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ABSTRACT

The initial uproar over the Supreme Court's decision to invalidate the legislative veto in *INS v. Chadha* was deafening. Many feared that such a decision would wreak havoc on the public policymaking process but these fears never came to pass. In many cases Congress ignored the Court and continued to pass legislative vetoes. The executive branch, while often offering token objections, also continued to work as though the legislative veto was still part of the policymaking process. Why did these actors responsible for implementing the Court's decision in this case fail to fully and faithfully do so? This article argues that both congressional and executive branch actors had their own preferences that overrode their motivation to implement the Court's decision. As a result, these actors largely ignored the Court's mandate. By examining this compliance failure in the context of the *Chadha* case it is possible to explore the inter-branch dynamics that can be involved in the implementation of a Supreme Court decision that directly affects the other two branches of government.

I. INTRODUCTION

On June 23, 1983 the Supreme Court struck down the legislative veto by a 7-2 margin in the case of *Immigration and Naturalization Service (INS) v. Chadha*.[1] Reaction to the Court's decision was swift. Some members of Congress called the decision "statute shattering," and many scholars believed that *Chadha* would be a substantial blow to congressional oversight power.[2] Congressional unhappiness with the Court's decision in *Chadha* was clearly evident from the outset. Michigan Senator Carl Levin was quoted as saying: "This decision is

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1. INS v. Chadha, 462 U.S. 919 (1983).

2. Darren Wheeler, *Implementing* INS v. Chadha*: Communication Breakdown?*, 52 WAYNE L. REV. 1185, 1186 (2006).

going to cause a lot of conflict and chaos."[3] Unhappy at the thought that Congress had lost a valuable oversight tool, die-hard veto proponent Representative Elliott Levitas asserted that Congress would put the Administration on a very short leash.[4]

Even the justices themselves appeared to appreciate the potential gravity of their decision. When later queried about the 1982-1983 term, Chief Justice Burger responded that *Chadha* was the most important case the Court decided "especially in the long run . . . *Chadha* is certainly among one of the fifty most important cases in our history."[5]

Despite the Supreme Court's decision, Congress continued to include legislative vetoes in statutes.[6] In the first sixteen months immediately following *Chadha* Congress added an additional fifty-three legislative vetoes.[7] Over two hundred more were added through 1993.[8] One commentator dryly noted that "*Chadha* may prove to be as effective in limiting legislative vetoes as the Eighteenth Amendment was in limiting the consumption of alcohol."[9]

By the time the Court announced its decision in *Chadha*, the legislative veto had become a popular oversight tool incorporated into hundreds of statutes by Congress as an oversight measure.[10] The Court's invalidation of this tool threatened not only these statutes but also threatened to disrupt the policymaking relationships between Congress and executive branch agencies.[11] However, *Chadha* did not turn out to be as devastating as many had feared.[12] This was due in part to the fact that Congress and executive agencies were somewhat reluctant to implement the Supreme Court's decision. This article explores why executive and legislative branch officials fail to faithfully and fully implement the *Chadha* decision.

3. *Supreme Court Decision That Stunned Congress*, U.S. NEWS & WORLD REPORT, July 4, 1983, at 14 [hereinafter *Stunned Congress*].

4. *Sharp Shifts in Congress Practices and Legislative Conflict Predicted*, N.Y. TIMES, June, 24 1983, at A1 [hereinafter *Sharp Shifts*].

5. BARBARA H. CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 232 n.27 (Oxford Univ. Press 1988).

6. Louis Fisher, *Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case*, 45 PUB. ADMIN. REV. 705, 706 (1985).

7. *Id.*

8. Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS., 273, 273 (1993).

9. MICHAEL MEZEY, CONGRESS, THE PRESIDENT, AND PUBLIC POLICY 170 (Westview Press 1989).

10. William West & Joseph Cooper, *The Congressional Veto and Administrative Rulemaking*, 98 POL. SCI. Q. 285, 286 (1983).

11. INS v. Chadha, 462 U.S. 919, 1002 (1983).

12. Wheeler, *supra* note 2.

Even if courts clearly articulate a decision, there are still a number of other variables that can affect the implementation of that decision.[13] Many political and legal scholars argue that the preferences of those responsible for implementing a judicial decision are a key element of the overall implementation picture.[14] The *Chadha* case provides a good example of a case where many of those responsible for the implementation of the decision clearly did not agree with the Court.[15] This article explores the hypothesis that executive and legislative officials had their own preferences that overrode their motivation to fully and faithfully implement the Court's decision. In other words, actors responsible for implementing a judicial decision often have other preferences that influence their behavior aside from the Court's directions, preferences that may override any interest they would have in fully implementing the Court's decisions.

Part I of this article introduces the subject and the research question. Part II will briefly outline the history and use of the legislative veto. This will provide context for the Supreme Court's *Chadha* decision. Part III will review the judicial implementation literature that focuses on organization approaches to the implementation of judicial decisions. Part IV will focus on the *Chadha* decision itself in order to see just what it was that Congress and the executive branch had to work with in the wake of *Chadha*. The reactions of both executive branch officials and Congress will then be reviewed in Parts V and VI. What actions were taken and what reasoning was given for them? Did these actors articulate conflicting preferences that affected their ability and willingness to implement the *Chadha* decision? In Part VII, a brief case study, *The Treasury Act of 1992*, will illustrate how congressional and executive preferences shaped policymaking in a post-*Chadha* national government.

13. *See, e.g.*,BRADLEY CANON & CHARLES JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (CQ Press 1999).

14. *See, e.g*., CANON & JOHNSON, *supra* note 13; BEN M. CROUCH & JAMES W. MARQUART, AN APPEAL TO JUSTICE: LITIGATED REFORM IN TEXAS PRISONS, (Univ. of Texas Press 1989); GEORGE EDWARDS, III, IMPLEMENTING PUBLIC POLICY (CQ Press 1980); STEPHEN L. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (Dorsey Press 1970); Lawrence Baum, *Implementation of Judicial Decisions*, 4 AM. POL. Q. 86 (1976); James Spriggs, *Explaining Federal Bureaucratic Compliance with Supreme Court Opinions*, 50 POL. RES. Q. 567 (1997) [hereinafter *Federal Bureaucratic Compliance*]; James Spriggs, *The Supreme Court and Federal Administrative Agencies: A Resource-Based Theory and Analysis of Judicial Impact*, 40 AM. J. POL. SCI. 1122 (1996) [hereinafter *Supreme Court*]; Donald Van Meter & Carl E. Van Horn, *The Policy Implementation Process: A Conceptual Framework*, 6 ADMIN. & SOC'Y 445 (1975).

15. *See Stunned Congress, supra* note 3; *Sharp Shifts, supra* note 4.

II. THE LEGISLATIVE VETO

The legislative veto is essentially a generic name for a number of different types of actions designed to provide a measure of congressional control over the manner in which the executive branch implements a statute.[16] While a legislative veto can take a variety of forms, it is "essentially . . . a clause in a statute, which says that a particular executive action . . . will take effect only if congress does not nullify it by resolution within a specific period of time."[17] Through legislative veto provisions in statutes "Congress simultaneously reserved the power to block specific exercises of this authority by passage of resolutions which were not submitted for presidential review."[18]

The legislative veto was originally employed during the Hoover Administration.[19] At that point in time, it was primarily used for executive branch reorganization.[20] Prior to this, Congress had to pass legislation authorizing any executive reorganization.[21] As time passed, Congress discovered additional uses for this new oversight tool. By the time *Chadha* was decided in the mid-1980s, the legislative veto was a part of over two hundred statutes.[22] These statutes included over three hundred separate veto provisions.[23] The Congressional Budget and Impoundment Act of 1974 and the War Powers Act of 1973 are but two of the more prominent acts that contained legislative vetoes.[24] The legislative veto became such a popular oversight tool that vetoes became boilerplate language added to hundreds of statutes without really much thought about how such provisions would affect the implementation of the statutes in question.[25] As a result of this proliferation in the use of the legislative veto, it was no small matter when the Supreme Court decided to rule on the constitutionality of the legislative veto in *Chadha*.

16. *See* CRAIG, *supra* note 5.

17. Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L. J. 785, 785 (1984).

18. Michael J. Horan, *Of Train Wrecks, Time Bombs, and Skinned Cats: The Congressional Response to the Fall of the Legislative Veto*, 13 J. LEGIS. 22, 22 (1986).

19. BARBARA H. CRAIG, THE LEGISLATIVE VETO: CONGRESSIONAL CONTROL OF REGULATION 16 (Westview Press 1983).

20. *Id.*

21. *Id.*

22. West & Cooper, *supra* note 10.

23. *Id.*

24. For a partial list of statutes containing legislative vetoes see the attached appendix to Justice White's dissenting opinion in *INS v. Chadha* 462 U.S. 919,1003–13 (1983) (White, J., dissenting).

25. Wheeler, *supra* note 2, at 1189.

III. ACTOR PREFERENCE AND JUDICIAL IMPLEMENTATION

Compliance with judicial decisions is not something that can be taken for granted any more than a supervisor can assume that her instructions will be followed to the letter or a district office will follow the directives of the home office without fail. The Framers of the Constitution recognized this potential problem. In *Federalist* #78, Alexander Hamilton argued that the judicial branch of government was "beyond comparison the weakest of the three departments of power . . . . It may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[26] Courts must rely on others to implement their decisions. This can be problematic when a judicial decision is unpopular as evidenced historically by the furor surrounding controversial Supreme Court decisions such as those involving school prayer and school desegregation.[27] This section will review the various organizational approaches that have been employed in the judicial implementation literature. These approaches will examine the relationships between higher and lower courts, courts and executive agencies, and courts and Congress in the context of judicial implementation.

Organizational approaches to the analysis of the implementation and impact of judicial decisions are "based on the idea that although it is individuals who make acceptance and compliance decisions, they often do so in the context of organization goals and policies."[28] Research in this area has focused on a variety of organizational factors such as cost, organization structure/location,[29] and factors external to the organization.[30] Additionally, individual factors such as how officials understand the decision, the cost of compliance, agreement with the decision, the obligation to comply, and the official's personal interests have all been explored as variables that affect the implementation of

26. THE FEDERALIST NO. 78, at 465–66 (Alexander Hamilton) (Penguin Books 1961).

27. *See, e.g.*, KENNETH DOLBEARE & PHILLIP HAMMOND, THE SCHOOL PRAYER DECISIONS (Univ. of Chicago Press 1971); RICHARD JOHNSON, THE DYNAMICS OF COMPLIANCE: SUPREME COURT DECISION–MAKING FROM A NEW PERSPECTIVE (Northwestern Univ. Press 1967); WILLIAM MUIR JR., PRAYER IN THE PUBLIC SCHOOLS (Univ. of Chicago Press 1967); J.W. PELTASON, FIFTY-EIGHT LONELY MEN (Univ. of Illinois Press 1971); Michael W. Giles & Douglas S. Gatlin, *Mass Compliance with Public Policy: The Case of School Desegregation*, 42 J. POL. 722 (1980); Michael W. Giles & Thomas G. Walker, *Judicial Policy-Making and Southern School Desegregation*, 37 J. POL. 917 (1975).

28. CANON & JOHNSON, *supra* note 13, at 173.

29. *See* STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL SYSTEM (4th ed., Nelson–Hall 1993).

30. Van Meter & Van Horn, *supra* note 14, at 525.

judicial decisions.[31] Two areas that have historically received the most attention of judicial scholars are the organizational relationship between the Supreme Court and lower courts,[32] and the relationship between courts and bureaucratic agencies.[33]

A. Relationships Between Higher and Lower Courts

Judicial scholars examining the relationship between the Supreme Court and lower courts have often concluded that lower courts are constrained to some degree by Supreme Court decisions and feel compelled, for a variety of reasons, to abide by these decisions. Specific organizational approaches have included tension,[34] bureaucratic inertia,[35] and principal-agent models.[36] The general approach revolves around the idea that the hierarchy of courts is similar to bureaucratic hierarchies in that the decisions of the higher element affect the lower elements.[37] To the degree that this is correct, it may mean that the implementation of judicial decisions is similar to that of the implementation of policies within bureaucracies more generally and that there is some value in looking at possible linkages between the two.[38]

If lower court judges do feel somewhat constrained by higher court decisions, why might this be the case? Organization theorists often focus on the sense of professionalism that the vast majority of lower court judges have.[39] This sense of professionalism usually guides the judicial decision-making process rather than personal predilections about certain decisions with which they disagree.[40] It also helps to maintain the integrity of the judicial system.[41] No lower court judge likes to have

31. Baum, *supra* note 14, at 97; Van Meter & Van Horn, *supra* note 14, at 472; *see also* WASBY, *supra* note 29.

32. *See* CROUCH & MARQUART, *supra* note 14; Lauren Bowen, *Attorney Advertising in the Wake of* Bates v. State Bar of Arizona *(1977): A Study of Judicial Impact*, 23 AM. POL. Q. 461 (1995); Charles A. Johnson, *Judicial Decisions and Organization Change: Some Theoretical and Empirical Notes on State Court Decisions and State Administrative Agencies*, 14 L. & SOC'Y REV. 27 (1979); Donald Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994).

33. *See* CROUCH & MARQUART, *supra* note 14; *Supreme Court*, *supra* note 14; *Federal Bureaucratic Compliance*, *supra* note 14.

34. *See* Johnson, *supra* note 32.

35. *See* Songer et al., *supra* note 32; CROUCH & MARQUART, *supra* note 14; Bowen, *supra* note 32.

36. *See* Songer et al., *supra* note 32.

37. Baum, *supra* note 14, at 87–89.

38. *Id.*

39. Baum, *supra* note 14, at 101.

40. CANON & JOHNSON, *supra* note 13, at 38.

41. *Id.* at 37–39; *see also* Songer et al., *supra* note 32 (discussing a study using a Principal-Agent Model to reach similar conclusions).

decisions reversed by higher courts and several scholars have concluded that there is evidence to support the contention that the authority of higher courts is unusually strong in judicial organizations.[42]

In reality, higher courts have very few tools at their disposal when it comes to sanctioning lower courts and judges.[43] It is persuasion, often via opinions,[44] that higher courts usually use in their efforts to keep lower courts in line.[45] This relative freedom is largely due to the insulation that most judges enjoy. Federal judges are subject to very few external sanctions.[46] This gives them an exceptional amount of leeway in the performance of their duties, enough to lead some judicial scholars to maintain that influence is a two-way street between upper and lower courts.[47]

Despite these pressures to acquiesce to Supreme Court decisions, political scientist Lawrence Baum argues that judicial policy preferences can result in non-compliance with higher court decisions.[48] Baum contends that there is no reason to assume that policy preferences by those in the judicial system should differ radically from actors in other organizations.[49] Judges may hold strong opinions or policy preferences like any other organizational actor; such strong opinions may lead lower court judges to defy higher court rulings.[50] There is some evidence to support this contention.[51]

42. Baum, *supra* note 14, at 101; Songer et al., *supra* note 32, at 777–91. For a good discussion of the "upper court myth" see also JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN THE AMERICAN JUSTICE SYSTEM (Princeton Univ. Press 1950). Others argue that lower courts do have some influence of higher courts. *See, e.g.*, Walter Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959).

43. Baum, *supra* note 14, at 105.

44. *Id.* at 95.

45. *Id.* at 105–07.

46. *Id.* at 105.

47. Traciel V. Reid, *Judicial Policy-Making and Implementation: An Empirical Examination*, 41 W. POL. Q. 509 (1988).

48. Lawrence Baum, *Lower Court Responses to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208, 215 (1978); *see also* Baum, *supra* note 14, at 101.

49. *Id.*

50. *Id.* at 100.

51. Lawrence Baum, *Specialization and Authority Acceptance: The Supreme Court and Lower Federal Courts*, 47 POL. RES. Q. 693 (1994).

B. Relationships Between Courts and Executive Agencies

A handful of scholars have studied the relationship between courts and administrative agencies in the context of implementing judicial decisions.[52] It is the duty of the legislative branch to pass laws and the job of the executive branch of government, often via executive agencies, to carry out those laws. Executive branch agencies often do this with a great deal of discretion.[53] Often it is the courts that determine when executive branch agencies have abused this discretion.[54] When courts rule on statutory or constitutional matters relating to executive agency actions, these agencies are expected to comply.[55]

Although one might initially think that agencies automatically comply with court decisions, Martin Shapiro warns that "the student of judicial-administrative politics must be prepared for a world of mutual influences rather than sovereign commands."[56] Shapiro notes that courts typically allow agencies to do as they please and that when they do act they are only one political actor among many.[57] Furthermore, while courts and agencies influence each other, they rarely press their claims in an effort to force confrontation. James Spriggs argues that general absence of executive agency defiance of Supreme Court decisions is a result of the highly interdependent relationship between the two.[58] These actors must deal with each other on a repeated basis, so it is in the interest of both to maintain a non-confrontational relationship.[59] Because of this desire for inter-branch comity, the study of the relationship between courts and administrative agencies is mostly a study of marginal cases.[60]

Despite this generally non-confrontational relationship, tension can result when court opinions run contrary to an agency's mission or goals.[61] As early as 1970, Stephen Wasby hypothesized that "[c]ompliance is more a function of norms in affected organizations than it is of Supreme Court rulings."[62] Agency goals and preferences can

52. *See* CROUCH & MARQUART, *supra* note 14; *Supreme Court*, *supra* note 14; *Federal Bureaucratic Compliance*, *supra* note 14.

53. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837 (1984).

54. *Id.*

55. *Id.*

56. MARTIN M. SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 271 (MacMillan 1968).

57. *Id*. at 265.

58. *Federal Beuracratic Compliance*, *supra* note 14, at 567.

59. *Id.*

60. SHAPIRO, *supra* note 55, at 265–68.

61. CANON & JOHNSON, *supra* note 13, at 82.

62. WASBY, *supra* note 14, at 257.

color responses to judicial decisions.[63] When an agency is committed to certain defined goals and preferences and is faced with a judicial decision instructing it to go against these preferences, tension results.[64] James Spriggs found support for the proposition that agency preferences affect executive agency compliance with Court decisions in his analysis of Supreme Court opinions that reversed or remanded a federal agency decision from 1953–1990.[65]

Agency norms, especially the preferences of agency actors responsible for implementing judicial policies, can be a vital aspect of successful policy implementation.[66] There are three elements that can affect the disposition of the implementing populations. First, those responsible for implementing a judicial policy must understand what it is they are supposed to do.[67] Second, their immediate acceptance or rejection of the court's decision is vital.[68] Finally, the intensity of the response is an important factor.[69] Sometimes judicial decisions may fall within a "zone of indifference" and will be implemented simply because no one feels very strongly about them.[70] Many scholars contend, however, that "barring other constraints or pressures, groups that support a judicial policy will implement the policy faithfully; those that do not will either ignore it or resist its implementation, wherever and whenever possible."[71] Agency actors must have a desire to implement the judicial decision. Something must motivate them. If there are psychological and/or material costs associated with changing policies in response to a judicial decision without specific direction, officials will often adopt policies that benefit them or ignore a court decision altogether.[72]

This article draws on the research that explores the implementation of judicial decisions by executive agencies but it also goes one step further. The inter-branch relationship between the judiciary and Congress

63. CANON & JOHNSON, *supra* note 13, at 82.

64. WASBY, *supra* note 14, at 173–74.

65. *See Supreme Court*, *supra* note 14.

66. CANON & JOHNSON, *supra* note 13, at 82.

67. Van Meter & Van Horn, *supra* note 14, at 472–73.

68. *Id.* at 473.

69. *Id.*

70. EDWARDS, *supra* note 14, at 90.

71. CANON & JOHNSON, *supra* note 13, at 82; *see also* DOLBEARE & HAMMOND, *supra* note 26; EDWARDS, *supra* note 14; PELTASON, *supra* note 27; WASBY, *supra* note15; Baum, *supra* note 14; *Federal Bureaucratic Compliance*, *supra* note 14; *Supreme Court*, *supra* note 14; Van Meter & Van Horn, *supra* note 14.

72. CANON & JOHNSON, *supra* note 13, at 69; Lawrence Baum, *Implementing Judicial Decisions: An Organizational Perspective*, 4 AM. POL. Q. 1, 86 (1980); *see also* PELTASON, *supra* note 27. This is also evident in many of the school prayer impact studies. *See e.g.*, CROUCH & MARQUART, *supra* note 14, at 235; DOLBEARE & HAMMOND, *supra* note 27; JOHNSON, *supra* note 27; MUIR, *supra* note 26; Johnson, *supra* note 32, at 27–29.

is also central to an examination of the implementation of the *Chadha* decision.

Despite the trail of notable confrontations, only a small percentage of court decisions ever receive widespread negative attention from Congress.[73] As is often the case though, it is the exceptions to this general rule that have historically received the most scholarly attention.[74]

C. Relationships Between Courts and Congress

As early as the 1960s, scholars sought to stress the differences between "anti-court" reactions and "anti-decision" reactions.[75] Anti-court reactions, those aimed at changing the size of the Court or changing its jurisdiction, are relatively rare while anti-decision reactions are much more common.[76] William Eskridge found that each Congress since 1975, on average, has enacted legislation to modify or overturn roughly a dozen Supreme Court decisions dealing with the interpretations of statutes.[77] Despite this activity, Harry Stumpf notes that hostile congressional reaction usually occurs in response to constitutional rulings by the courts as opposed to statutory rulings.[78] This may be because statutory rulings can be overturned, or clarified, with less conflict than is often engendered in attempting to pass a constitutional amendment in response to a court decision.[79] Several scholars contend that the congressional game in anti-court legislation is "largely bluff, huff and puff"[80] or merely an exercise in "position-taking."[81]

73. HARRY STUMPF, AMERICAN JUDICIAL POLITICS, 416 (2d ed. Prentice Hall 1998); WASBY, *supra* note 14, at 203.

74. *See* WALTER MURPHY, CONGRESS AND THE COURT (Univ. of Chicago Press 1962); C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT 1957–1960 (Univ. of Minnesota Press 1961); STUMPF, *supra* note 73; WASBY, *supra* note 14; Joseph Ignagni & James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47 POL. RES. Q. 353 (1994); Richard A. Paschal, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J. L. & POL. 143 (1991); Harry Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377 (1965)..

75. STUMPF, *supra* note 73, at 416–19.

76. *Id.*

77. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 335 (1991).

78. STUMPF, *supra* note 73, at 419.

79. Constitutional amendments aimed at overturning Supreme Court decisions are relatively rare but they do occur. For examples, see the histories surrounding Amendments Eleven, Fourteen, Sixteen, and Twenty-Six. This tactic was also attempted in response to the *Chadha* decision without success. *See e.g.*, CRAIG, *supra* note 19.

80. STUMPF, *supra* note 73, at 425.

81. Paschal, *supra* note 74, at 202. And for a detailed discussion of congressional "position-taking" see DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (Yale Univ. Press 1974).

Some researchers also note that these negative responses to court decisions appear to come in "waves or crisis periods" and usually involve a wide range of congressional participants.[82] Others argue that electoral considerations sometimes play a key role in the decisions of members to actively oppose Supreme Court decisions.[83] Several of these factors were likely at work in the *Chadha* case. Many considered the rise of the regulatory state in the late 1970s to indeed be a crisis, and the response to *Chadha* was certainly not isolated to a few members of Congress.[84] Some argued that the legislative veto was a powerful symbolic tool for congressional members, one that they could point to as a means to control the federal bureaucracy.[85] Such rhetoric would certainly resonate for incumbents in congressional elections.

Political scientist Richard Paschal writes that there are three basic ways for Congress to limit a Supreme Court decision without directly addressing the policy at issue in the decision: First, Congress can opt not to appropriate the money necessary to enact the decision.[86] Second, Congress can choose not to implement (or just partially implement) the decision.[87] Finally, Congress can just refuse to comply.[88] The final two options were certainly employed by Congress to varying degrees in response to the Court's *Chadha* decision.[89]

As this brief review has revealed, a number of scholars have examined the organizational factors that affect the implementation of judicial decisions. This article will build on the work related to the implementation of judicial decisions by administrative agencies by examining the executive branch response to the Court's *Chadha* decision. Did they express preferences that prevented them from faithfully implementing the Court's decision? At the same time, we will review congressional responses as well. As a result, this research broadens the scope of the literature by examining a new case and at the same time exploring the inter-branch dynamics associated with the preferences of both executive and legislative officials responsible for implementing the Court's decision.

82. STUMPF, *supra* note 73, at 419.

83. Ignagni & Meernik, *supra* note 74.

84. *See* CRAIG, *supra* note 19; MARTHA LIEBLER GIBSON, WEAPONS OF INFLUENCE: THE LEGISLATIVE VETO, AMERICAN FOREIGN POLICY AND THE IRONY OF REFORM 39 (Westview Press 1992); JESSICA KORN, THE POWER OF SEPARATION 34 (Princeton Univ. Press 1996).

85. Jessica Korn, *The Legislative Veto and the Limits of Public Choice Analysis*, 109 POL. SCI. Q. 873, 892 (1994).

86. Paschal, *supra* note 74, at 198 n.202.

87. *Id.*

88. *Id.*

89. *See* Wheeler, *supra* note 2.

IV. THE SUPREME COURT'S *INS V. CHADHA* DECISION

A. Background

As is seemingly common in constitutional law, landmark cases often emerge from events that seemed minor at their inception.[90] Jagdish Chadha was lawfully admitted to the United States on a non-immigrant student visa in 1966.[91] Chadha's visa expired in 1972 and less than one year later the District Director for INS filed an Order to Show Cause why he should not be deported from the United States.[92] At the 1974 deportation hearing Chadha conceded that he was deportable but was given leave to file an application for suspension of deportation pursuant to Section 244(a)(1) of the Immigration and Nationality Act.[93] Chadha's deportation hearing was resumed and eventually the immigration judge ordered that his deportation be suspended based on the fact that Chadha had met statutory requirements allowing him to remain in the United States because he had "resided continuously in the United States for over seven years, was of good moral character, and would suffer 'extreme hardship' if deported."[94] Pursuant to statute, the Attorney General reported the suspension of deportation to Congress.[95]

Upon receiving the Attorney General's recommendation for the suspension of deportation of immigrants such as Chadha, Congress had the right via Section 244(c)(2) of the Immigration and Nationality Act to veto the decision of the Attorney General.[96] On December 12, 1975, Congress did just that when Representative Joshua Eilberg (D-PA) introduced a motion opposing "the granting of permanent residence in the United States to [six] aliens."[97] Included in this group, for reasons not articulated in the congressional record, was Jagdish Chadha.[98] The resolution was passed without debate or recorded vote.[99] Neither the Senate nor the President was required to take any action on the matter, and they did not.[100]

90. *See e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).
91. INS v. Chadha, 462 U.S. 919, 923 (1983).
92. *Id.*
93. *Id.* at 924.
94. *Id.*
95. *Id.*
96. 8 U.S.C.S. § 1254(c)(1) (LexisNexis 2008).
97. *Chadha*, 462 U.S. at 926.
98. *Id.*
99. *Id.* at 927.
100. *Id.* at 926–27.

Chadha's deportation hearings were once again reopened and the immigration judge set about enforcing the House's veto of the suspension of deportation.[101] Chadha appealed the deportation order in front of the immigration judge and the Board of Immigration Appeals on the grounds that Section 244(c)(2) was an unconstitutional legislative veto.[102] The Board held that it had no power to declare an act of Congress unconstitutional and Chadha's appeal was dismissed.[103]

Chadha then appealed to the Ninth Circuit Court of Appeals where he was joined by the INS in his claim that Section 244(c)(2) was unconstitutional.[104] The Ninth Circuit, in an opinion by Judge Anthony Kennedy, agreed with Chadha and struck down Section 244(c)(2) of the Act on the grounds that it constituted a violation of the constitutional separation of powers doctrine.[105] The case was then appealed to the United States Supreme Court.[106]

B. Majority Opinion

Chief Justice Warren Burger issued the Court's six-justice majority opinion in the *Chadha* case.[107] Justice Powell wrote a concurring opinion[108] and Justices White[109] and Rehnquist[110] each wrote separate dissents. In the majority opinion, Burger affirmed the Ninth Circuit's ruling and struck down the one-house legislative veto provision contained in Section 244(c)(2) of the Immigration and Nationality Act.[111] Burger's opinion was widely panned by many in the legal and scholarly community.[112] It was referred to by one critic as "wooden, . . . rigid and mechanical."[113] Another called it "supremely simple"[114] and a third

101. *Id.* at 928.

102. *Id.*

103. *Id.* at 927.

104. *Id.* at 928.

105. Chadha v. *INS*, 634 F.2d 408 (9th Cir. 1980), *aff'd*, *INS* v. Chadha, 462 U.S. 919 (1983).

106. *See Chadha*, 462 U.S. 919.

107. *Id.*

108. *Id.* at 960 (Powell, J., concurring).

109. *Id.* at 968 (White, J., dissenting).

110. *Id.* at 1014 (Rehnquist, J., dissenting).

111. *Id.* at 959 (majority opinion).

112. *See* CRAIG, *supra* note 19; E. Donald Elliott, INS v. Chadha*: The Administrative Constitution, The Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125 (1983); Korn, *supra* note 85.

113. Korn, *supra* note 85, at 879 (quoting Elliot, *supra* note 112, at 147.

114. CRAIG, *supra* note 19, at 141 (citing *Alien's Deportation Fight Led to Landmark Decision*, N. Y. TIMES, June 25, 1983, at pg.8).

concluded that "[w]hatever one's view about the merits, the *Chadha* opinion is a disappointment."[115]

Some argued that the Court had decided the case on grounds far broader than necessary due to the Court's reading of the threshold issues involved.[116] Burger's opinion methodically addressed questions of jurisdiction,[117] severability,[118] standing,[119] ripeness,[120] adverseness,[121] and the political question doctrine,[122] and eventually determined that Chadha's case was properly before the Supreme Court.[123] Having disposed of the threshold issues, Burger turned to the constitutional issue at hand, the legislative veto.

Burger's reading of the constitutional issues in question was criticized by some legal scholars as being too formalistic.[124] Others characterized it as such primarily because it downplayed utilitarian arguments related to the "efficiency" of the legislative veto[125] and was "uncharacteristically economical and direct on the key issue of constitutionality."[126] Regardless, future Justice Stephen Breyer probably spoke for many when he concluded that "[t]he pure constitutional logic to which the majority pointed is very difficult to overcome."[127]

Chief Justice Burger's opinion focused on the plain language found in Article I governing the legislative process.[128] Burger first turned to the Presentment Clause found in Article I, Section 7 of the Constitution and concluded that the action taken by the House when it vetoed Chadha's suspension of deportation was essentially legislative in nature.[129] As such, the president had a role to play. Burger noted that the Framers purposefully included the president in the legislative process as one check on the abuse of legislative power.[130] To have a process that was essentially legislative in character exclude any presidential input was a

115. Elliot, *supra* note 112, at 144.

116. *Id.* at 131.

117. INS v. Chadha, 462 U.S. 919, 920 (1983).

118. *Id.* at 932–35.

119. *Id.* at 920.

120. *Id.* at 936–37.

121. *Id.* at 921.

122. *Id.*

123. *Id.* at 931.

124. Elliott, *supra* note 112, at 126.

125. Korn, *supra* note 85, at 875.

126. *Legislative Veto After* Chadha*: Hearings Before the Comm. on Rules H.R.* 98th Cong. 212 (1983) [*hereinafter APPC Hearings*] (statement of Mr. Stanley Brand, former legal counsel of H.R.).

127. Breyer, *supra* note 17, at 790.

128. *See Chadha*, 462 U.S. 919.

129. *Id.* at 952.

130. *Id.* at 947.

violation of Article I, Section 7, Clause 3.[131] While Burger conceded that not every action taken by the House or Senate need comply with the Presentment Clause, he contended that every one that was legislative in nature must.[132]

Legislation must also be passed by majorities in both the Senate and the House pursuant to the Bicameralism Clause also found in Article I, Section 7.[133] In Chadha's case, only the House voted to veto the suspension of deportation.[134] The Framers, argued the Chief Justice, carefully defined specific instances where bicameral procedural requirements need not be met, and the procedures in Chadha's case were not among these clearly articulated exceptions.[135] Burger concluded that, in the absence of these exceptions, legislative actions must be "exercised in accord with a single, finely wrought and exhaustively considered, procedure."[136] Chief Justice Burger downplayed the efficacy of the legislative veto as a useful tool for both Congress and the executive branch. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone" he opined, "will not save it if it is contrary to the Constitution."[137]

C. Concurring Opinion

Justice Powell concurred with the majority's opinion but was somewhat cautious about the scope of the majority's opinion noting that "[t]he breadth of this holding gives one pause."[138] Powell instead urged the Court to decide the case on narrower grounds by making the argument that the action taken by the House in Chadha's case was judicial in nature, not legislative. Congress, Powell argued, did not enact a rule but rather made a finding that several people did not comply in this instance.[139] "It thus undertook the type of decision that traditionally has been left to other branches" (i.e., the judiciary in this instance).[140] Having found fault with the actions of Congress on separation of powers

131. *Id.* at 945–47.

132. *Id.* at 952.

133. *Id.* at 921.

134. *Id.* at 927–28.

135. *Id.* at 922. There are four instances where one chamber of Congress is given explicit power to act without the other: (1) The House is given the power to initiate impeachments, while the Senate is given the sole power to (2) sit as a court of impeachment, (3) approve presidential appointments, and (4) ratify treaties.

136. *Id.* at 951.

137. *Id.* at 944.

138. *Id.* at 959 (Powell, J., concurring).

139. *Id.* at 964–65.

140. *Id.* at 965.

grounds, Powell declined to reach the broader questions regarding the constitutionality of legislative vetoes generally.[141]

D. Dissenting Opinions

In dissent, Justice Rehnquist focused primarily on the issue of severability. In short, he disagreed with the Court's majority that it was possible to just sever Section 244(c)(2) while leaving the remainder of the Immigration and Nationality Act intact.[142] Chief Justice Burger had disposed with the severability question in short order by noting that the Act had a severability clause which gave rise to the presumption that the constitutionality of the entire Immigration Act did not turn on the invalidity of any particular section of the Act.[143] "A provision is further presumed severable," wrote Burger "if what remains after severance 'is fully operative as a law.'"[144] Severing Section 244(c)(2) would leave the remainder of the Act intact.[145] To Rehnquist the matter was not so cut and dried. While conceding that there was an explicit severability clause in the Act, Rehnquist instead focused on the Act's legislative history in reaching the conclusion that "Congress has never indicated that it would be willing to permit suspensions of deportation unless it could retain some sort of veto."[146] Unwilling to sever the potentially offending provision or strike down the entire Immigration and Nationality Act, Justice Rehnquist was willing to uphold the actions of the House in Chadha's case and overturn the Ninth Circuit's opinion.[147]

Justice White's dissent focused largely on the functional importance of the legislative veto to the political branches of government. "Today's decision," he lamented, "strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history."[148] Rather than ruling broadly and seemingly striking down all forms and uses of the legislative veto, White argued that the Court should give serious deference to the fact that the legislative veto was an "important if not indispensable political invention that allows the president and Congress to resolve major constitutional and policy differences . . . and preserves Congress' control over

141. *Id.* at 967.
142. *Id.* at 1014 (Rehnquist, J., dissenting).
143. *Id.* at 920, 932 (majority opinion).
144. *Id.* at 934 (quoting Champlin Refining Co. v. Corp. Comm'n, 286 U.S. 210, 234 (1932).
145. *Id.*
146. *Id.* at 1015 (Rehnquist, J., dissenting).
147. *Id.* at 1014.
148. *Id.* at 1002 (White, J., dissenting).

lawmaking."[149] Without the veto, White argued, Congress was left with a Hobson's Choice to either refrain from providing Executive Branch agencies with needed discretion and flexibility, or to engage in a "hopeless" task of writing laws with excruciating specificity in order to cover every possible contingency.[150] Neither was desirable nor, in White's mind, feasible.[151]

Justice White responded to Burger's Presentment Clause arguments by contending that legislative vetoes complied with the spirit of Article I, Section 7.[152] Bills containing legislative vetoes complied with the Bicameral and Presentment Clause provisions.[153] They were passed by majorities in both houses and signed by the President.[154] Exercising a legislative veto did not enact new policy in violation of the Presentment Clause but rather only "negated" a particular executive branch action.[155] White also contended that legislative vetoes were an acceptable way for Congress to delegate power.[156] Congress regularly delegates lawmaking power to executive agencies, White reasoned.[157] It would therefore seem perfectly logical and acceptable to reserve a check (i.e., veto) on such delegations.[158]

Finally, Justice White also took issue with the majority's characterization of separation of powers. He argued that the Separation of Powers Doctrine had previously only led the judiciary to invalidate a particular government action when an express provision of the Constitution was violated.[159] The Court should not infer disapproval of the legislative veto just because the Framers did not put it in the Constitution.[160] In this circumstance, neither the executive nor the judiciary is prevented from carrying out their assigned constitutional functions.[161] Indeed, White noted, the Constitution provides for no explicit executive or judicial roles in the deportation process.[162]

149. *Id.* at 972–73.
150. *Id.* at 968.
151. *Id.*
152. *Id.* at 980.
153. *Id.*
154. *Id.* at 980–81.
155. *Id.*
156. *Id.* at 1002.
157. *Id.* at 984.
158. *Id.* at 986–87.
159. *Id.* at 999.
160. *Id.* at 999–1000.
161. *Id.*
162. *Id.*

In the end, the Ninth Circuit's opinion that struck down Section 244(c)(2) was upheld by the Supreme Court by a 7-2 margin.[163] Soon after the *Chadha* decision the Court struck down both one-house and a two-house legislative veto provisions in *Process Gas Consumers Group v. Consumer Energy Council*.[164] The message appeared to be sent: The legislative veto was dead.

V. EXECUTIVE BRANCH RESPONSES TO *CHADHA*

While in a strictly organizational sense both Congress and the executive branch are not in a hierarchically subordinate position to the Supreme Court, they are expected to carry out Court decisions. To what degree can organizational theory be applied to the *Chadha* case? We now turn to an examination of executive branch responses to seek an answer to this question.

While presidential attitudes towards the legislative veto have been described as ambivalent, all have criticized and questioned its use.[165] Every Attorney General since the Hoover Administration's William Mitchell has opposed the legislative veto.[166] At the same time, presidents have continued to sign bills into law that contain legislative vetoes.[167]

Public objections to the legislative veto begin to appear during the Eisenhower Administration. It was during this period of time that Congress began to increasingly use committee vetoes and "no appropriation" provisions in certain legislative areas.[168] Eisenhower himself had serious doubts about the constitutionality of the idea that Congress could delegate a power to one of its committees that, in effect, would give it the ability to prevent an executive action that had been carried out pursuant to law.[169] Eisenhower clashed with Congress over the inclusion of committee vetoes in legislation such as the Military Construction Act of 1951.[170] Upon seeing a draft of the legislation,

163. *Id.* at 919.

164. Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983).

165. For an exhaustive reference list of objections to the legislative veto by Presidents and Attorneys General see John Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARVARD J. ON LEGIS. 735, 737 n.7 (1979).

166. *Id.*

167. *Id.*

168. For a good discussion of the rise of the committee veto and presidential opposition, see H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1017–29 (1975).

169. Arthur S. Miller & George M. Knapp, *The Congressional Veto: Preserving The Constitutional Framework*, 52 IND. L. J. 376, 379 (1976).

170. Military Construction Act of 1960, Pub. L. No. 86–500, 74 Stat. 166.

Eisenhower sought to repeal these committee vetoes.[171] When he was unsuccessful, he threatened to order the Defense Department to ignore them.[172] Congress abruptly changed its course, replacing the committee vetoes with report-and-wait provisions.[173]

A second example of this conflict came in response to the 1954 Camp Blanding Bill.[174] This bill, in part, authorized the transfer of Camp Blanding from the United States Army to the state of Florida.[175] The transfer of this and other pieces of real estate were subject to a committee veto.[176] Eisenhower's objections to this arrangement were forceful enough that he vetoed the entire bill.[177] Even when Eisenhower signed legislation into law that contained vetoes, he noted his objections. Eisenhower's signing statement for the Department of Defense Appropriations Act for 1956 contained a declaration detailing his objections to the legislative vetoes in the bill and his intention to treat them as invalid, absent instructions from the courts to do otherwise.[178]

There were fewer public objections to the use of vetoes during the Kennedy Administration.[179] In fact, Kennedy routinely signed legislation containing "no appropriation" provisions while in office.[180] Far more common were presidential vetoes for bills containing legislative vetoes or signing statements objecting to their inclusion in bills.[181] This was the general approach to the legislative veto taken by the Kennedy, Johnson, Nixon and Ford Administrations.[182] A prime example of this is the Agricultural Trade Development and Assistance Act of 1964.[183] The bill contained committee vetoes over certain foreign currency transactions. President Johnson signed the bill but strongly noted his reservations

171. Watson, *supra* note 168, at 1022.

172. *Id.*

173. *Id.*

174. 100 CONG. REC. 7129, 7135 (1954).

175. *Id.*

176. *Id.*

177. *Id.*

178. CRAIG, *supra* note 5, at 53.

179. Watson, *supra* note 168.

180. "No appropriations" provisions are essentially a congressional check (or veto) on how the executive branch spends money. If Congress disagrees with how an executive agency is going to spend money to implement a program it can just cut off appropriations. It can also appropriate money to the executive branch with conditions that it be spent (or not spent) in a certain manner. Examples of these provisions can be found in: P.L. 87–578 (appropriations of Indian funds) and P.L. 87–703 (approval of agricultural loans to local agencies).

181. CRAIG, *supra* note 5, at 53.

182. *Id.* at 53.

183. *See Extension of Public Law 480 83d Congress: Hearings on S. 1498, S. 2687 and S. 2925 Before the Comm. on Agric. and Foresty*, 88th Cong. 1 (1964).

about the constitutionality of the veto provisions in his accompanying signing statement.[184]

The fight over the legislative veto appeared to be coming to a head during the Carter Administration. In a June 21, 1978 statement to Congress, Carter declared: "Pending a decision by the Supreme Court, it is my view . . . that these legislative vetoes are unconstitutional . . . . The inclusion of such a provision in a bill will be an important factor in my decision to sign or to veto it."[185] When Carter's Attorney General held a press conference after this announcement, reporters focused on the potential conflict between the two branches as opposed to the role of the legislative veto in regulatory matters.[186] Carter got his answer quickly. Within ten days Congress once again began to pass bills containing legislative vetoes.[187]

In an interesting twist, Governor Ronald Reagan, running for the presidency, supported the legislative veto during the 1980 campaign as a tool to curb regulatory excesses.[188] As a result, there was limited support for the legislative veto in the White House at the outset of the Reagan Administration.[189] Nevertheless, Reagan Administration officials quickly changed their tune when it became "their" executive branch and the legislative veto became a tool that Congress used to "meddle" in executive branch affairs.[190]

The Supreme Court handed down the *Chadha* decision towards the end of Reagan's first term in office, a term in which he experienced a good deal of legislative success.[191] One might initially think that the *Chadha* decision was a great victory for the executive branch, but most officials quickly realized that it was going to be of little practical value.[192] The chair of the White House policy council explained that judging from initial congressional reactions, "[i]t was already clear that we had nothing to gain from trying to find ways of using *Chadha* to alter inter-branch relations under any of these statutes, so we just agreed that those tainted legislative vetoes were no longer operable but that the rest of the statute remained unaffected."[193] Without statutory legislative

184. Statement by the President Upon Signing Bill Extending the Agricultural Trade and Assistance Act, 2 PUB. PAPERS 641 (October 8, 1964).

185. CRAIG, *supra* note 5, at 122.

186. *Id.* at 122–23.

187. *Id.*

188. *Id.* at 149.

189. *Id.*at 148–50.

190. *Id.*

191. THOMAS CRONIN & MICHAEL GENOVESE, THE PARADOXES OF THE AMERICAN PRESIDENCY 169 (Oxford Univ. Press 2d ed. 2004).

192. KORN, *supra* note 84.

193. Korn, *supra* note 85, at 885.

vetoes to govern the delegation of administrative discretion some observers, such as Louis Fisher, argued that informal, less public, means would be used to achieve the same end: congressional oversight control over executive agencies.[194]

Though part of the executive branch of government, executive agencies have very different constraints on their daily activities than do the president and top executive branch officials.[195] As just noted, presidents consistently decried the use of the legislative veto, and this rhetoric often contained the "tough talk" that presidents felt they needed to issue in defense of their presidential prerogatives vis-à-vis Congress.[196] Executive agencies must be more practical in both word and deed when dealing with Congress and congressional committees.[197] Consequently, their approach to the *Chadha* decision was a more conciliatory one.[198]

Despite the apparent victory handed to them in the *Chadha* decision, executive agency officials did not rush to insist on strict compliance with the Supreme Court's decision. The Reagan White House drafted a memo instructing all executive agency heads to avoid unnecessary confrontation with Congress over the legislative veto.[199] Many agency heads met with powerful committee chairmen to assure them that they would try no "tricks" and that business would be conducted largely as before, as long as they could maintain their existing level of agency autonomy.[200] Initial post-*Chadha* testimony in congressional hearings again revealed that the administration was not looking for a fight over the legislative veto.[201] Before the House Subcommittee on Administrative Law, Deputy Attorney General Edward Schmultz maintained "as strongly as possible" that the executive branch would continue "to observe scrupulously the 'reporting' and 'waiting' features that are central to virtually all existing legislative veto devices."[202] He stressed that the executive branch wanted to respond to the *Chadha* decision with a "spirit of comity and mutual respect."[203]

194. Fisher, *supra* note 6.

195. *See* CRONIN & GENOVESE, *supra* note 192.

196. Robert Dixon, Jr., *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C. L. REV. 429 (1978).

197. Fisher, *supra* note 8, at 288.

198. Korn, *supra* note 85 at 885.

199. *Id.*

200. Fisher, *supra* note 8, at 290–91.

201. Barton Gellman, *Administration Tiptoes on Legislative Veto*, WASH. POST, July 21, 1983, at A5.

202. *APPC Hearings*, *supra* note 126, at 4, 6 (testimony of Deputy Att'y Gen. Schmultz).

203. *Id.*

One notable, yet brief, exception occurred when Office of Management and Budget Director Jim Miller announced shortly after the *Chadha* decision that executive agencies would follow the Supreme Court's lead and employ the Court's reasoning in *Chadha*. Miller sent a memo to all agency heads advising them that they would no longer be bound by the traditional committee reports used to "guide" agency spending since they, like the legislative veto, were neither laws nor signed by the President.[204] When Congress threatened to tie the administration's hands with even stricter budgetary controls via other means, Miller quickly rescinded his earlier statement.[205]

Acceptance to the legislative veto was so ingrained in the executive branch that it appeared likely to accept vetoes even after the *Chadha* decision.[206] Some scholars pointed out that the equivalent of the legislative veto would still be found in many agency manuals.[207] Beyond the desire to maintain a "business as usual" approach to the relationship between the executive and legislative branches, both sides realized that absent the legislative veto Congress still retained a variety of oversight tools, both formal and informal, that were useful for monitoring the activity of executive agencies.[208] One unnamed Federal Trade Commission official lamented that Congress still had "27 different ways of torture."[209] Recognition of this fact resulted in an environment where executive agencies continued to keep Congress informed of their activities, even when not explicitly required to, in an effort to maintain a good working relationship between the two branches.[210]

Critics of the *Chadha* decision pointed to the beneficial "rules of the game" that the legislative veto brought to the policymaking process.[211] Congress was willing to give a fair amount of discretion to the executive branch but only if it could retain a final say over the implementation of policy through the legislative veto.[212] The executive branch received

204. *War Declared Over Report Language Issue*, CONG. Q. WKLY. REP., June 25, 1988, at 1752.

205. *OMB's Miller Back Away From Report Language Battle*, CONG. Q. WKLY. REP., July 9, 1988, at 1928.

206. Robert Gilmour & Barbara Hinkson Craig, *After the Congressional Veto: Assessing the Alternatives*, 3 J. PUB. ANALYSIS & MGMT. 373, 383 (1984).

207. Fisher, *supra* note 8, at 291.

208. *See generally* JOEL ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (Brookings Institute 1990); KORN, *supra* note 84; Fisher, *supra* note 8.

209. Peter Grier, *Veto Decision May Unleash Regulators*, CHRISTIAN SCI. MONITOR, June 28, 1983, at 2.

210. *See generally* ABERBACH, *supra* note 208; KORN, *supra* note 84; Fisher, *supra* note 8.

211. MARTHA LIEBLER GIBSON, WEAPONS OF INFLUENCE: THE LEGISLATIVE VETO, AMERICAN FOREIGN POLICY AND THE IRONY OF REFORM 39 (Westview Press 1992); Fisher, *supra* note 6.

212. *Id.*

much needed and desired discretion. This allowed agencies a great deal of freedom to operate without continually having to return to Congress to ask for congressional approval. In turn, Congress reserved the right through the veto to rein in any agency that deviated from congressional intent. It is this delicate arrangement that the Court upset causing both the executive and legislative branches to seek ways to avoid lawmaking via the Court's formalistic *Chadha* framework.[213]

As noted above, all presidents voiced their objections to the legislative veto in a number of ways even while signing bills containing vetoes into law.[214] This trend continued after the *Chadha* decision with the form changing little. President George H.W. Bush's signing statement accompanying the Department of Interior's Appropriations Bill for 1991 read as follows:

> Several provisions of H.R. 5769 purport to condition my authority, and the authority of affected Executive Branch officials, to use funds otherwise appropriated by the Act on the approval of various committees of the House of Representatives and the Senate. These provisions constitute legislative veto devices of the kind declared unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). Accordingly, I will treat them as having no legal force or effect in this or any other legislation in which they appear. I direct agencies confronted with these devices to consult with the Attorney General to determine whether the grant of authority in question is severable from the unconstitutional condition. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684–87 (1987).[215]

Similarly, in signing the Intelligence Authorization Act of 1990 President Bush remarked that the committee vetoes contained therein would in no way condition his future actions.[216] For all the rhetoric of the signing statements, the daily cooperation between executive branch agencies and congressional committees continued unabated. These types of statements often served as little more than a reminder that the Chief Executive retained certain constitutional options should he wish to exercise them.

213. Fisher, *supra* note 6.

214. Dixon, *supra* note 196.

215. Statement on Signing the Department of Interior and Related Agencies Appropriations Act of 1991, 26 WEEKLY COMP. PRES. DOC. 1769 (Nov. 5, 1990).

216. Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990, 2 WEEKLY COMP. PRES. DOC. 1851 (Nov. 30, 1989).

How do policymaking relationships governed by the legislative veto, and the initial response of the Reagan Administration, illustrate executive branch reaction to the Supreme Court's *Chadha* decision? The Court's decision certainly seemed to disrupt the "normal" course of business and the relationship between executive agencies and Congress. Many executive officials viewed the alternative (a veto-less system) with suspicion and distrust.[217] Congress was quick to remind them that it had not only other oversight powers, but powers that could make life more difficult for executive agencies.[218] When viewed in this light it seems reasonable that agency officials preferred the veto arrangements in place before the Court's decision over an uncertain, veto-less playing field. Agencies and officials that tried to take advantage of the Court's decision found themselves bound by alternative oversight methods.[219] To the degree that they wanted to retain their autonomy and discretion, they continued to interact with Congress as though vetoes, if not constitutional, were still understood to be part of the policymaking equation. It is this relationship with Congress that is a key component of the executive branch reaction to the Court's decision.

We see then that both presidents and agency officials generally opposed the veto but acquiesced to its use.[220] The executive branch had come to rely on the legislative veto for its discretion and, knowing that Congress had other oversight tools in its arsenal, had no desire to press the veto issue. In the next section, we will examine how Congress responded to the Court's decision by scrutinizing the individual and institutional reactions of Congress and its members.

VI. CONGRESSIONAL RESPONSES TO *CHADHA*

How did Congress respond to the Supreme Court's *Chadha* decision? Why did it continue to pass legislative vetoes even after these types of vetoes had been declared unconstitutional? This section will explore the hypothesis that members of Congress had their own preferences that guided their behavior and lead them to continue to pass legislative vetoes.

Initial congressional reaction to *Chadha* was anything but favorable. Immediately following the decision, member after member went to the floor of each chamber to denounce the Court's actions and outline ways

217. David Broder & Cass Peterson, *Supreme Court Strikes Down "Legislative Veto"; Hill's Hard-Won Gains of a Decade Wiped Out*, WASH. POST, June 24, 1983, at A1.

218. *Sharp Shifts*, *supra* note 4.

219. *See* ABERBACH, *supra* note 208.

220. Dixon, *supra* note 196.

to recapture power. Iowa Senator Charles Grassley defiantly claimed: "When Congress is through, executive branch powers will be curtailed and the nation will be left with a more cumbersome, less responsive government."[221] Legislative responses were almost instantaneous. Seventeen committee chairmen petitioned the Rules Committee to develop an institutional response to the Court's decision[222] and a number of hearings in both houses addressed the subject.[223]

Some reform approaches called for a joint resolution of approval for all major regulations.[224] A House proposal introduced by Trent Lott (R-MS) called for a joint resolution of approval for major rules and a joint resolution of disapproval for minor rules with provisions to make changes in House rules to expedite consideration of regulatory rules.[225] His House colleague Elliott Levitas (D-GA) proposed a blanket generic veto that would be placed in all legislation that delegated power to executive agencies, an approach favored by a number of congressmen.[226] A constitutional amendment was even drafted to overturn the Court's decision.[227] Some measures provided for report-and-wait provisions.[228] A report-and-wait provision simply requires that administrative agencies report proposed rules to Congress before implementing them[229]. Report-and-wait provisions differ from legislative vetoes because Congress must pass new legislation and present it to the President for his signature if it wishes to block an agency rule.[230] The *Chadha* Court went to great lengths to stress that report-and-wait provisions were constitutional.[231]

221. Cass Peterson & John Wilke, *In Wake of "Veto" Ruling, OMB Seems Eager for Truce with Hill*, WASH. POST, June 25, 1983, at A3.

222. *Legislative Veto Hearings After* Chadha*: Hearings Before the H. Comm. on Rules*, 98th Cong. 191 (1984) [hereinafter *Rules Hearings*].

223. CRAIG, *supra* note 19, at 144.

224. *See Rules Hearings*, *supra* note 222; *see also* S. 1080, 98th CONG. (1984). Determination of what a major regulation was to be based on how much spending was involved. Advocates of this approach estimated that this would force Congress to act on roughly 40–50 regulations per year. At the same time S. 1650, 98th CONG. (1984), provided for a joint resolution of disapproval for all agency rules.

225. *Rules Hearings*, *supra* note 222, at 111–14; *see also* H.R. 3939, 98th CONG. (1984).

226. H.R. 1776, 98th CONG. (1984).

227. *See* S.J. Res 135, 98th CONG. (1984). For a detailed argument supporting the amendment, see Dennis DeConcini & Robert Faucher, *The Legislative Veto: A Constitutional Amendment*, 21 HARV. J. ON LEGIS. 29 (1984).

228. *See* S. 1080, 98th CONG. (1984).

229. INS V. Chadha, 462 U.S., 919, 935 (1983).

230. *Id.*

231. *Chadha*, 462 U.S. at 935. Other courts have also upheld report-and-wait provisions. *See e.g.*, United States v. Hanna, 153 F.3d 1286 (11th Cir. 1998); Hechinger v. Metro. Wash. Airports Auth., 36 F.3d 97 (D.C. Cir. 1994); United States v. Scampini, 911 F.2d 350 (9th Cir. 1990); United States v. Litteral, 910 F.2d 547 (9th Cir. 1990); Lewis v. Sava, 602 F. Supp. 571 (S.D.N.Y. 1984).

When the dust settled none of these provisions had the support of a congressional majority and Congress took no comprehensive approach in responding to the *Chadha* decision.[232] Those critical of using joint resolutions worried about the possibility that Congress would need a supermajority to override a presidential veto. The use of joint resolutions to monitor executive agency rulemaking also had the potential to get Congress bogged down in administrative minutiae.[233] Generic veto proposals languished as well, with the result being "very much talk, very little action."[234]

There were a number of outspoken critics of the Court's decision in both houses of Congress. Elliott Levitas, a staunch supporter of the legislative veto and a firm believer that the Court had just produced a "train-wreck in government," voiced the thoughts of many when he boldly declared: "I firmly believe . . . Justice White's dissent will become the law of the land."[235] Rules Committee Chairman Claude Pepper (D-FL) agreed with Levitas and took things one step further arguing that Congress should continue to force legislative veto-type cases in an effort to force the Supreme Court to further specify the bounds of *Chadha* or revisit the issue and chip away at the *Chadha* opinion.[236] He even held out hope that a change in Court personnel would save future veto provisions.[237]

Trying to work around the Supreme Court's *Chadha* decision was one thing, but open defiance (the continued passing of legislative vetoes) was another. This defiance worried some observers. Richard Paschal voiced the concerns of many when he stated: "Nevertheless, while it is appropriate to allow the Court a second look at legislation it has previously invalidated, it may not be suitable to pass similar laws if they are repeatedly struck down as unconstitutional by the Court."[238] In noting the continuing tide of legislative vetoes after the *Chadha* decision, one scholar concluded: "[The Supreme Court's] decision will be eroded by open defiance and subtle evasion."[239]

Compliance with the *Chadha* decision was not completely absent, however. Congress amended some statutes by deleting legislative veto provisions from them and replacing them with joint resolutions.[240] In

232. Horan, *supra* note 19, at 22, 36.
233. *Rules Hearings*, *supra* note 222, at 35 (statement of Rep. Joe Moakley).
234. CRAIG, *supra* note 5, at 236.
235. *Rules Hearings*, supra note 222, at 292–93 (statement of Elliott Levitas).
236. *Id.* at 17 (statement of Chairman Claude Pepper).
237. *Id.* at 292.
238. Paschal, *supra* note 74, at 208.
239. Fisher, *supra* note 6.
240. Fisher, *supra* note 8, at 286.

other cases legislative vetoes remained but went unused.[241] Some legislative vetoes were converted into informal understandings that gave committees effective oversight control over agencies.[242]

As noted earlier, there was a spate of legislation introduced in both chambers designed to respond to *Chadha*.[243] None passed. Why? There are several explanations. One reason is that support for the legislative veto in Congress was far from unanimous. Anthony Beilenson (D-CA) voiced the opinion of many when he claimed, "I haven't been all that upset by the *Chadha* decision. I never thought that the veto was all that useful."[244] Similarly, Representative Joseph Moakley (D-MA) concluded: "[T]he decision should not be viewed as a disaster or as a victory for anyone."[245]

A second reason was that the majority of the leadership in both houses supported only limited use of the legislative veto to help Congress deal with certain troublesome issues, and they did not view it as a useful tool for everyday oversight.[246] House Minority Leader Bob Michel (R-IL) described the legislative veto as "kind of a cop-out," a way for Congress to defer making decisions on controversial topics.[247] The Speaker of the House, Tip O'Neill (D-MA), was described as a "longtime foe" of the legislative veto.[248] The leadership was cautious in its reaction to *Chadha*. It did not want to rush headlong into anything without first being sure about the ramifications for congressional oversight.

While many focus on the continued presence of legislative vetoes in statutes following the *Chadha* decision, perhaps the focus properly lies elsewhere. It is clear that Congress continued to pass legislative vetoes in defiance of the Court's decision.[249] Yet at the same time, Congress made some token efforts to modify existing veto provisions and strike others.[250] The loss of the veto prompted some scholars to fear that inter-branch conflict would become both more prevalent and more public. Martha Liebler Gibson argued that the legislative veto often prompted

241. *Id.* at 286–87.

242. *Id.* at 275.

243. *See supra* notes 225–229.

244. *Rules Hearings*, supra note 222, at 284–85 (statement of Rep. Beilensen).

245. Julia Malone, *Congress Starts Search for Way to Recoup Veto Power*, CHRISTIAN SCI. MONITOR, July 5, 1983, at 1.

246. CRAIG, *supra* note 5, at 103.

247. Martin Tolchin, *Hoover was First to Let Congress Veto President*, N.Y. TIMES, June 24, 1983, at B4.

248. Steven V. Roberts, *Congressmen Seeking Turf The Executive Calls Its Own*, N.Y. TIMES, Mar. 28, 1982, at E5.

249. Fisher, *supra* note 8.

250. Fisher, *supra* note 8, at 286–87.

Congress and agencies to informally negotiate issues to an amiable solution.[251] Without the veto, she feared more frequent and more public confrontations between the two branches.[252] Most scholars, however, feared just the opposite. As Louis Fisher has argued, what *Chadha* may have done is make lawmaking "more convoluted, cumbersome, and covert than before," driving underground legislative vetoes that were formerly in plain sight.[253] House Counsel Stanley Brand quipped: "We're about to get 'veto by telephone.' Committee chairmen will call the agencies and tell them what to do."[254] It is precisely these "informal arrangements" with executive agencies that gave some degree of comfort to those in Congress who lamented the loss of the legislative veto.[255] Clarence Long (D-MD) noted that congressional means of oversight consisting mainly of informal, inter-branch contacts had not really been affected by the decision.[256] Collectively, these informal pressures might very well amount to legislative veto authority (or better).[257] Representative Joe Moakley's (D-MA) words are telling: "The system is clearly not sanctioned by the *Chadha* decision, but that doesn't matter because the system is beyond the reach of the courts as long as both branches operate in good faith."[258] As long as Congress and the executive dealt in good faith they could continue to make and execute policy in a manner which both appeared to prefer, notwithstanding the Court's formalistic view of separation of powers enunciated in *Chadha*.[259]

If informal arrangements often accomplished the same purpose as the legislative veto, why did Congress continue to pass them? The presence of many of these veto provisions in legislation had become so common that they were often considered a boilerplate matter.[260] They were just routinely inserted without much thought being given to their presence. House Legal Counsel Steven Ross explained initial post-*Chadha* vetoes by saying, "Each bill isn't gone over with a fine-tooth comb to compare it to what the Supreme Court said in *Chadha*."[261] Justice Department Legal Counsel Ted Olson concurred: "It was probably not intentional to

251. GIBSON, *supra* note 211, at 5.

252. *Id.*

253. Fisher, *supra* note 8, at 292.

254. Tolchin, *supra* note 247.

255. Korn, *supra* note 85, at 880–881

256. *Id.*

257. *Id.*

258. *Rules Hearings*, *supra* note 222, at 33 (statement of Rep. Joe Moakley).

259. *Id.*

260. Diane Granat, *Legislative Vetoes Are Passed Despite High Court Decision*, 29 CONG. Q. WKLY. REP. 2235 (Oct. 1983).

261. *Id.*

include legislative vetoes or expect them to be enforced. The legislation might have been so far in the pipeline that people didn't catch them."[262] House Counsel Stanly Brand agreed with his Justice Department counterpart when he reminded everyone that the process of adjusting to the *Chadha* decision was "like the Queen Mary . . . [y]ou can't turn it around that quickly."[263]

Others were less sanguine about giving Congress the benefit of the doubt. In fact, one House Appropriations Committee staffer indicated that the post-*Chadha* inclusion of legislative vetoes was not accidental and that they would continue to be inserted until they were specifically challenged in the courts.[264] Having witnessed the continuing presence of legislative vetoes through 1986, Michael Horan claims:

> The continued appearance of these unconstitutional vetoes is not easy to explain. Related committee reports make no effort to defend their legality, and there is little or no floor discussion of the vetoes. What might have been shrugged off as mere carelessness in legislative draftsmanship cannot now be viewed as anything other than intentional in light of the persistent (though occasional) use of these committee vetoes, their number, and the fact that repeated calls by the President for their elimination have gone unheeded.[265]

It appears that many in Congress were opposed to the Supreme Court's decision.[266] Others realized that informal oversight measures would serve essentially the same purpose as the legislative veto.[267] Either way, it is apparent that many members of Congress preferred the veto or its equivalent as an oversight tool when dealing with the executive branch. Many argued that the legislative veto was an invaluable means of oversight for Congress, necessitated by the rise of the federal bureaucracy.[268] It was a vital tool that Congress could use when traditional oversight methods failed.[269]

Louis Fisher claims that the Supreme Court never really understood why Congress and the executive branch wanted the veto in the first

262. *Id.*

263. Martin Tolchin, *In Spite of the Court the Legislative Veto Lives On*, N.Y. TIMES, Dec. 21, 1983, at B10.

264. Granat, *supra* note 260, at 2236.

265. Horan, *supra* note 19, at 39.

266. Peterson & Wilke, *supra* note 221.

267. Korn, *supra* note 85, at 880–81.

268. Miller & Knapp, *supra* note 170, at 377.

269. *Id.*

place, thereby underestimating the full repercussions of its decision.[270] Scholars Jacob Javits and Gary Klein referred to the legislative veto as the "most efficacious" congressional oversight method, arguing that it had "unparalleled utility."[271] It was also certainly used with enough frequency that it can be said many members of Congress saw it as a way of fulfilling many of their oversight and policymaking needs.[272] Strom Thurmond's statement at congressional hearings following the decision illustrated this point when he concluded: "The veto was seen as an effective means of controlling the constantly expanding regulatory authority of agencies and a necessary mechanism."[273]

Stephen Breyer viewed the regulatory veto as one method of compromise between political accountability and the necessary complexity that is involved in regulatory decision-making.[274] Viewed in this light, the veto was a tool that Congress could use to maintain its constitutional prerogatives vis-à-vis the other branches of government in a changing political system.[275] Martha Gibson astutely summed up this position:

> At best the legislative veto was an eminently logical accommodation to the complexities of modern government—precisely the kind of adaptation which the Founders had in mind when they designed our government. At worst it was a facilitator of legislative irresponsibility, a means to transfer the duties of elected representatives to . . . unelected administrators.[276]

She went on to explain that the legislative veto could allow Congress to avoid the responsibility of legislating in politically sensitive areas by delegating authority to the executive branch, and then claiming credit by killing unpopular agency initiatives without having to offer any concrete alternatives in return.[277] To the degree that this is an accurate assessment of the potential value of the legislative veto, it is little wonder that members sought to retain it.

Some scholars concede that the legislative veto was a powerful symbolic tool but argue that "acknowledging that the legislative veto was

270. Fisher, *supra* note 8, at 275.

271. Jacob Javits & Gary Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 456 (1977).

272. *Rules Hearings*, *supra* note 222, at 238 (statement of Morris Ogul).

273. *APPC Hearings*, *supra* note 126, at 3 (statement of Strom Thurmond).

274. Breyer, *supra* note 17, at 787–88.

275. Miller & Knapp, *supra* note 170, at 375–76.

276. GIBSON, *supra* note 211, at 27.

277. *Id.*

a powerful symbol of congressional control is a far cry from establishing the mechanism's indispensability."[278] Others, like future Supreme Court Justice Antonin Scalia, saw it as "a solution in search of a problem;" it did not really deal effectively with the problems surrounding the delegation of congressional power and agency rulemaking.[279] In his testimony before the House Rules Committee, Morris Ogul concurred, stating that the legislative veto was "not quantitatively and probably not qualitatively central to the legislative efforts to oversee the bureaucracy."[280]

Joel Aberbach's study of the legislative veto in *Keeping a Watchful Eye: The Politics of Congressional Oversight* supports the contention that the legislative veto was not the invaluable oversight tool that many claimed.[281] Of the fourteen oversight techniques examined by Aberbach, the legislative veto ranked dead last in terms of use.[282] Indeed, only 2.4% of the staffers he surveyed reported using the legislative veto frequently or very frequently.[283] His results also revealed that the legislative veto was only the ninth (out of fourteen) most effective oversight tool employed by those in the 95th Congress.[284] These results lead Aberbach to postulate that the reasons the legislative veto scored so poorly as an oversight tool was that there were many more informal, and effective, ways of accomplishing congressional oversight goals.[285] Whether symbolic or practical, the legislative veto certainly became a favorite tool of many members of Congress. This is despite the many questions from the outset regarding its constitutionality and utility. Regardless, the veto's powerful appeal certainly indicates a preference by many in Congress not to give up that particular tool without a fight.

VII. THE TREASURY ACT OF 1992: POST-*CHADHA* POLICYMAKING IN ACTION

The Treasury, Postal Service, and General Government Appropriations Act of 1992 provides an instructive look at the ways in which legislative vetoes continued to be used long after the *Chadha*

278. Korn, *supra* note 85, at 892–93.

279. *Rules Hearings*, *supra* note 222, at 527 (statement by Antonin Scalia); *see also* Korn, *supra* note 85, at 879; Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, AM. ENTERPRISE INST. J. ON GOV'T & SOC'Y (Nov.–Dec. 1979), at 19.

280. *Rules Hearings*, supra note 222, at 238 (statement by Morris Ogul).

281. ABERBACH, *supra* note 208.

282. *Id.* at 132.

283. *Id.* at 267.

284. *Id.* at 136.

285. *Id.* at 132–36.

decision.[286] With Republican George H.W. Bush as President and a Democratic-controlled Congress, the budget sessions of the late 1980s and early 1990s were often tumultuous.[287] Even without divided government, the budget process is often one where Congress seeks as much control over how money is spent by the executive branch as it can get. The budget process of 1992 has been described by some as relatively "calm," but there is still evidence that Congress sought to flex its muscles through the appropriations process.[288]

The Treasury Act of 1992 contained a number of legislative vetoes.[289] These vetoes were committee vetoes.[290] The following provision regarding the administration of Internal Revenue Service (IRS) funds is illustrative:

> Section 1. Not to exceed 4 per centum of any appropriation made available to the Internal Revenue Service for the current fiscal year by this Act may be transferred to any other Internal Revenue Service appropriation upon advance approval of the House and Senate Committees on Appropriations.[291]

The shifting of funds by an executive agency, often called reprogramming, from one program to another has historically been arranged informally between Congress and agencies, but in recent years Congress has increasingly written vetoes such as the one above into appropriations legislation.[292]

Other committee vetoes included limits on the amount of funds transferred between programs in the General Services Administration, limits on the amount that presidential appointees could spend on redecorating their offices without advance approval of the Appropriations Committees, and requirements that facility maintenance for certain federal buildings be approved in advance by the Appropriations Committees.[293] These types of vetoes attempted to codify Appropriations Committee reports, which are increasingly used to

286. Treasury, Postal Service, and General Government Appropriations Act of 1992, Pub. L. No. 102–141, 105 Stat. 861 (1992) [hereinafter *Treasury Act*].

287. ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 211 (rev. ed. Brookings Inst. Press 2000).

288. *Id.* at 4.

289. *Treasury Act*, *supra* note 286; For example, Title VI limits the amount of funds that can be used to redecorate the offices of presidential appointees without specific advance approval by the Appropriations Committees.

290. *Id.*

291. *Id.* For an example see Title I, Administrative Provision—Internal Revenue Service, § 1.

292. SCHICK, *supra* note 287, at 248.

293. *See Treasury Act*, *supra* note 286.

micromanage the spending authority of executive branch agencies.[294] In discussing this process, Allen Schick notes that these committee reports are often not binding legally, but the reality is that few agencies want to cross Congress and ignore these reports.[295]

The appropriateness of such veto provisions was, in an unusual move, protested on the floor of the House during the debate of H.R. 2622. Representative James Traficant (D-OH), unhappy that an amendment of his was stripped from the bill, raised dozens of parliamentary objections to provisions in the Appropriations bill that caused debate to drag on for hours.[296] Representative Traficant noted that a significant portion of the bill (including the legislative veto provisions—though he didn't mention these by name) conditioned funding for programs or agencies on certain Executive (in)actions. [297]He successfully argued that this amounted to putting legislation in an appropriations bill in violation of House rules.[298]

Traficant's actions eventually turned out to be a quixotic attempt to buck the desires of congressional leadership. Allen Schick's discussion of the budget process notes that such conditional spending directions in Appropriations bills, while probably not appropriate, will likely remain there when the leadership desires it.[299] In this case, they did, and all the language stricken from the bill on the floor of the House reappeared in the House-Senate conference committee report on the bill.[300] The Treasury Act of 1992 passed the House and the Senate on a voice vote in each chamber on October 3, 1991.[301] The veto provisions had been restored in their entirety without a single word being mentioned about their presence in any of the debate on the bill.[302]

Predictably, President Bush commented on these veto provisions when he signed the bill into law on October 28, 1991. He wrote:

> A number of provisions in the Act condition the President's authority, and the authority of affected executive branch officials, to use funds otherwise appropriated by this Act on the approval of various

294. SCHICK, *supra* note 287, at 282-4.

295. *Id*. at 236. Recall our earlier discussion of how OMB head Jim Miller was rebuked when he tried to downplay the legal nature of these reports.

296. *See* 137 CONG. REC. H2622, H4615 (daily ed. June 18, 1991) (statement of Rep. James Traficant).

297. *See id.*

298. *See id.*

299. SCHICK, *supra* note 287, at 235.

300. 137 CONG. REC. H2622 (daily ed. Oct. 3, 1991).

301. *Id.*

302. *Id.*

> committees of the House of Representatives and the Senate. These provisions constitute legislative vetoes similar to those declared unconstitutional by the Supreme Court in *INS v. Chadha*. Accordingly, I will treat them as having no legal force or effect in this or any other legislation in which they appear.[303]

In essence, the "dance" was complete. Congress used the vetoes to condition executive branch spending. The President noted that they could not legally do this. Despite the President's proclamation, executive agencies surely took note of the congressional "recommendations."[304] The manner in which these vetoes were included surely indicates that the congressional leadership placed a value on them. In an era of divided and occasionally acrimonious government, the limits on presidential appointee office redecoration were probably just an inter-branch dig at the other party. As noted earlier, there was no public discussion of these veto provisions. Their presence and the fact that they were incorporated into Appropriations bills would apparently reflect Congress' desire to keep a very close eye on certain executive branch activities.

VIII. CONCLUSION

A number of political and legal scholars have used organizational theory to explain the implementation and impact of judicial decisions. One of the hypotheses often put forward is that agencies responsible for the implementation of judicial policies often have organizational preferences of their own that outweigh their motivations to comply with court decisions.[305] This article has applied the above hypothesis to the Supreme Court's decision to strike down the legislative veto in *INS v. Chadha*. There is some evidence to support that conclusion when analyzing executive agency response to the Court's *Chadha* decision. On its face, the executive branch was handed what appeared to be a victory from which it would vigorously seek to gain advantage.[306] This did not turn out to be the case as agencies continued to acquiesce both to congressional passage of legislative vetoes and informal veto-like arrangements.[307] To do so was the price for their precious, and preferred, autonomy. Although we are looking at separate, co-equal branches of

303. Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1992, 2 PUB. PAPERS 1349 (Oct. 28, 1991).

304. This would be comparable to the scenario described *supra*, note 206.

305. CANON & JOHNSON, *supra* note 13 at 82.

306. KORN, *supra* note 84, at 34.

307. Korn, *supra* note 85, at 885.

government, these agencies, at least in theory, appeared bound to implement the Court's decision. Our examination supports the contention that they were complicit in a failure to do so. They preferred the "old" pre-*Chadha* system and took actions (or failed to act) in order to preserve it.[308]

Congress was also responsible for implementing the Court's decision, yet it continued to pass legislative vetoes.[309] Again, we have seen where many members apparently found the legislative veto to be an indispensable tool for Congress in the oversight of executive agencies.[310] Others, including congressional leaders, were less inclined to rush into a comprehensive response to *Chadha*. They quickly reminded executive branch officials that other formal and informal oversight methods remained and that *Chadha* would result in no functional change in the relationship between the two branches.[311] Congress would continue to pass vetoes and retain the functional equivalent in areas where vetoes were modified or deleted. It too preferred the "old" system and resisted implementation of the decision in a variety of subtle and not so subtle ways as the Treasury Act of 1992 illustrates.

The findings in this particular case appear to support the theory that courts may have difficulty in gaining compliance with their decisions when those responsible for implementing them have preferences that clearly differ from those of the court. In this case we see an unpopular Supreme Court decision and responses by both Congress and the executive branch reflecting their desire to retain the old status quo.

308. Wheeler, *supra* note 2, at 1205.

309. Fisher, *supra* note 8.

310. The utility of the legislative veto as an oversight tool has been a point of contention among scholars. Those arguing that the legislative veto served a useful function include: MARCUS ETHRIDGE, LEGISLATIVE PARTICIPATION IN IMPLEMENTATION (Praeger 1985); Fisher, *supra* note 8; Javits & Klein, *supra* note 271; Miller & Knapp, *supra* note 170. Those arguing that the legislative veto was never really all that useful to Congress include: ABERBACH, *supra* note 208; CRAIG, *supra* note 5; KORN, *supra* note 84; Scalia, *supra* note 280.

311. Korn, *supra* note 85, at 880–81.