Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case

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■ *The Supreme Court's decision in* INS *v.* Chadha *(1983) set up unrealistic expectations about the disappearance of the legislative veto. Instead of sounding its death knell, the legislative veto is alive and well. The decision stimulated the executive and legislative branches to find ingenious and novel methods of achieving basically the same results: broad delegations of legislative power by Congress to the agencies, checked by congressional controls that do not need enactment of another law. Some of the new legislative vetoes are informal and non-statutory. A few rely on convoluted uses of the rulemaking powers available to the House and the Senate. Others are indistinguishable from the legislative veto supposedly struck down by the court. The adoption of joint resolutions as a substitute for one-House and two-House vetoes has introduced complex strategies between the branches, often putting the president in a weaker position than before. These consequences, sometimes of a surprising and bizarre nature, flow from a court decision that was broader than necessary.*

In past years the Supreme Court has damaged its reputation by issuing decisions based on misconceptions about the political and economic system. After trying to impose archaic and mechanical concepts about federalism, the taxing power, the commerce power, and other clauses of the Constitution, the court was forced to retreat from pronouncements that were simply unacceptable for a developing nation. To minimize what Charles Evans Hughes once called the court's penchant for "self-inflicted wounds," justices evolved a number of rules to limit their exercise of judicial review. One mainstay is the principle that the court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[1]

That guideline was not followed in 1983 when the Supreme Court issued *INS* v. *Chadha,* which declared the legislative veto unconstitutional in all its forms. The court announced that future congressional efforts to alter "the legal rights, duties and relations of persons" outside the legislative branch must follow the full lawmaking process: passage of a bill or joint resolution by both Houses and presentment of that measure to the president for his signature or veto.[2] The court lectured Congress that it could no longer rely on the legislative veto as "a convenient shortcut" to control executive agencies.[3] Instead, "legislation by the national Congress [must] be a step-by-step, deliberate and deliberative process."[4] According to the court, the framers insisted that "the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[5]

A History of Accommodations

All three branches reached agreement long ago that the step-by-step, deliberate and deliberative process is not appropriate for each and every exercise of the legislative power. Despite occasional invocations of the nondelegation doctrine, the court itself has accepted the inevitable delegation of legislative power to executive agencies and independent commissions. Administrative bodies routinely "make law" through the rulemaking process. Efforts are made to subject this lawmaking activity to procedural safeguards, but the persistence of the Administrative State is ample proof that the theoretical model of legislative action envisioned by the framers applies only in the most general sense to the 20th century.

Notwithstanding 50 years of delicate accommodations between the executive and legislative branches regarding the legislative veto, the Supreme Court decided to strike it down in one fell swoop. In his dissent, Justice White claimed that the court "sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.' "[6] Although White demonstrated better than his colleagues an appreciation of the realities and subtleties of lawmaking in contemporary times, he too framed the issue too starkly. He argued that without the legislative veto,

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Congress "is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies."[7] In fact, Congress and the agencies have access to a number of middle-range options that serve much the same purpose as the legislative veto. In some cases, current practices are difficult to distinguish from what supposedly vanished with the death knell.

Despite occasional invocations of the non-delegation doctrine, the court itself has accepted the inevitable delegation of legislative power to executive agencies and independent commissions. Administrative bodies routinely "make law" through the rulemaking process.

Lower courts were more alert than the Supreme Court to the complexities of the lawmaking process. Many of the courts handled the legislative veto issue in gingerly fashion, preferring to decide only the particular statutory provision before them. They deliberately refused to consider the legislative veto as an abstract proposition, susceptible to an across-the-board answer.[8] In 1982, however, the D.C. Circuit issued three broadsides against the legislative veto.[9] In one of the cases, two judges with prior experience in the legislative and executive branches warned their brethren about the dangers of overbroad decisions. Patricia Wald, who served in the Justice Department during the Carter years, and Abner Mikva, former member of Congress from Illinois, asked that an earlier case decided by a three-judge panel be reheard *en banc* "because vitally important issues of executive-legislative relations are articulated too broadly and explored inadequately in the panel opinion."[10] They urged the court to avoid a black-and-white treatment of unique accommodations that had proven useful for both the executive and legislative branches, such as the Reorganization Act, the Impoundment Control Act, and the Federal Salary Act.[11]

Opponents of the legislative veto viewed it as a blatant attempt by Congress to intrude upon executive prerogatives. This critique overlooked the fact that the legislative-veto procedure was an effort to balance the interests of both branches: the desire of administrators for greater discretionary authority and the need of Congress to maintain control short of passing another public law. Those interests persist after *Chadha.*

Under the legislative-veto accommodation, Congress delegated authority on the condition that certain administrative actions be delayed for a specified number of days. During that period Congress had an opportunity to approve or disapprove without further presidential involvement. Congress acted by a one-House veto (by a simple resolution of either House), a two-House veto (by concurrent resolution of both Houses), and committee veto. The very essence of the legislative veto is that it could be invoked without risk of a presidential veto. Congressional approvals and disapprovals were not submitted to the president.

This procedure obviously benefited Congress, but it was part of an accommodation with distinct advantages also to the executive branch. Executive officials accepted the legislative veto because they received discretionary authority that might otherwise have been withheld by Congress. While it is true that Congress gained a "shortcut" because its approval or disapproval was not sent to the president, the executive branch also enjoyed shortcuts. At the close of the legislative review period, administration proposals automatically became law as if they had been enacted by Congress.

It is often forgotten that the legislative veto was used initially to advance the interests of the president. President Hoover wanted to reorganize the executive branch without having to go to Congress for a public law. He proposed that his reorganization proposals become the law of the land unless one House disapproved within a fixed period of time. The lawmaking procedure was thus expedited to favor the president.[12] The procedure did not threaten vital principles of constitutional government. If one House disapproved, the structure of the executive branch remained as before. Exercise of the one-House veto merely preserved the *status quo.*

This type of legislative shortcut contained benefits for both branches. Even with *Chadha,* the need for a *quid pro quo* continues. Some of the new accommodations are statutory; others are non-statutory. The persistence of these executive-legislative compacts demonstrates the distance between the court's decision and the operational realities of government. Both executive officials and legislators are finding ways to avoid the theory of lawmaking espoused by *Chadha.*

The Persistence of Legislative Vetoes

It came as a surprise to some observers that Congress continued to place legislative vetoes in bills after the court's decision and President Reagan continued to sign the bills into law. In the 16 months between *Chadha* and the adjournment of the 98th Congress, an additional 53 legislative vetoes were added to the books.

A flagrant case of non-compliance? A sign of disrespect for the courts? An alarming challenge to the time-honored belief that the Supreme Court has the last word on constitutional questions? Perhaps, but the court painted with too broad a brush and offered a simplistic solution that is unacceptable to the political branches. Its decision will be eroded by open defiance and subtle evasion. Neither consequence is attractive, but much of the responsibility for this condition belongs on the doorstep of the court.

Some of the legislative vetoes enacted since *Chadha* are easy to spot. Most of them vest control in the appropriations committees. For example, construction grants

by the Environmental Protection Agency are subject to the approval of the appropriations committees (97 Stat. 226). The approval of the appropriations committees is required before exceeding certain dollar amounts in the National Flood Insurance Fund (97 Stat. 227). With the approval of the appropriations committees, up to 5 percent may be transferred between specified accounts of the National Aeronautics and Space Administration (NASA) (97 Stat. 229). Reimbursement of certain funds for the Ventura Marina project, administered by the Corps of Engineers, requires the prior approval of the appropriations committees (97 Stat. 312). Appropriations may not be available for the acquisition, sale, or transference of Washington's Union Station without the prior approval of the appropriations committees (97 Stat. 462).

Other legislative vetoes are more subtle. A continuing resolution provided that foreign assistance funds allocated to each country "shall not exceed those provided in fiscal year 1983 or those provided in the budget estimates for each country, whichever are lower, unless submitted through the regular reprogramming procedures of the Committees on Appropriations" (97 Stat. 736). Those procedures provide for committee prior-approval. The District of Columbia Appropriation Act for fiscal 1984 prohibited funds from being obligated or spent by reprogramming "except pursuant to advance approval of the reprogramming granted according to the procedure set forth" in two House reports, both of which require prior approval by the appropriations committees (97 Stat. 827).

One year after *Chadha,* President Reagan received the HUD-Independent Agencies Appropriations bill which contained a number of committee vetoes. In his signing statement, he took note of those vetoes and asked Congress to stop adding provisions that the Supreme Court had held to be unconstitutional. He said that "the time has come, with more than a year having passed since the Supreme Court's decision in *Chadha,* to make clear that legislation containing legislative veto devices that comes to me for my approval or disapproval will be implemented in a manner consistent with the *Chadha* decision."[13] The clear import was that the administration did not feel bound by the statutory requirements to seek the approval of congressional committees before implementing certain actions.

The House Appropriations Committee responded to the president's statement by reviewing an agreement it had entered into with NASA four years previously. Caps were set on various NASA programs, usually at the level requested in the president's budget. The agreement allowed NASA to exceed the caps with the approval of the appropriations committees. The House Appropriations Committee thought that the procedure had "worked well during the past four years, and has provided a mechanism by which the Congress and the Committee can be assured that funds are used solely for the purpose for which they were appropriated." Because of Reagan's statement and the threat to ignore committee controls, the committee said it was necessary to repeal the accommodation that had lasted for four years. Repeal language was inserted in the second supplemental bill for fiscal 1984. Both sides stood to lose. The appropriations committees would not be able to veto NASA proposals; NASA would not be able to exceed ceilings without enacting new language in a separate appropriation bill.[14]

Neither NASA nor the appropriations committees wanted to enact a separate public law just to exceed a cap. To avoid this kind of administrative rigidity, NASA Administrator James M. Beggs wrote to both committees on August 9, 1984. His letter reveals the pragmatic sense of give-and-take that is customary between executive agencies and congressional committees. His letter also underscores the impracticality and unreality of the doctrines enunciated by the Supreme Court in *Chadha*:

> We have now operated under the present operating plan and reprogramming procedures for several years and have found them to be workable. In light of the constitutional questions raised concerning the legislative veto provisions included in P.L. 98-371 [the HUD-Independent Agencies Appropriations Act], however, the House Committee on Appropriations has proposed in H.R. 6040, the FY 1984 general supplemental, deletion of all Committee approval provisions, leaving inflexible, binding funding limitations on several programs. Without some procedure for adjustment, other than a subsequent separate legislative enactment, these ceilings could seriously impact the ability of NASA to meet unforeseen technical changes or problems that are inherent in challenging R&D programs. We believe that the present legislative procedure could be converted by this letter into an informal agreement by NASA not to exceed amounts for Committee designated programs without the approval of the Committees on Appropriations. This agreement would assume that both the statutory funding ceilings and the Committee approval mechanisms would be deleted from the FY 1985 legislation, and that it would not be the normal practice to include either mechanism in future appropriations bills. Further, the agreement would assume that future program ceiling amounts would be identified by the Committees in the Conference Report accompanying NASA's annual appropriations act and confirmed by NASA in its submission of the annual operating plan. NASA would not expend any funds over the ceilings identified in the Conference Report for these programs without the prior approval of the Committees.

In short, the agency would continue to honor legislative vetoes. But they would be informal rather than statutory. Beggs ended his letter by assuring the appropriations committees that NASA "will comply with any ceilings imposed by the Committees without the need for legislative ceilings which could cause serious damage to NASA's ongoing programs." By converting the legislative veto to an informal and non-statutory status, NASA is not legally bound by the agreement. Violation of the agreement, however, could provoke the appropriations committees to place caps in the appropriation bill and force the agency to lift them only through the enactment of another public law.

Informal Legislative Vetoes

The NASA agreement describes a world of informal agency-committee accommodations that were solidly in

place before *Chadha*. No doubt these agreements will continue (and probably increase), notwithstanding the court's strictures on the proper steps for lawmaking. The reprogramming procedure has been followed for at least three to four decades. As an informal accommodation between the branches, it allows agencies to shift funds within an appropriation account provided they obtain committee approval for major changes.

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The arrangement is mutually beneficial to Congress and the agencies. Without such an understanding, Congress would have to appropriate with far greater itemization. With it, Congress can appropriate in lump sums and monitor major deviations through the reprogramming procedure. Line itemization is an unattractive solution because neither branch can forecast with adequate precision the financial needs of government agencies. There is a need for flexibility as the fiscal year unfolds and new requirements emerge.

Reprogramming is called informal in the sense that the procedures are not included in public laws. And yet the procedures are highly formalized, spelled out in great detail in committee reports, committee hearings, and correspondence between the committees and the agencies. Agencies place these understandings in their instructions, directives, and financial management manuals, alerting agency personnel to the types of reprogrammings that may be done internally with only periodic reports to Congress and the reprogrammings that require prior approval. Dollar thresholds are used at times to identify the latter. Certain matters of special interest are singled out for prior approval. With the growth of annual authorizations after World War II, the reprogramming process has come to require the prior approval not merely of the appropriations subcommittees but of the authorizing committees as well.[15]

Statutes after *Chadha* may rely more heavily on notification to designated committees before an agency acts. Notification does not raise a constitutional issue, since it falls within the report-and-wait category already sanctioned by prior court rulings.[16] In an informal sense, however, notification in a statute can become a code word to indicate the need for committee prior approval. For example, the Military Construction Appropriation Act for fiscal 1985 prohibits the use of funds to transfer or relocate any activity from one base or installation to another, or to initiate a new installation overseas, without prior notification to the appropriations committees.[17] For these kinds of matters, it is difficult to conceive of a situation in which the Pentagon would proceed against the opposition of its appropriations subcommittees.

The lower courts have recognized the need for informal clearance procedures between agencies and congressional committees. The General Services Administration (GSA) is required by statute to notify appropriate committees of the Congress in advance of a negotiated sale of surplus government property in excess of $10,000. The review panels are the House Government Operations and Senate Governmental Affairs committees. Agency regulations further provide that in the "absence of adverse comment" by a committee or subcommittee, the disposal agency may sell the property on or after 35 days.[18] The U.S. Claims Court found "compelling similarities" between the GSA procedure and the practices prohibited by *Chadha*. It regarded the combination of congressional statute, agency regulation, and agency deference to committee objections as tantamount to committee disapproval and therefore an unconstitutional violation of the doctrine of separated powers.[19]

Congressmen Jack Brooks and Frank Horton, the chairman and ranking minority member of the House Committee on Government Operations, respectively, filed an *amicus curiae* brief which argued that it was improper to characterize as a legislative veto the self-imposed agency deference to congressional sentiment. Such reasoning, they said, would render virtually every statute requiring notification an unconstitutional interference with agency decisions. Their brief also cited instances in which GSA had proceeded despite committee opposition to proposed sales.

The Claims Court was reversed on appeal. The U.S. Court of Appeals for the Federal Circuit found nothing unconstitutional about the decision of agencies to defer to committee objections:

> Committee chairmen and members naturally develop interest and expertise in the subjects entrusted to their continuing surveillance. Officials in the executive branch have to take these committees into account and keep them informed, respond to their inquiries, and it may be, flatter and please them when necessary. Committees do not need even the type of "report and wait" provision we have here to develop enormous influence over executive branch doings. There is nothing unconstitutional about this: indeed, our separation of powers makes such informal cooperation much more necessary than it would be in a pure system of parliamentary government.[20]

Chadha does not affect these non-statutory legislative vetoes. They are not legal in effect. They are, however, in effect legal. Agencies are aware of the penalties that can be invoked by Congress if they decide to violate understandings and working relationships with their review committees.

Internal Congressional Rules

What is now prohibited directly by *Chadha* can be accomplished indirectly through House and Senate rules. As highlighted by a dispute in the 1950s, rules governing authorizations and appropriations can serve as the functional equivalent of the legislative veto. President Eisenhower had objected to statutory provisions that required agencies to come into agreement with committees before implementing an administrative action. Such provisions, claimed the Justice Department, violated the constitutional principle of separated powers.[21] Congress retaliated by changing its internal

procedures so that funds could be appropriated for a project only after the authorizing committees had passed a resolution of approval. The form had changed; the substance of committee veto remained unscathed. Nevertheless, the Justice Department accepted the committee resolution as a valid form of action because it was directed at the internal workings of Congress (the appropriations committees) rather than at the executive branch. By relying on the authorization-appropriation distinction, Congress retained its committee veto.

At the start of the 99th Congress, Congressman Joe Moakley introduced a House concurrent resolution to strengthen legislative oversight over agency rulemaking. He explained that the resolution "seeks to respond to constitutional issues raised in connection with recent Court decisions relating to traditional legislative vetoes."[22] The resolution invokes two constitutional powers: the power of each House to determine the rules of its proceedings, and the requirement that no money be drawn from the Treasury but in consequence of appropriations made by law. The resolution would create a Joint Committee on Regulatory Affairs with authority to review all federal agency rules. If Congress adopted a concurrent resolution objecting to a regulation, it would be a rule in each House that the appropriations committees could not report new appropriations to carry out the regulation. The appropriations committees would be acting as agents for their respective Houses. The procedure contemplates a two-House veto directed at the internal workings of each House rather than at the executive branch.

Congress retains the right to place language in an appropriations bill to deny funds for agency activities. Although House and Senate rules generally prohibit the insertion of substantive language in appropriations bills, these rules are not self-enforcing. Members of both Houses find it convenient at times to attach legislation and limitations to the most available appropriations bill. Since a president is unlikely to veto an appropriations bill simply because it contains an offensive rider, the practical effect is at least a two-House veto. Because of accommodations and comity between the House and the Senate, the reality in many cases is a one-House veto.

The Trade and Tariff Act of 1984 includes an intriguing use of congressional rules to control the executive branch. The statute authorizes either tax committee—Senate Finance or House Ways and Means—to disapprove the negotiation of certain trade agreements.[23] The actual effect is not to prevent negotiation but to withdraw the president's authority to submit trade agreements for expedited consideration by Congress.[24] These expedited procedures offer major conveniences for the president. His bill implementing a trade agreement is assured automatic introduction in both Houses; neither House may amend the president's bill; the bill will be discharged from the tax committees if they fail to act within a specified number of days; motions to consider the implementing bill are privileged and not debatable; and debate in either House is limited to not more than 20 hours. These procedures represent an exercise of the rulemaking power of each House "and as such they are deemed a part of the rules of each House." The two Houses retain the right to change the rules "at any time, in the same manner and to the same extent as in the case of any other rule of that House."[25]

If one of the tax committees objected to the negotiation of a trade agreement, would the Justice Department and the president complain about congressional interference with executive duties or challenge the committee action as an invalid legislative shortcut incompatible with *Chadha*? Probably not. Unless the executive branch is willing to swallow this arrangement, Congress can repeal the fast-track procedure and force the president to submit an implementing bill subject to all the uncertainties and "indignities" of the regular legislative process: having a bill buried in committee, or amended until the executive branch cannot recognize its own creature, or filibustered to death on the floor.

Joint Resolutions: Shifting the Burden

After *Chadha*'s invalidation of the legislative veto, members of Congress and the agencies searched for statutory alternatives that would satisfy their institutional needs. The joint resolution is a tempting substitute, since it meets *Chadha*'s requirement of bicameralism and presentment. Like an ordinary bill, joint resolutions must pass both Houses of Congress and must be presented to the president for his signature or veto.

Depending on the type of joint resolution, the burden shifts to Congress or the president. A joint resolution of disapproval usually weakens legislative control because it requires Congress to act and the resolution is vulnerable to the president's veto. Congress cannot be expected to pass joint resolutions to stop every agency action it opposes. The workload is too heavy and veto overrides too difficult.

On the other hand, a joint resolution of approval shifts the burden to the president, who would have to obtain the approval of both Houses within a set number of days. The results could be ironic. For example, reorganization plans submitted to Congress by the president since 1949 were subject to a one-House veto. If one House failed to disapprove within a specified number of days, a reorganization plan became law. The Reorganization Act Amendments of 1984 reverses the burden. A reorganization plan could not take effect unless Congress passed a joint resolution of approval within 90 days. As the statute notes: "Failure of either House to act upon such resolution by the end of such period shall be the same as disapproval of the resolution."[26] The practical effect is that Congress still has a one-House veto, but it can be invoked by inaction rather than action. The new procedure puts the president at a definite disadvantage. He must secure the support of both Houses within a limited number of days.

Joint resolutions of approval are also being used for such controversial issues as the MX missile. Before *Chadha,* Congress made use of legislative vetoes to con-

trol the timetable for the MX program. Legislation in 1981 prohibited the obligation or expenditure of funds to develop the basing mode after November 18, 1981, if before that date the two Houses agreed to resolutions expressing disapproval of the president's plan.[27] Congress strengthened its hand the following year by prohibiting the obligation or expenditure of funds to initiate full-scale engineering development of a basic mode until *approved* by both houses in a concurrent resolution.[28] This change required the president to lobby both houses for support.

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After *Chadha,* Congress turned to the joint resolution of approval to protect its institutional interests. At the end of 1984, Congress authorized the use of $1.5 billion in prior-year, unobligated funds for the MX missile. However, the funds could not be obligated unless Congress passed two joint resolutions of approval after March 1, 1985. The first resolution would be handled by the armed services committees, and the second by the appropriations committees. Action on the joint resolution was subject to certain fast-track procedures spelled out in the statute: procedures to discharge committees, time limits on floor debate, and prohibitions on amendments.

A similar approach was used for Nicaragua. A proscription on the use of intelligence-agency funds would cease after February 28, 1985, if Congress passed a joint resolution of approval, again subject to expedited procedures.[29] A joint resolution of approval, although it conforms to the court's decision, offers not the slightest benefit to the president. It is functionally identical to a concurrent resolution of approval. In either case the president must obtain the support of both houses; doubtless the president would sign a joint resolution giving him the authority he sought.

Congress must be selective in its use of the joint resolution of approval. It cannot serve as an all-purpose substitute for the legislative veto. On November 3, 1983, the House of Representatives voted down the use of a joint resolution to approve certain rules promulgated by the Environmental Protection Agency. During hearings the following year, Congressman John Dingell expressed his satisfaction with the House action and warned against overuse of joint resolutions of approval: "if you want to see the Congress clogged, overloaded, incapable of action, because of a new effort to review a prodigious number of actions by the Executive and regulatory structure, that is a fine way to do it."[30]

To protect Congress from being overloaded, combinations of joint resolutions of approval and disapproval are possible. A few months after *Chadha,* Congressman Trent Lott introduced legislation to require a joint resolution of approval for major rules and a joint resolution of disapproval for minor rules.[31] This hybrid approach subjects major rules to a heavy burden but allows minor rules to take effect unless disapproved by Congress. Senator Charles E. Grassley has also recommended this approach for agency rules.[32]

Prior to *Chadha,* major arms sales were subject to a joint resolution of disapproval. Both houses had to disapprove within a limited number of days. In response to the court's decision, Congressman Stephen Solarz introduced legislation to divide arms sales into two categories. The president would be prohibited from selling arms to certain countries and international organizations unless Congress enacted a joint resolution authorizing the sale. This procedure would force the White House to enlist the support of both houses. Whereas both houses had to disapprove under the previous system, the Solarz bill would allow one House to stop an arms sale simply by refusing to support a joint resolution of approval. The administration would face not a two-House but a one-House veto. As for the second category in the Solarz bill, arms sales for NATO, Japan, New Zealand, Australia, and Israel would be allowed to go forward unless Congress disapproved by joint resolution within 15 days.[33]

Congress and the executive branch reached an interesting compromise on the D.C. Home Rule Act. The Reagan administration usually preferred that Congress use joint resolutions of disapproval as a substitute for the legislative veto. If Congress failed to act, administration proposals would automatically take effect. If Congress managed to pass a joint resolution of disapproval, the president could veto it. In the case of the District of Columbia, however, the strategy was reversed. The use of a joint resolution by Congress to disapprove certain laws passed by the D.C. Council effectively eliminated presidential participation. If Congress disapproved and the president vetoed the joint resolution, his action would merely reinstate the D.C. law. The president would have little leverage through his veto to influence D.C. legislation.

The Justice Department pressed for a joint resolution of approval to allow the president to veto changes in the D.C. criminal code. However, the D.C. government and members of Congress opposed this procedure as a step backward from home rule. The administration eventually acquiesced and accepted the use of joint resolutions of disapproval as substitutes for the one-House and two-House vetoes in the D.C. Home Rule Act.[34]

Conclusions

Through its misreading of history, congressional procedures, and executive-legislative relations, the Supreme Court has commanded the political branches to follow a lawmaking process that is impracticable and unworkable. Neither agencies nor committees want the static model of government offered by the court. The inevit-

able result is a record of non-compliance, subtle evasion, and a system of lawmaking that is now more convoluted, cumbersome, and covert than before. In many cases the court's decision simply drives underground a set of legislative and committee vetoes that had previously operated in plain sight. No one should be misled if the number of legislative vetoes placed in statutes gradually declines over the years. Fading from view will not mean disappearance. In one form or another legislative vetoes will remain an important method for reconciling legislative and executive interests.

Notes

1. *Ashwander* v. *TVA,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), quoting from *Liverpool, N.Y. & P.S.S. Co.* v. *Emigration Commissioners,* 113 U.S. 33 (1885).
2. *INS* v. *Chadha,* 462 U.S. 919, 952 (1983).
3. *Ibid.*, p. 958.
4. *Ibid.*, p. 959.
5. *Ibid.*, p. 951.
6. *Ibid.*, p. 967.
7. *Ibid.*, p. 968.
8. *Chadha* v. *INS,* 634 F.2d 408 (9th Cir. 1980); *Clark* v. *Valeo,* 559 F.2d 642, 650 n.10 (D.C. Cir. 1977); and *Atkins* v. *United States,* 556 F.2d 1028, 1059 (Ct. Cl. 1977).
9. *AFGE* v. *Pierce,* 697 F.2d 303 (D.C. Cir. 1982); *Consumers Union, Inc.* v. *FTC,* 691 F.2d 575 (D.C. Cir. 1982); and *Consumer Energy Council of America* v. *FERC,* 673 F.2d 425 (D.C. Cir. 1982).
10. *AFGE* v. *Pierce,* 697 F.2d at 308.
11. *Ibid.*
12. Louis Fisher, *Constitutional Conflicts between Congress and the President* (Princeton, N.J.: Princeton University Press, 1985), pp. 164-166.
13. *Weekly Compilation of Presidential Documents,* vol. 20 (July 18, 1984), p. 1040.
14. H. Rept. No. 916, 98th Cong., 2d Sess. (1984), p. 48.
15. Louis Fisher, *Presidential Spending Power* (Princeton, N.J.: Princeton University Press, 1975), pp. 75-98.
16. *Sibbach* v. *Wilson & Co.,* 312 U.S. 1, 14-15 (1941); and *INS* v. *Chadha,* 462 U.S. at 935, n.9.
17. Military Construction Appropriation Act, Pub. L. No. 98-473, 98 Stat. 1881 (sec. 108), and 1882 (sec. 118).
18. 40 U.S.C. §484(e)(6); 41 C.F.R. §101-47.304-12(f).
19. *City of Alexandria* v. *United States,* 3 Ct. Cl. 667, 675-678 (1983).
20. *City of Alexandria* v. *United States,* 737 F.2d 1022, 1026 (C.A.F.C. 1984).
21. See 41 Op. Att'y Gen. 230 (1955) and 41 Op. Att'y Gen. 300 (1957).
22. *Congressional Record,* vol. 131, H137 (daily ed. January 24, 1985).
23. Trade and Tariff Act, Pub. L. No. 98-573, 98 Stat. 3014 (1984).
24. H. Rept. No. 1156, 98th Cong., 2d Sess. (1984), p. 151.
25. 19 U.S.C. §2191 (1982).
26. Reorganization Act Amendments, Pub. L. No. 98-614, §3(a)(1), 98 Stat. 3192 (1984).
27. Pub. L. No. 97-86, §203, 95 Stat. 1102 (1981).
28. Pub. L. No. 97-377, 96 Stat. 1846 (1982).
29. Pub. L. No. 98-473, 98 Stat. 1916-1918, 1935-1937 (1984).
30. "Legislative Veto After Chadha," *Hearings before the House Committee on Rules,* 98th Cong., 2d Sess. (1984), p. 11.
31. H.R. 3939, 98th Cong., 1st Sess. (1983).
32. *Congressional Record,* vol. 129, S17081-84 (daily ed. November 18, 1983) and 130 Cong. Rec. S926 (daily ed. February 3, 1984).
33. H.R. 5759, 98th Cong., 2d Sess. (1984).
34. D.C. Home Rule Act. Pub. L. No. 98-473, 98 Stat. 1974-75 (1984).