

THE LEGISLATIVE VETO: INVALIDATED, IT SURVIVES

LOUIS FISHER*

I

INTRODUCTION

In *INS v. Chadha*,¹ the Supreme Court invoked a strained theory of separation of powers to strike down Congress's use of a "legislative veto," a device used for a half century to control the executive branch. Through the use of the legislative veto, Congress delegated power to the executive branch on the condition that Congress could control executive decisions without having to pass another law. These legislative controls, short of a public law, included one-house vetoes, two-house vetoes, and even committee vetoes. Congressional actions by a legislative veto were not presented to the President for his signature or veto.

It may appear that this procedure thrust Congress unfairly (or even unconstitutionally) into administrative decisions that should have been left to executive officials; the initiative for the legislative veto came from President Hoover, however, and executive officials tolerated the arrangement for decades because it was in their interest. By attaching the safeguard of a legislative veto, Congress was willing to delegate greater discretion and authority to the executive branch. If Congress failed to invoke the legislative veto, the executive branch could, in effect, "make law" without further congressional involvement. The experiment with the legislative veto lasted for five decades before it was invalidated by the Supreme Court in 1983.

In response to *Chadha*, Congress eliminated the legislative veto from a number of statutes. The legislative veto continues to thrive, however, as a practical accommodation between executive agencies and congressional committees. More than two hundred new legislative vetoes have been enacted since *Chadha*. In addition, legislative vetoes of an informal and nonstatutory nature continue to define executive-legislative relations. The meaning of constitutional law in this area is evidently determined more by pragmatic agreements hammered out between the elected branches than by doctrines announced by the Supreme Court.

The next part of this article explicates the Court's decision in *Chadha*. Part III discusses the origins of the legislative veto and its traditional place in the

lawmaking process. The current status and role of the legislative veto are described in Part IV. The article concludes by explaining *Chadha's* negative effects on lawmaking.

II

INS v. CHADHA

In what was widely touted as a landmark separation of powers decision, the Supreme Court in *INS v. Chadha* declared that "legislative vetoes" were an invalid form of congressional control. Writing for the Court, Chief Justice Burger ruled that whenever congressional action has the "purpose and effect of altering the legal rights, duties, and relations" of persons outside the legislative branch, Congress must act through both houses in a bill presented to the President.² Congress had to comply, therefore, with two elements of the Constitution: bicameralism (passage by both houses) and the Presentation Clause (presenting a bill to the President for his signature or veto). All legislative vetoes violated the latter principle because they were not presented to the President. Some legislative vetoes also violated bicameralism because only one house had to veto the congressional action. Under this decision, Congress could no longer exercise control merely by passing "simple resolutions" (adopted by either house), "concurrent resolutions" (passed by both houses but not sent to the President), or even by committee actions.

Justice Powell, concurring in the judgment, nevertheless found reason to be concerned by the majority opinion. "The breadth of this holding," he said, "gives one pause."³ The respect due the judgment of Congress as a "coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide these cases."⁴ It was his view that the decision could have been decided "on a narrower ground."⁵ Instead of invalidating all legislative vetoes, ranging from rulemaking to war powers, Justice Powell would invalidate the veto only in those cases in which Congress "assumed a judicial function in violation of the principle of separation of powers."⁶

Chadha was such a case. The Immigration and Nationality Act authorized the Attorney General to suspend the deportation of an individual. The statute also permitted either house of Congress to disapprove the Attorney General's decision. The Attorney General submitted a list of 340 suspensions and the House of Representatives disapproved six of the names. Among the six was Jagdish Rai Chadha, a foreign student who had remained in the United States illegally after his visa expired. The legislative veto thus became an instrument to rule on the legal rights of an individual. Although Justice Powell agreed with

2. *Id.* at 952.

3. *Id.* at 959 (Powell, J., concurring).

4. *Id.* at 960.

5. *Id.*

6. *Id.*

the Court's judgment as to Mr. Chadha's case, he said he would be "hesitant to conclude that every veto is unconstitutional on the basis of the unusual example presented by this litigation."⁷

Because of the broad grounds on which the Court based its ruling, all of the statutory provisions authorizing legislative vetoes were rendered unconstitutional. As Justice White noted in his dissent, the Court not only invalidated the one-house veto in the immigration statute "but also sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'"⁸ Justice White "regret[ed] the destructive scope" of the Court's ruling, pointing out that the decision struck down in "one fell swoop" more laws enacted by Congress than the Court had cumulatively invalidated in the entire history of the Court.⁹

In one sense, Justice White overstated his case. He predicted that without the legislative veto Congress would be

indented style: faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies.¹⁰

In fact, Congress and executive agencies have discovered other more acceptable options: using the legislative veto precisely as before and converting legislative vetoes into informal understandings that give committees effective control over agency decisions.

What accounts for this gap between what the Court said and what the two political branches continue to do? Why has there been so little compliance with what all observers regard as an "epic" separation of powers decision? Did the Court attempt too broad a remedy and fail to recognize the practical needs that led Congress and the executive branch to adopt the legislative veto in the first place? Evidently those needs were present before *Chadha* and continue to exist after the Court's decision.

III

ORIGINS OF THE LEGISLATIVE VETO

Chadha is deficient in part because the Court never fully understood why Congress and the executive branch decided to adopt the legislative veto. It is superficial to think that the legislative veto merely represents an attempt by Congress to encroach on executive responsibilities. The legislative veto originated because presidents wanted it.¹¹ Executive initiative, not legislative

7. *Id.* at 924 n.1.

8. *Id.* at 967.

9. *Id.* at 1002.

10. *Id.* at 968.

11. See *infra* text accompanying notes 23, 39, 40, 42, 44, and 66.

usurpation, explains why the legislative veto took root and flourished. Presidents asked Congress to delegate additional authority and were willing to accept the legislative veto that controlled the delegation.

In addition, Congress did not need the Court to explain that the lawmaking process requires bicameralism and presentment. That elementary fact is well understood. At no time in the controversy of the legislative veto did anyone argue that Congress can make a law by anything short of that process, such as one chamber passing a simple resolution or both houses passing a concurrent resolution, neither of which go to the President.

A. The Lawmaking Process

The making of a public law obviously requires action by both houses of Congress and presentment of a bill to the President for his signature or veto. The Constitution provides that “[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President.”¹² Bills and “joint resolutions” must comply with bicameralism and presentment before becoming public laws. “Joint resolutions” and “bills” are identical. They must pass both houses and be presented to the President.

From an early date, Congress passed simple resolutions and concurrent resolutions for internal housekeeping matters. Since those resolutions did not affect persons outside the legislative branch, they were not considered to be “legislative in effect.” Many were adopted pursuant to congressional powers under Article I to determine procedural rules and to punish or expel members.¹³ A Senate report in 1897 concluded that the meaning of “legislative in effect” depended on substance, not form. If a simple resolution or concurrent resolution contained matter that was “legislative in its character and effect,” it had to be presented to the President.¹⁴

On such issues there was no dispute. But what if a public law, enacted by both Houses and signed by the President, authorized use of a simple or concurrent resolution? Having been sanctioned by a public law enacted through the regular legislative process, would the simple or concurrent resolution be legally binding? Could such resolutions be used to control executive officials?

The binding nature of simple or concurrent resolutions was addressed in 1854 by Attorney General Cushing. The administration had rejected the claim of an Isaac Bowman, who proceeded to apply to Congress for relief. The Senate passed a resolution stating that his claim for half-pay due his father should be referred to the Secretary of the Interior for liquidation. The House of Representatives passed a similar resolution. Cushing summarized the issue:

12. U.S. CONST. art. I, § 7, cl. 3.

13. *Id.* at art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).

14. S. REP. NO. 1335, 54th Cong., 2d Sess. 8 (1897).

Whereupon the question of law submitted to me for consideration is, whether, on the supposition that the Secretary, on a re-examination of the case, maintains his original opinion, and believes the claim not to be allowable under the provisions of the said act on the evidence presented, is he bound to consider these two resolutions, or either of them, as mandatory on him, and as compelling him to liquidate the claim against his judgment of the right of the case?¹⁵

Cushing said it was “impossible” for him to conceive of anything other than a negative answer to this question.¹⁶ Either by bill or joint resolution, Congress could command a departmental official to perform a ministerial act, and the official was bound in law to comply.¹⁷ Simple and concurrent resolutions had no such binding effect. Cushing, however, made this careful distinction:

Of course, no separate resolution of either House can coerce a Head of Department, unless in some particular in which a law, duly enacted, has subjected him to the direct action of each; and in such case it is to be intended, that, by approving the law, the President has consented to the exercise of such coerciveness on the part of either House.¹⁸

Apply this key point to *Chadha* and the question is now more complex than suggested by the Supreme Court. The one-house veto allowing Congress to disapprove suspensions by the Attorney General was placed in an immigration bill and signed into law by the President, without any challenge to its constitutionality. By approving the law, did the President “consent to the coerciveness” of the one-house veto?

At the turn of the century, Congress used some simple and concurrent resolutions to control the executive branch. Legislation in 1903 employed simple resolutions to direct the Secretary of Commerce to make investigations and issue reports.¹⁹ In 1905, Congress relied on concurrent resolutions to direct the Secretary of War to make investigations in rivers and harbors matters.²⁰ House precedents recognized the authority of a single house or both houses, through a concurrent resolution, to direct these executive activities.²¹

B. Presidential Initiatives

The concept of the legislative veto, as applied in the twentieth century, owes its origin to President Herbert Hoover. Frustrated by an uncooperative Congress, he wanted to make changes in legal structures without having to go through the regular legislative process where his proposals might be ignored or amended beyond recognition. He searched for innovative methods in the

15. 6 Op. Att’y Gen. 680, 681 (1854).

16. *Id.*

17. *Id.* at 681-82.

18. *Id.* at 683.

19. Act of Feb. 14, 1903, Pub. L. No. 87, § 8, 32 Stat. 825, 829 (1903).

20. Act of Mar. 3, 1905, Pub. L. No. 215, § 2, 33 Stat. 1117, 1147 (1905).

21. 2 ASHER C. HINDS, HIND’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 1593-1594 (1907).

lawmaking process that would facilitate and expedite presidential action in cutting federal spending and in increasing "economy and efficiency." Speaking as Secretary of Commerce in 1924, Hoover had recommended that Congress give the President authority, within specified limits, to reorganize executive departments and agencies.²²

In his first annual message to Congress, in 1929, President Hoover suggested that Congress could delegate reorganization powers to him, subject to some form of congressional approval or disapproval. He said that he saw

no hope for the development of a sound reorganization of the Government unless Congress [was] willing to delegate its authority over the problem (subject to defined principles) to the Executive, who should act upon approval of a joint committee of Congress or with the reservation of power of revision by Congress within some limited period adequate for its consideration.²³

In essence, the constitutional tables would be turned by allowing the President to submit proposals subject to a congressional veto, instead of requiring Congress to present a bill to the President for his approval or rejection.

President Hoover returned to the subject of executive reorganization in his 1931 annual message, although this time he did not specify a method of congressional disapproval.²⁴ During the election year of 1932, he asked Congress for authority to consolidate various executive and administrative activities. He proposed that the President incorporate the reorganization changes in an executive order, which would lie before Congress for sixty days during which time Congress could "request suspension of action."²⁵ The precise form of congressional control was left unspecified.

Economy and efficiency in government became catchwords during the presidential campaign in 1932. Both parties called for drastic reductions in federal spending. The temper in Congress favored some grant of authority to the President as a remedy for the delays associated with the legislative process. Senator David Reed expressed his disillusionment with the system in place:

Mr. President, I do not often envy other countries their governments, but I say that if this country ever needed a Mussolini it needs one now. I am not proposing that we make Mr. Hoover our Mussolini, I am not proposing that we should abdicate the authority that is in us, but if we are to get economies made they have to be made by some one who has the power to make the order and stand by it. Leave it to Congress and we will fiddle around here all summer trying to satisfy every lobbyist, and we will get nowhere. The country does not want that. The country wants stern action, and action taken quickly . . .²⁶

22. JOINT COMMITTEE ON THE REORGANIZATION OF THE EXECUTIVE DEPARTMENTS, HEARINGS ON "REORGANIZATION OF THE EXECUTIVE DEPARTMENTS," 68th Cong., 1st Sess. 353 (1924).

23. PUB. PAPERS, 1929, at 432.

24. Annual Message to Congress on the State of the Union, PUB. PAPERS, 1931, at 580-95.

25. The President's News Conference of February 16, 1932, PUB. PAPERS, 1932-33, at 53-58.

26. 75 CONG. REC. 9644 (1932).

Hoover received reorganization authority in the form of an amendment (Part II) to the Legislative Branch Appropriations Act for fiscal year 1933.²⁷ Title IV of Part II, known as the Economy Act of 1932, authorized the President to reorganize the executive branch, subject to a one-house legislative veto. The procedure required the President to submit reorganization proposals in an Executive Order, which would become effective within sixty days unless either House disapproved by simple resolution. Congress could shorten the time period by passing a concurrent resolution of approval:

SEC. 407. Whenever the President makes an Executive order under the provisions of this title, such Executive order shall be transmitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall sooner approve of such Executive order or orders by concurrent resolution, in which case said order or orders shall become effective as of the date of the adoption of the resolution *Provided further*, That if either branch of Congress within such sixty calendar days shall pass a resolution disapproving of such Executive order, or any part thereof, such Executive order shall become null and void to the extent of such disapproval.²⁸

Hoover signed the bill on June 30, 1932. Even with the presence of a one-house veto, the procedure clearly had benefits for the President. Instead of requiring the President to secure the support of both houses for bills he wanted passed, as would be necessary in the regular legislative process, the burden was on Congress to prevent presidential plans from taking effect. Other expedited features were attractive to the President: The executive orders to reorganize could not be buried in committee, filibustered, or amended by Congress, either in committee or on the floor.

Shortly after Hoover signed the bill, Congress adjourned. When it reconvened on December 5, 1932, Hoover issued eleven executive orders consolidating some fifty-eight governmental activities.²⁹ By that time, however, Hoover had been overwhelmingly defeated for reelection, and it was evident that members of Congress, in the closing hours of a lame-duck session, intended to leave reorganization changes to his successor, Franklin Delano Roosevelt. On January 19, 1933, the House of Representatives passed a resolution disapproving all of Hoover's reorganization proposals.³⁰

Before leaving office, President Hoover raised a question about the constitutionality of the legislative veto. On January 24, 1933, he vetoed a bill that required the Joint Committee on Internal Revenue Taxation to approve any refunds or credits in excess of \$20,000. Hoover argued that it was unconstitutional for Congress to undertake executive and administrative functions.³¹ To

27. Act of June 30, 1932, Pub. L. No. 212, 47 Stat. 382 (1932).

28. *Id.* §§ 401-408.

29. 76 CONG. REC. 233-54 (1932).

30. *Id.* at 2125-26.

31. *Id.* at 2445-46.

his veto message, he attached an opinion by Attorney General William Mitchell, who challenged not only the committee control over tax refunds but also the one-house veto over executive reorganization proposals:

It must be assumed that the functions of the President under this act were executive in their nature or they could not have been constitutionally conferred upon him, and so there was set up a method by which one house of Congress might disapprove Executive action. No one would question the power of Congress to provide for delay in the execution of such an administrative order, or its power to withdraw the authority to make the order, provided the withdrawal takes the form of legislation. The attempt to give 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.³²

On the vote to override Hoover's veto, Congressman Heartsill Ragon asked why the President should object to the provision that gave Congress the right to investigate refund amounts that exceeded \$20,000: "We have the right, or have been assuming the right, to examine all amounts above \$75,000. Has anyone ever objected to the constitutionality of the act that gave us that authority?"³³ At what point on the continuum between \$75,000 and \$20,000 did the constitutional violation emerge? The joint committee presently conducts a review (in effect a veto) of tax refunds in excess of \$200,000.³⁴

One day before Roosevelt's inauguration, Congress extended the President's reorganization authority for two years but eliminated the one-house veto.³⁵ Roosevelt could exercise the authority without the check of a legislative veto. Senator James F. Byrnes offered the amendment to delete the legislative veto after reaching the conclusion that Attorney General Mitchell was "probably correct."³⁶

President Roosevelt was not particularly interested in executive branch reorganization, as the process was understood at that time. He did not consider reorganization as a means of achieving "economy," notwithstanding campaign rhetoric to that effect, but rather as a means to increase the President's managerial power. To Roosevelt, the true purpose of reorganization was "improved management, which would make administration more responsive to the national interest and better able to serve that interest."³⁷

In 1937, Roosevelt asked Congress to renew the authority to reorganize the executive branch, subject, however, to a joint resolution of disapproval (to satisfy both bicameralism and presentment). He advised Congress the next year that any action short of a bill or joint resolution, such as by simple resolution or concurrent resolution, would merely represent "an expression of congressional

32. 37 Op. Att'y Gen. 63-64 (1933).

33. 76 CONG. REC. 2448 (1933).

34. 26 U.S.C. § 6405(a) (1988).

35. Act of Mar. 3, 1933, Pub. L. No. 428, §§ 401-409, 47 Stat. 1489, 1517-20 (1933).

36. 76 Stat. 3538 (1933).

37. RICHARD POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT 7 (1966).

sentiment” and could not “repeal Executive action taken in pursuance of a law.”³⁸ Consequently, one-house or two-house legislative vetoes would have no binding effect on the President.

The Senate passed legislation acceding to his request, but the House of Representatives balked. Members of the House did not want to oppose a reorganization plan by joint resolution, have it vetoed by the President, and then scramble for the necessary two-thirds in each House for an override. In effect, they would delegate authority by majority vote but could recapture it only with an extraordinary majority.

Within a matter of days, after realizing that his bill was dead in the House of Representatives, Roosevelt reversed course and supported an amendment to allow Congress to reject reorganization plans by a concurrent resolution. A number of ingenious arguments were conceived to justify Roosevelt’s switch. First, the President would be acting as an “agent” of Congress, subject to the conditions established by the legislative branch. The legislative veto would thus be the vehicle by which Congress would announce that the President had violated or misused his power of agency. Second, administrative supporters distinguished between the use of a concurrent resolution applied to past laws (which would have been unconstitutional) and those applied to laws “in the making” (constitutionally acceptable).³⁹

The reorganization bill enacted in 1939 included the two-house veto. In signing the bill, Roosevelt expressed no constitutional objections. Whatever constitutional misgivings presidents may have harbored about the legislative veto, they acquiesced because Congress insisted that it would delegate certain authorities only by attaching effective conditions of legislative control. Presidents who wanted additional statutory authority had to take the strings attached to it.

For example, President Roosevelt signed the Lend Lease Act of 1941, which permitted Congress to terminate the President’s emergency authority by concurrent resolution. Roosevelt had strong reservations about the constitutionality of this procedure, but withheld them from the public and Congress. In a memorandum to Attorney General Robert H. Jackson, asking that a statement be prepared detailing his constitutional position, Roosevelt explained that “the emergency was so great that I signed the bill in spite of a clearly unconstitutional provision contained in it.”⁴⁰ The memorandum requested by Roosevelt was prepared and left in Jackson’s hands to publish at some future date.⁴¹ When it was published in 1953, Jackson claimed that Roosevelt’s reasons for not publishing those views in 1941 were political. Roosevelt’s views coincided with those of the opponents of the Lend Lease Bill. His supporters had argued that the concurrent resolution provision was valid. For Roosevelt to make his views known at that time, Jackson said it “would confirm and delight his opposition

38. 83 CONG. REC. 4487 (1938).

39. *Id.* at 5004-05.

40. Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1354 (1953).

41. *Id.*

and let down his friends. It might seriously alienate some of his congressional support at a time when he would need to call on it frequently. It would also strengthen fear in the country that he was seeking to increase his personal power."⁴²

Presidents Truman and Eisenhower also signed reorganization bills that contained the legislative veto. When the authority was extended in 1949, Congress tightened its control by substituting a one-house veto for the concurrent resolution of disapproval. In the meantime, the legislative veto began to proliferate, again at the urging of the executive branch. Legislation in 1940 authorized the Attorney General to suspend deportation of an alien, subject to a two-house veto (later changed to a one-house veto).⁴³ Under the previous system, relief was available only if Congress passed a private bill for the individual. The administration successfully argued that passage of private bills created a hardship on aliens and that it would be better to delegate discretionary authority to executive officials, subject to a legislative veto.⁴⁴

During the emergency conditions of World War II, it was impracticable for Congress to authorize each defense installation or public works project. Beginning with an informal system in 1942, all proposals for acquisitions of land and leases were submitted to the Naval Affairs Committees for their approval.⁴⁵ That understanding was formalized in public laws enacted in 1944.⁴⁶ For such projects, the Secretary of the Navy had to "come into agreement" with the Naval Affairs Committees.⁴⁷ Congress enacted similar arrangements in 1949.⁴⁸

When executive officials objected to congressional committee involvement in administrative decisions, Congress could always eliminate discretionary authority for the officials and force them to obtain advance congressional approval. Thus, statutory language in 1951 prohibited the military departments from granting or transferring any land or buildings unless Congress first authorized the departmental action through the regular legislative process.⁴⁹ President Truman objected to the restriction, pointing out that it would cause unwarranted delays, and urged Congress to repeal it.⁵⁰ Congress repealed the offending language, but inserted a requirement that the military departments and the Federal Civil Defense Administration ("FCDA") would have to come into agreement with the

42. *Id.* at 1356-57.

43. Act of June 28, 1940, Pub. L. No. 670, 54 Stat. 670 (1940).

44. Harvey C. Mansfield, *The Legislative Veto and the Deportation of Aliens*, 1 PUB. ADM. REV. 281 (1941).

45. Virginia A. McMurtry, *Legislative Vetoes Relating to Public Works and Buildings*, in STUDIES ON THE LEGISLATIVE VETO, PREPARED FOR THE HOUSE COMMITTEE ON RULES, 96th Cong., 2d Sess. 432-514 (1980).

46. Act of Jan. 28, 1944, Pub. L. No. 244, 58 Stat. 7 (1944); Act of Apr. 4, 1944, Pub. L. No. 289, 58 Stat. 189 (1944).

47. 58 Stat. 190 (1944).

48. Act of May 11, 1949, Pub. L. No. 60, § 2, 63 Stat. 66 (1949).

49. Act of Jan. 6, 1951, Pub. L. No. 910, § 407, 64 Stat. 1221, 1223 (1951).

50. Special Message to the Congress on the Transfer or Sale of Surplus Military Property, Public PUB. PAPERS, 1951, at 106-07.

Armed Services Committees before acting on certain real estate transactions. Truman vetoed the bill largely on policy grounds, but added: "Under our system of Government it is contemplated that the Congress will enact the laws and will leave their administration and execution to the executive branch."⁵¹ Yet at the end of the year he signed a bill that required the military departments and the FCDA to come into agreement with the Armed Services Committees before proceeding with the disputed real estate actions.⁵² In 1952, in another veto message, Truman objected to the committee-veto power that Congress attempted to give to the Post Office committees: "I do question the propriety and wisdom of giving Committees veto power over executive functions authorized by Congress to be carried out by executive agencies."⁵³

In 1954, President Eisenhower vetoed a bill that required the Secretary of the Army to come into agreement with the Armed Services Committees concerning the disposal of land in Florida. Eisenhower was explicit in identifying the constitutional problem: "[T]he bill would violate the fundamental constitutional principle of separation of powers prescribed in Articles I and II of the Constitution which place the legislative power in the Congress and the executive power in the Executive Branch."⁵⁴ Congress enacted new legislation that omitted the coming-into-agreement provision.⁵⁵

The interbranch struggle continued in 1955 when Congress added to the defense appropriation bill a section that allowed either of the Appropriations Committees to disapprove the disposal or transfer by contract of work that had previously been done by civilian employees of the Defense Department.⁵⁶ To stem the tide of these committee vetoes, Attorney General Brownell prepared an opinion that dismissed this form of legislative control as an unconstitutional infringement on executive duties:

The practical effect of these provisions is to vest the power to administer the particular program jointly in the Secretary of Defense and the members of the Appropriations Committees, with the overriding right to forbid action reserved to the two Committees. This, I believe, engrafts executive functions upon legislative members and thus overreaches the permitted sweep of legislative authority. At the same time, it serves to usurp power confided to the executive branch.⁵⁷

51. Veto of Bill Reciting to Land Acquisition and Disposal Actions by the Army, Navy, Air Force, and Federal Civil Defense Administration (May 15, 1951), PUB. PAPERS, 1951, at 282.

52. Act of Sept. 28, 1951, Pub. L. No. 155, § 601, 65 Stat. 336, 365 (1951).

53. Memorandum of Disapproval of Bill Authorizing the Postmaster General to Lease Quarters for Post Office Purposes, July 19, 1952, PUB. PAPERS, 1952-53, at 488.

54. Veto of Bill Providing for the Conveyance of Lands Within Camp Blanding Military Reservation, Florida, May 25, 1954, PUB. PAPERS, 1954, at 508.

55. Act of July 14, 1954, Pub. L. No. 493, 68 Stat. 474 (1954).

56. Department of Defense Appropriation Act, 1956, Pub. L. No. 157, § 638, 69 Stat. 301, 321 (1955).

57. 41 Op. Att'y Gen. 230, 231 (1955).

President Eisenhower signed the defense appropriation bill with its provision for committee veto, but, drawing on the Brownell opinion, indicated that the latter provision would be regarded as invalid by the executive branch.⁵⁸ By approving the bill, he did not acquiesce in the provision for a legislative veto: "once an appropriation is made the appropriation must, under the Constitution, be administered by the executive branch of the Government alone"⁵⁹ On several other occasions, Eisenhower indicated that he would not accept provisions for committee control of administrative decisions.⁶⁰

The Eisenhower Administration soon learned that if it closed the door to one type of committee control Congress could invent others that passed constitutional muster. Legislation was soon drafted to prohibit appropriations for certain real estate transactions unless the Public Works Committees first approved the contracts.⁶¹ The "committee veto" thus operated within the halls of Congress rather than against executive agencies. Eisenhower signed the bill after Brownell assured him that this new procedure was constitutional because it was based on the power of Congress to control its authorization and appropriation procedures. The committee veto was directed internally against another committee instead of externally against the executive branch. The form had changed; the committee veto remained.⁶² In 1972, President Nixon also acknowledged that this type of internal committee veto posed no constitutional problem.⁶³ These provisions remain in current law.⁶⁴

IV

THE ACCOMMODATION COLLAPSES (ALMOST)

Interbranch relations experienced serious conflicts in the 1970s when Congress added the legislative veto to statutes covering such diverse subjects as the war power, national emergencies, impoundment, presidential papers, federal salaries, and agency regulations. By the late 1970s, when public opposition to federal controls over the private sector intensified, Congress threatened to extend the legislative veto so that it covered every regulation issued by federal agencies.⁶⁵

The Carter Administration challenged the constitutionality of legislative vetoes, but made a few exceptions. An opinion by Attorney General Griffin Bell

58. PUB. PAPERS, 1955, at 688-689.

59. *Id.* at 689.

60. Veto of Bill Authorizing Certain Construction of Military Installations (July 15, 1956), PUB. PAPERS, 1956, at 596-59; Statement by the President Upon Signing the Small Reclamation Projects Act of 1956, PUB. PAPERS, 1956, at 648-50.

61. Act of September 9, 1959, Pub. L. No. 86-249, § 7(a), 73 Stat. 480 (1959).

62. JOSEPH P. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 230-31 (1964).

63. Statement About Signing the Second Supplemental Appropriations Act, PUB. PAPERS, 1972, at 627.

64. *E.g.*, 38 U.S.C. § 5004(a) (1988); 40 U.S.C. § 606(a) (1988).

65. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 142-43 (1991).

in 1977 attempted to justify the one-house veto in the reorganization statutes; the administration wanted to keep reorganization authority, but cast doubt on other forms of the legislative veto.⁶⁶

The following year, President Carter released a major critique of the legislative veto. He now took the position that all legislative vetoes were unconstitutional and would be treated merely as “report-and-wait” provisions.⁶⁷ The administration would report to Congress on pending actions, wait a specified number of days, take into consideration the congressional response, and then act in the way the administration decided was best. It would not regard any committee veto, simple resolution, or concurrent resolution as legally binding.

On the very day that Carter issued his statement denouncing legislative vetoes, two officials from his administration appeared at a press conference to explain the administration’s policy. Reporters wanted to know how Carter’s unyielding position applied to the procedure governing arms sales, which Congress, under law, could veto by concurrent resolution. Attorney General Bell was asked whether President Carter would feel bound if Congress, by a two-house veto, disapproved the pending Mideast arms sales package. Bell replied:

He would not be bound in our view, but we have to have comity between the branches of government, just as we have between nations. And under a spirit of comity, we could abide by it, and there would be nothing wrong with abiding by it. We don’t have to have a confrontation every time we can.

White House adviser Stuart Eizenstat added:

I think the point the Judge is making is that we don’t concede the constitutionality of any of [the legislative vetoes] yet, but that as a matter of comity with certain of these issues where we think the Congress has a legitimate interest, such as the War Powers Act, as a matter of comity, we are willing to forego the specific legal challenge and abide by that judgment because we think it is such an overriding issue.⁶⁸

Although the Carter Administration made a few accommodations with Congress, it was also willing to support a legal challenge to the legislative veto. The challenge ultimately resulted in the 1983 Supreme Court decision *INS v. Chadha*, which struck down the legislative veto in all its forms. By the time the case reached the Court, briefs in opposition to the legislative veto were filed by the Reagan Administration, the American Bar Association, and the attorneys for Chadha. The Senate and the House of Representatives filed briefs that defended the constitutionality of the legislative veto.

66. Reorganization Act—Constitutionality of Provision Permitting Disapproval of Reorganization Plan by Resolution of a Single House of Congress, 43 Op. Att’y Gen. 10 (1977).

67. Legislative Vetoes: Message to the Congress, PUB. PAPERS, 1978, at 1146-49.

68. Office of the White House Secretary, Briefing by Attorney General Griffin B. Bell, Stuart E. Eizenstat, Assistant to the President for Domestic Affairs and Policy, and John Harmon, Office of Legal Counsel, June 21, 1978, at 4.

A. Congressional Compliance with *Chadha*

Following the Court's ruling in 1983, Congress amended a number of statutes by deleting legislative vetoes and replacing them with joint resolutions. Congress replaced the one-house veto in the executive reorganization statute with a joint resolution of *approval*.⁶⁹ Although this satisfied the twin requirements of *Chadha* (bicameralism and presentment), the President's position was actually worsened. The President now had to obtain the approval of both houses within a specified number of days in order to reorganize executive agencies. Under the procedure that operated before *Chadha*, a reorganization plan automatically became effective within a fixed number of days unless one house acted to disapprove. The shift to a joint resolution of approval meant that Congress had, in effect, a negative one-house veto. The refusal of one House to support a joint resolution of approval would spell defeat for a reorganization proposal. The new procedure was so onerous that the Reagan Administration decided not to request a renewal of reorganization authority after it expired.

Congress also replaced several legislative vetoes in the District of Columbia Home Rule Act with a joint resolution of disapproval.⁷⁰ This form of action puts the burden on Congress to stop a District of Columbia initiative. The *Chadha* decision had cast a legal cloud over the city's authority to issue tax-exempt bonds and to take certain actions involving criminal law.

Three statutes in 1985 removed legislative vetoes from statutory procedures. The concurrent resolution governing national emergencies was replaced by a joint resolution of disapproval.⁷¹ The same approach was used on legislation concerning export administration.⁷² A number of legislative vetoes had been used in the past to deal with federal pay increases. Congress eliminated those legislative vetoes and again relied on a joint resolution of disapproval.⁷³

After *Chadha*, some members of Congress introduced legislation to change the War Powers Act, which contains a provision that allows Congress to pass a concurrent resolution to order the President to withdraw troops engaged in combat. It was suggested that the concurrent resolution be replaced by a joint resolution of disapproval.⁷⁴ As finally enacted, however, the procedure for a joint resolution was not added to the War Powers Act. Instead, it is a separate and alternative legislative procedure that is available to force a vote to order the withdrawal of troops.⁷⁵

69. Act of Nov. 8, 1984, Pub. L. No. 98-614, 98 Stat. 3192 (1984).

70. Department of Transportation and Related Agencies Appropriation Act, 1985, Pub. L. No. 98-473, § 131, 98 Stat. 1945, 1974 (1984).

71. Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 801, 99 Stat. 405, 448 (1985).

72. Export Administration Amendments Act of 1985, Pub. L. No. 99-64, § 301(b), 99 Stat. 120, 160 (1985).

73. Foreign Assistance and Related Programs Appropriations Act, 1986, Pub. L. No. 99-190, § 135(e), 99 Stat. 1322 (1985).

74. 129 CONG. REC. 28,406-08, 28,673-74, 28,683-84, 28,686-89 (1983).

75. 129 CONG. REC. 33,395-96 (1983); 97 Stat. 1062, § 1013 (1983). See 50 U.S.C. § 1546a (1988).

It can be argued that the concurrent resolution in the War Powers Act is technically not a legislative veto covered by *Chadha*. If we define legislative veto as a condition placed on delegated authority (such as the authority delegated in reorganization statutes), nothing is delegated in the War Powers Resolution. Congress did not claim that the war power was purely a legislative prerogative and that it was delegating a portion to the President with the understanding that it could control the delegated power by exercising a two-house veto. In that sense, *Chadha* has no application to the War Powers Act.⁷⁶

Legislation in 1974 gave Congress a one-house veto to disapprove presidential proposals to defer the spending of appropriated funds.⁷⁷ Even before *Chadha*, Congress began to disapprove deferrals by inserting language in bills passed through the regular legislative process, and then continued to do that after the *Chadha* decision was announced. In 1986, however, when the Reagan Administration turned to deferrals to make the deficit targets in the Gramm-Rudman-Hollings legislation, affected parties went to court to contest the legality of presidential deferrals. They argued that if the one-house veto was invalid under *Chadha*, the President's deferral authority was inextricably tied to the unconstitutional legislative veto. According to the argument of plaintiffs, Congress would not have delegated the deferral authority to the President unless it knew it had a one-house veto to maintain control. If one part of the statute fell, so did the other. The federal courts accepted that argument, holding that the deferral authority and the one-house veto were inseverable.⁷⁸ Congress promptly converted the judicial doctrine into statutory law.⁷⁹ The effect was to limit the President to routine, managerial deferrals and prohibit the use of deferral authority to delay the spending of funds simply because the President disagrees with the budget priorities enacted into law.

In some cases legislative vetoes remained in the law but were never used after *Chadha*. For example, the Nuclear Non-Proliferation Act of 1978 included a two-house veto over certain agreements for cooperation,⁸⁰ and that procedure continues to remain part of the law.⁸¹ However, Congress does not attempt to use concurrent resolutions to control presidential initiatives in the area of non-proliferation.⁸²

76. Louis Fisher, *War Powers: The Need for Collective Judgment*, in *DIVIDED DEMOCRACY: COOPERATION AND CONFLICT BETWEEN THE PRESIDENT AND CONGRESS* 213-15 (J. Thurber ed., 1991).

77. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1013(b), 88 Stat. 297, 335 (1974).

78. *City of New Haven, Conn. v. United States*, 809 F.2d 900 (D.C. Cir. 1987); *City of New Haven, Conn. v. United States*, 634 F. Supp. 1449 (D.D.C. 1986).

79. Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 206, 101 Stat. 754, 785 (1987).

80. Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, § 308, 92 Stat. 120, 139-41 (1978).

81. 42 U.S.C. §§ 2159(b)-(f) (1988).

82. *Cranston v. Reagan*, 611 F. Supp. 247, 251 (D.D.C. 1085).

B. Legislative Vetoes After *Chadha*

Notwithstanding the mandate in *Chadha*, Congress continued to add legislative vetoes to bills and Presidents Reagan and Bush continued to sign them into law. From the date of the Court's decision in *Chadha* to the end of the 102nd Congress on October 8, 1992, Congress enacted more than two hundred new legislative vetoes. Most of these require the executive branch to obtain the approval of specified committees. Several committee vetoes appear in the Treasury-Postal Service and General Government Appropriations Act for fiscal 1992.⁸³

When signing this bill into law, President Bush said that the provisions "constitute legislative vetoes similar to those declared unconstitutional by the Supreme Court in *INS v. Chadha*. Accordingly, I will treat them as having no legal force or effect in this or any other legislation in which they appear."⁸⁴ Although the President may treat committee vetoes as having no legal force or effect, agencies have a different attitude. They have to live with their review committees, year after year, and have a much greater incentive to make accommodations and stick by them.⁸⁵ Presidents and their legal advisers can indulge in confrontations with Congress on these issues. Agencies cannot risk these types of collisions with the committees that authorize their programs and provide funds. The need for practical compromise is illustrated by the following section, which demonstrates that even if Congress somehow eliminated all legislative vetoes from statutes, the reality of committee vetoes would persist.

C. Informal and Nonstatutory Legislative Vetoes

The effect of *Chadha* was to drive some of the committee vetoes underground, where they operate on the basis of informal and nonstatutory understandings. This dynamic became obvious in a conflict that arose in 1984, when President Reagan signed an appropriations bill for the Department of Housing and Urban Development and independent agencies. He objected to the presence of seven provisions that required executive agencies to seek the prior approval

83. Pub. L. No. 102-141, 105 Stat. 834 (1991). The Internal Revenue Service may not transfer funds in excess of 4 percent of an appropriation without the advance approval of the Appropriations Committees (*id.* at 840); any transfers of funds by the Treasury Department must be approved in advance by the Appropriations Committees (*id.* at 842, § 105); certain reprogrammings by the General Services Administration are subject to the approval of the Appropriations Committees (*id.* at 850); the funds may be obligated only upon the advance approval of the House Committee on Public Works and Transportation and the Senate Committee on Environment and Public Works (*id.*); transfers of funds for the Federal Buildings Fund must be submitted promptly to the Appropriations Committees for approval (*id.* at 856, § 6); and executive officials appointed by the President may not spend more than \$5,000 to redecorate their offices unless expressly approved by the Appropriations Committees (*id.* at 871, § 618).

84. 27 WEEKLY COMP. PRES. DOC. 1525 (Oct. 28, 1991). See also his warnings to Congress at 25 WEEKLY COMP. PRES. DOC. 1853 (Nov. 30, 1989); 25 WEEKLY COMP. PRES. DOC. 1947 (Dec. 13, 1989); 26 WEEKLY COMP. PRES. DOC. 1765 (Nov. 5, 1990); 26 WEEKLY COMP. PRES. DOC. 1769 (Nov. 5, 1990); 27 WEEKLY COMP. PRES. DOC. 1525 (Oct. 28, 1991); 28 WEEKLY COMP. PRES. DOC. 1865 (Oct. 5, 1992); 28 WEEKLY COMP. PRES. DOC. 1874 (Oct. 6, 1992).

85. *E.g.*, LOUIS FISHER, *THE POLITICS OF SHARED POWER* 76-77 (1993).

of the Appropriations Committees.⁸⁶ In stating that he would implement legislation “in a manner consistent with the *Chadha* decision,”⁸⁷ he implied that committee-veto provisions would be regarded by the administration as having no legal effect. After notifying the committees, agencies could do as they liked without obtaining the committees’ approval.

The House Appropriations Committee lost little time in responding to this presidential challenge. It reviewed a procedure that had worked well with the National Aeronautics and Space Administration (“NASA”) for about four years. Statutory ceilings (“caps”) were placed on various NASA programs, usually at the level requested in the President’s budget. NASA could exceed those caps only if it received permission from the Appropriations Committees. Because the administration now threatened to ignore the committee controls, the House Appropriations Committee said that it would repeal both the committee veto *and* NASA’s authority to exceed the caps.⁸⁸ If NASA wanted to spend more than the caps allowed, it would have to do what the Court mandated in *Chadha*: pass a bill through both Houses and present it to the President.

NASA did not want to obtain a new public law every time it needed to exceed spending caps. To avoid that kind of administrative rigidity, NASA Administrator James M. Beggs wrote to the Appropriations Committees and suggested a compromise. Instead of putting the caps in a public law, he recommended that they be placed in the conference report that explains how Congress expects a public law to be carried out. He then pledged that NASA would not exceed any ceiling identified in the conference report without first obtaining the prior approval of the Appropriations Committees:

Without some procedure adjustment, other than a subsequent separate legislative enactment, these ceilings could seriously impact the ability of NASA to meet unforeseen technical changes or problems that are inherent in challenging R&D programs. We believe that the present legislative procedure could be converted by this letter into an informal agreement by NASA not to exceed amounts for Committee designated programs without the approval of the Committees on Appropriations. This agreement would assume that both the statutory funding ceilings and the Committee approval mechanisms would be deleted from the FY 1985 legislation, and that it would not be the normal practice to include either mechanism in future appropriations bills. Further, the agreement would assume that the future program ceiling amounts would be identified by the Committees in the Conference Report accompanying NASA’s annual appropriations act and confirmed by NASA in its submission of the annual operating plan. NASA would not expend any funds over the ceilings identified in the Conference Report for these programs without the prior approval of the Committees.⁸⁹

86. Statement on Signing the Department of Housing and Urban Development—Independent Agencies Appropriations Act, 1985 (July 18, 1984), PUB. PAPERS, 1984 (II), at 1056.

87. *Id.* at 1057.

88. H. REP. NO. 916, 98th Cong., 2d Sess. 48 (1984).

89. Letter from James M. Beggs, Administrator of the National Aeronautics and Space Administration, to Congressman Edward P. Boland, Chairman of the Subcommittee on HUD-Independent Agencies of the House Committee on Appropriations, August 9, 1984 (on file with *Law & Contemporary Problems*).

NASA continues to abide by this agreement, which is permissible under *Chadha*.⁹⁰ While not legally bound by this letter, NASA knows that violations of trust would provoke the Appropriations Committees to reinsert caps in the public law and compel the agency to seek a separate law each time it needs to exceed the spending ceilings. Through such muscle, faith is inspired.

Another example of informal legislative vetoes came in 1987 when the Director of the Office of Management and Budget, James C. Miller III, objected to a statutory provision that required the administration to obtain "written prior approval" from the Appropriations Committees before transferring foreign assistance funds from one account to another. The provision, he claimed, violated *Chadha*.⁹¹ The House Appropriations Committee gave a familiar reply: it would repeal the legislative veto and, at the same time, repeal the administration's authority to transfer foreign assistance funds. Congressman David R. Obey, Chairman of the Appropriations Subcommittee handling foreign assistance, remarked: "To me, that [OMB letter] means we don't have an accommodation any more, so the hell with it, spend the money like we appropriated it. It's just dumb on their part."⁹²

Rather than jeopardize valuable flexibility in the administration of foreign assistance, OMB backed away from the confrontation. The regular legislative language, including the committee veto, was enacted into law.⁹³ But when Miller repeated the challenge the next year, Congress followed through on its threat and deleted both the committee veto and the transfer authority.

The two branches reached a novel compromise in 1989. Congress removed the legislative veto from the public law, but required the administration to follow "the regular notification procedures of the Committees on Appropriations" before transferring funds.⁹⁴ While not articulated in the public law, those procedures require the administration to notify the Committees of each transfer. If no objection is raised during a fifteen-day review period, the administration may exercise the authority. If the Committees object, the administration could proceed only at great peril. By ignoring committee objections, the executive branch would most likely lose transfer authority the next year.

Informal, nonstatutory committee controls are used frequently to monitor agency spending. For decades, congressional committees have insisted on approving agency "reprogramming" (shifting funds from one program to another within the same appropriations account). In return for the discretion to reprogram funds, agencies are expected to notify congressional committees and

90. See 139 CONG. REC. H7371 (daily ed. Oct. 4, 1993).

91. Edward Walsh, *OMB Objection Raises House Panel's Hackles*, WASH. POST, August 13, 1987, at A13.

92. *Id.*

93. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988, Pub. L. No. 100-202, § 514, 101 Stat. 1329-131, 1329-155 (1987).

94. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. No. 101-167, § 514, 103 Stat. 1195, 1219 (1989).

in some cases obtain committee approval. These understandings were first spelled out in committee reports, as part of the legislative history of a bill, and later incorporated in agency budget manuals.⁹⁵ Despite *Chadha*, this type of legislative veto continues to be honored by executive agencies. For example, the Department of Defense *Budget Guidance Manual* for May 1990 explains which reprogramming actions require prior congressional approval.⁹⁶ Even if Congress entirely removed legislative vetoes from statutes, their equivalent would be embedded in agency manuals.

A final example of an informal agreement that permits committee control involves the "Baker Accord" of 1989. In the early months of the Bush Administration, Secretary of State James A. Baker III decided to give four committees of Congress a veto power over the fractious issue of funding the Nicaraguan Contras. In return for receiving \$50 million in humanitarian aid for the Contras, Baker agreed that a portion of the funds could be released only with the approval of certain committees and party leaders.⁹⁷ White House Counsel C. Boyden Gray objected to this level of involvement by Congress in foreign policy, especially through what appeared to be an unconstitutional legislative veto.⁹⁸ Robert H. Bork regarded the Baker Accord as "even more objectionable" than the legislative veto struck down in *Chadha*, because it permitted control by mere committees instead of a one-house veto.⁹⁹

However, the informal nature of the Baker Accord is not prohibited by *Chadha*, and Baker agreed to the compromise. In a letter to Congress, he agreed that the Contras would not receive financial assistance after November 30, 1989, unless he received letters from "the Bipartisan Leadership of Congress and the relevant House and Senate authorization and appropriations committees."¹⁰⁰ Four members of Congress sued the President and the Secretary of State for entering into this "side agreement" with Congress, claiming that it represented a forbidden legislative veto. A federal district court dismissed the suit on the grounds that the plaintiffs had no standing and that the case constituted a question of national defense and foreign policy committed to the elected branches.¹⁰¹

95. LOUIS FISHER, *PRESIDENTIAL SPENDING POWER 75-98* (1975).

96. DEPARTMENT OF DEFENSE, *BUDGET GUIDANCE MANUAL* (DOD 7110-1-M), May 1990, at 431-6 (§ 431.4A.1), 431-11 (para. 3).

97. John Felton, *Bush, Hill Agree to Provide Contras With New Aid*, CONG. Q. WKLY REP., March 25 1989, at 656.

98. David Hoffman & Ann Devroy, *Bush Counsel Contests Contra Air Plan*, WASH. POST, March 26, 1989, at A5.

99. 135 CONG. REC. S3885 (daily ed. Apr. 13, 1989).

100. Letter from Secretary of State James A. Baker, III, to Speaker Jim Wright, April 28, 1989 (on file with *Law & Contemporary Problems*).

101. *Burton v. Baker*, 723 F. Supp. 1550 (D.D.C. 1989).

V

CONCLUSION

To lessen the chance of a self-inflicted wound, the Supreme Court usually abides by the prudential course not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."¹⁰² The Court ignored that fundamental guideline in *Chadha* by issuing a decision that not only reached beyond the immigration statute but exceeded the Court's understanding of executive-legislative relations. Through an endless variety of formal and informal agreements, congressional committees will continue to exercise control over administration decisions.

The Court applied a simplistic solution to a complex issue. In doing so, it suggested that the government follow a conventional lawmaking process that excludes Congress from the administration of problems. That type of government does not, and cannot, exist. By misreading the history of legislative vetoes and failing to comprehend the subtleties of the legislative process, the Court directed the executive and legislative branches to adhere to procedures that would be impracticable and unworkable. Neither Congress nor the executive branch wanted the static model of government offered by the Court.

The predictable and inevitable result of *Chadha* is a system of lawmaking that is now more convoluted, cumbersome, and covert than before. Finding the Court's doctrine incompatible with effective government, the elected branches have searched for techniques that revive the understandings in place before 1983. In many cases, the Court's decision simply drives underground a set of legislative and committee vetoes that formerly operated in plain sight. In one form or another, legislative vetoes will remain an important mechanism for reconciling legislative and executive interests. The executive branch wants to retain access to discretionary authority; Congress wants to control some of those discretionary decisions without having to pass another public law. Such accommodations are better fashioned by committees and agency officials than by judicial decisions, especially the broadly crafted rules announced in *Chadha*.

102. *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (citing *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Comm'r*, 113 U.S. 33, 39 (1885)).