of war in protection of American rights and interests abroad.\textsuperscript{216} The answer is unclear since neither the language of the Constitution nor the record of the Federal Convention provides a conclusive definition of the President's power to defend the nation against attack or of the power of Congress to initiate war.\textsuperscript{217}

\textbf{The Legislative History}

The incursion into Cambodia in May 1970 provided an impetus for a number of legislative propositions on the war powers.\textsuperscript{218} The

\begin{footnotesize}
212. \textit{Id.} § 5(b).
213. \textit{Id.} § 5(c).
214. \textit{Id.} P. Holt, \textit{supra} note 209, at 3. The National Commitments Resolution (S. Res. 85, 91st Cong. 1st Sess., 115 Cong. Rec. 17245 (1969) (agreed to June 25, 1969, by a vote of 70-16) was the legislative forerunner to the War Powers Resolution and as a simple Senate resolution, it did not require the concurrence of the House. \textit{Id.}
215. See E. Corwin, \textit{Total War and the Constitution} 46 (1970). For an illumination of some of the technical difficulties of the larger problems of Congressional-Executive relations in time of crisis, see generally R. Turner, \textit{The War Powers Resolution: Its Implementation in Theory and Practice} (1983). The most controversial and constitutionally suspect provisions of the War Powers Resolution were contained in section 5(b). President Nixon and his legal advisors argued that this provision was an unconstitutional limitation of the Commander-in-Chief powers. This was all the more objectionable because congressional inaction would be enough to strip the President of his constitutional authority. \textit{Id.} at 13. The second reason given by President Nixon in vetoing the War Powers Resolution was that the provision set out in section 5(c) that allows Congress to direct the President to remove U.S. forces from a hostile environment, could result in an impermissible legislative infringement upon a valid presidential power under the Constitution by means of a concurrent resolution which needs only a simple majority of each house of Congress to become effective and is not subject to the president's veto override. \textit{Id.} at 14.
216. P. Holt, \textit{supra} note 209, at 25. An argument has been made that in some respects the War Powers Resolution broadens the president's powers due to the fact that section 2(c) is nonbinding and nonenforceable and that under the operative section of the resolution, the President has the unilateral authority to commit American troops anywhere in the world, under any conditions he decides for 60 to 90 days. \textit{Id.}
\end{footnotesize}
lack of prior consultation with Congress and the near crisis in relations between the executive and legislative branches which the incident occasioned disturbed many members of Congress.\textsuperscript{219} The issue centered on the “twilight zone” of concurrent authority which the Founding Fathers gave the Congress and the President over the war powers of the national government.\textsuperscript{220}

Testimony received during congressional hearings confirmed the view of many members of Congress that the constitutional balance of authority over warmaking swung heavily to the President in modern times.\textsuperscript{221} The objective of the war powers legislation was to restore the balance of power mandated in the Constitution by outlining arrangements which would allow the President and Congress to work together in mutual respect and maximum harmony toward their ultimate, shared goal of maintaining the peace

\textsuperscript{219} Id. at 2348.
\textsuperscript{220} Id. “War powers” may be taken to mean the inherent authority in national sovereignties to declare, conduct and conclude armed hostilities with other states. \textit{Id.} The constitutional war powers expressly reserved to Congress are found at U.S. CONST. art. I, § 8:

\begin{quote}
The Congress shall have Power . . .

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulations of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States;

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and other Powers vested by this Constitution in the Government of the United States, or in any Department, or Officer thereof.
\end{quote}

\textit{Id.} The president’s war powers are expressed in U.S. CONST. art. II, § 2: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” \textit{Id.}

\textsuperscript{221} \textit{War Powers Hearings, supra} note 218, at 2349. See \textit{Keynes, supra} note 217, at 2. The modern view of the President as a king—general exercising prerogative to make foreign policy, initiate war, conclude peace treaties is in contrast to the Framers’ conception of executive authority. The authors of the Constitution separated and shared the powers of war, defense and foreign affairs between Congress and the President in the hope that the Constitution would then check government power, promote law, limit each branch to the performance of its constitutional functions, and keep Congress and the President accountable to the people. See also Wormuth, \textit{The Nixon Theory of the War Power: A Critique}, 60 CALIF. L. REV. 623 (1972).
and security of the nation.\textsuperscript{222} The intent and effect of the "House Joint Resolution" was to reaffirm the constitutionally given authority of Congress to declare war.\textsuperscript{223}

The constitutional argument in support of the concurrent resolution is based on the capacity of Congress to limit or to terminate the authority it delegates to the Executive.\textsuperscript{224} In the area of the war powers, the Constitution is clear that the power to declare war belongs to Congress; the President is designated as the Commander-in-Chief to prosecute wars authorized by Congress.\textsuperscript{225}

The President assumes some measure of congressional authority whenever he commits United States Armed Forces to hostilities abroad on his own responsibility.\textsuperscript{226} The legislative veto provision under the War Powers Resolution allows Congress to rescind that authority pursuant to its enumerated power to "declare war" and the Necessary and Proper clause of article I, section 8 of the Constitution.\textsuperscript{227}

Absent the legislative veto provision in the War Powers Resolution, Congress cannot curb the President's commitment of troops to hostilities with a simple majority vote of "no confidence."\textsuperscript{228} Indeed, Congress would have to mobilize a two-thirds majority to "override" what in effect could be a Commander-in-

\textsuperscript{222} War Powers Hearings, supra note 218, at 2349.
\textsuperscript{223} Id. See Keynes, supra note 217, at 163. Only Congress has the constitutional authority to initiate war and military hostilities—and to change the nation's condition from peace to war. Id. (citing U.S. Const. art. I § 8, cl. 11). The President has constitutional authority to defend the nation, its armed forces, and its citizens and their property against armed attack or when the threat of such an attack is imminent. Keynes, supra note 217, at 163. Article II does not confer independent constitutional authority on the President to initiate hostilities or to transform defensive military actions into offensive wars. Id. The defensive powers of the President as Commander in Chief creates a zone of exclusive constitutional authority in which the President's power is plenary. Id. at 165. The Congress cannot constitutionally limit the president's defensive powers. Id. If the United States is attacked at a time Congress is not in session, the President has plenary power to challenge an enemy without waiting for Congress to convene, ratify his past actions and authorize his future conduct. Id. If Congress is in session, the President does not have to wait for Congress' blessing before responding to the enemy's challenge. Id.
\textsuperscript{224} War Powers Hearings, supra note 218, at 2358.
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} U.S. Const. art. I, § 8. War Powers Hearings, supra note 218, at 2358. But see id. at 2358-62 for supplemental and minority views of certain Representatives of Congress questioning the wisdom of attempting to draw rigid lines between the President and Congress in the area of warmaking powers. In some respects the War Powers Resolution would expand the constitutional authority of the President and in others it would severely restrict his authority. The only appropriate method according to some Members of Congress for making such far-reaching changes would be to amend the Constitution. Id. See also note 216 supra.
\textsuperscript{228} E. Keynes, supra note 217, at 169-70.
Chief's "declaration of war." As Senator Javits (R-N.Y.) argued during the Senate floor debates:

The Constitution provides that Congress shall declare war. This requires a simple majority of both Houses of Congress. But it takes two-thirds of both Houses to override a Presidential veto. Thus, if Congress attempts to exercise its constitutional responsibility of "deciding on war" through after-the-fact, funds-cutoff legislation, the veto power gives the President an enormous tactical advantage. In effect, it enables the President to make war with the support of only one-third of either House of Congress.

This result would in effect stand the constitution on its head.

Laws made "in pursuance" of Congress' article I powers are, of course, the "[s]upreme law of the land," and the President is bound by the Constitution to "take care that . . . [they] be faithfully executed." Yet, in the absence of a "legislative veto" provision, such as section 5(c) of the War Powers Resolution, the only manner in which Congress could enforce its enumerated power to declare—or not to declare—war in the circumstances described above would be to either: (1) override, by a two-thirds majority, what is in effect a presidential declaration of war; or, failing that, (2) resort to the cumbersome process of impeachment and removal.

Justice Holmes observed that it is impossible to distinguish between legislative and executive action with mathematical precision and, as such, those distinctions must be received with a certain latitude or our government cannot go on. What complicates making such distinctions is the fact that there is a twilight or gray area where the President and Congress appear to have concurrent authority—where the distribution of power is uncertain. The authority of Congress to enact laws is the core of Congress' powers, and to the extent that its legislative authority does not encounter an express constitutional limitation or intrude upon the core powers held by another branch, Congress may act. At the same time, article II, section 3 of the Constitution vests in the President the duty to see that the laws are faithfully executed. According

229. Id.
232. See E. KEYNES, supra note 217, at 169-70.
235. Stewart, supra note 124, at 603.
to our constitutional system of separation of powers, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.\(^{237}\)

Congress has struggled to find appropriate mechanisms to fulfill its role in foreign affairs. To this end, the use of the legislative veto may have a special functional attractiveness and may be justifiable in the area in foreign affairs, while at the same time may be unconstitutional, or at least unwise, in all or most domestic applications.\(^{238}\)

**CONCLUSION**

The important issue left open by *Chadha* concerns the manner in which that decision will be applied to other federal statutes containing provisions which may be characterized as "legislative vetoes." Justice Powell's concurrence and Justice White's dissent suggest that the Court may be open to a case-by-case analysis of future challenges.\(^{239}\) A good example of this is illustrated by the War Powers Resolution. Rote application of the majority's analysis in *Chadha* would suggest that if Congress were to veto actions taken by the executive branch pursuant to provisions in the enabling legislation, Congress would be legislating, and therefore the requirements of article I, section 7, clauses 2 and 3 would apply. The danger of employing this simplistic analysis to the War Powers Resolution is this: Congress could say to the President that the United States is not at war and order him to bring the troops home by cutting off funding. The President could veto this declaration. Congress would then have to override the President's veto with a two-thirds majority in each House. If this veto override failed, the effect would be to enable the President to declare war with the support of only one-third of either House of Congress. This narrow reading of *Chadha*, applied to the War Power Resolution, would be unconstitutional since the power to declare war is an enumerated power specifically given to Congress, not to the President. According to Justice White, the appropriate question is whether the legislative veto provision in a given statute prevents the executive branch, or the judicial branch, from accomplishing its constitutionally assigned functions.\(^{240}\) In order to avoid the constitutional problems potentially inherent in a simplistic application of *Chadha* to a given legislative veto provision, such as that con-

\(^{237}\) *Youngstown*, 343 U.S. at 587.

\(^{238}\) *Martin*, *supra* note 42, at 291 n.102.

\(^{239}\) See notes 75-114 and accompanying text *supra*.

\(^{240}\) See notes 102-03 and accompanying text *supra*. 
tained in the War Powers Resolution, the question posed by Justice White must in each case be addressed and answered.

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