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The Congressional Veto: Preserving the Constitutional Framework

ARTHUR S. MILLER* & GEORGE M. KNAPP**

The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of government would preclude the establishment of a Nation capable of governing itself effectively.¹

INTRODUCTION

This article analyzes a recent important development in the division of powers between Congress and the Executive. It is more speculative than exhaustive. The aim is to provide a different perspective on a basic constitutional concept.

It is assumed that the "practical statesmen" who wrote the Constitution must have sought to establish a system of government which encouraged interbranch cooperation and abhorred unnecessary conflict. Their major premise was the necessity of achieving policies reflecting all societal interests;² their goal was the achievement of meaningful communication between the branches of government. Cooperation, rather than conflict, was to be the operative principle. Only under such circumstances would the products of the governmental process be superior to the products of government under the Articles of Confederation.

Over the course of 190 years, these "practical statesmen" have been accorded a unique status. They have been honored not only as political philosophers of the highest caliber, but also as gifted prophets of the most profound social and political changes. This has had significant consequences for constitutional scholarship. For if some scholars (and judges) are to be believed, one need only refer to the writings of the framers to find the answer to current political questions. The view that the "intent" of the framers ought to control present day decisionmaking, however, produces, 

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¹Buckley v. Valeo, 424 U.S. 1, 121 (1976).
²This reflection of all societal interests requires the existence of a balance of influence between the numerous social forces which affect governmental institutions. See F. NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE 96-148 (1957).
as historian Michael Kammen has said, an "awkward anomaly in American
thought." Professor Kammen continues:

Although the founders were themselves engaged in a continuous quest for
modes of legitimacy appropriate to their times and needs, subsequent
Americans have sought to validate their own aspirations by invoking the
innovations and standards of our hallowed pantheon as unchanging
verities. This nostalgic vision of the Golden Age actually conjures up an
era when values were unclearly defined, when instability often seemed
beyond control, when public rancor and private vituperation were
rampant, and institutions frail and unformed. Even if the ancient
documents are considered to be dispositive on some
constitutional issues, these papers do not necessarily reflect a true con-
sensus of the framers. To view The Federalist Papers, for example, as
determinative of a group or societal intent, one must ignore the fact that
this work is authoritative only to the extent that it reflects the views of three
articulate men who wrote as advocates, not as dispassionate scholars. Their
views were not shared by all participants at the Philadelphia Convention—
not even by the thirty-nine men who eventually signed the Constitution. In
fact, there are inconsistencies in some of the Papers that reflect a failure on
the part of Hamilton, Madison and Jay to resolve, among other things, the
fundamental question of the limits and nature of governmental inter-
action. Constitutional issues, accordingly, should be analyzed in the light
of the system established by the framers as a group rather than in the
context of the arguments presented by a few of its members at the debates in
the Convention or in subsequent publications. Study of the system
requires an understanding of the key principles of governmental cooper-
ation as the constitutional order has evolved, rather than analysis of general
statements of political theory advanced for partisan purposes. Since it is
impossible to read the minds of men long dead, explanation of the
implications of the concept of separation of powers requires consideration
of issues "in the light of our whole experience and not merely in that of
what was said a hundred [or more] years ago." Put more bluntly, the
Founding Fathers have been buried; they cannot and, indeed, should not
rule us from their graves.

M. KAMMEN, PEOPLE OF PARADOX 56 (1972).

Id.

Madison, in particular, did not resolve completely the issue of the limits of interaction.
In The Federalist No. 47 (J. Madison), he maintained that the principle of separation of
powers permits a branch to have some agency of control over another branch. Yet, in The
Federalist No. 48 (J. Madison), he argued that no branch should possess an "overruling
influence" over another.

This examination of the "congressional veto" mechanisms discards as essentially irrelevant certain methods of analysis used by various scholars.\(^7\) Rather than labeling the veto as "legislative" or "quasi-legislative," the focus here will be upon its use as a means of legislative oversight. Our examination will concentrate on the validity of the congressional veto as a method of attaining the broad goal of interbranch cooperation central to the constitutional system. We reject the view that conclusions drawn from the debates of the Constitutional Convention or the writings of certain individuals are controlling on this issue. Voices from the eighteenth century provide useful information on the events to which the Constitution was intended as a reaction. They are, however, but one of several criteria to be employed today in constitutional decisionmaking. Their views cannot be considered to be absolute authority. In fact, when specific statements of the framers contradict the spirit of interaction among the branches and the checks thereon which are at least implicit in the Document of 1787, these statements should be rejected.

The congressional veto also requires analysis in light of the clear alteration of the historical distribution of governmental power. Under the traditional theory of separation of powers, "the rule is that in the actual administration of the government, Congress or the Legislature should exercise the legislative power, the President or the state executive, the Governor, the executive power, and the courts or the judiciary the judicial power . . . ."\(^8\) But that is not now, nor has it ever been, entirely true. The Constitution did not separate powers; it established a system of separated institutions sharing power—a quite different, and indeed fundamental, proposition.

The drafters of the Constitution listed specific acts of interbranch intervention which are permissible. The President can veto certain acts of Congress.\(^9\) The Senate is allowed to participate in the appointment process.\(^10\) Nowhere in the Constitution, however, does one find an explicit provision permitting federal courts to invalidate acts of Congress or acts of state governments.\(^11\) The fact that judicial intrusion into the legislative process is considered legitimate today indicates the evolutionary nature of the system of checks and balances. In other words, it is not per se improper


\(^8\)Hampton & Co. v. United States, 276 U.S. 394, 406 (1928) (Chief Justice Taft).

\(^9\)U.S. Const. art. I, § 7, cl. 3.

\(^10\)U.S. Const. art. II, § 2, cl. 2.

\(^11\)Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
for checks to be instituted merely because the framers failed to provide expressly for the situations which give rise to the need for the checks.

It is therefore contended that the use of the legislative veto should be examined in the context of the shifting relationships of power which give meaning to the system of “separation of powers.” These relationships require innovative methods of interbranch intervention to affect necessary checks on newly asserted powers. The congressional veto is but one method of obtaining some measure of control over the exercise of delegated powers. The issue of its constitutionality requires study of whether the veto, as currently used, serves to unduly hamper those governmental activities which Congress has deemed appropriate to be performed by the executive branch. The basic question is one of both law and policy: whether the veto may be exercised by Congress, and if so, what institutional changes might be required to control its use.

THE NEW ALLOCATION OF POWERS

The framers surely did not foresee that a combination of congressional delegation of powers and executive control over major sources of information would produce a situation where the President, the executive branch generally, would become the major policy formulator. As Professor Clinton Rossiter has said: “Presidential duties are not purely Executive in nature. He is also intimately associated, by Constitution and custom, with the legislative process, and we may therefore consider him to be the Chief Legislator.” If that be so, then a constitutional change of sweeping proportions has taken place, without benefit of amendment. That change necessitates concomitant adjustments in the historical view of “the” legislative power. Something was needed to prevent Congress from becoming an organization with only ostensibly coequal powers, thereby allowing the Executive to become even more powerful.

Part of that “something” is the increasing use of the congressional veto. In the view of former Attorney General Edward Levi, this check on the Executive is but one example of an “irreversible change in our constitutional system.” Its importance is seen in the fact that its use as a means for congressional review of administrative actions produces “a new and ironic reversal of roles—the executive making the laws and the legislature wielding, in effect, the veto.” That “veto,” of course, is extraconstitutional in that it is not expressly granted. But, as will be shown, its existence can reasonably be implied from the constitutional text.

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14Id.
Furthermore, the veto is both statutory and nonstatutory. Most scholarly attention has been directed to the former only; little is known about nonstatutory vetoes, but as will also be shown, they are likely to be more important than their statutory counterparts.

**Types of Mechanisms**

A recent study has shown that "[n]o less than 295 separate provisions adopted in 196 different Acts of Congress during the last forty-three years (since June 30, 1932) have mandated some type of Congressional review over or consent for contemplated or pending executive implementation of those laws."\(^{15}\) These provisions, commonly known as the "congressional veto," permit Congress, its committees and even specifically named members to exert some form of control over executive actions.

The provisions include both informal and formal mechanisms of legislative oversight. Although some controversy has developed over the constitutional status of the "informal veto,"\(^{16}\) critical commentary has long focused only on those statutes which authorize Congress or its committees to control specific executive policies through passage of resolutions of approval or disapproval. These statutes, referred to as the "legislative veto," encompass a variety of control mechanisms.

In general, the statutory provisions share a variety of common procedures.\(^{17}\) Most require notification of Congress, or at least certain congressional committees, of planned executive action. The difference centers on the type of congressional response needed to prevent the executive action. In some areas, resolutions of approval must be passed by Congress or a prescribed committee before the executive may act. In most cases, though, the executive action is deferred for a specified time period, at the end of which the action becomes operative unless Congress or an authorized committee has adopted a resolution of disapproval.

The most important aspect of the veto is that it prevents, or at least postpones, executive actions from taking effect. The mechanism takes on further significance since it operates to prevent the exercise of the presidential veto power.

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\(^{15}\) Norton, Congressional Review, Deferral and Disapproval of Executive Actions: A Summary and an Inventory of Statutory Authority (April 30, 1976) (Library of Congress Congressional Res. Serv. 1) [hereinafter cited as Norton, Congressional Review]. Not all of the 295 provisions are still on the statute books.

\(^{16}\) Control of Federal Administration, supra note 7, at 603, notes President Truman's reaction to a bill, H.R. 3096, 82d Cong., 1st Sess. (1951), which would have required certain executive officials to "come into agreement" with the Armed Services Committees of each House over certain land purchases. Truman's veto message expressed his concern over the "gradual trend on the part of the legislative branch to participate to an even greater extent in the actual execution and administration of the laws." H.R. Doc. No. 133, 82d Cong., 1st Sess. 3 (1951).

The most commonly used formal method of congressional veto is the concurrent resolution, which initially appeared in 1919. The Senate Committee on Foreign Relations proposed that provisions should be attached to the Versailles Treaty which would permit membership in the League of Nations to be terminated on passage of a concurrent resolution. Since 1919 the concurrent resolution has been employed as a means of retaining control over certain statutory grants of authority. At present, such a resolution may be used to, inter alia, terminate specified actions of the armed forces, revoke acts passed by the District of Columbia government, limit expenditure of funds for the assistance of specified Middle East countries, and prevent sales of defense supplies or services in excess of $25 million to foreign countries. In the view of Congress, these resolutions do not come within article I, section 7 of the Constitution, and thus are operative without being submitted to the President for his approval or veto. That, however, is an unresolved constitutional question as there has been no Supreme Court decision on point.

The "one-House" veto, however, became the first form of legislative veto to be exercised by the Congress. In 1932 the President received authority to reorganize executive departments and agencies under the terms of the Legislative Appropriation Act. The reorganization proposals, however, could be terminated should either House pass a resolution of disapproval. Failure to act meant that the reorganization went into effect.

The statutory power of one House of Congress to control designated executive proposals and regulations has also been extended. One-House veto provisions are included in statutes which grant power to block "impoundment" decisions made by the President, fund authorizations

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18 Id. at 4-5. Norton counts 36 statutory provisions which require both Houses to pass concurrent resolutions expressing either approval or disapproval. He finds only 27 provisions which enable actions to be terminated or prevented through the actions of just one House of Congress.
19 Control of Federal Administration, supra note 6, at 575, summarizing 58 Cong. Rec. 8074 (1919).
20 For a discussion of the historical development of this veto mechanism in general, see Congress Steps Out, supra note 7, at 1002-28.
26 Although the President's reorganization power has now lapsed because Congress failed to renew the statute, President Carter has requested that it be renewed. See N.Y. Times, Nov. 18, 1976, at 1, col. 6; N.Y. Times, Jan. 31, 1977, at 12, cols. 1-2.
for construction of the Diego Garcia naval base, regulations governing public access to the tapes and papers of President Nixon, defense contracts in excess of $25 million, and regulations proposed by the Federal Elections Commission.

If the goal of legislative vetoes is prompt and effective control of executive actions, the one-House resolution provides an easier means for Congress to express its disapproval than the concurrent resolution which requires the passage of duplicate resolutions. Should, however, the goal be that of forcing greater disclosure of proposed executive actions, the committee veto becomes important. It not only enables a congressional committee to be fully informed of the details of an executive action, but also permits a more focused and lengthy study of the merits of a given proposal.

Committee vetoes were rarely used before World War II. Of the provisions currently in force, only a minority should be considered to be statutory legislative vetoes. Most statutory provisions merely require agencies to consult with appropriate committees before implementing proposed policies. The consultation requirement, however, permits a powerful, albeit informal, method of congressional control. Agencies usually acknowledge and honor the objections raised by the committees.

As a formal tool of legislative oversight, the committee veto is important as a means of controlling limited fields of executive operations. Of the twenty provisions that give committees the right to prevent promulgation of planned regulations or activities, most noteworthy are those relating to experimental educational programs, reclamation and irrigation projects, and construction proposals. The committee veto is more interesting for its limited scope than for its use as a means for the

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32Small, The Committee Veto, supra note 7, at 6.
34Small, The Committee Veto, supra note 7, at 7.
38Congress Steps Out, supra note 7, at 1093 (APPENDIX B).
effective control of major executive policy decisions. Again, its constitutional validity is unsettled.

Finally, there are nonstatutory legislative vetoes which have arisen through long continued practice. Often, though certainly not always, the nonstatutory vetoes arise in the way appropriation statutes are administered. They are a means by which prescriptions from both Houses of Congress may be altered through accommodations reached between administrative officers and committee chairmen. They are a form of committee veto, but without authorization in statute. These vetoes occur, for example, in “reprogramming” appropriated funds and have become so routine that the procedures are now published by the Department of Defense. Reprogramming means shifting funds from one project to another within a budget account. It should be distinguished from “transfers,” which are transactions between accounts—from one to another. This type of legislative veto or approval finds the administrator conferring with committee members, seeking to reallocate appropriated funds. If, for instance, $100 million is appropriated to the Army to buy widgets, and subsequently it is determined by the Army that gadgets are better than widgets, the $100 million can, if the appropriate committees approve, be reprogrammed to buy gadgets. That transaction is a neat circumvention of the full legislative process, but no one, least of all the Executive, complains. Far from being controversial, it is an extraconstitutional means by which many tasks of government can be accomplished without going through the full legislative process.

In a complex, technologically oriented society, government could hardly operate without use of nonstatutory, informal accommodations that have been developed between executive and congressional officials. Should the statutory congressional veto be judicially invalidated, the nonstatutory web of interactions that make up a substructure of government in spite of the facade of separation of powers would, a fortiori, be at least imperiled, if not also rendered illegal. The mechanisms of nonstatutory vetoes are a classic illustration of the fact that separation of powers means cooperation as much or more than it means conflict. There are, in other words, compelling policy reasons for not disturbing the status quo, reasons that suggest that the judiciary would be ill-advised to trench upon the web of

39The Director of the Bureau of the Budget, after receiving approval of the Chairman of the Committee on Appropriations of the House of Representatives, was permitted to amend a circular which described government policy on rents for federal employees living quarters. Supplemental Appropriations Act, 1953, Pub. L. No. 82-547, 66 Stat. 637 (1952) (codified in scattered sections of 2, 5, 31, 40, 50 U.S.C.).

40L. FISHER, PRESIDENTIAL SPENDING POWER 75-98 (1975) [hereinafter cited as PRESIDENTIAL SPENDING].


42PRESIDENTIAL SPENDING, supra note 40, at 76.
accommodations that enable the government to act. Those who challenge the congressional veto apparently do not realize what a declaration of unconstitutionality would do to the arrangements of mutual benefit, and presumably of public benefit, that have developed over the past several decades. One of two quite undesirable consequences would result: either the Executive would be given untrammelled power to "execute" the laws without significant check, or Congress would have to legislate precisely and narrowly on each subject. The former alternative would mean an even greater absence of accountability than now exists; the latter would so slow government that urgent needs would not be met.

*The Need for the Congressional Veto*

Changing socioeconomic relationships in the exercise of governmental powers require new checks and balances. It may be true, as Joseph Harris has said, that Congress has made "broad delegations of authority to the executive departments because of the size and complexity of their operations." But other factors indicate the need for Congress to give itself a veto power over executive exercise of delegated authority. These include the following:

1. The environment in which Congress operates has drastically changed. The size of the institutions in our pluralistic nation is increasing exponentially, as compared with 1787, and this greatly complicates the decisionmaking process. Congress has not changed structurally in any essential manner since the first Congress, even though socioeconomic and political conditions have been completely altered.

2. There is more diversity in the United States as a result of mass higher education and a rising level of income.

3. There has been a knowledge explosion. The amount of information available is beyond the capacity of anyone, even any institution, to assimilate.

4. The scope and nature of governmental activity has been vastly expanded, particularly since the "constitutional revolution" of the 1930's. Government has changed from the "negative, nightwatchman state" to one which has assumed affirmative obligations.

5. The United States is part of a global village existing on Spaceship Earth. This means that literally every place on this planet, as well as the places in the unimaginable reaches of space, is of importance to the nation, and thus to Congress.

6. The power of the President, as one person, and of the presidency, as an institution, has increased beginning with Woodrow Wilson and taking an exponential leap with Franklin Delano Roosevelt and his successors.

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*J. Harris, Congressional Control of Administration* 246 (1964).
This poses critical problems for time honored concepts of "separation of powers."

7. There is an institutional deficiency in the means with which to hold the public administration generally, and the President specifically, accountable in any systematic manner.

8. Generally speaking, there is a knowledge deficiency on Capitol Hill, both in Congress and in the staff. Both tend to be captive to what the Executive wishes to tell them.

9. Congress recesses or adjourns for periods of time, both short and long. For example, it adjourned on October 2, 1976, and was not scheduled to return until January 1977. During all that time, the executive branch was at work. Government cannot stop simply because Members of Congress want to run for office.

10. Congress tends to react to problems rather than compiling sets of well considered goals towards which it wishes to move. Accordingly, it is always on the defensive. It waits for the executive branch to establish priorities, which can then be defined in terms of particularized congressional interests, because there is no institutional capability to project future, nonspecific needs. Nor, for that matter, is there any such capability elsewhere in government, although some agencies at least try to think about the future. Without a comparable effort by Congress, both Houses will forever be playing "catch up."

These societal and governmental factors assume greater significance when viewed in the context of growing congressional recognition that it is necessary to develop some mechanism to ensure that powers delegated to the executive branch are exercised in the contemplated manner. Therefore, increased use of the congressional veto should be understood as an attempt to formulate "legislation which would give Congress some type of veto over Executive Branch rules and regulations judged to be inconsistent with the legislative intent of the authorizing statute."44

The congressional veto, statutory and nonstatutory, is by no means the only method Congress has to insure that the policies embodied in its statutes are not defeated by executive branch implementation. As Professor Davis has noted, Congress "can and does revoke or modify grants of authority, it uses its power of appropriation to control the general direction of policy, the Senate uses the power to confirm or reject appointments, and the various committees listen to complaints and allow administrators to explain their policies."45 But these procedures are inadequate to the need; they have not kept up with increased executive power.

Congressional committees have recognized that the traditional legislative checks are not sufficient to oversee executive action. For example, in discussing section 206 of the Marine Fisheries Conservation Act of 1975,\textsuperscript{46} which permits either House to disapprove certain international fisheries agreements, a House committee stated:

\begin{quote}
[T]hese procedures [veto mechanisms] recognize that the oversight role of Congress cannot be effectively undertaken unless there is adequate review and deliberation before these agreements become a reality. Given the clearcut and uniform requirements embodied in section 201, which will govern all agreements authorizing foreign fishing, it is unlikely that either House of Congress will be compelled to disapprove an agreement. Section 206 would simply guarantee that requirements will be religiously followed in the future.\textsuperscript{47}
\end{quote}

That the congressional veto is a necessary method of enforcing the requirement that the Executive comply with legislative policy has long been the major claim of the veto's supporters.\textsuperscript{48} They note that the typical methods of legislative oversight cannot serve to safeguard the congressional interest in policy implementation that follows statutory prescriptions. Threats to reduce appropriations may serve to prevent specific contraventions of congressional directives, but the mere fact that Congress reduces a specific appropriations account does not raise sufficient pressure on the executive branch to force implementation of a policy that it wishes to ignore.\textsuperscript{49} Investigations may help focus attention on flagrant violations of policy directives, but they cannot operate as a means for providing information necessary for a detailed assessment of the pattern of executive response.\textsuperscript{50} Finally, the revision of statutes, with the sometimes insurmountable requirement that presidential vetoes be overruled, may not serve as an effective method to revoke those powers which the Executive has a vested interest in continuing to exercise. The Supreme Court noted as much in \textit{Sibbach v. Wilson}.\textsuperscript{51} Traditional oversight techniques, unlike the legislative veto, cannot be adequately used "to make sure that the action under the delegation squares with the congressional purpose."\textsuperscript{52} \textit{Sibbach} is the leading judicial expression on congressional vetoes; the case, however, dealt not with executive actions, but with the power of Congress to "veto" new rules of procedure in the federal courts.

The basic issue which must now be decided is whether congressional retention of a power to review actions of the Executive taken pursuant to

\begin{footnotes}
\item \textsuperscript{47}H.R. REP. No. 94-445, 94th Cong., 1st Sess. 60 (1975) (emphasis added).
\item \textsuperscript{48}The Legislative Veto, supra note 7.
\item \textsuperscript{49}Id. at 508.
\item \textsuperscript{50}Id. at 510.
\item \textsuperscript{51}Sibbach v. Wilson & Co., 312 U.S. 1 (1941).
\item \textsuperscript{52}Id. at 15.
\end{footnotes}
delegated authority is consistent with the constitutional allocation of governmental powers. Resolution of that issue requires study of the constitutional system itself, at least insofar as separation of powers is concerned. Analysis of the constitutional arguments that critics and supporters of the veto have presented will set forth the conflicting considerations.

THE MUDDLED DEBATE

In determining the appropriate test for evaluating the constitutionality of the legislative veto, it is important to note particular aspects of past analysis. Past discussion has focused on three issues: delegation of congressional authority, avoidance of the presidential veto power, and intrusion into executive actions. In attempting to give meaning to these concepts, fundamental analytical problems have developed. When reliance is made on provisions of the Constitution and writings of its major theoreticians, certain logical inconsistencies occur. These inconsistent conclusions have been either ignored or rationalized into oblivion.

Problem 1: Determining the Limits on Delegation

While some scholars have explored and defined the limits on the exercise of the legislative veto in the concurrent resolution form, others have focused attention on the question of the constitutionality of the one-House and committee resolution forms of the veto. This latter question is usually answered in a manner consistent with findings made on the validity of the concurrent resolution. If the commentator has felt that the legislative veto is within the proper scope of congressional activity, it is not unusual that the conclusion will be reached that all its manifestations are also constitutional. Should the commentator believe that Congress as a whole cannot exercise the veto power, the general conclusion will be reached that either its committees or one House acting alone may not exercise this power.

The delegation issue, not surprisingly, is more noteworthy for the logic employed in certain arguments than for the conclusions that are reached. The central issue is whether Congress may delegate to one House or to a committee the power to use veto resolutions. Criticism of that type of delegation was first succinctly expressed by President Eisenhower. While

53Note, however, that the approval given is subject to a qualification. The Legislative Veto, supra note 7, at 477, suggests that the committee veto may be exercised properly only if the subject matter in question is within the usual scope of the committee.

54Control of Federal Administration, supra note 7, at 569-70, phrases the issue in the following manner: "[D]o these statutes represent attempts by Congress . . . to vest legislative power in a single House or in a congressional committee?"
approving a bill which permitted either the Senate or House Committee on Interior and Insular Affairs to disapprove certain projects by committee resolution.\(^5\) the President stated that he "did not believe that the Congress can validly delegate to one of its committees the power to prevent executive action taken pursuant to law."\(^6\) Such congressional action, in his view, constituted unlawful congressional delegation to its committees of the legislative function "which the Constitution contemplates the Congress itself, as an entity, should exercise."\(^7\) This objection is predicated on the premise that "[t]he Framers intended that the concurrence of both Houses be required except in those cases specifically provided for elsewhere in the Constitution, as in the treaty-making and appointment powers enumerated in Article II."\(^8\) It is argued that since disapproval has the effect of modifying or repealing part of the statute, it is equivalent to a legislative act. Therefore, it is said that such action must follow the usual express constitutional procedures for enactment of legislation.\(^9\) The argument, when its premises are applied with any measure of consistency, produces some interesting conclusions. Professor Bernard Schwartz has argued:

\[\text{[I]f the holding that the legislature cannot be given the power to amend a rule . . . were consistently applied in an inflexible manner, it would practically destroy the rule-making power of the administrative agencies themselves . . . [A]gencies themselves are given the power to make laws through their rules; otherwise, how can the legislature be enacting a change in the law through its annulment power. But if that is true, following the rigid separation of powers approach, are not its delegations of such law-making power to the agencies equally invalid?}\]

Additional conceptual problems are raised in the context of the discussion of the delegation doctrine. The critic must argue that the delegation of executive authority violates some constitutional principle. When multiple grounds of objection, bicameralism and usurpation, are raised, care must be taken to prevent inclusion of mutually exclusive theories in an otherwise internally consistent argument. The unconstitutionality of the committee veto cannot be based on the view that, on the one hand, it is legislative action under article I, and, on the other hand, that it impermissibly projects congressional committees into a domain reserved for the executive branch.\(^{61}\) That argument is logically untenable; if

\(^7\)Id.
\(^8\)Brief for Plaintiff at 52, Clark v. Valeo, No. 76-1825 (D.C. Cir. 1977).
\(^{61}\)Small, The Committee Veto, supra note 7, at 66.
Congress can validly enact a committee veto through compliance with the requirement of the presentation clause, it would be able to directly control executive action.

Problem 2: Determining the Effect of the Presidential Veto Clause

Those who seek to analyze the constitutionality of the veto clause in terms of its effect on the presidential veto power are faced with a major quandary. A decision must first be made as to whether the congressional veto, in either its general or individual manifestations, is to be considered an "Order, Resolution, or Vote to which the concurrence of the Senate and House of Representatives may be necessary." In making this decision, support usually is drawn from what limited explanations exist as to the meaning of the key terms.

References are made to the debates at the Constitutional Convention in attempts to indicate how the phrasing of the presentation clause was achieved. Reliance on history, however, surely does not provide a clear indication of what the framers "intended." We know that Madison felt that "if the negative of the President was confined to bills, it would be evaded by acts under the form and names of Resolutions, votes, etc." This proposal, although rejected on August 15, 1787, was adopted in a "new form" the next day. What is not known is why the framers felt the need to include Madison's suggested addition. It could be argued that since the framers left little guidance as to what the terms in the presentation clause were to mean, it should be interpreted strictly. Legislative veto by concurrent resolution, accordingly, would have to be presented to the President. Other forms, which do not by their terms require concurrence by both Houses of Congress, would be exempt from presidential review. The folly of using a strict interpretation is obvious. As one commentator recently wrote: "It verges on irrationality to maintain that action by concurrent resolution, whereby Congress is at least held in check by its own structure, is invalid because the veto clause so states, but that the invalidity of a simple resolution, wherein a single House acts without check, is more in doubt." Some commentators try to avoid the pitfalls of strict interpretation of the presentation clause either by referring to the fragmentary reports of Constitutional Convention debates or by invoking "precedent." To them, that clause is to be viewed as presenting a flexible concept, and attention

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62 U.S. Const., art. I, § 7, cl. 3.
63 Id.
65 Congress Steps Out, supra note 7, at 1066 n. 428.
66 Logical consistency should require that other concepts, especially such nebulous themes as "checks and balances" and "separation of powers," be accorded the same treatment.
thus must focus on what types of congressional action must be presented to the President. The issue, though rephrased by individual scholars, becomes one of "whether exercise of the veto constitutes 'legislating' in the sense regulated by the Constitution."\(^6\)

Opponents of the congressional veto generally structure their attack along the following lines:

1. A determination is made of the type of congressional actions that ought to be subject to presidential review. The premise is generally accepted that only "non-legislative, non-policymaking concurrent action"\(^6\)\(^8\) is exempt from presidential review. Critics recognize that some policymaking acts, such as proposed constitutional amendments, are exempt from presidential veto.\(^6\)\(^9\) Therefore, congressional activity subject to presidential review must be both "legislative" and "policymaking" in character.

2. An attempt is then made to define the framers' "intent" in giving the President the power to be involved in the legislative process through exercise of the veto. After analysis of the debates at the Constitutional Convention and the writings of one Publius, two conclusions are usually drawn. First, the veto power is seen as "part of the legislative procedure primarily to give the President a defensive weapon against congressional encroachment upon his constitutional powers, and only secondarily as a check against unwise action."\(^7\)\(^0\) Second, the President's veto power is not to be avoided merely because "policy decisions having the force of law" are embodied in the form of resolutions which permit Congress to control the final government decision.\(^7\)

3. The legislative veto is defined as a mechanism having the effect of law since it sets policy and has a "public effect."\(^7\)\(^2\) In fact, concurrent resolutions are seen as "indistinguishable from the policy decisions and legal consequences of ordinary legislation."\(^7\)\(^3\)

4. Exercise of the control mechanisms of the legislative veto is viewed as an encroachment on the "executive function" to administer the laws since it gives the legislative branch power to approve or disapprove executive acts.\(^7\)

5. The legislative veto is. unconstitutional as currently formulated. Proposals for specific exercise of congressional control must be received by the President so that he can exercise his veto power.

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\(^6\)The Legislative Veto, supra note 7, at 474.
\(^7\)Control of Federal Administration, supra note 7, at 573.
\(^8\)Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798). There are no cases on point, but presumably declarations of war would not be subject to presidential veto.
\(^7\)The Federalist No. 73 (A. Hamilton).
\(^7\)Control of Federal Administration, supra note 7, at 593, 595.
\(^7\)Brief for Plaintiff at 47, Clark v. Valeo, No. 76-1825 (D.C. Cir. 1977).
\(^7\)Control of Federal Administration, supra note 7, at 593-594.
\(^7\)37 Op. Att'y Gen. 56, 58 (1933).
That analysis, seemingly logical at first glance, has debilitating shortcomings as a fundamental constitutional test. The argument permits congressional disapproval of executive actions so long as each exercise of control is presented to the President for his approval or veto. Thus, if the President accepts the congressional statement, or if a veto is overridden, Congress would be constitutionally permitted to direct executive activities. In other words, by following proper procedure Congress would be able to "interfere" with the "execution of the laws." Surely that interference is contrary to the view that "the executive power" connotes an independent residuum of presidential power unreachable by congressional action.

To use a different approach, the legislative veto, not being "legislative in effect," need not be presented to the President. As a matter of constitutional doctrine, however, it is invalid because it impermissibly invades the President's powers. That analysis, at best, is circular; it assumes the answer in the statement of the premises. The question is whether the term "the executive power" in article II has a substantive content unreachable by any type of congressional action. But one cannot use questions as reasons or make a question an unassailable first premise—even though the Supreme Court at times has been guilty of that intellectual sin.\textsuperscript{75}

Rational analysis no doubt can be devised to avoid the problems of internally inconsistent doctrines. Use of the veto power test, however, raises additional constitutional difficulties. The issue is whether the President, who is sworn to faithfully execute the laws, may act so as to alter those conditions which Congress has placed by law on the exercise of statutory powers. More specifically, does the "horizontal effect"\textsuperscript{76} of article I, section 8, clause 18, mean that Congress has the constitutional power to exert control over the exercise of executive authority? This is an unresolved constitutional question. The plain meaning of the "necessary and proper" clause, however, would seem to indicate that the ultimate power is congressional—that Congress, in other words, can condition its delegation of powers by placing limits on the delegates so as to insure compliance with congressional intent. The doctrine of unconstitutional conditions places restrictions on some curbs; for example, "the means devised in the execution of a power granted" must not be forbidden by the Constitution.\textsuperscript{77} No such infirmity exists with respect to the congressional veto. The question is whether the power to veto executive action through passage of a resolution impliedly avoids the requirements of the presentation clause.

\textsuperscript{75}See, e.g., Wilson v. Girard, 354 U.S. 524 (1957).
The conflict between the veto and the necessary and proper clause of article I is not one that may be readily resolved. The Supreme Court tends to defer to congressional actions in most cases. In the *Legal Tender Cases,* for example, the Court stated that "sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it." In the case of the congressional vetoes, the issue is whether the means devised to control the execution is "proper" under the Constitution. There can be little doubt that they are "necessary" to ensure faithful adherence to the congressional purpose. But if they conflict, at least impliedly, with the President's veto power, they should be invalidated. Whether such a conflict in fact exists is answerable neither by reference to constitutional text nor by the intentions of those who wrote that text; as with all constitutional issues, it is not logically deducible from the Constitution. The question, in brief, is one of "policy"—of the political theory appropriate to the times and the circumstances. That theory must take into consideration the need for institutional adjustments to counteract the growth of power in the executive branch. Absent such innovations, executive power, already dangerously unaccountable, will become completely out of external control—a development contrary to the letter and spirit of American constitutionalism.

It cannot be stated with assurance that the laws which authorize congressional control over executive actions are *per se* inconsistent with the "letter and spirit of the Constitution." Consideration of the constitutionality of the congressional veto, by focussing on the second, "forgotten" half of article I, section 8, clause 18, means that Congress should be able to control executive activities authorized by statute. The plain meaning of the power to make laws "necessary and proper" to carry into effect the powers "vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" leads ineluctably to that conclusion, a conclusion that comports with the quintessence of the fundamental law, in that it permits reasonable checks to be placed on the exercise of power.

**Problem 3: Understanding the Meaning of Separation of Powers**

The belief that the congressional veto may be properly examined in the context of the "separation of powers" is difficult to sustain. The "doctrine" has not been defined by the courts in any manner which would be dispositive on the issue of the constitutionality of the legislative veto.

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79Id. at 539.
80Logan v. United States, 144 U.S. 263, 283 (1892).
Nonetheless, the separation of powers argument must be faced. Under this argument, exercise of the congressional veto constitutes an impermissible interference with executive action, rather than merely being an exercise of a power granted to Congress by a statute. The veto power is undoubtedly an interference with the administration of the laws. To suggest otherwise may be "to brush aside or ignore a wealth of authoritative precedent." But do these precedents indeed exist? Or, if they do, are they "authoritative"? If so, there is a source of analytical thought arguably free from the internally inconsistent arguments that result from presentation of a separation of powers question in terms of what is "legislative" and what is "executive." It is doubtful that these precedents exist: "[F]actually relevant federal precedents condemning the legislative veto as an impermissible legislative invasion of the executive domain are not available for citation."

Analysis of the legislative veto may, however, focus on cases where traditional separation of powers arguments were used to resolve claimed intrusions on executive authority. Major cases in this area are Springer v. Philippine Islands and Buckley v. Valeo, where the Supreme Court found unconstitutional attempts by legislative bodies to share the executive power of appointment. Neither of these cases, nor theoretically similar state cases, have addressed the specific issue of whether the congressional veto can be used to control executive actions. Buckley specifically left the question unanswered; but Justice White, concurring, opined that "the provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto." That position is unassailable.

Discussion of "precedent" eventually becomes a mere recitation of the traditional separation of powers themes of control and conflict. Since the relevant cases, including Sibbach, cite a history that is incomplete and an intent of the framers that is in fact unascertainable, both critics and supporters of the congressional veto can find support for their arguments.

Resolution of constitutional issues framed in terms of the separation of powers doctrine requires an understanding of the conflicting purposes assigned to that "sacred maxim of free government." Separation of powers is not a doctrine in the sense of positive law; it is a political theory concerning a system of allocation of governmental powers. It reflects the consensus of the thirty-nine individuals who signed the Document of 1787.

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81 Small, The Committee Veto, supra note 7, at 42.
82 Id. at 43.
83 277 U.S. 189 (1928).
84 424 U.S. 1 (1976).
85 U.S. Const. art. II. § 2, cl. 2.
88 The Federalist No. 47 (J. Madison).
on what was then perceived as the permissible limits of governmental interaction. But use of it as a standard for judging the constitutionality of activities not foreseen is made impossible by the fact that the framers did not agree on what the doctrine specifically meant. The term was not used in the tripartite division of powers. It is merely an inference drawn from the first three articles of the Constitution.

To individuals such as Madison and Hamilton, separation of powers may have had a special meaning of institutional conflict. Powers, said Madison, were separated and specifically allocated to “guard against concentration of the power of governance in the same hands.” Even with separation, however, it was foreseen that one branch might intrude on the prerogatives of another in a manner not consonant with the Constitution. To prevent this interference, institutional restraints were designed to allow the affected branch a method of self-defense. As Madison stated:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provisions of defense must in this, as in all other cases, be made commensurate to the danger of attack... It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this; you must first enable the government to control the governed; and in the next place oblige it to control itself.

The problem, in brief, is that “a gradual concentration of... powers in the same department” has in fact occurred, with the consequent need for institutional invention to cope with that unforeseen development.

The Madisonian conception of institutional conflict poses a key question: If conflict is the norm, can different modes of self-defense be established to meet changing forms of intrusion? Madison and Hamilton are silent on this point. Some analysts, though, argue that governmental branches can only exercise those control mechanisms which are expressly granted in the Constitution. For example, referring specifically to the legislative veto, Watson states:

The fact that the historical precedent for the current use of congressional extra-legislative power was strictly confined in scope and emerged after

89Id.
90THE FEDERALIST No. 51 (J. Madison) (emphasis added).
considerable debate over congressional control of executive power, suggests that the practices would have been regarded as improper by the Framers and their early successors. Likewise, no support for extra-legislative control of the executive can be derived by analogy from the non-legislative roles granted to the Congress by the Constitution; these functions are explicitly stated, and the ways in which they may be exercised are narrowly specified.\textsuperscript{91}

The difficulty with that argument is at least twofold. First, it would defy rational analysis to assume that the Founding Fathers felt that the Executive could protect itself from congressional interference,\textsuperscript{92} but that Congress could not seek to maintain some control over powers it delegated, since the framers did not anticipate that the flexibility implicitly given to the Executive in administration might be used to frustrate policy goals set by Congress. Second, it must be considered, as has been said above, that the second part of article I, section 8, clause 18 means precisely what it says—that Congress has power to make laws “necessary and proper” to carry into effect the “powers vested by this Constitution in the Government of the United States, or in any Department or office thereof.” An argument based on historical analysis of the framers’ intent cannot ignore some plain constitutional language while giving implied, “inherent” effect to parts of article II. A rigid view of separation of powers thus does not provide an adequate method of constitutional analysis. It does not serve to “oblige” an executive dominated government, such as we now have, “to control itself.”

\textbf{AN ALTERNATIVE TEST}

\textit{Potential Cases}

As long as reliance is placed on contradictory theoretical data and unclear “tests,” it is doubtful that the issue of the constitutionality of the legislative veto will be coherently and comprehensively resolved. The judiciary, however, will eventually have to decide cases which raise a specific challenge to the legislative veto.\textsuperscript{93} Judges must be prepared to give a complete and understandable analysis of the constitutional implications of the veto. This requires that those techniques which have served only to muddle past analysis, that is, attempting to label the veto and employing strict theoretical interpretation of the separation of powers, be rigorously

\textsuperscript{91}Congress Steps Out, supra note 7, at 1030.
\textsuperscript{92}Such intrusion had actually occurred under the Articles of Confederation. See generally C. Rossiter, 1787 \textit{The Grand Convention} 46-57 (1966).
\textsuperscript{93}The case of Clark v. Valeo, No. 76-1825 (D.C. Cir. 1977), highlights the practical difficulties involved in challenging the legislative veto. The plaintiff must allege sufficient acts so as to convince a court that an actual “case or controversy” exists. Even if such showing is made, the plaintiff must avoid attacking the legislative veto process, for such claim might be considered to raise a “political question.”
avoided. Further, judges should appreciate two other important factors: (a) that a declaration of unconstitutionality of the statutory legislative veto could well jeopardize many established nonstatutory procedures that inure to the benefit of the Executive and, indeed, permit some urgent governmental work to be done; and (b) a recognition that with the rise of the "imperial presidency" some alternative must be devised if accountability on executive power is to be effected. Despite Watergate and President Nixon's resignation, the presidency still dominates.

Three cases now in the judicial pipelines may provide the basis for a definitive constitutional ruling: Clark v. Valeo, Atkins v. United States, and Pressler v. Simon. The second is, at this writing, still awaiting decision; Clark, however, was decided on January 21, 1977 and Pressler was decided in October, 1976 by a three-judge federal district court. Each merits brief attention here. In Clark, Ramsey Clark, a voter and then a candidate for the Democratic nomination for United States Senator from New York, brought suit against the Senate, the House of Representatives, and the Federal Elections Commission, seeking to have the "one-House" veto of the Federal Elections Act declared unconstitutional. At the trial, District Judge Charles Richey, rather than deciding the procedural and substantive issues, certified five questions to the United States Court of Appeals for the District of Columbia Circuit. That court sat en banc to hear argument on the questions together with a special three-judge court made up of the district judge and two appeals judges. The Department of Justice sought intervention at the district court level under 24 U.S.C. 2403, but this petition was denied by Judge Richey, who instead allowed permissive intervention under rule 24(b). At oral argument and in its brief, the Justice Department, even though it had intervened on Clark's side, maintained that Clark did not have standing to bring the suit. But the court of appeals held that the suit was not ripe for adjudication and remanded it to the district court with an order to dismiss it. That conclusion clearly evidences judicial wariness to enter the political thicket of the legislative veto.

In Atkins, 140 federal judges brought suit to recover back pay allegedly owed them because Congress had not taken inflation into consideration and had, accordingly, diminished the pay of judges contrary to the

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94No. 76-1825 (D.C. Cir. 1977). For other cases, see McCorkle v. United States, No. 76-1479 (4th Cir. 1976); Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp., No. 76-3712 (5th Cir. 1976).
95No. 41-76 (Ct. Cl. 1976).
97Id.
100Id., slip op. at 1 (D.D.C. Aug. 13, 1976). The certified questions include the constitutional attacks on the veto mechanism and the article III issues of standing and ripeness.
101See note 89 supra & text accompanying.
At this writing, the Court of Claims has yet to rule on the suit. As a part of the suit, the government, as represented by the Department of Justice, "admitted" in oral argument that a congressional veto in the Federal Salary Act of 1967 was unconstitutional—the same position it took in *Clark v. Valeo*. The Justice Department further argued that the judges' case was nonjusticiable.

*Pressler* was decided on October 12, 1976. It involved a suit by a Member of Congress for a pay increase. Under the Postal Revenue and Salary Act of 1967 and the Executive Salary Cost of Living Adjustment Act of 1975, the President may recommend salary increases for, *inter alia*, Members of Congress. Again, there is provision for a one-House veto, which was in fact exercised in 1974 and 1976. *Pressler*, a Congressman, brought suit under the "ascertainment" clause of the Constitution: "The Senators and Representatives shall receive a compensation for their services to be ascertained by law." The three-judge court granted him standing to sue under the doctrine of *Kennedy v. Sampson*, but then rejected his suit on the merits. After noting the absence of relevant data in *The Federalist Papers* or constitutional debates, the court went on to state:

Repeatedly during the discussions preceding its adoption, our founders sought to preserve in the Constitution a flexible approach to government that would facilitate accommodation to changing conditions and experience. The Constitution is not to be parsed in the narrow, rigid, pedantic manner of a statute. It must remain flexible and adaptable, placing reliance upon the checks-and-balances built into our tripartite format and the sound attitude of voters expected at the polls. The "necessary and proper" clause of Section 8 of the same Article [I] is but one expression of this sound approach. *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

The Salary Act and the Adjustment Act fix congressional compensation by law and these statutes are not prohibited by Article I, Section 6. Neither of these Acts insofar as they govern ascertainment of congressional compensation contravene the Constitution. Accordingly, plaintiff's motion for summary judgment is denied and the complaint is dismissed.  

*Pressler* thus may be said to stand for the proposition that the necessary and proper clause has both a "horizontal" and a "vertical" effect. That clause, since *McCulloch v. Maryland*, has been considered to apply

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102 Plaintiffs claim that the action of the Senate in disapproving the salary adjustments submitted by the President under the Federal Salary Act of 1967, 2 U.S.C. § 351 et seq. (1970), was unconstitutional.
107 511 F.2d 430 (D.C. Cir. 1974).
almost entirely, insofar as the constitutional law of the Supreme Court is concerned, with the vertical effect of enabling Congress to add implied powers to the expressly delegated powers in the first seventeen clauses of article I, section 8, and simultaneously to authorize, through the supremacy clause, federal congressional control over an ever increasing amount of state and local activities. The second part of clause 18 speaks horizontally in terms of a similar congressional power over the other departments of government. As said above, its meaning is plain and unequivocal. The leading study of the clause’s second, “forgotten” half maintains that the broad sweep accorded the vertical portions of the necessary and proper clause by the McCulloch doctrine is equally applicable to the horizontal. Or as Professor Charles Black has said, “The powers of Congress are adequate to the control of every national interest of any importance, including all of those with which the president might, by piling inference on inference, be thought to be entrusted.” If the Pressler case is a true harbinger of judicial things to come, then surely Professor Black’s views will be validated. The answer may well come in the final resolution of either Clark or Atkins, or both. The question still remains, though, as to which of the available methods of analysis should be used to determine the constitutionality of the legislative veto.

The Needed “Test”: Separation of Powers as a Political Principle

If, as has been argued, the historical notion of separation of powers is not a sufficient test of constitutionality, either because it is not clear what the framers intended when they divided responsibilities among the branches, or because it is not valid to say that the original intention, even if determinable, is controlling; then it becomes necessary to provide a better standard of judgment. Such a standard is adumbrated here.

The conventional wisdom about separation of powers is that of Justice Brandeis, dissenting in Myers v. United States, where he said that powers were separated in the Constitution “not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution

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10Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of “The Sweeping Clause,” 36 Ohio St. L.J. 788 (1975). Professor Van Alstyne maintains that the second half of clause 18 assigns to Congress alone the responsibility to say by law what additional authority, if any, the executive and the courts are to have beyond that core of powers that are literally indispensable, rather than merely appropriate or helpful, to the performance of their express duties under articles II and III of the Constitution. Id. at 799.


1272 U.S. 52 (1926).
of the governmental powers among three departments, to save the people from autocracy. Modern scholars are beginning to refute that view, at least in part. Powers were separated in 1787 as much to promote efficiency as anything else. John Adams, Thomas Jefferson, John Jay and James Wilson all stressed the need for governmental efficiency as the principal reason for establishing an executive independent from the legislature, for under the Articles of Confederation government was both weak and inefficient.

A major conclusion that should be drawn from analysis of the Constitutional Convention is that the framers adopted a governmental system which permitted controls to be evolved which would take care of alterations in the balance of governmental powers while also allowing potential disputes to be resolved through a process of cooperation. The theme of cooperation, the forgotten side of separation of powers, has characterized most of American history. It serves as the basis for a more appropriate "test" for determining the constitutionality of the legislative veto.

It is doubtful that the concept of separation of powers can really have any objective meaning. As Professor Felix Frankfurter noted:

On the whole, "separation of powers" has been treated by the Supreme Court not as a technical legal doctrine. Again barring some recent decisions, the Court has refused to draw abstract analytical lines of separation and has recognized necessary areas of interaction among the departments of governments. . . . Enforcement of a rigid conception of powers would make modern government impossible. The control of navigation, the regulation of railroad rates, the administration of the Pure Food and Drug Act, the allocation of wave lengths, are all achieved by refusing to treat the doctrine of separation of powers as a sterile dogma.

Cooperative interaction is to be preferred, although some conflict is both inevitable and desirable. What may be considered an act of cooperation by one branch, however, may be viewed as an improper intrusion by the other. As former Attorney General Levi stated:

Inevitably in a system of divided powers, there are points where responsibility conflicts, where legitimate interests and demands appear on either side. In such instances, accommodation and compromise reflecting the exigencies of the matter at hand have been not only possible but a felt necessity. The essence of compromise is that principle or power is surrendered by neither side, but that there is a respect for the responsibility of others and recognition of the need for flexibility and reconciliation of competing interests.

113Id. at 293.
A better test, simply stated, requires a balance of the need for accountability of congressionally delegated powers with the requirement that the effective exercise of those powers not be unduly hampered. This is a pragmatic judgment, based on the recognition of both the goal of cooperation and the inevitability of institutional conflict. It permits measures to be devised which achieve avoidance of conflict through resolution of disagreements arising from Executive misinterpretations of the congressional intent. Separation of powers, when it is thus viewed as a political principle of intergovernmental resolution of conflict combined with a principle of accountability, serves as a valid method for analyzing the constitutionality of the legislative veto.

The advantages stemming from cooperation between the executive and legislative branches in the area of policy formation have been noted by proponents of the legislative veto.

One of the unique advantages of the veto, when properly used and structured, is that in areas where such requirements [effective and intelligent decisions on policy] are hardest to fulfill. . . . The device provides a means of inducing Congress to take increased advantage of the Executive's expertise and its resources for planning, coordination, and taking an overall view.\footnote{The Legislative Veto, supra note 7, at 513-14.}

Supporters of the veto claim that it offers additional benefits. Cooperation, it is argued, produces policies which reflect a consensus of divergent institutional interests. For that consensus to be achieved, each branch must treat itself on an equal basis. The congressional veto, accordingly, "functions to preserve and strengthen that equilibrium which lies at the heart of the separation of powers principle."\footnote{Id. at 515. The "equilibrium" referred to is that which prevents the feared "overconcentration of power in the hands of any one department."}

The congressional veto cannot be considered, by any criterion, to be per se violative of the separation of powers doctrine. But that cannot be the final answer; unnecessary disruption of executive branch operations must be avoided. Legal doctrine alone cannot provide definitive answers. Answers to the disruption question can only be forthcoming from data that would demonstrate that Congress has both the institutional capacity and the will to be in operation continuously, thereby enabling it to give more than perfunctory attention to executive actions submitted for review. By no means can it now be said that Congress is capable of fulfilling that necessary task. If Congress is to persist in its use of its veto power, and if it is validated when a proper case reaches the Supreme Court, then the need for institutional improvements will become imperative. That need would
become urgent if H.R. 12,048 (or similar measures) were to become law. The bill provides for congressional review of nearly all administrative rules. Stoutly opposed by the Executive, it is a clear harbinger of legislative things to come, although no concomitant institutional reform is evident.

THE VETO IN OPERATION

Analysis of the congressional veto should focus on whether the mechanism has been exercised in a manner which achieves its basic goals. From the few instances where it has been employed, it is clear that the mere presence of a veto power does not serve to prevent certain acts arguably not within a statute's terms, although, to a minor extent, Congress has managed to force the President to reevaluate some proposed activities. The failure of the congressional veto, however, is most evident in the areas of war powers and "impoundment" of appropriated funds, where the Executive has the distinct advantage of being able to complete actions before Congress has a chance to respond.

Under the War Powers Resolution of 1973, Congress may order the removal of United States armed forces committed by the President. As the Mayaguez incident shows, however, troops may be deployed and removed quite promptly. By the time Congress can agree on a concurrent resolution which will order removal, the troops may have completed their limited mission. Even if the hostilities still continue when Congress is ready to act, it is improbable that it will deny the President needed support. The years that Congress took to oppose the Vietnam conflict is vivid evidence supporting that conclusion. It is pointless to order the President to cease operations when such activities have already halted. The veto, if it had been exercised in the Mayaguez incident, merely would have served to state congressional disapproval of the action. As a mere slap on the wrist, it would have no real meaning.

"Impoundment" is another area where the President has long felt immune from congressional control. With passage of the Budget Control and Impoundment Act of 1974, however, the President must now submit proposed rescissions or deferrals of budget authority to Congress. Those

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120See OREGON STATE LEGISLATIVE RES. OFF., LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS 106 (Doc. No. 76 1975). Similar conclusions may be drawn from state legislatures, for example, Connecticut, where the system operates to send all proposed rules to the legislature.
“impoundments” may be disapproved if either House passes a resolution within forty-five days of the original submission. Nevertheless, the Executive can “impound” funds at the end of a congressional session and avoid facing congressional disapproval. The General Accounting Office announced in September, 1976 that President Ford had violated the Act by delaying the report of the proposed “impoundment” of a $126 million congressional appropriation for child nutrition and education programs. Before Congress could even be in a position to respond to this action, the government would have entered a new fiscal year, so that any proposed response would lack effect.

Even though some veto provisions have been ineffective, Congress has influenced executive branch policy in foreign affairs. Congress, for example, used the concurrent resolution power of the amendments to the Atomic Energy Act of 1954 when it approved a proposed two-year extension of an atomic energy cooperation agreement with Israel.

Some general conclusions on the effectiveness of the legislative veto may be made. In general, a President may still act in a manner contrary to congressional policy. Nevertheless, executive activity may occasionally be altered as a result of threats to veto proposed executive programs. In an effort to prevent the Foreign Assistance Subcommittee of the Senate Foreign Relations Committee from vetoing arms sales to Saudi Arabia, President Ford agreed to reduce substantially the number of weapons to be sold.

Data are not available to validate the proposition that congressional veto mechanisms unduly delay the administration of the laws. Except for cases such as the Federal Elections Commission which in 1976 failed by two days to meet the statutory requirement of laying before Congress for thirty days, there are few instances where it can be said that executive actions are held up for lack of congressional response. This is particularly true of the nonstatutory vetoes—those in which executive and congressional officers “come into agreement” on the reprogramming of appropriated funds for example.

Needed Reforms

Critics of the congressional veto have focused their arguments traditionally on abstract constitutional issues. Attention should be directed to the practical difficulties involved in implementation of committee review

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124 Los Angeles Times, Sept. 5, 1976, § 1, at 2, col. 3.
procedures. If Congress is not ready to exercise the veto power effectively and speedily, the whole constitutional debate may be academic. Surely the President's constitutional duty to veto or approve statutes within ten days should be paralleled by a like requirement for Congress to act as quickly. If the congressional veto is to be used as a truly effective oversight technique, the problems of haphazard analysis and institutional delay must somehow be remedied. No ready solution is apparent, but some matters are clear.

Congress, should it acquire the power to review all agency regulations, must have competent staff in sufficient quantities so that adequate analysis may be made of the highly technical issues often dealt with by agencies. The examination should focus on the impact of proposed rules on the social structure. There must be a means of analyzing in advance what difference it will make to the American people if a given administrative rule is or is not promulgated. That type of review requires Congress to create a staff structure adequate for the purpose.

Application of the congressional veto to the rulemaking process requires that Congress take fundamental steps to achieve institutional reorganization. It is essential that Congress operate on a full-time basis. Executive agencies should not have to wait for Congress to return from adjournments or recesses in order to proceed with administrative implementation of policies. Furthermore, Congress should adopt specific criteria for analyzing proposed regulations. It might, for example, be asked whether the regulation was the product of regularized administrative procedures. It also should be asked whether the regulation conforms with the policies expressed in the authorizing statute. Finally, in selecting criteria for analysis Congress should consult with those states that have had experience with legislative review of administrative rules.

The congressional veto is consistent with the principle—the political theory—of separation of powers. The principle, if viewed as a theory of political interaction, has a comprehensible meaning. It requires that the goal of flexibility and of cooperation between the branches be central to the operation of governmental power. One branch should not seek, nor be allowed, to dominate the other. The branches, furthermore, should not act as isolated units. The principle requires that they cooperate so that political differences are resolved and urgent tasks of government are taken care of without undue delay. The congressional veto not only serves as a means for ensuring that delegated power be exercised as Congress originally desired, but it also forces the Executive to consult with Congress.

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129 H.R. 12048, The Administrative Rule Making Reform Act of 1976, 94th Cong., 2d Sess. (1976), if it had been passed, would have exempted from legislative review those rules which relate to agency management or personnel as well as those relating to national defense secrets.

130 Alaska, Arkansas, Connecticut, Georgia, Iowa, Kansas, Michigan, Montana, Nebraska, Oklahoma, Oregon, South Dakota, Virginia, Washington and Wisconsin.
That delay, speaking generally, is not undue; it is a necessary part of American constitutionalism. It would add little delay to the already far too slow administrative processes. The view, bruited in the 1930's, that the agencies would prevent delay has not been validated by experience. The standard additional time, thirty or sixty days, would not, as governmental affairs go, be excessive. There are other and deeper problems of the public administration.

Past discussion of the congressional veto has been noteworthy mainly for the fact that commentators have been able to arrive at opposite conclusions using similar premises.¹³¹ This problem can be resolved only if analysis focuses on constitutional principles as being expressions of a general political philosophy rather than as specific statements of strict rules.¹³² When so viewed, the congressional veto may be examined in terms of whether it can operate in a manner consistent with that philosophy. The major issue that must be resolved, then, and the subject which should be the focal point for future study, is whether Congress is capable of exercising the veto in such a manner that it does not become a tool of selective harassment which will unduly delay necessary executive action.

¹³¹ Compare Stewart, Constitutionality of the Legislative Veto, 18 Harv. J. Legal Studies 593 (1976) with Congress Steps Out, supra note 7. Both rely on the Constitutional Convention debates and The Federalist Papers to establish the “meaning” of the Presidential veto power and the separation of powers principle. They reach opposite conclusions; Stewart finds the congressional veto valid, while Watson opposes the veto.

¹³² See Frohmayer, The Separation of Powers: An Essay on the Vitality of a Constitutional Idea, 52 Ore. L. Rev. 211, 213 (1973): “A constitution is inescapably the embodiment of a political theory. It takes no great insight, therefore, to conclude that principles which guide the allocation of power under that constitution are implicitly theories of political organization. . . . [N]o analysis can proceed without an appreciation of the present realities of political power. . . .”