

NOTES

CONGRESSIONAL VETO OF ADMINISTRATIVE ACTION: THE PROBABLE RESPONSE TO A CONSTITUTIONAL CHALLENGE

As the size, complexity, and regulatory jurisdiction of federal administrative agencies have expanded, charges of arbitrary and unreasonable conduct on the part of the agencies become increasingly common.¹ In particular, it is frequently alleged that the agencies' autonomy and lack of accountability cause them to lose touch with economic and political reality and to operate in a rarified atmosphere of legal abstraction and statutory dogma.² Ironically, nowhere has the criticism been more intense than among the members of Congress, the creators of the regulatory agencies.³ The thrust of the arguments in defense of the agencies has been that independence is necessary for effective regulation, and that the agencies have in fact been responsive when bureaucratic inequities are called to their attention.⁴

In response to the criticism, a number of remedial legislative proposals have recently been put before Congress.⁵ The most sweeping

THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

Hearings on H.R. 3658 and H.R. 8231 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) [hereinafter cited as *House Hearings* (Because the official bound volume of these hearings arrived just prior to publication, page number citations to those statements appearing in the bound volume will be found in the parentheses following the date)];

Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1961) [hereinafter cited as Cooper & Cooper];

Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953) [hereinafter cited as Ginnane];

Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975) [hereinafter cited as Watson].

1. See, e.g., Russell, *Hill Eyes Its Own Veto Power*, Washington Post, Dec. 27, 1975, § A, at 2, col. 1.

2. *Id.* See also Statement of Rep. Mark Andrews, *House Hearings*, Oct. 21, 1975; Statement of Harold E. Ford, Executive Director, Southeastern Poultry & Egg Ass'n, *House Hearings*, Oct. 23, 1975 (208); Kilpatrick, *The OSHA Box Score: Business 2, Bureaucrats 0*, Raleigh News and Observer, Mar. 3, 1976, at 5, col. 1.

3. See Russell, *supra* note 1; 121 CONG. REC. 10,204 (daily ed. Oct. 22, 1975) (remarks of Mr. Butler).

4. See Statement of Robert J. Lewis, General Counsel, Federal Trade Commission, *House Hearings*, Oct. 31, 1975 (463); Statement of Bert Concklin, Deputy Assistant Secretary of Labor for Occupational Safety and Health, *House Hearings*, Oct. 23, 1975 (477).

5. The various proposals are summarized in Russell, *supra* note 1. For a descrip-

reform proposals are embodied in two bills currently being heard in committee, House Bill 8231⁶ and House Bill 3658.⁷ Though they differ somewhat in scope of application, the broad purpose of both bills is to require that rules being promulgated by federal agencies be presented to Congress for evaluation before becoming effective. Under both bills, either house of Congress could prevent implementation of a regulation by adopting a resolution of disapproval before the expiration of a statutory waiting period. A regulation not expressly disapproved within the statutory period would take effect automatically.⁸

The idea of congressional oversight of the executive branch is not new,⁹ and its history, substantive merits, and constitutional implications

tion of the two proposals with the broadest prospective application, see note 8 *infra*. More limited legislative efforts to supervise the functioning of individual agencies are discussed in note 9 *infra*. Proposals to de-regulate industries which have traditionally been heavily regulated are a further manifestation of the prevailing anti-administrative mood. See, e.g., N.Y. Times, Dec. 11, 1975, at 45, col. 4 (natural gas); *id.* Oct. 9, 1975, at 1, col. 7 (airlines).

6. H.R. 8231, 94th Cong., 1st Sess. (1975).

7. H.R. 3658, 94th Cong., 1st Sess. (1975).

8. Specifically, House Bill 3658 would amend the portion of the Administrative Procedure Act governing rulemaking procedures, 5 U.S.C. § 553 (1970). Under the bill's provisions, any agency rule which is required to be preceded by general notice of the proposed rulemaking and which would subject a violator to a criminal sanction would take effect only if two conditions were met. First, the rule would have to be published in the *Federal Register* at least thirty days of continuous session of Congress before it was scheduled to take effect. Second, the thirty-day period would have to elapse without adoption by either house of Congress of a resolution stating simply that "that House does not favor the rule." H.R. 3658 §§ 3(f)-(g), 94th Cong., 1st Sess. (1975). Exceptions to these requirements are made for rulemaking procedures involving military or foreign affairs, agency management or personnel, public property, loans, grants, benefits, or contracts. *Id.* § 3(a).

Although similar in purpose, House Bill 8231 is considerably broader in scope. It applies to "any rule or regulation to be used in the administration or implementation of any law of the United States or any program established by or under such law," as well as to changes in such rules. H.R. 8231, § 1, 94th Cong., 1st Sess. (1975). No rule or rule change could take effect for a period of sixty "legislative" days following its issuance, during which either house of Congress could veto the proposal by adopting "a resolution in substance disapproving such rule, regulation, or change because it contains provisions which are contrary to law or inconsistent with the intent of the Congress, or because it goes beyond the mandate of the legislation it is designed to implement or in the administration of which it is designed to be used." *Id.* § 2(b).

The procedures proposed in the two bills are markedly similar to the British practice of requiring that administrative regulations be "laid before" Parliament for a period of time during which they are subject to parliamentary disapproval before taking effect. See Ginnane 584-85 & n.62; Watson 1068-70.

9. A comprehensive review of the history of the legislative oversight concept is provided in Watson 991-1029. See also Cooper & Cooper 469-71; Ginnane 570-99.

Several recent enactments have included provisions allowing one or both houses of Congress to veto proposed executive actions by resolution. See, e.g., Federal Election

have been discussed at great length.¹⁰ The present bills are unique, however, in that they represent Congress's first attempt to institutionalize a general policy which subjects nearly all administrative regulations to congressional veto. No court has had occasion to evaluate directly the constitutionality of a congressional veto scheme, but the scope and potential impact of the present bills make it likely that a prompt constitutional challenge would ensue upon passage. This Note will address the limited question of the probable response of the Supreme Court to such a challenge.

The Constitutional Question

The veto provisions currently before Congress have given rise to two types of constitutional objections. First, it has been argued that the congressional veto constitutes a general usurpation of the executive function.¹¹ Congress's authority and competence, it is asserted, are limited to the area circumscribed by its enumerated legislative powers,¹²

Campaign Act Amendments of 1974, 2 U.S.C.A. § 438(c) (Supp. 1976) (providing for single-house vetoes of regulations proposed by the Federal Election Commission); Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 753(g)(2) (Supp. III, 1973) (allowing either house to reject exceptions made by the President to mandatory allocation rules); Trade Act of 1974, 19 U.S.C.A. §§ 2192-94 (Supp. 1976) (permitting Congress to disapprove specified presidential actions by means of concurrent resolution); Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C.A. § 1403(b) (Supp. 1976) (allowing either house to block presidential impoundment of appropriated funds); Presidential Recordings and Materials Preservation Act, 44 U.S.C.A. § 2107 n. (Supp. 1976) (allowing either house to disapprove implementing regulations proposed by the General Services Administration). For a more complete listing of legislative veto statutes, see Watson App. B.

Most recently, an amendment has been added to the Consumer Product Safety Act, S. 644, 94th Cong., 1st Sess. (1975) (currently in conference), which would allow either house of Congress to reject regulations proposed by the Consumer Product Safety Commission. See 121 CONG. REC. 10,204 (daily ed. Oct. 22, 1975).

10. Compare Ginnane; Schauffler, *The Legislative Veto Revisited*, 8 PUB. POLICY 296 (1958); and Watson (advocating a cautious approach to the use of the legislative veto) with Cooper & Cooper (supporting the necessity and propriety of the veto). See generally J. Cooper, *Schauffler and the Veto: A Commentary*, 8 PUB. POLICY 328 (1958); J. Cooper, *The Legislative Veto: Its Promise and Its Perils*, 7 PUB. POLICY 128 (1956); Newinan & Keaton, *Congress and the Faithful Execution of the Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953).

11. See 121 CONG. REC. 10,205 (daily ed. Oct. 22, 1975) (remarks of Mr. Drinan and Mr. Eckhardt); Statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Dep't of Justice, *House Hearings*, Oct. 29, 1975 (373). In arguing for the necessity of a limited executive privilege with respect to control of government secrets, the present Attorney General has also expressed the view that there is a definable sphere of executive activity upon which Congress may not encroach. See Statement of Attorney General Edward H. Levi before the Senate Comm. on Government Operations, Feb. 6, 1976.

12. Congress's principal powers are enumerated, U.S. CONST. art. I, and the legisla-

and any attempt by Congress to exercise control over the day-to-day execution of laws already passed is violative of the doctrine of separation of powers.¹³

A second and more specific constitutional argument is that such a provision would allow an evasion of the President's veto authority¹⁴ in a manner which the framers of the Constitution sought expressly to preclude.¹⁵ Once Congress has created an agency and defined its

tive process is governed specifically by section 7 of that article. Incidental congressional powers and responsibilities are provided for elsewhere in the Constitution. *See, e.g.*, U.S. CONST. art. II, § 2 (confirmation of presidential appointments); *id.* art. III, § 1 (establishment of inferior federal courts); *id.* art. IV, § 3 (admission of new states and disposal of government property); *id.* amend. XII (congressional role in presidential elections).

13. The Constitution does not require explicitly that the powers of the three branches be held and exercised independently. Rather, the separation doctrine is implicit in the system of checks and balances which the Constitution provides. It is clear from the debate and rhetoric surrounding the framing of the Constitution that its authors intended the enumeration of discrete and offsetting powers to result in the sort of division of authority which Montesquieu had advocated in the abstract. *See THE FEDERALIST* Nos. 47-48 (J. Madison). *See generally* Buckley v. Valeo, 96 S. Ct. 612, 682-84 (1976); 1 & 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1937 ed.); Watson 1030-49.

14. U.S. CONST. art. I, § 7:

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated. . . . If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . .

[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.

15. Those taking this view emphasize that the framers, in arriving at the final version of section 7 of article I, were concerned primarily with protecting the executive, who was seen as representing a national constituency, against more parochial interest groups in Congress. *See THE FEDERALIST* No. 73 (A. Hamilton). It is noted that the Constitutional Convention rejected preliminary drafts of the section which appeared to provide opportunities for congressional evasion of the President's veto by action other than in the prescribed legislative form. It is argued that the third clause of the section, with its mention of orders, resolutions, and votes, was added specifically to foreclose such evasion by making all binding congressional action subject to the presidential veto. *See* 5 *ELLIOTT'S DEBATES* 431 (1845).

Proponents of this analysis recognize, of course, that the third clause of section 7 of article I applies the veto requirement only to those legislative acts "to which the Concurrence of the Senate and House of Representatives may be necessary." Their argument assumes, however, necessarily with some circularity, that the text and history of the section taken as a whole strongly imply that all significant legislative acts were

powers, it is argued, any attempt to alter that original legislation, as by specific restrictions on the agency's exercise of its powers, is a legislative act equivalent to repeal or amendment which can be properly accomplished only through the full legislative process.¹⁶ Although Congress might legitimately delegate all of its authority in a given area to an administrative agency, the argument continues, neither the original delegation nor any subsequent modifications can be carried out without adherence to the constitutional scheme of shared congressional and executive authority.¹⁷

In response to the first category of objections, it has been suggested that in practice the separation doctrine has proven to be little more than

intended to be concurred in by both houses. *Cf. Buckley v. Valeo*, 96 S. Ct. 612, 757-58 (1976) (White, J., concurring).

The history of section 7 of article I is reviewed from this perspective in Ginnane 572-73 and Watson 1030-49. A conflicting interpretation of the historical material is discussed in notes 16-21 *infra* and accompanying text.

16. This view was expressed succinctly in a memorandum drafted at the direction of President Franklin Roosevelt by the staff of Attorney General (later Justice) Jackson. The Lend-Lease Act, ch. 30, 55 Stat. 53 (1941), contained a provision authorizing Congress to revoke the powers granted to the President by concurrent resolution. Although he signed the act for foreign policy reasons, President Roosevelt supervised the preparation of a confidential memorandum expressing his constitutional objections to the revocation provision. Justice Jackson, acting pursuant to the late President's wishes, released the document in 1953. Jackson, *A Presidential Legal Opinion*, 66 HARV. L.REV. 1353, 1357-58 (1953).

17. Commentators advocating a cautious approach to the use of the congressional veto have pointed to two specific dangers. First, one Congress, by including a veto provision in an enabling act passed by a two-thirds majority over the President's veto, would set the stage for subsequent Congresses to change policy against the President's will by simple majority. Momentary peaks of congressional support for a particular policy, it is argued, will be preserved at the expense of both future Presidents and future members of Congress. *See* Watson 1030-49. Second, it has been suggested that single-house congressional veto provisions bring about an undesirable enhancement of the powers of congressional minorities by undercutting the principle of bicameralism. Allowing control of administrative action by resolution of one house, it is noted, leaves open the possibility of policy changes being made by fifty-one Senators in a Congress of 535, or by a coalition of large-state Representatives reflecting a narrow local interest. Either of these results, the argument concludes, would directly contravene the framers' intent, implicit in the bicameral system, to control individual self-aggrandizement and to prevent the development of regional hegemonies. *See id.* at 1065-68.

Additionally, it is feared that a congressional veto provision like those proposed in House Bill 3658 and House Bill 8231 would confuse and ultimately weaken the judicial review process by allowing future Congresses to read their views into the legislative histories of earlier enactments. *See* Statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Dep't of Justice, *House Hearings*, Oct. 29, 1975 (376): "And if, as seems to me the obvious design of these bills, the Congress is to create out of whole cloth, or even—the best that can be envisioned—to summon up out of its unrecorded institutional memory an intent that is not apparent in the language or printed history of the original statute, then a principle of statutory construction will be violated."

a captivating but unworkable abstraction.¹⁸ It is argued that the framers of the Constitution saw the doctrine as a safeguard against the extreme situation of tyrannical self-aggrandizement by one of the three branches, not as an operating principle for the federal government.¹⁹ The recent trend in the development of intergovernmental relations is seen as favoring cooperative intermingling of function and responsibility among the three branches.²⁰

The second objection, encroachment on the presidential veto power, has been criticized for being premised on an overly literal interpretation of the veto clause itself and the debates leading to its enactment.²¹ It is admitted that the primary purpose of the veto power was to permit the President, with his national constituency, to protect minority and, ultimately, national interests against geographical or ideological coalitions riding ephemeral tides of sentiment. It is argued, however, that the clause should be read only as a restriction on attempts at gross evasion of the presidential review authority, and not as a limit on congressional flexibility in implementing properly enacted legislation.²² The proponents of this interpretation find it sufficient for Congress to meet the requirements of the veto clause once, at enactment of the enabling legislation which authorizes the congressional veto.²³

Despite the absence of a definitive ruling, there is ample judicial authority to be cited in support of either side of the question whether a congressional veto provision would be an unconstitutional evasion of the presidential veto power.²⁴ A strict constructionist approach to this and

18. See Cooper & Cooper 479-87, 502-07.

19. See *id.* at 477-79, 502-07. The argument resolves itself into a question of emphasis: is the separation of powers an affirmative doctrine with limited exceptions, or, as these authors would have it, an abstraction which marks the periphery of a practical policy of intermingling? See note 13 *supra*.

20. See Cooper & Cooper 488-99. The authors suggest that the congressional veto is substantively indistinguishable from other, admittedly legitimate means of legislative oversight. For example, Congress can significantly influence agency policy by exercising its control over agency budgets, or by threatening repeal or amendment of agency enabling acts. See also J. Cooper, *The Legislative Veto*, *supra* note 10, at 134-36. But see *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966) (invalidation of administrative decision because of undue congressional influence). For recent examples of the intermingling trend, see the statutes cited in note 9 *supra*.

21. See Cooper & Cooper 477-79.

22. *Id.*

23. *Id.* See also *Buckley v. Valeo*, 96 S. Ct. 612, 757 (1976) (White, J., concurring); 121 CONG. REC. 10,206 (daily ed. Oct. 22, 1975) (remarks of Mr. Levitas).

24. The remarks of Justice Jackson in the *Steel Seizure Case* concerning the general issue of separation of powers are equally applicable to the narrower question considered here: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah. A century and a half of

other problems which arise under the separation of powers doctrine finds support in a series of cases dating back to Reconstruction. In *United States v. Klein*,²⁵ the Court vigorously defended the independence of the President's pardon power in striking down a law which provided that a presidential pardon alone was insufficient evidence of the loyalty of a claimant to property confiscated during the Civil War.²⁶ Nine years later, in *Kilbourn v. Thompson*,²⁷ the Court rejected an attempt by the House of Representatives to punish for contempt a witness called to testify in a matter not directly related to the House's legislative duties. After Kilbourn had refused to respond to a subpoena directing him to testify and to produce certain documents regarding private real estate dealings, the House ordered the Sergeant-at-Arms to arrest him. The Court found that the House's action constituted an unwarranted attempt to extend its internal rulemaking power. The net effect of permitting such action, the Court concluded, would be to allow Congress to achieve substantive legislative ends without recourse to the legislative process, a clear violation of the separation doctrine.²⁸

partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

The Supreme Court came perhaps closest to deciding the constitutionality of the congressional veto in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). *See generally* *Cooper & Cooper* 469 n.9. *Sibbach* involved a challenge to the Federal Rules of Civil Procedure, which were promulgated under Supreme Court direction and took effect upon the passage of a stipulated period of time without congressional disapproval. The Court not only upheld the Rules, but even praised the veto provision as a measure "employed to make sure that the action under the delegation squares with the congressional purpose." 312 U.S. at 15. Despite the superficial relevance of the case, however, a decision regarding a rare use by Congress of special judicial expertise would not appear to control issues arising along the active and traditionally sensitive legislative/executive interface. The Court has very recently suggested, without reference to *Sibbach*, that the legislative veto question remains open. *Buckley v. Valeo*, 96 S. Ct. 612, 692 n.176 (1976).

25. 80 U.S. (13 Wall.) 128 (1871).

26. *Id.* at 147-48. The Court found the law objectionable as both an unwarranted encroachment upon the pardon power and an interference with its own right to decide cases on appeal. The Court of Claims had original jurisdiction over the claimants' actions, with direct review by the Supreme Court. The Court held that the law amounted to an effort "to prescribe a rule for the decision of a cause in a particular way." *Id.* at 146. With respect to the pardon power, the Court stated: "It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon, and it is granted without limit." *Id.* at 147. *See also* *Waymen v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825).

27. 103 U.S. 168 (1880).

28. The Court stressed that "the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of

Early in this century the Court twice affirmed its support for strict separation of powers in the federal government. In *Myers v. United States*,²⁹ the President's authority to remove "Officers of the United States"³⁰ without congressional approval was upheld. The Court noted that Congress's powers are specifically enumerated in the Constitution, while those of the executive are broadly implied, and inferred from this comparison a general presumption in favor of the executive in conflict situations.³¹ And in *Springer v. Philippine Islands*,³² a case technically decided under the Philippine Organic Act,³³ but actually reasoned according to principles of American constitutional law, the Court found legislators constitutionally disqualified to hold positions in an executive agency.³⁴ The doctrine of separation of powers was described as a "general rule inherent in the American constitutional system."³⁵ More

Congress." *Id.* at 191 (emphasis added). Compare the quoted language with Justice White's suggestion in *Buckley v. Valeo*, 96 S. Ct. 612, 657-58 (1976) (White, J., concurring), that there is a category of quasi-legislative congressional action, sufficiently "legislative" to avoid conflict under the separation of powers doctrine, but not so "legislative" as to require submission to the President for his assent or veto. See note 44 *infra*.

29. 272 U.S. 52 (1926). The President removed Myers, a first-class postmaster, before the expiration of his statutory four-year term. Myers sued to recover his salary for the remainder of his term, but his challenge to the President's action was rejected. The Court held that the act of removal was a purely executive function, in spite of Congress's constitutional authority to vest the appointment of inferior officers in persons other than the President, and to define the term and tenure of such officers. *Id.* at 161. See generally Bruff, *Presidential Exemption From Mandatory Retirement of Members of the Independent Regulatory Commissions*, 1976 DUKE L.J. 249.

30. U.S. CONST. art. II, § 2.

31. 272 U.S. at 128:

It is reasonable to suppose also that, had it been intended to give Congress power to regulate or control removals in the manner suggested, it would have been included among the specifically enumerated legislative powers in Article I, or in the specific limitations on the executive power in Article II The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed and that no express limit is placed on the power of removal by the executive, is a convincing indication that none was intended.

32. 277 U.S. 189 (1928).

33. Ch. 416, 39 Stat. 545 (1916).

34. The Court struck down an act of the Philippine legislature creating a national coal company and vesting the power to vote the company's stock in a board consisting of the Governor General, the President of the Senate, and the Speaker of the House of Representatives of the Philippines. The Court held that this effort to appoint legislative officials to executive positions violated the separation of powers principle implicit in the Philippine Organic Act. 277 U.S. at 199-203. With respect to the relation between the Organic Act and the American constitutional system, the Court commented, "[t]hus the Organic Act, following the rule established by the American constitutions, both state and federal, divides the government into three separate departments—the legislative, executive and judicial." *Id.* at 201. The Court therefore found it appropriate to decide the case solely by reference to American judicial precedent.

35. 277 U.S. at 201. Two further aspects of the *Springer* case are incidentally

recently, the Court has occupied the same philosophical ground in rejecting a congressional effort to cede continental shelf acreage to a state by concurrent resolution in defiance of presidential opposition,³⁶ and in its famous denial of the President's authority to seize and operate private steel mills pursuant to his war powers.³⁷

The more flexible, less literal judicial approach to the separation doctrine has its roots in an eighteenth century holding that a constitutional amendment approved by two-thirds of Congress need not be submitted to presidential scrutiny.³⁸ It was not until the first of the leading twentieth century cases, however, that the Court again adopted this approach, when it referred to the permissibility of one branch's seeking the "assistance" of another in upholding a congressional delegation of its tariff authority to the President.³⁹ Then, in *Humphrey's*

relevant to the congressional veto question. First, the Court determined that the functions of the members of the coal board were in fact executive by a process of elimination, ruling out the possibility of their being either legislative or judicial in nature. The Court concluded, "[t]he fact that they do not fall within the authority of either one of these two constitutes logical ground for concluding that they do fall within that of the remaining one of the three among which the powers of government are divided." *Id.* at 202-03. Since the powers of the legislature are carefully enumerated in the Constitution, while those of the executive are determined on an implied or residual basis, adopting this mode of analysis would have the effect of enhancing the presumption in favor of the executive in conflict situations.

Second, the Court found that long acquiescence by the U.S. Congress in the Philippine practice in question, where Congress had power to annul Philippine statutes, was insufficient support for an otherwise unconstitutional law. *Id.* at 208-09. This reasoning may be applicable by analogy to the situation of long acquiescence by the executive in congressional usurpation of its powers. See note 20 *supra* and sources cited therein.

36. *United States v. California*, 332 U.S. 19 (1946). The Court rejected the argument that this particular congressional action was excepted from presidential review by the constitutional grant of power to Congress to dispose of public lands. *Id.* at 28; U.S. CONST. art. IV, § 3, cl. 2. See notes 54-56 *infra* and accompanying text.

37. *Youngstown Sheet & Tube Co. v. United States*, 343 U.S. 579 (1952). Here again the Court suggested that a history of acquiescence by the victim of interbranch usurpation was not controlling. *Id.* at 586-89.

38. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

39. *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928). In *Hampton*, a classic delegation case, the Court upheld a provision of the Tariff Act of 1922 which allowed the President to adjust duties in order to equalize production cost differentials between foreign and domestic manufacturers. Tariff Act of 1922, ch. 356, § 315, 42 Stat. 858. With respect to separation of powers, the Court noted that "it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power." This was seen as a flexible rule, however, as the Court allowed that one branch might "invoke the action of the other two branches." The permissible extent of such intermingling was held to be a relative question, "fixed according to common sense and the inherent necessities of the governmental co-ordination." 276 U.S. at 406. See also *Yakus v. United States*, 321 U.S. 414, 424-25 (1944).

Executor v. United States,⁴⁰ the Court limited its earlier holding in *Myers*, deciding that Congress could in fact circumscribe the President's removal authority with respect to offices which Congress had created to function independently.⁴¹ Finally, in *Currin v. Wallace*,⁴² the Court took perhaps its most expansive view of the constitutional restrictions on the legislative process, allowing Congress to condition the operability of an administrative regulation on a referendum vote by the affected citizens.

The Present Court's Probable Approach

The conflicting precedents, then, would seem to permit the Court great flexibility in dealing with a constitutional challenge to the proposed veto bills. However, language in one of the least publicized portions of *Buckley v. Valeo*,⁴³ the recent case involving the Federal

40. 295 U.S. 602 (1935).

41. The Federal Trade Commission Act, 15 U.S.C. § 41 (1970) provides for presidential appointment of commissioners for fixed terms, with removal before the expiration of a term allowed only for cause. Humphrey was appointed by President Hoover for a term expiring in 1938. Upon taking office in 1933, President Roosevelt sought unsuccessfully to elicit Humphrey's resignation, and then announced Humphrey's removal, giving as a reason only his desire to have the Commission manned by his own appointees. Humphrey died shortly thereafter and his executor sued to collect salary not paid following the "removal." The Court allowed recovery, holding that although the President's appointment power was unlimited, Congress might legitimately restrict his removal authority where the duties of the agency involved "are performed without executive leave and, in the contemplation of the statute, must be free from executive control." 295 U.S. at 628. *Accord*, *Weiner v. United States*, 357 U.S. 349 (1958).

42. 306 U.S. 1, 16 (1939). The Court rejected a complex constitutional attack on the Tobacco Inspection Act of 1935, 7 U.S.C. §§ 511 *et seq.* (1970), which authorizes the Secretary of Agriculture to designate auction markets and to regulate sales through the designated markets. *Id.* § 511d. In the portion of the case pertinent to this discussion, the Court upheld a provision that no market designation would be effective unless it were approved by two-thirds of those voting in a referendum taken among the affected growers. Although *Currin* was technically a delegation case, the extent of legislative involvement in the implementation of the statute which the Court permitted contrasts markedly with the attitude toward the functioning of the respective branches which the Court took in the cases discussed in notes 26-37 *supra*.

43. *Buckley v. Valeo*, 96 S. Ct. 612 (1976). The case dealt with a multi-faceted constitutional attack on the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 *et seq.* (Supp. III, 1973), *as amended*, Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 83 Stat. 1263. In addition to its holding in Part IV of the opinion, discussed here, the Court upheld provisions of the Act and Amendments which require extensive disclosure and recordkeeping, and establish the federal income tax checkoff system for collecting public election funds. The Court struck down limitations on personal expenditures by candidates and their supporters as violative of the first amendment. The specific question of the Act's congressional veto provision, see note 9 *supra*, was raised by the plaintiffs, but the Court found the question mooted by its other determinations. 96 S. Ct. at 692 n.176.

Election Campaign Act, suggests the likelihood of the Court's rejecting a veto provision in the form of the bills currently before Congress. In Part IV of *Buckley*, the Court held the organization and functioning of the Federal Election Commission to be unconstitutional with respect to all but its information-gathering duties.⁴⁴ The Court found an untenable conflict between the status of the Commission members as important

44. The Court's opinion was rendered per curiam, with Chief Justice Burger and Justices Marshall and White writing qualified concurrences. Justice Stevens did not participate in the decision. All but Justice White concurred fully in Part IV. Justice White joined in the Court's findings regarding the composition of the Commission, with minor reservations, 96 S. Ct. at 749, but added a comment on the congressional veto provision. After discussing the separation doctrine and the apparent purpose of the executive veto, he concluded that "the provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto." *Id.* at 758.

The analysis of this Note assumes that the Court would resolve a challenge to a broad congressional veto law by directly confronting the constitutional issues involved. The reasoning underlying Justice White's conclusion, however, provides a model for resolving such a challenge by circumventing the separation of powers and veto clause questions. Justice White found the veto clause inapplicable because the congressional veto over the Commission's actions was not fully legislative in nature: "Congressional influence over the substantive content of agency regulation may be enhanced but I would not view the power of either House to disapprove as equivalent to legislation or to an order, resolution or vote requiring the concurrence of both Houses." *Id.* at 757. For purposes of the separation doctrine, however, Justice White implied that the congressional veto was legislative to the extent that it did not conflict with the prerogatives of either the executive or judicial branches: "I would be much more concerned if Congress purported to usurp the functions of law enforcement, to control the outcome of particular adjudications, or to pre-empt the President's appointment power . . ." *Id.* at 758.

Justice White, then, attributed a vague intermediate status to the congressional veto provision: legislative for purposes of satisfying the separation doctrine, but sufficiently non-legislative to avoid the requirements of the veto clause. The analysis gives rise to two immediate objections. First, the logic employed is severely strained, depending as it does on the existence of a narrow quasi-legislative category of government functions. Second, and most important, it is difficult to see how Justice White reconciled his conclusion here with his concurrence in the Court's finding that the Commission's enforcement power was "authority that cannot possibly be regarded as merely in aid of the legislative function of Congress," *id.* at 691, and in the Court's strong statement of the separation doctrine. In light of these conflicts, the only reasonable interpretation of Justice White's comment on the congressional veto provision is that it represents an indirect pulling back from the Court's strict view of the principle of separation of powers. Justice White's argument might, therefore, be successfully urged on a lower court inclined to take a more flexible view of the separation doctrine than the present Supreme Court, but unwilling to challenge the Court's language in *Buckley*.

In any event, it is uncertain whether Justice White would consider a general statute imposing a Congressional veto provision retroactively on all administrative enabling acts to be within his concept of "legislation establishing [a] disapproval procedure," *id.* at 758, for purposes of meeting the requirements of the veto clause. Accordingly, the predictive analysis developed here will apply only to those Justices concurring fully in Part IV of the Court's opinion.

"Officers of the United States" and the statutory provision calling for the appointment of a majority of the members by Congress rather than the President.⁴⁵ In its statement of general principles, its selection and use of illustrative authority, and its comments on particular constitutional provisions, the Court evinced a literal respect both for the separation doctrine itself and for the sections of the Constitution which lend substance to it.

In setting forth the philosophical premises which it saw as controlling, the Court turned to those writings of Madison which reflect the strictest view of the separation doctrine taken at the time of the drafting and ratification of the Constitution.⁴⁶ Although recognizing that "the Constitution by no means contemplates total separation of each of these three essential branches of government,"⁴⁷ the Court went on to quote Chief Justice Taft in *Hampton & Co. v. United States*⁴⁸ to the effect that "the rule is that *in the actual administration of the Government* Congress or the Legislature should exercise the legislative power, the President or the state executive, the Governor, the executive power, and the courts or the judiciary the judicial power"⁴⁹ The conclusion of the quoted passage allowed for the possibility of interbranch cooperation, but clearly subordinated it to the principle of independence:

"[T]his is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the other two branches *in so far as the action involved shall not be an assumption of the constitutional field of action of another branch.*"⁵⁰

Finally, the Court illustrated the principles it had expounded by refer-

45. 96 S. Ct. at 685-93; Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 310, 88 Stat. 1263, 1280. The appointments clause, U.S. CONST. art. II, § 2, cl. 2, provides as follows:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Court held that the clause forbade congressional appointment of "Officers" exercising rulemaking and enforcement powers like those delegated to the Commission. 96 S. Ct. at 690-93.

46. *Id.* at 683, quoting THE FEDERALIST No. 47 at 302-03 (G.P. Putnam's Sons ed. 1889) (J. Madison); cf. Cooper & Cooper 502-07. See note 11 *supra*.

47. 96 S. Ct. at 683.

48. 276 U.S. 394 (1928).

49. 96 S. Ct. at 683, quoting *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928) (emphasis added).

50. 96 S. Ct. at 683, quoting *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928) (emphasis added).

ence to a series of cases which took a strong position in favor of the autonomy of the three branches.⁵¹

In analyzing the text of the appointments clause of the Constitution,⁵² the Court attached great significance to the action of the framers in rejecting appointment power in the legislative branch, and inferred from the deliberate action of the draftsmen an intent to have the clause taken at its literal face value.⁵³ The Court summarily rejected the argument that Congress's general authority to supervise elections,⁵⁴ read in conjunction with the necessary and proper clause,⁵⁵ created an exception to the appointments clause applicable to the facts of this case. The Court held that

{t]he position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause.⁵⁶

Significantly, the same analytical approach would be applicable in the case of a constitutional challenge to a congressional veto statute. Like the appointment clause, the presidential veto provision of the

51. 96 S. Ct. at 684, *citing* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Springer v. Philippine Islands*, 277 U.S. 189 (1928); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (nonjudicial duties may not be imposed on a judge holding office under article III of the Constitution).

Attorney General Levi has recently expressed the view that the *Buckley* opinion reflects a strong commitment to the separation doctrine, stating that

{t]he limits upon the powers of the respective Branches are distinctions of degree. Each branch has at times crossed into the area of another, and I suggest the Framers assumed a certain flexibility in this regard. But recognition of the constraints of the principle is required of all branches The line must be drawn. The Supreme Court drew that line in *Buckley* Statement of Attorney General Edward H. Levi before the Senate Comm. on Government Operations, Feb. 6, 1976.

Further evidence of the present Court's belief in the vitality of the separation doctrine can be found in *United States v. Nixon*, 418 U.S. 683, 702-07 (1974). In *Nixon*, although the Court found a claim of executive privilege based on the separation doctrine to be insufficient grounds for denying a federal district judge the right to make an *in camera* inspection of presidential tapes and documents, the doctrine itself received strong support. Another aspect of the separation principle provided a collateral rationale for the Court's holding, since it was found that the executive privilege claim, if allowed, would interfere with the judiciary's authority to decide criminal cases.

52. U.S. CONST. art. II, § 2, cl. 2 (quoted in note 45 *supra*).

53. 96 S. Ct. at 687-88. The Court noted that the strengthening of the appointments clause was part of an overall effort to fortify the executive branch against legislative encroachment. See J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 385-91, 472, 521, 527, 573-75 (Ohio Univ. Press ed. 1966); Watson 1040-43.

54. U.S. CONST. art. I, § 4.

55. *Id.* art. I, § 8, cl. 18.

56. 96 S. Ct. at 688.

Constitution was the result of lengthy deliberation involving the rejection of alternatives which threatened to promote congressional evasion.⁵⁷ As in *Buckley*, it is argued in this context that other related grants of power to Congress combine to erode the literal impact of the applicable constitutional restrictions.⁵⁸ Reasoning by inference from the structure of the Court's argument in *Buckley*, one can conclude that the Court would react in a similar way to a congressional veto statute which also conflicts with a parallel express constitutional limitation on congressional power.

In reaching its strict construction of the appointments clause, the Court had to balance two conflicting judicial precedents, and its handling of them is instructive. The first of the relevant cases, *Myers v. United States*,⁵⁹ had given unequivocal support to the President's control over "the executive power of the Government, *i.e.* the general administrative control of those executing the laws, including the power of appointment and removal of executive officers"⁶⁰ The later case of *Humphrey's Executor v. United States*⁶¹ suggested the existence of a general exception to the President's absolute authority under the appointments and removal clause where the duties of the officer concerned required him to have substantial independence from the executive branch in order to function effectively. At minimum, the language of the case left open the opportunity for a subsequent court to define such an exception explicitly.⁶²

It was argued on behalf of the Commission in *Buckley* that the need for independence which had influenced the Court in *Humphrey's Executor* was especially pressing, "since the administration of the Act

57. See note 15 *supra*. The text of the veto provision, U.S. CONST. art. I, § 7, is quoted in note 14 *supra*.

58. See Cooper & Cooper 477, 482.

59. 272 U.S. 52 (1926).

60. *Id.* at 163-64. See notes 29-31 *supra*.

61. 295 U.S. 602 (1935).

62. Although the decision turned on Congress's ability to limit the President's removal power alone, the strong language used by the Court in limiting *Myers* (see notes 29-31 *supra* and accompanying text) would seem susceptible of broad extension: "Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend on the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers." *Id.* at 631-32. For subsequent courts utilizing *Humphrey's Executor* as precedent, the question is again one of emphasis: the case might be cited simply as clear authority for circumscription of the President's removal authority in particular circumstances, or it might be employed more expansively as support for the proposition that an agency's purpose and function will have considerable bearing on its general constitutional standing.

would undoubtedly have a bearing on any incumbent President's campaign for reelection."⁶³ The *Buckley* court chose not to take advantage of the opening left by *Humphrey's Executor*, however. Instead, it emphasized that the specific holding in that case was limited to the removal power alone, and therefore not applicable to the appointment question raised in *Buckley*.⁶⁴

Analogous arguments would again be likely in a case involving a congressional veto statute. Proponents of the bills now before Congress have contended that the close relationship between the executive and the regulatory agencies has contributed to a neglect of practical considerations and public concerns on the part of the agencies.⁶⁵ Presumably, reference would be made to this problem in urging on the Court a flexible approach to the separation doctrine like that taken in *Humphrey's Executor*. In light of the foregoing considerations, however, the most reasonable inference is that the Court would reiterate the limited applicability of *Humphrey's Executor* and refuse to extend its general analysis to other constitutional provisions.

Finally, the Court determined that the Federal Election Commission could continue to function as presently composed in the very limited area of aiding Congress in performing the traditionally legislative tasks of investigation and gathering information.⁶⁶ The Court drew a clear distinction between these functions and "the more substantial powers exercised by the Commission" which fell within the sphere of the executive branch.⁶⁷ Although this conclusion might seem obvious at first impression, it must be remembered that it necessarily implies a belief in the disputed premise that two centuries of assumption and acquiescence among the branches have not obliterated the distinctions in power and function on which the separation doctrine rests.⁶⁸ It is significant that the historical trend toward intermingling of the branches has not dissuaded the present Court from the validity of the proposition that "[l]egislative power, as distinguished from executive power, is *the authority to make laws, but not to enforce them.*"⁶⁹

63. 96 S. Ct. at 689. The Court noted that the same argument would also apply to the need for the Commission to be independent of Congress. *Id.*

64. *Id.* at 690. See also *id.* at 753-54 (White, J., concurring).

65. See Statement of Harold E. Ford, Executive Director, Southeastern Poultry & Egg Ass'n, *House Hearings*, Oct. 23, 1975 (208); 121 CONG. REC. 10,204 (daily ed. Oct. 22, 1975) (remarks of Mr. Butler).

66. 96 S. Ct. at 690-93.

67. *Id.* at 691.

68. See Cooper & Cooper 507-08; Ginnane 572.

69. 96 S. Ct. at 692, quoting *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (emphasis added).

Conclusion

Despite the Court's disclaimer,⁷⁰ the analysis developed here suggests that in *Buckley v. Valeo* the Supreme Court in fact took a significant step toward resolving the constitutionality of the congressional veto of administrative action. The statement of philosophical premises and principles of construction necessary to the *Buckley* decision is strong evidence of a strict view of the doctrine of separation of powers and an unwillingness to dilute the literal meaning of the constitutional provisions in which the doctrine is embodied. To uphold the constitutionality of a congressional veto provision like one of those now before Congress would be virtually impossible without doing violence to the language and logic of the lengthy, carefully reasoned, and politically sensitive *Buckley* decision.

70. 96 S. Ct. at 692 n.176.