The Chadha Decision and the Prospects for Regulatory Reform

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In the months since the Supreme Court, in *INS v. Chadha*, struck down the "legislative veto" device in broad terms, commentary has focused on the resulting crisis in relations between the legislative and executive branches and on various possible solutions to the crisis. I believe there is no crisis and no need for precipitate solutions. I want to argue instead that the entire debate concerning legislative oversight of executive functions, both before and after *Chadha*, really involves a larger and more fundamental problem that cannot be solved through the mechanics of legislative vetoes or substitute procedures.

The rise of the legislative veto, at least as applied to domestic spending and regulating, is roughly coincident with the rise of large administrative state. But this is not just a coincidence. The legislative veto is one of a variety of techniques Congress has used over the past forty years in an effort to preserve its traditional policymaking authority from erosion—erosion due, ironically, to the very growth of the size and scope of the federal government.

When Congress considers whether to expand the federal government's reach into some field previously the domain of the states or private arrangements—highways, education, medical care, automobile design, and so forth—its approach is to debate the merits of the individual issue before it, and then, almost always, to resolve the debate in favor of expansion. Congress almost never seriously debates, much less resolves, the larger problem economists refer to as diseconomies of scale. The term refers to the inherent limits on the size and range of activities any one organization can undertake efficiently, regardless of the abstract merits of the activities taken individually, and regardless of the energies and good intentions of the people in charge. Over the past several decades the number of activities the federal government has taken responsibility for has grown fabulously, while the government itself is still directed by 537 human beings, and is still the cumbersome and inefficient organization the Founders designed it to be.

Not only the size of the federal government but the scope and complexity of its undertakings have increased dramatically. The terms of what may be called our Grand Political Accommodation in the U.S. are that (a) outright socialization is forbidden; while (b) differential subsidization, taxation, and regulation are unrestricted, and are in fact encouraged at least some of the time by every influential political quarter. But partial public management of otherwise private markets requires an endless succession of decisions that are highly technical and detailed, yet are highly contentious—‘political" rather than "proprietary"—and therefore of great importance to the representatives who direct the government.

Administering a system of compulsory medical care insurance for the aged and poor, and prescribing the design of new industrial processes around the constraint of "minimum feasible" air or water pollution, are not only larger but more complex than any of the federal government's peacetime enterprises before the 1930s.

Now a strong case can be made that the federal government has passed the threshold of diminishing returns to scale and scope—that it has taken on more numerous and diverse responsibilities than any organization can manage with tolerable efficiency, even one armed with the coercive powers of the state. Whether or not this is so, however, it seems quite clear that the growth of government has worked to the relative disadvantage of the legislative branch and the relative advantage of the executive branch. The legislature is a collegial body of independent individuals representing a profusion of different views and interests; it is best suited to making occasional broad decisions requiring the definition of a common social consensus. The executive is a hierarchy of like-minded individuals accountable to a single boss; it is best suited to making numerous detailed decisions within a pre-established policy framework. The growth in the number and complexity of decisions facing the government has played to the executive's inherent strengths. While both branches have grown in absolute power as new laws have staked out new domestic territories for the federal government, the executive branch's superior ability to manage these new territories has given it a larger share of the division of authority to define and direct national policy.

That this is so can be seen in the fact that Congress, as a concomitant of its approval of larger and more complex government, has been obliged to delegate increasing legal and policymaking authority to the executive branch. With the government intervening more and more deeply into private markets, Congress increasingly has lacked the resources—chiefly time and information—necessary to enact in law all of the discrete judgments and compromises necessary to guide these interventions. So it has increasingly fudged—enacting vague and often flatly contradictory statutory standards that have effectively transformed executive officials (and derivatively judges) into de facto lawmakers. The executive branch, for its part, has responded with brilliant policymaking innovations that have at once demonstrated its superior versatility in managing the large complex state and encouraged further legislative delegations. The greatest of these is "informal rulemaking," which subtly combines the efficiency of executive decision-making with the key legitimating features of judicial and legislative decision-making—due process and public sanction.

None of Congress's own policymaking innovations have come close, not even the "legislative veto." It is important to recognize, however, that this is what the legislative veto was: a means of holding onto a part of the authority delegated to the executive; of avoiding the hard, time-consuming, and sometimes impossible compromises of legislating; and of importing some of the efficiencies of executive

decision-making into the legislature. Of course, to describe the legislative veto in this way is not to approve it as a constitutional matter, as Mr. Justice White appeared to in his dissent in*Chadha*. It may be that the Constitution does not, by its terms, forbid the giant modern state—but this hardly means that the terms the Founders did agree on must give way to the administrative convenience of that state.

The legislative veto is, however, only one of several devices Congress has fashioned to retain day-to-day policymaking authority. Indeed, legislative veto provisions were in hundreds of statutes for decades, and over consistent presidential opposition, before any were challenged in definitive cases before the Supreme Court in 1983, suggesting the relative unimportance of the device. Where large stakes have been involved, Congress has been more likely to rely on other means of influencing or controlling the Administration in office—appropriations riders requiring or forbidding agencies to undertake certain actions; informal agreements between committee chairmen and executive officials; and, of course, direct legislative nullification of executive actions, as in cases of the saccharin ban and the automobile seatbelt-ignition interlock regulation. The legislative veto stands out from these and other devices of legislative control only in that it stepped clearly over the constitutional foul line.

Since *Chadha*, many observers have expressed the hope that Congress will now become "more responsible" and begin making the tough legislative choices it avoided under cover of the legislative veto. The analysis above suggests that this is a vain hope. The problem of modern lawmaking has nothing to do with individual legislators avoiding their responsibilities. It is rather an institutional problem, inherent in the very size and ambitions of modern government and the incorrigible cumbersomeness of legislative decision-making. In the future, Congress will probably rely more heavily on appropriations riders and similar techniques, which will probably re-centralize legislative authority somewhat in the hands of the committee chairmen and party leaders. (The legislative veto was always a backbencher's idea, widely opposed by influential committee chairmen and party leaders in both Houses.) But Congress will probably not write "better" laws or take back large chunks of statutory discretion from the executive branch, so long as it is under such pressure to write and finance so many laws. It will probably not even write more detailed laws: the Clear Air Act, the reigning paradigm of highly detailed legislative regulation, has now mired Congress in a thirteen-year-long drafting marathon, leaving the drafters in a dispirited state (along with those who try to interpret, enforce, and obey the results).

Over the past decade, as Congress was adding legislative veto provisions to more and more regulatory statutes, and considering enacting a generic law to subject all regulatory decisions to legislative vetoes, the executive and judicial branches were developing their own programs for increased regulatory oversight. Presidents Ford, Carter, and Reagan issued increasingly rigorous orders requiring the executive agencies to assess the benefits and costs of their

regulations and submit them for review by the Executive Office of the President. The courts strengthened their own standards of review far beyond the original conception of the "arbitrary or capricious" standard of the Administrative Procedure Act. In spite of occasional controversies, Congress has generally supported these efforts, sometimes for the record. The "Regulatory Reform Act of 1982," which passed the Senate unanimously, contained provisions to strengthen legislative oversight of the regulatory process (a blanket legislative veto) and executive oversight (benefit-cost analysis and review by the President's office) and judicial oversight (a "Bumpers Amendment" to the APA). But the remarkable thing is how far the executive and judicial branches have succeeded unilaterally in tightening management of regulatory decision-making.

The successive executive order review programs, culminating in President Reagan's Executive Order 12291, are especially notable here. The benefit-cost analysis requirements have fallen well short of the regulatory reformers' wild hopes that economics would somehow drive politics from the regulatory field. But they have imposed a modicum of discipline on the regulatory bureaucracies, narrowing somewhat the freewheeling discretion afforded by most regulatory statutes. By making regulatory decisions more factual and comprehensible, the programs have made them more vulnerable to control not only by presidents but by judges and legislators as well. Indeed the executive order programs, by loading the rulemaking files with detailed empirical analyses and obliging the agencies to explain their decisions in terms of these analyses, have probably done as much to strengthen judicial review as any of the judiciary's own doctrinal innovations. Virtually all of the critical court decisions in recent regulatory cases, such as the Supreme Court's Benzene, Cotton Dust, and Passive Restraints decisions, have turned decisively on economic and statistical issues that were in the record in the first place because of the executive order programs.

Which is to say that the executive order programs are one more example of the executive branch's comparative advantage in directing the large administrative state. The *Chadha* decision will give somewhat greater impetus to these programs, although senior congressional committee chairmen will oppose the trend just as they opposed the legislative veto itself. It is possible, however, that Congress will buck the trend directly. This is suggested by the breathtaking proposal of Congressman Levitas and others: that Congress require that regulations be affirmatively approved by statute before they can take effect. This would, of course, avoid the constitutional problems of the legislative veto. It would also oust the courts entirely of review of regulatory decisions (except on constitutional grounds), and thereby put an end to most of "administrative law" itself! But it would do so at the cost of swamping Congress with thousands of additional, highly detailed legislative decisions each year, which would surely be unmanageable and lead to procedures for "approving" agency rules in large batches.

Perhaps a middle ground can be devised. Congress and the President might be

required to affirm only the several dozen most important rules each year (just as Executive Order 12291 singles out for special treatment "major" rules imposing compliance costs of $100 million or more). Or statutory approval might be required only of the rules of the so-called "independent" regulatory agencies, thus giving the President as well as Congress responsibility for the policies of these agencies. Most presidents would support such procedures as a general proposition, just as most legislators have supported the executive order programs as a general proposition. In all events, the Levitas proposal puts the dilemma of congressional control of the large modern state in the most exquisite possible light: the control is Congress' for the taking, limited not by the Constitution but by the nature of the legislative process.