Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers

Congressional Hearings on Legislative Veto (1981)[1]

As Ronald Reagan ascended to the White House, the question of the constitutionality of the legislative veto was making its way through the judiciary. The federal judiciary had long ducked the issue, but several lawsuits raising fundamental challenges to the legislative veto were being pushed through the courts. Among them was the suit of Jagdish Chadha, an exchange student whose deportation was suspended by the attorney general until the House of Representatives exercised a legislative veto to overturn the suspension order. In 1980, eight years after Chadha's student visa expired, the Court of Appeals for the Ninth Circuit overturned the House's action and declared that the provision of the immigration law providing for a legislative veto was unconstitutional. Numerous bills were introduced to reform, reassert, or repeal the legislative veto process, and in 1981 the House held hearings examining the process by which Congress reviewed rulemaking by executive agencies. Among the witnesses was Theodore Olson, the newly appointed head of the Office of Legal Counsel; Alan Morrison, the director of a unit of Ralph Nader's Public Citizen and the lead attorney arguing Chadha's case; and Democratic congressman Elliot Levitas. During the presidential campaign of 1980, Republicans endorsed the legislative veto as a way of reining in the bureaucracy. After the inauguration, the administration announced its opposition to the legislative veto as an unconstitutional infringement on the presidency.

Why might the Reagan administration have changed their position on the legislative veto? Is support for the legislative veto a conservative or liberal position? Does the legislative veto promote or hinder congressional responsibility? Does it enhance democracy? Should the exercise of the legislative veto be understood as a form of lawmaking? How might it be an exercise of executive power by Congress?

THEODORE OLSON (Assistant Attorney General).

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For purposes of constitutional analysis, all the types of legislative vetoes . . . share two substantial infirmities.

First, because they do not provide for presentation to the President of a resolution purporting to bind the executive branch, they violate the constitutionally mandated procedures for legislative action set forth in the presentation clauses of article I, section 7, clauses 2 and 3. A related defect of legislative veto provisions other than two-House vetoes is that they violate the constitutional principle of bicameralism, under which all exercises of the legislative power having binding effect on the executive branch must first involve passage of a resolution or bill by both Houses of Congress. . . .

Second, since legislative vetoes would allow the legislative branch, or some unit of it, to substitute its judgment about how best to execute the law for that of the executive branch, legislative veto provisions violate the underlying constitutional principle of the separation of powers, under which the Legislature is to legislate and the executive is to execute the law.

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[1] *Congressional Review of Agency Rulemaking: Hearings before the Subcommittee on Rules of the House*, 97th Cong., 1st Sess. (1981).

The presentation requirement is critical to our constitutional scheme of government. The separation of powers that distinguishes our Constitution is counterweighted with a system of checks by each branch over the other two.

The President's power to approve or veto actions of Congress is absolutely necessary to the preservation of the Presidency and to the system of constitutional checks and balances. . . . The Constitution's Framers feared that, absent a Presidential veto, "the legislative and executive powers might speedily come to be blended in the same hands." . . .

The Framers also believed that the President's veto power could operate on behalf of the public interest to protect against the effects of special interests to our public life. . . .

Legislative veto provisions purport to authorize congressional resolutions that change the law without being subject to the Presidential veto. They circumvent one of the President's most important constitutional powers, in a sense, his only defense. They are therefore not constitutionally permissible. . . .

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The boundary between legislative and executive action is set in the first instance by Congress when it decides how much discretion to delegate to the executive branch in implementing policies established by this body by statute. Once such an authorization is enacted, however, the implementation of the statutory policies is an executive function. Indeed it is the core of the executive branch's function. The statute sets a boundary beyond which the executive branch may not go without intruding on the legislative function. It similarly sets a boundary within which the executive must be allowed to function without congressional vetoes or requirements except as adopted through the constitutional process of legislation. If it were otherwise, Congress would be able to arrogate to itself the essence of the executive's function. In that circumstance, there would be no place for the executive as a separate, coequal branch of government.

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ALAN MORRISON (Congress Watch).

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. . . . I think from a separation of powers point of view, if what the Congress is doing is saying, "we think you exercised your discretion improperly," that is plainly executive action. If what it is doing . . . is to say, "we changed our minds," that is plainly legislative. If you did what you are doing, which is saying the agency didn't follow the intent, that seems to be judicial.

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I recognize and applaud the Congress for recognizing its oversight responsibilities and there is a proper way to conduct oversight; it is conducted that way, and that is a way which gathers investigative materials and leads to a new law, or to a change in the law. But any time the Congress takes action which purports to bind others in a way short of the full legislative process, then that is not permitted by the Constitution.

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. . . . Now, I recognize that when a legislative committee and/or appropriations committee, in this House or the other body, issue a resolution which says, "We think you ought to re-think that rule," that any agency which doesn't at least take a look at it is courting legislative, if not budgetary disaster.

But that is different from a provision which gives the agency no choice and says to them, "You may not put that rule into effect." Whether it is wise to disagree with the Congress or not is a different matter, but as far as the power to purport to stop a rule . . . that violates the Constitution.

The people have a right to know what the rules are, to have their administrative process not be in vain, and not to come up and find a rule vetoed without the kind of careful consideration that the Congress simply doesn't have the time to give it.

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[T]he agencies are, it seems to me, doing a better job. They are thinking about rules more carefully. Judicial review [of agency actions] may be too late in some sense, but it is not too late as long as it goes into effect before the rule takes place on the community.

So, other than that, the Constitution is not designed, as Mr. Olson pointed out, to promote efficiency; it is designed to prevent undue accretions of power and to see that when Congress takes action it is on a carefully considered basis.

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REPRESENTATIVE ELLIOT LEVITAS (Democrat, Georgia).

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At the heart of this issue of congressional veto of administrative rules and regulations is the question: Who makes the laws in this country – the elected Representatives of the people or the unelected bureaucrats?

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One has only to glance at the daily Federal Register to realize that the executive and independent agencies have evolved into a fourth branch of government with hosts of regulations which carry the force of law without legislative consideration. While it may be true that Congress has previously given – or abandoned – to the bureaucracy the power to enact these administrative laws, that does not justify an unmitigated continuation of this practice.

There is clearly a need to have administrative rules to fill in the gaps between the broad principles embodied in acts of Congress, but this does not mean that Congress should leave it to civil servants or appointed officials to pass thousands upon thousands of far-reaching rules that can put citizens in jeopardy of losing liberty or property without having anyone elected by the people or answerable to them involved in the process.

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[T]he public will have a larger voice in the rulemaking process. Access to Congressmen and Senators is far easier than access to anonymous, faceless bureaucrats. Most Federal administrators are hard-working, dedicated, and talented people who conscientiously do their jobs and serve the public faithfully and well. Some few, however, are zealots who in some elitist way think they – not the people or the elected Congress – run the country. The purpose of congressional veto is to deal with this problem and to see that the public is given an input, through their elected Representatives, in the promulgation of administrative rules and regulations. . . .

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I am personally of the view that the Supreme Court will uphold the constitutionality of the legislative veto violates the constitutional principle of separation of powers. How can the legislative branch invade executive powers by reviewing legislative decisions simply because they are called regulations instead of laws? If anything, the thousands of rules/laws passed by the bureaucrats in the executive branch invade the legislative powers of Congress. Certainly, Congress delegated rulemaking authority to the executive branch agencies, but the separation of powers doctrine does not preclude that the delegation be absolute and cannot be conditioned by legislative enacted according to the constitutional design. In short, if Congress has the power to delegate rulemaking authority, it is axiomatic that it can delegate all the power or it can condition or limit that delegated power by making it subject to a congressional veto. The far more serious question of whether Congress can delegate legislative powers to the executive branch was decided decades ago by the Supreme Court. Conditioning that delegation of power is merely a corollary to a well-established principle.

The legislative veto does not violate the Presentment Clause or the principle of bicameralism because it is not legislation. It is simply a maintaining of the status quo. It is the same as if a bill were introduced and it did not pass both Houses of Congress . . . . It is not changing the law.

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