REMARKS OF
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I appreciate the opportunity to participate in this forum and I commend the Association for the speed with which it has acted to afford the members of this committee with an opportunity to weigh the impact of the three recent Supreme Court decisions which nullify the legislative veto. Particularly in recent years, the veto has been viewed by Congress and by the business community as an important tool in keeping the regulatory process accountable. And I think it is important that both Congress and thed business community respond cautiously to the present challenge.

BACKGROUND

The sweeping Supreme Court decision in the matter of Immigration and Naturalization Service -v- Chadha appeared, on first reading, to invalidate all forms of the legislative veto. And the summary decisions in the subsequent rulings on the vetoes applicable to the Federal Energy Regulatory Commission and the Federal Trade Commission certainly tend to confirm the broadest reading of Chadha.

But the ruling deals with a matter so focused at the inner subtleties

of relations between the executive and legislative branches, that it is hardly surprising that much public, official, and media discussion has substantially distorted both the significance and the effect of the decision. In some respects, the Chadha decision means a good deal more than has been recognized yet and, in others, may mean a good deal less.

Use of the veto

Although my position has been characterized in opposition to the legislative veto, I think it is very important to understand that no one is really an opponent of the veto. Members of Congress have simply had honest differences on how and where it should be applied.

Every President since Herbert Hoover has argued that the veto is unconstitutional, yet each of them has proposed a veto at one point or another.

The former chairman of the Committee on Rules, Congressman Bolling, was charged last year with killing the veto, but he is the author of the model for all modern vetoes, the Congressional Budget and Impoundment Control Act of 1974.

The question for Members has been the application of the veto in particular contexts. And I suspect that nearly every Member has voted both for and against the concept. So the Supreme Court decision should delight no one. Certainly, the decision is a significant one and will force some very fundamental changes in the manner in which our government operates. But assertions that the decision strikes a devastating blow to the Congress as regards its power relative to the President misgauges the long range effects

of the way Congress will handle this new balance in future legislation. But it also misjudges even the immediate consequences of what the decision really means with respect to about 300 statutes touched by it.

The legislative veto has been in use for over 50 years and both Congress and the President have found the device convenient. Typically the way the device has come into being is that Congress and the President reach an agreement that the executive will be granted a specific power, which would not exist except for the enactment of the law, and Congress ties a limitation to that delegation -- that the executive decision will be subject congressional nullification.

It is important to note that the legislative record is rather clear that all Administrations, notwithstanding their official posture of opposition to the veto, have been the authors of such compromises nearly as often as Congress.

In general, the approach is rather convenient. The President obtains some political advantage in that the fundamental principle of legislative physics -- inertia -- is turned to his advantage. The President is freed from having to send-up a recommendation and wait for the whole process of enactment to run its course through subcommittees, committees, and the floor in each House and through conference. Instead, the Executive issues a proposed regulation (or some other form of executive action) and, if any step of the nullification process falters during a set number of days, the matter becomes effective as the functional equivalent of law. Congress, for its part, retains roughly the same degree of control it would have had in the

normal legislative process but structures the situation, where speed or flexibility is needed, to compensate for its own institutional weaknesses.

In this context, the veto works best when it is enacted as part of a negotiated agreement between the branches to improve management flexibility or response to emergency situations.

The best examples of the former are laws which have given the Executive authority to temporarily defer spending or implement less than departmental reorganizations, subject to congressional nullification. The War Powers Act is the best and strongest example of the latter.

Historically, the courts have been very reluctant to intervene in these kinds of political agreements between the other branches. Indeed, as recently as 1978, the Supreme Court allowed to stand a lower court ruling which affirmed a law which had allowed the President to adjust federal pay scales annually, subject to a legislative veto.

Expanded use of the veto

Increasingly, however, there has been alarm about the proliferation in the uses to which the legislative veto has been put. The veto is on weakest grounds when foisted by Congress for its own convenience or inability to face hard choices. And such uses have become disturbingly more common in recent years than the cautious "power sharing" agreements between the branches which gave birth to the device.

And suddenly, in the past few years, congressional exuberance with the device has led to the birth of proposals for a "generic" legislative veto --

a proposed law which would give Congress the power to review and nullify each regulation issued by the entire government.

The issue reached a head last year when the Senate passed the proposal 69 to 25. A similar House proposal, which was not acted on, was co-sponored by a substantial majority of the House.

The results of such a proposal could have been disturbing and the potential for genuine paralysis in entire, important segments of the regulatory process was the great risk posed by a broad, generic veto.

Certainly, the business community has legitimate greviences against poorly considered federal regulations. It has equal greviences against poorly considered laws. And to expect a Congress that can barely pass a few hundred laws in a year to seriously review 7,000 regulations, is the answer to neither problem.

Unlike the hundreds of specifically linked agreements enacted since 1932, a generic veto is nothing more or less than an unconstitutional effort to turn the entire process of national government on its head, transferring to each branch the functions for which it has the least expertise and legitimacy.

It was becoming increasingly clear that the use of the legislative veto was a runaway train and there was increasing doubt of any ability to restrain the device to its traditional and accepted uses. It was in response to this trend, I believe, that the Supreme Court has now been forced to intervene in a matter it had successfully sought to avoid deciding for a generation.

In this regard, the decision should not be viewed as a disaster or as a victory for anyone.

EFFECT OF THE COURT DECISION

Congress, admittedly, has lost a tool which has, in its better applications, proved useful and efficient. But, by restraining Congress from immersing itself in every item of regulation and adjudication, the court has saved Congress from drowning in detail it lacks the institutional capacity to manage, and freed it to act within the scope of its legitimate role for shaping national policy.

Clearly, the Chadha decision will force vast institutional adjustments to be made by Congress to prepare itself to work effectively under this new arrangement but I sincerely believe the long term effects could be salutory for Congress, the President and the Nation.

Specific legislation

In the long run, the Congress will be strengthened in relation to the President, the bureaucracy, and the courts. It will be forced to write laws with greater specificity. Far less substance will be left for regulatory or judicial interpretation and powers of a legislative character will be delegated with narrower limitation both as to scope and duration.

Severability

But, I believe that initial discussion of the decision has even more significantly misjudged the short term effects.

The specific decision of the court applies to a single provision of the

immigration laws and found that provision unconstitutional. To the extent that the ruling is interpreted as having "shifted" power from the legislative branch to the executive, however, that is correct only because the court was able, in this case, to make two findings; the operative language of the ruling is, "We hold that the Congressional veto provision in section 244(c)(2) is severable from the Act and that it is unconstitutional."

The grounds on which the Court held the veto unconstitutional are so broad as to make clear the intention of the court that its decision would govern lower courts in the review of all the 300 provisions of law that have used the veto. And that review will probably take a decade or more.

It seems doubtful that any of these laws will survive subsequent challenge; in the Chadha decision, the Supreme Court has left itself and the lower courts almost no room to maneuver on that matter.

The particular law had authorized the Attorney-General to suspend deportation of aliens in certain cases, and had provided that Congress could overrule that determination. By the court finding the veto unconstitutional, Congress loses its power to review those determinations.

By the court finding that review severable from the delegation, the Attorney General retains his powers. But, had the court been unable to find the two propositions severable, the entire arrangement would have fallen and the Attorney General would have been able to suspend deportations only by requesting that Congress pass a bill for the relief of the individual in question.

As the courts begin to sort out the 300 remaining laws, Chadha will turn out to have been a rather exceptional case and the finding of severability will be impossible in the majority of cases.

Under a 1967 law, previously noted, Congress gave the President authority to revise the federal pay schedules annually, subject to congressional disapproval. On the same constitutional basis on which Chadha was later decided, a group of federal jurists sued for a pay raise proposed by the President but disapproved by Congress. The court ruled that it was inconceivable that Congress would have given the President the power to adjust pay if the determination were not subject to congressional review. The court was able to rule that the two matters were not severable and, if the veto of the President's authority was unconstitutional, that authority would fall with it. As a result, it was possible to hold that no claim existed without reaching the constitutional merits and, on appeal, the Supreme Court declined to review the case.

I think that this model is likely to be repeated in most court reviews steming from the Chadha decision. And the manner in which it is repeated will satisfy no one. One of the most effective and articulate supporters of the veto, Congressman Levitas of Georgia, pointed out that the veto is neither conservative nor liberal, neither pro-business nor pro-environment. "It is," he astutely observed, "a two-edged sword." And I would echo his observation in predicting the effect of the unraveling of the legislative veto, as Chadha is applied to future cases.

The Congressional Budget and Impoundment Control Act of 1974, for ex-

ample, establishes a flexible system for cooperative action between the President and Congress to rescind or defer federal spending. There is no question that the one House veto of Presidential proposals for deferrals is embraced by the Chadha decision. However, the Act contains no severability clause and the legislative history clearly documents that Congress would never have granted deferral authority absent a congressional review mechanism -- indeed, the bill was written in response to President Nixon's use of impoundments and restraint of that power was the clear, unequivocal purpose of the Act.

Therefore, under Chadha, what is lost is it not Congress' power to review spending decisions, but the President's authority to make them. But this is not something that should delight anyone. Although attempts have been made to use deferral authority for substantive purposes and some proposals have been disapproved, the general use of the device is purely ministerial and Congress has permitted more than 3/4ths of the proposals to take effect. In the wake of Chadha, the President is legally required to obligate appropriations, even if everyone involved is in clear agreement that the appropriation is in excess of the amount needed. It is clear that a decision must be made quickly on how to resolve such a disaster within the terms of the Supreme Court decision, but it is equally clear that it is Congress which decides what that resolution is to be.

At the end of the last session, an appropriation was made for the MX missile but it could be spent only if Congress subsequently approved the release of the money. The method by which that approval was made is clearly

overturned by the Chadha decision and the history of the law is that the appropriation would not have been made in the absence of the review (the review provision was adopted as an amendment that rejected a straight appropriation). And so the only proper legal course open to the President at this moment to handle MX funding is to come to Congress again for an appropriation everyone already thought he had.

The same situation will hold equally true for agencies and other instrumentalities of the federal government who now may think the Chadha decision frees them from congressional interference.

Those who would argue that the power of the D. C. City Council to make laws is severable from the congressional review of those laws will find little comfort in the legislative history of the enactment of Home Rule legislation, and will find that issue further complicated by a specific constitutional requirement that Congress "exercise exclusive Legislation in all Cases whatsoever, over such District . . . "

Limited effect on severable delegations

Undoubtedly, some cases will be discovered where it will be possible to find delegations severable from the congressional review mechanism applicable to determination under the delegation. But, even in such cases, the effect of such shifts of power are likely to be smaller than expected.

A clear example would be the Federal Trade Commission. The severability of a veto, adopted in the context of a routine 1980 authorization, for an agency established in 1914, left little doubt that congressional authority

to overrule regulations of the Federal Trade Commission was voided by Chadha, as the Court confirmed in its summary decision on that matter.

But, neither, is there any question that the ability of the Commission to issue rules at all, and indeed the very existence of the FTC beyond September 30th depends entirely on the enactment of a pending authorization to which any change in the Federal Trade Act is probably germane.

Likewise, the Nuclear Waste bill, adopted last year, authorized the Secretary of Energy to fix a tax on nucle r generation of electricity to be placed in a trust fund for the development of a nuclear waste repository, subject to an legislative veto. During consideration of that bill, an amendment was adopted which required Congress to act by law, rather than a veto, to overturn state objections to siting decisions; the legislative history of the bill confirms that this change was made in response to constitutional reservations about the veto. That history, combined with an unequivocal severability clause, might permit the tax to stand without congressional review. But, although the delegation of taxing powers to the executive is an extraordinary precedent, I am inclined to believe that Congress will find it has lost rather little power. The executive wins freewheeling authority to tax utilities and deposit the proceeds in a trust fund. But any expenditure from that fund remains totally subject to the congressional authorization and appropriation process, and to any requirements -- including alterations in the tax -- which Congress may chose to place in such bills.

RESPONSES TO CHADHA

In fashioning institutional remedies to the current situation, I would

hope that all branches of government have registered a valuable lesson to be learned from Chadha. The process of government is -- and quite legitimately -- a political one. And the Nation is best served when that process is allowed to work, even with some tensions, with flexibility and a fair regard by each branch for the legitimate role of the others.

Throughout their history, the appropriations committees have handled routine adjustments during a fiscal year through a process known as reprogrammings. 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. Slightly simplified, the process is that, if the Administration wants to transfer money from one purpose to a related one within the same appropriation, a letter is sent to the relevent subcommittees of the House and Senate Appropriation Committees. The commmittees vote on the matter and the Administration abides by the decision. The committees are aware that the Administration is under no statutory obligation to comply with arbitrary instructions and the Administration is aware that appropriations run for only a year and are usually revised to reflect any difficulties the committees have noted during the prior appropriation.

But there is no rule of Congress nor any federal law on the subject for any court to review. It is simply an accommodation based on restraint and a decent respect by each branch for the responsibilities and privileges of the other.

Where understood practices and comities between the branches are stretched beyond their understood terms, the branch damaged must be expected to respond

with all the powers within its reach. The survival of our constitutional system requires that self-defense.

Presidential impoundment powers had actually proven useful tools for fiscal flexibility which served the purposes of both branches for a generation, under a variety of Democratic and Republican Presidents and Democratic and Republican congressional chambers. But, President Nixon dramatically abused the system. Indeed it is not unreasonable to characterize his actions as an attempt to use impoundment to give the Presidency something the Constitution had deliberately denied it -- an item veto of appropriations. In 1974, Congress responded to the constitutional threat by extinguishing impoundment powers and replacing it with the comparatively cumbersome congressional budget process.

The development of the War Powers Resolution is a case of obviously similar retrenchment of an informal system stretched too far.

The legislative veto, likewise, proved a useful and effective tool to both branches to provide comparable administrative and regulatory flexibility. But the zealousness with which Congress attempted to toss it onto a variety of laws began to shift the constitutional balance in such a manner that the Supreme Court was forced to rule more sweepingly than it might have wanted, on an issue I suspect it would have preferred not to address at all. Indeed, the record is rather clear that in 1978 the Supreme Court "ducked" a case that presented an opportunity to rule on the identical issues posed by the Chadha case.

I am not distraught over the current situation, for reasons I think I have outlined clearly. But, as we survey the results of the Chadha decision, it is rather clear that the courts' attempts to side-step the issue in previous years was wise and that the interests of neither the President nor Congress have been advanced by this definitive constitutional resolution of the issues.

The immediate task involves all three branches and will be facilitiated by the greatest possible caution and restraint by each.

No single committee of Congress can undertake these next steps. They involve the entire institution and I am aware of no committee which does not have some law within its jurisdiction touched by Chadha. It is not necessary that all these laws be repealed or modified by Congress, nor that most of them become subject to judicial rulings.

In some cases, resolution will be forced on Congress. For example, at some point an individual will appear before the District of Columbia courts, charged with a matter which would not be a crime save that the previous Congress overturned a revision of certain D. C. criminal ordinance. The individual's attorneys will argue his case on constitutional grounds. Under Chadha, the congressional review mechanism is likely to fall, although there are constitutional peculiarities unique to that veto which could separate the case. Whether the courts strike down only the veto or the entire Home Rule delegation, the Committee on the District of Columbia will face a inescapable responsibility to fashion a legislative remedy.

Other vetoes will never be tested. The courts cannot rule hypothetically and issues must actually exist to be tested. We could hardly dispatch an ambassador-at-large to obtain the consent of some nation to an invasion because our government needs to bring a test case of the War Powers Resolution.

So, although it is not wholely satisfactory, we have to face the fact that we know as much today as we probably will ever know about the status of the War Powers Resolution. It is unlikely that the Committee on Foreign Affairs will be able to fashion a revision of the law within the terms of Chadha, but it is obviously required that the matter be examined.

Informal alternatives

In many cases, a decision will be made deliberately to avoid any clarification. It is possible that Congress and the President will simply decide, for example, to observe all the procedures of title X of the Congressional Budget and Impoundment Control Act, as a political accommodation. As I have stated, I expect that the congressional review of deferrals under title X would be struck down under the Chadha decision. But the non-severability of Presidential deferral authority is sufficiently clear that neither branch has any incentive to test the law. So long as both branches operate with some comity, and avoid any effort to use the deferral section to deal entitlements, I am inclined to doubt that their accommodation can ever come within reach of the courts.

Similar determinations to seek no judicial resolution, and to simply abide by the terms of statutes of doubtful constitutionality, may turn out to be an appropriate response in many other cases. Various "project authoriza-

tion" powers exercised by the public works committees of each House, and similar fiscal controls exercised by other committees, have worked efficiently over the years and there is little reason to abandon them.

But, even in cases in which it is determined to leave a matter undecided, it is important that even that decision be reached as the result of careful committee review.

Review of veto laws and bills

I hope that each committee of the Congress will promptly begin a review of all of the laws within its jurisdiction touched by the court decision to clarify these issues. In addition, I would strongly urge committees to review pending legislation very carefully. The Chadha decision is unequivocal and puts Congress on clear public notice of how the federal judiciary will rule in these matters. An argument of nonseverability will be very difficult to sustain in the case of any delegation, which involves a suspect review mechanism, enacted subsequently to the Supreme Court ruling.

INSTITUTIONAL RESPONSES

In addition to these individual statutory and legislative reviews, I expect that the subcommittees of the Committee on Rules, will initiate hearings immediately after the August recess to study some of the broader institutional issues posed by the Chadha decision.

Personally, I think Congress should reserve judgement on these institutional responses pending a substantial process of information gathering along the lines of my subcommittee hearings and the ones being conducted by

the House Judiciary Committee in considering regulatory reform. However, it might be appropriate to comment on some of the propositions that are likely to be discussed:

Constitutional amendment

When any proposition is declared unconstitutional, the first response naturally will be to examine the possibility of a constitutional amendment.

As a matter purely of arithmetic, this approach seems possible; certainly the veto has always enjoyed two-thirds support in each House and nearly three-quarters of the states vest similar powers in their legislatures.

But I suspect that efforts to draft a workable proposal will prove impossible. The one resolution (H. J. Res. 313) which has been introduced, for example, is limited in its applicablity to regulations. That approach would resolve the issue that has presented Congress with the least difficulty, without resolving the more sensitive and difficult issues raised by war powers, national emergencies, export controls, and other executive actions. If an attempt is made to broaden it, a constitutional amendment would move directly against the heart of the Constitution, the separation of powers doctrine. If an attempt is made to narrow it, we are faced with the difficulty of constitutionally defining the term regulations.

I think that a constitutional amendment will prove impossible, if only because no one will be able to find a satisfactory manner in which one can be drafted.

Statutory nullification and approval

By focusing so strongly on the presentation clause in Chadha, the Court appeared to be pointing the way toward joint resolutions, submitted to the President in the same manner as bills, as a constitutional alternative to the traditional legislative veto.

Selecting between the use of approval or disapproval resolutions, however, raises difficult questions of political balance.

Joint resolutions of disapproval, if they pertain to actions which the President is likely to seek to uphold, shift the balance of power dramatically by delegating powers of a legislative character and then leaving the Congress able to influence those legislative actions only by majorities sufficient to override a Presidential veto.

I would cite the authorization, appropriation and impoundment process as a clear example of a case in which such an arrangement would be a matter of poor policy. The funding process of government is that funds are authorized by law and then appropriated in a subsequent Act. Title X of the Congressional Budget and Impoundment Control Act provides authority for the President to propose to defer spending, subject to nullification by a one-House veto. If that system needs to be revised, I think Congress should hesitate before it considers a system that would require it to pass three laws to get money spent.

But, in the case of regulations of some independent agencies (over which the President may have even less control than Congress) statutory nullifica-

tion may sometimes prove appropriate. In many cases, Congress and the Pres - ident are likely to be in agreement about a rule.

Joint resolutions of approval, on the other hand, retain significant policy powers in the Congress, but could lead Congress toward further and dangerous involvement in the smallest details of national government.

Political factors, in the long run, will tend to work against the joint resolution of approval, particularly as a tool of regulatory oversight. Those subject to federal regulation, have found the legislative veto attractive, over the years. They get a full shot at lobbying their position through the regulatory process. If they win, the matter is resolved to their satisfaction; if they lose, they can move on without prejudice to seek a resolution of disapproval, if the rule is subject to legislative veto. Again, if they win, their victory is absolute. But, if they lose, the statute customarily carries a provision indicating that congressional inaction on, or even rejection of, a resolution of disapproval has no meaning; so they open their third fight in the courts on a relatively equal footing. Even before Chadha, the legal community was beginning to have qualms about the veto, as both the appeals court in this circuit and the Supreme Court began to ignore this disclaimer and note congressional inaction under veto laws in certain rulings. But a joint resolution of approval goes even further. To the extent that it enacts a regulation into law, it shelters the regulation from many of the judicial challenges it might overwise face. Forced to chose between Congress and the courts as a sole forum for appeal of rules, regulated communities may decide that Capitol Hill is not the arena in which they chose to fight.

I can imagine certain emergency powers, like exercises under the War Powers Resolution, for which joint resolutions of approval might be appropriate solutions to the issues posed by Chadha.

But, in most cases, I would caution against such an approach. As traditionally drafted, legislative vetoes laws have served not only as a limitation on agency exercises but, also, as rules of Congress to limit congressional review of those exercises. My greatest criticism of the veto is that it has locked Congress into "yes or no" responses to delicate and complicated issues. The rebuttal to my position, obviously has been that the matter is placed before Congress in a form that it can only approve or disapprove by concurrent resolution; to improve it, we would have to act by statute. Now that the courts have made clear that we only can act by statute, anyway, all arguments for the rules of the House that customarily attach to vetoes disappear.

Although there are precedents that indicate it has not always been so, the President's right to propose legislation is undoubted in the modern practice. And the authority of Congress to respond legislatively to such a communication is equally undoubted. To pass a law authorizing the executive to issue a rule or make any other proposal and to say Congress can pass a joint resolution enacting the recommendation, is a self-evident restatement of the Constitution. So what is the point of bothering to write such laws? If they follow the traditional form of previous legislative vetoes, the answer would be to impose a form of "closed rule" on congressional action on the recommendation.

The House would be unlikley to adopt a closed rule on a bill yet to be written by one of its committees. And it ought be even more hesitant to write into law a closed rule to allow entities outside of Congress to propose classes of law over which Congress surrenders its traditional powers to consider and perfect.

In the short run, however, both joint resolutions of approval and of disapproval will be popular and the choice between them will pose difficult questions for the Congress. When the House considered the authorization for the Consumer Product Safety Commission (H. R. 2668) it faced the first task of sorting out these options. An amendment providing for approval resolutions was offerred by Congressma Levitas of Georgia and one providing for disapproval resolutions by the subcommittee chairman, Congressman Waxman of California. The House provided a disquieting indication of how ready it is to face the challenges of Chadha by adopting both amendments.

Severability

Over the years, it has become almost customary to include in Acts of Congress provisions known as "savings provisions" or "severability clauses." In light of the three recent Supreme Court decisions on the veto, it seems rather clear that this has not been an intelligent policy.

If a portion of a law is held invalid, it should be up to Congress, alone, to examine the remainder and determine the extent to which it wishes to renew that matter and the extent to which it wishes to change it. Savings provisions are a dangerously open invitation to the courts to assume that legislative function.

The Federal Trade Commission was established in 1914; it was given regulatory powers in 1974; and the veto was added in 1980. The history strongly suggests severability. But the other two cases decided by the Court provide no such history. The court relied far to glibly on the presence of a savings provision in the ruling in Chadha, in which it decided to hold component subsections of a coherent, linked section severable from each other. As Justice White noted in dissent, "Surely, Congress would want the naturalization provisions of the Act to be severable from the deportation section. But this does not support preserving §244 [the provision which authorizes the Attorney General to suspend certain deportations] without legislative veto . . . "

It is possible that the Committee on Rules should propose a rule of the House which prohibits savings clauses, places limitations on their use, or, at least, impose substantial reporting requirements on committees which wish to propose them. Indeed, it might be suggested that, in some cases, committees should be required to consider the possibility of "non severability" clauses, so that the courts and Congress are both required to review laws in their totality.

Delegations

The modern administrative state has required substantial delegation of legislative powers to the executive. And the legislative veto has been an entirely understandable response to the imbalance that has caused. In the absence of the legislative veto, Congress is going to have to examine those delegations it has already made and those it proposes to make with considerably more caution.

One of the matters I would expect my subcommittee to review is the possibility that the rules of the House might impose requirements on committees, in handling bills authorizing delegations of a legislative character, to report in some detail to the House on the need for doing so and the committee's intent in how those authorities will be used.

Regulatory Reform and the Bumpers Amendment

The area of response to Chadha which lies within the jurisdiction of the Committee on the Judiciary is the matter of regulatory reform, and the always controversial proposition which accompanies it -- the Bumper amendment. I would urge Congress to act with considerable caution on such responses.

Most regulatory reform proposals are designed to increase the powers of the President or the courts over the regulatory process. In the wake of the Chadha decision, which clearly weakens congressional authority over regulation in comparison to the other branches, I think Congress should be reluctant to heap new regulatory powers on these other branches.

I do not dispute the need for regulatory reform. But I think Congress needs to make some important institutional responses to Chadha before it will be appropriate to proceed with regulatory reform proposals, particularly those which increase Presidential and OMB control over rulemaking, without appropriate congressional authorities to balance those review powers.

The proposal, known as the Bumpers amendment, to allow the courts of the United States to independently review regulations, seems to present little merit at this point. The Chadha decisions, and a number of rulings

in the regulatory area, make it clear that the courts already have rather more power over regulatory affairs than is probably appropriate.

I would strongly urge Congress, in weighing the Bumpers amendment, to realize that the the most compelling separation of powers danger that faces this country does not concern the "unelected bureaucrats." We've done fairly well in dealing with the federal bureaucrary and have adequate legislative powers in reserve to redress any grevience which may arise there. But, we are today confronted with a federal judiciary, which has shown little reluctance to move forcefully in areas heretofore assumed to be of a legislative character. And Congress would be ill-advised to expand those powers over regulation, pending some very serious thought about the current balance of powers between the branches.

Oversight

In the last two Congresses, the Committee on Rules and the Committee on the Judiciary have dealt with the issue of regulatory reform from very different perspectives of what the real problems are, much less their solutions. I am hopeful that the Chadha decision has created a climate in which the linked issues of regulatory reform and congressional reform can be addressed in a more coordinated fashion.

It continues to be my contention that the root source of most complaints about the regulatory process lies in the statutes which govern the agencies and the manner in which Congress writes those laws. And any regulatory reform proposal that does not address the need for major structural changes in congressional oversight and lawmaking is doomed to failure. In the last Con-

gress, I put forward H. R. 1, as a vehicle by which the two committees could conduct a coordinated review of administrative, congressional, and judicial aspects of regulatory reform.

The central aspect of H. R. 1, from the vantage point of the Committee on Rules, was the proposal for the establishment of a select committee to review all federal agency rulemaking. The proposal was a modification of prior recommendations by Congressman Kindness of Ohio, who had put forward a bill (H. R. 14222, 95th Congress) to establish a joint committee to conduct such reviews.

H. R. 1 would have established a select committee with broad authority to review proposed and existing federal agency rules, which would enable the House to address the most fundamental complaints about regulation (conflict, duplication, and overlap) in a manner not possible under the existing committee structure. The majority of state legislatures and all national legislatures, which have legislative review laws, have found it appropriate to establish specific committees for this purpose.

The bill authorized the committee to report to the House joint resolutions to disapprove pending rules. Although a majority of House the preferred the convenience of one or two House vetoes, Congress is on clear notice, under Chadha, that it has to act by joint resolution. To the extent that a joint resolution may be perceived as a weaker tool, I would think Congress would seek to establish a stronger "handle" to operate that tool. So this proposal would appear to be more attractive in the wake of Chadha. If that perception is now shared by the other body, I would have no objection to

returning to the earlier recommendation of the gentleman from Ohio for a joint committee.

The most serious internal objection to the select or joint committee approach would concern the jurisdiction of standing committees. But, based on my committee's examination of the practice of other legislatures, I would expect that such a committee would recommend minor regulatory improvements to the agencies, and legislative improvements to the standing committees, to minimize conflict, duplication, and overlap, far more often than it would report disapproval resolutions.

SUMMARY

The genius of our constitutional system is that the Presidency, the Congress, and the Courts will always exist and have to work together. In the resolution of any confrontation, even one as sweeping as Chadha, the question is whether the three, in reaching accommodations that replace the veto, have learned the lessons of recent history and can apply them with comity and with common sense.