After the Legislative Veto

Reflections from the Losing Side

Michael Davidson

AMONG THE CASES the Office of Senate Legal Counsel inherited when it came into being in July 1979 was *Chadha* v. *Immigration and Naturalization Service*, a case that seemed to be hibernating in the Ninth Circuit Court of Appeals after having been argued there fifteen months earlier. The case came to life for us on December 22, 1980, when the circuit court held the one-house veto invalid under section 244 of the Immigration and Nationality Act of 1952. From then until the Supreme Court laid the issue to rest on June 23, 1983, the veto question commanded our attention. Writing just after that preoccupying experience, I offer here only a few preliminary personal observations.

There is no doubt about the completeness of the Court's invalidation of the legislative veto. The key to the breadth of the Court's opinion is its reliance on the presentment clauses. These are the clauses in Article I which provide that all bills and every resolution requiring the concurrence of both houses of Congress shall be presented to the President for signature or veto. The Court wove the presentment clause into a general statement about the separation of powers, but its emphasis on them demonstrates that their violation alone is sufficient to invalidate all vetoes by one or both houses. Both Justice Lewis Powell in his concurrence and Justice Byron White in his dissent perceived the sweep of the ruling. The Court's summary invalidation of vetoes under the Natural Gas Policy Act of 1978 and the Federal Trade Commission Improvements Act of 1980 confirmed these fraternal observations. In short order, the Court had applied the principles of *Chadha* to executive and independent agencies, and to unicameral and bicameral disapproval statutes.

Michael Davidson, legal counsel to the United States Senate, argued the Senate's position on the Chadha *case before the Supreme Court. The views here are his own.*

IT MIGHT SOUND a little like Dr. Pangloss for a supporter of the losing side, like myself, to praise the decision. In looking at the totality of the loss of the legislative veto, however, I have found much to value in Chief Justice Warren Burger's majority opinion as well as in Justice White's dissent. Being not yet fully removed from my own affiliation with this case, I ask indulgence for starting with the dissent.

There has always been a great deal of strong language used in discussions about the legislative veto. It has been said that the device amounted to legislative tyranny and invited manipulation by special interests. But its history was far less dark. Congress used statutory authorizations for the veto to resolve important political difficulties at historic moments when the nation's well-being would have suffered from extended legislative impasses. The veto procedure was a means of assuring a concerned Congress that it could safely delegate

the extraordinary powers the President would need to manage the economy and foreign affairs during World War II. It was used over thirty times in those four years. Subsequently, in the 1970s, Congress turned to the veto to resolve a number of severe disagreements between the political branches about the allocation of budgetary and foreign policy powers. Justice White's dissent recognized the intertwined purposes of the veto: to provide flexibility to the executive, to ensure that final accountability remains with elected representatives, and to furnish presidents and congresses with a means of resolving major differences. Without the veto some of these objectives may be subordinated. Nevertheless, finding a balance between flexibility and accountability remains the challenge to the political branches. The dissent stands as a durable statement of the problem that they must now address through some means other than the veto.

Although we had wishes for a different or at least a narrower majority opinion, still, if we had to lose as totally as we did, the chief justice's statement of basic principles served the occasion well. The breadth of the opinion took from us the chance to make the argument for the veto in what we thought were stronger cases, such as those involving statutes regulating impoundments, war powers, foreign arms sales, and nuclear fuel transfers. However, our plea for judicial prudence may have been overcome by judicial realism. If the question of the legislative veto could be answered by reference to constitutionally invariable procedures, then the full answer could be given in one case. The wide reach of the Court's opinion potentially creates a large immediate repair problem for the Congress. Yet, there is a good reason—as much as we argued against it—to prefer an immediate answer to a prolonged period of statute-by-statute litigation.

The legislative veto has served, as noted, to reconcile intense political differences of the past; with the passage of time many of those disagreements might now be resolved through other arrangements. There is no fixed reason, for example, why it should now be necessary to keep the legislative veto in the immigration laws, even though it was a useful means of distributing power during an earlier impasse. In fact, the Judiciary committees in both houses reported bills in 1980 to repeal the immigration vetoes. The greater value of the legislative veto may always have been its usefulness in resolving new problems, serving as a temporary accommodation during stressful times, until a more lasting equilibrium between the political branches could be developed. This suggests that the truly serious loss may be the unavailability of the veto in resolving presently unforeseen problems. Nevertheless, the wisdom of the Court's decision, as I perceive it, is that the elective branches should know how constitutionally secure their new compromises will be. The chief justice's opinion marks those boundaries clearly.

THE IMMEDIATE QUESTION for Congress is whether existing statutory arrangements will have to be repaired. This question turns in large part, initially, on the severability of statutes that contain legislative veto provisions. In other words, is the delegation of power to the executive or an agency severable from the congressional check on that power, the veto? If not, the delegation falls with the veto.

We presented this as a major consideration, important in its own right, in *Chadha* and in the companion case under the Natural Gas Policy Act. In *Chadha,* the Court found that the presence of a severability clause created a presumption of severability that could not be overcome. In the Natural Gas Policy Act case, the absence of a severability clause did not deter the Court from affirming a judgment of severability. Putting these decisions together, there is hardly a case in which the courts will rule that delegated executive power is completely bound up with the veto that had superintended it. The result is that the executive emerges after these long years with the better part of a fifty-year bargain. The burden will be on Congress to recapture any power it believes it has lost.

This is not to say that severability is inimical to Congress in all cases. The impoundment portions of the Congressional Budget and Impoundment Control Act of 1974 were a compromise between divergent House and Senate approaches. The Senate position was that the President should be required to obtain specific statutory authorization if he wished not to expend appropriated funds. The House approached the matter differently. Reluctant to require congressional action to authorize every

presidential refusal to spend, it preferred a statute that would enable the two houses to select which presidential refusals they would override and to allow all others to become effective by congressional silence.

The final compromise conformed substantially to the Senate's view. If the President cannot get both houses to pass a rescission bill within forty-five days of requesting it, then the appropriated funds must be expended. Thus the rescission of an appropriation, which amounts to the permanent modification of an appropriation law, requires a new law, a result that is fully consistent with *Chadha*. The veto portion of the impoundment act applies only to temporary deferrals of spending within a fiscal year. For cases when the President postpones spending, but does not cancel it, Congress adopted the House plan of selective consideration by each house of proposed deferrals. Under the test of severability, the rescission mechanism stands independently of these deferral procedures. Even if the power to disapprove deferrals is severable from the power to make them, the power of the executive remains sharply limited, since all it can use its power for is to delay the inevitable. The executive has gained more flexibility over the timing of expenditures within fiscal years, but it is not relieved of its obligation ultimately to honor congressional spending determinations.

The preceding short narrative on impoundment controls provides a side lesson of some significance. While the veto has been viewed as a means of reconciling executive and legislative differences, it is naturally a mistake to think of Congress as a monolith. Frequently the veto has been a tool of bicameralism to reconcile the differences between the two houses of Congress. In these cases, the severance of legislative veto provisions will push the statute closer to the original legislative proposal of one house or the other and undo the compromise that had allowed the houses to agree. The unavailability of the veto in the future may make some compromises within Congress more difficult to attain.

ASIDE FROM WHETHER AND HOW to repair existing statutes, the major issue for Congress is whether to search for new mechanisms or to adapt old ones to achieve the objectives of the veto. The beginning point for this search should be the recognition that the legislative veto was a procedure to resolve many different kinds of issues. Now that the common solution that unified these issues—the veto—has been removed, the differences among them become important in assessing what, if anything, should replace the veto.

The subjects to which the device has been applied may be assigned to two rough categories. In one category are those problems for which it would be difficult and perhaps undesirable for Congress to delineate detailed standards for executive action in advance. Often the executive actions involved are those that are taken directly by the President. Examples are arms sales and executive reorganization plans, in which the President's determinations will be shaped by events in contexts not foreseen by the original delegation of authority. The veto supplied a needed procedure for assessing particular decisions that Congress could not have easily anticipated ahead of time and addressed in a general statute. Consequently, the interest of Congress in controlling executive discretion in such matters cannot be fully satisfied by setting clearer standards for the agencies. For this reason, the search for alternatives to the veto, especially in the area of foreign policy, may very well include procedures which require that Congress be a participant in those singular decisions.

Rulemaking is different because there is no reason to doubt that Congress is able to prescribe more explicit standards for rulemakers. Granted, the application of developing scientific knowledge in, for example, environmental regulation can also involve an assessment of the new and the unpredictable. Nevertheless, the constitutional legitimacy of rulemaking requires that agency decisions should be made according to a consistent set of legislated principles. The impetus behind the veto of agency rulemaking came from the difficulty of attaining that goal, not from a doubt of its importance or validity. It also came from a desire for an auxiliary way to ensure adherence to congressional intent and, in some instances, a desire for an opportunity to reexamine particular delegations to rulemaking bodies. Perhaps the greatest weakness in our argument for the veto was our inability to explain why the first of these objectives did not involve a

judicial act, and why the second was not an attempt to amend statutes by a means other than new legislation.

THERE ARE A NUMBER OF ALTERNATIVES already in the field and ready to compete for legislative favor. One is a proposal to assign to the President the responsibility for monitoring the rulemaking activities of both executive and independent agencies. Several years ago, the American Bar Association appointed a Commission on Law and the Economy to study federal regulatory agencies. The commission looked for a means to harmonize the potentially conflicting objectives of regulatory agencies and recommended, in a 1979 report, that the President be authorized by statute to direct agencies to consider or reconsider the issuance of critical regulations. Other alternatives would leave the controlling influence in the legislative branch. Congress could identify those regulatory activities that engender the greatest concern about the proper role of administrative agencies in a democracy, and provide a further statutory delineation of the authority of those agencies. Or Congress could use its legislative power to review specific administrative actions through a constitutional form of legislative review that involves both houses of Congress and the President.

One proposal to implement this last alternative is simply to substitute joint resolutions of disapproval for unconstitutional legislative vetoes. The constitutional infirmity of one- or two-house vetoes of rules is not shared by statutory disapproval of agency rulemaking. There is a good reason to pause before settling for only that, however—and it is that Congress may have more flexible tools at hand. To see why, we should revert for a moment to the structure of the legislative veto and the practical problem it created.

The typical legislative veto statute was organized around three central features: that the agency report a proposed rule or action to Congress, that the effective date of the rule or action be deferred until after a period of congressional review, and that the resolution before Congress be in a prescribed and generally negative form. These statutes were often embellished by procedures for expedited congressional consideration, particularly special rules to hasten committee discharge of veto resolutions and limitations on debate.

Of the three features, the key to the veto procedure was the prescribed negative resolution of disapproval. This resolution was unamendable and it disapproved the entire agency action. The reason for its fixed form lay in the constitutional uncertainty that always hovered over the legislative veto. Even the strongest advocates of the veto recognized that Congress could not reserve the right to reshape an executive proposal. The constitutionality of the veto, everyone agreed, required that the agency proposal be accepted or rejected by a resolution in the form prescribed in the veto statute. If Congress had attempted to go beyond the form prescribed in the veto statute, it would have been engaging in legislation. The negative form of congressional action was never wholly satisfactory because it failed to inform the agency, in a positive fashion, how it should exercise its discretion. There was simply no choice, however, because anything that varied from the statutorily prescribed form of the veto would require new legislation.

This is the silver lining of Chadha: while fixed procedures and a limited question were "inseverable" from the legislative veto, Congress is now free to choose from a wider range of alternatives in erecting a replacement.

If Congress is to adopt statutory resolutions of disapproval, however, it can easily go on to provide substantive guidance to the agency at the same time. In fact, Congress has done this for years in its consideration of rules of civil and criminal procedure which have been prescribed by the Supreme Court and submitted to Congress for review. There is absolutely no cause for constitutional concern if Congress turns its review of selected agency rules into an occasion to act affirmatively about them. This is the silver lining of *Chadha*: while fixed procedures and a limited question were "inseverable" from the legislative veto, Congress is now free to choose from a wider range of alternatives in erecting a replacement. ■