The Legislative Veto: A Move Away from Separation of Powers or a Tool to Ensure Nondelegation

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I. INTRODUCTION

HANGING times and political unrest often lead to reflection on government and its structure. The Framers of the United States Constitution, in describing the constitutional structure and basic principles of our federal system, left us with two constitutional doctrines: (1) separation of powers; and (2) nondelegation. The constitutional concept of separation of powers involves the division of power among three
branches of government. James Madison affirmed this concept when he stated that "the three great departments of power should be separate and distinct." The nondelegation doctrine, a corollary of the separation of powers doctrine, prohibits any branch from giving away its power. The separation of powers doctrine prevents the accumulation of excessive power in one branch; the nondelegation doctrine prevents one branch from abdicating its authority to another. But total separation of each branch was never envisioned.

The constitutional concept of checks and balances provides for each branch to exercise oversight and control over the other branches. Separation of powers was never intended to mean that each branch of government should not have partial agency in, or control over, the acts of the other branches.

An analysis of these two constitutional doctrines reveals that they have competing goals. When working as designed, both doctrines create a self-enforcing system based on mutual respect and the pragmatic need for comity among the branches. The need for a cooperative and functional system has grown with the complexity of the federal government and is particularly acute with regard to the increasing importance of administrative agencies.

In balancing these doctrines, each branch of government

1. The Constitution of the United States divides power into three separate branches of government: 1) "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1, cl. 1 (emphasis added). 2) "The executive power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1 (emphasis added). 3) "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1, cl. 1 (emphasis added).

2. The Federalist No. 47, at 139 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981). Madison cautioned that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, . . . may justly be pronounced the very definition of tyranny." Id.


4. See Buckley v. Valeo, 424 U.S. 1, 120-24 (1976); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (noting that the "[Constitution] enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Id. (Jackson, J., concurring)).

5. The checks and balances among the three branches of the federal government find textual support in the Constitution. See U.S. Const. art. I, § 2, cl. 5 (oversight of the executive branch by the legislative branch). Additional support for this checks and balances system can be found in the Framers' intent. See The Federalist Papers (Roy P. Fairfield ed., 2d ed. 1981).

6. See Madison, supra note 2, at 140 (citing the political philosopher Montesquieu).

7. Id. No. 51, at 160. Madison asserted: "This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs . . . ." Id. (emphasis added).

8. President Roosevelt's New Deal brought with it increased expectations of the federal government. In order to accommodate these expectations, regulatory administrative agencies, generally a part of the executive branch, have been given authority, often with little guidance. See Geoffrey R. Stone et al., Constitutional Law 413-14 (2d ed. 1991). This regulatory authority has grown exponentially since World War II and includes legislative, executive, and judicial authority. One example of this concentration of power
must be careful neither to abdicate its constitutionally assigned role nor encroach on another branch’s constitutionally assigned role.9

Keeping this limitation in mind, each branch must develop effective policy tools that maintain the checks and balances intended by the Framers of the Constitution. Each branch of government has, over time, utilized tools that are not enumerated in the Constitution to exercise control over or “check” other branches of government.10 These tools must be carefully crafted to preserve the separation of powers between each branch and to ensure no unconstitutional delegation of authority from one branch to another.11

This Comment reviews the constitutionality of one such tool—the legislative veto. The next section reviews the history and development of the legislative veto. The third section analyzes INS v. Chadha,12 a United States Supreme Court decision holding legislative vetoes unconstitutional. The last section discusses the current debate surrounding the legislative veto and suggests a need for workable tools that check the delegation of authority and separation of powers between the branches of our government.

II. HISTORY AND DEVELOPMENT OF THE LEGISLATIVE VETO

The legislative veto is a tool used by Congress to exercise oversight and control over the executive branch while maintaining a balance of power.13 Congress must retain oversight and control of the executive

within an administrative agency can be seen in the statutory delegation of authority to the Immigration and Naturalization Service. See infra notes 45-65 and accompanying text.


10. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (the United States Supreme Court vested itself with the authority to declare acts of Congress unconstitutional).

11. Commentators have analogized the growth in size and importance of administrative agencies to a fourth branch of government. Arguably, this fourth branch is outside the federal government structure envisioned by the Framers. Consequently, delegating lawmaking, law enforcing, and judicial authority to an administrative agency does not implicate separation of powers and nondelegation concerns voiced by the Framers. However, for this Comment, it will be assumed that administrative agencies are a part of the executive branch, and as such implicates separation of powers and nondelegation issues.


13. “The types of legislative veto include: congressional disapproval by a one-house vote; approval by a one-house vote; disapproval by a concurrent resolution of both houses; approval by a concurrent resolution of both houses; disapproval or approval by committee action; and selective veto, approving part and disapproving part . . . .” Douglas B. Habig, Comment, The Constitutionality of the Legislative Veto, 23 Wm. & Mary L. Rev. 123, 123-24 (1981) (emphasis added).

Use of the legislative veto allows Congress to delegate legislative authority while avoiding the constitutional requirements of bicameralism and presentment for each legislative decision. The bicameral requirement provides that all bills passed, as well as every order, resolution, and vote, must involve both houses of Congress. Presentment requires that all bills, orders, resolutions, and votes be presented to the President for approval. The Constitution explains these requirements: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Repre-
branch in situations where Congress has delegated a portion of its law-
making authority. Without such oversight and control, the balance of
powers would be altered.

The first legislative veto was initiated by President Herbert Hoover. Hoover wanted Congress to delegate to the president the authority to
reorganize the executive branch, including various administrative activi-
ties, subject to congressional approval or disapproval. Hoover first re-
quested this veto in his 1929 Annual Message and again in his 1931
Annual Message to Congress. He finally received the requested reor-
ganization authority subject to a one-House legislative veto. The dele-
gated authority allowed President Hoover to submit an Executive Order
containing the proposed reorganization to Congress; the proposal was to
become effective unless either House disapproved by simple resolution
within a designated time frame.

Based on this grant of authority, Hoover issued eleven Executive Or-
ders consolidating approximately fifty-eight activities. The House of
Representatives vetoed all of these Executive Orders, deciding to leave
organizational changes to the newly-elected Franklin D. Roosevelt. In
an apparent about-face, then vetoed a bill requiring joint ap-
proval by the Joint Committee on Internal Revenue Taxation for refunds
or credits in excess of $20,000 on the grounds that Congress should not be
involved in executive or administrative functions. In support of this
new position, Hoover cited Attorney General William Mitchell's conclu-
sion that the legislative veto was unconstitutional.

sentatives.” U.S. Const. art. I, § 1. “Every Bill which shall have passed the House of
Representatives and the Senate, shall, before it becomes a Law, be presented to the President
of the United States; . . . .” U.S. Const. art. I, § 7, cl. 2.

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

U.S. Const. art. I, § 7, cl. 3.

14. This situation is often a political trade where Congress agrees to delegate a portion
of its lawmaking authority if the Executive is willing to delegate a portion of its administra-
tive or law enforcing authority. The Executive's willingness to support this "trade" is rec-
ognized when the president does not veto enactment of the legislation that includes a
legislative veto provision.

15. Louis Fisher & Neal Devins, Political Dynamics of Constitutional Law
123-24 (1992). This delegation of power, subject to legislative approval or disapproval
("veto"), reversed the roles of Congress and the president as defined in the Constitution.

See U.S. Const. art. I, §§ 1, 7, clss. 2, 3.

17. Id. at 124.
18. Id.
19. Id.
20. Id.
Probs. 273, 276 (Autumn 1993).
rectly to the separation of powers issue lurking within the legislative veto:
President Roosevelt, like President Hoover, had a mixed record of support regarding the legislative veto. Despite uncertainties about the constitutionality of the device, Roosevelt understood that Congress would not delegate certain authority without this reservation of power. He conceded that the legislative veto presented a check on executive power, but felt it was a necessary cost of increased delegation of legislative power to the executive branch. But, in an attempt to preserve his constitutional objections, President Roosevelt articulated them in a memorandum to his attorney general, Robert H. Jackson.

Regulatory administrative agencies within the executive branch began a pattern of steady growth after the 1930s, prompting greater use of the legislative veto. During the 1940s, legislative veto provisions appeared in reorganization acts, immigration acts, and defense appropriations. Presidents Harry S. Truman and Dwight D. Eisenhower signed bills containing legislative vetoes. President Truman, however, later made it clear that he considered the legislative veto unconstitutional. His administration reported that the legislative veto was contrary to the fundamental constitutional doctrine of separation of powers and would frustrate proper administration of legal rights.

President Eisenhower also voiced constitutional objections to the legislative veto. In response to President Eisenhower’s concerns, and in hopes of curbing the use of the legislative veto, Attorney General Brownell issued an opinion opposing the congressional committee veto as unconstitutional. Despite the fact that this opinion had little effect on the use of

The Constitution of the United States divides the functions of the Government into three great departments—the legislative, the executive, and the judicial—and establishes the principle that they shall be kept separate, and that neither the legislative, executive, nor judicial branch may exercise functions belonging to the others. [The legislative veto] attempts to entrust to members of the legislative branch, acting ex officio, executive functions in the execution of the law, and it attempts to give to a committee of the legislative branch power to approve or disapprove executive acts.

Id. at 58.

23. FISHER & DEVINS, supra note 15, at 125; see also 83 CONG. REC. 4981, 5004-11 (1938) (debating the constitutionality of Congress’s power to exercise the legislative veto).

24. FISHER & DEVINS, supra note 15, at 125.

25. This memorandum was later published. Robert H. Jackson, A Presidential Legal Opinion, 66 HARV. L. REV. 1353 (1953) (arguing that the legislative veto is unconstitutional because it fails to meet constitutional requirements of bicameralism and presentment).


27. Fisher, supra note 21, at 277.


29. PRESIDENT’S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 213-14 (1953). No assertion was made that the delegation to the executive, vesting lawmaking authority in administrative agencies, was contrary to separation of powers; only the legislative veto, was challenged as unconstitutional.

the legislative veto, the President continued to object to provisions giving Congress control over administrative decisions as constitutionally unacceptable.\textsuperscript{31} In the 1970s the legislative veto was included in statutes involving the "war powers, national emergencies, impoundment, presidential papers, federal salaries, and selected agency regulations."\textsuperscript{32} Congress used the legislative veto with increasing frequency in an effort to control the ever increasing promulgation of regulations by government agencies. At the same time, presidents continued to approve legislation containing legislative vetoes, while calling into question the veto's constitutionality.\textsuperscript{33}

An example of this dual executive branch position can be seen in the 1977 opinion of President Carter's attorney general, Griffin Bell.\textsuperscript{34} The opinion supported a one-House veto in a particular reorganization statute\textsuperscript{35} while refusing to give support to other statutory legislative vetoes.\textsuperscript{36} Attorney General Bell explained:

[I]f the procedures provided in a given statute have no effect on the constitutional distribution of power between the legislative and the executive—that is, the power of presidential veto is effectively preserved and the principle of bicameralism is respected—the fact that the procedure is not explicitly authorized by the language of Article I is not enough to render the statute unconstitutional.\textsuperscript{37}

But Attorney General Bell was quick to distinguish the "reorganization" statute under review from "statutes which provide for subsequent resolutions disapproving presidential actions in the administration of continuing programs."\textsuperscript{38}

\[\text{[The legislative veto] engrafts executive functions upon legislative members and thus overreaches the permitted sweep of legislative authority. At the same time, it serves to usurp power confided to the executive branch. The result, therefore, is violative of the fundamental constitutional principle of separation of powers prescribed in Articles I and II of the Constitution which places the legislative power in the Congress and the executive power in the executive branch.}\]

\textit{Id.}


\textsuperscript{32} Fisher, \textit{supra} note 21, at 284.

\textsuperscript{33} \textit{See supra} notes 15-32 and accompanying text. This pattern of action makes clear that the executive branch wanted the delegation of authority from Congress but did not want Congress to exercise control over or administer the authority.


\textsuperscript{35} 5 U.S.C. § 906(a) (1976).

\textsuperscript{36} Reorganization Act, \textit{supra} note 34, at 2-4. Attorney General Bell stated, "I should emphasize at the outset that my opinion is limited to this particular statute ... and is to be taken in no manner as approving the constitutionality of the procedure of congressional disapproval of executive action by resolution in other statutes." \textit{Id.} at 2.

\textsuperscript{37} \textit{Id.} at 3.

\textsuperscript{38} \textit{Id.} at 4. This position challenges the legislative veto in isolation without considering the reality that "resolutions disapproving presidential actions in the administration of continuing programs" is coupled with a delegation of authority from Congress to the executive. \textit{Id.} But for the delegation of authority there would be no "presidential actions."
President Carter challenged the legislative veto in all areas except those related to reorganization. President Carter, following President Eisenhower's lead, declared that legislative veto provisions would be treated as "report-and-wait" provisions. The report-and-wait provisions would require the Executive to report to Congress, wait for a response, and then act as the Executive believed appropriate. The exercise of any legislative veto would be considered congressional disapproval and would be given "serious consideration [by executive officials] ... [but the legislative veto would not be regarded as] legally binding." 

While President Carter was taking this hard-line approach, others in his administration took more pragmatic positions. Attorney General Griffin Bell and White House aide Stuart Eizenstat announced in a White House press release that certain types of legislative vetoes were acceptable. Bell and Eizenstat were not willing to concede that a legislative veto might be constitutional; however, both agreed acceptance of the legislative veto was based on a spirit of courtesy and respect between coequal branches of government. The Carter administration's position ultimately resulted in a constitutional challenge to the legislative veto which culminated in the Supreme Court's decision in INS v. Chadha.

III. INS V. CHADHA

The Supreme Court dealt directly with the constitutional issues presented by the legislative veto in INS v. Chadha. To appreciate the constitutional dimensions of this decision, the legal history of the case must be examined. Chadha and its various opinions lay out the arguments both for and against the constitutionality of the legislative veto.

39. Id.
40. Legislative Vetoes: Message to Congress, 1 PUB. PAPERS 1146, 1149 (June 21, 1978).
41. Id. President Carter stated his opposition to the legislative veto in no uncertain terms: "Such intrusive devices infringe on the Executive's constitutional duty to faithfully execute the laws. They also authorize Congressional action that has the effect of legislation while denying the President the opportunity to exercise his veto. Legislative vetoes thereby circumvent the President's role in the legislative process established by Article I, Section 7 of the Constitution."

42. This is consistent with a statement by Louis Fisher, who maintains "[i]t 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." Fisher, supra note 21, at 275.
43. Id. at 285, citing Office of the White House Secretary, press release, June 21, 1978, at 1-4 (stating that legislative vetoes in the War Powers Resolution are acceptable).
46. Id.
47. Chadha touches all three branches of government because it is based on an administrative adjudication within the executive branch that was originally empowered by a congressional grant of authority limited by a legislative veto and ultimately appealed to the Supreme Court.
This section begins with Chadha’s deportation proceedings leading to the congressional exercise of a statutory legislative veto and follows the case from the Board of Immigration Appeals to the Ninth Circuit Court of Appeals and ultimately to the Supreme Court, which declared legislative vetoes unconstitutional.

It is necessary to understand the statutory delegations of duties made by Congress before analyzing Chadha. Without this background, neither the separation of powers challenge, which is the primary focus of Chadha, nor the lack of consideration given the nondelegation doctrine can be fully appreciated. The Alien Registration Act of 1940 (the Act) authorized the attorney general, a member of the executive branch, to suspend deportation proceedings in certain hardship cases. The Act required the attorney general to report each suspension to Congress, which reserved the right to exercise a two-House legislative veto. In 1952 Congress replaced the Act with the Immigration and Nationality Act (INA). INA section 244(c)(2) substituted the 1940 two-House legislative veto for a one-House legislative veto.

The INA entitles an alien to a hearing to determine deportability. During this hearing, conducted by an administrative law judge (ALJ), the Immigration and Naturalization Service (INS) must prove the grounds for deportability listed in an order to show cause. An alien may apply for suspension of deportation. Upon completion of the necessary forms, the ALJ conducts a hearing and receives evidence on the issues of grounds for deportability and for suspension. For a favorable grant of

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48. When considering the statutory duties imposed by Congress it must be remembered that the Supreme Court has established that Article I, by vesting legislative power in Congress, imposed constraints on the legislature’s authority to delegate that power to others. The Supreme Court stated that the applicable test was whether Congress has laid “down by legislative act an intelligible principle to which the person or body authorized to take action is directed to conform.” J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).


50. The two-House legislative veto reserved Congress the right to disapprove suspension by a vote from both the House of Representatives and the Senate.


52. The new one-House veto allowed either house acting alone to override the attorney general’s suspension of deportation. Questions arise regarding whether this violates the bicameralism requirements of U.S. Const. art. I, §§ 1, 7, cls. 2, 3.


55. Id. An administrative law judge is an officer or employee of the INS vested with the power delegated to the attorney general to administer and enforce the INA. 8 C.F.R. § 2.1 (1995) (authorized by 8 U.S.C. § 1103 (1988)).

56. INA § 244(a), 8 U.S.C. § 1254(a) (1994); 8 C.F.R. § 242.17(a) (1995). The ALJ has been delegated the power to consider applications for suspension, subject to review by the Board of Immigration Appeals (BIA). 8 C.F.R. § 242.21 (1995).

57. 8 C.F.R. § 244.1 (1995).
suspension, the alien must first meet the statutory prerequisites, and then the ALJ must exercise favorable discretion.

If the ALJ denies suspension, section 106(a) permits the alien to seek review of the administrative order. Since deportation proceedings deal with the liberty of a person, an initial review by an appellate court is permitted. The Board of Immigration Appeals (BIA) performs the initial review. If the alien finds no relief from the BIA, the alien may then seek relief in the federal circuit court in his venue, and ultimately, the United States Supreme Court.

If the ALJ grants suspension, the attorney general can adjust the alien's status to that of "an alien lawfully admitted for permanent residence." At this point, the alien has one final obstacle to overcome—the one-House legislative veto. Congress activates this disapproval mechanism when reports of favorable action in suspension cases are received from the attorney general. Congress may choose to take action anytime during the current session until close of the following session. The reports generally are sent to the Judiciary Committees of each House. By agreement between the committees, all suspension cases are first considered by the Senate Judiciary Committee, and if approved, are then considered by the House Judiciary Committee.

A. Deportation Proceedings

1. Order to Show Cause

Chadha, an East Indian born in Kenya, held a British passport and entered the United States in 1966 on a nonimmigrant student visa which expired on June 30, 1972. The INS issued an order to show cause why

58. These prerequisites require a period of residence in the United States, good moral character, and hardship. See INA § 244(a), 8 U.S.C. § 1254(a) (1994).
61. The BIA and the INS are distinct agencies; the BIA is in the Department of Justice's Executive Office for Immigration Review. See 8 C.F.R. §§ 3.1-3.8 (1995).
62. INA § 106(a), 8 U.S.C. § 1105a (1994). Section 106(a) states that a petition for review in the court of appeals "shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation . . . made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title." Id.
64. INA § 244(c)(1), 8 U.S.C. 1254(c)(1) (repealed 1988). The report should contain "a complete and detailed statement of the facts and pertinent provisions of law in the case . . . with the reasons for such suspension." Id.
65. The decisions of the ALJ were not reported but were included as appendices to the Jurisdictional Statement, INS v. Chadha, No. 80-1832, app. B, 64a-66a & app. D, 70a-71a (May 1, 1981).
Chadha should not be deported.68 During initial deportation proceedings Chadha admitted his illegal status and the ALJ found him deportable.69 Chadha applied for suspension of deportation under the provisions of section 244(a)(1).70

2. Grant of Relief

The ALJ found that Chadha met the statutory requirements for relief of suspension.71 The ALJ exercised a favorable grant of discretion based on the finding of “extreme hardship” because “it would be extremely difficult, if not impossible, for [Chadha] to return to Kenya or go to Great Britain by reason of his racial derivation.”72 The ALJ granted Chadha’s suspension application and ordered his deportation be suspended.73 The ALJ forwarded a report of Chadha’s suspension to Congress under section 244(c)(1).74 The ALJ’s order provided for Chadha’s status to be adjusted to lawful permanent resident if Congress took no action adverse to the order.75 Chadha’s deportation proceedings would be reopened if Congress vetoed the order.76

3. Exercise of Legislative Veto

The Senate Judiciary Committee approved the attorney general’s suspension by not exercising its veto power. The House Judiciary Committee then considered the attorney general’s decision. Representative Eilberg introduced a resolution disapproving the “granting of permanent residence” to Chadha on December 12, 1975.77 The House Judiciary Committee discharged the resolution from further consideration on December 16, 1975.78 Prior to discharge, Representative Wylie noted that the resolution had not been printed or made available to the Members of the House.79 Representative Eilberg explained that if the resolution was

68. Id. The order to show cause charged Chadha in violation of INA § 241(a)(2) for overstaying his visa. Id.
69. Id.
70. Id.
71. Id. Required statutory prerequisites include a period of residence in the United States, good moral character, and hardship. See INA § 244(a), 8 U.S.C. § 1254(a) (1994).
73. Id. at app. B, 64a-66a.
74. INA § 244(c)(1), 8 U.S.C. § 1254(c)(1) (repealed 1988).
76. Id.
77. H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,247 (1975). The resolution said, in pertinent part, “the House of Representatives does not approve the granting of permanent residence in the United States to the aliens hereinafter named, in which cases the Attorney General has submitted reports to the Congress pursuant to section 244(a)(1) of the Immigration and Nationality Act, as amended.” H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,800 (1975).
78. 121 CONG. REC. 40,800 (1975).
79. Id. Normally the House would have distributed the resolution before acting on it.
not passed during the current session, the aliens named would automatically be granted permanent residence. Representative Eilberg stated the House Judiciary Committee supported the resolution reversing the attorney general's grant of suspension because the aliens contained in the resolution did not meet the statutory requirements of hardship. Without further debate or recorded vote, the committee passed the resolution. The House Judiciary Committee used the one-House legislative veto to reverse the administrative, and tacitly the Executive, grant of suspension.

4. Denial of Relief

Following the legislative veto of Chadha's suspension, the ALJ reopened his deportation proceedings. Chadha then asserted that section 244(c)(2), providing for a one-House legislative veto, was unconstitutional because "it is in contravention to Article I, Section 7, of the Constitution" in that it violates the separation of powers doctrine. The ALJ, having no authority to rule on the constitutionality of an Act of Congress, ordered Chadha deported to the United Kingdom. However, the ALJ noted in his decision that it appeared Chadha had "a point." The ALJ also noted that a successful constitutional challenge might "[extinguish] the right of suspension of deportation under any and all circumstances."

B. Appeal to Board of Immigration Appeals

Chadha appealed to the Board of Immigration Appeals (BIA), asserting that section 244(c)(2) was unconstitutional "in that it provide[d] for legislation inconsistent with and in contravention of Article I, Section 7 of the United States Constitution and [was] violative of the separation of powers [sic] doctrine contained in Article I, Section 6 of the United States Constitution." The BIA concluded that it had "no power to declare..."
unconstitutional an act of Congress” and dismissed Chadha’s appeal. The BIA, in its decision, commented that Chadha’s constitutional claim was “without merit.” The BIA, quoting its decision in Matter of Santana, stated that “Congress has the absolute and unqualified power to prescribe the conditions under which an alien may enter the United States.”

C. Appeal to Ninth Circuit Court of Appeals

After Chadha’s unsuccessful appeal to the BIA, he petitioned the Ninth Circuit Court of Appeals for relief. Chadha again asserted that the one-House legislative veto provision in section 244(c)(2) was unconstitutional. The INS agreed that the legislative veto was unconstitutional and the Ninth Circuit requested amici curiae briefs from the House of Representatives and the Senate in support of the constitutionality of the legislative veto.

1. Jurisdiction and Justiciability

Congress, before reaching the merits of the case, challenged the Ninth Circuit’s jurisdiction and the justiciability of the case. The Ninth Circuit rejected Congress’s contention that the controversy became moot when Chadha married an American citizen. The Ninth Circuit found jurisdiction pursuant to INA section 106(a). The Ninth Circuit addressed each of Congress’s three points individually: (1) Chadha lacked standing; (2) the case presented a political question; and (3) the case lacked requisite adverseness.

Congress claimed Chadha lacked standing because he had suffered no injury in fact, was asserting a generalized government grievance, and was impermissibly asserting the rights of others. Congress’s argument that...
Chadha suffered no injury in fact was based on the premise that section 244(c)(2) was a non-severable portion of section 244. If the court invalidated section 244, Chadha would be deportable because there would be no authority for the Executive’s grant of suspension.\footnote{103} This argument led Congress to conclude that Chadha was deportable regardless of the court’s decision and therefore suffered no injury in fact.\footnote{104} The Ninth Circuit disagreed with Congress’s basic premise that section 244(c)(2) was not severable.\footnote{105}

The Ninth Circuit relied on the severability clause of section 406 of the INA and the proposition that section 244(a) operated independently of section 244(c)(2) to reject Congress’s position.\footnote{106} Section 406 states that “[i]f any particular provisions of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.”\footnote{107} Additionally, section 244(a) gives the attorney general power to adjust the status of an alien; subsections (b) through (f) merely restrict this power.\footnote{108} Therefore, section 244(a) operates independently, giving section 244(c)(2) a non-essential character.\footnote{109}

The court concluded that Chadha had suffered injury in fact.\footnote{110} The Ninth Circuit, citing \textit{Buckley v. Valeo},\footnote{111} stated that “parties with sufficient concrete interests at stake have been held to have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights.”\footnote{112} The Ninth Circuit found Chadha to have “sufficient interests at stake” because if it invalidated section 244(c)(2) his original suspension under section 244(a) would be reinstated.\footnote{113} Additionally, the court found that Chadha had alleged an Article III case or controversy because he demonstrated “injury in fact” and a substantial likelihood that “the judicial relief requested will prevent or redress the claimed injury . . . .”\footnote{114}

\begin{thebibliography}{114}
\footnotetext[103]{Id.}
\footnotetext[104]{Id.}
\footnotetext[105]{Id. at 415-17.}
\footnotetext[106]{Id.}
\footnotetext[107]{INA, § 406, 66 Stat. at 163 (1952). The court explained that a severability clause provides a presumption of severability. \textit{Chadha}, 634 F.2d at 415 (citing Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938)). The court further explained that because Congress sought to establish inseverability it must bear the burden of demonstrating that “[Congress] would not have enacted those provisions within its power” without section 244(c)(2). \textit{Chadha}, 634 F.2d at 415-16 (citing Champlin Refining Co. v. Corporation Comm’n, 286 U.S. 210, 234 (1932)). For a discussion of the general principle of severability, see \textit{Buckley v. Valeo}, 424 U.S. 1, 108 (1976) (per curiam).}
\footnotetext[108]{\textit{Chadha}, 634 F.2d at 416-17.}
\footnotetext[109]{Id.}
\footnotetext[110]{Id. at 417.}
\footnotetext[111]{424 U.S. 1, 12 n.10 (1976) (per curiam).}
\footnotetext[112]{\textit{Chadha}, 634 F.2d at 415.}
\footnotetext[113]{Id. at 417-18.}
\footnotetext[114]{Id. at 418 (citing Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 79 (1978)).}
The Ninth Circuit used its finding of Chadha's injury in fact to dismiss Congress' argument that Chadha was asserting a generalized government grievance.\(^{115}\) The court explained that Chadha's challenge of section 244(c)(2) to redress his injury was specific and concrete and, in a separation of powers claim, sufficient for standing purposes.\(^{116}\) Similarly, Congress's argument that Chadha was asserting the rights of the executive and judicial branches and not his own failed because Chadha established standing.\(^{117}\) The Ninth Circuit held that any benefit gained by the executive or judicial branch was ancillary to Chadha's claim.

Congress, invoking the political question doctrine,\(^{118}\) then argued that the court should refuse to decide Chadha's claim because any decision would be an encroachment on legislative powers.\(^{119}\) Congress based this assertion on the constitutional power it held over aliens under the Naturalization Clause,\(^{120}\) when read in conjunction with the Necessary and Proper Clause.\(^{121}\) The Ninth Circuit recognized that the political question doctrine was implicated when the source of a claimant's appeal was textually committed to another branch of government, thereby invoking the principle of separation of powers.\(^{122}\) However, the Ninth Circuit recognized that Chadha's claim did not arise from either the Naturalization or the Necessary and Proper Clauses; Chadha's claim was that section 244(c)(2) violated the separation of powers doctrine.\(^{123}\) Since the Constitution does not textually commit the separation of powers doctrine to any one branch of government, no political question problem existed within this case.

Next, Congress asserted that the case lacked requisite adverseness because the parties below, Chadha and the INS, had agreed that section 244(c)(2) was unconstitutional.\(^{124}\) The Ninth Circuit found this argument unpersuasive. Relying on *Aetna Life Insurance Co. v. Haworth,*\(^{125}\) the

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115. Id.
116. Id.
117. *Chadha,* 634 F.2d at 418.
118. The "political question doctrine holds that certain issues should not be decided by courts because their resolution is committed to another branch of government . . . ." *BLACK'S LAW DICTIONARY* 1158-59 (6th ed. 1990) (citing Islamic Republic of Iran v. Pahlavi, 455 N.Y.S.2d 987, 990 (N.Y. App. Div. 1982)).
119. Id.
120. U.S. Const. art. 1, § 8, cl. 4.
121. U.S. Const. art. 1, § 8, cl. 18.
122. *Chadha,* 634 F.2d at 419; see Gilligan v. Morgan, 413 U.S. 1, 10-11 (1973) (political question doctrine based on judicial recognition of separation of powers); Powell v. McCormack, 395 U.S. 486, 519-20 (1969); Baker v. Carr, 369 U.S. 186, 217 (1962) (no political question when the doctrine in dispute is not textually committed to any one branch of government).
123. *Chadha,* 634 F.2d at 419. In looking at section 244(c)(2) in isolation, the Ninth Circuit fails to recognize two underlying principles: (1) Congress is not permitted to abdicate or transfer to others the essential legislative function with which it is vested (see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)); and (2) the original grant of authority under the INA was made pursuant to the Naturalization Clause. U.S. Const. art. 1, § 8, cl. 4.
124. *Chadha,* 634 F.2d at 419.
Ninth Circuit explained that a controversy "must be a real and substantial [one] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." If the court ruled for Chadha, he would not be deported; if the court found section 244(c)(2) constitutional, the INS would deport Chadha—even if it disagreed with the court's findings. The Chadha case was sufficiently adverse and the Ninth Circuit decision would have real meaning.

2. Constitutional Merits: The Legislative Veto as a Judicial Act

After dismissing Congress's questions regarding jurisdiction and justiciability, the Ninth Circuit reached the merits of the case: whether section 244(c)(2) violated the constitutional doctrine of separation of powers by permitting Congress, acting pursuant to a legislative veto, to intrude upon the executive and judicial branches. The case was one of first impression. Congress had never been found in derogation of the separation of powers doctrine absent a showing of textual support within the Constitution clearly conferring powers on another branch of government. The 1976 Supreme Court decision in Buckley v. Valeo had been the last time the Court found a legislative action violated the separation of powers doctrine.

The Ninth Circuit recognized that the separation of powers doctrine was designed as a self-enforcing rule. The court, however, considered it a duty "to resolve disputes with or among the other component parts of the Government" when violation of this self-enforcing rule occurred. To meet this obligation in a case of first impression, the Ninth Circuit set the standard of review for defining a constitutional violation of the separation of powers doctrine. Relying on Nixon v. Administrator of General Services, the court defined a violation as "an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government."

Analyzing the separation of powers issues, the Ninth Circuit considered three different views of the legislative veto: (1) "as a correction of

126. Chadha, 634 F.2d at 419.
127. Id.
128. Id. at 420. This may explain why Chadha cited Article I, Sections 6 and 7 of the Constitution as textual support for his separation of powers challenge.
129. 424 U.S. 1, 118-24 (1976) (per curiam).
130. Chadha, 634 F.2d at 420-21 (decision based on a textual showing of support within the Constitution).
131. Id. at 422.
132. Id. (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).
133. Id. at 425.
135. Chadha, 634 F.2d at 425.
judicial or executive misapplication of the statute;” (2) “as a means for [Congress to share] the administration of the statute with the Executive;” and (3) “as the exercise of a residual legislative power to define substantive rights under the law— but falling short of statutory [action] which would . . . require formal constitutional procedures for legislation.”

The Ninth Circuit, focusing on the judicial nature of the congressional proceedings, held that the legislative veto was a corrective device used to review misapplication of the statute by other branches.\footnote{136} It was the judiciary’s responsibility, at the conclusion of administrative proceedings, to determine if the executive branch had correctly applied the statute that established executive authority.\footnote{137} Congress assumed a judicial role when it exercised a legislative veto.\footnote{138} The Ninth Circuit held that this supervening legislative veto resulted in a de facto revision of any preceding judicial branch opinion, causing a disruptive and unnecessary interference with a central function of the judicial branch.\footnote{139} Section 244(c)(2) allows Congress to reserve to itself the power to determine if its judgment should be substituted for the judgment of the judicial branch.\footnote{140}

According to the court, Congress’s use of the legislative veto converts judicial decisions into mere advisory opinions.\footnote{141} Further, the legislative veto has the potential to nullify judicial attempts to require uniform application of the statute by the executive branch.\footnote{142} Finally, the legislative veto disrupts the relationship between the judicial branch and Congress: the integrity of the judicial branch is undermined when its decisions may be subjected to congressional review.\footnote{143}

Congress argued that the legislative veto was not a corrective device but rather served the sole purpose of allowing it to share in the administration of the statute.\footnote{144} Section 244(c)(2) allowed Congress, through use of the legislative veto, to supplement the executive branch’s implementation of the statute.\footnote{145} The Ninth Circuit turned this argument against

\footnote{136}{\textit{Id.} at 429.}
\footnote{137}{\textit{Id.} at 429-30. The Ninth Circuit premised this argument on the foundation that a legislative veto or “review” judges the actions of the executive branch. \textit{Id.} This position fails to recognize that Chadha’s appeal was based on separation of powers issues relating to bicameralism and presentment, not judicial review.}
\footnote{138}{\textit{Id.} at 430.}
\footnote{139}{\textit{Chadha,} 634 F.2d at 430.}
\footnote{140}{\textit{Id.}}
\footnote{141}{\textit{Id.} at 430-31.}
\footnote{142}{\textit{Id.} at 430 (e.g., an ALJ exercises negative discretion and the alien appeals to an Article III judge who reverses the ALJ, granting suspension; the legislative veto has the potential to overturn this judicial decision).}
\footnote{143}{\textit{Id.} at 431 (e.g., the executive, knowing that judicial opinions are merely advisory, will not be compelled to interpret the law in conformity with them, increasing the potential that the law will not be uniformly applied).}
\footnote{144}{\textit{Chadha,} 634 F.2d at 430.}
\footnote{145}{\textit{Id.} Congress premised this argument on the foundation that a legislative veto or “review” supplements the actions of the executive branch. \textit{Id.} The Ninth Circuit’s premise is more closely aligned to the plain meaning of the word “review.” See \textit{BLACK’S LAW DICTIONARY} 1320 (6th ed. 1990).}
\footnote{146}{\textit{Chadha,} 634 F.2d at 431.}
Congress, and determined that by "supplementing" the executive branch's implementation or administration of the statute Congress assumed a law enforcement role.\textsuperscript{147}

The Ninth Circuit held that Congress's gratuitous supplementing of the executive branch's implementation is "disruptive and unnecessary to the sound administration of the law."\textsuperscript{148} Congress erodes the executive branch's authority through the legislative veto by setting aside the executive branch's law enforcement decisions.\textsuperscript{149} Moreover, the legislative veto undermined executive branch authority exercised under a legal standard, subject to judicial review—further damaging the executive branch's credibility with the judicial branch.\textsuperscript{150} Finally, the legislative veto disrupted the relationship between the executive branch and Congress, detracting from the executive branch's authority.\textsuperscript{151}

The Ninth Circuit did not reach the third issue, whether the legislative veto could be viewed as the exercise of a residual legislative power to define substantive rights under the law, concluding instead, that the issue in this case was a separation of powers violation.\textsuperscript{152} In dicta, however, the Ninth Circuit did address the contentions of the parties as to whether the legislative veto was constitutional by reason of its unicameral character.\textsuperscript{153}

The Ninth Circuit concluded "[section 244(c)(2)] violates the constitutional doctrine of separation because it is a prohibited legislative intrusion upon the Executive and Judicial branches."\textsuperscript{154} The court held the legislative veto violates the separation of powers doctrine because it allowed one House of Congress to reverse a reasoned decision by the Executive on an individual case.\textsuperscript{155} The Ninth Circuit reasoned that "[b]y assuming the task of correcting misapplications of the law, Congress [is] performing a role ordinarily a judicial or an internal administrative responsibility."\textsuperscript{156}

D. \textbf{Ap\textsuperscript{e}al to United States Supreme Court}\textsuperscript{157}

The INS, pursuant to 28 U.S.C. § 1252, filed a notice of appeal to the United States Supreme Court seeking relief from the Ninth Circuit's deci-
After many procedural maneuvers and oral argument, the Supreme Court issued a decision. The final decision incorporated four separate opinions. The majority opinion is comprised of five structural parts; Justice White's dissent substantially parallels this structure. The structure of these opinions provides a road map by which to analyze the constitutional dimensions of the legislative veto. Where the Court restated the Ninth Circuit arguments, it will only be noted. After exhausting the constitutional arguments in these opinions, Justice Powell's concurring opinion and Justice Rehnquist's dissent will be incorporated into the analysis.

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opinion deciding the case on its merits. This Section is done in hopes of alleviating confusion by ambitious readers who attempt to research this issue on their own.


After oral argument, the Supreme Court issued an opinion restoring the case to the calendar for reargument. INS v. Chadha, 458 U.S. 1120 (1982) (over the dissent of Justices Brennan and Blackmun). The Supreme Court also issued an opinion allowing the Solicitor General to file a third supplemental brief. INS v. Chadha, 459 U.S. 1097 (1983).


161.
The Supreme Court summarized the facts and procedural history of the case, expanding on the Ninth Circuit's statements in two instances. First, the Supreme Court pointed out that the legislative veto, "pursuant to section 244(c)(2) . . . was not treated as an Art[icle] I legislative act." Second, the Supreme Court stated "[i]t is not at all clear whether the House generally, or Subcommittee Chairman Eilberg in particular, correctly understood the relationship between H. Res. 926 and the Attorney General's decision to suspend Chadha's deportation." The Supreme Court relied on legislative history to support this proposition. Referring to a similar resolution introduced in 1974, the Supreme Court noted that when asked whether the resolution disapproving suspension was contrary to the Attorney General's action, Representative Eilberg answered no. The Supreme Court concluded that use of the legislative veto "in no way constitute[d] a confirmation of what the Attorney General intend[ed] to do."

1. Challenges to Supreme Court Authority

The Supreme Court then considered eight independent challenges to its authority. First, Congress argued that the Supreme Court lacked jurisdiction. Relying on Deposit Guaranty National Bank v. Roper, Congress argued that the INS could not appeal to the Supreme Court because by the time the Ninth Circuit granted relief, it was no longer aggrieved. The Supreme Court, however, took jurisdiction under 28 U.S.C. § 1252. The Supreme Court explained that the INS qualified as "any party" within the meaning of section 1252 because the Ninth Circuit decision prohibited its action.

Second, Congress reasserted its Ninth Circuit argument that section 244(c)(2) was a nonseverable provision of the act and if held unconstitutional the entire act must fall. Justices Rehnquist and White, dissenting, agreed that Congress did not intend section 244(c)(2) to be severable. Justice Rehnquist noted that Congress had a long history of

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162. Chadha, 462 U.S. at 927. Article I legislative acts require bicameralism and presentation. See supra note 13 and accompanying text. The Supreme Court states "[the resolution] was not submitted to the Senate." Chadha, 462 U.S. at 927-28. But see supra notes 66, 77-78 and accompanying text.

163. Chadha, 462 U.S. at 927 n.3.


165. Id. (quoting 120 Cong. Rec. 41412 (1974)).

166. Id. at 929.

167. See supra note 100 and accompanying text (Ninth Circuit argument).

168. 445 U.S. 326 (1980). The Roper Court stated that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." Id. at 333 (citation omitted).


170. Id.

171. Id. at 930-31.

172. Id. at 931-35.

173. Id. at 979 n.16, 1014-15 (White & Rehnquist, JJ., dissenting). Justice White read the "savings clause" in INA section 406 to pertain to "the severability of major parts of the
maintaining control over deportation suspension (whether that control was by private bill, concurrent resolution, or one-House veto) and this history did not support severability of section 244(c)(2). The Supreme Court, relying on legislative intent, adopted the reasoning of the Ninth Circuit and rejected the argument.

Third, Congress argued that Chadha lacked standing because he had suffered no injury in fact. Again, the Supreme Court adopted the Ninth Circuit position, holding that Chadha had demonstrated injury in fact. Fourth, Congress then asserted that the case should not be heard because Chadha had alternative relief available. Congress noted Chadha's marriage to a United States citizen, making him eligible for classification as an immediate relative. Additionally, Congress noted that Chadha may be eligible for relief under the Refugee Act of 1980. The Court found these alternative forms of relief speculative and rejected Congress's position.

In its fifth argument, Congress re-alleged that the court of appeals lacked jurisdiction under INA section 106(a). The Supreme Court adopted the Ninth Circuit's reasoning and found jurisdiction pursuant to INA section 106(a). The Supreme Court acknowledged the Third Circuit's counterargument that "judicial review under § 106(a) would not extend to the constitutionality of § 244(c)(2) because that issue could not have been tested during the administrative deportation proceedings conducted under § 242(b)." But the majority opinion rejected this proposition by making clear that no statute was immunized from constitutional scrutiny by the courts.

In its sixth point, Congress reasserted the argument that the case lacked adverseness. The Supreme Court agreed with the Ninth Cir-

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175. Chadha, 462 U.S. at 931-35; see supra notes 107-09 and accompanying text (Ninth Circuit position).


179. Id. See supra note 99 and accompanying text (Ninth Circuit position).


182. Id.

183. Id. at 937-39; see supra note 100 and accompanying text (Ninth Circuit position).

184. Chadha, 462 U.S. at 938 n.11 (citing Dastmalchi v. INS, 660 F.2d 880 (3d Cir. 1981)).

185. Id. at 942 n.13 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

186. Id. at 939.
circuit's holding of adequate Article III adverseness. The Supreme Court added that "from the time of Congress' formal intervention, . . . concrete adverseness is beyond doubt." Congress's seventh argument re- alleged a nonjusticiable political question, with a few new twists. The Supreme Court disagreed, held no political question existed, and challenged whether Congress had chosen a constitutionally permissible means of implementing its plenary power over aliens.

In the eighth, and final argument, the Senate asserted that the case was nonjusticiable because Chadha's claim was a mere "assault on the legislative authority to enact Section 244(c)(2)." The Supreme Court dismissed this argument, noting that its adoption would result in every constitutional challenge of a statute being characterized as a political question. Once again relying on Marbury v. Madison, the Supreme Court asserted that the constitutionality of statutes was a decision for the courts.

2. Constitutional Merits: The Legislative Veto as a Legislative Act

After favorably resolving all challenges to its authority, the Supreme Court turned to the constitutional issues presented by the case. The Court divided the constitutional issues along two lines: those involving Article I and those generally dealing with separation of powers. Prior to laying the foundation for the Article I challenges, the Court explicitly stated that its inquiry revolved around the constitutionality, not the wisdom, of the statute.

The Court defined the boundaries of the dispute as within: (1) the bicameral requirements of Article I, Section 1; (2) Article I, Section 7, clause 2; and (3) the Presentment Clauses of Article I, Section 7, clauses 2 and 3. Relying on the Framers' intent, the Court held that these provisions were an integral part of the constitutionally designed separation of powers and could not be set aside merely to promote efficiency or con-
In his dissent, Justice White wrote that the legislative veto conformed to the spirit, if not the letter, of separation of powers because it "[was] an important if not indispensable political invention that allow[ed] the President and Congress to resolve major constitutional and policy differences, assure[d] the accountability of independent regulatory agencies, and preserve[d] Congress' control over lawmaking." Justice White drew the majority's attention to previous Supreme Court decisions recognizing the modern administrative state and noted this was a clear indication that not all legislative acts must be passed in accordance with Article I. Justice White wrote that the legislative veto was a balancing tool required by Congress to check the sheer size and responsibility of rule making and regulation by the administrative state.

In support of the Presentment Clauses, the Supreme Court relied on the Framers' intent to hold that the presidential veto power was a carefully crafted device designed to protect the Executive from congressional overreaching and the people from bad laws. Noting that the bicameral requirements were interdependent with the Presentment Clauses, the Supreme Court used the Framers' intent to show that the dominant nature of the legislative branch required that "the legislative power . . . be exercised in accord with a single, finely wrought and exhaustively considered, procedure."

The Supreme Court held that the challenged action, the legislative veto under section 244(c)(2), was legislative in nature. The Court confirmed this position by comparing the challenged action to the character of the action it supplanted. Congress agreed, in the alternative, that the legislative veto either amended or supplemented the Attorney General's report, or repealed the application of section 244 to Chadha. The Supreme Court found this argument unpersuasive, noting that

198. Chadha, 462 U.S. at 944-46. "There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided." Id. at 959 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).
199. Id. at 945, 972-73.
200. Id. at 984-87 (citing FTC v. Ruberoid Co., 343 U.S. 470 (1952)). Congress was required to establish a "prescribed standard" when delegating congressional authority to regulatory and executive agencies. United States v. Chicago, Milwaukee R.R. Co., 282 U.S. 311, 324 (1931). As long as the entity receiving the delegated powers had to conform to an "intelligible principle," the delegation was constitutionally permissible. J.W. Hampton & Co. v. United States, 276 U.S. 394, 409 (1928). "Intelligible principles" surviving judicial scrutiny are those which are "just and reasonable" or within the public interest, convenience, or necessity. Chadha, 462 U.S. at 985.
201. Chadha, 462 U.S. at 985.
202. Id. at 947-48 (citing records from the Federal Convention of 1787, The Federalist Nos. 51 & 73, and various other sources); see also Geoffrey S. Stewart, Note, 13 HARV. J. ON LEGIS. 593, 609-11 (1976). But see 462 U.S. at 981 (White, J., dissenting) (suggesting a modest role for the Presentment Clause).
204. Id. at 952.
205. Id. Absent the legislative veto, Article I legislation is the only mechanism Congress may use to alter the legal rights, duties, and relations of others. Id.
206. Id. at 952-54.
amendment or repeal of statutes must conform with Article I require-
ments of bicameralism and presentment.207

The House of Representatives argued that section 244(c)(2) met the requirements of bicameralism and presentment when it was enacted and, therefore, when administering the legislative veto these steps need not be repeated.208 Justice White’s dissent made a similar argument. White explained that the legislative veto did not create new law, or exist without specific statutory authorization, therefore it was not subject to bicameralism or presentment.209 The majority disagreed, holding that enactment of section 244(c)(2) failed to meet constitutional requirements, despite compliance with bicameralism and presentment, because it modified or amended Article I and therefore required enactment consistent with Article V.210 The Supreme Court explained that a bill enacted into law after meeting the requirements of bicameralism and presentment was not immune to a constitutional challenge.211 Thus, the challenge was correctly before the Supreme Court for review.212

The House of Representatives protested that invalidating section 244(c)(2) sanctioned lawmaking by the attorney general.213 Each branch of government is presumed to act within its own constitutionally delegated sphere.214 The argument then was that when the attorney general, an officer of the executive branch, administered section 244 he was executing the law, not making it.215 Acts executing the law are not subject to the bicameral requirements of Article I because these acts are limited by statutes duly enacted under Article I.216 Executive acts are checked by both judicial review and Congress’s power to modify or revoke statutory authority entirely.217

Justice Powell, in a concurring opinion, disagreed with both the majority and Congress. Powell found the legislative veto a judicial act, not an executive act.218 The majority agreed that the legislative veto appeared judicial because it “reviewed” executive action and conceded that “it is normally up to the courts to decide whether an agency has complied with its statutory mandate.”219 The majority, however, held that characteriz-

207. Id. at 954.
208. Chadha, 462 U.S. at 958 n.23 (citing Brief for House of Representatives No. 80-2170 at 40).
209. Id. at 980.
210. Id. at 958. Article V requires Congress to propose constitutional amendments by a two-thirds vote; ratification or “enactment” of amendments requires support by three-fourths of the states. U.S. Const. art. V.
211. Chadha, 462 U.S. at 942 n.13, 958 n.23.
212. Id. at 942 n.13 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), in support of judicial review).
213. Id. at 953 n.16 (citing Petitioner’s Brief No. 80-12170 at 40).
214. Id. at 951-52.
215. Id. at 953 n.16.
216. Chadha, 462 U.S. at 954 n.16.
217. Id.
218. Id. at 960, 964. This is also the position on which the Ninth Circuit based its decision.
219. Id. at 956 n.22.
ing the legislative veto in section 244(c)(2) as judicial in nature would result in the claim not being justiciable for lack of an Article III case or controversy. Justice Powell found this argument unpersuasive. Powell believed that the question presented was not whether Chadha had a justiciable claim but whether Congress violated the separation of powers doctrine. He found Congress clearly in violation of the separation of powers doctrine because it had assumed a function ordinarily entrusted to the courts. Under 5 U.S.C. § 704, the courts have review of final agency action. Despite a different approach, Justice Powell reached the same conclusion as the majority: the legislative veto was unconstitutional because it was not within the authority vested in Congress.

Congress argued that support for the legislative veto was found in its ability to delegate portions of its power to administrative agencies. In his dissent, Justice White agreed citing legislative history and presidential support. The Supreme Court held that Congress made a choice to delegate its powers to the attorney general, and its choice to deport Chadha must be enacted in the same fashion: "bicameral passage followed by presentment." The Supreme Court then listed constitutionally permissible means by which Congress can control delegated power.

220. Id. The attorney general's suspension of Chadha's deportation presents no case or controversy until after Congress exercises the legislative veto. Justice Powell's argument reasoned that because the legislative action reviewing the attorney general's decision was adjudicatory the court should stand in the place of Congress. Id. at 960. This logic is defeated by its result—if Justice Powell's argument had been adopted, Chadha would have no case.

221. Chadha, 462 U.S. at 965.

222. Id. Justice Powell also noted that Congress, acting as an appellant court in its review of the attorney general's decision, failed to provide Chadha with procedural safeguards, such as the right to counsel or a hearing, which would have been provided in a court or administrative proceeding. Id. at 965 n.8. This result was possible because there were no internal checks on Congress's judicial function and there were no political checks when Congress's decisions affected only one person (Chadha) rather than many. Id. at 966.

223. Id. at 954 (implying that its ability to delegate is the converse of its ability to reserve).

224. Id. at 969 (White, J., dissenting). Justice White, quoting the Senate Subcommittee on Separation of Powers, stated "an accommodation was reached years ago on legislative vetoes exercised by the entire Congress or by one House." Id. at 970 n.5 (quoting S. Rep. No. 549, 91st Cong., 1st Sess. 14 (1969)). Justice White noted that Presidents Kennedy and Johnson supported the constitutionality of the legislative veto. Id. (referencing General Counsel of the Department of Agriculture, Constitutionality of Title I of H.R. Rep. No. 6400, 87th Cong., 1st Sess. (1961); Separation of Powers: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 206 (1967)).

225. Whether this choice was a constitutional delegation of power is not considered. Professor Geoffrey Stone suggests the following possible motivations behind Congress's choice to delegate authority: (1) Congress may know of a general problem but lacks the required expertise to solve the problem; (2) Congress might fear creating a solution which will be quickly outdated; and (3) Congress can effectively avoid political liability for unpopular decisions made by executive administrative agencies. Geoffrey R. Stone et al., Constitutional Law 415-16 (2d ed. 1991).


227. Id. at 955 (limiting original grant of authority; durational limits on authorization; formal reporting requirements). See Jacob K. Javits & Gary J. Klein, Congressional Over-
The Supreme Court turned to the Framers' intent for support of its Article I position. The Supreme Court noted that the Framers "narrowly and precisely defined the procedure" for acts of Congress outside the "prescribed bicameral legislative role." As a result, the Constitution contained provisions "explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto."

The only clear exception the Supreme Court found to this general rule was in the case of a proposed constitutional amendment which had passed both Houses of Congress with the requisite two-thirds majority. The Court wrote that with regard to specific internal matters, each House may act alone, but distinguished this situation because internal matters merely bind the members of Congress. The Court also noted that where one-House action is provided for, the bicameralism check was substituted by other checks. The Court concluded that exceptions to bicameralism and presentment were "narrow, explicit, and separately justified" and did not include the "veto provided for in § 244(c)(2)."

The section was not authorized by constitutional design and did not comply with the Article I bicameralism and presentment requirements. Justice White disagreed, writing that section 244(c)(2) did conform to the


Justice White, in dissent, outlined substitutes Congress might use for the legislative veto and their flaws. Chadha, 462 U.S. at 973. Greater specificity in original grants might result in undesirable action or no action when controversy prevents Congress from reaching an agreement. Id. Formal reporting requirements are no substitute for actual authority. Id. Corrective legislation provides a retroactive response. Id.

228. Id. at 955.

229. Id. Four constitutional provisions are directly implicated:
"The House of Representatives shall chose their Speaker and other Officers; and shall have the sole Power of Impeachment." U.S. CONST. art. I, § 2, cl. 5

"The Senate shall have the sole Power to try all Impeachments. . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present." U.S. CONST. art. I, § 3, cl. 6.

"[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2.

"[The President] 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." U.S. CONST. art. II, § 2, cl. 2.

Additionally, implicit support for this position is found in the constitutional discussion of the electoral system of presidential election. See U.S. CONST. art. II, § 1, and Amend XII.

These provisions also support the Supreme Court's argument that the constitutionally prescribed one-House acts are not legislative. Chadha, 462 U.S. at 956.

230. Chadha, 462 U.S. at 956 n.21 (citing Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798); U.S. CONST. art. V). This exception is easily understood when it is remembered that Congress always has the ability to override a presidential veto if approved by two-thirds of each house. See U.S. CONST. art. I, § 7.

231. Chadha, 462 U.S. at 956 n.21 (citing U.S. CONST. art. I, § 7, cl. 2, 3 and § 5, cl. 2).

232. Id. (citing The Federalist Nos. 64, 66, & 75; U.S. CONST. art. I, § 3 and art. II, § 2). One example of a constitutional check substituted for bicameralism can be found in votes requiring a two-thirds concurrence rather than a simple majority. Id.

spirit of bicameralism and presentment which ensured approval of the president and Congress.\footnote{Id. at 994 (White, J., dissenting). Justice White explained that the president’s approval is found in the attorney general’s proposal to Congress and both the House of Representatives and the Senate show their approval by not vetoing the attorney general’s proposal. \textit{Id.}}

In taking its position, the Supreme Court turned away from the nondelegation doctrine. By confining its analysis to separation of powers, the Court was blind to the overall result: if Congress is unable to check its delegations of power, lawmaking—and ultimately accountability—is removed from the legislative branch. The Court forced this result when it supported the delegation of lawmaking authority to an administrative agency, but refused to allow Congress to have a say in that delegated authority. Justice White viewed the legislative veto as a tool to preserve Congress’s lawmaking function; a tool that did not violate Article I or the separation of powers doctrine.\footnote{Id. at 978-79.} White suggested that if violation of Article I bicameralism and presentment were a concern, the legislative veto could assume the role of providing legislative reaction to administrative rulemaking and could be used by the courts as a guide to legislative intent.\footnote{Id. at 975 n.11. This suggestion is analogous to earlier report and wait provisions. \textit{See supra note 40 and accompanying text.}} This approach was supported by the increased importance of administrative agencies in the current political system. As noted by Dean John Ely:

\begin{quote}
In theory it is the legislature that makes the law and the administrators who apply them. Anyone who has seen Congress in action, however, [will] know that the actual situation is very nearly upside down. . . . Courts thus should ensure not only that administrators follow the legislative policy directions that do exist [but] also that such directions are given.\footnote{JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-34 (1980). Dean Ely suggests that the transfer of power from elected members of Congress to faceless bureaucrats has led to a peaceful revolution. \textit{Id.}}
\end{quote}

Nonetheless, the current state of the law is defined by the holding in \textit{Chadha}: legislative vetoes are unconstitutional.\footnote{373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part). \textit{See infra notes 263-77 and accompanying text.}} Justice White, quoting Justice Harlan’s dissent in \textit{Arizona v. California},\footnote{373 U.S. 546, 626 (1963) (quoting Arizona v. California, 373 U.S. 546, 626 (1963)).} expressed his fear that the holding in \textit{Chadha} would result in “fundamental policy decisions” being made by appointed officials rather than Congress, “the body immediately responsible to the people.”\footnote{Chadha, 462 U.S. at 1002-03 (White, J., dissenting) (quoting Arizona v. California, 373 U.S. 546, 626 (1963)).} Justice White’s fear was quickly realized when the Supreme Court wasted no time invalidating legislative vetoes applying to the review of administrative decision making.\footnote{See Process Gas Consumers Group v. Consumer Energy Council of America, 463 U.S. 1216, 1217 (1983) (summary affirmance of lower court decision invalidating a one-
White's dissent in these summary affirmances noted that the Supreme Court was creating a "fourth branch" of government that would be free from oversight by the other three branches. Congress, responding to these summary decisions, amended a number of statutes, replacing legislative vetoes with joint resolutions.

This quick response was short-lived. The pragmatic reality that Congress would only selectively delegate its authority absent some control mechanism resurfaced and history began to quietly repeat itself. Congress continued to put legislative vetoes in bills and presidents continued to sign them into law. Between the Supreme Court's decision in Chadha and the end of the 101st Congress on October 28, 1990, over two hundred new legislative vetoes were enacted. In the end, Justice White's fears and Chadha's threats to congressional control have turned out to be empty. The nondelegation doctrine, on the other hand, suffered a severe blow under Chadha.

IV. CURRENT DEVELOPMENTS IN THE LAW

A. The Nondelegation Doctrine

Despite Chadha, the development of the nondelegation doctrine remains an issue. As administrative agencies grow in importance and the regulations they promulgate grow in number, Congress has moved farther from its constitutionally centered position as law-maker. In returning to the center, Congress must assert the nondelegation doctrine and then implement effective tools to maintain the constitutional goals of separation of powers and nondelegation.

The Framers' intent is often cited to support the need for separation of powers and nondelegation in our constitutional system. Not surprisingly, many statements in support of nondelegation are made incident to, or can be read as, supporting separation of powers. The correlation between the two doctrines is stark: one requires each branch of government to act presumptively within its constitutionally delegated authority, and the other requires that no branch give up its constitutionally delegated au-

243. FISHER & DEVINS, supra note 15, at 128.
244. Id.
245. Id. (listing examples from various 1989 statutes).
246. As Congress is removed from the lawmaking process, it is removed from political accountability. Administrative agencies have no need to be responsive because the bureaucratic nature of their jobs insulates agency personnel from accountability.
247. See Madison, supra note 2. Madison cautioned that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." Id. at 324-26; see also 37 Op. Att'y Gen. 56 (1933), supra note 22.
The nemesis of these two doctrines is the checks and balances system which requires each branch of government to function within the sphere of another in limited circumstances. The competing interests appear to frustrate both the separation of powers and nondelegation doctrines. The Constitution's Framers feared a concentration of power in the federal government, particularly in the legislative branch. Thus, it is noted that competing interests are necessary to resist "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . .".

Some argue that the nondelegation doctrine outlived its usefulness and has been long dead. Lawmaking today is generally accomplished by Congress articulating goals and broad policy considerations, and administrative agencies making rules or regulations to implement these broad statements. Some argue that this is not Congress's intended role. Congress must do more than establish goals; it must also specify the obligations needed to realize those objectives. When Congress merely enacts goals, administrative agencies and courts become the primary lawmakers.

Supporters assert that the nondelegation doctrine maintains its use because it "seeks to safeguard against excessive delegation and misuse or abuse of delegated law-making power." It also provides the foundation intended by the Framers to return Congress to its lawmaking role. Evidence of renewed confidence in the doctrine can be found in Industrial Union Department, AFL-CIO v. American Petroleum Institute. This confidence is supported by dicta in Buckley v. Valeo.

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248. See supra notes 1-3 and accompanying text.
249. See supra notes 4-6 and accompanying text.
250. See Madison, supra note 2; Chadha, 462 U.S. at 950 (quoting THE FEDERALIST No. 51: "In republican government, the legislative authority necessarily predominates.").
251. Chadha, 462 U.S. at 951.
252. Professor Geoffrey R. Stone, referring to the demise of the nondelegation doctrine, states "Panama Refining and Schechter [both decided in 1935] are the only two decisions that have invalidated federal statutes on nondelegation grounds in the nation's history." Stone, supra note 225, at 416-17 (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).
254. Id. at 181-83.
256. 448 U.S. 607 (1980) (plurality opinion) (restrictive reading of delegated authority); (Rehnquist, J., concurring) (concluding that OSHA provisions provide for unconstitutional delegated legislative powers to executive officials). Id. at 682-88.
257. 424 U.S. 1, 119 (1976) (per curiam) ("[T]he Legislative Branch may not exercise executive authority by retaining the power to appoint those who will execute its laws."); see also Springer v. Philippine Islands, 277 U.S. 189, 202 (1928) ("[T]he legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection . . ."); cf. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991) (suggesting that the failure to delegate executive functions to the executive branch may render a statute unconstitutional).
Unfortunately, Chadha's declaration that the legislative veto is unconstitutional on separation of powers grounds required that the nondelegation doctrine be set aside. The Supreme Court, deciding that Congress could not—through the legislative veto—act in an administrative or law enforcement manner, failed to take away the delegation of lawmaking authority that accompanied the veto. Consequently, Congress was no longer allowed to act in a presumptively executive role, even though the Executive, with Supreme Court support, could assume all delegated lawmaking authority without restriction.\(^{258}\)

Justice White, in explaining the difficulties with the legislative veto as a tool to guard against excessive delegation of authority, noted that the Constitution neither directly authorizes nor prohibits the legislative veto.\(^{259}\) Debate over its constitutionality divides "scholars, courts, Attorneys General, and the two other branches of the National Government."\(^{260}\) The debate, focusing on this constitutional silence, is generally advanced from either a formal or a functional approach. A formal approach allows the text of the Constitution, as it was originally understood, to supply clear guidance for most cases.\(^{261}\) A functional approach accounts for changed circumstances and the generality of the Constitution by requiring courts to identify the controlling constitutional doctrines and assess whether the arrangement under attack violates those doctrines.\(^{262}\)

**B. The Legislative Veto**

The legislative veto, like the nondelegation doctrine, is not dead. Chadha called into question whether the legislative veto could ever withstand a constitutional challenge.\(^{263}\) Arguing from a formal approach, many said it was not possible for the legislative veto to conform with Article I requirements of bicameralism and presentment and therefore it was doomed. Arguing from a functional approach, others said the legislative veto complied with the spirit, if not the letter, of Article I.

The Senate has renewed its confidence in both the nondelegation doctrine and the legislative veto. This renewed confidence is displayed in a bill which provides for review of all regulatory rule-making actions through the use of a legislative veto.\(^{264}\) Senator Don Nickles, one of the

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\(^{258}\) Chadha, 462 U.S. at 953 n.16.

\(^{259}\) Id. at 976.

\(^{260}\) Id. at 976-78 nn.12-14 (compilation of law review articles, cases, and commentary both favorable and unfavorable to the legislative veto).


\(^{263}\) The question is not whether legislative veto provisions can still be used; this is undisputed. See FISHER & DEVINS, supra note 15, at 128 (listing examples of legislative veto provisions in 1989 statutes).

\(^{264}\) S. 219, 104th Cong., 1st Sess. (1995); see also 1 C.F.R. 305 (Administrative Conference of the United States urges use of the legislative veto; No. 77-1).
bill's sponsors, noted in debate that the bill was needed to combat excessive regulation. Senator Nickles drew Senate members' attention to the fact that "the administration on November 14 [1994] published in the Federal Register that they were reviewing and working on 4,500 rules and regulations that would be effective for the years 1995, 1996, and 1997 . . . ." Senator Nickles stated further that Senate Bill 219 would give Congress "the right and the responsibility . . . to not only review, but to analyze these regulations and to reject those [found] too expensive, reject those [that] do not make sense." Senator Harry Reid added that the bill was a "good solution to the problem of excessive bureaucratic regulation."

Senate Bill 219 requires government agencies to submit new rules to Congress, and provides a forty-five day review period. If the new rules are not approved, Congress may enact a joint resolution of disapproval. The president then has the right to veto the joint resolution of disapproval. Congress can over-ride this presidential veto by a two-thirds vote in each House. The bill's proponents believe these provisions satisfy the concerns of both formalists and functionalists, and will withstand a constitutional challenge.

Senate Bill 219 was passed on March 29, 1995, "by a recorded vote of 100 yeas," and on March 30, 1995, the bill went to the House of Representatives with a request for a concurrence. Senator Levin commented that passing the legislative veto provided Congress the opportunity to take responsibility for regulatory lawmaking. Senator Boxer commented that Senate Bill 219 was a "very reasonable response to the problem of unreasonable regulations."

This renewed support for both the nondelegation doctrine and the legislative veto is the inevitable result of a government structure that is built on compromise. Chadha saw the pendulum move away from the

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266. Id.; see also 141 CONG. REC. S4750-51 (Senator Gramm commenting on the addition of 300 pages to the Federal Register by the Clinton administration).
268. 141 CONG. REC. S4697 (1995). Senator Reid also commented that bureaucrats had been laughing at Congress since the Chadha decision. Id.
270. Id. at § 104.
271. Id. at § 103.
272. Id.
273. The bill provides for bicameralism and presentment, though not in Article I form. Some will argue that the bill provides for negative rule-making and Article I authorizes only positive rule-making. See Chadha, 462 U.S. 919 (1983). The bill is functional; it meets the letter and spirit of Article I without restricting Congress's lawmaking authority.
274. 141 CONG. REC. S4758 (1995) (R 54-0; D 46-0; Vote No. 117).
275. 141 CONG. REC. H3979 (1995). The bill was amended on the House floor by insertion of the text of House Bill 450. The amended bill was passed on May 17, 1995, and sent to the Senate for concurrence. The Senate refused to concur in the House amendments and the bill was sent to a conference committee on June 16, 1995.
277. Id.
nondelegation doctrine; now it is merely moving back. Only time will tell how far the pendulum will swing. Perhaps in the end, there will be a return to few administrative agencies. Instead, lawmaking power will be vested in Congress, executive power vested in the president, and judicial power vested in the courts.278

V. CONCLUSION

This Comment has attempted to answer the following questions:

1. Why was the legislative veto declared unconstitutional in Chadha?

The legislative veto was declared unconstitutional in Chadha because it was considered a legislative act which failed to meet the Article I requirements for bicameralism and presentment.

2. What has been the impact of Chadha?

Chadha's initial impact was an increase in litigation which resulted in the Supreme Court summarily overturning both one-House and two-House legislative vetoes. Over time, the promise of Chadha, that all legislative vetoes would be declared unconstitutional and stricken from the over two hundred statutes containing them, has not materialized.279 Some individuals speculate that the Court's decision in Chadha merely drove the "accommodation" between Congress and the Executive underground; Congress no longer uses the legislative veto built into many statutes, but relies instead on informal nonstatutory understandings.280

3. Will Congress simply ignore the decision in Chadha?

No. When challenged through the judicial system, the holding in Chadha is used to strike down legislative vetoes. The need for cooperation among branches of government, however, results in reaching political accommodations at the outset and few challenges making it to the courts.

4. Should there be strict rules limiting Congress in delegating its legislative authority to others?

Yes. The need for nondelegation to be strictly enforced is confirmed by the lack of accountability that results when law-making is removed from Congress. Regulatory administrative agencies operate outside of the checks and balances system envisioned by the Constitution's Framers. Consequently they are not accountable to the people.

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278. See U.S. Const., supra note 1.
279. See Stone, supra note 225, at 431-33.
5. **Has enforcement of the nondelegation doctrine been abandoned by the United States Supreme Court?**

No. The nondelegation doctrine was set aside by the expectations imposed on government by the New Deal era and World War II. The need to delegate authority was a necessary result of the government's more centralized role and expanded size. The Supreme Court, understanding the need for compromise in changing times, has not decided a case on purely nondelegation grounds since the 1930s. As times change, however, we see the Court again embracing the nondelegation doctrine.

6. **Will the nondelegation doctrine be revived?**

Yes. House Bill 219 confirms that nondelegation is on the upswing, possibly as a result of the need to check regulatory administrative agencies.

7. **If the nondelegation doctrine is not revived, and if it proves impossible for Congress to set forth clear standards to govern decisions by administrative agencies, is there an alternative means by which Congress might reassert its original position as lawmaker?**

Yes. Congress can methodically and systematically repeal all delegated legislative authority. Alternatively, government can be decentralized, and local and state governments, as well as private institutions, can assume the functions currently performed by administrative agencies.
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FROM THE EDITOR

This issue of the SMU Law Review honors the memory of A. Kenneth Pye, former president of Southern Methodist University and William Hawley Atwell Professor of Constitutional Law. The tributes, articles, and essays comprising this book are the works of President Pye's colleagues—those who knew, worked with, and were inspired by him over the course of his career. President Pye's distinguished service at SMU marked the final chapter of an impressive career dedicated to serving the academic community. Prior to his tenure at SMU, President Pye served at Duke University as dean and professor of the law school and as president and chancellor of the university. In addition to his many other accomplishments, President Pye was a former president of the Association of American Law School, a member of the American Bar Association’s House of Delegates, and holder of numerous honorary doctoral degrees. His untimely passing was a painful loss not only to SMU but to the broader legal and academic communities as well. Recognizing his many accomplishments, and in particular his contributions to SMU, the SMU Law Review dedicates this issue to A. Kenneth Pye.