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THE EXHAUSTION OF THE EXHAUSTION OF REMEDIES: INCREASING THE POWERS OF THE PRESIDENT UNDER THE GUISE OF ADMINISTRATIVE LAW REFORM

RODOLPHE J.A. DE SEIFE*

A major problem with the administrative process is its lack of accountability to the people. Although Congress is accountable to its constituency for the actions of its independent agencies, the President must also be held accountable when exercising quasi-legislative authority. Several recommendations have been made in an effort to further Presidential responsibility.

The most recent and pressing of these recommendations has been generated by the ABA Commission on Law and the Economy. On August 5, 1978, the Chairperson of that Commission widely distributed an exposure draft entitled "Federal Regulation: Road to Reform."¹ This article focuses on Recommendations Three and Five, the most controversial aspects of the draft.² Recommendation Three

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The author acknowledges the help of his colleague, Professor Lawrence Schlam, in coming up with an appropriate title for this article, and wishes to thank Gary L. Smith, William Lamarca and Frank G. Mays II for their contributions. All three graduated from Lewis University College of Law.† While their help has been extremely valuable in writing this analysis of the proposed reforms, the author cautions the reader that all the weaknesses in the presentation are his, and he is solely responsible for the substantive content of this paper.

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1. AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND THE ECONOMY, **FEDERAL REGULATION: ROAD TO REFORM** (September, 1979) [hereinafter cited as **REPORT OF THE COMMISSION**]. Although the first version of the report appeared in 1978, an updated version was distributed in 1979, and citations in this article will be the 1979 edition. Interested parties were invited to comment on the report. It was my privilege to comment extensively both at the August, 1979 Annual Meeting of the ABA in Dallas and at the first meeting of the National Institute on Law Reform in Washington, D.C., September 27-28, 1979.

2. The text of Recommendation Three states as follows:

RECOMMENDATION THREE: A statute should be enacted authorizing the President to direct certain regulatory agencies, within and outside the executive branch, to consider or reconsider the issuance of critical regulations, within a specified period of time, and thereafter to direct such agencies to modify or reverse their decisions concerning such regulations. "Critical" regulations should be defined as those the Presi-

proposes a statute authorizing the President to mandate agency consideration of "critical issues," with attendant power to modify or reverse subsequent agency action. Recommendation Five supports only minimal Congressional review of the Presidential exercise of these quasi-legislative powers. The essence of these recommendations was, in turn, debated vigorously at the 1979 annual meeting of the ABA in Dallas, Texas, where the section on Administrative Law narrowly adopted a revised version of the ABA's resolution to approve Recommendations Three and Five.³

dent finds to be of major significance both to the national interest and to the achievement of one or more statutory goals in addition to the goal primarily entrusted to the regulatory agency in question. Such a statute (1) should contain adequate subject matter limitations and procedural safeguards governing presidential exercises of this authority; (2) should not authorize intervention in licensing and ratemaking cases and should confine the President to the appropriate exercise of the agency's statutory discretion upon the basic facts (as distinguished from the ultimate conclusions) determined by the agency; (3) should provide time for congressional reaction before presidential orders become effective; (4) should expire after a limited time, so that Congress could refuse to extend the authority if the President did not adequately take congressional reaction into account; and (5) should not change the standards applicable to agency actions upon judicial review.

Id. at 126.

Recommendation Five was drafted as follows:

RECOMMENDATION FIVE: A statute should be enacted containing an appropriate and constitutional form of congressional review of presidential actions under statutes delegating certain limited quasi-legislative powers to the President (*e.g.*, statutory powers to reorganize government agencies and to fix government pay scales) and the statutory powers proposed in Recommendation Three. An appropriate and constitutional form of congressional review can be achieved by providing in a statute delegating a particular power that the delegation is limited to a specified term of years and that, during a brief period before any presidential action under a delegated power takes effect, the President may withdraw or modify his action in the light of any resolution that Congress or either House thereof may have voted during that period. Any such resolution would not invalidate the presidential action, but the Congress could, of course, decline to renew the President's delegated authority if he failed to respect congressional reactions. Any such statute would apply only to the exercise of the particular authority delegated by that statute and not to the exercise of authority derived from the Constitution or other laws. The Commission opposes the indiscriminate application of any form of legislative veto to all statutes delegating regulatory authority to independent and executive branch agencies.

Id. at 146.

3. The Council of the Administrative Law Section of the ABA first voted on August 19, 1979, against approving Resolution "A," which concerns the adoption of the Commission's recommendation, then reversed itself early the next morning. The House of

In its report, the ABA Commission argues that regulatory agencies often are independent of the President, issue decisions and orders that are not subject to effective control and so on.⁴ While these agencies may be independent of the President, and that may well be how it should be, they are not independent of Congress.

The position taken in this article maintains that these agencies are accountable to Congress and should be held accountable; if they are not, then this is the fault of Congress. Whether one can cure Congressional laziness or impotence by increasing the powers of the President without destroying the constitutional system is, to put it mildly, highly questionable. Yet, this is precisely the goal of proposals three and five. One result of the increased power granted to the President would be to increase industry pressure on the Chief

Delegates of the ABA approved the resolution, although the action was not unanimous. The approval, both on the part of the Administrative Law Section and the House of Delegates of the ABA has been criticized. Increasing the power of what some believe is already an imperial presidency will not produce effective administrative reform, according to critics of the resolution. Resolution "A" reads as follows:

BE IT RESOLVED, that the American Bar Association supports enactment of a statute authorizing the President to direct certain regulatory agencies, within and outside the executive branch, to consider or reconsider the issuance of critical regulations, within a specified period of time, and thereafter to direct such agencies to modify or reverse their decisions concerning such regulations. 'Critical' regulations should be defined as those the President finds to be of major significance both to the national interest and to the achievement of *one or more statutory goals in addition to the goal primarily entrusted to the regulatory agency in question*. Such a statute (1) should contain adequate subject matter limitations and procedural safeguards governing presidential exercises of this authority; (2) should not authorize intervention in licensing and ratemaking cases and should confine the President to the appropriate exercise of the agency's statutory discretion upon the basic facts (as distinguished from the ultimate conclusions) determined by the agency; (3) should provide time for congressional reaction before presidential orders become effective; (4) should expire after a limited time, so that Congress could refuse to extend the authority if the President did not adequately take congressional reaction into account; and (5) should not change the standards applicable to agency actions upon judicial review.

Resolved, that the Section on Administrative Law approves Resolution "A" of the Commission on Law and the Economy set forth in the Commission's report for the August 1979 meeting, with the following understanding: That the Commission on Law and the Economy shall amend its report for the purpose of clarifying that the resolution would confine the President to a consideration of those statutory goals, including both primary and subsidiary goals, which the agency whose decision is at issue has authority to consider.

4. REPORT OF THE COMMISSION, *supra* note 1, at 111.

Executive. We already have experienced the debilitating effects industry has on regulatory agencies: this problem can only increase with centralized power. While Presidential control over the executive agencies is taken for granted by many, the President should not be permitted to exercise that type of power over independent agencies.

Recommendation Three presents one of the most debatable Commission suggestions which, if implemented, would increase further the powers of what some already perceive as the "imperial Presidency," resulting in even greater deviation from the philosophy of the Founding Fathers.⁵ Moreover, Recommendation Three raises serious doubts about the continued vitality of the "independent agency" concept. This proposal threatens the concept of Congressional delegation of legislative powers to diverse agencies in favor of massive delegation of power to the Executive.

Recommendation Five, which suggests the delegation of increased "legislative" powers to the President, presents serious problems under our Constitution. Curiously, Recommendation Five opposes legislative veto powers over agency regulatory decisions. One wonders why Congress cannot veto proposed regulations by its own agencies. These regulations are assumed to have been promulgated by what is supposed to be an extension of the Congressional legislative power. I do not argue that Congress should have the same veto power over executive agencies. Admittedly, the increasingly blurred lines of authority between independent and executive agencies raises the question whether these distinctions should not be abolished. These proposals, however, eliminate the distinctions and emasculate Congress by stealth. If these distinctions are to be eliminated, the action is better done in a forthright manner.

In short, the Recommendations are reminiscent of the Roman custom of adopting a dictatorship during short periods of crises. The system worked until it resulted in the eventual dictatorship of the Caesars: we never learn. Suggestions that Congress might decline to renew the delegated authority are wishful thinking in a society now conditioned to the philosophy of "implied" Presidential powers: it would take another Vietnam and Watergate combination to get Congress to repeal such delegated authority.

RECOMMENDATION THREE

The Commission argues that the present American regulatory

5. *Id.* at 119.

approach lacks an effective process for making balancing choices among conflicting and competing goals.⁶ Moreover, when balancing decisions must be made, the Commission concluded, only elected officials and their immediate staff, who stand accountable to the electorate, can provide the requisite coordination and make the practical political judgments that weigh competing public interest.⁷ Their report concludes that the President, as an elected official, is the person most capable of making the needed balancing decisions as critical issues arise.⁸ The most appropriate and effective role for Congress, the Commission maintains, is to review and, where necessary, to curb unwise Presidential intervention. The Commission recommends, as its solution, a statutory grant of what it characterizes as carefully limited Presidential power to direct certain regulatory agencies to take up and decide critical regulatory issues within a specified time period. This grant would include the power to modify or reverse certain agency actions relating to such issues.

"Critical" issues would be defined as those which the President concludes affect the statutory goals of more than one agency and to be of major significance to the national interest. Thus, the Commission's proposal would permit Presidential exercise of authority delegated by Congress to agencies created by Congress. Presidential discretion would supplant independent agency judgment of how to implement Congressional policy. Under the proposal, the President would be able to redefine what policy the agency should carry out depending on Presidential perception of the national interest. This potential for dangerous concentration of power in the President is of primary concern to opponents of Recommendation Three.

Proposed Presidential Direction of Agency Action

My analysis of Recommendation Three focuses upon the Constitutional limits on Presidential authority. Recommendation Three would permit Presidential intervention in rulemaking. Rulemaking, however, is peculiarly legislative in character and primarily concerned with policy considerations for the future. Congress is the exclusive legislative body entrusted with the task of determining legislative policy and formulating rules of conduct. The legislature should sufficiently mark the field within which the administrator is

6. *Id.* at 124-25.

7. *Id.* at 110-11.

8. *Id.* at 111.

to act in order to guide his or her decisions to conform to the legislative will.

Recognizing the single-mindedness, independence and multiplicity of agencies, the Commission's recommendation is based upon a desire to promote speed and efficiency. It is predicated on the idea that the President represents all the people and is therefore the elected official most capable of making the necessary balancing choices among competing objectives. Legislative power, by contrast, is slower to exercise and may often be cumbersome, time-consuming, and inefficient. While the purpose of the framers of the Constitution was to prevent the whole power of one branch from being subverted to another, the branches are nevertheless interdependent. Cooperation is expected. But power must be entrusted to branches if for no other reason than to be able to hold someone accountable for its exercise.

In an effort to facilitate identification of a responsible official, the majority of the Commission resolves that the President should be granted authority over both independent and executive agencies.⁹ Since the Commission views the independence of certain agencies to be a major obstacle to coordinated regulatory policy in the United States, it is useful to examine the extent to which the two types of agencies have been differentiated, and the extent to which permitting the President to exercise such authority over the hitherto independent agencies would derogate the doctrine of Separation of Powers.

For example, the Commission's report views with some consternation the fact that the Federal Energy Regulatory Commission (FERC) is administratively a part of the new Department of Energy, but has decision-making power independent of the Secretary's control.¹⁰ The FERC was established as an independent agency created to administer the principal pricing and related regulatory activities transferred to the Department of Energy, principally from the Federal Power Commission, the Federal Energy Commission, the Federal Energy Administration, and the Interstate Commerce Commission.¹¹

According to one Senate Committee,¹² the proper handling of pricing and other energy regulatory functions transferred to the

9. *Id.*

10. *Id.* at 102.

11. See 42 U.S.C. § 7171 (Supp. 1978).

12. See S. REP. NO. 164, 95th Cong., 1st Sess. 37, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 854, 890.

Commission was considered at length. The act establishing the Department of Energy was intended to insure that the FERC acted in support of overall national policies. To this end the Secretary of Energy was assigned a leading role and provisions were made for expeditious action. At the same time, the Senate Committee was concerned that full, careful and impartial considerations be given to important regulatory decisions, since such decisions could affect the prosperity and lifestyle of practically every American citizen. The committee believed that no single official should have the sole responsibility for both proposing and setting such prices, especially where such person had a multitude of other policy and administrative responsibilities.¹³ Careful procedural protections are therefore to assure fairness to all parties when there is a statutory grant of executive powers to set prices. Consequently, to protect the integrity of the regulatory process, and to assure consistency in that process, Title IV of the Act assigns primary responsibility for consideration of major oil and natural gas pricing proposals specified in the Act to the independent Energy Regulatory Board.¹⁴

A clear and forceful statement of the policies which support the creation of certain independent regulatory agencies free from executive control was contained in the minority views of Representatives Moss (D. Cal.) and MacDonald (D. Ga.). Their views accompanied the House Government Operations Committee Report¹⁵ which had considered the 1969 Reorganization Bill.¹⁶ Congressional reasoning led to the creation of the Federal Energy Regulatory Commission as an independent agency. At this level it seems clear that permitting the President to order an independent agency to initiate, modify or reverse an action which it had undertaken would derogate from its status to the point where there would no longer be any practical distinction between it and an executive agency.

Clearly, since Congress creates agency independence, it can modify that status if it chooses to do so. The enabling legislation of independent agencies, such as the Interstate Commerce Commission,¹⁷ and the Federal Trade Commission,¹⁸ includes provisions which limit removal of any commissioner by the President for

13. *Id.*

14. Formal adjudicatory matters also were to fall within the jurisdiction of the Board. See U.S. CODE CONG. & AD. NEWS, *supra* note 12, at 890-91. (The Board became a "Commission" in the House-Senate Conference Committee).

15. H.R. REP. NO. 80, 91st Cong., 1st Sess. 6, *reprinted in* [1969] U.S. CODE CONG. & AD. NEWS 967, 774.

16. 5 U.S.C. §§ 901-912 (1976).

17. 49 U.S.C. § 11 (Supp. 1978).

18. 15 U.S.C. § 41 (1976).

reasons of inefficiency, neglect of duty, or malfeasance in office. *Humphrey's Executor v. United States*,¹⁹ and *Wiener v. United States*,²⁰ established the validity of Congressional restriction of the President's power to remove members of certain agencies from their offices.²¹ *Humphrey's Executor* and *Wiener* may, however, be read to stand for the principle that where an agency is performing quasi-judicial and quasi-legislative functions, a clear statement of Congressional intent to the contrary would totally preclude Presidential interference with that agency. Thus these cases demonstrate that the Separation of Powers doctrine retains its vitality after Congressional delegation of legislative functions to federal agencies. But authorizing the President to both define "critical regulatory issues" and to order agency action on that issue rises to the level of authorizing Presidential establishment of legislative policy. This is particularly the case where Presidential action would modify or reverse agency action, notwithstanding Congressionally-designated limitations on permissible agency response to Presidential directives.

The critical difference between the Administrative Procedure Act and Recommendation Three is that the latter does not distinguish between independent and executive agencies.²² Therefore, under Recommendation Three, the procedures associated with rulemaking and adjudication, as well as the law relating to judicial review,²³ are the same for independent and executive agencies. Modern cases dealing with the permissible scope of legislative delegation of authority make no distinction.²⁴ It cannot be said that Congress cannot delegate substantial legislative authority to the executive, and, as the Commission points out, there are many instances where independent agencies are expected to deal with problems which are the same as, or closely related to, those which are the responsibility of other agencies in the Executive Department.

19. 295 U.S. 602 (1935).

20. 357 U.S. 349 (1958).

21. Precise language upholding restricting of the President's power is found in *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). "We think it plain under the Constitution that illimitable power of removal (of members of administrative agencies) is not possessed by the President in respect of officers of the character of those just named." *Id.*

22. REPORT OF THE COMMISSION, *supra* note 1, at 126.

23. *Id.* See generally L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

24. See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

The wisdom of extending this practice of legislative abdication in the proposed manner is highly questionable.

The only distinction allowed by Recommendation Three is that an agency is independent when Congress withholds power from the Executive over the mission entrusted to the agency. The issue bound to arise in cases of conflict would be the substitution of Presidential will or purpose for that of Congress. At the simplest level, the President would direct a single agency to take positive action. In this situation, the burden would be on the party attacking the legislative choice to show that the absence of standards would make it impossible for the Executive to ascertain whether the will of Congress had been obeyed.²⁵ The trend of judicial decisions indicates that in such a case the delegation would be upheld.²⁶ The practical effect would be simply to further reduce the direct accountability of the agency to Congress. The Commission's analysis of Recommendation Three seems to be confined to this simple situation.

The more complex problem arises when the President might attempt to coordinate the activities of two or more agencies with conflicting statutory missions (e.g., Civil Aeronautics Board and Interstate Commerce Commission). If they are operating free of Presidential interference, both would be exercising authority delegated by Congress. Clearly then, where the President modified or reversed such an agency's decision or regulation, the President would not only be substituting his single purpose for that formulated by Congress, but he would also be limiting the extent of Congressional power to delegate authority.

It is also clear that both activities would constitute an exercise of legislative powers by the President. It could be argued that because Congress had authorized the President to define critical issues and to modify or reverse the agency's action, he was acting pursuant to express or implied authorization of powers by Congress to achieve this objective. The resulting issue would be whether Con-

25. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (union challenged as unconstitutional the Economic Stabilization Act of 1970 on the ground that it was an unlawful delegation of legislative power; the Act was upheld).

26. See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944) (one of the broadest delegations of power was upheld: the statutory standard was that prices are "fair and equitable"); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (standard was public convenience, interest or necessity); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12 (1932) (standard was "in the public interest").

gress can delegate its legislative power to the President to such an extent that he might substitute his own legislative purpose for a prior inconsistent Congressional purpose of the independent agencies involved.

At least two related strands of case law suggest that Presidential action would be upheld. First, courts employ various methods to avoid constitutional issues, including the application of the doctrine that federal statutes should be interpreted narrowly.²⁷ Second, there is a growing tendency of courts to approve ever-broader delegations of power by the legislative branch.²⁸ Recommendation Three of the Commission's report would substantially increase the jurisdiction of the President by continuing, if not accelerating the trend toward centralization of all power in the Executive Branch and, for all practical purposes, eliminating the distinctions between independent and executive agencies.

Effect of Limiting the President's Power to Rulemaking Functions

The proposed Presidential supervisory power would be limited primarily to agency rulemaking actions²⁹ and would affect adjudicatory powers only slightly. Rulemaking³⁰ is legislative in

27. See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958) (construing a statute regarding issuance of passports narrowly to avoid constitutional questions); *United States v. Rumely*, 345 U.S. 41 (1953) (abundant precedent for narrow construction of statute to avoid unfettered discretion in the Executive); *The Japanese Immigrant Case*, 189 U.S. 86 (1903) (words of statute do not require vesting of absolute power in Executive).

28. E.g., *Yakus v. United States*, 321 U.S. 414 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *New York Cen. Sec. Corp. v. United States*, 287 U.S. 12 (1932); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

29. REPORT OF THE COMMISSION, *supra* note 1, at 132. The report states that the President's power would be limited primarily to rulemaking agency actions. "No Presidential order could be issued with respect to agency actions that fall within the category of 'adjudications' subject to Section 556 and 557 of Administrative Procedure Act. . . ." *Id.*

30. "Rulemaking" means agency process for formulating, amending, or repealing a rule. 5 U.S.C. § 551(5) (1976).

The Administrative Procedure Act gives the following definition of a rule:

The whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or proscribe the law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations therefore, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

Id. at § 551(4).

nature,³¹ looking not to the evidentiary facts, but to policymaking conclusions to be drawn from the facts.³² Adjudication is judicial rather than legislative in nature.³³ It determines the specific rights of particular individuals and entities,³⁴ and it has an accusatory flavor. It may result in disciplinary action,³⁵ and it is concerned with issues of fact under stated law. Sections 556 and 557 of the Administrative Procedure Act apply to rules as well as adjudications which are required by statute to be made on the record after an opportunity for an agency hearing.³⁶ Although the Commission recommends that no Presidential order could be issued with respect to agency actions that fall within the category of adjudications subject to Sections 556 and 557 of the APA, the President would be permitted to use his power to direct reconsideration of the record before an agency with respect to its rulemaking function. He could require that the record before the agency be reopened notwithstanding the fact that Section 553 directs that the procedural safeguards incorporated into Sections 556 and 557 apply when the agency statute requires rules to be made on the record.³⁷ The question presented is

31. LEGISLATIVE HISTORY OF THE 79TH CONGRESS, at 193, 251, 353 (1944) [hereinafter cited as LEGISLATIVE HISTORY]; ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, 14 (1947) [hereinafter cited as MANUAL].

32. *American Express Co. v. United States*, 472 F.2d 1050 (3d Cir. 1973).

33. LEGISLATIVE HISTORY, *supra* note 31, at 193, 251.

34. *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977).

35. LEGISLATIVE HISTORY, *supra* note 31, at 353; MANUAL, *supra* note 31, at 14-15.

36. 5 U.S.C. § 556 (1976). Section 556(a) provides that: "This section applies, according to the provisions thereof, to hearings required by Section 553 and 554 of this title to be conducted in accordance with this section." Section 557(a) states that: "This action applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with Section 556 of this title." Section 553(c) states that when Rules are required to be made on the record after an opportunity for an agency hearing, Section 556 and 557 apply. Section 554(a) provides:

This section applies according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing except to the extent that there is involved—

- (1) A matter subject to a subsequent trial and the facts *de novo* in a court;
- (2) The selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;
- (3) Proceedings in which decisions rest solely on inspections, tests, or elections;
- (4) The conduct of military or foreign affairs functions;
- (5) Cases in which an agency is acting as an agent for the court;
- (6) The certification of worker representatives.

37. REPORT OF THE COMMISSION, *supra* note 1, at 129.

whether a Presidential order requiring an agency to reopen the record associated with its rulemaking function violates due process or the Administrative Procedure Act.

The constitutional and legislative impact of Recommendation Three on adjudication and rulemaking centers on three observations. First, the President would be precluded from interfering in adjudicatory proceedings where an individual or a small number of persons are directly affected upon individual grounds alone. It is not clear that if he were permitted to intervene in an adjudicatory proceeding where the issuance or nonissuance of a license raised a critical regulatory issue, he might not derogate the constitutional rights of noncandidates in favor of, or opposed to, the issuance of the license. Second, there is no constitutional right to a hearing if the agency is performing its rulemaking function. Third, where the agency statute requires that rulemaking must be on the record after opportunity for agency hearing, the agency is neither required to hear oral testimony, or permit cross-examination of agency witnesses, nor to hear oral argument. However, the parties who would be directly affected must be given adequate notice of what the agency intends to do, and must be given an opportunity to file statements of position, submissions of evidence, and other relevant observations.

The Commission's proposal indicates that the President could not issue an order directing agency action until 30 days after publication in the Federal Register of an intention to issue such an order.³⁸ The President and his staff would be required to comply with applicable statutes or regulations governing the affected agency regarding *ex parte* contacts and decision-making on the public record.³⁹ Thus, although the President might be able to restrain the agency from requiring or permitting oral testimony, cross-examination, and the like in rulemaking proceedings, if the agency statute requires decision-making to be on the public record, parties directly affected must be afforded an opportunity to submit relevant information or to object to the Presidential order. It is suggested that Congress should ensure that decision-making on the public record be included in the organic statute of any agency over which the President is given such control.⁴⁰

38. *Id.* at 129-30.

39. *Id.* at 130. Presumably, this would require Presidential compliance with 5 U.S.C. § 552 (1976), which requires publication of certain information in the Federal Register, and with 5 U.S.C. § 552(b) (1976), providing for open meetings.

40. *Id.* at 130-31.

Effect of Limiting the President's Power by Permitting Him to Order the Agencies to Take Action Only Within the Scope of the Powers Already Delegated to Them by Congress

Action directed by the President would be limited under Recommendation Three by the scope of the Congressional delegation of power to the agencies.⁴¹ To determine the practical limitations placed upon the President by this provision, it is useful to consider the extent of such powers in the context of recent judicial decisions. The Constitution does not forbid every delegation of "legislative power."⁴² There is no analytical difference in kind between the legislative function of prescribing rules for the future that is exercised by the legislature and that exercised by an agency implementing the authority conferred to it by the legislature. The problem is solely one of limits.⁴³

The legislative power granted to Congress by the Constitution includes the necessary flexibility and practicality.⁴⁴ In *Yakus v. United States*,⁴⁵ the Court articulated the principles which still govern the extent to which Congress is permitted to delegate legislative authority to the administrative agencies or to the executive department.

The Constitution as a continuously operative charter of the government does not demand the impossible or the impracticable Congress is free to delegate the legislative authority provided it has exercised the essentials of establishing the legislative policy and formulating a rule of conduct The key question is not answered by noting that the authority delegated is as broad or broader than Congress might have selected if it had chosen to operate within a narrower range. The issue is whether the legislative description of the task assigned sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept in compliance with the legislative will.⁴⁶

41. *Id.* at 127.

42. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 305 (1933).

43. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 745 (D.D.C. 1971).

44. *Currin v. Wallace*, 306 U.S. 1 (1939).

45. 321 U.S. 414 (1944).

46. *Id.* at 424.

There is no forbidden delegation of legislative power if Congress expresses an intelligible principle to which the official or agency must conform.⁴⁷ These doctrines have been applied to sustain legislation that delegated broad authority to the President and to administrative agencies.⁴⁸ In only two cases, both decided in the mid-1930's, has the Supreme Court held that the delegation of legislative authority to the President or to an administrative agency was unconstitutionally broad.⁴⁹

It was explicitly held that Congress may delegate authority across the branches of government. In *Amalgamated Meat Cutters and Butcher Workmen of North America v. Connally*,⁵⁰ the Meat Cutters and Butcher Workmen of North America, AFL-CIO, attacked the constitutionality of the Economic Stabilization Act of 1970.⁵¹ Under the Act, the President was given authority to stabilize prices and wages but not at levels below those prevailing on May 25, 1970. He was precluded from singling out a particular industry or sector unless he made a specific finding that wages or prices in that sector had increased at a rate disproportionate to the rate for the economy as a whole. As evidenced in the pertinent committee report,⁵² this provision was intended to be a limitation upon the President's power. The court stated that Congress is free to

47. *Hampton v. United States*, 276 U.S. 394, 409 (1928). See generally Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359 (1947).

48. Cases in which the courts have approved delegation of powers with only broad standards for administrative guidance include: *Luxter v. United States*, 334 U.S. 742, 785-86 (1948) (recovery of "excessive profits" on war contracts); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (licensing of radio communications "as public convenience, interest or necessity requires"); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932) (permitting consolidation of carriers when "in the public interest").

49. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

50. 337 F. Supp. 737 (D.D.C. 1971).

51. 12 U.S.C. § 1904 (1976).

52. The report states:

The Committee has serious reservations about applying the price and wage control authority to a single industry. An industry subject to price controls has no control over the price it must pay for the products of other industries. Likewise, workers subject to wage controls have no protection against a continued rise in the cost of living. For these reasons, the committee hopes the administration will adopt a voluntary system of wage-price guideposts before applying mandatory controls to any specific sector of the economy.

S. REP. NO. 92-89, 92d Cong., 1st Sess. 3, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 1047, 1048-49, cited in *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 749 (D.D.C. 1971).

delegate legislative power provided that it has exercised "the essentials of the legislative function"—of determining the basic legislative policy and formulating a rule of conduct. . . ."⁵³ The court then reasoned that by examining several factors, it was possible to ascertain whether the actions of the President in establishing the 90-day freeze on prices and wages comported with the will of Congress. The historical background was considered relevant to the determination that the President had stayed within the bounds authorized by Congress.⁵⁴ The court was careful to point out, however, that the approaches and guidelines for the present law could differ from similar legislation upon which it might have been based.⁵⁵

Several other factors were examined in determining the constitutionality of delegated legislative power. The purpose of the legislation was determined by considering the reports of the responsible Congressional committees⁵⁶ and from other relevant legislative history. Further, in *Amalgamated Meat Cutters*, the court noted that the statute granted stabilization authority for a period of time which was limited initially to about six months. While the court did not consider the time limitation to be dispositive, it was material in determining whether the scope of the delegation exceeded constitutionally permissible limits. When the expiration date was reached, Congress refused an administration request to extend the authorization. This, according to the court, established close Congressional control and conjoined flexibility in the President to act promptly

53. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971), citing *Yakus v. United States*, 321 U.S. 414, 424-25 (1944).

54. The government in *Amalgamated Meat Cutters* submitted the following analysis on this point:

In enacting the legislation in question here, Congress was, of course, acting against a background of wage and price controls in two wars. The administrative practice under both of those Acts was the subject of extensive judicial interpretation and review. This substantial background of prior law and practice provides a further framework for assessing whether the Executive has stayed within the bounds authorized by Congress and provides more than adequate standards for the exercise of the authority granted by the Act.

337 F. Supp. 737, 748 (D.D.C. 1971).

55. *Id.* at 748.

56. H.R. REP. NO. 91-1330, 91st Cong., 2nd Sess. 9 (1970), reprinted in *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 767-70 (D.D.C. 1971). Authority for establishing the purpose of legislation in this fashion may be found in *United States v. International Union, AFL-CIO*, 352 U.S. 567, 585 (1957), and *Cole v. Young*, 351 U.S. 536, 548 (1956).

with an obligation in Congress to undertake an affirmative review without prolonged delay.

In upholding the President's actions, the court in *Amalgamated Meat Cutters* first ascertained whether a construction of the Act was possible which would avoid the conclusion that unfettered discretion was invested in the executive.⁵⁷ The constitutional argument was avoided because the court found that it was not the intent of Congress to permit the President to be unfair and inequitable. Congress did not indicate an intention either in the Act or the legislative history that the President would be permitted to impose controls beyond the initial freeze without any possibility of judicial review. In Section 202 of the Act the President was constrained to a standard of removal of "gross inequities." Therefore, the court implied a Presidential duty to take whatever feasible action might be required in the interest of broad fairness and avoidance of gross inequity. The court noted that the law does not contemplate that which is manifestly impracticable or suppose that all problems are to be taken care of at once.⁵⁸

The court also relied on the requirement in the Act that any action taken by the executive under the law subsequent to the freeze was required to be in accordance with previous established limitations. The court states that the requirement of subsidiary administrative policy established an on-going requirement of intelligible administrative policy as a corollary to legislative objective.⁵⁹

57. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 747-49 (D.D.C. 1971). See note 28 *supra* and accompanying text. See generally *Gulknack v. United States*, 396 U.S. 295 (1970) (Selective Service regulations allowing reclassification and accelerated induction by local draft boards of delinquent registrants beyond scope of power delegated to President by Universal Military Training Act); *Kent v. Dulles*, 357 U.S. 116 (1958) (Court refused to hold Congress had given "unbridled discretion" to Secretary of State over issuance of passports); *United States v. Rumely*, 345 U.S. 41 (1953) (enabling resolution limits scope of investigation authority of House committee); *The Japanese Immigrant Case*, 189 U.S. 86 (1903) (executive officers not vested with power to arbitrarily deport alien).

58. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 758 (D.D.C. 1971). See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, *reh. denied*, 392 U.S. 917 (1968); *Wisconsin v. FPC*, 373 U.S. 294, 313-14 (1963); *Bowles v. Willingham*, 321 U.S. 503 (1944).

59. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971), *citing* *Yakus v. United States*, 321 U.S. 414, 426 (1944). The court stated: [T]he standards prescribed by the present act with the aid of the "statement of considerations" required to be made by the administrator are sufficiently definite and precise to enable Congress, the courts, and the public to ascertain whether the administrator in fixing the designated prices had conformed to those standards. "Hence we are unable to find in them an unauthorized delegation of legislative power."

Such a requirement, according to the court, furthers the constitutional objective of accountability, but the courts would be required to exercise "imaginative interpretation" in examining the exercise of executive discretion within the vague penumbral bounds of the broad statutory standard.⁶⁰

Finally, the court discussed judicial review and administrative procedure as limiting executive power. The safeguarding of meaningful judicial review is one of the primary functions of the doctrine that prohibits undue delegation of legislative powers. A provision for judicial review was found to be implicit in the enforcement provisions.⁶¹ Challenges could also be made to the executive's actions under the adjudicatory provisions of the Administrative Procedure Act. The term "agency" is considered by leading scholars to include the President but, in any event, the APA would be applicable to the official or group responsible for implementation of a Presidential order. Similarly, the actions taken by the President under the 1970 Act would be subject to rule-making provisions of the Administrative Procedure Act. However, the court pointed out that the applicability of such provisions could be of little practical consequence because the rule-making provisions requiring notice and opportunity for participation by interested persons are subject to the provisions removing those requirements.⁶² The adjudication pro-

60. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971), *citing* *FCC v. RCA Communications Inc.*, 346 U.S. 86, 90-91 (1953).

61. The Act provides for enforcement by fine or by injunction. The Act reads:
 § 204 *Penalty*

Whoever willfully violates any order or regulations under this title shall be fined not more than \$5,000.

§ 205 *Injunction*

Whenever it appears to any agency of the United States, authorized by the President to exercise the authority contained in this section to enforce orders and regulations issued under this title, that any person has engaged, is engaged or is about to engage in any acts or practices constituting a violation of any regulation or order under this title, it may in its discretion bring an action, in the proper district court of the United States Court of any territory or other place subject to the jurisdiction of the United States to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the agency, any such court may also issue mandatory injunctions commanding any person to comply with any regulation or order under this title.

12 U.S.C. § 1904 (1976).

62. 5 U.S.C. 553(b) (1976) provides that:

Except when notice or hearing is required by statute, this subsection does not apply—

.....

(B) When the agency for good cause finds (and incorporates the finding

cedures are applicable only when an agency hearing is required by statute, or by compulsion of general law.⁶³

The process by which the court in *Amalgamated Meat Cutters* reached its decision typifies that taken by many modern courts. This is especially true when courts deal with questions of overbroad delegation of legislative authority, particularly when the subject of the legislation is economic regulation. The results of that judicial process have led several scholars and justices⁶⁴ to conclude that the question of the constitutionality of overbroad delegation of legislative authority is no longer relevant. In summary, five basic principles will be utilized to avoid determinations of unconstitutionality.

First, whenever possible, federal statutes must be interpreted to avoid constitutional questions. *Second*, the court will insist that there must be a legislative purpose established by the legislation and that the action of the Executive or the agency must be in compliance with the legislative will. However, in seeking this "intelligible principle" the court will look to the legislative history of the act in question, and to analogous previous legislation. In fields such as wage and price stabilization, this approach permits a great deal of latitude to the court, and usually results in its approval of extremely broad delegation. *Third*, there must be an intelligible principle by which the court can establish some standard to which the court can hold the Executive or the agency. However, if such a limitation is not apparent on the face of the organic act, or in its legislative history, the court will look to extraneous factors such as the duration of the authorized powers, and such standards as the

and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)(B) (1976).

63. 5 U.S.C. § 554 sets forth adjudication procedures which are applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ." 5 U.S.C. § 554(a) (1976). See *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 761-62 (D.D.C. 1971); cf. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) (Court held that § 554 is "inapplicable to hearings, the requirement for which has been read into a statute by the Court. . .").

64. In *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), Mr. Justice Marshall in the dissenting opinion wrote that: "[T]he notion that the Constitution narrowly confines the power of Congress to delegate authority which was briefly in vogue in the 1930's has been virtually abandoned by the Court for all practical purposes, at least in the absence of a delegation creating 'the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions.'" *Id.* at 352-53 (Marshall, J., dissenting).

court finds "fairly implicit" in the act. *Fourth*, the court looks at the regulations promulgated by the agency pursuant to the act to limit the scope of the delegation as well as subsequent regulations enacted under the authority delegated by the legislation. *Fifth*, the court will tend to consider the availability of judicial and administrative review as supportive of broad delegations of legislative authority. All of this tends to support judicial sanction of broad delegation of legislative authority, and its concomitant increase in the legislative power of the executive and the agencies.

In the context of the ABA proposal, the restricting of the President's orders to those actions that could be taken by the agencies themselves would provide a great deal of assurance that the Presidential influence would be practically limited by Congressional legislative standards. Furthermore, the migration of legislative power into the hands of the agencies and more particularly, the President, would be accelerated. This point is made more evident by Justices Brennan's and Douglas' attempts to distinguish between the scope of delegation which is constitutionally permissible in the fields related to economic regulation, and that which is permissible when the regulations impose overbroad, unauthorized, or arbitrary criminal sanctions or otherwise affect constitutionally protected individual rights.

It must be made clear that either Congress or the President, acting within their respective constitutional powers, has specifically decided that the imposed procedures are necessary and warranted.⁶⁵ Such decisions cannot be assumed by acquiescence or nonaction. They must be explicit, not only to assure that individuals are not deprived of cherished rights with procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing the law.⁶⁶

65. See, e.g., *Greene v. McCloy*, 360 U.S. 474 (1958). In *Greene*, plaintiff, an engineer employed by government contractors, was discharged after the Department of Defense revoked his security clearance without adequate hearing. Chief Justice Warren wrote, "in the absence of explicit authorization from either the President or Congress, the respondents [Defense Department and others] were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Id.* at 508.

66. In *Greene*, Chief Justice Warren wrote:
[I]t must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. Such decisions cannot be assumed by acquiescence or nonaction. . . .

Formulation of policy is the primary responsibility of the legislature, entrusted to it by the electorate. To the extent that Congress delegates authority with indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to other people. Even though judicial standards of permissive vagueness are strict in protected areas without explicit action by lawmakers, decisions of great constitutional import and effect could still be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.⁶⁷

It can be seen that the Court has attempted to limit the scope of permissible legislative delegation to a relatively narrow area. In *California Bankers Association v. Schultz*,⁶⁸ however, Mr. Justice Douglas' dissent stated that the Bank Secrecy Act, which in his view had the enforcement of criminal law as its primary purpose, was too broad to pass constitutional muster. Citing *Schechter* and *Robel*, he stated that such legislation is symptomatic of the slow eclipse of Congress by the mounting Executive power. Such omnibus grants of power, according to Justice Douglas, allowed the Executive Branch to make the law as it chooses in violation of the principle that lawmaking is a Congressional, not an executive function. At the present time, if a regulation is violative of the Constitution, it is often considered on its own merits with no consideration given to the fact that it was promulgated by an agency or by the Executive pursuant to an overbroad delegation of legislative authority.

Conclusions and Recommendations

The various doctrines by which modern courts seek to avoid the constitutional question of improper delegation of legislative authority, as well as the general tendency of the courts to approve broad delegation, leads to the conclusion that Presidential action taken pursuant to the delegation of authority proposed by Recommendation Three would be upheld in all but the most exceptional

Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide.

Id. at 507. See also *Kent v. Dulles*, 357 United States, 116 (1958); *Watkins v. United States*, 354 U.S. 178 (1957); *Peters v. Hobby*, 349 U.S. 311 (1955); *Ex parte Ende*, 323 U.S. 283 (1944).

67. *United States v. Robel*, 389 U.S. 258, 276 (1967).

68. 416 U.S. 21 (1974).

cases. The President's power would be substantially increased by this measure. While the Commission recommends various procedural safeguards including expedited judicial review, it seems to have lost sight of the fact that the Separation of Powers is also a necessary element of our constitutional framework. The Court has consistently extended the scope of constitutionally permissible delegation of legislative authority, and in doing so has contributed to what Mr. Justice Douglas characterized as the "slow eclipse of Congress by the mounting Executive Power."

Control over the agencies must continue to be exercised by the Congress. While the goals of Recommendation Three are valid, the recommendation is deficient in that it permits the President to define the "critical regulatory issue," and thus the legislative purpose of his actions.⁶⁹ The Recommendation should be modified to provide that upon the recommendation of the President, the Congress would pass a resolution defining the critical regulatory issue and granting the authority otherwise specified to resolve that issue. Such authority would be limited in terms of time. This requirement for positive action by Congress would inhibit the trend toward cen-

69. It might be useful to note that during the marathon discussion within the Administrative Law Section at Dallas, during the recent annual meeting of the ABA, the author raised the following problems which would result from adopting the Commission Recommendation "A":

1. Parties in administrative proceedings would not be certain when they had "exhausted their administrative remedies" if there was a possibility of presidential "interference" in the process.
2. Presidential action of the type advocated by the Commission would, in all likelihood, delay decision-making subject to judicial review, thus further estranging the present-day administrative process from its original goals. See Cragun & de Seife, *A Skeptic Views Twenty-Five Years of Administrative Practice*, 16 FED. B.J. 556 (1956); See also my more recent views, matured by twenty-plus years of Washington experience subsequent to the writing of that article, in de Seife, *Administrative Law Reform: A Focus on the Administrative Law Judge*, 13 VAL. U.L. REV. 229 (1979).
3. In the case of the FTC's sweeping rule on "holder in due course" in consumer transactions, which had been cited by the proponents of the Commission Report as the type of agency action which could very well have entailed presidential action under this proposal, my then role as bank counsel would have led me to advise my banking clients (in addition to the advice that they could fight the FTC in court or "live with it") to seek "a way to get to the White House" which, had this alternative been *legitimately* open to them, they might well have done.
4. The Commission's recommendation would in effect legitimize the activities of those lawyers whose six, or more, figure incomes derive from their ability to place phone calls to strategically placed friends in the White House. Why should we do this? The "fees" earned under such circumstances should have at least a slight bitter after-taste of "questionability" as is now the case.

tralization of power in the hands of the President yet would increase the flexibility available to the President while retaining most of the positive benefits of the Commission's proposal.

RECOMMENDATION FIVE

There is no dispute that government intervention, often in the form of Congressional delegation of authority, has become an increasingly influential factor in today's economic and social environment. The need for such increased intervention is disputable, especially when the affected activity has typically been self-regulating or when basic and traditional notions of individual freedom have been curtailed. In addition, reasonable persons differ as to which branch of government is best suited to oversee the administration of this ever-increasing intervention. It is apparent that the drafters of the Commission Recommendations believe that the President of the United States is the man for the job, if not the "Man for all Seasons." An introductory passage of the draft indicates this thought: "The President is the elected official most capable of making the needed balancing decision as critical issues arise, while the most appropriate and effective role for Congress is to review, and when necessary, to curb unwise presidential intervention." This happy outlook is reflected in Recommendation Five of the Commission which urges increased control over government agencies by the President, with only minimal Congressional review.

It is my view that accountability to the public by those who establish and implement policy is lacking in the administrative process. This is even more fundamental than the lack of administrative efficiency because no agency can become truly efficient without increasing its accountability to the public, especially that part of the public which is affected by that agency's authority. One cannot expect an agency to become more accountable voluntarily. Therefore, the public, either through direct participation in administrative proceedings, or through representation by some accountable entity, must see to it that such a transformation in the present *modus operandum* occurs. If done properly, the latter procedure can have a greater impact, because it imposes accountability on an agency for all its operations, both internal and external.

The very purpose of such representative oversight is defeated if the representative itself cannot be held to account. Congress, or its separate, newly formed agency, must be the representative directly answerable to the people. It is axiomatic that if increased delegation of quasi-legislative authority to the President is

necessary to assure agency accountability to him, then such increased authority must include an effective check on its use by the President. That check is the legislative veto; without it, Congress will escape responsibility for the actions of its administrative agencies.

More Presidential Power—A Response to a Weak Congress?

An examination of Congressional review of delegated authority to the President must include an inquiry into basic notions concerning the separation of powers. How does the use of legislative delegation coincide with a government composed of three branches, with each branch having a different function but sharing at least one common element, that is to act as a check and balance to the other branches?

As has been observed, "In the colonies, the King—the executive power—had acted unchecked, often with the Parliament's—but not the colonists'—consent. The doctrine of separation of powers was seen as a means of controlling executive power."⁷⁰ Madison once said: "the doctrine of separation of powers was the sacred maxim of free government, designed to guard against the concentration of the power of governance in the same hands—the very definition of tyranny."⁷¹ People are ruled by people. If people were perfect, they would not need to be governed. "If man was [*sic*] depraved and anti-social, he then required control; but those who controlled, themselves being human beings, would mercilessly exploit their subjects unless there was some way to limit their powers."⁷² Separation of powers is a form of internal limitation on government power. Accountability is the external check on government by the people.

When examining a proposal such as the one presented by Recommendation Five, it is often enlightening to get back to basics. The Constitution of the United States grants the power to make laws to the Congress⁷³ and gives the President executive powers.⁷⁴

70. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 374 (1976).

71. Madison, *The Federalist No. 47*, in THE FEDERALIST PAPERS 153 (C. Rossiter ed. 1961).

72. Miller, *Separation of Powers: An Ancient Doctrine Under Modern Challenge*, 28 AD. L. REV. 299, 301 (1976).

73. "All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

74. "The executive power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1.

This distribution of functions has not been changed formally, but certain political powerplays have produced *de facto* modifications. This change in fact, as opposed to fundamentalist constitutional theory, has resulted in increased Presidential authority. It was caused by “. . . the ready and long-continued acquiescence of Congress, accompanied by the Supreme Court’s well-nigh complete refusal or inability to stay the course of constitutional change.”⁷⁵ Increased authority necessarily means a reduction in the power of Congress and the Judiciary. One explanation given for this phenomenon is that: “the higher the state of technological development, the greater the concentration of political power.”⁷⁶ With increased complexity there is a need to have a system of control and policy that can evaluate the situation and respond quickly.

As previously noted, the inference from Recommendation Five is that its authors believe that the President is best suited to fill this need.⁷⁷ Admittedly, an individual can act more quickly than a large body of individuals presenting divergent interests. Admittedly, the President is the only public official who is elected by a national voting constituency. However, aside from the apparent advantages, there are risks involved when the power of one individual is increased without a corresponding increase in that person’s accountability. Without the latter, our system of checks and balances is meaningless. It becomes obvious that: “[t]he ‘system’ of separated powers is not working, either to prevent the possibility of tyranny or to promote efficiency. Executive law-making threatens despotism; we have even reached the point where a leading Senator could say in 1971 that perhaps we do need an ‘enlightened’ despotism, ‘if only temporarily.’”⁷⁸ Without advocating any form of tyranny, whether it be enlightened or arbitrary, and at the same time without completely dispelling the usefulness of increased Presidential power, we ought to critically examine the components of Recommendation Five.

The overriding theme of the Commission’s recommendation is congressional review of delegated quasi-legislative authority to the President. The method of congressional review would consist of delegating the power to legislate for “only” two to three years. After this period, the Congress could decide not to renew this power “if he (the President) repeatedly failed to respect congres-

75. Miller, 28 AD. L. REV., *supra* note 72, at 304.

76. *Id.* at 306.

77. See note 2 *supra*.

78. Miller, 28 AD. L. REV., *supra* note 72, at 318.

sional action."⁷⁹ Secondly, any action the President might take would not take effect for seventy legislative days in order to allow the President to reconsider, in light of any action taken by Congress.⁸⁰ The President's action could not be barred or invalidated by Congress.⁸¹ The legislature could take certain actions during the seventy-day reconsideration period, but the President would not be compelled to reconsider.⁸²

If the Commission meant this to be a form of Congressional review, it failed. It does not provide for means to check the use of power delegated to the Executive except by not renewing it after two or three years. During the interim, the President would have unbridled discretion to exercise such authority as he deemed appropriate.

A number of cases have involved congressional power to control Presidential action. In *Myers v. United States*,⁸³ one of the famous *Removal Cases*,⁸⁴ the Court held that a legislative provision restricting the President's power to remove certain groups of postmasters unconstitutionally abridged the President's duty to execute the laws. This was not a case, however, where Congress was attempting to control quasi-legislative authority delegated to the

79. Recommendation Five states: "[T]he Congress could, of course, decline to renew the President's delegated authority if he repeatedly failed to respect congressional reactions." ABA COMMISSION ON LAW AND ECONOMY, FEDERAL REGULATION: ROAD TO REFORM 111 (exposure draft Aug. 5, 1978) [hereinafter cited as ROAD TO REFORM].

80. Recommendation Five states:

[A]n appropriate and constitutional form of congressional review can be achieved by statutes delegating particular powers for a limited period of two or three years, and providing for a period of 70 legislative days before any presidential action under a delegated power takes effect, during which the President may withdraw or modify his action in light of any legislative action that may have been taken by Congress or either House during that period.

See note 2 *supra*.

81. Recommendation Five provides, "Such a statute would not provide that any such resolution would automatically invalidate the presidential action. . . ." See note 2 *supra*.

82. The recommendation states, "the President *may* withdraw or modify his action in light of any legislative action. . . ." *Id.* at 7 (emphasis added).

83. 272 U.S. 52 (1926).

84. These cases establish the parameters of the President's power to remove appointees from office. In *Myers*, Mr. Chief Justice (and former President) Taft held that the Tenure of Office Act unconstitutionally limited the extensive powers of the President to remove appointees. However, the expanse of the *Myers* decision was narrowed in *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), and in *Wiener v. United States*, 357 U.S. 349 (1958).

President. This fact was clarified in *Humphrey's Executor v. United States*,⁸⁵ decided just nine years later. It limited *Myers* to instances involving "purely executive officers" and held that Congress could limit the Presidential removal of a member of an independent regulatory agency.

In *Schechter Poultry Corp. v. United States*,⁸⁶ decided the same year as *Humphrey's Executor*, the Court struck down as unconstitutional the National Industrial Recovery Act of 1933. This Act authorized the President to promulgate "codes of fair competition for the trade or industry." In striking the Act, the Court held that the delegation was overbroad because the President's acts were not subject to adequate scrutiny either by Congress or the courts.

Similarly, *Panama Refining Co. v. Ryan*,⁸⁷ involved a challenge to the constitutionality of Section 9(c) of the National Industrial Recovery Act. The Court struck down the provision on the ground of excessive delegation warning that "[t]he question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good."⁸⁸ The Court recognized the ability of Congress to delegate certain quasi-legislative powers: "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested." However, "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules *within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply*."⁸⁹ The constant resort to this delegating ability, ". . . cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."⁹⁰

In *FEA v. Algonquin*,⁹¹ the Court upheld certain acts taken by the President pursuant to a delegation of legislative authority under the Trade Expansion Act of 1962. A license fee imposed by the

85. 295 U.S. 602 (1935).

86. 295 U.S. 495 (1935).

87. 293 U.S. 388 (1935).

88. *Id.* at 420.

89. *Id.* at 421 (emphasis added).

90. *Id.*

91. 426 U.S. 548 (1976).

President was attacked on the grounds that it was beyond his authority both constitutionally and statutorily. The Court disagreed, holding that such an act was within the scope of delegated authority which was a proper delegation of power by Congress, because it established clear preconditions to Presidential action.

These cases reveal a number of things about Congress' ability to control the President's action. First, unless the President is acting solely within Article II powers, Congress may properly restrict the President when he either affects Congressionally delegated activity or exercises certain quasi-legislative authority.

These cases reveal that Recommendation Five's minimal provisions for Congressional review are insufficient when compared to case law. Any statute enacted pursuant to the Recommendation would be invalid because it fails to delineate clear standards with which to judge the validity of the President's acts.⁹²

92. In his article, *Beyond Discretionary Justice*, Charles Wright commented: To be sure we can all join in rejecting broad formulations of the separation of powers doctrine, such as the famous statement in *Field v. Clark*, 143 U.S. 692 (1892): 'That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.' But one can reject this extreme position without conceding that Congress should be permitted, in effect, to vote itself out of business. There must be some limit of the extent to which Congress can transfer its own powers to other bodies without guidance as to how these powers should be exercised.

Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

In their book, *Power, Inc.*, Martin Mintz and Jerry S. Cohen argue that the purpose of the separation of power structure is to ensure accountability. With regard to the relationship between Congress and the President they observed: "Intended by the Framers to be the foremost branch, Congress was to balance and oversee the White House. For many reasons, prominently including the unexpected rise of Presidents as party leaders, Congress long has been floundering—and frequently in the wings, rather than on stage." M. MINTZ & J. COHEN, *POWER, INC.: PUBLIC & PRIVATE RULES & HOW TO MAKE THEM ACCOUNTABLE* 15 (1978). Congress can be found "in the wings rather than on stage" with regards to the power to make war as when Congress carelessly authorized President Eisenhower to protect our "vital interests" in the Middle East.

Congress can again be formal backstage when the President declares a state of national emergency. The Senate Special Committee on National Emergencies and Delegated Powers, concluded that abuse of this emergency rulemaking authority has contributed "to the erosion of the structure of divided powers, the bedrock of our constitutional system of government." FINAL REPORT OF THE SPECIAL COMMITTEE ON NATIONAL EMERGENICES AND DELEGATED EMERGENCY POWERS, S. Rep. No. 94-922, 94th Cong., 2d Sess. (1976). The Committee, examining the legal status of Executive decisions, concluded that:

The constitutional authority for such a delegated power is as broad as the

Existing Alternative Recommendations

The avowed purpose of delegating quasi-legislative power to the President is to improve the workings of administrative agencies. In order to determine the best way to do this, it seems logical to start by finding out exactly what is faulty in the administrative process or at least what problems the President can be expected to solve. Administrative agencies have lost sight of basic goals intended by Congress and are "burdened by a morass of detail, a good deal of which is probably unnecessary busywork, they (administrators) are charged to protect."⁹³ Unlike the Founding Fathers who had a firm notion of what kind of society they wanted and then devised a governmental structure appropriate to that society, the administrative process can be characterized as a system of randomness. This short-range pragmatic problem-solving approach has caused government to lose sight of "the long-run aims of government—fairness and efficiency."⁹⁴ Had we remained true to these interests "we would have avoided the repeated patchwork efforts to meet these problems—efforts which become easy captive to the producer groups they (the agencies) are designed to regulate."⁹⁵ Congress, when considering new regulatory legislation, needs "to resolve basic policy issues on such elemental factors as protection versus competition, instead of leaving these dangling in the form of vaguely and ambiguously worded delegations."⁹⁶ On the other hand, the President may be in

power of Congress. This is only limited by the restriction that when the Constitution expressly vests a power in Congress, that body may not entirely relinquish its constitutional responsibility by delegating full discretion and authority in that area to any other body or person. Since the Presidential power to issue an order is, in such instances, based entirely on an act of Congress, a subsequent act by Congress may supersede, annul or modify such an order.

Id. at 7.

In addition, the Committee concluded that even during periods of peace and stability there is "considerable confusion in procedure, a decided absence of a comprehensive means for public accountability and an uncertain basis for determination of legal authority on which executive directives may be issued or challenged." *Id.* at 9. The burden to alleviate this uncertainty and lack of accountability rests with Congress. "Until Congress grapples with these issues directly, it will be faced with a continuing veil of secrecy and be unable to carry out its constitutional task of overseeing the Executive. The Indochina war and Watergate tragically illustrated the results of such congressional inattention." *Id.*

93. Hanslowe, *The Malaise of the Administrative Process*, 1962 DUKE L.J. 447.

94. *Id.* at 481.

95. *Id.*

96. *Id.* at 486.

an appropriate position to coordinate the enforcement of law and policy with administrative agencies.

The Landis Report,⁹⁷ a comprehensive study of the administrative process, analyzed the failure of administrative agencies to formulate policy pursuant to their enabling acts and delays in the disposition of adjudicatory proceedings. As to the President's role in solving these particular problems, the Report states: "The congestion of the dockets of agencies, the delays incident to the disposition of cases, the failure to evolve policies pursuant to basic statutory requirements are all a part of the President's constitutional concern that the laws are faithfully executed."⁹⁸ With regard to the relationship between agencies and Congress, the report suggests that the right and duty of Congress to inquire into the operation of its regulatory agencies could be carried out by delegating such authority to special committees.⁹⁹

Implicitly, the report recognizes that the power to reorganize the structure of an agency does not originate from the President's Article II authority. Rather, it must come from Congress: "[Agency] reorganization can be accomplished best and most expeditiously by the Executive. To do this, however, he must be empowered to act."¹⁰⁰ Therefore, the President, when he is acting under such

97. STAFF OF SENATE SUBCOMM. ON AD. PRACTICES AND PROCEDURE, COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960).

98. *Id.* at 33.

99. The Report noted:

[An agency's] responsibility is to the Congress rather than solely to the Executive. The policies that they are supposed to pursue are those that have been delineated by the Congress *not* by the Executive. Departure from these policies or the failure to make them effective or their subordination of legislative goals to the directions of the Executive is thus a matter of necessary legislative concern. . . . There is no question but that Congress has both the right and duty to inquire into effectiveness of the operation of the regulatory agencies in their handling of the broad powers that have been delegated to them.

Id. at 34 (emphasis added).

100. *Id.* at 36. The late Dean Landis of Harvard Law School also recommended the reorganization of the Administrative Conference of the United States. The purpose of his plan was to make the Conference more effective at developing improvements in the legal procedures by which agencies operate and facilitating its role in interagency activities.

The concept of an *Administrative Conference of the United States* promises more to the improvement of administrative procedures and practices and to the systematization of the federal regulatory agencies than anything presently on the horizon. It would achieve all that the concept of

authority, should be subject to Congressional scrutiny, not only to maintain a proper balance of powers, but also to ensure agency accountability to the people.

The Legislative Veto

In *Regulation and the Political Process*,¹⁰¹ Cutler points out the need for a system of continuous political monitoring of all government regulation to insure responsiveness to the changing economic and social needs that the political process reflects. While delegation to agencies is necessary in order to handle the numerous and complex questions involved in regulating the economy, that does not relieve elected officials of the responsibility to remain accountable to the public for the actions of their delegates.

Once again, it must be determined what political entity is best suited to assume the difficult role of agency overseer. Cutler considers this question and discusses the conflict between Congress and the President in this respect: "The battle has cut agency policymaking adrift from any meaningful, coordinated and visible oversight by politically accountable authority."¹⁰² The arguments in favor of the President assert that he is capable of acting more quickly than Congress in articulating policy goals, and such overview activity is consistent with his responsibility for executing the laws. The arguments favoring Congress to have primary responsibility for agency oversight point to recent developments indicating that Congress may be willing and able to undertake increased oversight of regulatory policymaking.¹⁰³ In addition, Congressional inquiry and debate is superior to Presidential exercise of his own discretion or the limited diversity of input from the Presidential staff. Congress

the Office of Administrative Procedure envisaged by the Hoover Commission and endorsed by the A.B.A. hoped to accomplish, and can do so at a lesser cost and without the danger of treading on the toes of any of the agencies.

Id. at 74. I support this recommendation or any similar proposal for increased delegation of authority to the Conference. See also, Mashaw, *Reforming the Bureaucracy: The Administrative Law Technique*, 26 AD. L. REV. 261 (1974); Robinson, *The Administrative Conference and Administrative Law Scholarship*, 26 AD. L. REV. 269 (1974); Gardner, *A Review of the Work of the Administrative Conference*, 26 AD. L. REV. 281 (1974); Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771 (1975).

101. Cutler & Johnson, *Regulation of the Political Process*, 84 YALE L.J. 1395 (1975).

102. *Id.*

103. S. REP. No. 71, 94th Cong., 1st Sess. (1975); S. REP. No. 55, 94th Cong., 1st Sess. (1975); H. Rep. No. 988, 93rd Cong., 2d Sess. (1974).

is also more politically accountable because it is not as isolated or obligated to only a favored constituency.

Cutler concludes that neither the President *alone* nor Congress should be relied upon to give direction to regulatory policy. He favors a combination of Presidential ability to act quickly and pursue a single consistent policy with Congress' collegiality and ability to check an arbitrary and isolated President.¹⁰⁴ The result is the enactment of "a statute that would authorize the President to modify or direct certain agency actions, and set priorities among competing statutory goals, *subject to a one-house congressional veto* and to expedite judicial reviews."¹⁰⁵ With regard to the one-house veto provision, Cutler admits that: "Although the constitutionality of this procedure . . . has not been squarely resolved, it does provide a practical and politically acceptable method for granting authority to the President that Congress would be unwilling to grant without such a condition."¹⁰⁶

A reading of Recommendation Five leaves one with the impression that the drafters oppose any statutory delegation of quasi-legislative authority to the President that includes a provision enabling Congress to "automatically invalidate presidential action. . . ."¹⁰⁷ However, the material following the Recommendation describes certain situations where Congress can exercise "an effective item by item check . . . over Presidential action."¹⁰⁸ In addition to the confusion this format creates in understanding the real impact of the Recommendation, the legislative veto raises questions regarding constitutionality and efficiency. These objections to the legislative veto are without force. The legislative veto cannot properly be compared to the process of legislative amendment because

104. Cutler & Johnson, 84 YALE L.J., *supra* note 101, at 1414.

105. "By following the President's and Congress' (*sic*) essentially policy-oriented reviews with the courts friction between the constitutional roles of the legal review, the Cutler-Johnson approach would avoid the judiciary and the political branches that adheres in some legislative veto proposals." McGowan, *Congress, Court, and Control of Delegated Powers*, 77 COLUM. L. REV. 1119, 1173 (1977).

106. Cutler & Johnson, 84 YALE L.J., *supra* note 101, at 1415-16. Since 1932, Congress normally has been willing to delegate reorganization power to the President only on condition that the law contain a legislative veto provision. The Reorganization Acts of 1939, 1945, 1949 and 1977 all provided that presidential reorganization plans were not to become effective for a stated period during which they could be disapproved by Congress—under the Acts of 1939 and 1945 by concurrent resolution of the two houses and under the Acts of 1949 and 1977, by a resolution passed by a majority of either House.

107. ROAD TO REFORM, *supra* note 79, at 111.

108. *Id.* at 112.

that process never has an impact on the promulgation of rules except insofar as it may modify the agency's enabling act. Furthermore, to say that the veto "totally destroys" rules and puts nothing in their place is to imply that it somehow takes away something that always existed. The legislative veto, if it rejects a rule, simply preserves the *status quo*. Therefore, it is not necessary to put something in the place of the rejected rule; it is the proposed rule that is attempting to "destroy" existing format.

President Carter has commented on the legislative veto.¹⁰⁹ He has no objection to its use when it is embodied within reorganization acts because it "does not involve Congressional intrusion into the administration of on-going substantive programs, and it preserves the President's authority because he decides which proposals to submit to Congress."¹¹⁰ But in any other context, he contends it circumvents the President's role in the legislative process.¹¹¹ In addition, the original purpose for the veto has disappeared and its only remaining effect is to impede relations between the Executive and the legislature:

The desire for the legislative veto stems in part from Congress' mistrust of the Executive, due to the abuses of years past. Congress responded to those abuses by enacting constructive safeguards in such areas as war powers and the budget process. The legislative veto, however, is an overreaction which increases conflict between the branches of government.¹¹²

According to President Carter, the initial purpose behind the proposals for a legislative veto have substantially dissipated. The constitutionality of the legislative veto is a more serious matter. There have been a number of articles on the legislative veto issue with divergent viewpoints on its constitutionality.¹¹³ There is no doubt

109. THE LEGISLATIVE VETO—MESSAGE FROM THE PRESIDENT OF THE U.S. H.R., DOC. NO. 95-357, 124 Cong. Rec. H5879 (daily ed. June 21, 1978) [hereinafter cited as LEGISLATIVE VETO—MESSAGE].

110. *Id.* at 5879.

111. U.S. CONST. art. I, § 7.

112. LEGISLATIVE VETO—MESSAGE, *supra* note 109, at H5880.

113. Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323 (1977); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423 (1978); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Keeffe, *The Legislative Veto: Now You See It, Now You Don't* (I), 63 A.B.A.J. 1296 (1977); Miller

that Congress may constitutionally delegate some of its legislating authority to the President.¹¹⁴ The legislative veto is a device to control and limit the exercise of such delegated authority.¹¹⁵ One argument raised against the validity of the veto is that it interferes with the President's Article II authority to execute the laws.¹¹⁶ This argument ignores the fact that it is not Article II action that is subject to the veto; rather it is legislative, or quasi-legislative action, delegated *by Congress to the President* that is the object of the veto.¹¹⁷

Another argument raised against the veto is that it interferes with the President's constitutional authority to participate in enacting proposed legislation.¹¹⁸ In reality, the argument goes, the veto

& Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Newmann & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CAL. L. REV. 565 (1953).

114. "As the complexity of government has increased, Congress has found it necessary to delegate extensive authority to the executive branch in order to implement legislative policy." Abourezk, 52 IND. L.J., *supra* note 106, at 323.

115. "The author strongly believes that the Congressional veto is a constitutionally sound tool needed to control the exercise of powers which are delegated to the executive branch in necessarily broad terms. . . . Rather than interfering with the President's duty to faithfully execute the laws, the Congressional veto preserves the separation of powers by protecting the legislative prerogative from executive encroachment." *Id.* at 327.

116. "Is the Congressional veto an unconstitutional attempt by Congress to interfere with the execution of the laws, or is it a permissible action which protects the legislative power of Congress from encroachment by another branch of the government?" *Id.* at 324.

117. Robert G. Dixon, Professor of Law at Washington University School of Law and Chairman of the ABA's new Committee on the Legislative Veto states that the veto, when made on policy grounds, as compared to one based on *ultra vires* grounds "is a direct interference with the proper exercise of executive power, in derogation of the Article II allocation to the Executive of the responsibility for executing the law." Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash*, 56 N.C.L. REV. 423, 445 (1978). However, Professor Dixon does not describe how the veto in fact interferes with the President's Article II authority.

President Truman, asking Congress to pass the Reorganization Act of 1949, stated:

In this procedure there is no question involved of the Congress taking legislative action beyond its initial passage of the Reorganization Act. Nor is there any question involved of abdication by the Executive of his Executive functions to the Congress. It is merely a case where the Executive and the Congress act in cooperation for the benefit of the entire Government and the Nation.

S. REP. No. 232, 81st Cong. 1st Sess. 19 (1949).

118. 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; if he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have

changes the boundaries of the delegation. Congress is rewriting the statute in derogation of the President's veto power.¹¹⁹ Another way of saying this would be that the legislative veto violates the Constitution's Presentation Clause,¹²⁰ which requires that all legislation be submitted to the President for his signature or veto.

This argument also fails. The veto in no way interferes with the President's authority to participate in the legislative process because it is not in the nature of legislation.¹²¹ Furthermore, the President participates in the enactment of the enabling legislation within which the veto is found. "Since the enabling legislation was either signed by the President or passed over his veto, there has been no infringement of the President's veto power."¹²²

originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of the House, it shall become a Law. But in all such Cases the Votes of both Houses will be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

U.S. CONST. art. I, § 7, cl. 2.

119. Dixon, 56 N.C.L. REV., *supra* note 117, at 445.

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

U.S. CONST. art. I, § 7, cl. 3.

121. H.R. REP. NO. 105, 95th Cong., 1st Sess. 10, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 491, 500. It should be stressed that this article is concerned with the type of legislative veto contained in the Reorganization Acts, under which executive or administrative action can be annulled by resolution of one or both Houses. The claim that the legislative veto violated the veto clause is based essentially on the separation of powers doctrine. It assumes that all congressional action involved an exercise of legislative power, which must, as such, be subject to the President's veto. This assumption rests upon an outmoded application of constitutional doctrine (reference omitted). The modern view recognized that some blending of powers may be permissible. Accordingly, legislative approval of an administrative rule or other executive action is not an exercise of power to enact a law within the meaning of the veto clause but merely a condition which the legislature may attach to delegated powers.

122. Abourezk, 52 IND. L.J., *supra* note 113, at 338.

Analogous cases indicate that at least some courts are willing to accept the constitutionality of the legislative veto. *Watrous v. Golden Chamber of Commerce*,¹²³ involved an attack upon a Colorado statute providing that any pledge of tax proceeds as security for highway bonds would first be subject to approval by joint resolution of the Senate and House of Representatives. The court rejected the contention that the approval requirement violated the governor's veto power. "The joint resolution for which the statute provided," said the court, "was not 'legislative' in the sense of a bill or resolution which has to be submitted to the governor for approval."¹²⁴

The one-house legislative veto provision has also been attacked as a violation of the Constitution's requirement that legislation should be passed by both houses and be signed by the President.¹²⁵ Professor Dixon contends that:

Under Article I, Section 7, after Congress has delegated power, the administrator can resist congressional influence until a two-third's majority in both houses can be achieved to override a presidential veto of a statutory amendment (or repealer) that takes away or modifies the delegated power in question. Under the congressional veto device, however, congressional influence can become controlling when a bare majority of a quorum in one house can be mustered.¹²⁶

Article I, Section 7, is devoid of any statement either regarding Congressional delegation of power to the administrator or, for that matter, what the administrator can do after such delegation of power. The one-house congressional veto is not some unilaterally-created independent authorization; rather, it is embodied within a statute that was subject to the normal Article I, Section 7 procedures when it was enacted: "since the congressional veto is not a legislative act, the disapproval mechanism need not require the concurrence of the

123. 121 Colo. 521, 218 P.2d 498 (1950).

124. *Id.* at 524, 218 P.2d at 502. See Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978).

In *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), the Federal Salary Act of 1967 was attacked because of its one-house legislative veto provision. The district court dismissed the challenge. The court of appeals affirmed without reaching this issue.

125. Judge MacKinnon, dissenting in *Clark v. Valeo*, 559 F.2d 642, 678-95 (D.C. Cir. 1977), assailed the one-house veto at great length as a completely different method of accomplishing a legislative result by a congressional procedure not authorized by the Constitution, i.e., by one house instead of two houses and the President.

126. Dixon, 56 N.C.L. REV., *supra* note 113, at 448.

second House any more than it does the concurrence of the President. Bicameralism is preserved in the enactment of the enabling legislation, at which point either House of Congress has the power to 'veto', i.e., vote not to pass, that enabling law."¹²⁷

Atkins v. United States,¹²⁸ provides some enlightenment in this area. Among other things, Atkins challenged the constitutionality of the authority delegated to the President by Congress under the Federal Salary Act and the one-house veto provision contained in the Act. With regard to the constitutionality of the one-house veto, the Court of Claims concluded that the legislative veto is properly exercised by a single house. The Constitution does not require the concurrence of both Houses, since Congress is neither making new law, nor altering existing law. The maintenance of the *status quo* does not require concurrence.¹²⁹

In an attempt to provide constitutionally permissible accountability for the exercise of quasi-legislative authority, Recommendation Five in effect promotes unchecked Executive responsibility. The utility of the legislative veto, however, should be examined more closely as a workable alternative. Those who fear constitutional barriers to the implementation of the one-house veto fail to recognize that the requirement of constitutional bicameralism applies only to the enactment of new legislation or the modification of existing legislation. When requiring the maintenance of the *status quo*, the legislative veto provides a useful and constitutional compromise between positions requiring either sole congressional or sole executive responsibility for agency action.

CONCLUSION

Delegation of quasi-legislative authority has become an accepted procedure for improving Congressional operations in a world of increasing complexity. In addition to Congressionally-created agencies, the President is an effective delegatee of such legislative power, especially in areas of agency oversight and inter-agency coordination.

A major problem with the administrative process is its lack of accountability to the people. Aside from increasing direct public participation in administrative hearings, Congress is well-suited to

127. Abourezk, 52 IND. L.J., *supra* note 113, at 341.

128. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

129. *Id.* at 1063.

represent its constituents and hold agencies to their obligation to act in the public interest. The President, under authority granted to him from Congress and in furtherance of his constitutional duty to execute the laws, should also make the agencies accountable. However, when exercising quasi-legislative authority, he too must remain accountable to the people. The most effective and constitutional way to accomplish this is the one-house legislative veto in all delegations of quasi-legislative authority to the President.

