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THE CONGRESSIONAL VETO AND SEPARATION OF POWERS: THE EXECUTIVE ON A LEASH?*

ROBERT G. DIXON, JR.†

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A most innovative and troublesome current development in American public law is the suddenly expanded use of the congressional veto device for control of the federal administration. From a constitutional law exotic largely confined to the Federal Reorganization Acts¹ and little noticed even by specialists, the veto has become in the post-Watergate years an almost routine addition to any statute delegating significant administrative power.

At the outset it may suffice to say by way of definition that the congressional veto is a means whereby the legislature or some part, such as one house or even a committee, can block or modify administrative action taken under a statute. Because the legislative action does not rise to the dignity of a statutory amendment, the President's constitutionally prescribed veto power is avoided. Further, the bicameral principle is offended if the action is by less than a resolution of both houses. The effect, nevertheless, is basic policymaking by the Congress in nonstatutory form.² Constitutional problems, in addition to general separation of powers considerations, arise under both the specific article I provisions concerning the presidential role in the basic lawmaking process,³ and the specific article II reservation of administration of statutes to the Executive.⁴

The intensified congressional interest in the legislative veto device lies at the center of a fine paradox in our governmental system. There is tension between the persistent tug of the town meeting democracy concept, which points toward legislative supremacy and views representatives as the tribunes of the people, and the more subtle separation of powers principles upon which the Constitution rests. While most citizens may concede that the

1. See notes 15 & 27 and text accompanying notes 13, 27 & 28 *infra*.

2. For a more detailed definition of legislative veto see note 14 *infra*.

3. U.S. CONST. art. I, § 7, cls. 2, 3.

4. *Id.* art. II, § 1, cl. 1.

type of regulatory and service activity that "contemporary public opinion requires the state to engage in can, as a practical matter, be carried on only by the executive branch of the government,"⁵ the accretion of discretionary authority in the executive branch through loose delegations of power by Congress is not accepted with equanimity. The tension has deep roots, traceable to our early political theory. As former Attorney General Levi has noted, in 1776 separation of powers was a slogan of the Revolution meaning that power was to be "separated from the executive and given to legislatures."⁶ By 1787, as a reaction to legislative excesses in the interregnum period, a true separation of powers doctrine emerged "as a criticism of legislative power and was central to the theory of the new government."⁷

As a device for controlling administrative action the congressional veto in the present day would be expected to strike a responsive chord among those concerned about the magnitude and power of the modern administrative state. Former President Nixon's Watergate gave added timbre. When Watergate emotion and separation of powers reason clash, the former is aided both by the populist feelings that have revived in the mid-seventies⁸ and by the fact that the model of government that is the simplest and easiest to grasp is the legislative model.

We still operate, however, under the 1787 Constitution augmented by judicial review, and although separation of powers disputes are not the favorite fodder of the judiciary, congressional veto issues finally began to be litigated in 1976. By 1977 the litigation had produced the first major scrutiny at the court of appeals level⁹ and a major ruling on the merits in the Court of Claims.¹⁰

Without attempting a definitive survey of all the past writing¹¹ or of all experience under the now multitudinous congressional veto provisions, this

5. Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U.L. REV. 1031, 1033 (1955).

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

7. *Id.* at 375.

8. Such populist feelings were an important factor in the determination of the American Bar Association's House of Delegates in August 1976 not to reindorse the ABA's 14-year-old statement against the congressional veto. AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 24 (1976).

9. *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.) (per curiam), *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977), *discussed at text accompanying notes 171-93 infra*.

10. *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 98 S. Ct. 718 (1978), *discussed at text accompanying notes 251-73 infra*.

11. *See generally* J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1964); C. NORTON, CONGRESSIONAL REVIEW, DEFERRAL AND DISAPPROVAL OF EXECUTIVE ACTIONS: A SUMMARY AND INVENTORY OF STATUTORY AUTHORITY (Library of Congress Congressional Research Service JK 1015C 76-88G, 1976); N. SMALL, THE COMMITTEE VETO: ITS CURRENT USE AND APPRAISALS OF ITS VALIDITY (Library of Congress Congressional Research Service JK

essay will provide background needed to place the constitutional issues and the litigation in context. It will focus particularly on the hypothesis, not inconsistent with the litigation to date, that under a separation of powers "purpose" analysis the use of the congressional veto device to check day-by-day administration of the government is both unconstitutional and unwise, but that its use may be harmless in the context of discrete legislation. In the latter instance the roles of the President and Congress may be viewed as reversed, without destroying the parity in lawmaking contemplated by article I. Possible examples include the authorization under the Salary Act for the President to submit periodic revisions in salaries for high officials subject to a one-house veto,¹² and perhaps the similar formula in the sequence of Federal Reorganization Acts, including the current one obtained by President Carter.¹³

I. DEVELOPMENT OF THE LEGISLATIVE VETO CONCEPT

In historical perspective the legislative veto as a device for controlling administrative activities¹⁴ is a quite recent development dating essentially

1015C A-179, 1967); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators*, 41 CALIF. L. REV. 565 (1953); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

12. See Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2, 5, 18, 26, 47 U.S.C.).

13. Reorganization Act of 1977, 5 U.S.C.A. §§ 901-912 (West 1977). See also note 27 and text accompanying notes 27 & 28 *infra*.

14. The term "legislative veto" is generally used at the federal level to mean action taken by Congress or a congressional subgroup to control implementation of a particular executive action. Statutes authorizing this form of legislative control have given it varying forms. The veto power has been granted to both houses, one house or a congressional committee. The form can be either negative (requiring disapproval of the action), or more rarely, affirmative (requiring approval of the action). Usually the negative form provides that the action will become effective after a specified period if there is no action formally disapproving it, so that it is possible for executive acts to be implemented without any action by the group with the veto power. See Cooper & Cooper, *supra* note 11, at 468-69.

Committee veto provisions frequently take the form of "come into agreement" or "no appropriations" requirements. The "come into agreement" provision requires that the agency and the designated congressional committee reach an agreement before the agency may act. For example, the committee might have to approve the terms under which an agency would acquire or dispose of property. Under a "no appropriations" provision the substantive committee, as distinguished from appropriations committees, will scrutinize all agency requests for expenditure of funds above a certain amount. Such a provision is usually attached to public buildings construction bills. The Public Works Committees of both houses are given the power to approve all requests for expenditures in excess of a specified amount for any one project. See, e.g., Ginnane, *supra* note 11, at 599-604.

Some commentators have included in their definitions of the legislative veto what is known as a "report and wait" or "laying provision." These provisions require that an agency action be

from a governmental reorganization act in 1932, although there were occasional earlier manifestations.¹⁵ In general, the frequency was low until 1970, but has increased rapidly since 1974. For example, H. Lee Watson's tabulation of statutes authorizing congressional action on major matters by simple (one-house) or concurrent resolution shows that in the first six months of President Ford's administration, which began on August 9, 1974, there were ten examples. The prior ten statutes containing such provisions occurred in the Nixon administration between 1969 and mid-1974. Between 1959 and 1969, however, there were only four examples.¹⁶ A Library of Congress survey for the period 1932 through 1975, which also includes statutes authorizing the committee veto that has become common in respect to public building construction, found 295 congressional review provisions in 196 laws.¹⁷ For the year 1975 alone the survey found fifty-eight legislative review provisions in twenty-one acts of Congress. Administrative decisions on a wide variety of subjects, including the extensive education grants program, foreign assistance, energy policy and research, agriculture, trade agreements and arms control, have been placed under such legislative disapproval provisions.¹⁸

This development represents a significant attempt by Congress to move from vigorous *oversight* of the executive, through hearings, reports and revision of statutes, to *shared administration*¹⁹ under existing statutory

submitted to Congress or one of the above mentioned congressional subgroups for a specified period of time. "Report and wait" provisions have also been viewed as not properly allocable to the legislative veto classification, because if Congress decides to take further action on the subject it must do so through regular legislative processes. See, e.g., Watson, *supra* note 11, at 1060-65. See also Miller & Knapp, *supra* note 11, at 371-74.

15. See Watson, *supra* note 11, at 1004-09. Watson outlines the development of the use of concurrent (two-house) and simple (one-house) resolutions to retain control over the subject matter of laws passed by Congress. Early attempts to use these forms of control were spasmodic and did not affect large issues of policy. Some met with presidential opposition, or were questioned in Congress. Others were made moot by circumstances that prevented congressional exercise of its powers. Control was more successful in areas such as printing and selection of land for historic memorials. *Id.* After the Reorganization Act of 1932, ch. 314, 47 Stat. 382 (formerly codified in scattered sections of 2, 5, 10, 38, 39, 41 U.S.C.), this manner of legislative control became increasingly common, and involved Congress in basic substantive decisions not directed to enactment of statutes. See Watson, *supra* at 1009-29.

16. Watson, *supra* note 11, at 1089-92.

17. C. NORTON, *supra* note 11, at i. The statutes are tabulated at *id.* at 8-12. These figures include "report and wait" provisions, which many commentators consider constitutional. See note 14 *supra*.

18. C. NORTON, *supra* note 11, at 8-12. The Congressional Research Service has tabulated instances between 1960 and 1975 when a resolution was filed in the House or Senate for the use of a legislative veto. The figures have been reprinted in Cohen, *Junior Members Seek Approval for Wider Use of the Legislative Veto*, 9 NAT'L J. 1228, 1230 (1977). Of the 351 resolutions filed during the period, 224 were filed during 1974 and 1975.

19. Dixon, *Congress, Shared Administration, and Executive Privilege*, in CONGRESS AGAINST THE PRESIDENT 126-28 (H. Mansfield ed. 1975).

delegations. Sometimes the President has acquiesced in silence by approving the bills, but the general presidential response has been one of opposition, whether or not directly expressed.²⁰ With increasing frequency there have been signing statements protesting the inclusion of the legislative review provisions, or outright vetoes, such as the unsuccessful veto by President Nixon of the War Powers Resolution in 1973.²¹

President Ford in his early months in office signed several measures without objection, but his administration later developed a hard-line approach. The Department of Justice vigorously opposed the congressional veto on constitutional grounds in a series of congressional hearings,²² the

20. Upon signing the Lend-Lease Act of 1941, ch. 11, §§ 2-10, 55 Stat. 31 (codified as amended at 22 U.S.C. §§ 411-419 (1970)), President Roosevelt took the unusual action of submitting to then Attorney General Robert Jackson a private memorandum expressing his grave reservations about the constitutionality of the veto provision it contained. He labeled the provision "clearly unconstitutional," but because of the urgent need for the bill he could not afford to offend his political allies by public objection to the provision. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1354 (1953). Justice Jackson was to make the memorandum public when it could be done without embarrassment, which he did in 1953. *Id.* at 1357.

Watson found that President Wilson, and every President from Hoover through Ford, had objected to the legislative device on one occasion or another, but that there were some inconsistencies. Watson, *supra* note 11, at 1004-29. See also Cooper & Cooper, *supra* note 11, at 470 n.11.

John Bolton suggests that political considerations have frequently tempered presidential opposition to legislative veto provisions and calls for judicial recognition of this factor when and if a decision on the constitutionality of the veto is reached. See J. BOLTON, *THE LEGISLATIVE VETO: UNSEPARATING THE POWERS* 10-12 (1977).

21. President's Message to the House of Representatives Returning H.J. Res. 542 Without His Approval, 9 WEEKLY COMP. OF PRES. DOC. 1285 (Oct. 24, 1973); White House Statement Following Action by the Congress Overriding the President's Veto, 9 WEEKLY COMP. OF PRES. DOC. 1312 (Nov. 7, 1973); see War Powers Resolution, 50 U.S.C. §§ 1541-1548 (Supp. V 1975).

22. The main points of the arguments were based on the principle of separation of powers, specific constitutional provisions establishing the presidential veto and pragmatic objections. The separation of powers argument did not include labeling of some actions as inherently executive, legislative or judicial. The Justice Department recognized that clear-cut distinctions of that type are frequently impossible:

Some [governmental action] might be performed by any of the three branches—and in that situation it is up to Congress to allocate the responsibility. . . . Once it has done so, however, once Congress has so allocated the responsibility, the very essence of separation of powers requires that Congress cannot control the discharge of functions assigned to the executive or the courts, except through the plenary legislative processes of amendment and repeal.

Improving Congressional Oversight of Federal Regulatory Agencies: Hearings on S. 2258, S. 2716, S. 2812, S. 2878, S. 2903, S. 2925, S. 3318, and S. 3428 Before the Senate Comm. on Government Operations, 94th Cong., 2d Sess. 124 (1976) (citation omitted) (statement of Assistant Attorney General Antonin Scalia).

The added level of congressional scrutiny was viewed as making less likely judicial review of an agency regulation that had been approved by Congress (or left untouched by Congress if the veto provision required no affirmative action). The Department also felt that the veto would not really be effective in forcing upon Congress meaningful oversight; it would serve only to truncate the constitutionally prescribed process for enactment of legislation by creating a procedure for avoidance of the presidential veto, and, in the case of the one-house veto, for avoidance of the concurrence of both houses. *Id.* at 80-81. For other Department of Justice

President began to question the propriety of the legislative veto provisions in some bills he signed,²³ and vetoed seven on this ground.²⁴ The Ford

statements see *Congressional Review of International Agreements: Hearings on H.R. 4438 Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 2d Sess. 182 (1976) (statement of Antonin Scalia); *Congressional Review of Administration Rulemaking: Hearings on H.R. 3658, H.R. 8231, and Related Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 373 (1975); *Congressional Oversight of Executive Agreements—1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 167, 173-74, 183-87 (1975) (testimony of Antonin Scalia). See also Symposium, *1976 Bicentennial Institute—Oversight and Review of Agency Decisionmaking*, 28 AD. L. REV. 575, 684 (1976) (statement of Antonin Scalia).

23. *President Ford's Signing Statements: Education Amendments of 1974, The President's Remarks at the Bill Signing Ceremony*, 10 WEEKLY COMP. OF PRES. DOC. 1056 (Aug. 21, 1974) (Pub. L. No. 93-380, 88 Stat. 484 (1974) (codified in scattered sections of 20 U.S.C.)); *Amtrak Improvement Act of 1975, Statement by the President on Signing the Bill Into Law, While Expressing Reservations About One of Its Provisions*, 11 WEEKLY COMP. OF PRES. DOC. 560 (May 26, 1975) (Pub. L. No. 94-25, 89 Stat. 90 (1975) (codified as amended in scattered sections of 45, 49 U.S.C.)); *Statement by the President on Signing H.R. 7710, Which Includes Amendments to the Child Support Provisions of Title IV of the Social Security Act*, 11 WEEKLY COMP. OF PRES. DOC. 856 (Aug. 11, 1975) (Act of Aug. 9, 1975, Pub. L. No. 94-88, 89 Stat. 433 (codified in scattered sections of 42 U.S.C.)); *Statement by the President on Signing S. 3065 Into Law*, 12 WEEKLY COMP. OF PRES. DOC. 857 (May 11, 1976) (Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified in scattered sections of 2, 18, 26 U.S.C.)); *Statement by the President on Signing H.R. 13680 Into Law*, 12 WEEKLY COMP. OF PRES. DOC. 1104 (July 1, 1976) (International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified in scattered sections of 22 U.S.C.)); *Statement by the President on Signing H.R. 3884 Into Law*, 12 WEEKLY COMP. OF PRES. DOC. 1340 (Sept. 14, 1976) (National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified in scattered sections of 8, 10, 16, 50 U.S.C.)).

24. *President Ford's Veto Messages: President's Message to the House of Representatives Returning H.R. 15323 Without His Approval*, 10 WEEKLY COMP. OF PRES. DOC. 1279 (Oct. 12, 1974) (Atomic Energy Act Amendments); *President's Message to the House of Representatives Returning H.R. 8617 Without His Approval*, 12 WEEKLY COMP. OF PRES. DOC. 643 (Apr. 12, 1976) (Hatch Act Amendments); *President's Message to the Senate Returning S. 2262 Without His Approval*, 12 WEEKLY COMP. OF PRES. DOC. 643 (Apr. 12, 1976) (Foreign Assistance Bill); *President's Message to the House of Representatives Returning H.R. 12567 Without His Approval*, 12 WEEKLY COMP. OF PRES. DOC. 1142 (July 7, 1976) (Appropriations Bill for Federal Fire Prevention and Control); *President's Message to the House of Representatives Returning H.R. 12944 Without His Approval*, 12 WEEKLY COMP. OF PRES. DOC. 1261 (Aug. 13, 1976) (extension of the Federal Insecticide, Fungicide and Rodenticide Act); *President's Memorandum of Disapproval of H.R. 5446*, 12 WEEKLY COMP. OF PRES. DOC. 1486 (Oct. 10, 1976) (International Navigational Rules Act of 1976); *President's Memorandum of Disapproval of S. 2081*, 12 WEEKLY COMP. OF PRES. DOC. 1541 (Oct. 20, 1976) (Agricultural Resources Conservation Bill).

During his administration President Ford's position on the legislative veto changed from one of remonstrance to one of rejection. The development is evidenced not only by the content of his statements, but also by their time sequence. In 1974 he vetoed only one bill, and made only one signing statement that commented on the device. After this first veto, President Ford did not exercise his veto power to discourage the use of the congressional veto provisions until April of 1976. Between April and October of 1976 he vetoed six bills containing the device. As his political position strengthened he seemed to progress from the caution born of the inherent weakness of his post-Watergate appointment, coupled with the natural tendency of a former Congressman to support strong congressional control of the Executive, see *Education Amendments of 1974, The President's Remarks at the Bill Signing Ceremony*, *supra* note 23, at 1057,

administration also saw the first attempt by Congress to shift from its practice of adding legislative veto provisions to bills on an ad hoc basis to adoption of a general requirement of congressional review. Hearings were held on a proposed amendment to the Administrative Procedure Act²⁵ to require congressional review of administrative rulemaking before the rules

to an increasing awareness of the need to defend the Executive from congressional desire to control directly administrative functions. The Atomic Energy Act Amendments, vetoed in 1974, contained one of the more unusual versions of a legislative veto. Even if the President had signed it, the effectiveness of the Act itself, dealing with recompense for a nuclear accident, would have been held in abeyance until Congress had an opportunity to react to a forthcoming relevant study, and perhaps then, to block all implementation of the contemplated program by concurrent resolution. President Ford characterized the proposed bill as "merely the expression of an intent to legislate." President's Message to the House of Representatives Returning H.R. 15323 Without His Approval, *supra* at 1279. In effect, Congress here was reversing the normal legislative process and asking for presidential approval of substantive legislation before Congress was ready to commit itself to support the legislation. For an analysis of "reverse legislation" in fields not involving administration of a program, see text accompanying notes 274-78 *infra*.

President Ford's signing statements commenting on the congressional veto also increased in frequency during his administration. He objected to one congressional veto provision in 1974, two in 1975, and three in 1976. President Ford's earliest statement expressing disapproval characterized the veto provision as "troublesome." He felt that "attempting to stretch the constitutional role of the Congress is not the best remedy" when Congress is faced with the frustrations of dealing with the executive branch. Education Act Amendments of 1974, The President's Remarks at the Bill Signing Ceremony, *supra* at 1057. On the basis of a report from the Attorney General in 1975 President Ford began to take a firmer stance. In all of his subsequent signing statements and veto messages the following general themes are reiterated: The provisions violate article I, § 7; they would involve the Congress in "day-to-day executive functions in derogation of the principle of separation of powers, resulting in the erosion of the fundamental constitutional distinction between the role of the Congress in enacting legislation and the role of the Executive in carrying it out." Statement by the President on Signing H.R. 13680 Into Law, *supra* note 23, at 1105.

President Ford's position on the status of the allegedly unconstitutional congressional veto provisions in the bills he did sign underwent a similar modification during the course of his administration. In the first two statements he did not comment on their potential severability. Instead his comments were restricted to the undesirability of the veto provisions, and the general desirability of the subject of the legislation. For example, while signing the Amtrak Improvement Act of 1975, he noted that he signed it because of the nation's need for passenger rail service. Amtrak Improvement Act of 1975, Statement by the President on Signing the Bill into Law, While Expressing Reservations About One of Its Provisions, *supra* note 23, at 856. In Ford's later signing statements he signalled a policy of noncompliance with veto provisions. In August of 1975 he directed the Secretary of HEW to regard the veto provision as simply a request for information. Statement by the President on Signing H.R. 7710, Which Includes Amendments to the Child Support Provisions of Title IV of the Social Security Act, *supra* note 23, at 856. He directed the Attorney General to challenge the constitutionality of the veto provision contained in the Federal Election Campaign Act Amendments in May 1976. Statement by the President on Signing S. 3065 Into Law, *supra* note 23, at 857-58. He noted that the veto contained in the International Security Assistance and Arms Export Control Act had never been exercised, and that he was reserving his position until the question of constitutionality had been raised directly in July 1976. Statement by the President on Signing H.R. 13680 Into Law, *supra* at 1105. Finally, in September of 1976, President Ford announced that he would treat the veto provision in the National Emergencies Act as severable. Statement by the President on Signing H.R. 3884 Into Law, *supra* note 23, at 1340.

25. H.R. 12048, 94th Cong., 2d Sess. (1976).

could go into effect.²⁶ As is always the case in interbranch disputes, these proposals had broad bipartisan support.

The full reaction of the Carter administration to the congressional veto movement is not yet known. Even before the new President was sworn in the issue arose in the context of his request for renewed Reorganization Act authority, which had lapsed during the second Nixon administration and not been renewed under President Ford. Here, despite some backing and filling on the side issue of the particular manner of the congressional veto,²⁷ he was

26. Had this bill been adopted it would have expanded the description of agency rulemaking and limited the types of agency action exempt from review to matters relating to agency management or personnel or matters relating to national defense or foreign affairs that are properly classified by Executive order. The act would have authorized disapproval by concurrent resolution or disapproval by one house without disagreement from the other house. *Id.*

27. The Administration proposal, *see* H.R. 3407, 95th Cong., 1st Sess. (1977); H.R. 3442, 95th Cong., 1st Sess. (1977), retained the veto from the Reorganization Act of 1971, Pub. L. No. 95-17, § 2, 91 Stat. 29 (presently codified as amended at 5 U.S.C.A. §§ 901-912 (West, 1977)). Reorganization plans would become effective after 60 days unless disapproved by either house of Congress. Plans could go into effect without any action by Congress under this type of veto provision.

Congressman Jack Brooks was a major opponent of the Carter reorganization bill. His own proposed bill granting reorganization authority, H.R. 3131, 95th Cong., 1st Sess. (1977), would have required an affirmative vote by both houses of Congress to approve any plan. He tried "to preserve all the authority past Presidents have had to reorganize the Government," but also "to keep it clearly within the constitutional confines of our legislative process. The Constitution, after all, says all legislative power shall be vested in Congress. If a plan cannot survive a vote in Congress, it simply should not become law." H.R. REP. NO. 105, 95th Cong., 1st Sess. 1, 10 (1977).

President Carter maintained his stance on the constitutionality of a negative one-house veto after receiving the view of Attorney General Griffin Bell that the veto in this instance did not violate separation of powers principles. Letter from Griffin Bell to President Carter (Jan. 31, 1977), *reprinted in* H.R. REP. NO. 105, *supra* at 10-11 [hereinafter cited as Bell, Letter to the President]. The Justice Department opinion stated that the proposed veto, when kept in the narrow context of executive reorganization, did not alter the balance of powers between the executive and the legislative branches. Assistant Attorney General John Harmon distinguished the Reorganization Act veto from the veto as it applies to an ongoing program. Unlike an ongoing program context the President has "ultimate veto power" in his decision not to submit reorganization plans. Harmon pointed out that in an ongoing program this flexibility, which serves to protect the President from congressional coercion, is often not available. Letter from John Harmon to Senator Abraham Ribicoff (Feb. 14, 1977) (copy on file with author). Harmon has since reasserted this distinction in relation to a proposed congressional veto provision to be added to the Refugee Act of 1977. Letter from John Harmon to Representative Joshua Eilberg (Apr. 1, 1977) (copy on file with author).

The final proposal that became the Reorganization Act of 1977, 5 U.S.C.A. §§ 901-912 (West 1977), did involve some compromise as a result of the Brooks/Carter difference of opinion. The bill requires "(by request)" pro forma resolutions of disapproval of reorganization plans. *Id.* § 910. A resolution of disapproval causes the bill to go before the appropriate congressional committees. If there is no committee recommendation after 45 days the committee is discharged automatically. *Id.* § 911. The resolution is then subject to a motion for a floor vote, leading to a potential one-house veto. *Id.* § 912. Of course, if there is no motion there will be no floor vote. Although the compromise seems to have produced only cosmetic changes in the Carter proposal for renewed reorganization authority in the previous one-house veto format, the Committee on Government Operations expressed the belief that, "this procedure

willing to pay the usual price exacted by Congress since 1932 and to accept its veto power.²⁸ In regard to substantive legislation, too, the accession to power of a Democratic President did not cause Congress to lose its newly acquired taste for inducing administrators, under threat of a potential veto, to develop modes of participatory administration with key members of Congress.²⁹

will virtually assure a vote by both the House and the Senate on every plan." H.R. REP. NO. 105, *supra* at 17.

28. See Reorganization Act of 1977, 5 U.S.C.A. §§ 901-912 (West 1977). The legislative veto provision appears in *id.* § 906.

29. For example, H.R. 116, ch. 6, 95th Cong., 1st Sess. (1977), which was before the Judiciary Committee in 1977, would allow Congress to disapprove of agency rules by concurrent resolution or by a one-house veto if the other house did not object. In either case Congress would have 90 days to consider regulations. *Id.* § 602. The proposed bill also permits either house to direct agency reconsideration of a rule. If one house passes this resolution during the initial 90 day waiting period the proposed rule shall not go into effect. If reconsideration is directed for a rule that is already in effect the rule shall lapse within 180 days if the agency has failed to submit a revised rule to Congress. *Id.* § 603. The possibilities for delay in implementation of rules subjected to this procedure are considerable. The initial waiting period is 90 days, with the possibility of a resolution to reconsider, causing a new round of public hearing, a new rule and another 90 day waiting period. The use of a resolution to reconsider any rule, including rules already in effect, would add to the potent negotiation power. See text accompanying notes 92-94 *infra*.

The final version of the bill to create a new Department of Energy, 42 U.S.C.A. §§ 7101-7352 (West Supp. Pamphlet No. 3 1977), that was passed in Congress on August 2, 1977, see 123 CONG. REC. S13,279, S13,291 (daily ed. Aug. 2, 1977), does not include a congressional veto provision. The House version of the bill, H.R. 6804, 95th Cong., 1st Sess. (1977), 123 CONG. REC. H5406 (daily ed. June 3, 1977), passed in the House on June 3, 1977, did contain a one-house veto provision that would have applied to any regulation, other than a fuel pricing rule, proposed by the Department of Energy or by the Federal Energy Regulatory Commission. Senator Schweiker attempted to include a similar provision in the Senate bill, which would have given Congress a one-house, non-item veto over all regulations proposed by the Secretary of Energy, but the amendment was defeated on the floor of the Senate. 123 CONG. REC. S7943-45 (daily ed. May 18, 1977).

President Carter began to show hostility to the use of congressional veto provisions during his first year in office. He vetoed one bill, citing as one reason the congressional veto provision, and attacked the constitutionality of veto provisions on three occasions in his signing statements. He vetoed the Department of Energy Authorization Bill (the Clinch River Breeder Reactor Bill), citing the veto provisions as "not consistent with Administration policies and the national interest," and as a limitation on the "constitutional authority of the President." Veto of Department of Energy Authorization Bill, Message to Senate Returning S. 1811 Without Approval, 13 WEEKLY COMP. OF PRES. DOC. 1726 (Nov. 5, 1977).

His language condemning the congressional veto in his signing statements has grown stronger. In his first statement he merely noted that the veto "may violate Article I, Section 7 of the Constitution." International Navigational Rules Act of 1977, Statement on Signing H.R. 186 Into Law, 13 WEEKLY COMP. OF PRES. DOC. 1128 (July 28, 1977) (Pub. L. No. 95-75, 91 Stat. 308 (codified at 33 U.S.C.A. §§ 1601-1608 (West Supp. Pamphlet No. 3 1977))). In his second signing statement he said the veto has "the potential of involving Congress in the execution of the laws." International Security Assistance Act of 1977, Statement on Signing H.R. 6884 Into Law, 13 WEEKLY COMP. OF PRES. DOC. 1185 (Aug. 5, 1977) (Pub. L. No. 95-92, 91 Stat. 614 (codified at scattered sections of 22 U.S.C.A. (West Supp. Pamphlet No. 3 1977))). Upon signing the International Emergency Economic Powers Act the President announced his intention to treat the veto provision as a "report and wait" provision. Presidential War Powers Bill, Statement Signing H.R. 7738 Into Law, 13 WEEKLY COMP. OF PRES. DOC. 1941 (Dec. 28, 1977)

Such a negotiation power, with teeth, is perhaps the most significant aspect of the broadened congressional veto power. The manner in which it is changing the conventional relationship between the Executive and members of Congress, and blurring lines of political accountability, merits careful study, whether or not it is ultimately deemed offensive to the separation of powers doctrine.³⁰ Beyond the scope of this essay, but also meriting careful analysis, is the concurrent increase during the past few years in legislative veto provisions affecting administration of state governments.³¹

II. CONSTITUTIONAL QUESTIONS RAISED BY THE CONGRESSIONAL VETO

A. *General Separation of Powers Considerations*

Justice Frankfurter opened his separation of powers opinion in the *Presidential Steel Seizure Case*³² with an observation perhaps more humorous than instructive: "Before the cares of the White House were his own, President Harding is reported to have said that government after all is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland."³³ Subsequently, the Justice observed that the authority of the three branches is not to be gleaned "from an abstract analysis," for the Constitution is a "framework for government."³⁴ Judges and other commentators, before and since, have talked about the interaction and

(War or National Emergency—Presidential Powers, Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified at scattered sections of 50 U.S.C.A. (West Supp. Pamphlet No. 4 1978))).

30. For some preliminary studies see Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); S. Kurzman, Memorandum of Citations and Descriptions of Statutes Administered by HEW Which Condition Effectiveness of Departmental Action on Congressional Approval, reprinted in ABA SEPARATION OF POWERS COMMITTEE, 1974-1975 REPORT app. B.

31. Although the provisions at the state level vary considerably, and some provide merely for a waiting period to provide opportunity for the legislature to react by the usual statutory mode, approximately 25 states now have some provisions for legislative review or veto of various forms of administrative action. Legislative Improvement and Modernization Committee, National Conference of State Legislatures, *Legislative Review of Administrative Regulations*, Final Report (2d draft as amended June 11, 1977) (copy on file in office of *North Carolina Law Review*). Litigation under state constitutional separation of powers provisions has produced varied results. Decisions upholding the provisions include *Watrous v. Golden Chamber of Commerce*, 121 Colo. 521, 218 P.2d 498 (1950); *State ex rel. Porterie v. Grosjean*, 182 La. 298, 161 So. 871 (1935); *Brown v. Heymann*, 62 N.J. 1, 297 A.2d 572 (1972). Decisions invalidating the provisions include *State ex rel. Schneider v. Bennett*, 219 Kan. 285, 547 P.2d 786 (1976); *In re Opinion of the Justices to the Governor*, —Mass.—, 341 N.E. 2d 254 (1976); *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (1950); *Moran v. La Guardia*, 270 N.Y. 450, 1 N.E.2d 961 (1936).

32. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

33. *Id.* at 593 (Frankfurter, J., concurring).

34. *Id.* at 610 (Frankfurter, J., concurring).

cooperation of the branches, and stressed the checks and balances as well as the separation of powers.³⁵

To say this is not to say that separation of powers defies rational inquiry. We approach reasonably firm ground when there is a conjunction of intent of the Framers, relevant constitutional text, longstanding practice and understandings, and the requirements of the basic political theory that distinguishes our system from the parliamentary system. In respect to the congressional veto there seems to be the basis for such a conjunction.

The Framers were neither reticent on separation of powers nor overly friendly to the legislative power.³⁶ As already noted,³⁷ there had been a reversion from the legislative supremacy theory of the Revolution to a concern for "stability and energy in government."³⁸ The solution to this concern, while maintaining the "vital principles of liberty,"³⁹ was separation of powers, for "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."⁴⁰ It was made clear that the particular source of the feared tyranny was the "legislative department," which among the new states was "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."⁴¹ Madison returned to the separation theme as a member of the House of Representatives in the First Congress: "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is just that it separates the legislative, Executive, and judicial powers."⁴²

Of particular relevance to the congressional veto issue is the manner in which the Constitutional Convention followed through on the concern for

35. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Id.* at 635 (Jackson, J., concurring).

36. For a detailed analysis of the constitutional debates and contemporary writings on the relation of various extra-legislative control devices to the purposes of the Framers, see Watson, *supra* note 11, at 1029-48. As a guide to constitutional validity he suggests testing particular uses of the legislative veto device against the following four criteria concerning the proper role of Congress: (1) Does the particular use in question force the legislator to choose between his constituency and the national interest; (2) does it encourage the exercise of self-interest; (3) does it tend toward legislative dominance of the government; and (4) does it foster increase of overall federal power by weakening separation of powers friction? *Id.* at 1048-49.

37. See text accompanying notes 6 & 7 *supra*.

38. THE FEDERALIST No. 37, at 267 (B. Wright ed. 1961) (J. Madison).

39. *Id.* at 268.

40. *Id.* No. 47, at 336 (J. Madison).

41. *Id.* No. 48, at 343 (J. Madison). See also *id.* No. 71, at 460 (A. Hamilton) (comments on the "imperious" nature of popular assemblies).

42. 1 ANNALS OF CONG. 604 (Gales & Seaton eds. 1789).

separating the powers as a check on the legislature.⁴³ It prescribed in fine detail in article I, section 7, the *process* of legislation and the presidential veto power, making the President a strong but not controlling participant in the lawmaking process.⁴⁴ The twofold purpose, according to Hamilton, was to enable the President to defend himself against being "stripped of his authorities by successive resolutions, or annihilated by a single vote," and to furnish additional security against enactment of improper laws because of the "effects of faction" or "want of due deliberation."⁴⁵

It has become fashionable to downplay the relevance of constitutional text in separation of powers analysis, while giving lip service to the proposition that usages "cannot supplant the Constitution."⁴⁶ The reason is not hard to find. A substantial portion of the relative handful of separation of powers disputes that have reached the courts have dealt with usages in areas in which the Constitution concededly is more "open-textured"⁴⁷ than it is concerning the congressional veto, such as presidential initiatives and pleas of immunities or the constitutional status of the independent regulatory commissions.

1. Presidential Initiatives and Immunities

An analysis of cases dealing with presidential initiatives and immunities indicates that despite some loose language it is premature to say that anything goes, or that our system of separated powers has taken on the outlines of the picture of Dorian Gray. If the presidential initiatives have involved such matters as foreign relations, military affairs or national security, where the clarity of article I, section 7 is lacking, the Supreme Court admittedly has tended to augment the generality of the article II clauses (dealing with the "executive power," and the President's "Com-

43. As noted by Judge MacKinnon in his dissent in *Buckley v. Valeo*, 519 F.2d 821 (1975), *aff'd in part and rev'd in part per curiam*, 424 U.S. 1 (1975), in which he deemed both the method of appointment of the Federal Election Commission and the congressional veto in respect to its rules to violate separation of powers: "The degree to which the powers must be kept separate or may overlap depends in the final analysis upon applicable constitutional provisions." *Id.* at 925 (MacKinnon, J., dissenting).

44. After a bill has passed both the House and the Senate it must be presented to the President for his signature. If the President vetoes a bill during a session he must return it to the Congress with a statement of his objections to it and the veto may be overridden by a two-thirds vote of both houses of Congress. If during a session he fails to veto the bill within 10 days the bill becomes law automatically. However, if Congress adjourns in fewer than 10 days after his receipt of the bill, the President may veto it by simply failing to sign it (the so-called "pocket veto"), and it is not returned to Congress. U.S. CONST. art. 2, § 7, cl. 2.

45. THE FEDERALIST No. 73, *supra* note 38, at 469-70 (A. Hamilton).

46. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 610 (Frankfurter, J., concurring).

47. A. BICKEL, THE MORALITY OF CONSENT 29 (1975).

mander-in-Chief" and treaty-making roles⁴⁸) by appealing to developed custom and the inability of Congress to function on the front lines.⁴⁹ The President has fared rather well. Familiar examples of such broad interpretations of presidential authority include the dicta of Justice Stewart⁵⁰ and other Justices in the *Pentagon Papers Case*,⁵¹ the similarly deferential statements by the Court in *Chicago & Southern Airlines v. Waterman Steamship Corp.*⁵² concerning review of presidential authority in respect to licensing of foreign air routes, and the grandiloquent language about presidential primacy in foreign relations and military matters found in *United States v. Curtiss-Wright Export Corp.*⁵³ and the *Prize Cases*.⁵⁴

48. U.S. CONST. art. II, § 1, cl. 1 & § 2, cls. 2, 3.

49. It is highly unlikely that we can successfully execute a long-range program for the taming, or containing, of today's aggressive and revolutionary forces by continuing to leave vast and vital decision-making powers in the hands of a decentralized, independent-minded, and largely parochial-minded body of legislators. . . .

It is distasteful and dangerous to vest the executive with powers unchecked and unbalanced. My question is whether we have any choice but to do so. Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 7 (1961).

50. "For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power [national defense and international relations] than does, say, a prime minister of a country with a parliamentary form of government." *New York Times Co. v. United States*, 403 U.S. 713, 727-28 (1971) (per curiam) (Stewart, J., concurring).

51. *Id.* at 741 (Marshall, J., concurring); *id.* at 756 (Harlan, J., dissenting).

52. 333 U.S. 103 (1974).

But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id. at 111.

53. 299 U.S. 304 (1936).

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

Id. at 319.

54. *The Brig Amy Warwick*, 67 U.S. (2 Black) 635 (1863).

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral."

Id. at 668.

Whether the President in fulfilling his duties as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belliger-

If, however, the presidential initiatives involve the constitutional allocation of powers for essentially domestic matters, a far stricter judicial approach to separation of powers can be seen. Despite the backdrop of the Korean War, the *Steel Seizure Case* was perceived by the Court as posing an issue of allocation of domestic lawmaking authority between President and Congress over labor-management relations.⁵⁵ Given this perception of the issue,⁵⁶ there could be only one answer. There was a statute directly on

ents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.

Id. at 670.

55. Justice Jackson, concurring, said that when the President's power was not "turned inward," but was "turned against the outside world for the security of our society," he would indulge in "the widest latitude of interpretation" to sustain presidential authority. 343 U.S. at 645 (Jackson, J., concurring).

56. Other perceptions of the dimensions of the issues were possible. As Chief Justice Vinson pointed out in his dissenting opinion, "Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict." *Id.* at 676 (Vinson, C.J., dissenting). The extraordinary factors included the United States role in Korea, commitments to maintain international peace and security under the United Nations Charter, assistance to Greece and Turkey under the Truman Plan, and under the Marshall Plan and NATO in Western Europe. *Id.* at 668-69.

With differing perceptions of the setting come differing analyses of the case. According to one commentator,

The doctrine of the case, as stated in Justice Black's opinion of the Court, while purporting to stem from the principle of the separation of powers, is a purely arbitrary construct created out of hand for the purpose of disposing of this particular case, and is altogether devoid of historical verification.

Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 64-65 (1953). Corwin concludes that the constitutional significance of the case is:

(1) That the president does possess "residual" or "resultant" powers over and above, or in consequence of, his specifically granted powers to take temporary alleviative action in the presence of serious emergency . . . (3) It is also fairly evident that the Court would never venture to traverse a presidential finding of "serious" emergency which was *prima facie* supported by judicially cognizable facts, but would wave aside a challenge to such a finding as raising a "political question." (4) The Court would unquestionably have assented to the proposition that in all emergency situations the last word lies with Congress when it chooses to speak such last word. And the moral from all this is plain: namely, that escape must be sought from "presidential autocracy" by resort not to the judicial power, but to the legislative power—in other words, by resort to timely action by Congress and to procedures for the meeting of emergency situations so far as these can be intelligently anticipated.

Id. at 65-66. Compare Corwin's analysis to that of Kauper, who summarizes the potential impact of the case as follows:

All agreed further that Congress by virtue of its legislative powers has the paramount authority to prescribe procedures and programs to be followed in meeting an emergency situation of this kind; whatever authority the President may have by virtue of his office is subject to legislative limitation. . . . Indeed, the case should serve as a particularly valuable precedent in precluding an extensive interpretation of the President's autonomous military powers as a basis for executive control of the internal economy when the country is not in a state of declared war and not threatened with imminent invasion. Finally, the case shows a common area of agreement in that the interpretations placed upon the President's powers are based on the language of the Constitution, a common willingness to accept the premise that the President's powers are delegated powers and that the President's actions must be justified on the basis of

point, passed over Truman's veto, that not only failed to authorize presidential seizure to terminate a serious strike, but expressly authorized the alternative tactic of seeking an injunction. In short, absent special article II considerations, article I, section 7 prescribes the process for general law-making within the substantive areas delegated to the national government in article I, section 8.⁵⁷

Similarly, in *United States v. Nixon*⁵⁸ the Court hewed to the narrow issue before it: which interest should prevail in a contest between a generalized claim of executive confidentiality with no overtones of foreign or military security, and a claim of specific need for certain information in advance of a scheduled federal criminal trial? In rejecting the President's claim to an absolute privilege in this context, the Court brought the judicial branch into the separation of powers balance, saying that to allow the privilege would be to "cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts."⁵⁹ The Court did hold, however, that executive privilege is constitutional in principle, and even intimated that the privilege might be more weighty, or even absolute, if military or foreign relations matters are involved.⁶⁰ In short, in the *Nixon*

the grants of authority under Article II. The theory of inherent power in the conduct of foreign affairs, advanced in the *Curtiss-Wright* case finds no echo in these opinions dealing with presidential powers respecting internal matters.

Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 MICH. L. REV. 141, 174-75 (1952).

With the Corwin-Kauper insistence on the relevance of the constitutional text, when clear, there should be little dispute, and it is this point that is most relevant to the issue of the constitutionality of the congressional veto. The inference from their quoted language, that when Congress speaks its word is final, must be set against the Justice Jackson hypothesis that in some instances the President may prevail against express congressional opposition if his core constitutional responsibilities under article II are implicated. 343 U.S. at 637, 640 (Jackson, J., concurring). Recent Supreme Court support for the Jackson hypothesis concerning presidential powers is found in *United States v. Nixon*, 418 U.S. 683, 705-96 (1974); see note 60 and accompanying text *infra*.

57. U.S. CONST. art. I, § 8. The precision of the constitutional powers allocation in question may be an element inducing judicial review. In *Powell v. McCormack*, 395 U.S. 486 (1969), the Court enforced express constitutional language prescribing the qualifications for a congressman. It ignored arguments that on prudential grounds the dispute should be deemed nonjusticiable because the enforcement involved judicial intrusion into the internal policing of a sister branch. For cases involving interpretation and enforcement of legislative immunities, see *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Brewster*, 408 U.S. 501 (1972).

58. 418 U.S. 683 (1974).

59. *Id.* at 712.

60. In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. . . . The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. . . .

case the judicial interest under article III in a fair trial was not counter-balanced by any special concern founded in article II. Indeed, the article II clause most nearly in point would be that mandating the President to "take Care that the Laws be faithfully executed,"⁶¹ and that clause cut against the President in this case.

The available Supreme Court precedents on presidential powers and immunities suggest, therefore, that separation of powers remains a vital and enforceable constitutional principle in such situations as *United States v. Nixon*. There, insistence on an implied secondary authority of one branch would have blocked a basic prescribed function of another branch. The *Steel Seizure* holding further testifies very forcefully that as a matter of domestic law, uncomplicated by national security considerations, the express allocation of lawmaking power in article I, section 7 to the Congress, subject to an overridable presidential veto, exhausts the lawmaking possibilities in our separation of powers system.⁶² At the very least, such precedents indicate that doubts about the constitutionality of the congressional veto device for lawmaking and administrative direction cannot be lightly ignored.

2. The Independent Commission Movement

Expressions concerning the need for nonliteralism in approaching separation of powers are to be found in one other major area—the cases and writings rationalizing the creation and operation of the so-called independent regulatory commissions. As Justice Jackson noted, in an attempt to validate these mixed power but "seemingly necessary bodies," their functions have been called "quasi-legislative, quasi-executive or quasi-judicial."⁶³ He observed that this "'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."⁶⁴

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. . . . Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

Id. at 705-06.

61. U.S. CONST. art. II, § 3.

62. Such "lawmaking" includes the option, by statute, to delegate to administrative agencies under appropriate standards the authority to make what the British call, with precision, subordinate legislation, *i.e.*, rules and regulations. *Yakus v. United States*, 321 U.S. 414 (1944); *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (three judge court).

63. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

64. *Id.* at 488.

Unlike the situation with the congressional veto provision, however, independent commissions do not contravene a number of highly specific constitutional clauses concerning the proper role of Congress and its relation to the administration of the government.⁶⁵ Neither do they produce an intrusion of one branch into the core functions of another. The commissions pose the kind of conceptual problem to which Justice Jackson referred only if we engage in labeling, and try to find a bright line separating the "legislative," the "executive" and the "judicial." The Constitution itself, by its checks and balances principles, eschews any such bright line,⁶⁶ and it has been judicially determined that the commissions do not impermissibly intrude on the basic purposes of the separation of powers system. The President's authority to appoint the members of the commissions may not be compromised.⁶⁷ His removal power, however, may be limited under an admittedly more questionable decision.⁶⁸ From this decision flows the real problem with the commissions, one perhaps more political than constitutional: integrating commission programs into an overall governmental program in the interest of maximum cooperation and of efficiency in assignment of functions.⁶⁹

B. *Specific Constitutional Objections*

The congressional veto in general may be subject to serious question under at least the following major specific and significant constitutional provisions or principles: (1) the provisions of article I, section 7, clauses 2 and 3,⁷⁰ making the President a participant in the lawmaking process and according him a veto power; (2) the allocation to the President in the "take care" clause of article II, section 3⁷¹—perhaps as augmented by article II, section 1, clause 1,⁷² vesting in him the "executive power"—of the power of execution of the statutes as enacted; (3) the firmly developed principle that it is the function of the judiciary to interpret unamended statutes, and most certainly to rule on questions of exceeding statutory authority; (4) the

65. See note 213 and text accompanying notes 70-77, 212 & 213 *infra*.

66. See THE FEDERALIST No. 48, *supra* note 38 (J. Madison).

67. Buckley v. Valeo, 424 U.S. 1, 124-37 (1976) (per curiam).

68. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

69. See Dixon, *The Independent Commissions and Political Responsibility*, 27 AD. L. REV. 1, 16 (1975) (suggesting the need for a Separations of Powers Commission "to make recommendations to harmonize our present system with what the framers intended, democratic theory expects, and the times required"). See also Byse, *Comments on a Structural Reform Proposal: Presidential Directives to Independent Agencies*, 29 AD. L. REV. 157 (1977); Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975).

70. U.S. CONST. art. I, § 7, cls. 2, 3.

71. *Id.* art. II, § 3.

72. *Id.* art. II, § 1, cl. 1.

disability clause and incompatibility clause in article I, section 6,⁷³ which separate members of Congress from administrative functions; and (5) the appointments clause of article II, section 2, clause 2,⁷⁴ placing in the President and not the Congress power to appoint administrative officials. In addition, if the congressional veto device takes the mode of the one-house veto, or the committee veto, rather than the less common mode of the concurrent resolution, the bicameralism requirement for statute making and statute modification set forth in article I, section 7 is violated.⁷⁵

The bicameralism requirement is not to be lightly disregarded, for it derives from the "Great Compromise" on state representation versus popular representation that made possible the Union.⁷⁶ It is not a sufficient answer to say that because one house can block a proposal for new legislation, a one-house (or committee in one house) veto of administrative action should likewise be constitutional.⁷⁷ Such a one-house veto does not operate to block new legislation under article I, section 7; it operates to block or modify administrative power already created by an authorizing statute pursuant to operation of article I, section 7.

C. *Veto Variables: Ultra Vires Grounds or Policy Grounds*

How the constitutional inhibitions other than bicameralism are implicated in practice may depend on the basis given for a particular exercise of the congressional veto powers.⁷⁸ Suppose for example, that the Federal

73. *Id.* art. I, § 6, cl. 2.

74. *Id.* art. II, § 2, cl. 2.

75. *Id.* art. I, § 7. For tabulations of acts containing veto provisions by type of provision see C. NORTON, *supra* note 11, at 9-12; Watson, *supra* note 11, at 1089-94.

76. For accounts of the political struggles between Federalists and Antifederalists, and between large states and small states, see generally C. ROSSITER, 1787, THE GRAND CONVENTION 185 (1966); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 553 (1969).

77. Congressman Drinan, in his views concerning the Reorganization Act of 1977, points out:

The doctrine of bicameralism involves not merely the relationship between the executive and the legislative branches, it also implicates directly the relationship between the Federal legislature and the State governments, and the relationship ultimately between the Congress and the people. . . .

This great compromise of 1787 is undermined by the one House veto because it allows one House to act without the concurrence of the other in a matter of a legislative nature. The Attorney General argues that bicameralism is preserved because each House has the opportunity to act upon the matter. That facile assertion would appear to negate the clear procedural mandate of the clause in the Constitution requiring affirmative votes in both Houses on matters involving legislative action.

H.R. REP. NO. 105, *supra* note 27, at 42 (statement of Congressman Drinan). See also text accompanying notes 221-27 (discussing the Salary Act Amendments that now require affirmative action by both houses).

78. In *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.) (per curiam), *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977), discussed at text accompanying notes 171-93 *infra*, Judge

Election Commission, which in *Buckley v. Valeo*⁷⁹ already has been declared to be an executive agency for the purpose of the presidential appointing power,⁸⁰ should suffer a legislative veto of one of its rules because one house of Congress thinks it is ultra vires, contrary to the intent of the governing statute. So long as the authorizing statute remains unamended, why would not such congressional action be an invasion of the law interpretation function allocated to the judiciary?⁸¹ In any event, would it be a responsible way of proceeding?

On the constitutionality question it might be argued that the judicial function is not being totally defeated, on the theory that in a subsequent law suit the veto could be determined to be erroneous. Then the administrator would be free to implement the statute under his initial plan.⁸² If such a scenario developed, the price for the veto would be to impose only administrative delay in statutory implementation pending a judicial override of the erroneous veto. The situation might be analogized to that under "report and

Leventhal, concurring, declined to reach the merits of the constitutional veto issue on ripeness grounds, in part because he would deem it relevant to know the "reasons" given in an actual instance of use of the veto, *id.* at 659 (Leventhal, J., concurring).

79. 424 U.S. 1 (1976) (per curiam).

80. The Court concluded that the execution of certain powers granted to the Federal Election Commission were in part merely in aid of legislative functions, but that most of the powers granted to the commission (*e.g.*, rulemaking, advisory opinions and the conduct of administrative hearings) did not operate "merely in aid of Congressional authority to legislate." *Id.* at 141. These powers could be constitutionally exercised only by officers of the United States who were properly appointed by the President. *Id.* at 137-41.

81. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 178 (1803). "The interpretation of the laws is the proper and peculiar province of the courts." THE FEDERALIST No. 78, *supra* note 38, at 101 (A. Hamilton).

The Brief for the United States as Intervenor, *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.) (per curiam), *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977), noted that the stated purpose of inserting the congressional veto provision in the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§ 209(b)(2), 408(c), 409(a), 88 Stat. 1263 (codified as amended at 2 U.S.C.A. § 438(c) (West Cum. Supp. 1977); 26 I.R.C. §§ 9009(c), 9039(c)), was to prevent ultra vires actions or, as phrased in the House Administration Committee report, "to prevent the Commission from interpreting the Act in a manner inconsistent with the congressional intent." H.R. REP. No. 917, 94th Cong., 2d Sess. 3 (1976). A statutory amendment to disapprove a regulation would be valid, the Department of Justice said, but "the Constitution commits to the Courts (through the judicial power to interpret the laws) to strike down [*sic*] particular administrative regulations as being offensive to the statute, or the Constitution." Brief for the United States as Intervenor, *supra* at 42.

82. *See, e.g., Nixon v. Administrator of General Servs.*, 408 F. Supp. 321 (D.D.C. 1976), *aff'd*, 433 U.S. 425 (1977), in which the court hypothesized a very special and limited situation: that the provisions vetoed would be ones that the General Services Administration Administrator thought essential on constitutional grounds to protect the confidentialities and privacies associated with the former President's papers; that the regulation would then issue without these vetoed provisions; that it would then somehow be successfully challenged in court (presumably by Mr. Nixon on executive privilege or other grounds); and that the Administrator would then be free to re-issue the regulations, including the provisions designed to safeguard constitutionally protected interests.

wait" provisions that impose a limited period of delay in carrying out contemplated administrative action to provide an opportunity for the legislature to respond by legislation.⁸³ It has been suggested that such provisions are harmless because they are merely supportive of the constitutional primacy of Congress in basic lawmaking.⁸⁴

The analogy is inapt, however, because the delay under "report and wait" provisions is in most instances limited to a specific time period, in

83. Most commentators on the legislative veto have distinguished between the constitutionality of the full veto and "report and wait" provisions. The latter are thought to be constitutional even by some persons opposed to the former. When advising the President to veto an act containing a committee veto, Attorney General William Mitchell said, "No one would question the power of Congress to provide for delay in the execution of such an administrative order" 37 OP. ATT'Y GEN. 56, 63 (1933).

The Supreme Court upheld the validity of the "report and wait" provision in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). In *Sibbach* the challenged provision gave Congress a specified time period to disapprove the Federal Rules of Civil Procedure. For other views not challenging the constitutionality of the "report and wait" type of provision, see Cooper & Cooper, *supra* note 11, at 470; Ginnane, *supra* note 11, at 577; Watson, *supra* note 11, at 1060. Although Watson accepts the constitutionality of the "report and wait" provisions, he questions their wisdom. He fears that Congress will exert too much informal pressure on the administrators, thus creating a potent negotiation power. *Id.* at 1063. See also J. BOLTON, *supra* note 20, at 20.

Alan Morrison and Reuben Robertson do not comment specifically on the constitutionality of provisions that merely delay implementation of executive actions, but they express reservations about the wisdom and practicality of delay. They presented a hypothetical colloquy between an agency chairman and its general counsel to illustrate the problems caused when additional time is allowed for congressional consideration after an already cumbersome agency process.

[AGENCY] CHAIRMAN. What a great day! The Commission has finally reached unanimous agreement on the airline overbooking rule, and voted to issue it at once.

GENERAL COUNSEL. We have been working on this for years, but it's worth it because the rule is really a good one.

CHAIRMAN. The public has been very critical of us for not having dealt with this problem years ago. Also there has been tremendous pressure on us from members of Congress, demanding that we get the rule out.

GENERAL COUNSEL. Even the industry leaders want us to get done with the matter.

CHAIRMAN. The Commission wants to get this into effect immediately. We must give a specific effective date because the airlines need sufficient lead time to program their computers. How soon can we put the rule in force?

GENERAL COUNSEL. I don't know.

Improving Congressional Oversight of Federal Regulatory Agencies: Hearings on S. 2258, S. 2716, S. 2812, S. 2878, S. 2903, S. 2925, S. 3318, and S. 3428 Before the Senate Comm. on Government Operations, supra note 22, at 167-68 (statement of Alan Morrison and Reuben Robertson). For an actual example of the problems delay can cause, see the discussion of the proposed Federal Election Commission regulations at issue in *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.) (per curiam), *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977), *discussed at text* accompanying notes 100 & 187 *infra*.

84. The most common type of review provision used by the states grants to the overseer an advisory function only. Approximately 12 states have vested in a council or legislative committee the power to review proposed regulations and submit recommendations to the legislature for further action in the traditional legislative manner. See Legislative Improvement and Modernization Committee, *supra* note 31. For an example of such legislation, see KY. REV. STAT. § 13.087 (Cum. Supp. 1976).

order to avoid irresponsible congressional frustration of the administrative process. More significantly, to make the argument that an ultra vires veto should be as permissible as a "report and wait" provision, on the ground that the veto is not necessarily final, is to presuppose that judicial review to determine the erroneousess of the particular veto can be forthcoming and prompt.⁸⁵ If Congress vetoes regulations imposing conditions on an expenditure program (for example, if Congress had vetoed HEW's Title IX⁸⁶ regulations on sexual equality in school athletic programs⁸⁷), and if the agency enforces the condition anyway and cuts off funds, then a private suit raising the constitutionality of the veto is invited. The same potential joinder of issue with a private party would occur if, despite a congressional veto, the Occupational Safety and Health Administration sought to enforce against a private party a conduct regulation, or a regulation imposing a reporting or data-gathering requirement. However, such reliance would place on a private party the burden of investing time, effort and money to resolve an intragovernment separation of powers dispute. It also would create legal uncertainty. A specially authorized declaratory judgment procedure, to review promptly the correctness of those congressional vetoes made on the ground that the regulation is ultra vires, would be burdensome to the judiciary and perhaps itself subject to attack on ripeness and prudential grounds.⁸⁸ If an ultra vires based congressional veto is deemed invalid if

85. For many years it was thought that problems of standing and justiciability would preclude judicial review of the legislative veto device. Such considerations did prove fatal in the recent attempted challenge by Ramsey Clark to the congressional veto in the context of Federal Election Commission regulations. See *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.) (per curiam), *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977), *discussed at note 175 and accompanying text infra*. However, a ruling on the merits was achieved by the "judges suit" in the recent Salary Act cases. See *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 98 S. Ct. 718 (1978).

The Iowa Administrative Procedure Act, IOWA CODE ANN. §§ 17A.1-.23 (West Supp. 1977), contemplates judicial review by appropriate plaintiffs after the legislature has noted an objection to a submitted regulation. The objection cannot be on policy grounds, but must be on the ground that the regulation is "unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency." *Id.* § 17A.4. Under the Act the objection (unless it takes statutory form) does not prevent the regulation from going into effect. It does, however, operate to create a presumption that the regulation is "unreasonable" or ultra vires and places the burden of proof on those issues on the state if litigation arises. *Id.*

Whatever may be the merits of the congressional veto device in the Iowa context, the special feature of shifting to the state the burden of showing both that the regulation is not unreasonable and is not ultra vires is questionable, given the realities of modern government. Delegations of power are frequently made by legislatures in very imprecise terms. Despite the demise of substantive due process, modern courts show increasing signs of a willingness to substitute their own concepts of reasonableness for those of the administrators of a program. In short, under the Iowa burden of proof shifting provision the plaintiff would win whenever proof on either the issue of reasonableness or the issue of ultra vires was in even balance.

86. 20 U.S.C. §§ 1681-1686 (Supp. V 1975).

87. *E.g.*, 45 C.F.R. § 86.41 (1976).

88. See note 172 and accompanying text *infra*.

final, its constitutionality can hardly be saved by the theoretical possibility of a private law suit to reverse it.

Alternatively, the reason for a congressional veto may be grounded not on an *ultra vires* judgment, but rather on dislike with the manner in which the agency is proceeding within its delegated authority. The objection could be to the substantive content of the regulation, the method of enforcement, timing or the like. In a given instance a special interest simply may have more "clout" with one house of Congress—or more realistically, with key committeemen—than it has with the agency. The agency not only is backed by the majesty of the executive branch, but is also subject to far more stringent restrictions on *ex parte* contacts than is Congress.⁸⁹ A congressional veto based on such "policy" grounds would avoid the interference with the judicial function that is implicit in a veto based on *ultra vires* grounds. It would, however, be in violation of other principles concerning the allocation of functions among the branches of our tripartite system. First, the veto, in reality, changes the boundaries of the delegation. Congress is rewriting the statute, engaging in basic lawmaking, in derogation of the President's veto power. If it be a one-house veto, it also violates the principle of bicameralism and avoids the bicameral internal check against parochialism. In either instance there would be a sacrifice of the important purposes of deliberation, representation of the whole country and political accountability that are served by these constitutional provisions. Second, a veto on policy 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.

D. *Creation of an Extraconstitutional Negotiating Power*

In another basic way the congressional veto upsets the constitutional allocation of functions. A practical result of the veto power, whether or not any vetoes actually occur, is to force on the agencies a negotiation process "with teeth" as a condition of avoiding a threatened veto. In effect, the personnel of the agency is involuntarily enlarged to include a new set of powerful advisors not appointed by or controlled by the Executive, in derogation of the Executive's appointment and removal power in article II. As put in a Department of Justice brief in the recent sequence of litigation, if the Congress cannot appoint executive officials directly, as the Supreme

89. In the agencies there is not only a custom of avoidance of *ex parte* contacts, embodied to some extent in agency conduct codes, but a mandate against *ex parte* contacts when the rulemaking process is by formal hearing on the record. See 5 U.S.C.A. § 557(d)(1) (West 1977); Employee Responsibilities and Conduct, 5 C.F.R. § 735.201a (1977).

Court made clear in *Buckley v. Valeo*,⁹⁰ it cannot indirectly appoint one house as a "super-Executive" through the legislative veto device.⁹¹

For example, in the Department of Health, Education and Welfare, where the spread of the congressional veto device has been especially rampant,⁹² one program affected is the Office of Education's Basic Opportunity Grants for college level education.⁹³ An eligible undergraduate may receive up to half of his or her costs, reduced, however, by expected family contribution for the year. The Office of Education must publish in the *Federal Register* each year a schedule of expected family contributions for the succeeding fiscal year for various levels of family income. Simultaneously, the Office must transmit the schedule to Congress for possible negotiation under a one-house veto provision. There follows a sequence of informal negotiation and formal hearings at the instance of the respective House and Senate subcommittees, and in the House there has been a routine introduction of a resolution of disapproval that is always finally tabled.⁹⁴ The functional result of such a review process is not to create significant, ongoing administrative authority in the Congress or even one house thereof, but in the key members of the relevant subcommittees—a membership by definition nonrepresentative and subject to all the vagaries of periodic realignment of subcommittee assignments. In this context the "congressional veto" can become more a "fiefdom" concept than a grand democratic device for controlling the bureaucracy.

Other examples of the negotiating process in operation, seemingly developing in each instance into frustration of statutory purpose, can be found in the operation of the Federal Election Commission in respect to promulgation of expenditure and recordkeeping rules for congressional campaigns, and the General Services Administration in respect to promulgation of rules for public access to former President Nixon's papers.⁹⁵ Judge

90. 424 U.S. at 124-36.

91. Brief for the United States as Intervenor, *supra* note 81, at 41.

92. S. Kurzman, *supra* note 30.

93. 20 U.S.C. § 1070a (a)(3)(A)(ii) (Supp. V 1975).

94. S. Kurzman, *supra* note 30. For example, the schedules for the academic year 1975-1976 were published on July 2, 1974. Following negotiations and hearings the Senate subcommittee chairman sent a letter of approval to HEW on October 3, 1974, and in the House the resolution was tabled by the subcommittee on November 19, 1974. *Id.* See also *Hearings on the Family Contribution Schedule for the Basic Educational Opportunity Grant Program for Use in Academic Year 1975-76 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 3 (1974) (indicating that the subcommittee tends to press for liberalization of the schedules).

95. Both operations are included in Bruff & Gellhorn, *supra* note 30, at 1397-1403.

MacKinnon, in his dissenting opinion in *Clark v. Valeo*,⁹⁶ took note of the negotiation process between the Federal Election Commission and members of Congress, which became especially important after two different sets of initial proposed regulations were vetoed in October 1975, one (filing rules) by the House and one (financial disclosure rules) by the Senate.⁹⁷ That the negotiation process "with teeth" was a congressionally intended element of the congressional veto provision, and not a concealed by-product, is evidenced by comments of Congressman Anderson at the time of the House veto. He referred to a failure of an attempted "compromise revision" between the Commission and a House committee, the committee's "prerogatives and jurisdictional rights in the process involved," and the need for a "healthy working relationship" between the Commission and the committee.⁹⁸ Thereafter the Commission, as reconstituted with solely presidential appointees after *Buckley v. Valeo*,⁹⁹ deferred the proposal of new regulations until early August 1976, despite the imminence of the November 1976 election, in order to give key legislative aides time to make substantial revisions. The matter ended with a whimper, with no regulations in force when Congress adjourned on October 2, 1976. Although almost sixty calendar days had elapsed, only twenty-eight legislative days had elapsed, and the statute specified a thirty-day opportunity for a congressional veto.¹⁰⁰

A similar sequence of unsuccessful negotiation, presentation of proposed rules, congressional veto and indefinite postponement of achievement of regulations to implement the statute has occurred in regard to the rulemaking function of the General Services Administration under the Presidential Recordings and Materials Preservation Act.¹⁰¹ As noted in the Supreme Court's opinion rejecting arguments that the Act was facially invalid, and not reaching any issue of the validity of the rulemaking process or its prospective content, three sets of proposed regulations had been vetoed over a two-year period and the GSA Administrator was working on a fourth set.¹⁰²

At the level of constitutional analysis, is the strong negotiating power created by the congressional veto any different from other, accepted forms

96. 559 F.2d 642 (D.C. Cir.) (per curiam), *aff'd mem. sub nom.* Clark v. Kimmitt, 431 U.S. 950 (1977).

97. See *id.* at 679 n.2, 687 n.17 (MacKinnon, J., dissenting).

98. 121 CONG. REC. H10186 (daily ed. Oct. 22, 1975) (remarks of Representative John Anderson).

99. 424 U.S. 1 (1976) (per curiam).

100. See 559 F.2d at 666 (Robinson, J., dissenting); *id.* at 679 n.2 (MacKinnon, J., dissenting).

101. Pub. L. No. 93-526, 88 Stat. 1695 (1974); see 44 U.S.C. § 2107 note (Supp. V 1975).

102. Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977). A fourth set of regulations was finally put into effect in 1977. 41 C.F.R. § 105-63 (1977).

of strong congressional influence over the Executive? It is possible to muster support for an affirmative answer because "it is *a constitution* we are expounding,"¹⁰³ and the Constitution speaks here with considerable clarity. Under article I, section 7, after Congress has delegated power the administrator can resist congressional influence until a two-thirds 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.¹⁰⁴ Under the congressional veto device, however, congressional influence can become controlling when a bare majority of a quorum in one house can be mustered. To be sure, the bicameral two-thirds requirement of article I, section 7 may seem harsh, but any such objection must be addressed to the Constitution directly and does not support the constitutionality of the congressional veto device to shift the constitutional power balance between the President and Congress.

Arguments derived from the appropriations process also do not create a constitutional foundation for the congressional veto. By threats of no funding, or under-funding, policy may be influenced, but this is within the "power of the purse" expressly given to Congress by the Constitution. Indeed, it is reinforced in two ways: revenue measures must originate in the House of Representatives,¹⁰⁵ which was the only body directly elected by the people until the Senate was placed under popular election by the seventeenth amendment in 1913; and military appropriations may not be for a longer term than two years.¹⁰⁶ Further, as Judge MacKinnon has observed, "the normal congressional relationship" with the Executive, including the appropriations process, "acts *in futuro*;" there is not "any *immediate* intervention" in executive exercise of a statutorily authorized power.¹⁰⁷

E. Delegation of Powers Problems

Congressional veto provisions are sometimes perceived to pose problems under the delegation of powers doctrine. They operate as a delegation¹⁰⁸ of significant dispositive power to certain members of Congress without a trace of a standard¹⁰⁹ either to guide their discretion to negate a

103. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

104. U.S. CONST. art. I, § 7, cl. 3.

105. *Id.* art. I, § 7, cl. 1.

106. *Id.* art. I, § 8, cl. 2.

107. *Clark v. Valeo*, 559 F.2d at 682 (MacKinnon, J., dissenting) (emphasis in original).

108. One three judge district court has referred to the one-house veto as a "delegation by Congress to each House." *Nixon v. Administrator of Gen. Servs.*, 408 F. Supp. 321, 338 n.17 (D.D.C. 1976), *aff'd*, 433 U.S. 425 (1977). The issue was raised specifically by plaintiff in *Clark v. Valeo*.

109. The stated purpose sometimes included as part of the veto provision, *i.e.*, to determine whether the regulation is *ultra vires* because it exceeds the scope of the statute, is not a "standard"; it is an intrusion on the judicial function. *See* note 81 *supra*.

particular executive action or to provide a basis for "meaningful judicial review."¹¹⁰ Arguably, there is an improper delegation in two respects: first, delegation to an improper recipient; and second, delegation without standards to guide the discretion to make subordinate legislation.

Even though the rule that private persons are improper recipients of delegated power has lost much of its initial precision,¹¹¹ members of Congress acting under a congressional veto provision, and thereby sharing powers with administrative officers of the United States, would seem to be improper recipients because of the combined operation of three separation of powers clauses in the Constitution. The disability and the incompatibility clauses in article I, section 6 evince a clear purpose to separate the process of legislation per se from the process of administration per se. The disability clause specifies that "during the time for which he was elected," no member of Congress shall be "appointed to any civil office under the authority of the United States, which shall have been created . . . during such time."¹¹² The incompatibility clause provides that "no person holding any office under the United States, shall be a member of either House during his continuance in office."¹¹³ The third relevant clause is the appointments clause of article II, section 2, clause 2,¹¹⁴ which makes no provision for appointment of officers of the United States by Congress, and which was construed in *Buckley v. Valeo* to require presidential appointment of all members of the Federal Election Commission.¹¹⁵ When the members of one house veto the work of that Commission it plausibly could be asserted that they are in reality, if not technically, in form, exercising the Commission's delegated powers over the subject matter.

For Congress thus to delegate administrative power to itself by a congressional veto provision violates not only the general principle of separation of powers, but all three of these specific implementing clauses relating to administrative "offices." As Madison put it in *The Federalist*,

110. *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (upheld delegation of authority to the President to establish wage and price controls).

111. See Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 650 (1975).

112. U.S. CONST. art. I, § 6, cl. 2.

113. *Id.*

114. [H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Id. art. II, § 2, cl. 2.

115. 424 U.S. at 143.

after quoting Montesquieu's warning against allowing the legislative and executive powers to be "united" in the same person or body, "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."¹¹⁶ When commissions or Cabinet agencies engage in rulemaking and likewise "administer," there is no "uniting" in the "same hands" of the "whole power" of two branches of the government in the Madisonian sense because the Congress, by statute, always can reshape or take back the delegation. However, when Congress enacts a statute, and then delegates to itself (or a part of itself), through a nonstatutory process such as the congressional veto, the power to have final control over the administration of the statute, there is the kind of forbidden union of power in the "same hands" that the Framers feared and that the three constitutional clauses relating to administrative "offices" were designed to prevent.

Some problems exist in attacking the congressional veto on the second improper delegation ground—the more frequent "no standards" objection. To be sure, it could be argued that even the cases upholding very loose delegations to the Executive have something to point to in the nature of a standard, even if it is little more than an instruction to pursue the "public interest"¹¹⁷ in the context of the particular area of regulation. The congressional veto provisions, however, are on their face standardless. The rebuttal would be that the members of Congress possessed of congressional veto power are to second guess the agency, using the same statutory standards the agency used. Thus, if the standards were sufficient to validate the initial delegation to the agency, they should be sufficient to validate the redelegation to members of Congress. In effect, standards can be viewed as being "read into" the congressional veto provision. To the extent that such a rebuttal is persuasive, the "improper recipient" argument becomes stronger than the "no standards" argument in respect to delegation of power concerns raised by the congressional veto.

Apart from conventional constitutional analysis, the delegation to Congress (or a subgroup therein) that is implicit in a congressional veto provision may warrant more concern than a similarly loose or unguided

116. THE FEDERALIST No. 47, *supra* note 38, at 331 (J. Madison).

117. *See, e.g.*, 47 U.S.C. § 307(d) (1970) (the FCC may renew licenses "if the Commission finds that public interest, convenience, and necessity would be served thereby"). *See also* New York Cent. Sec. Co. v. United States, 287 U.S. 12 (1932) (leasing of one carrier by another is permitted if in the public interest); *International Ry. v. Public Serv. Comm'n*, 264 App. Div. 506, 36 N.Y.S.2d 125 (1942), *aff'd*, 289 N.Y. 830, 47 N.E.2d 435, 43 N.Y.S.2d 927 (1943) (contracts subject to approval by Public Service Commission if in the public interest).

delegation to an executive agency. The agencies, at least as to activity of a rulemaking nature, operate subject to the strictures of the Administrative Procedure Act, which requires a consultative and rationalized decisional process.¹¹⁸ Agencies, in addition, may have potentialities for formal self-limitation of discretion not transferable to the political arena in Congress.¹¹⁹ By contrast the congressional process, being political in the sense of "popular," and properly so, works by compromise and adjustment and is, from a jurisprudential standpoint, basically an irrational process. That is the essence of basic democratic policymaking, but it is inappropriate for the administrative process of developing the needed subordinate legislation for a program. For one house of Congress to intrude by a veto power into the latter process raises a specter of spasmodic, partial, unrationalized, inexperienced, nonrepresentative program development, and thus reinforces the wisdom of the article I, section 7 disposition and the bicameral principle.

F. *Due Process and Equal Protection Limitations on Congressional Intrusion Into Agency Action*

Absent some specially egregious fact situation, such as a specific interference with a personal interest, or intentional discrimination between persons similarly situated, neither due process nor equal protection requirements are likely to be violated by the exercise of the congressional veto power. Indeed, if such an egregious fact situation should arise, the more appropriate clause would be the bill of attainder clause, if the effect of the action could be said to penalize a specific person or group.¹²⁰

Plaintiffs did plead both due process and equal protection violations in *Clark v. Valeo*.¹²¹ The effect of subjecting proposed regulations of

118. Agency rulemaking normally follows either the notice and comment provisions or the formal hearing provisions of the Administrative Procedure Act, 5 U.S.C.A. §§ 553, 556, 557 (West 1977). In addition, the basis for agency action, even if informal, must be sufficiently rationalized to be understandable, if not credible, to the reviewing court. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (Secretary of Transportation may be required to supply reasons for approval of highway through park in the absence of formal findings that there was no alternate route). See also *NLRB v. Coca-Cola Bottling Co.*, 350 U.S. 264 (1956) (agency definition upheld as being in accord with both common usage and specialized usage in the area of labor relations); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973) (inadequacy of information from industry held insufficient basis for final administrative determination against industry).

119. See *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971); Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

120. See *United States v. Lovett*, 328 U.S. 303 (1946) (statute barring payment to specified government employees who were subjects of congressional investigation held unconstitutional). But see *Flemming v. Nestor*, 363 U.S. 603 (1960) (termination of benefits to deported alien pursuant to a general statute upheld).

121. 559 F.2d 642 (D.C. Cir.) (per curiam), *aff'd mem. sub nom.* *Clark v. Kimmitt*, 431 U.S. 950 (1977).

the Federal Election Commission to a one-house veto process, they argued, was to allow self-interested incumbents to control rules that would affect their future reelection campaigns in violation of due process restrictions on bias in decisionmaking.¹²² There are at least two difficulties with this argument. The first is that factors of self-interest are present, but necessarily tolerated, in the conventional statute-making process, too (for example, "Pork Barrel" legislation for home districts). Even if this difficulty is surmounted by pointing out that the one-house veto device escapes the salutary checks of bicameralism and the presidential veto, the second difficulty is that the strongest anti-bias precedents relate to officials exercising adjudicatory powers, rather than legislative or rulemaking powers.¹²³ There are two or three precedents that frown upon the exercise of congressional influence in a particular administrative proceeding. However these cases turn on the fact that congressional contact was unauthorized,¹²⁴ or operated before the agency made an adjudication¹²⁵ or a decision having adjudicatory aspects.¹²⁶

The basis for the equal protection argument in *Clark* was that nonincumbent candidates like Ramsey Clark are disadvantaged by having less access to the Commission to obtain favorable rules than incumbent candidates, and certainly less "clout," because only the latter can threaten a veto.¹²⁷ As already noted,¹²⁸ however, there are circumstances in the conventional legislative process in which incumbents may have more clout on matters affecting them personally than do outsiders: decisions by statute for equal public funding of incumbents and challengers even though incumbents have a built-in advantage in their office staff; and budgets for "official" mailings and trips to their constituencies.¹²⁹

122. See *id.* at 645 n.20.

123. See *Gibson v. Berryhill*, 411 U.S. 564 (1973) (barring professional organization's board members from deciding license revocation proceedings from which they could benefit); *Ward v. Village of Monroe*, 409 U.S. 57 (1972) (disapproving a mayor's power to fine traffic violators); *Tumey v. Ohio*, 273 U.S. 510 (1927).

124. *District of Columbia Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972) (decision to construct bridge held invalid because of undue pressure from members of Congress).

125. *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966) (congressional committee hearings challenging FTC's conduct of a pending divestiture case constituted a denial of due process).

126. *Sangamon Valley TV Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959) (private approaches to FCC members vitiated agency's allocation of channels).

127. 559 F.2d at 645 n.2.

128. See text accompanying note 89 *supra*.

129. Without the trigger of a fundamental right or a suspect category, court review of alleged improper classifications is confined to ascertaining that the classification has minimum rationality. See *Barrett, Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U.L. REV. 89; *Dixon, The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494 (1977); *Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model*

G. *Justifications of the Congressional Veto: "Conditional Legislation" Concept*

Most justifications for the congressional veto either consist of arguments against taking separation of powers very seriously in modern America,¹³⁰ or confuse the congressional veto with the many legitimate kinds of oversight that neither run afoul of specific clauses in the Constitution nor seek to legalize a "shared administration" concept.¹³¹ More specific justifications include attempts to make a very expansive interpretation of the "necessary and proper" clause of article I, section 8 which is discussed below in connection with the recent litigation,¹³² and the "contingent legislation" concept.

The contingent legislation concept is a sub-aspect of the delegation of powers heading. Historically, in the early era when courts took the purist separation of powers view that "Congress cannot delegate legislative power to the President,"¹³³ one escape device that allowed validation of some delegations was to say that the legislature itself had made the policy and had merely conditioned its application on an executive finding that specified circumstances existed. On this basis the Supreme Court in *Field v. Clark*¹³⁴ sustained a tariff act that allowed the President to shift certain imports from a duty-free to a fee schedule whenever he found that the exporting country

For a Newer Equal Protection, 86 HARV. L. REV. 1 (1972). *Quaere*, if justiciability hurdles could be overcome regarding judicial review of internal processes in Congress, could the equal protection plea be bolstered by arguing that a more stringent judicial review test should be applied here because the alleged adverse impact on the political process is analogous to tampering with a fundamental right?

130. One version of this approach attempts to use the independent regulatory commission experience and cases, *see* text accompanying notes 63-69 *supra*, as a basis for a general leniency, even subordinating the specific constitutional clauses that suggest some clear lines of division. *See* Cutler & Johnson, *supra* note 69; Schwartz, *supra* note 5, at 1031. Cutler and Johnson have suggested a plan to give the Executive more control over the actions of independent agencies through Executive orders directing some aspects of agency action. They include a one-house veto of these Executive orders on a pragmatic basis, to secure the necessary support in Congress for their proposal. Cutler & Johnson, *supra* at 1414-17. On the constitutionality of the veto Cutler had this to say:

The order itself would be subjected to a one-house veto, if we have to have a one-house veto to get the proposal enacted. My own view about the one-house veto is that at least in some areas, if it isn't constitutional it ought to be. . . . It is a very different proposition if carried to excess, but it has a practical virtue in today's age when it is so difficult for the Congress to legislate policy statute-by-statute against a background of crises that keep changing almost monthly. I have a hunch that the founding fathers, given today's problems, might have thought that was a fair practical solution of this kind of a problem.

Symposium, *supra* note 22, at 706 (statement by L. Cutler).

131. *See* Cooper & Cooper, *supra* note 11. *See also* text accompanying notes 105-07 *supra* (the appropriations power).

132. *See* note 266 and text accompanying notes 265 & 266 *infra*.

133. *Field v. Clark*, 143 U.S. 649, 692 (1892).

134. *Id.*

was not treating our products with reciprocal fairness.¹³⁵ On the basis of such cases it has been urged that the congressional veto is likewise constitutional as simply another variety of precondition, specified in advance, to the effectuation of a delegated power.¹³⁶ This argument—which amounts to saying that because Congress can choose not to legislate at all, it can attach any condition or contingency it wishes to the execution of a statutory power delegated to the executive—is a teasing half-truth, as the literature on the doctrine of unconstitutional conditions demonstrates.¹³⁷

Conditions precedent to administrative execution of statutory powers may be of several kinds: for example, a wholly objective event, such as a flood, which triggers disaster aid; a finding of “fact,” as in reciprocal tariff legislation or as in arms embargo legislation;¹³⁸ or a free option to be exercised by a third party, perhaps one affected by the potential policy, as in some agricultural legislation.¹³⁹ Some conditions precedent, though nominally factual, may be distinctly judgmental, as in the reciprocal tariff or arms embargo situations. In the first instance the President must assess business conditions, and in the second instance must calculate what balance of forces contributes to peace. In such situations if would be an intrusion on the President’s article II authority to execute statutorily delegated power for Congress to add, as a “second contingency,” that the President’s judgment concerning a particular tariff or embargo will be ineffective if blocked by a congressional veto.

Currin v. Wallace,¹⁴⁰ which is sometimes cited as precedent supporting the constitutionality of the congressional veto on a contingent legislation theory, can be distinguished from the judgmental condition precedent situation. There the Secretary of Agriculture was given power to designate auction markets and inspect tobacco to be offered there, but only if the affected farmers voted for such a program. In effect, the Secretary acquired no statutory authority to act until the farmers voted affirmatively in the

135. For more recent examples, see *Hirabayashi v. United States*, 320 U.S. 81, 104-05 (1943); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1928). As the complexity of the “findings” or “contingencies” increased, the courts had to admit that policymaking power was being delegated after all, and judicial inquiry shifted to the question whether the legislature had provided sufficiently precise “standards” to guide the administrative discretion. See text accompanying notes 116 & 117 *supra*.

136. Cooper & Cooper, *supra* note 11, at 475-76.

137. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-49 (1968); Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

138. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

139. See *United States v. Rock Royal Co-op.*, 307 U.S. 533 (1939); *Currin v. Wallace*, 306 U.S. 1 (1939).

140. 306 U.S. 1 (1939).

referendum. The referendum (the contingency) therefore operated on the statute, and *not* on an administrative determination already made. In upholding the statute the Supreme Court made this point clear: “[T]he required referendum does not involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market ‘unless two-thirds of the growers voting favor it.’”¹⁴¹

The statutory scheme in *Currin* did not involve an exercise of delegated law enforcement discretion by the Secretary as to whether the public interest as defined in the statute required an inspection, followed by a reversal vote in the farmers.¹⁴² That would be a different case. Even if a statute of this latter type were upheld,¹⁴³ the congressional veto device would not thereby be validated. A court decision to allow congressional delegation of power to private groups on grounds so unstructured yet conclusive, however bad as public policy, involves in constitutional terms solely a question of delegation doctrine. No other constitutional considerations come into play. Such a ruling could furnish no constitutional warrant for the quite different situation that is reached when, by a congressional veto device imposed on administrative authority, the Congress tries to blur or wipe out the constitutional prescriptions of article I, section 7 (regarding the scope of the congressional role in policymaking), and of article II (regarding the role of the Executive in executing statutes). The only exception to the constitutional ban on displacement of executive judgment, regarding what is needed for effective implementation of a statutory purpose, is court review. Even that does not operate on a substitution of judgment principle, or at least

141. *Id.* at 15.

142. Likewise, in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), and *Hirabayashi v. United States*, 320 U.S. 81 (1943), there was no question of congressional interference with the exercise of a delegated authority. Rather, the question was whether the standard (or triggering condition) to start the administrative implementation of the statute was precise enough. *See* note 135 and accompanying text *supra*.

143. Such a validation apparently occurred in *United States v. Rock Royal Co-op.*, 307 U.S. 533 (1939), in the heyday of the reaction against the old nondelegation doctrine. Yet the Court's opinion, written by newly appointed Justice Reed, will not withstand critical scrutiny. In order to uplift the milk industry the Secretary of Agriculture was empowered to define milk marketing areas and propose marketing orders, the key feature being minimum price scales for producers (farmers). The marketing order, however, could go into effect only if agreed to by 50% of the handlers (middleman purchasers from farmers), or if two-thirds of the farmers voted to foist it on the handlers and the public. The latter occurred, over handler opposition. *Id.* at 556. In the course of a 42-page opinion primarily discussing the factual record, Justice Reed devoted only half a page to the constitutionality of the contingent legislation feature. He cited *Currin v. Wallace*, 306 U.S. 1 (1939), and without discussion simply said: “[W]e must assume that Congress had the power to put this Order into effect without the approval of anyone. Whether producer approval by election is necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation.” 307 U.S. at 577-78.

should not. Rather, courts ask whether: (1) The action is within delegated authority; (2) has a rational basis in light of the discretion conferred; or (3) violates constitutional rights.¹⁴⁴

H. *Inappropriateness of the British Analogy: The "Laying" System*

Although not directly relevant to constitutional questions raised by the congressional veto, the British "laying" system merits brief mention because it is offered by some proponents of the congressional veto as another justification for it.¹⁴⁵ Under the British system some "subordinate legislation," (for example, rules and regulations to implement statutory authority), does not go into effect for a prescribed period, usually forty days, to permit its presentation to Parliament for either express approval or "approval" by nonaction.¹⁴⁶ There are significant limitations on the practice. Apparently fewer than half of the various actions constituting subordinate legislation are laid before Parliament,¹⁴⁷ and the limited grounds authorized for consideration by the scrutinizing parliamentary committee (for example, unusual or unexpected use of statutory powers and imposition of a charge on the public revenues¹⁴⁸) do not include a *policy* review.

In the view of one participant in the system, it is only the exclusion of policy review that has enabled the parliamentary committee to process its business with dispatch; indeed, this exclusion has produced "remarkable harmony" in the scrutinizing committee even though the chairman may be a member of the Opposition.¹⁴⁹ In short, the system deals primarily with subordinate issues in subordinate legislation, and does so in nonpolitical fashion. The occasional successes reported concern matters of minor impor-

144. See notes 81 & 118 *supra*.

145. Schwartz, *supra* note 5; Symposium, *supra* note 22, at 680 (statement of Congressman Levitas).

146. For a general description see J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 83-99 (2d ed. 1957); H. WADE, *ADMINISTRATIVE LAW* 313-14 (1967). The submissions are reviewed by the House of Commons' Select Committee on Statutory Instruments (Scrutiny Committee).

147. Carr, *Legislative Control of Administrative Rules and Regulations: Parliamentary Supervision in Britain*, 30 N.Y.U.L. REV. 1045, 1048 (1955).

148. H. WADE, *supra* note 146, at 319-20.

149. The chairman, by what is becoming a convention, is a member of the Opposition, so that it need not be feared that he is under any temptation to protect the Government's subordinate legislation from criticism. Consideration of policy being excluded, remarkable harmony prevails; on no occasion as yet has the chairman needed to take a vote.

Carr, *supra* note 147, at 1054. Carr notes that after World War II it was suggested that the Scrutiny Committee's task include policy review, but this proposal was rejected in order to maintain the more streamlined review that is possible only when policy matters are excluded from consideration. *Id.* at 1051. See also H. WADE, *supra* note 146, at 319, who reports that because the focus is on "questions of form rather than substance" the Scrutiny Committee does its work "without party strife."

tance and may consist of the department concerned voluntarily agreeing to make modifications in response to a meritorious remonstrance on a matter of form or technique.¹⁵⁰ It is reasonable to hypothesize, however, that if the congressional veto were to be modeled along the lines of the limited and nonpolitical British "laying system," its proponents (in Congress at least) would not be even remotely satisfied.

On institutional grounds as well the "laying system," whatever effect it may have as a parliamentary control device in Britain, cannot be intelligibly fitted into the American separation of powers system. Despite an occasional fillip in the House of Lords, the British system is essentially a one-house system; therefore, the special problem of the "one-house veto" in the context of a bicameral deliberative body cannot arise. More importantly, in Britain there is no executive separate from the Parliamentary majority, and no executive veto power. Realistically viewed, there is little functional distinction between House of Commons' policymaking by majority vote, which produces a statute, and House of Commons' policymaking by majority vote or majority silence, which may block or bring into being "subordinate legislation."

III. THE CONGRESSIONAL VETO IN THE ADMINISTRATIVE PROGRAM CONTEXT

The constitutionality of the congressional veto received its first full dress briefing, and at least partial judicial reaction, in the sequence of litigation in 1976 and 1977 arising out of the Federal Election Commission statute (Federal Election Campaign Act Amendments of 1974¹⁵¹), the Postal Revenue and Federal Salary Act of 1967¹⁵² and the Presidential Recordings and Materials Preservation (Nixon Tapes) Act of 1974.¹⁵³ The courts in the Tapes Act litigation, *Nixon v. Administrator of General Services*,¹⁵⁴ barely touched the congressional veto issue, thus the veto issue in that statute remains open for the future. The Salary Act litigation raised the issue only in

150. See H. WADE, *supra* note 146, at 320-21; Carr, *supra* note 147, at 1055. The House of Lords may participate in this method of supervision (except in financial legislation) but British constitutional custom would deter the Lords from rejecting the Government's subordinate legislation "if a political crisis was thereby precipitated." *Id.* at 1056.

151. Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2, 5, 18, 26, 47 U.S.C.).

152. Pub. L. No. 90-206, 81 Stat. 613 (codified as amended in scattered sections of 2, 5, 22, 28, 31, 38, 39, 40, 44 U.S.C.). In 1977 the veto provision was amended so that both houses must affirmatively approve salary proposals. See Emergency Unemployment Compensation Act of 1977, Pub. L. No. 95-19, § 401a, 91 Stat. 39 (codified at 2 U.S.C.A. § 359 (West Supp. Pamphlet No. 1 1977)).

153. Pub. L. No. 93-56, 88 Stat. 1695; see 44 U.S.C. § 2107 note (Supp. V 1975).

154. 433 U.S. 425 (1977), *aff'g* 408 F. Supp. 321 (D.D.C. 1976), *discussed at* note 82 *supra*.

the context of quadrennial salary adjustments for high officials, and in *Atkins v. United States*¹⁵⁵ the Court of Claims sustained the congressional veto. In that limited context the veto may be isolable, and valid, as "reverse legislation," rather than intrusion on executive discretion.¹⁵⁶

The Federal Election Commission (FEC) litigation, *Buckley v. Valeo*¹⁵⁷ and *Clark v. Valeo*,¹⁵⁸ raised the issue of constitutionality in its most critical context—congressional interference with an ongoing administrative program under statutorily delegated authority. Under the statute the FEC's implementing regulations must be submitted to Congress, and either house may nullify them by majority vote within thirty legislative days.¹⁵⁹ Both *Buckley* and *Clark* also illustrate the difficulty in achieving judicial review of the congressional veto, a matter worthy of some inquiry because major systemic shifts in power balance can result from nonreview¹⁶⁰ as well as from innovative and authoritative judicial constructions of the Constitution.

A. *Buckley v. Valeo*

In *Buckley* the initial version of the FEC statute was held unconstitutional under the appointments clause of article II,¹⁶¹ and the Court was able to sidestep the congressional veto issue.¹⁶² Although the veto issue was implicit in one of the questions certified by the district court to the court of appeals, that court treated it as one of the questions not yet ripe for review. It thus could view the FEC at that stage as "a constitutional legislative agency that performs primarily legislative functions."¹⁶³

155. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 98 S. Ct. 718 (1978), *discussed at text accompanying notes 221-50 infra*.

156. *See text accompanying notes 239-50 infra*.

157. 424 U.S. 1 (1976) (per curiam).

158. 559 F.2d 642 (D.C. Cir.) (per curiam), *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

159. 2 U.S.C.A. § 438(c)(1),(2) (West Cum. Supp. 1977).

160. Our federalism structure, as well as our separation of powers structure, offers examples of such power shifts, semi-sanctified by judicial silence. The vast system of federal grants-in-aid to the states, under which consent is bought for a variety of federal standards, has been exempt from full-dress judicial review of its intrinsic validity ever since the Court held that neither a state nor a citizen had standing to challenge this exercise of congressional power. *Massachusetts v. Mellon*, 262 U.S. 447 (1923). A later case upheld a federal rule that federal aid monies could only be handled by nonpolitical officials, but sloughed off, in typical Justice Reed fashion, the large federalism issue. *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947). On federalism implications, see Linde, *Justice Douglas on Freedom in the Welfare State*, 39 WASH. L. REV. 4 (1964).

161. U.S. CONST. art. II, § 2, cl. 2, *quoted in note 114 supra*.

162. 424 U.S. at 118-43. The members of the FEC were held to be officers of the United States, so that the provision for appointment of some FEC members by the Congress was a violation of the appointments clause. *Id.* at 125-26.

163. 519 F.2d 821, 833 (D.C. Cir. 1975); *see id.* at 889, 891 n.183.

A similar approach was taken in one of the two briefs that the Attorney General, in an unusual move, filed in the appeal to the Supreme Court. In one brief for himself as a named defendant and for the FEC, the Attorney General performed his customary role of defending a statute. He discussed public funding of elections and first amendment issues, but did not reach the separation of powers issues concerning the FEC's law enforcement authority and the congressional veto.¹⁶⁴ In a second brief for himself and for the United States as *amicus curiae*, the Attorney General argued that if the FEC had law enforcement powers they would be unconstitutional as an invasion of executive powers because the Commission majority was appointed and controlled by Congress.¹⁶⁵ Similarly, the congressional veto would be suspect. These warning "dicta" were softened, however, by the suggestion that since the FEC had not yet sought to exercise any law enforcement authority, the separation of powers issues were not "ripe."¹⁶⁶

Plaintiff Buckley, not inhibited by the institutional considerations that pressed on the Attorney General, pushed for a decision on the merits and asserted: "Vesting veto power in Congress is just as unconstitutional as vesting an appointment there."¹⁶⁷ In any event, the Court agreed that Congress was not just shadowboxing and that it did intend to confer enforcement power on the FEC. The Court therefore reached the separation of powers issue and held the FEC to be unconstitutional because the manner of its appointment did not comply with the appointments clause of article II.¹⁶⁸ It saw no need at that point to reach the congressional veto issue, referring to it as "the most recent episode in a long tug of war between the Executive and Legislative Branches . . . respecting the permissible extent of legislative involvement in rulemaking under statutes which have already been enacted."¹⁶⁹ Justice White, however, offered a cryptic dictum supporting the congressional veto concept.¹⁷⁰

B. *Clark v. Valeo*

After Congress had responded by 'providing for presidential appoint-

164. Brief for the Attorney General and the Federal Election Commission.

165. Brief for the Attorney General As Appellee and for the United States as *Amicus Curiae* at 116-19.

166. *Id.* at 108-09. It should be noted that in the same month, October 1975, in which these briefs were filed by the Attorney General, the House and Senate in separate actions exercised the congressional veto against two different sets of regulations proposed by the FEC. *See* text accompanying note 97 *supra*.

167. Brief of the Appellants at 208 n.9.

168. 424 U.S. at 118-43.

169. *Id.* at 140 n.176.

170. *Id.* at 284-85 (White, J., concurring in part and dissenting in part); *see* note 210 and accompanying text *infra*.

ment of all voting members of the FEC,¹⁷¹ the attack on the retained congressional veto provision was continued by Ramsey Clark in 1976 in his capacity as voter and as candidate for the Democratic nomination for United States Senator from New York. Because of the impending primary election, *Clark v. Valeo* was hastened to argument on a shortened briefing schedule in the Court of Appeals for the District of Columbia, sitting en banc on September 10, 1976.¹⁷² After Clark lost the primary election on September 14, 1976, the case was held back until January 21, 1977, at which time it was dismissed.¹⁷³ The Supreme Court without comment affirmed the dismissal on June 6, 1977.¹⁷⁴

The court of appeals offered a melange of considerations for the dismissal. The per curiam opinion for the court rested on lack of ripeness.¹⁷⁵ There was no ripeness in respect to Clark because in his sole remaining status as a voter he had shown no inhibition of his political activities flowing from the Act on the face, apart from any specific implementation. Further, he had protested "no specific veto action taken by Congress and identified no proposed regulation tainted by the threat of veto on review."¹⁷⁶ The quoted point intimates that as a voter he had only an abstract interest in constitutional integrity and thus intertwines ripeness and standing issues.

171. 2 U.S.C.A. § 437c (West Cum. Supp. 1977).

172. The judicial review provisions, found in *id.* § 437h, require the district court to certify all constitutional questions presented to it to the court of appeals for en banc consideration. The decisions of the court of appeals on matters certified are reviewable by direct appeal in the Supreme Court if the appeal is brought within 20 days of the lower court decision. Both the court of appeals and the Supreme Court are required to "advance on the docket and expedite to the greatest possible extent the disposition of any matter certified." *Id.*

In *Clark* the court of appeals received the certified questions from the district court on September 3, 1976, and ordered the hearing for September 10, 1976. See 559 F.2d at 644-45.

173. *Id.*

174. *Clark v. Kimmitt*, 431 U.S. 950 (1977) (mem.). Thus the "merits" of the dispute about the constitutionality of the congressional veto continue to evade Supreme Court consideration, whatever the significance to be derived from this summary affirmance in respect to the "ripeness" doctrine on an article III basis or prudential basis. Because of the varying views in the five opinions produced by the court of appeals sitting en banc, it would seem that very little significance would attach to the affirmance even if the dispute about the precedential value to be accorded summary actions in the "appeal" process is resolved in favor of according them binding effect. See *Mandel v. Bradley*, 432 U.S. 173 (1977) (per curiam) (summary affirmances prevent lower courts from coming to opposite conclusions on the precise issues presented); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (holding that lower court erred in disregarding a summary dismissal for lack of a substantial federal question). But see *Edelman v. Jordan*, 415 U.S. 671 (1974) (holding that summary affirmances do not have precedential value equal to full Court opinions). See also Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U.L. REV. 373 (1972).

175. 559 F.2d at 647. The court did not reach other issues such as the political question consideration and standing, *i.e.*, whether Clark had continued standing at least as a voter after failure of his candidacy, and whether the United States as intervenor had a continuing jurisdictional basis if Clark should be dismissed.

176. *Id.*

There was no ripeness as to the United States which, as intervenor, was directly asserting an interest in the constitutional integrity of separation of powers, because Congress had not yet exercised the veto in respect to any regulation submitted by the post-*Buckley* reconstituted FEC.¹⁷⁷

Concurring Judges Tamm, Bazelon and Wright agreed that there was lack of ripeness. They also would have held that the United States as intervenor lacked independent standing to “challenge the actions of one branch of the federal government as an unconstitutional invasion of the powers of another branch,”¹⁷⁸ because there was neither statutory authorization nor an “articulated injury to an interest of the federal government as a whole.”¹⁷⁹ They did suggest that the President might have standing in respect to interference with his veto power,¹⁸⁰ but presumably he too would be subject to a ripeness dismissal until the Congress actually exercised its veto by blocking a specific administrative action. Concurring separately, Judge Leventhal agreed with the ripeness dismissal of *Clark*, but would have preferred to base it on “prudential” or discretionary grounds¹⁸¹ rather than on article III grounds as the majority apparently intended.

Surely the *Clark* majority’s insistence on an actual congressional exercise of its supposed veto power as a precondition of avoiding a mandatory ripeness dismissal on article III grounds cannot be the last word on this branch of the law. This approach egregiously misconceives the true nature of the congressional veto in operation. It overlooks the extraordinary “negotiating power”—different from other legitimate kinds of congressional influence over administrative action—that the congressional veto vests in Congress.¹⁸² This negotiating power is illustrated by the factual record in *Clark* itself,¹⁸³ and by studies of the operation of the congressional veto device (whether or not “exercised”) in other programs.¹⁸⁴

Apart from the negotiating power question, the *Clark* majority’s position is blind to the possibilities for congressional maneuver in the so-called “exercise” of the veto power. The subtlety of the “exercise” concept also is illustrated in *Clark* itself¹⁸⁵ by the experience of the FEC, as reconstituted

177. *Id.* at 649.

178. *Id.* at 654 (Tamm, Wright, J.J. & Bazelon, C.J., concurring).

179. *Id.*

180. *Id.* at 654 n.1.

181. *Id.* at 657-64 (Leventhal, J., concurring).

182. See text accompanying notes 103-07 *supra*.

183. See text accompanying notes 96 & 97 *supra*.

184. See text accompanying notes 92-94 *supra*.

185. See 559 F.2d at 666-67 (Robinson, J., dissenting); *id.* at 680-82 (MacKinnon, J., dissenting).

after *Buckley*,¹⁸⁶ in attempting to devise implementing regulations in the face of the congressional veto provision in the statute. The FEC delayed submission of the regulations to permit further time for "negotiation." After submission in early August 1976, Congress stretched the statutory provision for thirty "legislative days" of consideration into almost sixty calendar days, and managed to adjourn on October 2, 1976, with only twenty-eight "legislative days" accumulated. Thus, the regulations were barred without need for an actual vote "exercising" the congressional veto power.¹⁸⁷ It would be an odd system of jurisprudence in which "ripeness" was allowed to depend on such chance factors largely within the control of Congress. The effect would be to deny "ripeness" to all possible challenges to the congressional veto in the last two calendar months of a congressional session—perhaps for an even longer time if Congress were clever about its work scheduling. It would be the kind of circumstance "capable of repetition yet evading review" that the Court has not allowed to defeat justiciability in other areas of the law.¹⁸⁸

More intellectually satisfying reasons for the dismissal in *Clark* are the discretionary prudential considerations that dominated Judge Leventhal's opinion: for example, the desire to have a "full-bodied record"¹⁸⁹ before reaching a previously unlitigated separation of powers issue. Such an approach would not allow Congress indefinitely to play "ducks and drakes" with constitutional law.

Approaching the question of ripeness from a somewhat different perspective, which sub silentio may go part way to prejudging the merits, Judges Robinson and MacKinnon deemed irrelevant the key consideration of the majority—that Congress had not yet exercised its power to disapprove FEC regulations. To them, the case raised "a purely legal issue,"¹⁹⁰ because Clark as a voter was alleging two immediate harms inhering in the

186. Even if the two actual exercises of the congressional veto in October 1975 to block FEC regulations are disregarded because those regulations emanated from the pre-*Buckley* unconstitutionally appointed Commission, this earlier experience demonstrates that "exercise" of the veto power is a real and not a remote possibility. See text accompanying note 97 *supra*.

187. See text accompanying note 100 *supra*.

188. *Roe v. Wade*, 410 U.S. 113, 125 (1973).

189. 559 F.2d at 662-63 (Leventhal, J., concurring). As to the point about the lack of a "full-bodied" record in *Clark*, it should not pass without notice that one reason for that situation was the refusal of the defense to brief the one-house veto issue in the court of appeals proceedings. They placed all their eggs in the jurisdictional-justiciability basket. See note 81 *supra*. For the majority to then use this defense-counsel-caused inadequacy in the record as one basis for dismissal seemed to Judge MacKinnon, who dissented on the dismissal issue, to border on constitutional chutzpah: "This is the first instance to my knowledge where a court has elevated such conduct on the part of a defendant into a *jurisdictional* defect." 559 F.2d at 694 (MacKinnon, J., dissenting).

190. 559 F.2d at 672 (Robinson, J., dissenting); *id.* at 690 (MacKinnon, J., dissenting).

congressional veto from the outset. One was the delay, amply documented in this case, in implementing the policy and protections of the statute because of the negotiation process the veto power induced and the power of Congress to put proposed regulations into limbo by timely adjournment. The other was the "taint"¹⁹¹ that will inhere in the regulations because of the veto-induced influence Congress will have on the FEC's deliberations—Congress becoming a "working party"¹⁹² in the functioning of the agency. Although Judge Robinson, unlike Judge MacKinnon, indicated he was not reaching the merits,¹⁹³ the taint argument, at least, would be difficult to square with the separation of powers doctrine when the merits are reached, if that doctrine is to have even moderate force.

C. *Constitutionality of Congressional Veto of Administrative Action in Light of Buckley and Clark*

The essence of what is wrong with the congressional veto in a situation such as the FEC regulation of campaign finance practices, and in respect to the many other administrative programs to which the veto device has been attached,¹⁹⁴ is that it subjects program administration to a continuous process of consultation with some members of Congress. Because the latter are in a position to have the last word, the veto becomes, in reality, a "sign-off" process rather than mere consultation. Members of Congress, more accurately, certain key committeemen in Congress and their staff aides, thus acquire power without responsibility. Their interventions can be selective and spasmodic; virtually never is the entire Congress responsibly involved. The veto intrusions, and veto-inspired sign-off intrusions, are not confined to major rulemaking actions but include a wide variety of administrative decisions, as the HEW experience in particular illustrates.¹⁹⁵

This is not to suggest that either the practical administrative problems or the question of constitutionality would vanish if an attempt were made to confine the congressional veto to "rulemaking." Rulemaking is a process whereby an administrator charged with developing and operating a regulatory or service program can formulate regulations of general application, and thus give prospective notice to those affected. The alternative is a series of individualized actions whereby policy is clarified in the process of being

191. *Id.* at 672 (Robinson, J., dissenting); *id.* at 679 (MacKinnon, J., dissenting).

192. *Id.* at 679 (MacKinnon, J., dissenting).

193. *Id.* at 662 (Robinson, J., dissenting).

194. See text accompanying notes 18, 92-95 *supra*.

195. Some examples of the types of HEW activities that are subjected to congressional veto control are the issuance of guidelines for state equalization programs, the implementation of special experimental projects and the abolition or consolidation of advisory councils. S. Kurzman, *supra* note 30.

applied, and hence may have retroactive effect in the particular application. There is not, however, a clear line between these two modes of operating,¹⁹⁶ as indicated by the longstanding difficulty, not to say confusion, under the Administrative Procedure Act (APA) regarding the definitions of "rule" (official action of a generally prescriptive nature)¹⁹⁷ and "order" (official action of a particularly prescriptive nature).¹⁹⁸ Further, when both modes of proceeding are statutorily authorized, as is the case with many programs, it is established law that the administrative body has discretion to proceed by "rule" or by "order" in policy development.¹⁹⁹ The latter mode of operating, of course, is like a common law process. In such situations a congressional veto provision may be counterproductive insofar as it operates to induce an agency to opt for the more hidden and retroactive adjudicatory mode of policy development by "order," instead of the more open and prospective mode of policy development by the rulemaking mode.²⁰⁰

Seemingly sensitive to some of these difficulties of categorization, Judge Leventhal in *Clark* intimated some thoughts on the constitutionality of the congressional veto, and hypothesized what might be called a "shared

196. If "rulemaking" were easily separable from the ongoing process of administration it could be handled in Congress at the outset by the statutory mode, without any need for delegation. Indeed, whenever possible that mode of policymaking should be followed, and the delegated scope of administrative discretion correspondingly narrowed. When this is not possible delegation, of course, must occur. At this point article II calls for separation, but only until the delegation is pulled back or modified by a new statute.

197. "[R]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe 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 thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing

5 U.S.C. § 551(4) (1970). There is presently before the Senate Judiciary Committee an amendment to the APA, S. 1721, 95th Cong., 1st Sess. (1977), 123 CONG. REC. S10,159 (daily ed. June 20, 1977), which would remove the ratemaking phrase from the definition of rule, and set out a separate definition of ratemaking. The definition of "rule" would also be amended to remove from it the words "or particular." These two changes, supported by both the American Bar Association and the Administrative Conference of the United States, would help to clarify the distinction between "rule" (general) and "order" (specific). CONG. REC., *supra* at S10,163-65.

198. "[O]rder" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing" 5 U.S.C. § 551(6) (1970).

199. *See, e.g.,* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). *See also* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); SEC v. Chenery Corp., 332 U.S. 194 (1947).

200. On the tendency of an agency, even without the veto inducement, to resist exercising rulemaking authority, and thus to limit its own discretion in respect to future actions, see Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. REV. 63 (1973); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

legislative power” argument. After noting that delegation of legislative type power to the Executive has been deemed constitutionally acceptable, he wrote:

If the particular regulation by an executive official or executive-appointed agency reflects delegation of what is in substance legislative power, the question arises why the legislature may not provide instead that when exercising legislative rulemaking power, the agency is “an agent of the Congress” and the delegation of legislative power is conditioned on at least modest concurrence of the executive-appointed initiator and of the legislative branch. The American Constitution accommodates hybrids that work. *E.g.*, the Comptroller General is appointed by the President (with Senate consent . . . but he conducts auditing for the Government “as an agent of the Congress”. . . .)²⁰¹

The short answer to the question he raises, and pro-legislative veto conclusion he infers, is that it well illustrates the point he had just made (that reaching the merits should await a thorough briefing). It is still a “constitution we are expounding,” and as to the congressional veto there is some very specific constitutional text to be dealt with—unlike the case of validating independent regulatory commissions²⁰²—that does not lend itself to a “hybridization” slough-off. Nor is the example he mentions, the Comptroller General, supportive of the constitutionality of the congressional veto. The Comptroller, through the General Accounting Office, conducts auditing but does not engage in the kinds of law enforcement pursuant to public law that so engaged the Supreme Court’s attention in *Buckley v. Valeo*.²⁰³

In constitutional terms Judge Leventhal’s suggestion apparently is based on the view that a statutorily delegated power to engage in rulemaking remains “legislative” in the article I sense. Hence, even though the delegatee is an article II official appointed by the President (as required for the FEC in *Buckley*), he concurrently is an “agent of Congress.”²⁰⁴ As such he

201. 559 F.2d at 664 n.13 (Leventhal, J., concurring).

202. See text accompanying notes 63-69 *supra*.

203. 424 U.S. at 140-41. The occasional exceptions to this statement, for example, the function of administering the 1971 Federal Election Campaigns Act, Pub. L. No. 92-225, 86 Stat. 3 (repealed 1974), before it was replaced with the 1974 Act, Pub. L. No. 90-206, 81 Stat. 613 (codified as amended in scattered sections of 2, 5, 22, 28, 31, 38, 39, 40, 44 U.S.C.) (which transferred the functions to the FEC), have gone unlitigated and perhaps have been unconstitutional.

204. See text accompanying note 201 *supra*. The “agent of Congress” phrase, like the prefix “quasi,” which eases the process of fitting the regulatory commissions into our constitutional order, conceals confusion. In our system all three branches can be characterized as “agents” of the people, but there can be no interbranch agency, in the full sense of the term, in a separation of powers system.

Powers can be delegated by Congress to executive agencies and delegations may be terminated. Unlike a true agency, however, Congress cannot interchange roles with the ad-

must come into "at least modest concurrence"²⁰⁵ with Congress when he exercises the delegated rulemaking power.

The opposing view is that even though the power is "legislative" in the constitutional sense when it remains in congressional hands, it becomes "executive" in the constitutional sense once it is delegated. Article II then attaches, including both the President's appointing power, which the Supreme Court expressly vindicated in *Buckley*, and his obligation to "take care" through *his* agents that the laws be faithfully executed.²⁰⁶ That the "take care" obligation, as well as the "appointments clause," has a transforming effect, so that legislative-type powers once delegated are no longer strictly "legislative," seems also to find some support in the Supreme Court's opinion in *Buckley* in respect to the FEC:

All aspects of the Act are brought within the Commission's broad administrative powers: *rulemaking*, advisory opinions, and determinations of eligibility for funds. . . . Congress viewed these broad powers as essential to effective and impartial administration of the entire substantive framework of the Act. Yet each of these functions also represents the performance of a significant *governmental duty exercised pursuant to a public law*. While the President may not insist that such functions be delegated to an appointee of his removable at will . . . *none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law* to allow it to be performed by the present Commission. These *administrative functions* may therefore be exercised only by persons who are "Officers of the United States."²⁰⁷

In the foregoing discussion there is a fair amount of "labeling" in the quotations on both sides of the argument. The central substantive point, rising above labels and forms of legislative action, must be that the separation of powers principle was intended to effectuate a basic separation of the *administrative process*, in which "rule" and "order" cannot be separated effectively from the *legislative process*. At least, such separation is required unless a principled and thus self-limiting basis for some "hybridization" can be articulated. The congressional veto may be specially rationalized in

ministrators without violating the "same hands" prohibition of the separation of powers doctrine, *see* text accompanying notes 32-42 *supra*, nor can Congress fully control the process of appointing and removing the recipients of delegated power. At best there is what might be called—horrors!—a quasi-agency.

205. *See* text accompanying note 201 *supra*.

206. U.S. CONST. art. II, § 2, cl. 2 & § 3.

207. 424 U.S. at 140-41 (emphasis added). This opposing view was also embodied in the Court of Claims in the dissenting opinion of Judge Skelton in *Atkins v. United States*: "Once made, such a delegation of power to adjust salaries becomes an executive power, and it remains such until and unless legislation is enacted (by both houses) withdrawing it." 556 F.2d at 1080 (citation omitted) (Skelton, J., dissenting).

the contexts of the Salary Act and the Reorganization Acts, for the very reason that an administrative *process* in the core sense is not being interfered with.²⁰⁸ This is not the case with the FEC or executive branch programs generally.

On a doctrinal level the opposing view to the Leventhal construct seems to be more in accord with the unique American separation of powers system. As applied to a conventional agency possessed of rulemaking powers, Leventhal's view proves too much. It would be a long step toward converting our presidential government into a ministerial government without at least three significant, central accountability components of the British parliamentary system: (1) tight party discipline in the House of Commons under the Prime Minister; (2) unicameralism, in essence if not in form; and (3) the tradition that Parliament cannot go beyond questioning the Minister to intrude on day-by-day administration.²⁰⁹ Without these components the congressional veto, which has no principled limits, can produce a scattered, irresponsible control from the congressional committees upward. It can displace the centrality of administrative control and direction that is a feature both of the parliamentary system through the Prime Minister and the American system through the President, and that enables pinpointed political accountability. Although Judge Leventhal has hypothesized that the congressional veto may produce a beneficial and "modest concurrence" between the executive rulemaker and Congress, the reality is that the congressional veto is a final negative on the administrator's attempt to implement a statutory authority that has not been modified by regular statutory process.

An even more forthright dictum by Justice White in *Buckley v. Valeo* in favor of the congressional veto antedated Judge Leventhal's teasing

208. See text accompanying note 216-19 *infra*.

209. In Great Britain the doctrine of ministerial responsibility to Parliament, enforced through a question period, produces the reality of strong civil service autonomy and independence. The doctrine is augmented by the Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28, § 2, which imposes criminal penalties on all unauthorized disclosures of information acquired in the course of official duty. As observed in H. WADE, *supra* note 146, at 17-18: "The cabinet system with its parliamentary majority provides a firm front against which the tides of public criticism surge and break, and behind which the civil service shelters." Administrators are not summoned by Parliament to testify and bring papers. The powerful congressional committee structure does not have a counterpart in Parliament; instead, the British on occasion make use of commissions of inquiry, outside the legislature. See R. CHAPMAN, *THE ROLE OF COMMISSIONS IN POLICY-MAKING 174-75* (1973); G. RHODES, *COMMITTEES OF INQUIRY 107* (1975).

In addition, of course, there is the reality that the so-called "laying system" for presenting subordinate legislation (rules and regulations) to the Parliament for review produces few changes above the cosmetic level. In the parliamentary system such a presentation is a presentation to oneself, up to the point when a government "falls" over some far larger issue than subordinate legislation. See text accompanying notes 145-50 *supra*.

dictum in *Clark*. Justice White's dictum also well illustrates the dominant theme of the *Clark* majority that decision of such a novel, institutional issue should await full briefing and a "full-bodied" record. Justice White sought to analogize the one-house veto to the power of either House, when operating in the conventional article I, section 7 mode for legislating, to block a proposed statute:

[B]ut for a regulation to become effective, neither House need approve it, pass it, or take any action at all with respect to it. The regulation becomes effective by nonaction. This no more invades the President's powers than does a regulation not required to be laid before Congress. Congressional influence over the substantive content of agency regulation may be enhanced, but I would not view the power of either House to disapprove as equivalent to legislation or to an order, resolution or vote requiring the concurrence of both Houses.²¹⁰

Whether or not the congressional veto ultimately is deemed constitutional, its validity cannot be convincingly supported by the approach in these quoted lines. The approach is not responsive to the way the congressional veto operates in practice, for it does not recognize that the influence over prospective regulations created in key members of Congress by the mere existence of the veto provision may permeate the administrative process. Furthermore, to say that once submitted a regulation becomes effective by "nonaction"—and hence is no more an invasion of presidential powers than if never submitted—is not responsive to what actually happened in submission of proposed regulations by the initial FEC. After a sequence of committee reports and procedural motions, final votes were taken on the veto question. A majority was mustered in the House against one regulation, in the Senate against another.²¹¹ Had the votes gone the other way these regulations would have become effective by the *action* of not mustering a majority.

More importantly, the votes on the question of disapproval of submitted regulations, however they come out and whether under a one-house or two-house veto provision, are congressional actions on the *shaping of public law*. As such, they must be fitted into the constitutional scheme delineated in articles I and II; yet no ready pigeonhole can be found. From one perspective the votes on proposed regulations are analogous to the

210. 424 U.S. at 284-85 (White, J., concurring in part and dissenting in part). From this dictum, and the silence of the other Justices, Judge Leventhal derived further support for his vote for a prudential dismissal of *Clark v. Valeo*. 559 F.2d at 664 (Leventhal, J., concurring). The White dictum was subjected to lengthy critical analysis by Judge MacKinnon, the only judge in *Clark* to squarely reach the merits. *Id.* at 685-90 (MacKinnon, J., dissenting).

211. See text accompanying note 97 *supra*.

executive (Article II) process of implementing delegated authority. That, however, would be a clearly unconstitutional intermixture of powers. Neither can the veto actions be fitted into article I, because what actually is happening is that Congress is making new public law by modifying an extant scheme of delegated power. For this reason, despite Justice White's contrary statement, the veto action falls under article I, section 7, clause 3—the "second presentment clause"²¹²—which the Framers inserted to ensure against an evasion of clause 2, which deals with presentment of formal bills.²¹³

In larger perspective it must ever be borne in mind that these specific clauses in the Constitution are supportive of a *separation of processes*—specifically, the separation of what we now call the administrative process from the legislative process. The separation principle is rooted as well in the intent of the Framers²¹⁴ and as a core concept in our system is accepted even by those who seek to justify some "modest" hybridization. The administrative process is subject, to be sure, to legislative authorization and direction by statute, but that too is limited by the President's defensive veto power.²¹⁵

212. U.S. CONST. art. I, § 7, cl. 3.

213. *Id.* art. I, § 7, cl. 2. James Madison was primarily responsible for the inclusion of the "second presentment clause." He observed "if the negative of the President was confined to *bills*; it would be evaded by acts under the form and name of Resolutions, votes &c—proposed that or resolve should be added after '*bill*' in the beginning of sect 13. with an exception as to votes of adjournment &c." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 301 (M. Farrand ed. 1911). After an initial vote of rejection, the clause met with approval when it was resubmitted by Mr. Randolph. *Id.* at 301-05. See also Symposium, *supra* note 22, at 687-88 (statement by A. Scalia).

214. See text accompanying notes 36-47 *supra*.

215. As Hamilton observed, because of the "propensity of the legislative department to intrude upon the rights" of the other departments, a "primary inducement to conferring [the veto power] upon the Executive is, to enable him to defend himself," for otherwise "the legislative and executive powers might speedily come to be blended in the same hands." THE FEDERALIST No. 73, *supra* note 38, at 468-69 (A. Hamilton). In somewhat puzzling fashion, this is turned around by Justice White in *Buckley* to yield the comment that the President's veto power, while giving him an important role in the legislative process, was not considered by the Framers to be an "inherently executive function." 424 U.S. at 285 (White, J., dissenting in part and concurring in part). By such labeling, room would be made for conferring a veto power on the Congress, too. Would not that miss the important point that the presidential veto was designed not only to protect some vacuum labeled the Presidency, but also was to be supportive of the larger separation of powers principle that Congress should not intrude on the administrative process? Years ago, in a quite different era (1885), Woodrow Wilson also remarked on the propensity of Congress to bring about a "scheme of congressional supremacy." W. WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 28 (1885, reprint 1956). We all know that by the time he assumed the Presidency the power balance had shifted; but the important point to be derived from his 1885 work is that in remarking about congressional supremacy he deplored both its impact on abstract separation of powers theory and its practical results. The potential for a major transformation of our system by vigorous use of the congressional veto has been noted by two of its supporters who concede that "the veto conceivably could be used to deliver the executive completely or substantially into the hands of Congress." Cooper & Cooper, *supra* note 11, at 505.

The administrative process cannot maintain its operational integrity as intended under the separation of powers principle if it is subordinated to sublegislative interventions by a congressional veto device not provided for in the Constitution and antithetical to its basic structure.

IV. THE CONGRESSIONAL VETO IN THE "DISCRETE LEGISLATION" CONTEXT

Whether or not there is a constitutional distinction, there is an observable programmatic and interbranch relationship distinction between use of the congressional veto to intrude on the operation of a continuous and evolving administration program²¹⁶ (of which *Buckley* and *Clark* are our closest, almost-litigated examples), and its use in somewhat discrete and narrow ways to change the law on a given point. The distinction is especially clear if the latter category is conceptualized as being confined to matters that are (1) conventionally and simply dealt with by statute, and (2) self-executing once the "law" is made, that is, which do not create, or act

216. Further clarification of the constitutional power of Congress to interfere in the administration of on-going programs may be forthcoming from the decision of an appeal pending in the Ninth Circuit, *Chadha v. Immigration & Naturalization Serv.*, appeal docketed, No. 77-1702 (9th Cir. Oct. 25, 1977).

Chadha has appealed a congressional veto of an administrative determination to suspend his deportation pursuant to the Immigration and Nationality Act, 8 U.S.C.A. § 1254 (West 1970 & Cum. Supp. 1977). The Attorney General has statutory authority to suspend the deportation of any alien who meets certain statutory qualifications, but must report the action to the Congress for possible veto by either house. *Id.* § 1254(c) (West 1970). Chadha was granted a suspension of deportation, but the House of Representatives vetoed the suspension of Chadha and five others after reviewing 340 cases. Brief for the Immigration and Naturalization Service at 5-6. Chadha is supported in his attack on the veto by the Immigration and Naturalization Service (INS) on the ground that the veto is an intrusion into the administration by the INS of consistent policies. *Id.* at 12.

In *Asimakopoulos v. Immigration & Naturalization Serv.*, 445 F.2d 1362 (9th Cir. 1971), when a departmental hearing officer (immigration judge) refused to grant a suspension, citing as his rationale a congressional committee report explaining its position in the exercise of prior vetoes, the Ninth Circuit held that such reliance on congressional action was an abuse of the judge's statutorily granted discretion to suspend deportations. *Id.* at 1363. The immigration veto power poses special problems in light of *Asimakopoulos*. If permitted Congress may, through a series of vetoes, attempt to establish a policy of narrowing the grounds for the suspension of deportations. The agency may then attempt to respond to the congressional gloss on its original delegation by cooperating in this constriction in order to avoid vetoes. *Asimakopoulos* seems to say that the veto may not thus be used to alter the scope of the original delegation. If the administrative agency must continue to decide cases in accordance with the initial delegation, only to have the cases vetoed in Congress, an impasse could result.

As is more likely, Congress will not establish a clear policy through the exercise of its veto, but rather will merely create uncertainty regarding the interpretation of the original statutory delegation. If this is the case the immigration judge will not be able to rely on congressional pronouncements, and will not be subject to attack for failure to exercise his discretion. However, the existence of the veto power and the knowledge of past vetoes may serve to create a potent negotiating power in Congress, or to alter the scope of administrative discretion in ways that may not be subject to judicial challenge because the change is not made explicit. For a further discussion of the negotiation power, see text accompanying notes 90-107 *supra*.

on, administrative discretion to operate a governmental program. One prime candidate for inclusion in such a special category is the quadrennial revision of the pay rates for Senators, Representatives, federal judges, high executive officials and certain others under the Federal Salary Act of 1967²¹⁷ as recently amended.²¹⁸ Another candidate would be the sequence of Reorganization Acts dating from 1932, under which the President is authorized to make certain kinds of relocations of administrative machinery and functions in the interest of vigor and efficiency—an authority recently renewed for President Carter.²¹⁹

The argument for the constitutionality of the congressional veto in such a limited range of matters would be enhanced if a bicameral response to the executive submission were required and a selective or “item” veto were prohibited. In such an instance the label “reverse legislation” could be applied because the constitutional parity of the President and Congress under the lawmaking provisions of article I, section 7 would not be impaired. *Atkins v. United States*,²²⁰ brought by a number of federal judges under the Salary Act and decided by the Court of Claims in May 1977, comes very close to being just such a case. On the merits the court sustained the one-house veto provision as exercised under the Salary Act in the case before it. The opinion is congenial to a “reverse legislation” concept although not squarely based on it.

A. *The Salary Act and Atkins v. United States*

The Salary Act of 1967²²¹ was a response to the twin realities that members of Congress hesitate to vote for a salary increase for themselves for fear of political repercussions, and that the salaries of federal judges and high executive officials can move upward only in tandem with congressional salaries. In an effort to depoliticize the issue and to have periodic increases to keep pace with inflation be more automatic, the Act created a Commission on Executive, Legislative and Judicial Salaries, which at four year intervals is to recommend to the President pay rates for such officials. On the basis of this information, the President is directed to include in his next budget message his own recommendation, to become effective thirty days

217. Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 613 (codified as amended in scattered sections of 2, 5, 22, 28, 31, 38, 39, 40, 44 U.S.C.).

218. Federal Salary Act of 1977, Pub. L. No. 95-19, 91 Stat. 45 (codified at 2 U.S.C.A. §§ 358-360 (West Supp. Pamphlet No. 1 1977)).

219. See notes 15 & 27 *supra*.

220. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 98 S. Ct. 718 (1978).

221. Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 613 (codified as amended in scattered sections of 2, 5, 22, 28, 31, 38, 39, 40, 44 U.S.C.).

after submission unless one house of Congress disapproves, in whole or in part.²²²

The Salary Act litigation arose because President Nixon's salary increase recommendations, submitted in February 1974, were vetoed in their entirety by Senate resolution. *Atkins v. United States*,²²³ which became the leading case, was filed for 140 federal judges, while other suits were filed by plaintiffs in the other two branches of the government.²²⁴ The basic theory of *Atkins* was to treat the Salary Commission as valid, and reach the golden egg of the 1974 increases²²⁵ by voiding and treating as severable the one-house veto provision. Although the question has never been raised, because it was not in the interest of the plaintiffs to do so and because no one else has tried, it may be noted that the goose (the Commission) is in distinctly poor health. As a mixed membership commission,²²⁶ not all appointed by the President with senatorial confirmation, unless its advisory status gives it immunity, it may be afflicted with the same disease that the Supreme Court found fatal to the initial Federal Election Commission in *Buckley v. Valeo*.²²⁷

Atkins had an unusual litigative history. At the outset, the brief of the Department of Justice for the United States as defendant²²⁸ did not squarely join issue with the contention of former Justice Goldberg, counsel for the judges, that the one-house veto was unconstitutional. Rather, it tried to finesse the issue. It was argued that the veto provision was inseverable, so that even if unconstitutional the judges would take nothing; and that if it were deemed unconstitutional but severable, the court's order should be prospective only in order to give Congress an opportunity to respond.²²⁹ In

222. *Id.* § 225(i) (formerly codified at 2 U.S.C. § 359 (1970)) (amended 1977). The 1977 amendment to the Act, 2 U.S.C.A. § 359 (West Supp. Pamphlet No. 1 1977), discussed in note 152 *supra*, not at issue in this case, may have eased the minds of some judges because it met bicameralism objections by requiring that both houses approve a salary recommendation before it can take effect, even though it left standing the selective veto objection.

223. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 98 S. Ct. 718 (1978).

224. See, e.g., *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977); *Pressler v. Simon*, 428 F. Supp. 302 (D.D.C. 1976), *vacated per curiam sub nom. Pressler v. Blumenthal*, 431 U.S. 169 (1977) (congressional salaries). On remand, the district court reinstated its dismissal of plaintiff's claim in *Pressler*; the Supreme Court affirmed on the basis of lack of standing. 98 S. Ct. 758 (1978) (mem.).

225. While the suit was pending the 1976 increases were achieved when Congress failed to disapprove them within 30 days. See *Salary Recommendations for 1977 Increases*, 2 U.S.C.A. § 358 (West Supp. Pamphlet No. 1 1977); 42 Fed. Reg. 10,297 (1977).

226. The Salary Commission is composed of nine members, three appointed by the President, two by the Speaker of the House, two by the President of the Senate and two by the Chief Justice. 2 U.S.C. § 352 (1970). Its function as advisor to the President seems to be a conventional executive function.

227. 424 U.S. at 140-43.

228. Defendant's Motion to Dismiss the Petitions.

229. *Id.* at 14, 23.

oral argument, however, the Court of Claims understood the Government to admit that the one-house veto provision was unconstitutional, and noted that the Government had taken a similar position in a concurrent proceeding in the court of appeals in *Clark v. Valeo*.²³⁰ The court itself then took the initiative to enlarge the proceeding by inviting amici curiae briefs from the Senate and the House of Representatives, both of which were already involved with the one-house veto issue in *Clark*.²³¹

After keeping the case *sub judice* for months, the Court of Claims, splitting four to three on the constitutionality of the one-house veto in this context,²³² dismissed the case on May 18, 1977. Two additional issues in the case were: the propriety of the Court of Claims' entertaining the case at all, since like all federal judges they would benefit personally from a decision for the plaintiffs; and an inflation-discrimination argument that the congressional refusal to raise judicial salaries in the face of severe inflation was a diminution of "compensation" in violation of article III, section 1.²³³

230. 556 F.2d at 1058. In *Clark*, the United States, through Assistant Attorney General Rex Lee, and Clark through his attorneys, Nader associates Alan Morrison and Larry Ellsworth (an interesting pair of bedfellows!) did file briefs listing many of the constitutional objections to the one-house veto device. Brief for Plaintiff; Brief for the United States as Intervenor, *supra* note 81.

231. The letter requesting briefs from the Senate and the House noted that the Department of Justice had admitted the unconstitutionality of the veto provision in the Act. The Department's position on the nonjusticiability of the claim, the inseparability of the veto from the statute and the prospective applicability of the salary increases were all brought to the attention of Congress. The court then invited the House and Senate to file briefs within 30 days. Both houses responded to the invitation and submitted briefs supporting the congressional veto. Letter from the Clerk of the Court of Claims to Carl Albert, Speaker of the House and Nelson Rockefeller, President of the Senate (Oct. 14, 1976).

232. The issue of the constitutionality of the congressional veto remains close, despite the inscrutable dictum of Justice White in *Buckley v. Valeo*, 424 U.S. at 284-85, *quoted* at text accompanying note 210 *supra*. This lack of understanding is indicated not only by the four to three vote in *Atkins* and the narrowness of the issue, *see* text accompanying notes 239 & 248 *infra*, but by the record of the court of appeals sitting en banc in *Buckley* and *Clark*. For those who like to play the dangerous game of predictions based on inferences, it may be hypothesized that in the Court of Appeals for the District of Columbia three or possibly four of the eight-judge bench have tipped their hand as being at least deeply concerned about separation of powers. Only one, Judge Leventhal in *Clark*, has intimated support for the congressional veto. 559 F.2d at 659 (Leventhal, J., concurring). Judge MacKinnon expressed direct opposition to the veto in both *Buckley*, 519 F.2d at 932 (MacKinnon, J., concurring in part and dissenting in part), and *Clark*, 559 F.2d at 685-90 (MacKinnon, J., dissenting); Judges Tamm and Wilkey in *Buckley* expressed sensitivity to separation of powers issues and, unlike the majority, would have reached and nullified the nonpresidential appointment of the initial FEC, 519 F.2d at 920-21 (Tamm & Wilkey, J.J., concurring in part and dissenting in part); Judge Robinson in *Clark* inferentially expressed similar sensitivity in the course of his ripeness discussion detailing the immediacy of the harms to Clark flowing from the "inevitable effects of its [congressional veto] operation in any context." 559 F.2d at 666 (Robinson, J., dissenting).

233. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

The propriety problem, on which the Court of Claims had unsuccessfully sought enlightenment from the Supreme Court earlier,²³⁴ was resolved by the "rule of necessity" because there was no other forum not personally involved.²³⁵ The inflation-discrimination argument, although supported by some startling data on disparity of treatment,²³⁶ was rejected by construing article III, section 1 as barring only an "assault upon the independence of the third branch,"²³⁷ shown by an intentional plan or gross neglect. The record showed only political cowardice rather than a punitive spirit against judges, and that others besides judges were adversely affected.²³⁸

The Court of Claims' majority opinion on the congressional veto issue, here a one-house veto, did not conceptualize a possible "reverse legislation" category, but did note that the Salary Act itself posed the issue in a very narrow context.²³⁹ Its favorable holding, therefore, does not support the constitutionality of the congressional veto in general. The opinion, however, is so loosely structured that selective quotation from it could yield some support for an across-the-board validation of the congressional veto.

Five factors were seen as dominant but two were merely truisms about congressional power,²⁴⁰ and two were parochialisms about the congressional

234. The question certified to the Supreme Court asked: "[A]re the judges of the Court of Claims required to disqualify themselves in these cases, or does the 'doctrine of necessity' authorize and require the judges of the Court of Claims to hear and decide these cases." 556 F.2d at 1035-36. After receiving briefs and hearing oral argument, the Supreme Court dismissed the question without comment or opinion. *Atkins v. United States*, 426 U.S. 944 (1976) (mem.).

235. 556 F.2d at 1035-39. The court took this position after discussing the statute, the Code of Judicial Conduct of the American Bar Association adopted by the Judicial Conference and earlier cases such as those relating to claims of judicial immunity from the income tax. *Id.*

236. During the period from 1969 to 1975, when the salaries of the federal judges remained unchanged due to the exercise of the veto, the cost of living increased 34.4%. This meant that the judges purchasing power decreased accordingly, from \$40,000 to \$26,200. The salaries of most government employees were increased by 36.5%, and the salaries of starting government lawyers were raised 59.32%. Members of the armed forces received more than twice their former level of pay, and the Congress raised the size and salaries of its own staff and increased its own allowances. *Id.* at 1033-34.

237. *Id.* at 1045.

238. *Quaere*: Even absent a punitive spirit against judges, could all adversely affected groups mount an equal protection attack, alleging unreasonable classification? Would a court reject it either by concluding that absent a specific article III, § 1 claim the dispute was a political question, *see id.* at 1051-54, or by finding no basis for applying more than a minimal rational scrutiny, thereby concluding there was adequate rationality because pay scales were all that Congress felt the public would tolerate? For a discussion of legislative classification, see Barrett, *supra* note 129, at 122-30; Dixon, *supra* note 129, at 525-33; Gunther, *supra* note 129.

239. The only "one-House veto" we have before us is that contained in section 359(1)(B). The only instance of its use that is before us occurred in S. Res. 293, which disapproved the whole of the President's recommendations. We are not to consider, and do not consider, the general question of whether a one-House veto is valid as an abstract proposition, in all instances, across-the-board, or even in most cases. 556 F.2d at 1058-59.

240. The first two factors deemed significant were: that the pay setting function has traditionally been exercised by the Congress and is an intrinsically legislative concern; and that

heart's desire.²⁴¹ Only the last flushed out a significant consideration: "[T]he President's salary proposals, even when they become law, do not order or regulate any person, either actually or potentially."²⁴² As the court further said, "There are no elements of the regulation or enforcement of, or of the planning or carrying on of, an ongoing or continuing program, or of interference with executive discretion in new or existing programs of substantive character."²⁴³

This perception that the veto issue under the Salary Act was different because neither regulation nor law enforcement was involved, and no congressional intrusion into program administration would occur, was not consistently followed. The opinion contains loose language about the "ultimate power" over the subject matter being "vested by the Constitution in Congress,"²⁴⁴ and about pay setting being "at the center of the congressional sphere."²⁴⁵ After all, there is very little that is not ultimately in the congressional sphere by proper statute or even proposed constitutional amendment. However, the one-house veto issue is whether that ultimate power can be exercised by a part of Congress in nonstatutory mode. Similar overbreadth in the rationale of the Court of Claims is found in its statement that in exercising the delegated functions under the Salary Act the Executive merely acts as "an agent of the legislative branch."²⁴⁶ As already noted, in a separation of powers system there is no room for a true "agency" concept.²⁴⁷

Despite such loose encompassing language, and occasional references to the "necessary and proper" clause, the court's conclusion that the one-house veto was constitutional in the context of the Salary Act was cautiously

despite this tradition of legislative dominion the pay setting function "may properly be delegated to the President." *Id.* at 1059.

241. The next two factors were: that while delegating, "Congress was much concerned with its own pay and with the relationship of its own pay to that of the judges and other officials; and that "although it wished to delegate, Congress was intent on retaining a large measure of control." *Id.*

242. *Id.*

243. *Id.* at 1065. In my paper on the congressional veto, presented at the 1976 Association of American Law Schools meeting in Houston, I had expressed this thought as follows: "They [laws like the Salary or Reorganization Acts with a congressional veto provision] do not involve creation of a new substantive program or tampering with the authorized administrative discretion in an ongoing existing program." Speech by J. Dixon, ABA Assoc. of American Law Schools Meeting, in Houston, Texas (Dec. 29, 1976) (copy on file with author). To similar effect in *Atkins* is this statement: "The legislative veto in the Salary Act does not seek to enforce any law, or appoint any agents to enforce the law, and is a device used in aid of legislation . . ." 556 F.2d at 1070.

244. 556 F.2d at 1068.

245. *Id.* at 1061.

246. *Id.* at 1068.

247. See note 204 *supra* and text accompanying notes 201 & 204 *supra*.

presented. The court noted that there had been no invasion of administrative responsibility, but rather a reversal of "legislative" roles²⁴⁸ with the constitutional influence of both President and Congress preserved, in its view, because "nothing in the law is changed absent the concurrence of the President and a majority in each House."²⁴⁹ The court also noted that because the Senate had disapproved the President's recommendations for each salary category in 1974, the court did not have before it the issue of constitutionality of a partial disallowance, even though under the Salary Act partial vetoes are authorized.²⁵⁰ Although the court refused to reach the point, a partial veto would, of course, undercut the court's theory that the President's parity with Congress in his legislative role was not being undercut by the congressional veto. In any event, with the two significant qualifications mentioned, the court upheld the congressional veto and the 140 plaintiff judges, and all federal judges, gained nothing in 1977 from President Nixon's regard for them in 1974.

B. *The "Necessary and Proper" Clause Argument for the Congressional Veto*

The *Atkins* case also provided the occasion for airing a theory of validation of the congressional veto heretofore largely ignored—the "necessary and proper" clause of article I, section 8, clause 18.²⁵¹ Development of the theory came largely in the briefs, especially in the briefs for the Senate and House as invited amici.²⁵² The Court of Claims' majority mentioned the clause occasionally, largely as a makeweight,²⁵³ but fell far short of endorsing the breadth of the claims made for it by counsel.

Appeal to the necessary and proper clause to justify novel congressional excursions into the domains of the other two branches has antecedents in other contexts than that of the congressional veto. Similar assertions were made during the hearings in 1973 on the various bills to establish by statute a

248. 556 F.2d at 1065, 1067.

249. *Id.* at 1064.

250. See text accompanying note 222 *supra*. Although the 1977 amendment requires affirmation by both houses of Congress if any pay increase is to take effect, it leaves untouched the item veto issue. In fact, the 1977 amendment *requires* separate votes on each section of the President's recommendations. 2 U.S.C.A. § 359 (West Supp. Pamphlet No. 1 1977).

251. "The Congress shall have the power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

252. Brief Amicus Curiae on Behalf of Frank Thompson, Jr., Chairman, Committee on House Administration, United States House of Representatives [hereinafter cited as House Brief]; Brief Amicus Curiae on Behalf of Nelson A. Rockefeller, President of the United States Senate [hereinafter cited as Senate Brief].

253. See, e.g., 556 F.2d at 1061, 1071.

special prosecutor immune from control by the President,²⁵⁴ and the 1974 hearings on removing the entire Department of Justice from the executive branch.²⁵⁵

The necessary and proper clause has a familiar first part, which gives to Congress the power to make all laws "necessary and proper for carrying into execution the *foregoing powers*,"²⁵⁶ the lawmaking and internal house-keeping powers allocated to Congress in preceding parts of article I. The less familiar, or at least less commonly invoked, second part gives to Congress the same implementing power in respect to "*all other powers vested by this Constitution*."²⁵⁷ It has been suggested that the first part of the clause may be viewed as having a "vertical effect," operating on the powers expressly or impliedly allocated to Congress in article I, and that the second part of the clause has a "horizontal effect," giving to Congress an implementing and refining authority in respect to powers allocated to the other two branches in article II, article III and the last two articles and the amendments.²⁵⁸ In *McCulloch v. Maryland*²⁵⁹ an expansive reading was

254. See *Special Prosecutor: Hearings on S. 2612 and S. 2603 Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973). The supporters of the proposal for an independent special prosecutor relied primarily on article II, § 2, which vests in Congress the power to control the source of appointments of inferior officers of the United States, to justify a court appointed special prosecutor. As an added line of argument, supporters relied on the necessary and proper clause. Professors Freund and Kurland admitted in their testimony that, without the primary language about the appointments power, the necessary and proper clause alone would be a shaky justification for the establishment of a special prosecutor. *Id.* at 166-67, 365 (testimony of Paul A. Freund & Philip B. Kurland).

There is no constitutional counterpart to the appointments clause language to rely on when considering the legislative veto. The necessary and proper clause contains the language used for primary constitutional justification by its supporters. However, as Acting Attorney General Robert Bork pointed out in his testimony before the Senate committee, this sweeping clause should properly be read as "a means of making the exercise of powers by the various branches effective, not as a means of shifting powers between branches of government." *Id.* at 453 (testimony of Robert H. Bork, Acting Attorney General). See also *Special Prosecutor and Watergate Grand Jury Legislation: Hearings on H.J. Res. 784 and H.R. 10937 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

255. See *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974).

256. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

257. *Id.* (emphasis added).

258. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the "Sweeping Clause,"* 36 OHIO ST. L.J. 788, 823 n.104 (1975). This essay, which was approvingly cited in both the House Brief, *supra* note 252, at 28, and Senate Brief, *supra* note 252, at 8, in *Atkins*, is especially aimed at containing executive initiatives. It rests on the following hypothesis derived from the second part of the necessary and proper clause:

[T]his clause assigns to Congress alone the responsibility to say by law what additional authority, if any, the executive and the courts are to have beyond that core of powers that are literally indispensable, rather than merely appropriate or helpful, to the performance of their express duties under articles II and III of the Constitution.

given to the first part of the clause, and a congressional power to charter a national bank was found. The issue is whether such an expansive reading is also appropriate in respect to the second part of the clause—a policy that would have major implications for separation of powers.

The central proposition the Senate Brief derived from the clause was that "Congress by law may specify the means and the manner by which the powers vested in any branch or officer of the federal government may be executed subject only to the limitation that it cannot contravene an express constitutional provision,"²⁶⁰ or "take the action itself."²⁶¹ Surely, no one would object to specificity in congressional delegation of power to the Executive, provided it follows the statutory mode prescribed in article I, section 7, with presidential participation.²⁶² If discretionary powers are conferred, however, which is virtually unavoidable in modern law enforcement, it does not follow that Congress also has the power to insist on a congressional checkoff day by day, decision by decision, before the administrator can exercise the power. It likewise does not follow that Congress has power to so limit a constitutionally prescribed power of another branch, such as the presidential power of appointment of executive officials, that the selection of the appointee is shifted to Congress, even though the President still signs the appointing papers.²⁶³ The separation of powers prohibition

Van Alstyne, *supra* at 794. There is, however, internal tension in the essay, because the author at the same time deplores as "ill-considered" such Watergate-inspired congressional initiatives as placing prosecution and law enforcement outside Presidential control, exemplified by the 1974 attempt to place the Department of Justice outside the executive branch. *Id.* at 793.

259. 17 U.S. (4 Wheat.) 316 (1819).

260. Senate Brief, *supra* note 252, at 8.

261. *Id.* at 28.

262. The Senate Brief at this point seems to confuse the kind of control over executive actions that may flow from a carefully worded statute, making some duties virtually ministerial, with the kind of control-plus-derogation of prior statutory policy that may flow from a congressional veto device. For example, in support of a broad "horizontal" approach to the necessary and proper clause, Justice McReynolds is quoted, *id.* at 27, as saying in *Myers v. United States*, 272 U.S. 52 (1926): "Perhaps the chief duty of the President is to carry into effect the will of Congress through such instrumentalities as it has chosen to provide." *Id.* at 184 (McReynolds, J., dissenting). On its face this statement seems unobjectionable, provided it is borne in mind that the "will of Congress" referred to by Justice McReynolds obviously is one in which the President participates through his veto power.

Similarly supportive of the statutory power to create ministerial duties, but not of the power to use a congressional veto, is the counsel's suggestion that the effect of the holding in *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928), could be gotten around by a statute specifying "who [other than a legislative offshoot], how, and for what the stock could be voted." Senate Brief, *supra* at 28. In *Springer*, an oft-cited separation of powers case, *see, e.g.*, *Kwai Chiu Yuen v. Immigration & Naturalization Serv.*, 406 F.2d 499, 501 (9th Cir. 1969), the Supreme Court had held invalid the creation of a legislatively controlled commission to vote the stock in a government-owned corporation. 277 U.S. at 202-03.

263. Congress may fix some qualifications, but it would violate the principles of *Myers v. United States*, 272 U.S. 52 (1926), to hem in the President completely.

against the "same hands" doing both legislative and administrative work must be linked to a power autonomy principle if it is to have meaning. Otherwise, all power could be concentrated in Congress under the "horizontal effect" of the necessary and proper clause. So long as Congress directed the other branches in fine detail on how to carry out their delegated or constitutionally conferred responsibilities, the "same hands" prohibition technically would not be violated. In reality, those "different hands" that exercised the power would be merely the hands of an agent, not of a coordinate principal in a separation of powers, checks and balances system.

While not quite as insistent as the Senate Brief in using the necessary and proper clause as an instrument to make the executive a mere agent of Congress, the House Brief did rely on the clause to establish a plenary discretion in Congress to oversee the exercise of delegated power. Viewing the Salary Act as making a delegation of legislative power, the brief argued that the article II status of the President yielded no defense against continued congressional dominance on either of two theories: that the power remained "legislative" despite the delegation; and that even if the President's action under the delegation was viewed as an exercise of "executive power," it was "exercisable only at the sufferance of Congress, acting pursuant to the last portion of the 'necessary and proper' clause."²⁶⁴ What emerges here, as in the Senate Brief, is a principle of congressional control of the executive, without principled limits, via the necessary and proper clause.

It is noteworthy that both congressional briefs are cast in terms of a general theory of congressional control of the Executive under the necessary and proper clause. There was no attempt to develop a validating rationale for the congressional veto limited to the special facts of *Atkins*, a special "reverse legislation" theory implicit in the holding of the *Atkins* majority. The *Atkins* dissenters felt that the broad implications of the necessary and proper argument proved far too much, and swept away bicameralism, the President's veto authority, and the vesting of executive authority in the President.²⁶⁵ In short the amici, who carried the main burden of defending the congressional veto in the final round of briefing, lost the argument but won the case.²⁶⁶

264. House Brief, *supra* note 252, at 27.

265. 556 F.2d at 1081-82 (Skelton, Kashiwa & Kunzig, J.J., concurring in part and dissenting in part).

266. In spite of the Department of Justice's attempt to finesse the veto issue in its brief for the United States, the concession of unconstitutionality had slipped out in oral argument. See text accompanying note 230 *supra*. When the House and Senate responded to the invitation to brief the issue, the Department of Justice was put in an awkward position. Reorganization Act authority, with its veto provision, had already been requested by President-elect Carter. See note 27 and accompanying text *supra*. In *Clark v. Valeo* the government had conceded that the

The "horizontal" necessary and proper clause argument has been thought to receive some support from the judiciary's long acquiescence in the theory that virtually none of article III is self-executing; that Congress, not the courts, controls jurisdiction, form and procedure; and that, in general, the courts may not act in the absence of some authorizing statute.²⁶⁷ Even under *Wayman v. Southard*,²⁶⁸ however, must the judiciary accept all rules of procedure Congress imposes? Suppose a rule imposed such rigid time limits on decisions that judicious consideration was jeopardized? That action would not contravene a specific protective clause, unless the resilient due process concept could be invoked to bring to bear the trump card of judicial review. In passing it may be noted that even the tradition of judicial deference to Congress on matters of judicial procedure is not limitless. A line is drawn, or attempted to be drawn, at the point at which Congress does not content itself with general prescriptions but seeks instead to determine the outcome of a pending case.²⁶⁹ Such congressional action affecting the judicial process is directly analogous to what Congress does by legislative veto, in certain of its manifestations: it displaces executive judgment on how to execute the law under a governing statute that concededly admits of alternative routes of implementation.

veto was clearly unconstitutional. 559 F.2d at 647-48. To file a brief in *Atkins*, responsive to the amicus briefs, would have emphasized the possible inconsistencies of the Department's position vis-à-vis the vetoes in the Salary Act, the Federal Election Campaigns Act and the Reorganization Act. The United States did not file a reply brief in *Atkins*, and the burden of attacking the veto as unconstitutional was left to plaintiffs. Their brief stressed that whatever might be the reach of the necessary and proper clause it does not repeal the requirement of bicameralism. Plaintiffs' Brief in Response to the Briefs of Amici Curiae at 29-32.

267. In *Wayman v. Southard*, 23 U.S. 1, 10 Wheat. 1 (1825), the Supreme Court had to decide whether the federal rules governing execution of judgments would prevail over state rules. Chief Justice Marshall said,

The constitution concludes its enumeration of granted powers, with a clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment. That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain positions which reasoning cannot render plainer.

Id. at 10, 10 Wheat. at 22. See also Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229 (1973); Van Alstyne, *supra* note 258.

268. 23 U.S. 1, 10 Wheat. 1 (1825).

269. In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), the Court held unconstitutional a law enacted while Klein's appeal was pending. The law interpreted a Presidential pardon to mean that a property claimant had been a supporter of the rebellion, and thus required dismissal for want of jurisdiction. The Court held that the right of appeal was not denied in a particular class of cases, but as a means to deny the effect of a presidential pardon. The law was not a valid exercise of the power of Congress to make exceptions to the Court's jurisdiction under article III, § 2, but rather an improper attempt to control the outcome of a pending case. See also P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM* 315-16 (2d ed. 1973).

The necessary and proper clause argument in its full sweep simply proves too much, as the dissenting judges in *Atkins*, without explicit dispute from the majority, perceived.²⁷⁰ It must be noted that in *United States v. Nixon*²⁷¹ the Supreme Court quite clearly adopted the view that implied powers necessary to the effective discharge of the enumerated powers exist under article II and article III, and exist independent of congressional sanction.²⁷² On this basis the Court constitutionalized executive privilege, and even hinted it might be absolute in some circumstances. On the facts before it, however, the Court subjected the privilege to limitations needed to preserve "the basic function of the courts."²⁷³ It is fair to infer that the Court thereby rejected a "vacuum cleaner" interpretation of the necessary and proper clause, which would suck into Congress virtually all powers of the other branches except those needed to sustain vital life signs.

C. Feasibility of a Narrow "Reverse Legislation" Category for the Congressional Veto

As noted at the outset of this section, the Salary Act cases, and perhaps the unlitigated Reorganization Act controversy, present the congressional veto issue in a context more suggestive of "reverse legislation" than of an attempted congressional hegemony over the administrative process. Whether or not the difference assuredly amounts to a constitutional difference, it is an observable functional difference and has not gone unremarked. Despite general opposition to the congressional veto expressed by Presidents and their Attorneys General,²⁷⁴ the position taken regarding Reorganization Acts has varied from an opinion of unconstitutionality;²⁷⁵ to acceptance in silence; to an attempt, under Attorney General Tom Clark in 1949, to rationalize it in terms at best contrived,²⁷⁶ to the recent opinion of Attorney General Bell on the current Reorganization Act. Here, a reverse legislation theory begins to emerge with more clarity.²⁷⁷

270. See text accompanying note 265 *supra*.

271. 418 U.S. 683 (1974).

272. *Id.* at 705 n.16.

273. *Id.* at 712.

274. See notes 15 & 20 and text accompanying notes 21-24 *supra*.

275. Attorney General William Mitchell advised: "The attempt to give to either House of Congress, by action which is not legislation, power to disapprove administrative acts, raises a grave question as to the validity of the entire provision in the Act of June 30, 1932, for Executive reorganization of governmental functions." OP. ATTY. GEN., *supra* note 83, at 63-64.

276. A Department of Justice informal memorandum presented in 1949 found constitutional concurrent-resolution veto provisions. The opinion states that when the Congress disapproves a reorganization plan it is not "exercising a legislative function," but attaches no other label. S. REP. NO. 232, 81st Cong., 1st Sess. 19 (1949).

277. Bell, Letter to the President, *supra* note 27, *discussed at* text accompanying note 289 *infra*. See also Remarks of William Rehnquist, Assistant Attorney General, before the Section

For reasons already given, it would not be enough merely to say that Congress has the constitutional power to fix salaries, and that in the Salary Act Congress simply has made a "pragmatic judgment" that presidential recommendations might be helpful in discharging salary-fixing authority.²⁷⁸ In the Salary Act, as litigated prior to the 1977 amendment, Congress had neither retained the matter for conventional disposition under article I, section 7, nor delegated it to the Executive under intelligible standards, subject to the check of ultimate judicial review. It had given the President power to make recommendations that would become law if neither house of Congress entered an objection.

Presumably, there would be no objection to a Salary Act that set up a study commission in the executive branch to report information to Congress, after receipt of which Congress by statute would enact salaries subject to presidential review under his veto power. That would be a conventional article I, section 7 type process, preserving the constitutional parity of Congress and the President in the lawmaking process. How different was the situation under the Salary Act with its initial one-house veto provision? Is not the procedure for making the quadrennial changes in salaries still very similar to the ordinary legislative process, except that the roles of Congress and the President are, in a sense, reversed? Since it would take an affirmative vote of both houses to bring a new salary statute into being, is there anything wrong in asserting, analogously, that the President's recommendation under the Salary Act is like a recommendation for new legislation, and simply fails for lack of support in one house? From the standpoint of constitutional analysis, a presidential veto power after the congressional action is not needed in this reverse legislation situation, because the President only proposes what he can accept. Also, the bicameralism principle is not offended because in the ordinary legislative process a one-house negative blocks change in the law. The reverse legislation principle, in the narrow area in which it applies, can thus be said not to ignore but to satisfy the bicameralism principle.

Although the one-house veto would seem to be inoffensive in this context, something would be very wrong if the Congress actually exercised its veto on an item basis. An item veto, also referred to as selective or partial veto, was authorized in the Postal Revenue and Federal Salary Act of 1967—either House could negate "all or part of" the President's recom-

of Administrative Law of the ABA, Dallas, Texas, Committee Veto: Fifty Years of Sparring Between the Executive and the Legislature (Aug. 12, 1969) (copy on file with author).

278. House Brief, *supra* note 252, at 16.

recommendations for each category of officials covered by the Act.²⁷⁹ For example, Congress could negate the recommended increase for executive officials while allowing the increases for itself, federal judges and others to become law. Item veto authorization is continued, even strengthened, in the 1977 amendment to the Salary Act. In switching from a provision for a one-house negative to a provision for a two-house approval, the amendment requires separate votes on each category in the President's recommendation.²⁸⁰ Thus, the President-Congress constitutional parity under article I, section 7, upon which the reverse legislation theory depends, would not be obtained. The President's initial "consent" (evidenced by his salary recommendations) would be destroyed by modifying his recommendations, yet he could not apply his own veto power under article I, section 7 to this new version of the law of the land. Not even the President, under his constitutionally authorized veto authority, is deemed to have an item veto power.²⁸¹ Supporters of a congressional veto in some form agree that an item veto would be highly suspect and probably unconstitutional, but the message seems to be slow in reaching Congress.²⁸² If the Salary Act were further amended, however, to prohibit a congressional item veto,²⁸³ it would appear to be a wholly inoffensive and constitutionally permissible form for reverse legislation.

279. Pub. L. No. 90-206, § 225(i), 81 Stat. 644 (formerly codified at 2 U.S.C. § 359(1)(B) (1970)), as amended by Federal Salary Act of 1977, Pub. L. No. 95-19, § 40(a), 91 Stat. 45 (codified at 2 U.S.C.A. § 359 (West Supp. Pamphlet No. 1 1977)).

280. 2 U.S.C.A. § 359 (West Supp. Pamphlet No. 1 1977).

281. *Atkins v. United States*, 556 F.2d at 1078-79 (Skelton, J., dissenting in part and concurring in part).

282. Cooper and Cooper, who support the use of the one-house veto as a legitimate means of congressional control, agree that to protect the President nonamendability is essential. Cooper & Cooper, *supra* note 11, at 512.

The Conference Committee report on the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101(a), 90 Stat. 475 (codified as amended at 2 U.S.C.A. § 437(c) (West Cum. Supp. 1977)), which established a President-appointed commission, felt it necessary to explain their definition of "rule or regulation" as follows:

[T]his provision does not give the Congress the power to revise proposed regulations by disapproving a particular word, phrase, or sentence, but only gives each House of the Congress the power to determine which proposed regulations of the Commission constitute distinct regulations which can only be disapproved in whole. This provision is intended to permit disapproval of discrete self-contained sections or subdivisions of proposed regulations and is not intended to permit the rewriting of regulations by piecemeal changes.

H. REP. NO. 1057, 94th Cong., 2d Sess. 75 (1976). See also Bruff & Gellhorn, *supra* note 30, at 1397-1403 (study of the attempt to use an item veto against regulations submitted by the General Services Administration to provide public access to Mr. Nixon's papers and tapes suggesting that the functional result of an item veto is amendatory, and thus is more clearly unconstitutional than a non-item, one-house veto).

283. It should also be amended to place the Commission on Executive, Legislative and Judicial Salaries under presidential appointment to avoid conflict with the principles of *Buckley v. Valeo*, 421 U.S. at 109-43, as has been done with the Federal Election Commission, see 2 U.S.C.A. § 437(c)(a)(1) (West Cum. Supp. 1977).

The Reorganization Acts that allow the President to reorganize the executive branch or reallocate functions subject to a possible congressional veto would seem to qualify for similar analysis, absent, of course, any item veto power. The congressional veto in these acts does not interfere with the administrative process of executing public law. It merely checks the President's authority to propose what may be regarded as amendments to the existing statute-based structure of the executive branch. In respect to the Salary Act, the congressional veto operates only on a presidential proposal that amounts to a simple amendment to the existing salary scales for top echelon officials. In neither situation is there any tampering with the authorized administrative discretion in a continuous program of regulation of the economy or distribution of welfare benefits, which, broadly viewed, are the two primary domestic functions of the national government. To be sure, in each situation there may be a sequence of actions, but each one is essentially discrete and nonadministrative, dealing only with government structure or government salaries. The change in the law that occurs in each situation could be handled by statute if Congress chose to be more active. In the strict sense of the term there has not been a "delegation" to the Executive, but rather a shifting around of the article I, section 7 process for basic lawmaking.

The situation would be quite different and article II of the Constitution would enter the picture if a substantive program had been created and if the congressional veto tampered with the authorized administrative discretion in such an ongoing program. The congressional veto would then interfere with the President's duty to take care that the laws are faithfully executed, and wholly apart from that clause, the congressional veto would operate to create an unauthorized power for Congress. If anything is clear about our constitutional plan of separation of powers, it is that members of Congress are not to be administrators.²⁸⁴ Inability to keep a delegation narrowly limited provides no constitutional warrant for transforming Congress either into a body of administrators or a body with shared administrative powers.

These last points also explain why the congressional veto does not stand on any firmer constitutional footing if applied to a so-called independent agency, such as the Interstate Commerce Commission or the Federal Election Commission. In the first place, it must be noted that the commissions are still "executive" in that the President has the power of appointment, retains some removal power despite *Humphrey's Executor v. United*

284. See text accompanying notes 111-15 *supra*. See also THE FEDERALIST No. 47, *supra* note 38 (J. Madison).

States,²⁸⁵ and in practice has various other means of influence.²⁸⁶ Further, at least two of the constitutional objections to the one-house veto, when applied to ongoing administration and administrative rulemaking, are relevant whether the action at issue is by a Cabinet agency or an "independent" commission. These are (1) the bicameralism principle for direct congressional policymaking, and (2) the article I reservation of a veto power to the President over congressional actions that have the effect of narrowing the scope of authority conferred by any existing statute. These considerations are not affected by any limitations that may be imposed by statute on the President's power to remove Commission officials, and thus on his power to direct their discretion.²⁸⁷

In more precise constitutional terms, the essential aspects of a potential "reverse legislation" exception to the general objection to one-house vetoes are the following: (1) viewing such statutes as the Salary and Reorganization Acts as calling for a discrete sequence of legislative choices (even though loosely bound together by an initial statute) that are not intertwined with program administration, article II considerations are not reached; (2) the President's article I role is preserved because instead of having a veto power at the end, he has a proposal power at the beginning; (3) the congressional role is preserved because unless both houses concur, by withholding a negative, the status quo remains unchanged; and (4) it is critical to the safeguarding of the President's role in this context that there be no selective or partial veto power in Congress. If Congress has a power to modify, that is, to negate part of the President's proposal but not all of it, with no opportunity for the President to say whether he would agree to severability, then his constitutional parity with Congress in lawmaking is undermined.

285. 295 U.S. 602 (1935); see text accompanying note 68 *supra*. The President is still given the power to remove independent agency members for cause. 295 U.S. at 632. There is no procedure for reviewing a President's assertion that a specific cause exists, and it is doubtful that a court would review his judgment in this matter.

286. See Dixon, *supra* note 69, at 6-12 (noting 10 different "executive levers" for controlling some aspects of the "independent" agencies; e.g., the clearance of agency budget proposals through the Office of Management and Budget and the power of the President to select the agency member who will serve as chairman).

287. Watson finds the application of the congressional veto to independent agencies a dangerous means for congressional usurpation of additional power through resultant control of the agencies. He notes that this use of the veto would not be categorized as reverse legislation, since the President is not directly responsible for the regulations submitted by these agencies, as distinguished from his role in the activities of the executive branch agencies. Watson, *supra* note 11, at 1081.

Scalia points out that independent agencies were established to "take those matters which should be decided on the basis of reason and analysis out of the political process. . . . It would surely be ironic if, having set them up for that purpose, we suddenly throw them into the cauldron of . . . political review of their activities." Symposium, *supra* note 22, at 700-01 (statement of A. Scalia).

The one-house veto, if narrowly confined along the lines just indicated, would seem to have a high claim for validation. Even absent one feature here suggested as essential, the Court of Claims has validated it.²⁸⁸ Attorney General Griffin B. Bell reached a result consistent with a reverse legislation theory in arguing that the new Reorganization Act, with its one-house veto provision as proposed by President Carter and thereafter enacted, would be constitutional.²⁸⁹ In the course of a short opinion expressly limited to the question of the constitutionality of the congressional veto in the Reorganization Act context, Attorney General Bell noted that Congress and the President would possess "the same relative power as under the normal article I legislative process" and added: "The reorganization statute does not involve creation of a new substantive program or congressional interference with authorized administrative discretion in an ongoing program."²⁹⁰

D. *Some Caveats and Rebuttals*

Despite the symmetry of the argument in favor of a limited reverse legislation exception to the general unconstitutionality of the legislative veto, there are some problems in maintaining that the constitutional plan and the constitutional parity of the President and Congress are unaffected. To say that the President's role is preserved even without his usual veto power, because he only proposes what he will accept, has initial plausibility. Yet it may open the way for Congress, by mere majority vote rather than by the two-thirds vote required to override a presidential veto, to insist on a policy of inaction, and thus to repeal the basic policy of the initial statute. To that extent, acceptance of the reverse legislation theory involves some potential for undercutting the President's constitutional position under article I, section 7, in respect to modification of prior statutory policy. Whether this risk is real or fanciful would depend on how much of a "holding out," or creation of justified expectations of governmental action, there was in the initial authorizing statute. In the case of the Reorganization Acts, the only "holding out," if there be any at all, is to the President, not to beneficiaries

288. *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied 98 S. Ct. 718 (1978). The feature lacking is a ban on the item veto. Even though *Atkins* did not involve an exercise of an item veto, the following issue should have been addressed: would Congress have enacted the Salary Act absent an item veto? If the item veto were deemed inseverable the statute would fall in its entirety. The Court of Claims sub silentio treated the item veto as severable, perhaps without even recognizing the issue.

289. Bell, Letter to the President, *supra* note 27; see note 27 and accompanying text *supra*.

290. Bell, Letter to the President, *supra* note 27, at 3. Similar to one part of the *Atkins* opinion, see note 243 *supra*, this quoted language tracks very closely some of the lines in my Association of American Law Schools' paper, Speech by J. Dixon, *supra* note 243, delivered a few weeks earlier.

of a governmental program. Such would not be the case for statutes, with a congressional veto power annexed, creating regulatory or welfare dispensing programs.

A further question relating to the bicameralism principle can be raised. Nominally it is satisfied on the theory that "reverse legislation" (in the situation of the Salary and Reorganization Acts) involves a potential sequence of simple legislative acts, nonaction caused by a one-house veto being of the same dimension as action, insofar as the question of constitutional validity is concerned. However, it may be argued that nonaction is not always of the same constitutional dimension as action. Consider the situation in which the President and Congress have in deliberative fashion worked out a "solution" to a problem, subject, however, to a one-house veto on actual implementation. One house of Congress is thus enabled to destroy the "solution" without the Congress as a whole facing the usual legislative choices of actually repealing the organic act or continuing it in modified fashion. A supposed example of this hazard may be seen in the one-house veto that in 1974 blocked the increases recommended by the President under the Salary Act.²⁹¹ In addition, some irresponsibility may be seen under the Salary and Reorganization Acts even when no congressional veto is imposed to block a President's recommendation. A significant change in government salaries and government structure is being made without the Congress having to bear concurrent and contemporaneous responsibility with the President for the change.

Whether or not these suggested caveats about a reverse legislation exception to the general invalidity of the congressional veto rise to the level of indicating a constitutional defect in the theory, they are subject to some rebuttal on pragmatic grounds. For example, concerning the 1974 one-house veto action under the Salary Act, the dominant fact is that increase in congressional salaries is a matter to which Congress has shown great political sensitivity. This factor would operate equally forcefully in a sequence of regular legislative enactments dealing with salaries. When Congress operates by regular statutory process it does not always make a full series of hearings on the proposals a responsible precondition of final congressional action.²⁹² Further, even with the one-house veto the Congress

291. See text accompanying note 223 *supra*.

292. For example, the 1974 Amendments to the Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C.A. § 552 (West 1977)), were essentially the product of conference committee action on proposals by Senator Edward Kennedy, and had little relation to the ground covered in the House and Senate hearings the year before. See *Hearings Before the Foreign Operations and Government Information Subcomm. of the House Government Operations Committee on H.R. 5425, H.R. 4960*, 93d Cong., 1st Sess. (1973). Similarly, Senator Robert Kennedy added by floor amendment to the 1965 Voting Rights Act,

can use the full legislative process of holding hearings and of going on record as to the reasons for its action.²⁹³

Concededly, a concern for the truncating of the usual legislative process, and a shortening of the process of full deliberation and responsible voting that may flow from acceptance of the legislative veto even in a limited reverse legislation area, is a concern going to very relevant and important considerations in a democratic political system. However, to try to raise these legitimate concerns to the level of a general constitutional requirement, as a basis for attacking the congressional veto on that ground, proves too much. It proves too much because the regular bicameral statutory mode of action does not guarantee use of full deliberative processes in each instance in each house, as beneficial as that might be in the ideal world. Indeed, if carried to its logical extreme, the argument would render equally unconstitutional all delegated legislation (subordinate legislation in the British usage)²⁹⁴ under which important policy decisions are reached by administrators without a full congressional deliberative process. So long as we accept the principles of delegation—which, once it occurs, brings article II considerations into play—it should be difficult to fault a one-house veto provision in the limited Salary and Reorganization Acts situations where article II considerations are not reached.

The goal of a full, responsible, congressional deliberative process is reached, of course, under provisions such as those in the Salary Act as amended. They specify that the President's proposal will never go into effect unless *approved* by votes in *both* houses of Congress.²⁹⁵ Such a provision, however, probably should not be classified as a congressional veto provision. The only difference from the process of ordinary legislation that can be detected in the Salary Act as amended is that the President's own veto power is lacking. That lack would be immaterial if, as is not the case in the amended Salary Act, the Congress had to accept or reject the President's considered proposals in their entirety.

In sum, even the regular legislative process is not perfect when tested against all of the ideals the Framers had in mind for it, or that we now can conceive. A reverse legislation concept, narrowly confined as here outlined,

Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971-1974e (1970 & Supp. V 1975)), the significant provision displacing New York's requirement of voter literacy in English with a rule enfranchising those who had completed the sixth grade, in Spanish in Puerto Rico. See [1965] U.S. CODE CONG. & AD. NEWS 2508, 2577.

293. Such full treatment was given in 1975 to proposed regulations submitted by the initial Federal Election Commission. See the description by Judge MacKinnon in his separate opinion in *Clark v. Valeo*, 559 F.2d at 679 (MacKinnon, J., dissenting).

294. See text accompanying note 146 *supra*.

295. See note 152 *supra*.

would neither open up undue congressional tampering with the intertwined processes of adjudication, rulemaking and general administration in ongoing governmental programs, nor upset in a material way the parity of President and Congress under article I, section 7. The reverse legislation theory, whether or not it ultimately is held constitutional by the Supreme Court, seems to offer a principled and limited variant on the orthodox processes of lawmaking. The theory's built-in constraints also offer no basis for a vast expansion of the congressional veto device that could threaten our basic separation of powers system.

V. NOTE ON EXECUTIVE AGREEMENTS AND THE LEGISLATIVE VETO

Just as Watergate helped trigger a new demand for congressional control of domestic affairs, so did Vietnam rekindle older concerns about presidential dominance in foreign affairs, particularly through the making of executive agreements. In both instances the congressional veto has been viewed as a likely avenue for asserting more effective control. The direct response to Vietnam was the War Powers Resolution, which contains its own version of the congressional veto.²⁹⁶ Both before and since its passage there have been attempts by Congress to enact a general statute subjecting all or most executive agreements to some kind of congressional veto, the preferred device being a concurrent resolution of disapproval.²⁹⁷

For the purpose of constitutional analysis of these attempts to achieve stronger congressional control, it may be useful to divide executive agreements into three categories:²⁹⁸ (1) agreements entered pursuant to authorizing legislation;²⁹⁹ (2) agreements entered pursuant to treaty; and (3) agreements entered pursuant to the President's independent foreign affairs power.

296. 50 U.S.C. §§ 1541-1548 (Supp. V 1975).

297. See *Congressional Review of International Agreements: Hearings on H.R. 4438 Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, supra note 22; *Congressional Oversight of Executive Agreements—1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, supra note 22; *Congressional Oversight of Executive Agreements: Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972). The 1975 and 1976 hearings centered on bills seeking to subject executive agreements to a potential two-house veto within sixty days of transmission to Congress.

298. Compare the classifications in 11 FOREIGN AFFAIRS MANUAL ch. 700, reprinted in *Congressional Review of International Agreements: Hearings on H.R. 4438 Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, supra note 22, at 392.

299. See Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C.A. §§ 2101-2487 (West Cum. Supp. 1977)).

Presidential authority to enter executive agreements and make corresponding tariff adjustments within certain limits under the general delegation of 19 U.S.C. § 2111 (Supp. V 1975) is not made subject to congressional veto. However, a constitutional question may be raised

Executive agreements under prior statutory authorization may be directly analogized to the constitutional precepts already detailed in this article for domestic delegations. Thus, the congressional veto likewise would be inappropriate in the case of foreign affairs delegations. The proper analogy would seem to be to statutory delegations of domestic rulemaking authority to implement a statutorily established public policy. It would seem to follow that a congressional veto that intrudes on the administration of a statutorily authorized foreign affairs program is subject to the same constitutional infirmities, on both article I and article II grounds, that arise when the veto intrudes on the ongoing administration of a statutorily authorized program.³⁰⁰

concerning various one-house and two-house veto provisions and a two-house approval provision, in *id.* § 2437 that relates to the President's special delegated authority to make bilateral commercial agreements and extend nondiscriminatory treatment to countries not now receiving it, for example, Communist bloc countries.

Somewhat closer to the line may be the President's delegated authority under *id.* § 2112 to modify nontariff trade barriers (for example, import quotas) by executive agreement. The authority is made subject not only to a requirement of advance consultation with Congress, but also to a congressional approval requirement. The agreement cannot come into effect until Congress enacts implementing legislation that has been submitted by the President along with a statement of proposed implementing administrative action. Because the responsive congressional action is by legislation, and because it may be supposed that legislation to revoke the statutory authority, or to override a concluded agreement, would be constitutionally unobjectionable, it may be argued that the approval provision in the context of § 2112 is likewise permissible. The effect of this provision, however, may be to permit the two houses of Congress, without opportunity for presidential veto, to change the substantive breadth of the organic statute through a series of votes against particular agreements.

A more technical point is that § 2112 bars the possibility of self-executing agreements, thereby making an inroad on normal administrative power. The point is best understood by way of analogy. If a treaty is self-executing, then all that is required is consent of the Senate. However, if a treaty necessarily requires legislation there is no way that the Executive can force the Congress to pass the implementing bills; hence the failure of one house to agree to implementing legislation defeats the treaty. Section 2112, by requiring implementing legislation for all international agreements relating to nontariff trade barriers, has the effect of imposing a one-house veto on any agreements that otherwise could be self-executing.

It may be noted that in the international trade area as well some congressional delegations to the Executive for purely unilateral action are made, but are subject to constitutionally suspect congressional veto provisions. An example is the import relief authority in *id.* § 2253. The President may recommend import relief after he receives findings from the United States International Trade Commission (ITC) documenting the need for such relief. The President may either accept the ITC's proposal, decline to grant import relief or follow his own course of action. In the latter two instances he must repeat his decision to Congress. If both houses of Congress vote to disapprove the presidential action the recommendation of the ITC becomes effective.

This veto provision seems to violate two constitutional principles. In choosing between two administrative interpretations in the exercise of delegated power the Congress becomes chief administrator. Further, the § 2253 provision may give Congress the power to modify the original statutory delegation. The veto here is not analogous to a failure to pass administration-proposed legislation; new legislation in the form of increased protective duties or quotas could result, not subject to presidential veto. *See also* 19 U.S.C.A. § 1303(e) (West Cum. Supp. 1977) (subjecting to one-house veto the delegated authority of the Secretary of the Treasury to exclude the tariff surcharge on subsidized foreign imports).

300. *See* text accompanying notes 194-215 *supra*.

The question may be raised whether the potential "reverse legislation" exception to the general unconstitutionality of the congressional veto has a role to play in the category of executive agreements under prior statutory authorization. It would seem to be clearly inapplicable to the second and third categories of agreements, because its starting premise is the article I constitutional parity of the President and the two houses of Congress on general legislative matters. That parity is lacking in the case of agreements pursuant to treaties and those made under the independent power of the President. Even as to the first category of agreements, there seems to be little or no place for a permissible "reverse legislation" exception. It would be difficult to find foreign affairs analogs of the kind of activity that takes place under the Reorganization and Salary Acts and that does not involve executive discretion in administration of a program affecting public rights and duties.³⁰¹

In making an executive agreement pursuant to a treaty the President is implementing a specific constitutional process, the treaty process, which has an understood international law meaning. Even if a veto provision were imbedded in the treaty itself, and confined to the Senate, which alone under our domestic law has power to ratify treaties,³⁰² it should still be highly suspect. It would be in derogation of the international understanding of "treaty," which, while not dispositive, may illuminate the purposes the treaty power is intended to serve in our constitutional order and the standard of execution to be maintained until the treaty is repudiated by conventional processes.³⁰³ Equally importantly, a treaty-authorized executive agreement can also be viewed as analogous to a statutorily authorized (delegated) executive course of action, bringing into play the article II power of the President to take care that the "law," including treaty law, be faithfully executed.³⁰⁴ Hence, the President's executive agreement actions in this second category should be immune from congressional veto, as is his action under statutes in general.

In the case of executive agreements under the President's independent foreign or military affairs power, if an independent power to manage such matters is conceded to exist, then the President by definition has the power

301. See text accompanying note 243 *supra*.

302. See U.S. CONST. art. II, § 2, cl. 2.

303. Recognition that the international setting informs the content of our international relations power, particularly in respect to the role of the Executive, is found in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). On repudiation of treaties by Congress, see *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 163, 164 (1972).

304. U.S. CONST. art. II, § 3.

to exercise it free from the congressional veto.³⁰⁵ This statement may be a bit too neat, for although a core of independent power is apparently conceded by all and exists by objective necessity (for example, cease fire agreements or coordination of military operations with allies), its penumbral outreach is hotly debated.

This is an area in which separation of powers works its way more by the political processes of contention, negotiation and compromise than by appeals to clear constitutional text or authoritative adjudication. A complicating element is that authority over the matter in question sometimes may be concurrent but not equal, in the sense that the President possesses power to act alone if Congress has provided no advance authorization or guidance, but that Congress has the ultimate authority if it has signalled its will by timely enactment or even by conscious rejection of a policy. The clearest illustration of that kind of solo presidential authority subject to potential congressional dominance is found in *Youngstown Sheet & Tube v. Sawyer*,³⁰⁶ especially as delineated in Justice Jackson's three-way breakdown of presidential authority.³⁰⁷ In that case the Court nullified President Truman's seizure of the steel mills to avert a strike during the Korean War. The Court, however, did not nullify presidential seizure power per se, a power exercised frequently during World War II,³⁰⁸ rather, it placed major stress on the prior refusal of Congress to authorize the very seizure of power exercised by the President.³⁰⁹

One commentator, who in general views the congressional veto as unconstitutional, finds in this gray area some room for the congressional veto. Focusing on the War Powers Act rather than executive agreements, H. Lee Watson would accept the congressional veto as a device to negate presidential action taken under independent, nonstatutory authority in areas

305. See L. HENKIN, *supra* note 303, at 177.

306. 343 U.S. at 634 (Jackson, J., concurring).

307. Justice Jackson suggested the following mode of analysis. If the action is taken pursuant to express or implied congressional authorization, the power of the President is at a maximum because it rests on the combined constitutional power of the legislative and executive branches. If the President acts contrary to the express will of Congress his power is at its lowest ebb, because it can be justified only by a finding that the President has exclusive constitutional authority in the area. In the middle is a twilight zone in which power may be concurrent or its allocation uncertain. As a practical matter, failure of Congress to act in situations where authority is shared may confirm "independent" presidential responsibility. *Id.* at 635-38 (Jackson, J., concurring).

308. See *United States v. Montgomery Ward & Co.*, 150 F.2d 369 (7th Cir.), *vacated as moot*, 326 U.S. 690 (1945); Dixon, *Public Power and Critical Labor Disputes*, 13 J. POL. 511 (1951).

309. The majority opinion of Justice Black and four of the five concurring opinions relied on the refusal of Congress to give the President broad seizure powers. 343 U.S. at 586 (majority opinion); *id.* at 599-602 (Frankfurter, J., concurring); *id.* at 639 (Clark, J., concurring); *id.* at 657 (Burton, J., concurring); *id.* at 663 (Jackson, J., concurring).

in which Congress, by timely statute, would have possessed power to control the Executive.³¹⁰ Hence, he would accept that part of the War Powers Resolution that provides that whenever the Armed Forces are engaged in foreign hostilities without specific statutory authorization, they shall be "removed by the President if the Congress so directs by concurrent resolution."³¹¹ The suggested exception poses a problem in precise delineation. In some respects the independent or "solo" powers of the President are concurrent with congressional power, but in some respects they are not. This clearly is the thrust of some dicta in *United States v. Nixon* intimating that there may be a wholly independent operation of executive privilege in the national security field.³¹² *Youngstown* itself did not purport to address the question of presidential power in a "theater of war" context, as distinct from domestic steel production. The President may well prevail in that context and related contexts, at least for a limited period. In assessing the constitutionality of the concurrent resolution provision in the War Powers Act, therefore, we must ask whether the fact situations that may arise under it would be analogous to the domestic factory seizure in *Youngstown* or would present the difficult question of the President's independent article II authority in a "theater of war."

A similar inquiry would have to be made in assessing the constitutionality of a congressional veto over executive agreements made pursuant to the President's independent foreign affairs power, in those areas where it is not conceded that the President's independent power is also exclusive, or at least temporarily final, because of exigent circumstances. However, the President normally would not have made the agreement unless he felt constitutionally authorized, and in the foreign affairs area quickly responsive constitutional adjudication as in *Youngstown* is unlikely. Thus, if the President were disinclined to accord final power of interpretation of his constitutional powers to Congress, the congressional veto device over such executive agreements could be a device for constitutional confrontation—or more likely, another round of political interplay between President and Congress.³¹³

In sum, the congressional veto stands on no stronger constitutional footing in respect to executive agreements than it does in respect to presi-

310. Watson, *supra* note 11, at 1082-86.

311. 50 U.S.C. § 1544(c) (Supp. V 1975).

312. 418 U.S. at 705-14.

313. If the President concededly lacks authority to make an agreement under the three available sources of power—his independent foreign or military affairs power, prior authorizing treaty or prior authorizing legislation—yet names an executive agreement with the hope of obtaining congressional approval, Congress possesses power to defeat the putative agreement by nonaction or to ratify it in whole or in part. Such a defeat would not be a congressional veto.

dential administration of statutes generally. Equally important are some practical considerations. American foreign policy would be subject to severe credibility problems abroad if it were subject to spasmodic derailment by a House or Senate veto. Our separation of powers system is unique, and as Covey Oliver has pointed out, the division of foreign affairs between the executive and legislative branches already produces uncertainty and embarrassment.³¹⁴ Because there is a clear need to speak to the world in a manner that shows that our promises will be honored, the attempt to increase congressional control by the nonlegislative process of congressional veto is as unwise as it is constitutionally suspect.³¹⁵

VI. CONCLUSION

To write on the congressional veto at this stage is to write about a shifting terrain. The main features of this terrain are a congressional pressure to insert the veto control device in all manner of statutes, and to subject all rulemaking to it; a vacillating executive response; and a total absence of judicial review until 1977. Yet the congressional veto may raise the most pressing separation of powers issue since Watergate. There may be strong support in general democratic theory for the proposition that in our separated powers system the Congress should be viewed as *primus inter pares*. The Founding Fathers, however, had significant reservations. They created a much more balanced system, undergirded with several very specific textual provisions. Under this system there is no room for a full-blown congressional veto, although a limited reverse legislation exception for the Salary and Reorganization Acts may be constitutionally harmless and politically insignificant, as the Court of Claims seemed to think in *Atkins v. United States*. The difficulty with use of the congressional veto as a general congressional control device over the administration of the government is that it goes beyond the oversight function per se and becomes an intermeddling activity with serious implications for responsible government and orderly policy development. Pushed to its extreme, it would make the Congress not *primus inter pares*, but simply *primus*.

314. Oliver, *The United States and the World*, 426 ANNALS 166 (1976).

315. The general unconstitutionality of the congressional veto in these foreign affairs contexts does not mean, of course, that the President has unlimited power. His treaty-derived power to make executive agreements can be lost by treaty modification or statutory modification of the treaty. *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888). Direct statutory authorization can be repealed. Further, the two houses are under no enforceable compulsion to enact any needed funding or implementing legislation for an executive agreement, or even for a Senate-ratified treaty.