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The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives

JAMES ABOUREZK*

As the complexity of government has increased, Congress has found it necessary to delegate extensive authority to the executive branch in order to implement legislative policy.1 The substantive rights of American individuals and businesses are increasingly affected by agency actions taken pursuant to broad delegations of power. Agency rules and regulations have taken on the character of legislation, rather than merely "filling in the details." In 1974, for example, the President signed into law 345 public laws. Yet to implement these new laws as well as existing statutes, the executive branch and the administrative agencies published 272 new rules and 6,164 amended rules in the Federal Register, requiring 10,981 pages in the Code of Federal Regulations.2 For the next year, Congress passed 270 new public laws, while the number of agency rules and amendments increased to 309 new rules and 6,996 rule amendments covering 12,463 pages.3 By the end of 1975, the compilation of existing rules in the Code of Federal Regulations required 70,792 pages.

As a means of controlling and limiting the exercise of legislative-like power by executive or administrative agencies, Congress has adopted the congressional veto procedure.4 This procedure enables Congress, by action short of enactment of new legislation, to preclude implementation of proposed executive or administrative actions which have been advanced

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1 The power of Congress to delegate power to the executive branch has long been established. See, e.g., FEA v. Algonquin SNG., Ind., 44 U.S.L.W. 4483 (1976); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Wayman v. Southard, 24 U.S. (10 Wheat.) 1 (1825).

2 Letter from the Office of the Federal Register to Senator Abourezk (Mar. 2, 1977) [on file at the INDIANA LAW JOURNAL]. In 1974, there were also 156 proposed new rules and 2,524 proposed rule amendments requiring an additional 5,939 pages in the Code of Federal Regulations. Id.

3 Id. In 1975, there were also 177 proposed new rules and 2,865 proposed rule amendments requiring 6,741 pages in the Code of Federal Regulations. Id.

4 The term "congressional veto" applies to those actions by Congress (or either House) which legally require the Executive (or an agency) to refrain from taking a proposed action. It does not apply to resolutions which direct a member of the executive branch to perform a specific action which otherwise would have been a discretionary function, nor does it apply to methods of legislative control such as conditions on appropriations and reporting requirements.
pursuant to statutory authority. The congressional veto takes three forms: (1) action by one or more designated committees of Congress (committee veto); (2) a simple resolution passed by either House of Congress (one-House veto); or (3) a concurrent resolution (concurrent veto). The congressional veto customarily takes effect in the following manner. Congress enacts a statute, either signed by the President or passed over his veto, requiring implementation by the executive or an administrative agency. Pursuant to a delegation of authority in the enabling statute, an affected agency must submit to Congress whatever executive orders, rules, regulations or directives it proposes to implement the stated congressional policy. If at the expiration of a specified time period, usually thirty to sixty days, no disapproval action is taken by the Congress, the proposed action becomes effective.

Generally, the congressional veto has been used in statutes which delegate broad authority to executive or administrative agencies. Congress' increasing reliance upon this type of review procedure is reflected in figures showing the number of statutes in which the device has been included. Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940-49, nineteen statutes; between 1950-59, thirty-four statutes; and from 1960-69, forty-nine. From the year 1970 through 1975, at least one hundred sixty-three such provisions were included in eighty-nine laws.5

These laws deal with our most critical national problems, ranging from military construction and defense production to Indian affairs, energy research, education and foreign assistance. The broad delegations of authority to the executive branch contained in these laws underscore the increased extent to which responsibility for governing is shared between Congress and the Executive. The increased involvement of the two branches in the constitutionally imprecise area of shared power raises a fundamental issue of separation of powers: Is the congressional veto an unconstitutional attempt by Congress to interfere with the execution of the laws, or is it a permissible action which protects the legislative power of Congress from encroachment by another branch of the government?

The Constitution does not, of course, specify how the two branches share power in the administrative area, although some overlap is a

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The first congressional veto was included in the Legislative Appropriations Act for fiscal year 1933, which authorized the President to reorganize the executive agencies by executive order, subject to congressional disapproval within sixty days prior to the effective date of the order. Act of June 30, 1932, Pub. L. No. 72-212, ch. 314, 47 Stat. 387 (1932) (repealed 1966).
recognized necessity for effective government. Our discussion must be guided by the Supreme Court's most recent description of separation of powers, as well as the experience and perceptions of the men who drafted the Constitution. One must consider not only the technical constitutional arguments which bear on the legitimacy of the veto, but one must also examine the institutional relationships within which the veto operates. In deciding whether the veto comports with the principle of separation of powers, it must be determined whether the veto serves and enhances the constitutional division of powers, or whether it is antagonistic to the constitutional scheme.

The Supreme Court declined its first opportunity to address the constitutionality of the congressional veto in the recent case of *Buckley v. Valeo.* The decision held unconstitutional those sections of the Federal Election Campaign Act Amendments of 1974 which authorized congressional appointment of four of the six members of the Commission. Also challenged in the suit were the several congressional veto provisions in the law, authorizing one or both Houses of Congress to disapprove rules proposed by the Election Commission. The Court found the composition of the Commission unconstitutional, and thus did not address the question of Congress' power to prevent implementation of proposed Commission rules through use of the congressional veto. However, Mr. Justice White in a concurring opinion indicated that he found no constitutional infirmity in the congressional veto of agency regulations, "at least where the President has agreed to legislation establishing the disapproval procedures or the legislation has been passed over his veto."

The constitutionality of the one-House veto may be decided by the courts in the near future. A well-publicized case currently pending in the Court of Claims is based in part upon a challenge to the one-House congressional veto. In *Atkins v. United States,* a number of federal judges have alleged that the refusal of Congress to grant the federal judiciary cost of living pay increases amounts to an unconstitutional diminution of salary, contrary to the provisions of the Constitution. The second count of that suit alleges the unconstitutionality of the one-House veto provision of the Federal

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7The Court held, in part, that the section of the Act which gave to the President *pro tempore* of the Senate and the Speaker of the House the power to appoint voting members to the Commission violated the appointments clauses of the Constitution. U.S. Const. art. II, § 2, cls. 1-2.
9Id. at 286.
11U.S. Const. art. III, § 1: "The Judges, both of the Supreme and inferior courts,
Salary Act. The United States Court of Appeals for the District of Columbia Circuit recently dismissed the case of Clark v. Valeo which challenged the one-House veto provision of the Federal Campaign Act. The court ordered the Clark case dismissed for lack of ripeness; an appeal is pending, however, and the Supreme Court may yet reach the merits of the controversy.

shall . . . at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." 

18 U.S.C. §§ 351-61 (1970). The Act permits the President’s proposed adjustment of federal (including judicial) salaries to take effect as of a certain date, 2 U.S.C. § 359 (1970), but “only to the extent that . . . (B) neither house of the Congress has enacted legislation which specifically disapproves all or part of such recommendations . . .." On March 6, 1974, the Senate, pursuant to clause (B), adopted S. Res. 293, 93rd Cong., 2d Sess., 120 CONG. REC. S2878 (daily ed. March 6, 1974), which disapproved the recommended increase in congressional salaries. That action is specifically challenged in Atkins v. United States, No. 41-76 (Ct. Cl., filed Feb. 11, 1976).

It is worth noting that the Department of Justice, representing the United States in the suit, refused to brief the congressional veto issue, implicitly conceding its unconstitutionality. The Secretary of the Senate and the Clerk of the House of Representatives, named defendants in the suit, subsequently retained outside counsel to defend the interests of Congress.

When the Department, in a case such as this, refuses to defend the constitutionality of a challenged statute, it is a fiction to state that it continues to actually represent the interests of the United States. In fact, it becomes the lawyer for the Executive and abandons its traditional role of defending the constitutionality of statutes pursuant to the executive duty to see that the laws are faithfully executed.

The author introduced legislation in the last Congress, S. 3854, 94th Cong., 2d Sess. (1976), which would bar the Department of Justice from intervening in suits in order to oppose the constitutionality of statutes. See 122 CONG. REC. S17076-84 (daily ed. Sept. 29, 1976). Additionally, Section 205(a)(1) of the proposed Watergate Reform Act, S.495 94th Cong., 2d Sess., which passed the Senate last year, would have authorized Congress to retain counsel when the Department of Justice refused to represent the legislature. See 122 CONG. REC. S12114 (daily ed. July 21, 1976). The author had earlier introduced this provision as separate legislation (S. 2731, 94th Cong., 1st Sess., 121 CONG. REC. S20878-81 (daily ed. Dec. 2, 1975)). The essential features of these bills have been introduced in the 95th Congress as part of S.555, the Public Official Integrity Act of 1977. See 122 CONG. REC. S1902-31 (daily ed. Feb. 1, 1977). For a full discussion of these issues, see Hearings on the Representation of Congress and Congressional Interests in Court Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm., 94th Cong., 2d Sess. (1975-1976).

15Id. Plaintiff Ramsey Clark, an unsuccessful candidate for the Democratic Senatorial nomination in New York, is challenging the one-House veto provisions of the Federal Election Campaign Act Amendments of 1976, which Congress enacted subsequent to the Supreme Court decision in Buckley v. Valeo, 424 U.S. 1 (1976). The Department of Justice, reflecting President Ford's opposition to the legislative veto, intervened in the case on the plaintiff's side. Even though it theoretically represents the interests of the United States in this case, the Department of Justice is pursuing the interests of the Executive against that of Congress.

The Department also failed to defend the constitutionality of the statute challenged in the Buckley case. There the Department represented the Federal Election Commission, the Clerk of the House of Representatives, as well as the Attorney General, who was a named defendant. After a lack-luster defense at the district and circuit court levels, the Department proceeded to undercut its representation of the Commissioners and congressional officers in the Supreme Court by filing a brief on behalf of the Attorney General conceding the unconstitutionality of the composition of the Commission. The author considers such selective "representation" to be ethically objectionable.
These cases are directed specifically to the use of the one-House veto and will not necessarily decide the broader questions involving all uses of the congressional veto. The author strongly believes that the congressional veto is a constitutionally sound tool needed to control the exercise of powers which are delegated to the executive branch in necessarily broad terms. Moreover, it plays a vital role in protecting Congress’ constitutional role as legislator from an executive branch which has increasingly come to view lawmaking as an activity better performed by itself. The intention here is to demonstrate that use of the congressional veto is consistent with the distribution of powers enumerated in the Constitution. Rather than interfering with the President’s duty to faithfully execute the laws, the congressional veto preserves the separation of powers by protecting the legislative prerogative from executive encroachment. Nor is the congressional veto an attempt to circumvent the President’s veto power in violation of the presentation clause. The congressional veto is not a legislative act which is subject to presidential approval. It operates as a condition precedent to the effectiveness of proposed executive action. As a matter of policy, the congressional veto serves as a vital check when the exercise of executive powers intrudes upon Congress’ role as lawmaker.

The Framer's Plan

The framers of the Constitution sought to write a document which would prevent the tyrannical exercise of power by either the Executive or the Legislature. They were well aware of the dangers flowing from excessive strength in either branch, and they resolved to provide each branch with the power to prevent domination by the other. The framers’ determination to guarantee a strong and vigorous Chief Executive resulted from their

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11 The discussion that follows focuses on the one and two-House versions of the congressional veto. The arguments which support the constitutionality of these two forms of the veto apply to the committee veto as well. Statutes containing a committee veto provide that a proposed agency action must lie before a designated congressional committee or committees for a certain period of time before taking effect; a vote of disapproval by the committee or committees during that time will be sufficient to prevent the proposed action from becoming effective. The committee veto vests a great deal of power in a relatively few Senators or Representatives. While this may represent unsound congressional policy, it cannot be attacked constitutionally. Since the committee veto is a condition precedent to the passage of the legislation, see notes 61-77 infra & text accompanying, the argument remains solely one of policy and not of legality. For a thorough analysis of the committee veto procedure, including an assessment of its constitutionality, see generally Hearings on the Separation of Powers Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm., 90th Cong., 1st Sess. (1967).


13 See The Federalist No. 48 (J. Madison); The Federalist No. 73 (A. Hamilton); 2 Farrand, supra note 18, at 74-78. For a lengthy summary of this position, see Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983, 1038-48 (1975).
experiences with an ineffectual government almost totally legislative in character. The country had floundered under the Articles of Confederation, as well as under the state constitutions, from a lack of adequate executive power. Moreover, colonial assemblies had dominated colonial governors, thereby eliminating their role as a check on the legislature. Against this was balanced the framers’ fear of a hereditary monarchy, personified by King George, whose oppressive rule, in combination with the dictates of the House of Commons, had fired their rebellion. A strong democratic legislature was viewed as the best and last defense of a free people.

The framers were confident that the constitutional system of separation of powers and checks and balances would be adequate to control possible abuses by either branch. This confidence was based in part on their belief that the two branches were natural adversaries and that each would jealously guard its prerogatives against encroachment by the other.

What the framers did not anticipate, of course, was the growth of a huge federal bureaucracy, exercising powers delegated by one branch in order to help execute the constitutional duty of another. Government in the late eighteenth century was the enterprise of a relatively small number of men, most of whom were acquainted with one another. The total number of federal employees in 1792 was 780 (excluding deputy postmasters), 660 of whom were employed in the Department of Treasury. Contrast this with the figure for 1976, which shows that federal civil employment totaled nearly 2.9 million. Furthermore, early statutes reflect the detail with which Congress was able to prescribe the government’s business. For example, in 1818, Congress specified by law how many clerks every department and office could employ and set the exact salary for


21THE PRESIDENT: OFFICE AND POWERS, supra note 20, at 5.

22FARRAND, supra note 18, at 100. Mr. Butler warned the Convention that “in all countries the Executive power is in a constant course of increase,” and that “a Cataline or a Cromwell” could arise as readily in America as elsewhere. Id.

23See 1 FARRAND, supra note 18, at 100-01.

24The appointment power was regarded as the only specifically granted executive power likely to be abused, and was made subject to a check by the requirement of Senate confirmation. THE FEDERALIST No. 77 (A. Hamilton). Another reason why the delegates expressed relatively little concern about executive abuses was the probability that George Washington would become the first Chief Executive. As South Carolina delegate Pierce Butler wrote in 1788, “I do [not] believe . . . [the executive powers] would have been so great had not many of the members cast their eyes toward General Washington as President, and shaped their ideas of the Powers to be given a President, by their opinions of his Virtue.” J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 16 n.3 (1964).


each one. Another early act of Congress directed the route to be taken by a postman in traveling between two cities. Such matters are now handled by agency administrators.

Given the size and method of government in their day, the framers could not have perceived the necessity for creating the administrative agencies, the so-called "fourth branch," which exercise powers in a detail once performed by Congress. Not having anticipated the existence of the modern fourth branch, the framers can hardly be said to have intended a particular mode of congressional regulation of the administrative agencies. Within this context, the framers' discussions during the Constitutional Convention are instructive. They do not, however, lead to the conclusion that the founders' concern for a strong Executive precludes Congress from limiting the lawmaking power of the administrative agencies by means of the congressional veto.

The genius of the framers' work is found in the Constitution's applicability to situations which were unforeseeable and unanticipated. The lessons of their political experience, as described above, shaped the document they wrote. If our governmental needs and experiences differ from those of the framers, then our needs and experiences, consistent with the basic principle of separation of powers, should guide our approach in analyzing a type of legislative-executive conflict not specifically foreseen, yet admirably provided for, by the Constitution's draftsmen.

The framers' goal of an efficient, interdependent government operating within a flexible system of separated powers is very much alive today. As the Supreme Court stated in *Buckley v. Valeo*:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.

In *Buckley*, the Court expressed its strong commitment to the continued vitality of the separation of the three branches of government. The Court quoted from James Madison's defense of Montesquieu's maxim that the legislative, executive and judicial departments ought to be separate and distinct:

> The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. 'When the legislative and executive powers

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29"That, instead of the road from Fayetteville, by Lumberton to Cheraw Courthouse, the route of the post shall hereafter be on the most direct road from Fayetteville to Cheraw Courthouse..." 4 ANNALS OF CONG. 1504 (1795). See Cooper & Cooper, THE LEGISLATIVE VETO AND THE CONSTITUTION, 30 GEO. WASH. L. REV. 467, 483 n.45, 486-87 n.54 (1962).
30424 U.S. 1, 122 (1976), quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (concurring opinion of Mr. Justice Jackson).
are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them, in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.' \textsuperscript{31}

The principle of separation of powers, noted the Court, was designed as a vital check against tyranny; however, a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself." \textsuperscript{32} The Court thus explicitly acknowledged that the Constitution did not require total separation of each of the branches. The President, for example, participates in the legislative process by virtue of the veto power\textsuperscript{33} and by his responsibility to submit a legislative program to Congress;\textsuperscript{34} the Senate shares power with the President in making appointments\textsuperscript{35} and treaties.\textsuperscript{36}

These considerations are vital to an understanding of the evolution of the relative strengths of the Congress and the Executive from that perceived two hundred years ago. The change has precipitated an imbalance in the separation of powers that was never intended.

\textbf{The Central Problem: Delegation Controlled}

Our experience with a strong Executive over the past half century is in marked contrast to the experience of the framers. The growth of the "modern Presidency" at the expense of Congress has become an accepted truth in the political discussion of recent years.\textsuperscript{37} The modern President has become the embodiment of political power in American life.\textsuperscript{38} When a national crisis flares, the single individual is perceived to be better able to focus collective energies and act swiftly than is a legislative group. Emergency powers granted or assumed by the Executive in time of crisis often outlive the crisis and even the President, for the Presidency is uniquely an office of accumulated power: "Precedents established by a forceful or politically successful personality in the office are available to less gifted successors, and permanently so because of the difficulty with which the Constitution is amended." \textsuperscript{39} For example, the bold and popular

\textsuperscript{31}Id. at 120 (quoting \textit{The Federalist} No. 47 (J. Madison)).

\textsuperscript{32}Id. at 121.

\textsuperscript{33}U.S. Const. art. I, § 7, cls. 2 & 3.

\textsuperscript{34}U.S. Const. art. II, § 3, cl. 1.

\textsuperscript{35}U.S. Const. art. II, § 2, cl. 2.

\textsuperscript{36}Id.

\textsuperscript{37}See, e.g., C. Hardin, \textit{Presidential Power and Accountability} (1974); A. Schlesinger, \textit{The Imperial Presidency} (1973); \textit{The President: Office and Powers}, \textit{supra} note 20.

\textsuperscript{38}See generally \textit{The President: Office and Powers}, \textit{supra} note 20.

\textsuperscript{39}Id. at 30.
Jackson was the first President to appeal to the people over the heads of their elected representatives; his successors individually and the office itself have benefited from the perception of the President as the "People's Choice." Similarly, Lincoln was the first President to claim "the war power" as his own, reading the "Commander-in-Chief" clause in conjunction with the "shall take care" clause. With his interpretation, a new and permanent dimension to the Presidency was born. Propelled by a severe crisis and backed by a huge mandate, Franklin D. Roosevelt was the first President to push massive social welfare programs which benefited large, identifiable voting blocs. Democratic presidents have profited ever since from the coalition he built.

Successive Presidents inheriting this accumulated power base have built on it by garnering popular support for expanding their powers. Whether in the field of foreign affairs or in the domestic area, the accretion of political power directly affects the relative strengths of the two branches in areas of shared powers. The locus of decisionmaking can shift significantly if one of the branches loses its popular support or dramatically increases it.

One of the most striking examples of this shifting power can be seen in the operation of executive and independent agencies. Congress sets a specific policy when it legislates and then delegates to an agency the requisite powers to implement that policy. However, nothing is more crucial to the success of any given program than the manner in which the powers delegated to implement policy are interpreted and carried out. The relative strength of the Presidency bears directly on the President's ability either to execute or to frustrate congressional intent. The combined effect of a broad delegation and enhanced presidential power is to enable agencies to exercise legislative powers in a manner virtually uncontrolled by Congress. Therefore, an institutional check on delegated powers, such as the use of the congressional veto, is necessary.

It has been argued that using the congressional veto to control delegation amounts to an interference with the President's duty to faithfully execute the laws. This, however, represents a simplistic view which ignores the constitutional theories of separation of powers and checks and balances which have evolved over two hundred years.

Congress necessarily delegates extensive authority to the executive branch in order to accomplish legitimate legislative objectives. If Con-
gress must delegate power without abdicating its legislative function, then
the problem becomes the recoverability of delegated authority pursuant to
procedures established by the Congress. Professor Corwin stated the answer
to this dilemma in precise terms:

As we have seen, moreover, it is generally agreed that the maxim that the
legislature may not delegate its powers signifies at the very least that the
legislature may not abdicate its powers. Yet how, in view of the scope that
legislative delegations take nowadays, is the line between delegation and
abdication to be maintained? Only, I urge, by rendering the delegated
powers recoverable without the consent of the delegate; and for this
purpose the concurrent resolution seems to be an available mechanism,
and the only one. To argue otherwise is to affront common sense.46

Professor Corwin's argument that the delegated power must be recoverable
by the delegator is persuasive. Congress, having the power to determine
and limit the scope of the delegation, possesses the power to determine
when the exercise of legislatively delegated powers has impinged upon the
legislative prerogative or has in some manner exceeded the scope of the
authority originally granted.

When the delegator is the legislature, it has the power to specify that
some actions are within the scope of the delegate's power and that others
are not. If the delegate pursues an impermissible action, the legislative
power would be an empty one indeed if the legislature lacked the simple
power to constrain the delegate's actions within the scope of the delegation.
It has been argued that the legislature should, at such a time, enact a new
law to more specifically define the scope of the delegation.47 Such a course,
however, would subject the legislative act to executive veto, requiring a
two-thirds vote of the legislature to override. This means that a two-thirds
vote of the legislature is needed to define more precisely the scope of a
delegation, when the original delegation required but a majority vote to
take effect. It defies logic to argue that the legislature, having by majority
vote directed an agency to take certain actions, should then be required to
muster a two-thirds vote in order to require the agency to stay within the
scope of that original delegation.

Because Congress must jealously guard its legislative power against
executive agency encroachment through actions which exceed the scope of
a legislative delegation, the legislature should not be deprived of all means
of protecting its own authority. The very act of delegation pushes
Congress into the constitutionally gray area between legislation and
abdication of the legislative power. It does not follow that Congress has a

46The President: Office and Powers, supra note 20, at 130 (footnote omitted).
47This argument was made by the Department of Justice in their brief in the Clark case.
Brief for appellant at 33-34, 44, Clark v. Valeo, No. 76-1825 (D.C. Cir. 1977).
certain degree of power to enter that gray area through delegation, yet possesses less power to determine when that delegation has been exceeded or abdication of legislative authority has occurred.48

It might be argued that if the question is determining whether the delegate has exceeded the scope of delegated powers, then the determination should be made by the courts. But once an agency regulation has become law, its validity can be challenged only by a private litigant through administrative and finally judicial review. A different situation presents itself when, prior to the effective date of the proposed regulation, it becomes apparent that it offends the scope of congressional purpose. At that point, it would be manifestly irresponsible for Congress to sit idly by and let this regulation take effect. Congress would be abdicating its duty as lawmaker if it permitted such an action to become law and work its pernicious ways upon the people who have elected that Congress. The congressional veto maintains Congress' equality, and also avoids that institutional weakening which would result from constantly relying on the judicial process to protect its prerogatives.

As noted earlier, the Supreme Court has never directly ruled on the constitutionality of the congressional veto. Prior to Justice White's concurrence in Buckley, the only statement on the issue came in the case of Sibbach v. Wilson & Co. 49 The Court in Sibbach upheld the congressional delegation to the Supreme Court of the power to promulgate the Federal Rules of Civil Procedure. That delegation contained a provision that proposed rules must be submitted to Congress prior to their effective date, so that Congress could have an opportunity to disapprove the regulations by legislation if they were contrary to the policy behind the enabling legislation. The Court commented favorably on such a procedure: "The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose."50 In a footnote supporting that position, the Court cited the congressional veto provision of the 1939 Reorganization Act.51 Regardless whether the statute contains a report-and-wait provision, as in Sibbach, or a direct congressional veto, the congressional policy behind each procedure is identical: retention of control over delegated powers in order to insure that their exercise comports with congressional policy. Thus the analysis of the decision in Sibbach supports the principle that Congress has the power to control

49312 U.S. 1 (1941).
50Id. at 15 (footnote omitted) (emphasis added).
delegated powers after their exercise. The congressional veto represents the latest, and most effective, review device available to Congress.

To claim that the congressional veto interferes with the faithful execution of the laws is to preserve the form over the substance of the principle of separation of powers. Such a view would restrain the necessary overlap of executive and legislative functions into impractical "watertight compartments" which the framers never envisioned.

Under this interference theory, Congress must adopt a total "hands-off" policy after a delegation of power, or not delegate in the first instance. Neither alternative is acceptable. As the Supreme Court has noted, Congress must delegate: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." In any delegation, Congress has a responsibility to oversee the manner in which executive agencies administer that delegation. Given the range of governmental activities performed by executive agencies and the impossibility of anticipating every circumstance and contingency which might arise subsequent to a grant of authority, Congress has come to rely upon the congressional veto as an effective control device to preserve its own constitutional prerogatives. To deny Congress this workable middle ground is to leave only one practical alternative—an increasing abdication of Congress' policymaking function.

Use of the congressional veto to control the exercise of delegated power is not limited to situations involving the agencies, but is applicable to delegations to the President as well. The Executive frequently takes action by order or directive which derives authority from an enabling piece of legislation. A vivid example of this type of executive action which requires continued congressional attention is the sale of arms to a foreign nation. Under the Constitution, Congress shares power with the Executive in foreign affairs. The Congress remains continuously responsible to the American people to see that sophisticated weapons are not haphazardly or unwisely distributed to countries in politically sensitive areas of the world. While Congress attempts to express this policy in specific Military Authorization Acts, it is obviously unable to specify prospectively exactly what types of sales should be made to which nations, given the highly technical nature of modern weaponry and the degree to which foreign policy considerations can change within a relatively short period of time. Faced with the difficulty of

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52It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires. Springer v. Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., and Brandeis, J., dissenting).

53Sunshine Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).

54U.S. Const. art. I, § 8, cl. 3.
prospectively legislating upon such matters with great specificity when all the relevant facts are not available at the time an authorization is made, and yet unwilling to abdicate its role in the conduct of foreign affairs because of a necessarily broad delegation to the Executive, Congress uses the congressional veto as a means of insuring continued congressional participation consistent with its legislative interest and responsibility.

Moreover, in the area of foreign affairs, Congress has not limited the use of the congressional veto to situations involving power delegated to the Executive, but has invoked the veto when the President, acting under a claim of inherent or implied power, has encroached upon an enumerated power of the legislature. Congress alone is given the authority to declare war under the Constitution, but as a practical matter, Presidents, claiming expansive powers under the "Commander-in-Chief" clause, have committed us to wars without a prior congressional declaration. Congress has turned to the congressional veto to limit this practice.

In 1973, Congress passed the War Powers Resolution, over the veto of President Richard Nixon. The relevant part of the War Powers Resolution provides that:

[At any time that the United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if Congress so directs by concurrent resolution.]

The Act was intended to cover those rare emergencies in which a President must act to defend American troops or citizens before Congress can meet to decide whether to declare war or continue the commitment of armed forces. In such instances, the veto is used to circumscribe a President's actions in "a zone of twilight in which he and Congress may have concurrent authority or in which its distribution is uncertain." Without this statutory check, Presidents could use, as they have in the past, a claim of presidential authority to emasculate the constitutional responsibility of Congress to declare war.

55U.S. CONST. art. I, § 8, cl. 11.
56U.S. Const. art. II, § 2, cl. 1.
58Id., § 1544(c).
59The author has warned that the War Powers Resolution could be interpreted as providing the President with a blank check to act in virtually all crises, even where Congress could in fact meet to declare war or decide for peace before intervention. 119 Cong. Rec. 25051-5 (1973). This interpretation is mistaken, but if the Resolution is read in this manner, it provides an example of a congressional veto which practically surrenders the legislature's constitutional powers. The Resolution should not be so interpreted, because it would be unconstitutional for Congress to surrender an enumerated constitutional power by statute.
60Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
THE CONGRESSIONAL VETO AS CONDITION PRECEDENT TO LEGISLATION

It is necessary to examine one other objection made against the congressional veto: the claim that it violates the Constitution's presentation clause, which requires that all legislation be submitted to the President for his signature or veto. This position does not survive a close reading of the Constitution. The presentation clause does not apply to the congressional veto because the veto procedure is not a legislative act. Rather, congressional acquiescence is a condition precedent to the implementation of policy established by prior legislation.

This view was articulated in 1939 by the House Committee which considered the first statute to provide for the congressional veto by concurrent resolution, the Reorganization Act of 1939. The Committee reasoned that:

The failure of Congress to pass such a concurrent resolution is the contingency upon which the reorganizations take effect. Their taking effect is not because the President orders them. That the taking effect of action legislative in character may be made dependent upon conditions or contingencies is well recognized.

The committee based its conclusion on several Supreme Court decisions which recognized the right of Congress to condition the effectiveness of legislation upon the occurrence of a specified contingency. The case relied upon was Currin v. Wallace. The Supreme Court there upheld a condition precedent to an increase in Social Security payments; if the condition fails to occur, i.e., the cost of living fails to increase at a certain rate, there is no automatic increase in benefits.

Use of conditions precedent in legislation is fairly common and the procedure has been upheld by the Supreme Court. See notes 65-67 infra & text accompanying. A recent example is found in the law providing automatic cost of living increases for those receiving benefits under the Supplemental Security Income Program, 42 U.S.C. § 1382f (Supp. IV 1974). Whenever the Secretary of Health, Education and Welfare determines that the cost of living index for the previous quarter has increased by three percent or more, he must increase by the same percentage, the amount paid to each SSI recipient, 42 U.S.C. § 415(i) (Supp. III 1973). If the cost of living has not risen at the prescribed rate, there is no increase for that quarter. The increase in benefits is thus conditioned upon the occurrence of a certain event, a specified rise in the cost of living index. The consequences of that event occurring or failing to occur follow automatically. Thus, a specified rise in the cost of living index is a condition precedent to an increase in SSI payments; if the condition fails to occur, i.e., the cost of living fails to increase at a certain rate, there is no automatic increase in benefits.

Act of April 3, 1939, Pub. L. No. 76-19, 53 Stat. 561 (1939). The President was authorized to prepare reorganization plans for making transfers, consolidations and abolitions of executive agencies and functions. He was directed to submit any proposed plans to Congress; they would become effective after the end of sixty calendar days, unless both Houses passed a concurrent resolution expressing disapproval of the plans.

61U.S. Const. art. I, § 7, cl. 3:
Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

62Use of conditions precedent in legislation is fairly common and the procedure has been upheld by the Supreme Court. See notes 65-67 infra & text accompanying. A recent example is found in the law providing automatic cost of living increases for those receiving benefits under the Supplemental Security Income Program, 42 U.S.C. § 1382f (Supp. IV 1974). Whenever the Secretary of Health, Education and Welfare determines that the cost of living index for the previous quarter has increased by three percent or more, he must increase by the same percentage, the amount paid to each SSI recipient, 42 U.S.C. § 415(i) (Supp. III 1973). If the cost of living has not risen at the prescribed rate, there is no increase for that quarter. The increase in benefits is thus conditioned upon the occurrence of a certain event, a specified rise in the cost of living index. The consequences of that event occurring or failing to occur follow automatically. Thus, a specified rise in the cost of living index is a condition precedent to an increase in SSI payments; if the condition fails to occur, i.e., the cost of living fails to increase at a certain rate, there is no automatic increase in benefits.

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64H. REP. No. 120, 76th Cong., 1st Sess. 4-6 (1939).
65306 U.S. 1 (1939).
referendum of affected farmers as the condition upon which regulations proposed by the Secretary of Agriculture would become effective. Citing language in *J.W. Hampton, Jr. and Co. v. United States*, that "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because the effective date is dependent on future conditions," the Court in *Currin* reasoned that "[h]ere it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions." Likewise, the congressional veto is an integral part of a condition upon the effectiveness of proposed regulations; the expiration of a specified period of time during which no congressional disapproval has been expressed is the condition upon which the effectiveness of proposed regulations is made to depend.

There is no question that Congress can effectively take actions that are not part of the ordinary legislative process. Congress frequently makes binding decisions through procedures that do not fit neatly into the categories of legislative or executive action. Because these actions do not result in the enactment of a law, they need not follow the procedures set forth in the presentation clause. For example, the Senate is specifically empowered by the Constitution to approve treaties and appointments and to try impeached federal officials. Each House can judge the elections and qualifications of its members, determine the rules of its own proceedings, and punish the misbehavior of its own members. Recognized powers of Congress not enumerated in the Constitution but implied from its other powers include the power to carry on investigations and the right to concur in resolutions not subject to presidential veto.

The result sought through use of the congressional veto does not require a legislative act to be effective. Any repeal of a law already in effect

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66*U.S. 894, 407 (1928).*

67*306 U.S. 1, 16 (1939).* See *Hirabayashi v. United States*, 320 U.S. 81, 104 (1948), stating: "[T]he essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative upon ascertainment of a basic conclusion of fact by a designated representative of the Government." *See also United States v. Rock Royal Coop., Inc.*, 307 U.S. 533 (1939) (orders pursuant to agricultural marketing statute made dependent upon approval of procedures); *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892) (finding of fact by executive officer under Tariff Act).

68Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 Geo. Wash. L. Rev. 467, 473-76 (1962), presents a slightly different formulation of this same idea, reaching a similar conclusion.

69*U.S. Const. art. II, § 2, cl. 2.*

70*Id.*

71*U.S. Const. art. I, § 3, cl. 6.*

72*U.S. Const. art. I, § 5, cl. 1.*

73*U.S. Const. art. I, § 5, cl. 2.*

74*Id.*

requires a legislative act, since a repeal or amendment of any statute undeniably requires an act of equal stature to be effective. But the congressional veto neither amends nor repeals an existing statute. Nor does it amend or repeal agency regulations that as yet have the force of law. A statute would be required to limit the scope of an administrator's statutory power to propose certain regulations, or to repeal or modify the regulations after they have taken effect. But between the date those regulations are submitted to Congress pursuant to a statute, and the date they will become effective, an action preventing them from taking effect is not a legislative act; indeed, it need not be, because the regulations are not yet law.  

That the congressional veto is a condition precedent to the legal effect of a regulation is reinforced by an analysis of the enabling legislation which creates the veto mechanism. In the enabling act Congress has determined that the veto safeguard is part of the congressional intent in enacting legislation authorizing agency actions. Congressional action by veto represents no departure from the public policy expressed in the statute authorizing an administrator to propose regulations, subject to the congressional veto. In the words of one commentator, "[T]he policy decisions involved in the original act include and are linked to the policy decisions made possible by the veto provision. Put another way, the veto provision constitutes an integral part of the original policy decision."  

Since the enabling legislation was either signed by the President or passed over his veto, there has been no infringement of the President's veto power. As Justice White stated in his concurrence in Buckley v. Valeo: "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."  


78424 U.S. 1, 286 (1976) (emphasis added). See Hearings on the Separation of Powers Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm., 90th Cong., 1st Sess. 185, 199 (1967) (statement of Professor Arthur Maas, Dep't of Gov't, Harvard Univ.); Stewart, Constitutionality of the Legislative Veto, 13 Harv. J. Legis. 593, 614 (1976). It is worth noting in this context that every President since Franklin Roosevelt has signed into law statutes containing congressional veto provisions.
veto power has been avoided. That power resides in the office of the Presidency, not the individual occupying that office, and it has already been exercised or waived.

It is noteworthy that the presentation clause objection has not been important enough to compel the President to veto legislation containing a congressional veto when the legislation serves his own needs. For example, the use of the congressional veto in reorganization statutes has become an accepted practice by both Congress and the Executive. While such a practice does not fix the constitutionality of the congressional veto, it at least raises a presumption of constitutionality. Even the most critical of commentators has expressed support for the veto device when utilized in the context of reorganization.

Addressing the constitutionality of the legislative veto provision of the Reorganization Act of 1949, Assistant Attorney General Peyton Ford stated that an objection to the legislative veto provision contained in an earlier Reorganization Act was based upon an unsound premise, namely, that the Congress in disapproving a reorganization plan is exercising a legislative function in a non-legislative manner... Such approval or disapproval by the Congress or either House thereof is not a legislative act. Nor is it, in the circumstances, an improper legislative encroachment upon the Executive in the performance of functions delegated to him by the Congress. As indicated above, the authority given to the President to reorganize the government is legally and adequately vested in the President when the Congress takes the initial step of passing a reorganization act.

The President, in asking the Congress to pass the instant reorganization bill, is following the pattern established by those acts, namely by taking the position that if the Congress will delegate to him the authority to reorganize the government he will undertake to submit all reorganization plans to the Congress and to put no such plan into effect if the Congress indicates its disapproval thereof. In this procedure there is no question involved of the Congress taking legislative action beyond its initial passage of the Reorganization Act. Nor is there any question involved of abdication by the Executive of his Executive functions to the Congress. It is merely a case where the Executive and Congress act in cooperation for the benefit of the entire government and one Nation.

While Presidents have not always so generously endorsed congressional veto provisions in Reorganization Acts, they have consistently supported

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80 See, e.g., Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 989, 1077-78 (1975).
such statutes as necessary and useful methods of sharing power with Congress.\textsuperscript{83}

Acceptance of the congressional veto to control government reorganization has generally been premised on the assumption that reorganization plans are procedural rather than substantive legislation.\textsuperscript{84} This distinction, however, is more imagined than real. One need only examine the shifting of real agency power to the Office of Management and Budget (OMB) to discern how reorganization acts can be quite substantive in effect.

Originally established in 1921\textsuperscript{85} to serve as the accountant for the executive department, OMB underwent a dramatic change under the Reorganization Plan No. 2 of 1970.\textsuperscript{86} Although its basic statutory authority remained undisturbed, OMB acquired a new managerial function as a result of the reorganization plan. OMB not only has the power to control and supervise the preparation and administration of the budget, but is also involved with the administrative organization and practices of the executive departments and agencies. Its current responsibilities include clearing and coordinating departmental advice on proposed legislation; conducting research and promoting the development of administrative management plans; assisting in the consideration and clearance of proposed executive orders and proclamations; assessing program objectives, performance and efficiency; and planning and developing programs to recruit, train, motivate, deploy and evaluate career personnel.\textsuperscript{87}


President Carter has requested reorganization authority which includes a provision for disapproval by either House of Congress of any reorganization plan submitted by the President. See 123 CONG. REC. S. 2319 (daily ed. Feb. 4, 1977). Thus the present administration is on record as supporting the use of the congressional veto, at least in the context of reorganization.

\textsuperscript{84}"'The power to reorganize executive departments is not a substantive power through which government acts on the subjects of government; it is merely the power to decide how to govern.'" Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 68 CALIF. L. REV. 981, 1077 (1975).

\textsuperscript{85}Budget and Accounting Act of 1921, tit. II, § 207, 42 Stat. 22 (1921).


\textsuperscript{87}UNITED STATES GOVERNMENT MANUAL 87-88 (1976-1977).
Recognition by Congress of the vast power which now resides in OMB came in 1974 when Congress mandated Senate confirmation of OMB's Director and Deputy Director. Indeed, in the case of OMB, Congress ignored the substantive effect which Reorganization Plan No. 2 had because the proposal was considered procedural, pertaining only to internal structure and organization.

Thus the determination of whether the veto provisions of the reorganization acts are supportable cannot rely on an unsound labeling of the underlying acts as procedural. Rather, one must look to whether the congressional veto itself is a constitutionally permissible tool of the Congress to preserve its legislative power.

THE ONE-HOUSE VETO

The additional objection made to the one-House veto states that it is an improper delegation of legislative power because it violates the principle of bicameralism. This position is not supportable. The principle of bicameralism is essential, of course, to any legislation. It represents the Great Compromise of the Constitutional Convention, balancing the competing interests of the large and small states. But since the congressional veto is not a legislative act, the disapproval mechanism need not require the concurrence of the second House any more than it does the concurrence of the President. Bicameralism is preserved in the enactment of the enabling legislation, at which point either House of Congress has the power to "veto," i.e., vote not to pass, that enabling law. The decision of both Houses that at some time in the future one of them shall have the power to veto regulations proposed under the legislation does not defeat bicameralism, but is in fact an expression of it.

In like manner one must reject the argument that the one-House device violates the Constitution by delegating the legislative power of Congress to one of its parts. If the congressional veto is not a legislative act, then

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89 The position that the constitutionality of a congressional veto is not dependent upon the type of statute in which it is used was taken by Senator Sam Ervin and the late Professor Alexander Bickel in the following exchange:
Senator Ervin: I have convinced myself to this point. If the principle of the Reorganization Acts is constitutional, then a comparable procedure allowing Congress to veto watershed projects conceived by the Executive is also constitutional.
Professor Bickel: I quite agree.
Senator Ervin: And if the latter is unconstitutional then the former is unconstitutional.
Professor Bickel: I quite agree with that. . . .
90 See 1 FARRAND, supra note 18, at 550-51, 461-62; 2 FARRAND, supra note 15, at 18, 631.
Congress is not delegating any legislative power. It is simply establishing a condition upon which the proposed regulations can become effective. So long as the contingent action is not legislative in nature, it makes little difference whether it be taken by one House or two.

The constitutionality of the one-House veto was challenged in a case recently decided by the United States District Court for the District of Columbia. In *Pressler v. Simon*, a United States Congressman petitioned the district court to declare unconstitutional certain provisions of the Postal Revenue and Salary Act of 1967 and of the Executive Salary Cost of Living Adjustment Act of 1975. These provisions granted automatic pay raises to federal officials, including Members of Congress, without requiring a vote by Congress, unless either House specifically disapproved all or part of a recommended pay raise. The court held that the automatic salary increase provisions did not violate the ascertainment clause of the Constitution. In dismissing the claim on the merits, the court did not rule directly on the challenge to the one-House veto. But it referred favorably to the veto provision while commenting on the extent to which automatic pay increases remained subject to congressional ascertainment: “however, not only does the Commission which recommends pay levels contain members representing each House of Congress, but even in this circumstance the delegation is not absolute. When the President submits recommendations *either House, acting alone, can by negative vote prevent the recommendations from taking effect*.”

**Conclusion**

The congressional veto is neither specifically sanctioned nor specifically disapproved in the Constitution; it falls within that constitutionally gray area of interbranch relationships crucial to the effective functioning of modern government. The framers, men experienced in the practical problems involved in making government work, intentionally drew up a document with sufficient flexibility to embrace situations they could never anticipate—one which could meet the needs of a different age. The congressional veto is a modern expression of that constitutional flexibility.

The congressional veto cannot be exercised unless the law authorizing its use has been presented to the President for his signature or passed over his veto. It is not a modification or repeal of any existing law, but a

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94 U.S. Const. art. I, § 6: “The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by law...”
condition precedent to the effectiveness of proposed agency action. The device also serves as a limitation on the exercise of delegated and shared powers by the executive branch. The congressional veto permits Congress to steer a middle course between excessive delegations to the Executive and futile attempts to legislate in minute detail. As Professor Corwin has stated, it maintains the line between delegation and abdication of legislative powers.

Far from being an interference with the President's constitutional duties, the congressional veto checks Executive and agency encroachment into the legislature's prerogatives. Even in those instances when the veto is not exercised, its presence acts as an informal check on possible executive branch overreaching. The result is a strengthening, rather than weakening, of the traditional separation of powers, by providing that balance between the branches which ensures that the powers of each will be maintained.