After the Legislative Veto

Restoring the Separation of Powers

Theodore B. Olson

On June 23 the Supreme Court added the name Jagdish Rai Chadha to the honor roll of individuals who are remembered, not for their deeds, but for their singular timing in having been associated with a momentous exposition by the Supreme Court of the meaning of the Constitution. Mr. Chadha's exhilarating legal odyssey seemed hopeless in December 1975 when the House of Representatives passed a resolution requiring that he and five other immigrants be deported, notwithstanding the U.S. attorney general's decision to suspend his deportation (along with 339 others) for humanitarian reasons. Eight years later, after his case was submitted for decision twice in the Ninth Circuit Court of Appeals and twice more in the Supreme Court, the Supreme Court ended his jeopardy by proclaiming that the House resolution was unconstitutional.

In *Immigration and Naturalization Service* v. *Chadha* and in summary dispositions two weeks later of two other cases (*Process Gas Consumers Group* v. *Consumers Energy Council* and *United States Senate* v. *Federal Trade Commission*), the Supreme Court conclusively rejected the innovative and imaginative legislative veto device, thus bringing to a climax six decades of increasing tension between the executive and legislative branches over how federal laws are made in this nation and how and by whom they shall be enforced. The Court's *Chadha* opinion, in which five other justices joined, was delivered by Chief Justice Warren Burger. Justice Lewis Powell concurred in the result, but would have decided the case on narrower grounds. Justice William Rehnquist dissented on grounds which avoided the constitutional issues. Justice Byron White issued a forceful dissent.

Many have described these decisions as a dramatic shift in power away from Congress and toward the presidency. One member of Congress called *Chadha* a "train-wreck" for government. Another was quoted as saying, "Oh, my God, the floodgates are open." The *Washington Post* editorialized in its headlines: "Hill's Hard-Won Gains of a Decade Wiped Out" and "Decision Alters Balance of Power in Government." However, hyperbole from the protagonists aside, the decisions actually represent not a shift of power but a timely halt to a gradual but major erosion of presidential authority, an erosion threatening the balance of power between the two political branches of our national government so carefully structured in Philadelphia in 1787. They provide an ideal occasion for a badly needed reexamination of the allocation of governmental power and accountability in this country.

A reappraisal of where unplanned governmental evolution has been taking us is well

Theodore B. Olson, who serves as assistant attorney general, Office of Legal Counsel, U.S. Department of Justice, helped prepare the Reagan administration's case on the legislative veto issue. The views here are his own.

overdue. The judiciary has turned increasingly from deciding cases and interpreting laws to supervising the manner in which laws are executed and how appropriated funds should be spent. Congress (and its 300-odd committees and subcommittees), having taken on more work than it can possibly handle participating in the execution of the laws which it has passed, has precious little time left for the larger issues for which it is best suited. Responsibility is all too readily vested in "independent" (read "unaccountable") agencies which have become more and more remote from the citizens they govern. Commissions and panels regrettably seem to be the only entities sufficiently respected to make widely acceptable decisions regarding matters as important as which missile system to construct or how to preserve social security.

The Proliferation of the Veto Weapon

Legislative vetoes are both symptomatic and illustrative of these trends. Over the last six decades, various forms of the device have been appearing as major appendages to a vast array of legislative enactments. The concept is seductively appealing and mechanically simple. In its basic form, Congress attaches to the exercise of statutory or constitutional authority by the President, by an executive branch department, or by one of the "independent" regulatory agencies a procedure pursuant to which, usually within a specified time, a decision may be reversed by a disapproval resolution adopted by one house of Congress (the "one-house veto"), both houses (the "two-house veto"), or even a congressional committee or a combination of committees. Another form of legislative veto provides that some type of affirmative vote by one or more committees or one or both houses is necessary to validate an executive action, meaning that the action, rather than being subject to a nullification resolution, is no more than a proposal unless and until approved by some action in Congress. Yet another variation permits either nullification or affirmation by one house to be determinative unless a contrary resolution is adopted by the other house. This variation is called the "one-and-one-half-house veto." In all cases, the congressional "veto" or "approval" is the final legally significant action. It is not forwarded to the President for his approval or veto. Indeed, a study by the House Committee on Foreign Affairs recently described the legislative veto mechanism in the War Powers Resolution—which set the "standard for later enactments, particularly those designed to recapture power for the Congress away from the executive branch"—as an "attempt by Congress to avoid the Presidential veto. . . ." (*The War Powers Resolution*, 1982).

Congress has attached legislative veto mechanisms to virtually every type of executive branch and regulatory agency action—to decisions that are primarily administrative in nature, to those that are "quasi-legislative" (rulemaking), and to such matters as the reprogramming of appropriated funds or the deferral of the obligation of specific appropriations. A few examples are useful to illustrate the breadth and variety of the practice:

- The War Powers Resolution provides, among other things, that in the absence of a declaration of war or specific statutory authorization, U.S. armed forces engaged in hostilities outside the United States "shall be removed by the President if the Congress so directs by concurrent resolution." (Concurrent resolutions, unlike joint resolutions, are not presented to the President for his approval or veto.)
- The provision at issue in *INS* v. *Chadha* allowed the attorney general to suspend the deportation of any alien in cases of extreme hardship, but required him to proceed to deport any such alien if "either the Senate or the House passes a resolution stating in substance that it does not favor the suspension of such deportation."
- The Federal Pay Comparability Act provides that the President must select an agent to recommend federal employee compensation based on comparability with private sector wages. The President may either adjust pay rates in conformity with such recommendations, or forward an alternative plan to Congress, which becomes effective unless either house adopts a resolution disapproving the plan, in which case the President must implement the agent's report.
- Committee vetoes: For example, the Department of Transportation may expend appropriated funds to sell Washington, D.C.'s Union Station only if authorized by the House and Senate appropriations committees; or it may

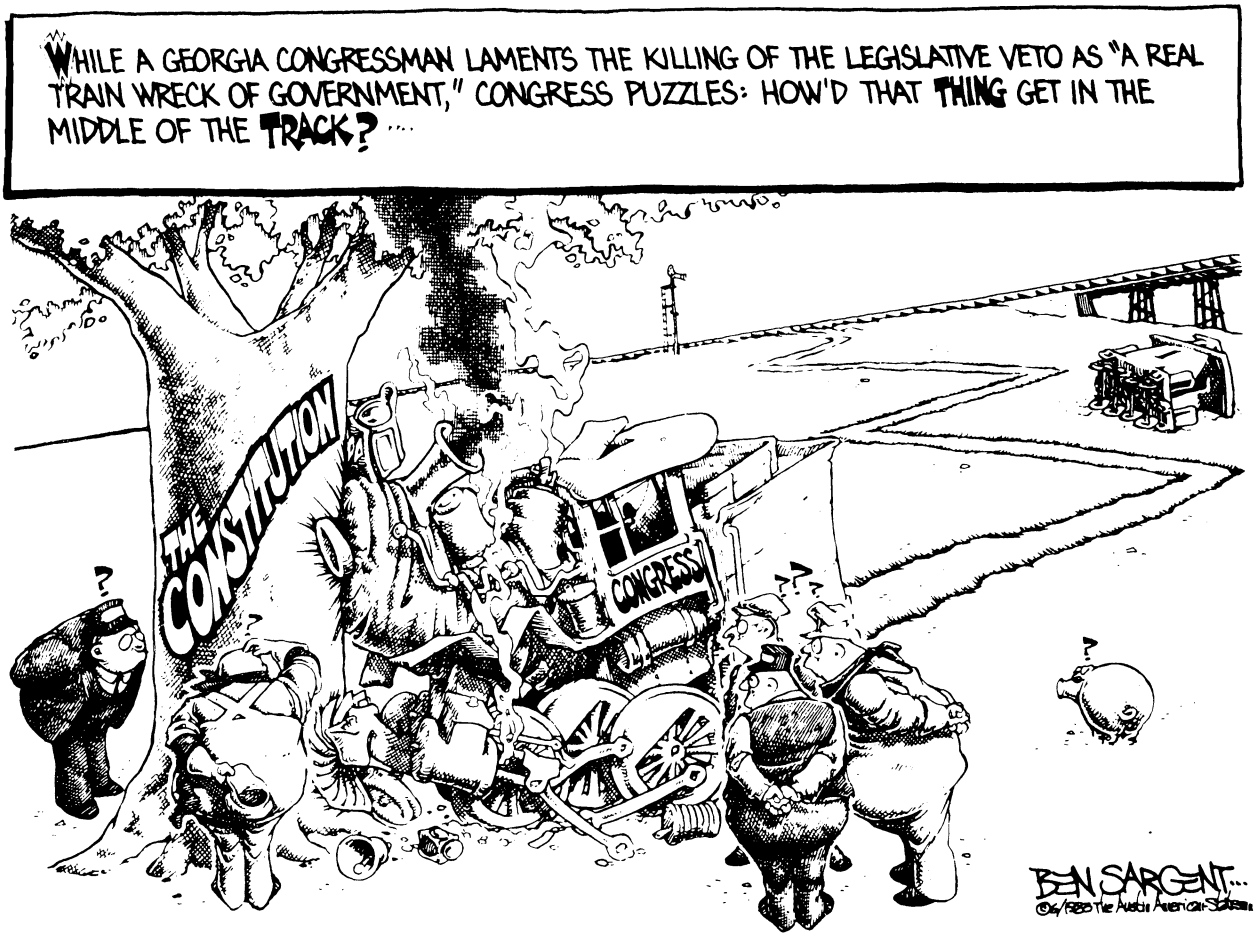
spend funds above certain levels to rehabilitate Union Station, but only if it receives approval from one of two other congressional committees. The Federal Aviation Administration may reorganize its regional office structure if the appropriations committees approve.

• Rulemaking: For example, rules promulgated by the Department of Education, an executive department, and the Federal Trade Commission, an independent agency, are subject to disapproval by concurrent resolutions.

The list of other major statutes that contain some form of legislative veto is impressive and long. It includes the Export Administration Act, the Arms Export Control Act, the National Emergencies Act, the statute providing for promulgation of Rules of Evidence by the Supreme Court, the Nuclear Non-Proliferation Act, the Neutrality Act, the Congressional Budget and Impoundment Control Act, the Outer Continental Shelf Lands Act, the Atomic Energy Act, the Federal Election Campaign Act, the District of Columbia Self-Government and Governmental Reorganization Act, and many, many others. Congress has established broad and pervasive power to reverse decisions made by the agencies and the executive branch, without having to pass laws in order to do so.

Presidential Objections

Our early history contains some intriguing references to congressional resolutions that operated much like legislative vetoes. But the initial twentieth-century experiment with the device has been traced to the administration of Woodrow Wilson, who vetoed an appropriations bill containing a provision that certain documents could not be printed without congressional committee approval. During the Hoover administration, executive branch reorganization authority containing a one-house veto provision was passed by the Congress and signed by the President. One year later, the attorney general questioned the constitutionality of that provision and also advised President Hoover that an enrolled bill which provided



that illegally or erroneously collected taxes could be refunded only with the approval of a joint congressional committee on taxation was unconstitutional. He reminded Hoover that "[e]ach President has felt it his duty to pass the executive authority on to his successor, unimpaired by the adoption of dangerous precedents. . . . The proviso in this deficiency bill may not be important in itself, but the principle at stake is vital." Hoover vetoed the bill. Congress, possibly influenced by the attorney general's legal analysis, omitted the legislative veto provision from the next reorganization bill, only to include it again in 1939. In succeeding years, legislative vetoes were added to legislation with gradually increasing frequency. The experiment became common practice in the 1970s. President Carter complained part way through his presidency that more legislative veto provisions had been passed in the previous four years than in the preceding twenty. Unfortunately, his message fell on deaf ears and the tempo, if anything, increased.

While every President since Hoover has had some occasion to object to congressional efforts to erode presidential powers by affixing legislative vetoes to substantive legislation, there have been times when Presidents have supported, acquiesced in, or simply winked at the practice. Constitutional reservations were occasionally either ignored or rationalized away. Pragmatism and the exigencies of the moment are strong forces in practical politics.

There is some facially appealing logic behind legislative vetoes. In the first instance, Congress delegates vast and generally unchecked policy-making power to executive and independent agencies. Therefore, why not, in the interest of retaining that policy-making power in the hands of the elected representatives, place a congressional check on excessive regulations, regulations that go beyond the scope of the delegated authority or, more likely, are simply viewed as poor or unpopular policy at the time the veto is cast? If legislative power is to be exercised through rulemaking, why not make sure that ultimate power to approve or reject these rules rests with the elected members of Congress rather than the tens of thousands of unelected bureaucrats?

The logic became more compelling to many in Congress when Vietnam and Watergate spurred the desire to check the "imperial presidency." Congress has reasoned that its constitutional authority to appropriate all funds and to determine much of the nation's policy direction carries with it, under the "necessary and proper" clause of the Constitution, the power and duty to delegate the exercise of authority subject to the condition that one or both houses of Congress or its committees do not disagree with the way the authority is exercised. As Justice White pointed out in his dissent in *Chadha*, the legislative veto became, in the minds of many, not only efficient, convenient, and useful, but "an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress's control over lawmaking." The belief was (and is) widespread that, as Justice White also put it, the "complexity and size of the Federal Government's responsibilities [have] grown so greatly that the Congress must rely on the legislative veto as the most effective if not the only means to insure their role as the nation's lawmakers."

A Delicate Constitutional Balance

To many, however, the constitutional objections to the legislative veto are insurmountable and the practical advantages wholly illusory. The constitutional issues go to the very core of our system of government. First, the powers of the national government were quite deliberately divided among three branches because the concentration of governmental power was considered the greatest threat to individual liberty. In the view of the Framers, the accumulation of power in one branch of government was, as Madison expressed it, "the very definition of tyranny," and the legislature, with the authority to make all laws and to appropriate all money, was considered the branch with the greatest

In the view of the Framers, the accumulation of power in one branch of government was, as Madison expressed it, "the very definition of tyranny"....

(Continues on page 27)

Restoring the Separation of Powers
Theodore B. Olson
(Continued from page 22)

potential power. The Framers also believed, along with Montesquieu, that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." Hence, Madison cautioned, "it is against the enterprising ambition" of the legislature "that the people ought to indulge all their jealousy and exhaust all their precautions."

Not only did the Founders believe that vesting executive power in the legislature would lead to tyranny, but they also generally agreed that a great legislative body must set policy. Involving itself in the details of enforcing the law would quickly destroy the legislature's ability to make policy. In a letter in August 1787 regarding the proposed structure of the national government, Jefferson put it this way:

> Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation and takes the place of everything else. Let any man recollect or look over the files of Congress, he will observe the most important propositions hanging over from week to week and month to month, till the occasions have past them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small objects.

The second basic premise of our constitutional structure that is brought into question by legislative vetoes is the President's role in the legislative process. There was virtual unanimity at the Constitutional Convention that the President should participate in that process by exercising a veto over proposed legislation. The purpose was threefold:

- To check, as Chief Justice Burger put it in *Chadha*, "whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures."
- To ensure that the legislative process included a national perspective. As expressed fifty years earlier by the Supreme Court in *Myers* v. *United States* and again in *Chadha*: "The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide. . . ."
- To enable the President to defend the powers of the executive from legislative encroachments. Without the veto, Hamilton observed, the "legislative and executive powers might speedily come to be blended in the same hands" and the President, "absolutely unable to defend himself against the depredations" of the legislature, "might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote."

The third fundamental structural component of the Constitution violated by many legislative vetoes is bicameralism. Hamilton, among others, regarded the prospect of a single legislative chamber so abhorrent that he declared that the result would be the accumulation, "in a single body, [of] all the most important prerogatives of sovereignty, and [would] thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived." The internal check of two chambers, each elected in a different manner and each to provide representation from a different perspective, was extraordinarily important to the Framers.

The presentment clauses of the Constitution bring these principles together. Article I, section 7, clause 2, plainly states that federal laws are made in the United States only by the affirmative votes in two houses of Congress in favor of a bill followed by submission to the President for his approval or veto and, if vetoed, overridden by a two-thirds vote in both houses. Anticipating that if this requirement were confined to bills, it could be evaded "by acts under the form and name of resolutions," the Framers added clause 3. That clause provides that "[e]very Order, Resolution, or Vote" requiring concurrent action (except resolutions of adjournment) "shall be presented to the President," who may approve or veto the order, resolution, or vote. Like clause 2, clause 3 provides that a vetoed bill may still become law if it is subsequently passed by a two-thirds

vote of both houses of Congress. Thus, clause 3, read in conjunction with clause 2, makes quite plain that the Framers intended that *all* exercises of legislative power having the substantive effects of legislation must follow the specified legislative procedure, irrespective of the form of congressional action.

While skillful arguments were made in support of the constitutionality of legislative vetoes, it is difficult to imagine a concept that would more squarely contravene three such vital structural components of the Constitution —separation of powers, checks and balances, and bicameralism. Not including Justices Powell and Rehnquist, who would have approached the matter differently, a total of nineteen federal court of appeals judges and Supreme Court justices considered the constitutionality of legislative vetoes in the development of the three cases that the Supreme Court finally decided in late June and early July. In several broad and unequivocal opinions, all relying more or less on the same constitutional principles mentioned here, eighteen of the nineteen came to the same conclusion: legislative vetoes are fundamentally and unquestionably antithetical to the text, structure, and basic tenets of our national charter.

In *Chadha,* the Supreme Court determined that *every* legislative act taken by Congress had to comport with the presentment clauses. And it defined legislative acts broadly to include all actions that have the "purpose and effect of altering the legal rights, duties and relations of persons including Executive Branch officials . . . outside the Legislative Branch."

Aside from constitutional objections, there are practical objections to the veto device. Widely respected observers have provided compelling testimony that legislative vetoes simply did not serve the purposes for which they were intended, and were, in fact, counterproductive. A distinguished American Bar Association Commission on Law and the Economy found them "inefficient and not very helpful" ("Federal Regulation: Roads to Reform," 1979). The commission's report added: "Unlike the normal process of legislative amendment, legislative vetoes totally destroy the rules as promulgated, put nothing in their place, and leave the agency in a quandary as to what if anything it should do next to fulfill its statutory mandate."

Former assistant attorney general and University of Chicago law professor Antonin Scalia, now a federal appeals court judge, set out a devastating indictment of the practical effect of legislative vetoes in these pages four years ago ("The Legislative Veto: A False Remedy for System Overload," November/December 1979). He and others have demonstrated that rather than fostering more participation in the policy-making process by members of Congress, legislative vetoes do exactly the opposite in a variety of ways. In the first place, they give Congress a convenient, perhaps subliminal, excuse for excessive, overly broad delegations of authority. It is much easier to justify broad grants of authority with the rationalization that specific exercises of delegated authority will be reviewable.

Second, legislative vetoes foster nonaccountable decision making and allow lawmakers to evade politically tough decisions. As Judge Scalia observed, broad, safe, and unimpeachable platitudes such as "safe and healthy" places to work, products free of "unreasonable risks of injury," and freedom from "sex discrimination" are placed on the legislative agenda and approved, while the genuinely political task of converting these ideals into hard policy choices are left to unelected decision makers. Lawmakers may criticize an unpopular decision by an "unelected bureaucrat" without ever having to cast, and therefore defend, an affirmative vote on the subject.

They also tend to bog Congress down in precisely the minutiae about which Jefferson cautioned. When every agency decision, however insignificant, is reviewable, Congress will find itself hopelessly mired in trivia and unable to expend its precious human resources on the larger issues involved in giving policy direction to the country. Moreover, instead of increasing the involvement of elected officials in decision making, the practical effect of legislative vetoes is to impose an additional bureaucracy consisting of committee and subcommittee staffs over the existing agency bureaucracy. As a result, the process becomes even more mysterious and Kafkaesque, intelligible only to the lobbyists. Finally, the legislative veto mechanism may undermine respect for the rule of law in that Congress may appear to use it in an arbitrary and capricious manner. The House voted to compel Mr. Chadha's deportation without de-

bate or recorded vote. And the House's veto of the Federal Energy Regulatory Commission's incremental pricing rule for natural gas (overturned by the Supreme Court two weeks after *Chadha*) seems to have been a case of changed sentiment: the same body, just two years before, had passed the law requiring such a rule.

The legislative veto, then, was due for reappraisal even if the Supreme Court had upheld it. Now that it has been struck down, both the courts and Congress will have major decisions to make. For the courts, the task is the more limited one of tying up loose ends. The *Chadha* Court decided that the legislative veto in that case was severable from the authority granted the attorney general. Hence, the attorney general may continue to suspend deportations in appropriate cases and there is little likelihood of litigation over past acts under that provision. However, suits over future exercises of authority under other statutes with legislative veto provisions may be initiated on the theory that the unconstitutional segment may not be severed from the grant of authority. If not, the substantive authority might fall along with the unconstitutional feature. While the Court's legislative veto decisions strongly suggest that most veto provisions will be found to be surgically removable without damage to the residual authority, that result is by no means automatic. Each statute will have to be examined individually.

Retroactivity might also be an issue for the courts. To what extent may authority be exercised if it was initially transferred by the President from one agency to another pursuant to a reorganization statute with a legislative veto? While the courts may not wish to upset settled decisions or the allocation of authority which has existed for many years, imaginative lawyers will almost certainly develop arguments to the contrary.

Congress, meanwhile, will have the more open-ended responsibility of deciding what it should do, if anything, to replace the authority that it granted to itself and to its committees through legislative vetoes. Many constitutional alternatives are already being debated. In organic statutes, Congress can—and undoubtedly should—place more specific and precise limits on agency authority to issue rules, particularly in areas having major policy implications. Many broad delegations of power have been on the books long enough to provide a base of experience from which Congress can derive more exact and detailed statutory guidance.

Congress can always override unwise, inappropriate, burdensome, or excessive agency rules with legislation. After all, the only difference between an unconstitutional concurrent veto resolution and a valid joint resolution is that the President is included in the latter process. The President is not likely to disagree with both houses often, and he must pay a political price if he does. Some argue that timely congressional responses to agency actions will be difficult because of the procedural hurdles within Congress that impede the enactment of legislation. However, Congress can adopt rules ensuring early floor consideration of bills overturning agency regulations. This technique, of course, suffers from the same criticism that the ABA commission leveled against legislative vetoes: it is not particularly constructive simply to overrule a regulation if nothing is put in its place.

Congress can also adopt sunset provisions that require agencies to return to Congress periodically for reenactment of generic authority. Congress can hold oversight hearings, at which members of Congress may demand explanations for rules perceived to be frivolous or excessive. Congress can adopt resolutions expressing views which may not be legally binding upon an agency, but which may be useful from a policy standpoint in an agency's implementation of the law. "Report-and-wait" provisions, pursuant to which agencies must give Congress an opportunity to respond through legislation before rules become effective, suffer the defect of prolonging important rulemaking, often unnecessarily. But they may be useful in some situations and are certainly constitutional.

Congress, of course, has the authority to appropriate the funds with which agencies execute the law. Encumbering appropriations measures with substantive legislation is a most unfortunate process because it mingles policy judgments with budgetary considerations and circumvents the committee deliberations that are so vital to sensible substantive enactments. However, it is a constitutionally sound congressional technique and Congress may choose to employ it in certain select, but one would hope limited, situations.

The alarmists who have been bemoaning the *Chadha* decision seem to have little faith in the Constitution. Justice White's dissenting opinion suggested that Congress would be faced with the dilemma of having "either to refrain from delegating necessary authority, [therefore] leaving itself with a hopeless task of writing laws with requisite specificity . . . , [or to] abdicate its law-making function to the executive branch and independent agencies." However, it is by no means obvious that government has become so complex in the last few years that writing reasonably specific delegations of authority has become "hopeless." Nor is it evident that including in the process the one official elected by the nation as a whole, exactly as contemplated by the Constitution, has suddenly become impossible or unpalatable.

Justice White's dissent in the two legislative veto cases which extended *Chadha* to one- and two-house vetoes over independent agency rulemaking made the telling point that the "President's authority to control independent agency law-making . . . on a day-to-day basis is non-existent." He argued that the invalidation of the legislative veto removes congressional control as well, which "merely guarantees that the independent agencies, once created, for all practical purposes are a fourth branch of the government not subject to the direct control of either Congress or the executive branch." This question of accountability is a valid and vital one, but Justice White seems quite wide of the mark when he implies that *Chadha* means that an unaccountable fourth branch is a constitutional command. The legislative veto was neither an effective nor constitutional answer to the real problem of an unaccountable fourth branch. It is time to develop more congressional direction in the guidance given to these agencies and to put responsibility for the faithful execution of the law back where it belongs—in the executive branch, under the President who the people elected to fill precisely that role.

Restoring Accountability

Each time an apparent need in our society is addressed by a branch of government neither created for nor equipped to handle the task, the consequences prove to be regrettable in the long run. The courts tend to lose both the support of the governed and their capacity to decide cases expeditiously as they venture more into the legislative and executive arenas to fulfill perceived lapses by the other branches. The same is true of the other branches—their capacity to perform the functions assigned to them atrophies and their credibility and acceptability as instruments of government decrease as they plunge more of their limited resources into responsibilities allocated to other branches.

Each time an apparent need in our society is addressed by a branch of government neither created for nor equipped to handle the task, the consequences prove to be regrettable in the long run.

We have witnessed an increasing tendency in recent decades not to trust the existing institutions of our government to solve society's ills. One consequence has been resort to a mixed assortment of commissions, agencies, government or quasi-government corporations, authorities, institutions, and boards. They collectively form the "fourth branch" to which Justice White referred, but they are not cohesive, centrally managed, or accountable in any intelligible way to specific governmental authority, and are barely understandable to the vast majority of Americans. It is legitimate and timely, especially in the aftermath of *Chadha,* to ask whether these entities produce what we expect of them or whether they are simply self-perpetuating and unchecked baronies. Perhaps some of the energy that we will undoubtedly expend in seeking alternatives to legislative vetoes should be channeled into efforts to return authority to the three branches of government carefully established by the Framers of the Constitution. As a beneficial byproduct, the process might expose authority that is not only lodged at random in various unrestrainable agencies, but is not even the proper business of the federal government. The primary result, however, should be the rediscovery that in our system power must be exercised in a manner that allows the electorate to hold its representatives to account for decisions employing that power. ■