

# HARVARD LAW REVIEW

## CONGRESSIONAL CONTROL OF ADMINISTRATIVE REGULATION: A STUDY OF LEGISLATIVE VEToes

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*Several administrative programs contain provisions allowing Congress to veto agency rules, and there is now a bill before Congress to extend this veto power to all agency rulemaking. In this Article, Professor Bruff and Dean Gellhorn analyze the histories of five federal programs subject to the legislative veto to determine the effect of the veto on the rulemaking process and on the relationships between the branches of government. Extrapolating from this practical experience, they suggest that a general legislative veto is unlikely to increase the overall efficiency of the administrative process, may impede the achievement of reasoned decisionmaking based on a record, and may encourage violation of the principle of separation of powers, the doctrine of limited delegation of congressional authority, and emerging concepts of due process in administrative law.*

COMPLAINTS of a malaise in the administrative process and calls for regulatory reform are not new.<sup>1</sup> Recently, however, these attacks on government regulation have been renewed with special fervor. Numerous cures have been proposed, ranging from general deregulation to sunset and sunshine bills.<sup>2</sup> One

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This Article is based on a report prepared for the Administrative Conference of the United States. The Conference, however, has not approved the Article, and the authors have sole responsibility for it.

<sup>1</sup> See generally Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947 (1971). Even the term "malaise" has a pedigree. See H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 2-3 (1962).

<sup>2</sup> Sunset laws would require periodic renewal of the authorization of agency programs. They take their name from the fact that they would allow the "sun to set" on particular programs unless their renewal is justified and authorized. See generally Adams, *Sunset: A Proposal for Accountable Government*, 28 AD. L. REV. 511 (1976).

Sunshine laws provide for open administration by requiring that agency meetings be public and on the record. The recent federal sunshine law also forbids ex parte communications in adjudicative proceedings. Government in the Sunshine Act, Pub. L. No. 94-409, § 4(a), 90 Stat. 1241 (1976) (to be codified in scattered sections of 5 U.S.C.).

idea receiving special attention in Congress has been a proposed amendment to the Administrative Procedure Act (APA)<sup>3</sup> providing that substantive rules issued pursuant to the notice-and-comment procedures of 5 U.S.C. § 553 must be submitted to Congress for review before taking effect.<sup>4</sup> Then, if either house of Congress (or both houses, under some proposals) should disapprove a proposed rule within a specified period, such as sixty days, it would not take effect. The purpose of this "legislative veto," which would not require the concurrence of the President, would be to give Congress an opportunity to void administrative regulations which, in its judgment, exceed statutory authority or implement unsound policy.<sup>5</sup>

In recent years, Congress has added legislative veto provisions to an increasing number of laws governing agency action.<sup>6</sup> Most of these statutes involve executive action other than rule-making; they range in subject matter from the reorganization of the executive branch to the conduct of foreign affairs and the administration of public works programs. No legislative vetoes have

<sup>3</sup> 5 U.S.C. §§ 551-706 (1970 & Supp. V 1975).

<sup>4</sup> Such a bill reached the floor of the House at the close of the 94th Congress, under a procedure requiring a suspension of the rules and a two-thirds vote to pass it. The bill failed to receive the two-thirds vote by a narrow margin. H.R. 12048, 94th Cong., 2d Sess., 122 CONG. REC. H10666-90, H10718-19 (1976). See generally H.R. REP. NO. 94-1014, 94th Cong., 2d Sess. (1976); *Congressional Review of Administrative Rulemaking: Hearings on H.R. 3658, H.R. 8231 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Congressional Review Hearings*]; *Improving Congressional Oversight of Federal Regulatory Agencies: Hearings Before the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. (1976).

<sup>5</sup> These two objectives of a legislative veto may be difficult to separate in practice. See, e.g., W. CARY, *POLITICS AND THE REGULATORY AGENCIES* 45 (1967) (congressional objections to the wisdom of agency policy are often phrased in terms of its legality). See also p. 1419 *infra*.

Examples of recent regulations with little popularity in Congress include seat-belt interlock requirements ultimately reversed by legislation, see *Motor Vehicles and Schoolbus Safety Amendments of 1974*, Pub. L. No. 93-492, 88 Stat. 1470 (codified at 15 U.S.C. § 1410b(b)(1) (Supp. V 1975)), and Environmental Protection Agency regulations that would have severely limited parking and automobile traffic in downtown Boston and Los Angeles, see *Congressional Review Hearings*, *supra* note 4, at 141, 264, 426-30.

<sup>6</sup> These provisions take a wide variety of forms, including requirements for congressional or committee approval of agency action. See generally Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975); CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, *CONGRESSIONAL REVIEW, DEFERRAL AND DISAPPROVAL OF EXECUTIVE ACTIONS: A SUMMARY AND AN INVENTORY OF STATUTORY AUTHORITY* (1976); H.R. DOC. NO. 416, 93d Cong., 2d Sess. 753-819 (1974).

been applied to adjudications, however, since they are constitutionally protected from direct congressional scrutiny.<sup>7</sup>

Since 1972, Congress has extended the legislative veto to a series of agency programs involving rulemaking. Most of the current federal experience with legislative veto of rulemaking has occurred in five programs:<sup>8</sup> the Office of Education's establishment of family contribution schedules for its program of basic grants for postsecondary education; the Department of Health, Education, and Welfare's rules issued under the General Education Provisions Act since 1974; the Federal Energy Administration's exemptions from price and allocation controls on petroleum products; the General Services Administration's regulations regarding public access to the papers and tapes of the Nixon Presidency; and all of the Federal Election Commission's rules governing the conduct and financing of campaigns. The proposals currently before Congress would substitute a legislative veto having broad applicability to rulemaking for this ad hoc approach.

This Article examines the history of these five programs in order to appraise the desirability and the constitutionality of applying the legislative veto to rulemaking. After providing some background, we focus on the case histories and the lessons to be learned from them. We then proceed to a necessarily more speculative discussion of the long term institutional effects of a broad legislative veto provision. Would it, for example, shift the focus of rulemaking from the agencies to Congress? What would be its effects on the agencies, on Congress, and on the courts — and on the interrelationship of the three branches of government?

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<sup>7</sup> See *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966).

The term "adjudication" as used herein means a full evidentiary hearing governed by §§ 5, 7 & 8 of the APA, 5 U.S.C. §§ 554, 556, 557 (1970 & Supp. V 1975). Unless otherwise indicated, "rulemaking" means informal rulemaking governed by § 4 of the APA, 5 U.S.C. § 553 (1970 & Supp. V 1975), and not formal rulemaking, a relatively rare procedure in which a statute explicitly subjects rulemaking to the APA's adjudication procedures. The term "executive action" is used for matters not within the APA's special procedural requirements for rulemaking or adjudication. These technical matters are further elaborated in Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 39-41 & nn.12-14 (1975).

<sup>8</sup> Experience with the legislative veto is examined in detail in Part II *infra*. See note 46 *infra*.

Legislative veto provisions are also found in some of the states and in the British Commonwealth. See generally W. GELLEORN & C. BYSE, *ADMINISTRATIVE LAW* 122-27 (6th ed. 1974). We did not subject them to empirical inquiry, and make only occasional reference to them here.

## I. THE BACKGROUND: CONSTITUTIONAL, STATUTORY, AND POLICY ISSUES SURROUNDING THE LEGISLATIVE VETO OF RULEMAKING

Any proposal to impose broadly applicable limits on agency authority to develop policy is intimately related to the long struggle of administrative agencies for legitimacy and independence. American attitudes toward the agencies have always demonstrated a fundamental ambivalence. On one hand, administrative agencies are viewed as necessary vehicles for the development of policy and are often created to resolve issues that Congress is unwilling or unable to decide. They are expected to develop experience and specialized knowledge and to provide efficient administration of complex and burdensome tasks. On the other hand, Americans are suspicious of delegation of lawmaking authority to agencies, which seems inconsistent with the Constitution's allocation of the responsibility for lawmaking to Congress. An assessment of the legislative veto of administrative regulations requires an understanding of its place within the statutory and constitutional scheme that has evolved to define the role of the agencies.

### *A. The Legislative Veto as a Substitute for the Delegation Doctrine*

Over the course of time, constitutional doctrine has developed to support administrative lawmaking. The courts have come to recognize that it is impractical for the legislature to make the innumerable policy decisions necessary to the daily operation of a large and complex government. Therefore, modern courts applying the delegation doctrine, which theoretically limits congressional grants of power to the agencies, have rejected ancient and rigid dicta that the lawmaking power vested in Congress may not be delegated elsewhere.<sup>9</sup> Today the courts purport to require only that statutory delegations of congressional authority contain basic policy standards for the administrator to follow. This "standards" requirement is designed to preserve the separation of powers by placing broad policy determinations in the hands of elected representatives rather than appointed bureaucrats and by facilitating judicial review. Yet even this minimal requirement has proved to be unworkable in practice. Almost without exception, the courts have refused to enforce constitutional constraints on congressional delegations of lawmaking authority

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<sup>9</sup> See, e.g., *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 341-42 (1974). See generally K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 2.01-03 (Supp. 1970); G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 102-06 (1974).

to the agencies. The Supreme Court has been unwilling to require Congress to specify policy standards as clearly as possible, or to revise broad standards as experience permits. The result is that lawmaking power is now lodged in administrative hands without any constitutional assurance that the agencies are responsive to the people's will.<sup>10</sup>

The legislative veto can be viewed as a mechanism to help fill the void left by the decline of the delegation doctrine. Its purpose is to limit agency rulemaking authority by lodging final control in Congress. But instead of controlling agency policy in advance by laying out a roadmap in the statute creating the agency, Congress now proposes to control policy as it develops in notice-and-comment rulemaking, after the agency's expert staff and interested members of the public have had an opportunity to assist in its formation. In this way Congress can be fully informed before primary policy is decided. Still, the legislative veto is only a negative check on policies proposed by the agencies, not a means for making policy directly.

### *B. Separation of Powers*

Legislative veto provisions raise a series of constitutional questions involving the separation of powers. Chief among these is whether legislative vetoes constitute an impermissible evasion of the President's veto authority, or an impermissible intrusion into the powers vested in the executive or judicial branches of government (depending on whether the veto is meant for policy or legality review).<sup>11</sup> Supporters of the legislative veto argue that since it is a control on administrative lawmaking similar to that which the delegation doctrine purports to impose, it is fully consistent with the separation of powers. They emphasize that the branches of government are not wholly separated but often have a limited role in one another's functions.<sup>12</sup> For example, the President's veto gives him a role in legislation; the power of advice and consent gives the Senate a role in administration. If, then, the legislative veto device gives Congress an appropriately limited role

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<sup>10</sup> Congress does, however, possess a variety of "oversight" devices. Agency action is affected by legislative appropriations, congressional investigations, the continuing supervision of the standing or special committees, and the operation of the appointments process, including the power of advice and consent. In addition, Congressmen often play an "ombudsman" role by interceding with the agencies on behalf of interested constituents. See generally W. GELLHORN & C. BYSE, *supra* note 8, at 109-22.

<sup>11</sup> See generally Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEGIS. 593 (1976), and sources cited therein at 593 n.1.

<sup>12</sup> See, e.g., *id.* at 598-601. See generally *Buckley v. Valeo*, 424 U.S. 1, 120-23 (1976) (per curiam opinion).

in the executive function, it constitutes an appropriate counterweight to broad delegation. By returning policymaking authority to Congress, it helps preserve the separation of powers. Opponents argue that legislative vetoes are functionally like legislation in that they foreclose otherwise permissible readings of statutes. To foreclose such interpretations similarly by legislation would require the approval of the President or the concurrence of two-thirds of both houses of Congress to override his veto. Thus legislative vetoes passed without presidential concurrence arguably abridge the President's role in the legislative process.<sup>13</sup> Furthermore, for Congress to pass on the legality of administrative rules may usurp the judicial function.<sup>14</sup>

If a single house may veto regulations, the fundamental principle of bicameralism may be violated. The Constitution lodges legislative authority in a bicameral Congress, in part as an internal check against the aggrandizement of congressional power.<sup>15</sup> Proposals allowing one house to veto administrative regulations appear to circumvent that check.<sup>16</sup> Since the legislative veto is designed as a negative constraint on policy-making, however, supporters argue that it gives each house no more power than the bicameral system, under which legislation may also be blocked by either house. They also emphasize that the statute authorizing the legislative veto must itself be passed by the normal legislative process involving concurrence of both houses and presidential approval or veto override.<sup>17</sup> Nevertheless, Congress cannot by legislation alter the bicameral system engraved in the Constitution. Moreover, the substantive policy created by the agency's rule, if within the bounds of the statutory delegation, arguably had the approval of both houses and the President in the original delegation. To the extent that a legislative veto by a single house may redirect this policy, serious questions are raised about the veto's consistency with the Constitution's legislative scheme.

Whether the legislative veto will founder upon these constitutional objections is unclear. Although Mr. Justice White rejected them in his concurrence in *Buckley v. Valeo*,<sup>18</sup> a majority of the Supreme Court specifically left the question for another day.<sup>19</sup>

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<sup>13</sup> See, e.g., *Congressional Review Hearings*, *supra* note 4, at 376-78.

<sup>14</sup> See pp. 1429-31 *infra*.

<sup>15</sup> THE FEDERALIST NO. 49, at 315-16 (J. Madison) (New American Library ed. 1961).

<sup>16</sup> See Watson, *supra* note 6, at 1032-36.

<sup>17</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 286 (1976) (White, J., concurring).

<sup>18</sup> *Id.* at 284-86 (White, J., concurring).

<sup>19</sup> See *id.* at 140 n.176 (per curiam opinion).

The Court of Claims, however, recently has upheld the constitutionality of a one-house veto.<sup>20</sup>

*C. The Legislative Veto in Context:  
Developments in Rulemaking*

The Administrative Procedure Act provides generally applicable procedural constraints for the agencies' delegated policy-making. It thus defines the procedural context in which an increased congressional involvement in rulemaking functions. The basic assumption upon which the APA rests is that policy is developed and applied in one of two ways: by adjudication or by rulemaking.<sup>21</sup> Most agencies have broad discretion to choose which approach is more suitable.<sup>22</sup> However, this bipolar analysis reflects the formal structure more than the reality of the administrative process. Much agency action is neither adjudication nor rulemaking: the APA does not provide special procedures for executive actions such as consent settlements, policy statements, and contracts. Nevertheless, the APA's constraints are important. Adjudication must adhere to most of the common law safeguards of a trial, including notice of the charges, a hearing before an unbiased tribunal, and an opportunity to present evidence and to challenge or rebut contrary proof. The ultimate findings and decision must be supported by the record. Informal rulemaking, in contrast, has traditionally required only published notice of a proposed rule, an opportunity to comment on it, and a concise statement of the basis and purpose of the final rule.<sup>23</sup>

During the past several decades, the procedures of formal adjudication have become increasingly elaborate and time-consuming. They have therefore seemed ill-suited to many new regulatory programs in such fields as environmental protection; Congress accordingly has set the agencies administering them on a course of rulemaking. Whether spurred by Congress or on their own initiative, agencies have relied increasingly on rulemaking or other informal executive action rather than on adjudication.<sup>24</sup> Because the APA has few explicit procedural requirements for such activities and because no formal record is required, judicial

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<sup>20</sup> *Atkins v. United States*, 45 U.S.L.W. 2560 (Ct. Cl. May 18, 1977). See generally *Clark v. Valeo*, 45 U.S.L.W. 2349 (D.C. Cir. Jan. 21, 1977) (en banc), *aff'd mem. sub nom. Clark v. Kimmitt*, 45 U.S.L.W. 3789 (U.S. June 6, 1977).

<sup>21</sup> See note 7 *supra*.

<sup>22</sup> See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The governing statutes of a few agencies, however, require rulemaking for the formulation of policy. See *Congressional Review Hearings*, *supra* note 4, at 426, 478, 480.

<sup>23</sup> See 5 U.S.C. § 553 (1970).

<sup>24</sup> See generally *Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974).

review has been difficult.<sup>25</sup> Courts have responded to this challenge by importing procedural requirements into various informal proceedings on both constitutional and statutory grounds.<sup>26</sup> Illustrative of this broader trend is a series of cases imposing new procedural requirements for informal rulemaking.<sup>27</sup> These judicial requirements have been summarized as follows:

First, both the essential factual data on which the rule is based and the methodology used in reasoning from the data to the proposed standard must be disclosed for comment at the time a rule is proposed . . . . Second, the agency's discussion of the basis and purpose of its rule—generally contained in the “preambles” to the notices of proposed and final rulemaking and in the accompanying technical support documents—must detail the steps of the agency's reasoning and its factual basis. Third, significant comments received during the public comment period must be answered at the time of final promulgation . . . . Fourth, only objections to the regulations which were raised with some specificity during the public comment period, and to which the agency thus had an opportunity to respond, may be raised during judicial review.<sup>28</sup>

Congress has also imposed special procedural requirements beyond those in the APA in several recent delegations of rulemaking power, in order to assure that agencies have fully considered the issues and proposed solutions. For example, the Federal Trade Commission's new rulemaking authority includes requirements for cross-examination and specific findings based on evidence in the record.<sup>29</sup>

Several purposes are discernible in these new statutory and judicial requirements. One is to assure fair treatment of persons

<sup>25</sup> Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 754-55 (1975).

<sup>26</sup> See Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267 (1976); Pedersen, *supra* note 7, at 46-50.

<sup>27</sup> Home Box Office, Inc. v. FCC, No. 75-1280 (D.C. Cir. March 25, 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973); International Harvester, Inc. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972); General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968). See generally Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

<sup>28</sup> Pedersen, *supra* note 7, at 75-76 (footnotes omitted).

<sup>29</sup> 15 U.S.C. § 57a(b), (c) (Supp. V 1975). This provision of the Federal Trade Commission Improvement Act granted express statutory authority to the FTC to conduct rulemaking proceedings, but pursuant to stringent procedural requirements. See also Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970 & Supp. V 1975) (in particular, § 655 concerning rulemaking).



submitting comments by requiring actual agency consideration and response. A second is to foster reasoned agency decision-making by exposing thinking within the agency to public criticism and by requiring reasoned resolution of the issues. A third is to facilitate judicial review by providing a record to justify a final rule.<sup>30</sup> Obviously, these purposes are closely intertwined.

Introducing legislative veto provisions into this scheme raises issues at the foundation of modern rulemaking. To what extent is rulemaking a normative or political process which is brought closer to the people's representatives by the legislative veto, and to what extent is it an expert or rational process that should not be subject to "political" influences? Recent commentators have attacked the "naive" view of rulemaking which characterizes it as a decision by experts divorced from political considerations.<sup>31</sup> They emphasize that there is no ideal resolution of policy in service of some unitary public interest; there are only resolutions of greater or lesser acceptability to experts and to the various interest groups that make up the American public.<sup>32</sup> Certainly the notice-and-comment portion of the rulemaking process retains some "legislative" characteristics, in that anyone affected by a proposed rule may make his views known, although tinged by self-interest. Yet whatever the role of political conflict, the premises of democracy demand that it be in the open. There is ample justification for procedural constraints on rulemaking to exclude unseen political influences.

The new statutory and judicial requirements thus seek to exclude secret influences and to assure the openness of the rulemaking process. Their premises are that a meaningful statutory standard, or at least rationality review by the courts, constrains the substance of the resulting rules, and that the agency staffs have a contribution to make in formulating rules even if they are not Solomonic. Any statutory provision for a legislative veto should be evaluated for consistency with these emerging aims of the rulemaking process. Of particular importance to the courts is that there be some sort of agency record for review and that information in the record be the exclusive basis for decision.<sup>33</sup> When a legislative veto system is implemented, informal con-

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<sup>30</sup> All of these themes can be found in *Home Box Office, Inc. v. FCC*, No. 75-1280, slip op. at 49-51, 90-92 (D.C. Cir. March 25, 1977).

<sup>31</sup> See generally Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 *COLUM. L. REV.* 771, 778-79 & n.22 (1975); Noll, *Breaking Out of the Regulatory Dilemma—Alternatives to the Sterile Choice*, 51 *IND. L.J.* 686, 689 (1976).

<sup>32</sup> E.g., Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 *STAN. L. REV.* 1041, 1063 (1975); Noll, *supra* note 31, at 689.

<sup>33</sup> *Home Box Office, Inc. v. FCC*, No. 75-1280, slip op. at 89-90 & nn.118-19 (D.C. Cir. March 25, 1977).

tacts between the agency and the committees, staff personnel, and members of Congress may increase. By their very nature these contacts are likely to be secret, or at least undisclosed by the administrative record. If the result is to deny interested persons fair treatment, to deflect an agency from its statutory grounds for decision, or to impair the ability of the courts to review rules, a violation of due process or the governing statute may result.<sup>34</sup> A careful examination of the actual interactions between Congress and the agencies that occur in the presence of a legislative veto provision is therefore necessary to a judgment of the desirability and constitutionality of the veto.

#### *D. Policy Issues Surrounding Legislative Veto Provisions*

So far, we have discussed only the theoretical consistency of the legislative veto technique with the statutory and constitutional schemes governing the agencies. There seems to be no clear a priori answer to the question of the constitutionality of the veto or its consistency with the statutory scheme of administration. Therefore, any decision to apply it broadly to administrative rulemaking in general should rest partly on an informed judgment regarding its likely effects in practice on the agencies, the courts, and Congress. Before examining case studies of five programs for which Congress has adopted the technique, we outline the policy issues surrounding legislative veto proposals.<sup>35</sup> The purpose is to provide a frame of reference for analysis of the case studies, and to aid evaluation of their usefulness in predicting the effects of a more general veto provision.

A question of central importance is whether the addition of congressional review to administrative rulemaking will diminish the effectiveness of the other procedural checks which Congress and the courts have imposed on the rulemaking process. The problem is that the congressional review process may not be governed by rules as strict as those applicable to agency rulemaking. Present procedures might be replaced by a less visible or closed process of review by congressional committee members and staffs, as well as other interested Congressmen. And if interest groups can lobby Congress during the review period, their influence might render currently required public procedures for rulemaking ineffective. In any case, a veto statute may reduce public participation before the agencies by shifting the focus of

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<sup>34</sup> See pp. 1433-37 *infra*.

<sup>35</sup> For an example of policy analysis of the effects of the legislative veto, see 2 SEN. COMM. ON GOVERNMENT OPERATIONS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION, 115-22 (Comm. Print 1977) [hereinafter cited as STUDY ON FEDERAL REGULATION].

attention to congressional review procedures. This is not meant to suggest that Congress need adopt the same procedures it imposes upon the agencies, thereby producing a largely redundant review process. It does suggest, however, that the differences between the legislative and administrative process may make it difficult to reconcile congressional review with other aspects of rulemaking.

An overall appraisal of a legislative veto provision must examine whether it helps to assure the acceptability of agency regulations to Congress as a whole. If review authority is actually exercised by congressional committees, which are less broadly representative than the full membership of either house, the intent of Congress as a whole may not be realized. The same may be true if committee action is not visible to the other members, so that there is no attention and assent to what the committees do.

Another fundamental issue is whether the opportunity for subsequent review of agency regulations will lessen pressure in Congress for specificity in legislation delegating rulemaking power. A purpose of legislative vetoes is to allow Congress to postpone deciding policy questions until a concrete resolution appears in the form of a proposed rule. Whether the effect of this approach is to increase or to decrease agency discretion will depend on the extent to which agency regulations receive actual review.

Delay is said to be a serious problem in rulemaking; Congress and the courts have often responded by imposing deadlines for promulgating rules.<sup>36</sup> The legislative veto creates an additional source of delay because rules must lie before Congress for the statutory period whether or not there is serious consideration of a veto. It is difficult to estimate the costs of delay in promulgating rules that lie before Congress without awakening actual review. Such costs seem likely to vary in their visibility and their seriousness. And they would be without any corresponding benefit unless the very presence of review authority improves the drafting process by increasing agency attention to the acceptability of rules to Congress.

When review of a rule does occur, irreconcilable differences in policy between the agency and Congress may lead to long-term impasses. As a result, the implementation of administrative programs may be considerably delayed or entirely thwarted. Thus, it is important to appraise whether active congressional review will tend to produce the speedy resolution of policy. This will depend on the time between rules submissions and vetoes, and on the willingness of agencies to modify vetoed rules in accordance with the will of Congress. Agencies may respond to the

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<sup>36</sup> *Id.* at 118.

possibility of program interruption through legislative vetoes by using adjudication rather than rulemaking to form policy. If so, delay problems may be exacerbated by the increased use of slow adjudicative processes.

In addition to increasing delay in the administrative process, legislative veto authority may also increase Congress' already considerable workload. Much of the work of screening regulations for review must be done by hired staff, rather than committee members; consequently, already burdened staffs would have to be enlarged to implement a generally applicable veto.<sup>37</sup> Furthermore, especially where proposed rules deal with complex and technical subjects, the review process itself may be difficult and time-consuming for the members of Congress. Hearings must be held and committee reports written. If a veto resolution is reported to the floor, there must be study, debate, and a vote. Whether a significant number of rules would reach this stage remains to be seen, but there is the potential for an alarming increase in the volume of Congress' business.

A final concern is that of the legislative veto's effect on judicial review. The failure of Congress to veto a rule might be construed as its ratification, and a court might feel bound to defer to Congress' implied judgment that the rule is not *ultra vires* or irrational.<sup>38</sup> But congressional review may turn either on these legality considerations or on a rule's soundness as a matter of policy—and the nature of judicial review may depend on the nature of congressional review. Courts may be more reluctant to question the judgment of Congress where review is based on considerations of policy than where it is purportedly limited to questions of statutory intent, which are within the traditional province of the courts. Moreover, the extent of a court's scrutiny may depend on whether the rule received careful examination in Congress, at least by a committee, or was not reviewed at all. If the judiciary defers to agency rulemaking on a theory of implied ratification by Congress, there may result a net loosening of constraints on agency discretion whenever rules have received little direct examination in Congress.<sup>39</sup> All of these legal questions would complicate the process of judicial review, and their

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<sup>37</sup> It has been suggested, however, that in the past vetoes have been infrequent enough to permit reliance by staff members on political controversy to bring a rule to their attention. *See id.* at 121. The statement in text assumes that Congress would attempt more systematic screening under a general veto.

<sup>38</sup> Somewhat analogously, it has been argued that congressional reenactment of the Internal Revenue Code constitutes ratification of existing Treasury Regulations. *See* K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 5.10 (1958).

<sup>39</sup> *See* pp. 1426–28, 1431 *infra*.

resolution might entail close judicial scrutiny of the internal workings of Congress.

## II. FIVE CASE STUDIES

Theoretically, the legislative veto is a simple congressional check on an agency's execution of its statutory mandate. The term "veto" brings to mind a process as quick and easy as a presidential veto — an action considered in isolation by a separate branch of government and exercised independently. In practice, the process by which legislative vetoes are exercised is neither simple nor entirely independent; rather it is part of the complex legal and political relationship between the agencies and Congress.<sup>40</sup>

Congress often includes veto provisions in legislation because it mistrusts the agency's intentions or is displeased with the agency's past decisions in a politically sensitive area.<sup>41</sup> Another reason for the veto is congressional indecision on major issues of program implementation, and a consequent wish to delegate broadly while retaining a means of policing agency policy initiatives.<sup>42</sup> These motives may coexist.<sup>43</sup> In any event, the advent of the veto procedure changes the balance of power between Congress and the agency. The full legislative process, including approval by both houses and either approval by the President or override of his veto, is no longer necessary to alter agency policy. Still, the passage of an actual veto resolution may be nearly as cumbersome and time-consuming for either house as legislation. The usual process is for one or more committees or subcommittees to hold hearings and to report to the full house, which debates the matter before a final vote.<sup>44</sup> Thus, it is in the interest of both Congress and the agency to avoid invoking the formal veto process if informal accommodation can be reached.

Because of this mutual desire for accommodation, the potential for a veto engenders a process of negotiation and compromise between Congress and the agency concerning the substance of forthcoming rules. This has several effects. First, since congressional committees give veto resolutions initial consideration, most of the activity occurs at the committee or subcommittee

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<sup>40</sup> See generally 2 STUDY ON FEDERAL REGULATION, *supra* note 35 (overview of agency-Congress relationship).

<sup>41</sup> See pp. 1383, 1397-98, 1405 *infra*.

<sup>42</sup> The energy statutes, e.g., 15 U.S.C. §§ 751-760 (Supp. V 1975); 42 U.S.C. §§ 6201-6422 (Supp. V 1975), provide the best example of this.

<sup>43</sup> See p. 1383 *infra*.

<sup>44</sup> Time constraints can lead to omission of some of these steps. See p. 1395 *infra*.

level.<sup>45</sup> Second, to the extent that rules already formulated by an agency are altered in negotiations with Congress, the agency's consideration of public comment in drafting the rule may be displaced. Third, interests dissatisfied with the results of the agency's notice-and-comment proceedings have a second opportunity to affect the rule by applying pressure in Congress. Finally, the congressional review process and the consultations which it engenders place great demands on the time and energy of both the agency and Congress.

In this Part, we examine how the legislative veto has worked in practice in five federal programs involving rulemaking, in order to identify the veto's effects on the relationship between Congress and the agencies and on the nature of the rulemaking process. The studies cover a period from the inception of veto authority in each program to the close of the Ninety-Fourth Congress in October 1976.<sup>46</sup>

#### *A. The Department of Health, Education, and Welfare and the Basic Educational Opportunity Grants Program*

Among the agencies we studied, the Department of Health, Education, and Welfare (HEW) was the most successful in running the gauntlet of the legislative veto. It was the only agency to avoid suffering any actual vetoes, in part because it changed its rules substantially under congressional pressure. The reasons for HEW's success, and for the greater difficulties encountered by the others, were partly political and partly inherent in the nature of the programs involved.

HEW's Office of Education (OE) administers a wide variety of federal programs of aid to education. Because of recent difficulties of state and local governments in supporting education, federal funds have been in great demand. Their distribution has consequently been a sensitive political issue; Congress has maintained a lively interest in administration of the programs. But legal controls have not always kept pace. Because the OE's activities concern federal grants, its rules governing them fall within an exception to the APA's procedural requirements for

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<sup>45</sup> Congressional oversight of agency action also centers in the committees in the absence of a veto provision, but there are some differences. See pp. 1386-87, 1389, 1422-23 *infra*.

<sup>46</sup> The five programs were chosen because they had generated enough rulemaking experience for empirical investigation of the effects of the veto provision. There are other legislative vetoes in statutes governing federal rulemaking, but there had been no significant experience pursuant to them in May 1976, when our investigation commenced. *E.g.*, Act of October 27, 1974, Pub. L. No. 93-942, 88 Stat. 1470 (automobile passive restraints).

rulemaking.<sup>47</sup> Free from the constraints of the APA, the OE caused congressional dissatisfaction by administering programs of aid under unpublished rules or without any rules at all.<sup>48</sup> Although the Department voluntarily adopted public rulemaking procedures in 1971,<sup>49</sup> in the following year Congress attached a legislative veto to the OE's new program of Basic Educational Opportunity Grants for postsecondary education.<sup>50</sup> This first application of veto authority to a federal program involving rulemaking resulted not only from congressional mistrust of HEW in its handling of aid to students, but also from substantial disagreement in the Conference Committee regarding how the program should be administered.<sup>51</sup>

The basic grants program supports college students by paying up to half of an undergraduate's educational costs, after subtraction of his family's expected contribution for the year. The statute requires the Commissioner of Education to publish a schedule of expected family contributions in the Federal Register by a date well in advance of the academic year involved.<sup>52</sup> It also requires an opportunity for public comment on the schedules, and allows them to take effect on a specified date unless vetoed sooner by either house of Congress.

During the first year of the new program, there were extensive informal meetings on the content of the family contribution schedules between the Office of Education and the staff of the House and Senate committees having substantive responsibility for the program.<sup>53</sup> The OE's policies seem eventually to have pre-

<sup>47</sup> See 5 U.S.C. § 553(a)(2) (1970).

<sup>48</sup> Sky, *Rulemaking and the Federal Grant Process in the United States Office of Education*, 62 VA. L. REV. 1017, 1041 (1976).

<sup>49</sup> See 36 Fed. Reg. 2532 (1971).

<sup>50</sup> 20 U.S.C. § 1070a(a)(3)(A)(ii) (Supp. V 1975).

<sup>51</sup> Interview with Peter Voight, Director, Division of Basic Grants, Office of Education, in Washington, D.C. (May 26, 1976) [hereinafter cited as Voight interview]. The conference report explaining the statute does not give reasons for the presence of the veto provision. S. CONF. REP. No. 798, 92d Cong., 2d Sess. 167 (1972).

The statute also contains controls on the OE other than the veto provision, principally requirements that the agency review its rules and reissue them after opportunity for public comment, see 20 U.S.C. § 1232 (1970 & Supp. V 1975), and a provision for General Accounting Office evaluations and audits of federal education programs, 20 U.S.C. § 1227(a) (Supp. V 1975). See generally Sky, *Rulemaking in the Office of Education*, 26 AD. L. REV. 129 (1974).

<sup>52</sup> 20 U.S.C. § 1070a(a)(3)(A)(i) (Supp. V 1975), as amended by Act of Oct. 12, 1976, Pub. L. No. 94-482, § 121(c), 90 Stat. 2091.

<sup>53</sup> Interview with Christopher Cross, Senior Education Consultant for the Minority, House Comm. on Education and Labor (then Deputy Assistant Secretary for Legislation (Education), HEW), in Washington, D.C. (May 25, 1976) [hereinafter cited as Cross interview]; Interview with Jean Frohlicher, Counsel for the Senate Comm. on Labor and Public Welfare (then Deputy Associate Commis-

ailed in most of these discussions.<sup>54</sup> Negotiation has since diminished, occurring mostly around the yearly hearings. The practice of the House committee has been to introduce a pro forma resolution of disapproval each year in order to trigger the hearings and an explicit decision on the schedules.<sup>55</sup> The Senate has also held yearly hearings, but without introducing veto resolutions. Although there has been no formal consideration of the schedules beyond the subcommittee level in either house, and no serious attempt at a veto, the negotiations and hearings have allowed searching review of the OE's regulations. Review of the schedules has often been characterized by subcommittee members as limited to questions of legality, but the actual emphasis has been on policy.

The schedules, though complicated, reflect specific normative principles; the subcommittees have demonstrated keen understanding of the schedules and have displayed no diffidence in disagreeing with the OE on matters of substance. Congressional review has focused on issues central to the equity of the grants. There has been steady congressional pressure to increase the number of persons eligible for the grants and the OE has changed its family contribution schedules in response to this pressure every year except 1976.<sup>56</sup> Usually the pressure has worked to increase the amount of reserved assets which need not be included in calculating a family's expected contribution. Pressed by constituents, the subcommittees have urged that certain assets, such as a family's equity in its home or farm, should be excluded because they are not realistically available for educational expenses.

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sioner for Legislation, OE), in Washington, D.C. (May 21, 1976) [hereinafter cited as Frohlicher interview]; Voight interview, *supra* note 51.

<sup>54</sup> Voight interview, *supra* note 51.

<sup>55</sup> See *Congressional Review Hearings*, *supra* note 4, at 460; *Hearings on H.R. 204 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 3, 123 (1973). In 1976, there were no hearings on the schedules in either house because the Education Amendments of 1976 took precedence. OE received informal notice from the subcommittees that no action to disapprove the schedules would occur. Letter from Christopher Cross, Senior Education Consultant (Minority), House Committee on Education and Labor, to H. Bruff (Nov. 2, 1976).

<sup>56</sup> See *Hearings on Examination of the Family Contribution Schedule for the Basic Educational Opportunity Grant Program for Use in Academic Year 1975-76 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 3 (1974); *Hearings on H.R. 745 Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975). In 1976, the pending Education Amendments precluded close attention to the schedules. See note 55 *supra*. There were no changes in them attributable to negotiations with the committees. Letter from Richard A. Hastings, Deputy Assistant Secretary for Legislation (Education), HEW, to H. Bruff (Nov. 22, 1976).



The subcommittees have not necessarily agreed with each other, however. In one year, pressure to increase farm assets reserves came from the Senate while pressure to increase home equity reserves came from the House, creating a distinct possibility of deadlock.<sup>57</sup> The agency defused the controversy by raising both reserves, which lowered grants for other applicants. In thus moving the basic grants program in a substantive direction that broadens the participation of large blocs of voters, the subcommittees have opened themselves to the charge of modifying the original legislation to appease interest groups.

In the review process, time pressure has fostered compromise, since everyone has known that if timely approval of the schedules were not to occur, the entire program would be in jeopardy.<sup>58</sup> The agency has found a bargaining ploy in the cyclical fiscal year pattern. Each year it offers to meet the expressed concerns of the subcommittees part way; a compromised issue can be dealt with again the following year. These characteristics may have encouraged the subcommittees to avoid reporting out veto resolutions in order to preserve their negotiating stance with the agency. Another consequence may be to give the OE more control over its destiny than would otherwise seem apparent, by allowing it to forestall cohesive opposition to the schedules. Overall, the OE and the subcommittees have increasingly approached agreement on basic policy. Indeed, recent hearings in the Senate show signs that the OE may have formed an alliance with the subcommittee, which may now stand in defense of policy accommodations reached between the agency and the subcommittee against criticism generated by the public.<sup>59</sup>

### *B. The Department of Health, Education, and Welfare and the General Education Provisions Act*

1. *General Rulemaking.* — In 1974, Congress amended the OE's organic statute, the General Education Provisions Act (GEPA),<sup>60</sup> to provide legislative veto authority over most OE rules (other than the family contribution schedules), and to some

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<sup>57</sup> See *Congressional Review Hearings*, *supra* note 4, at 445; Interview with Richard A. Hastings, Deputy Assistant Secretary for Legislation (Education), HEW, in Washington, D.C. (May 20, 1976).

<sup>58</sup> Voight interview, *supra* note 51.

<sup>59</sup> *Hearings on Examination of the Family Contribution Schedule for the Basic Educational Opportunity Grant Program for Use in Academic Year 1976-77 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 20, 27 (1975).

<sup>60</sup> 20 U.S.C. §§ 1221-1233 (1970).

rules authorized by related statutes.<sup>61</sup> Affected rules were to be transmitted to Congress and would take effect forty-five days later unless disapproved by concurrent resolution for inconsistency with statutory authority.<sup>62</sup> The veto's purpose, according to the House report, was to arrest the agency's accumulation of quasi-legislative power and a corresponding attrition in Congress' ability to make law.<sup>63</sup> The veto was limited to ultra vires rules, and a detailed finding of illegality was expected to accompany a veto resolution.<sup>64</sup>

Negotiations similar to those at the inception of the basic grants program followed the adoption of the 1974 amendments to the GEPA. Though reluctant to engage in negotiations,<sup>65</sup> HEW was brought into an "exhaustive" series of about twenty meetings with congressional staff from both houses, in order to insure that the staff's views would be considered in drafting regulations.<sup>66</sup> Such negotiations were not confined, however, to programs subject to a legislative veto. Extensive meetings between congressional and departmental staff had occurred after enactment of the Rehabilitation Act of 1973,<sup>67</sup> which does not contain a veto provision. In all these instances, negotiations arose to meet the need for extensive sets of new regulations in the face of congressional dissatisfaction with past performance;<sup>68</sup> they suc-

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<sup>61</sup> See 20 U.S.C. § 1232(d)(1) (Supp. V 1975). This veto power applies to activities under 20 U.S.C. §§ 1221d, 1221e, 1221e-1 (Supp. V 1975), and under title IX of the Education Amendments of 1972, 20 U.S.C. § 1232(f) (Supp. V 1975). The 1974 amendments also subject the OE's rules to the notice-and-comment provisions of the APA. 20 U.S.C. § 1232(b)(2)(A) (Supp. V 1975).

<sup>62</sup> The disapproval period runs without interruption except when either house adjourns for more than four days, whereupon a complicated set of provisions determines the applicable period. See 20 U.S.C. § 1232(d)(2) (Supp. V 1975).

After a veto, the agency must respond to Congress' veto findings in proposing any further rules. 20 U.S.C. § 1232(e) (Supp. IV 1974).

<sup>63</sup> H.R. REP. No. 805, 93d Cong., 2d Sess. 73 (1974).

<sup>64</sup> A later amendment added a directive to the courts not to construe a failure of Congress to adopt a concurrent resolution as approval of a rule, a finding of statutory consistency, or an action raising a presumption of validity. Act of Nov. 29, 1975, Pub. L. No. 94-142, § 7(a)(1), 89 Stat. 796 (amending 20 U.S.C. § 1232(d)(1) (Supp. V 1975)).

<sup>65</sup> Interview with Stephen Kurzman, Assistant Secretary for Legislation, HEW, in Washington, D.C. (May 25, 1976) [hereinafter cited as Kurzman interview]; Cross interview, *supra* note 53.

<sup>66</sup> *Congressional Review Hearings*, *supra* note 4, at 445.

<sup>67</sup> Interview with Darrel J. Grinstead, Office of General Counsel, HEW, in Washington, D.C. (May 20, 1975) [hereinafter cited as Grinstead interview]; Kurzman interview, *supra* note 65; *Congressional Review Hearings*, *supra* note 4, at 446, 454. The Rehabilitation Act of 1973 is codified at scattered sections of 29 U.S.C. (Supp. V 1975).

<sup>68</sup> Grinstead interview, *supra* note 67.

ceeded in reducing interbranch confrontation and the underlying dissatisfaction.<sup>69</sup>

More recently, consultations between HEW and Congress have been institutionalized. The Department has adopted a form to identify proposed rules whose content may be politically sensitive, which serves to warn the Department's Executive Secretariat that the subcommittees should be contacted and their views ascertained.<sup>70</sup> This procedure has been used whether or not the proposed rule is subject to a veto provision and has occurred even before a notice of proposed rulemaking.<sup>71</sup> Guidance on the political acceptability of a rule can thus be sought in the absence of definitive statutory guidelines.<sup>72</sup>

The review process under the 1974 amendments has in large part operated outside the formal and open procedures that were presumably intended for it.<sup>73</sup> Although the 1974 amendments authorized review of many HEW rules, only the controversial title IX sex discrimination regulation, discussed below, has occasioned formal veto resolutions and hearings. For the other rules, the review process has consisted of negotiations between the agency and the members and staff of congressional subcommittees. There are several reasons for the willingness of Congress to compromise here. First, the statute provides that review extends only to questions of legality, and is therefore limited. Second, the presence of the constitutional question has encouraged the committees to avoid confrontation in favor of negotiation.<sup>74</sup> Third, the requirement for a concurrent resolution means that if either house is satisfied with HEW's position, the agency prevails.

The principal practical problem for the agency caused by the presence of the veto provision has been time. In the OE's programs of aid to education, the span of a fiscal year must include both rulemaking to govern grants and the grant award process

<sup>69</sup> Frohlicher interview, *supra* note 53; Cross interview, *supra* note 53.

<sup>70</sup> *Congressional Review Hearings*, *supra* note 4, at 446; Kurzman interview, *supra* note 65.

<sup>71</sup> Kurzman interview, *supra* note 65. Congress has also offered its views to the agency during the public comment period, and has done so even for rules subject to a later transmittal for possible veto. *Id.*; Interview with A. Neal Shedd, Chief, Regulations Staff, Office of Education, HEW, in Washington, D.C. (May 24, 1976).

<sup>72</sup> Agency personnel emphasize the absence of statutory guidance. *E.g.*, *Congressional Review Hearings*, *supra* note 4, at 443, 446-47, 451.

<sup>73</sup> *Id.* at 448, 454.

<sup>74</sup> Frohlicher interview, *supra* note 53. The bill's signing statement expressed doubts regarding the veto's constitutionality, Sky, *supra* note 48, at 1024 n.22, and HEW's transmittal letters have reminded Congress of the issue. *Hearings on H. Con. Res. 330 Before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 24-25, 36, 39 (1975) [hereinafter cited as *Title IX Hearings*].

itself, since the awards must be made within the fiscal year of appropriation to avoid a lapse of funding.<sup>75</sup> Thus, all the phases of rulemaking (drafting a proposed rule, public participation, drafting a final rule, and congressional review) and all the phases of the grant process (invitation of applications, processing, and award) must be completed within a year or less.<sup>76</sup> To save time, the OE began submitting proposed rules to Congress, so that the periods for congressional review and public comment would run concurrently.<sup>77</sup> Congress forbade the practice by amending the GEPA to require submission of final rules.<sup>78</sup> In a renewed attempt to expedite its processes, the OE has since invited grant applications against proposed rules,<sup>79</sup> with the understanding that the applications may require revision if the rules are changed in response to public comment. Any changes in the rules thus create a considerable administrative burden and may defeat the expectations of grant applicants. The end result of this streamlining process is a substantial administrative bias against changing rules in response to public comment.<sup>80</sup>

2. *Title IX.* — The only HEW regulation to cause the introduction of resolutions of disapproval under the GEPA was the one implementing title IX of the Education Amendments of 1972,<sup>81</sup> which prohibits sex discrimination in educational programs receiving federal financial assistance. Title IX was adopted in conference, without hearings or a committee report to guide

<sup>75</sup> See generally Sky, *supra* note 48. The OE does not find it wise to initiate the rulemaking process until the experience of a prior year can be evaluated and the appropriation for the current year is known. If appropriations are passed after the start of a fiscal year, less than a year may be available for the process of making rules and awarding grants. Time pressure has been further exacerbated by the OE's practice of extending public comment periods beyond statutory minima. See *id.* at 1032 n.34; *Congressional Review Hearings, supra* note 4, at 456. Until the Education Amendments of 1976, the OE could waive public participation in an emergency under the "good cause" provision of § 4(b) of the APA, 5 U.S.C. § 553(b) (1970). This option may now be foreclosed by the Education Amendments of 1976, Pub. L. No. 94-482, § 405(b)(1), 90 Stat. 2081 (1976).

<sup>76</sup> Sky, *supra* note 48, at 1028, 1034, 1036-37. The OE is also subject to statutory rulemaking deadlines, which have recently been tightened. *Id.* at 1022.

<sup>77</sup> *Id.* at 1026. However, a "substantial" change in the final rule would occasion resubmission to Congress. *Title IX Hearings, supra* note 74, at 33-34.

<sup>78</sup> Act of Nov. 29, 1975, Pub. L. No. 94-142, § 7, 88 Stat. 796 (amending 20 U.S.C. § 1232(d) (Supp. IV 1974)).

<sup>79</sup> Sky, *supra* note 48, at 1029, 1033-34.

<sup>80</sup> *Id.* The practice of submitting proposed rules to Congress would have a similar effect.

<sup>81</sup> 20 U.S.C. §§ 1681-1682 (Supp. V 1975). For the final rule promulgated under this title, see 40 Fed. Reg. 24127 (1975).

agency rulemaking.<sup>82</sup> It left unresolved such major issues as whether the ban on sex discrimination extended to interscholastic athletics.<sup>83</sup> Nevertheless, the statute directed the federal agencies administering aid to issue implementing regulations. Within HEW, this task fell to the Office for Civil Rights.

Although legislative veto provisions were not made applicable to regulations under title IX until two years later,<sup>84</sup> the open-endedness of the delegation and the controversial nature of the subject matter made consultation with Congress desirable. The agency therefore engaged in discussions with congressional staff to aid development of a proposed rule.<sup>85</sup> Like the negotiations following enactment of the Rehabilitation Act of 1973, these discussions confirm that interbranch negotiation is not always associated with a legislative veto.<sup>86</sup>

Because of the controversial nature of the subject, the agency provided an extraordinary 120 days for public comment on the proposed rule, and the response was enthusiastic.<sup>87</sup> A lively debate in Congress and among the public ensued. While public comment was being received and considered, agency personnel met with members and staff of committees of both houses of Congress, and the Secretary met with Congressmen.<sup>88</sup> The Department requested suggestions and, in response to them, made certain changes in the rule which were desired by Senator Bayh and some women's organizations.<sup>89</sup> Among these changes was a requirement that institutions receiving grants conduct self-evalu-

<sup>82</sup> S. REP. NO. 798, 92d Cong., 2d Sess. 221-22 (1972). See generally 28 CONG. Q. ALMANAC 385-98 (1972); 121 CONG. REC. S12006 (1975) (Sen. Helms); Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U. L. REV. 113, 142-45 (1976) [hereinafter cited as *Ultra Vires Challenges*]; Buck & Orleans, *Sex Discrimination—A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1 (1973).

<sup>83</sup> *Title IX Hearings*, *supra* note 74, at 19; Buck & Orleans, *supra* note 82, at 12.

<sup>84</sup> See pp. 1385-86 & note 61 *supra*.

<sup>85</sup> *Congressional Review Hearings*, *supra* note 4, at 446; Interview with Gwendolyn Gregory, Director, Office of Policy Communications, Office for Civil Rights, HEW, in Washington, D.C. (May 27, 1976) [hereinafter cited as Gregory interview].

<sup>86</sup> Of course, there was precedent for negotiation by this time in the administration of the OE's basic grants program, which did have a veto provision.

<sup>87</sup> See 39 Fed. Reg. 22227 (1974). The proposed rule took two years to develop. The agency received over 9,700 comments, 40 Fed. Reg. 24127, 24128 (1975), and attempted to respond to them in the final rule, *Title IX Hearings*, *supra* note 74, at 31. For example, the proposed rules lacked self-evaluation requirements, but many comments sought them, and the final rule included them. *Id.* at 39.

<sup>88</sup> *Congressional Review Hearings*, *supra* note 4, at 446; Gregory interview, *supra* note 85.

<sup>89</sup> Gregory interview, *supra* note 85.

ations in the elimination of discrimination. One can only speculate whether the women's groups would have achieved the same changes without resorting to congressional pressure.<sup>90</sup>

After the final rule had been adopted by the agency, several resolutions of disapproval were introduced in Congress.<sup>91</sup> The only one to reach a hearing would have disapproved the very requirements for self-evaluation desired by the women's groups.<sup>92</sup> Its fate is illustrative of the constraints which time limits and interest groups can place upon the veto process. The resolution was referred first to committee and then to a subcommittee, which held six days of hearings focusing mainly on a proposed bill on a different topic.<sup>93</sup> The subcommittee amended the resolution to add another minor element of disapproval and reported it to the full committee, which, under pressure from the women's organizations, referred it to the Equal Opportunities Subcommittee.<sup>94</sup> As the end of the period for disapproval approached, this subcommittee held a one-day hearing and recommended against passage of the resolution.<sup>95</sup> Nothing further happened, and the regulation took effect at the end of the statutory period for disapproval.

### C. The Federal Energy Administration

In contrast to HEW's experience under legislative veto provisions, which illustrates successful negotiation and compromise with Congress, the early history of the Federal Energy Administration (FEA) shows the veto's potential for interbranch deadlock. It demonstrates how, in cases of disagreement on basic policy between Congress and the agency, the veto power can cause the frustration of important agency programs or the failure to formulate any programs at all. For the duration of the impasse the agency is impotent, sharing with Congress the political responsibility for failure to resolve important national policy issues.

After the sales embargo by the oil-producing nations in 1973,

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<sup>90</sup> Because many public comments had sought the same provisions, see note 87 *supra*, it is difficult to determine whether they were the result of public comment or congressional pressure or both.

<sup>91</sup> These are described in *Ultra Vires Challenges*, *supra* note 82, at 146 n.64.

<sup>92</sup> See H. Con. Res. 330, 94th Cong., 1st Sess., 121 CONG. REC. H6415 (1975); *Title IX Hearings*, *supra* note 74, at 1.

<sup>93</sup> *Review of Regulations to Implement Title IX of Public Law 92-318 Conducted Pursuant to Sec. 431 of the General Education Provisions Act: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975); *Title IX Hearings*, *supra* note 74, at 9.

<sup>94</sup> See 33 CONG. Q. 1484 (1975).

<sup>95</sup> See *id.* at 1563 (1975). See generally *Title IX Hearings*, *supra* note 74.

Congress passed the Emergency Petroleum Allocation Act of 1973 (EPAA)<sup>96</sup> to give the President power to allocate and fix the prices of certain petroleum products.<sup>97</sup> The Act also empowered the President to exempt any product from his controls upon specified findings,<sup>98</sup> but subject to legislative veto by either house of Congress until each house had been in session for five days.<sup>99</sup> In the following year, Congress created the FEA as an "independent agency in the Executive Branch"<sup>100</sup> to exercise the President's powers under the EPAA.<sup>101</sup> The statute applied the APA's rulemaking provisions to the FEA, with some modifications.<sup>102</sup>

Although the FEA began to develop proposals for decontrol immediately, no such proposals were implemented for nearly two years because of the inability of the agency and Congress to agree on policy. In July 1974, the new agency published a proposal to decontrol residual fuel oil, a heavy oil used by utilities and industry, especially in the Northeast.<sup>103</sup> But the proposal was dropped after informal consultation between the Administrator and a group of northeastern Congressmen convinced the agency that the proposed exemption would not survive review.<sup>104</sup> The matter then lay dormant while both President Nixon and Administrator Sawhill left office.

In his first state of the Union message, incoming President Ford proposed decontrol of the prices of all regulated petroleum products,<sup>105</sup> but Congress was in no mood to concur. In an effort to reach an accommodation with Congress, the FEA in 1975 prepared three successive proposals for phased decontrol, with time

<sup>96</sup> Pub. L. No. 93-159, Stat. 627 (1973) (codified at 15 U.S.C. §§ 751-760 (Supp. V 1975)), *repealed by* Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, § 401(b)(1), 89 Stat. 871; *see pp.* 1392-94 *infra*.

<sup>97</sup> *See* 15 U.S.C. § 753(a) (Supp. V 1975) (repealed 1975).

<sup>98</sup> *See* 15 U.S.C. § 753(g)(2) (Supp. V 1975) (repealed 1975).

<sup>99</sup> *See id.*

<sup>100</sup> *See* 15 U.S.C. § 762 (Supp. V 1975).

<sup>101</sup> Federal Energy Administration Act of 1974, Pub. L. No. 93-275, 88 Stat. 97 (codified at 15 U.S.C. §§ 761-798 (Supp. V 1975)).

<sup>102</sup> A minimum of ten days was required for public comment, but this requirement was waivable upon a detailed finding that delay would cause serious harm to the public. For rules with significant impact, the statute required an opportunity for oral presentation of views, to occur no later than 45 days after the rule's issuance. *See* 15 U.S.C. § 766(i)(1) (Supp. V 1975).

<sup>103</sup> 39 Fed. Reg. 24669 (1974).

<sup>104</sup> Interview with David Wilson, Office of General Counsel, Federal Energy Administration, in Washington, D.C. (June 2, 1976) [hereinafter cited as Wilson interview]; Interview with Eric Fygi, Office of General Counsel, Federal Energy Administration, in Washington, D.C. (May 20, 1976).

<sup>105</sup> *See* 11 WEEKLY COMP. PRES. DOCS. 49 (1975).

spans of 24, 30, and 39 months.<sup>106</sup> The first was withdrawn when it became clear that Congress would not accept it.<sup>107</sup> The latter two were vetoed by the House,<sup>108</sup> even though the 39-month plan sought political acceptability by providing for small price increases before the 1976 elections, and much steeper increases afterwards. The agency would go no further; it made no more submissions prior to December of 1975, when the enactment of the Energy Policy and Conservation Act of 1975 (EPCA)<sup>109</sup> settled the issue by legislation.

There were several reasons for the agency's failure to reach a successful compromise with Congress during this period. Most important, it became clear that a Congress beset by fears of inflation was not yet ready for decontrol; in fact, it appeared to the agency that the congressional position hardened as the FEA gave way.<sup>110</sup> Moreover, Congress was in the process of attempting to develop a coherent national energy policy for the first time. Accordingly, the agency's efforts occurred during a period of massive political maneuvers in Congress. It is thus not surprising that the agency was unable to gauge the mood of Congress accurately. Despite the agency's judgment that both of the later 1975 decontrol proposals had sufficient support in Congress to survive review, both were vetoed.<sup>111</sup> These setbacks were also due in part to the ability of congressional staff to provide rapid and independent evaluation of the decontrol proposals. The agency had supported them with analysis based on computer models of the economy but was met with alternative computer analyses de-

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<sup>106</sup> See 40 Fed. Reg. 19219, 30030, 31741 (1975).

<sup>107</sup> Wilson interview, *supra* note 104; Interview with Gorman Smith, Assistant Administrator, Regulatory Programs, Federal Energy Administration, in Washington, D.C. (June 2, 1976) [hereinafter cited as Smith interview].

<sup>108</sup> The first veto is described at 40 Fed. Reg. 31741 (1975). The second is H.R. Res. 641, 94th Cong., 1st Sess., 121 CONG. REC. H7899-900 (daily ed. July 30, 1975); 40 Fed. Reg. 34161 (1975). The Senate briefly debated its own resolution disapproving the proposed decontrols, but it was ultimately tabled. S. Res. 145, 94th Cong., 1st Sess., 121 CONG. REC. S14318 (daily ed. July 30, 1975); 121 CONG. REC. S14473 (daily ed. July 31, 1975).

<sup>109</sup> Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified at 42 U.S.C. §§ 6201-6422 (Supp. V 1975)). One technical decontrol proposal, concerning "stripper wells," did pass under the EPAA. Prices of oil from such wells, which produce less than ten barrels per day, had not been controlled. To create an incentive for greater production, the proposal allowed a well that had obtained stripper status to retain it even if it produced more oil. See 40 Fed. Reg. 10195, 22123 (1975). Though the proposal was preceded by consultation with congressional staff from both houses, Smith interview, *supra* note 107, the consultation produced no changes, as the proposal was not controversial. No congressional action was taken.

<sup>110</sup> Smith interview, *supra* note 107; Wilson interview, *supra* note 104.

<sup>111</sup> Smith interview, *supra* note 107; Wilson interview, *supra* note 104.



veloped by the committee staffs during the short review period.<sup>112</sup>

A revised legislative veto procedure was inaugurated by the EPCA.<sup>113</sup> The procedure applied to certain FEA rules termed "energy actions," among which were exemptions from price and allocation regulations promulgated under the EPAA.<sup>114</sup> The statute extended the period of review to fifteen days of continuous congressional session<sup>115</sup> but provided that energy actions could take effect earlier if approved by resolution in both houses.<sup>116</sup> There were also provisions to expedite disposition of a veto resolution<sup>117</sup> and limitations on judicial review of rules that had survived in Congress.<sup>118</sup>

After the passage of the EPCA, the FEA submitted as Energy Action No. 1<sup>119</sup> a proposal to decontrol residual fuel oil, for which it had unsuccessfully floated a trial balloon earlier. This time, the FEA was well prepared. It developed extensive data on the east coast market to show that further price control would be counterproductive.<sup>120</sup> Administrator Zarb met with members of Congress to press for approval,<sup>121</sup> and the Action included some specific provisions designed to win favor in the Northeast.<sup>122</sup> As a result of these efforts, the proposal sailed through without controversy.<sup>123</sup>

<sup>112</sup> Interview with Charles Curtis, Counsel, House Comm. on Interstate and Foreign Commerce, in Washington, D.C. (June 4, 1976) [hereinafter cited as Curtis interview].

<sup>113</sup> Pub. L. No. 94-163, 89 Stat. 871 (codified at 42 U.S.C. § 6421 (Supp. V 1975)).

<sup>114</sup> See 15 U.S.C. § 760a(c) (Supp. V 1975). There was a separate provision for review of energy conservation contingency plans and rationing contingency plans, which required the approval of both houses of Congress. 42 U.S.C. § 6221 (Supp. V 1975); 41 Fed. Reg. 21908, 21918 (1976).

<sup>115</sup> See 42 U.S.C. § 6421(c)(1) (Supp. V 1975).

<sup>116</sup> See 42 U.S.C. § 6421(c)(1), (2) (Supp. V 1975).

<sup>117</sup> See 42 U.S.C. § 6421(f)(3), (4) (Supp. V 1975).

<sup>118</sup> These provided that a court reviewing an energy action could not invalidate it on the ground that the findings were not adequate to meet the requirements of the energy statutes, or were arbitrary or without sufficient factual foundation within the meaning of the APA. See 15 U.S.C. § 757 (h) (Supp. V 1975) (referring to 5 U.S.C. § 706(2)(A), (E), (F) (1970)).

The EPCA applied APA rulemaking provisions to most rules adopted pursuant to it, with modifications similar to those in the EPAA. See 42 U.S.C. § 6393 (Supp. V 1975); p. 1391 & note 102 *supra*.

<sup>119</sup> 41 Fed. Reg. 7122 (1976).

<sup>120</sup> See *id.* at 7124-33.

<sup>121</sup> Interview with William J. Van Ness, Chief Counsel, Senate Comm. on Interior and Insular Affairs, Washington, D.C. (June 2, 1976) [hereinafter cited as Van Ness interview].

<sup>122</sup> Wilson interview, *supra* note 104.

<sup>123</sup> See 41 Fed. Reg. 13898 (1976); Smith interview, *supra* note 107; Van Ness interview, *supra* note 121; Wilson interview, *supra* note 104.

In lengthening the period for congressional review from five to fifteen days under the EPCA, Congress had tried to give itself more time to consider energy actions in depth. Still, it had wanted disapproval to come from its members' own reactions to executive action, and not from external pressures.<sup>124</sup> Thus, the review period had purposely been kept short to shelter Congress from a concerted lobbying effort.<sup>125</sup> And since the normal committee report process can seldom be completed in less than fifteen days, the brevity of the review period had the additional effect of reducing the role of committee guidance. It thus made a veto unlikely unless an action was clearly inconsistent with the majority will of a house. The history of Energy Action No. 2<sup>126</sup> show how these effects can prove decisive in technical areas of law in which congressional staff cannot match the agency's ability to gather and analyze relevant data.

To achieve competitive equity under its allocation and price controls, Congress created a system of "entitlements," or transfer payments among refiners. In an effort to equalize the costs of oil acquired by refiners, Congress required those refiners who used more than the national average of cheap "old" oil to make payments to those who used more than the national average of the more expensive "new" or imported oil. Through an amendment to the EPCA,<sup>127</sup> certain small refiners secured a partial exemption from these payments, and with it a windfall for those with significant stocks of old oil. Another amendment was added, however, authorizing a rule to remove the entitlement exemption upon a finding that it resulted in an unfair economic or competitive advantage for some small refiners over the others.<sup>128</sup> Energy Action No. 2 was promulgated to implement the second amendment. In order to generate lobbying support from those small refiners who would be deprived of their windfall, the Action contained, in addition to the revocation of exemptions, provisions for doubling the "small refiner bias," a price advantage applicable to all small refiners.<sup>129</sup>

Energy Action No. 2 was a highly technical regulation, and the FEA experienced some difficulty in educating Congress regarding it. In a briefing paper prepared for Congress,<sup>130</sup> the agency was able to demonstrate sharp differences in crude oil

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<sup>124</sup> Curtis interview, *supra* note 112.

<sup>125</sup> *Id.*

<sup>126</sup> 41 Fed. Reg. 9391, 20392 (1976).

<sup>127</sup> See 15 U.S.C. § 753(e) (Supp. V 1975).

<sup>128</sup> See 15 U.S.C. § 760a(g) (Supp. V 1975).

<sup>129</sup> Smith interview, *supra* note 107; Wilson interview, *supra* note 104.

<sup>130</sup> Federal Energy Administration, Briefing Paper on the Increase in Small Refiner Bias and Revocation of Current Small Refiner Exemption (May 21, 1976).

costs to small refiners in the absence of entitlements payments, but it could not translate these into differences in prices charged for refined oil.<sup>131</sup> Although congressional staff felt the proposal needed the support of explanatory data on the profitability of small refiners,<sup>132</sup> the subject was not one on which the staff could perform an independent analysis.<sup>133</sup> There had been little advance warning that the proposal was forthcoming,<sup>134</sup> and some staff members believed that the FEA had intentionally surprised Congress with Energy Action No. 2 so that the period for review would run before a careful evaluation could be made.<sup>135</sup>

Whether or not such surprise was intended, Congress' inability to make a thorough analysis, coupled with the increase in lobbying support generated by the provision for doubling the small refiner bias, led to the Action's survival despite substantial congressional doubt. Resolutions of disapproval were introduced in both houses,<sup>136</sup> and hearings were quickly held.<sup>137</sup> But the time for review dwindled and a motion to discharge the resolution from committee became necessary in the Senate.<sup>138</sup> As a consequence, much of the debate over Energy Action No. 2 was procedural rather than substantive. Some members took the position that, in the absence of committee guidance, they would have to support the President's program.<sup>139</sup> There were complaints about the inadequacy of the FEA's data, and pressure was put on the FEA to withdraw the Action so that Congress would have more time to consider it.<sup>140</sup> The FEA declined to withdraw it, and the veto resolutions failed to pass in either house when the votes were taken on the last day of the review period.<sup>141</sup>

This scenario was repeated in its broad outline when Congress

<sup>131</sup> Smith interview, *supra* note 107. The FEA argued that such a calculation would entail immense labor and would be unreliable because of other variables affecting prices.

<sup>132</sup> Van Ness interview, *supra* note 121.

<sup>133</sup> Curtis interview, *supra* note 112.

<sup>134</sup> *Id.*; Van Ness interview, *supra* note 121.

<sup>135</sup> Van Ness interview, *supra* note 121. There was, however, substantial lobbying by interested parties, including the FEA, during the review period. *Id.*; Wilson interview, *supra* note 104.

<sup>136</sup> H.R. Res. 1205, 94th Cong., 2d Sess., 122 CONG. REC. H4633 (daily ed. May 10, 1976); S. Res. 449, 450, 94th Cong., 2d Sess., 122 CONG. REC. S7450 (daily ed. May 19, 1976).

<sup>137</sup> See 122 CONG. REC. S8163-64 (daily ed. May 27, 1976); *Hearing on S. Res. 449 and 450 Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. (1976).

<sup>138</sup> See 42 U.S.C. § 6421(f)(4) (Supp. V 1975).

<sup>139</sup> See 122 CONG. REC. H5029 (daily ed. May 27, 1976) (remarks of Rep. Brown).

<sup>140</sup> See *id.* at H5031 (remarks of Rep. Staggers).

<sup>141</sup> See *id.*

considered Energy Actions Nos. 3 and 4,<sup>142</sup> which proposed decontrol of the middle petroleum distillates, principally heating and diesel oil. The FEA felt that its findings in favor of decontrol were stronger for these products than they had been for residual oil.<sup>143</sup> The agency had doubts, however, that the proposals would survive congressional review, since many voters feel the direct effects of increased prices for the middle distillates.<sup>144</sup> Thus, the anticipated problems of congressional review were primarily political. Veto resolutions were again introduced in both houses, and the Senate committee reported its resolution favorably.<sup>145</sup> Nevertheless, both resolutions again failed in votes taken on the last day for review.<sup>146</sup> The histories of Energy Actions Nos. 2, 3, and 4 illustrate the difficulty of exercising the legislative veto power when the period for review is short. The short review period does not seem to have had its intended effect of sparing Congress from lobbying by the FEA on the one hand and interests opposed to the proposals on the other. In fact, by hampering the normal committee report process, Congress may have deprived itself of sufficient internal guidance on the very sort of technical subject matter for which it usually relies heavily on committee expertise. Thus, the members of Congress may have been left to exercise their independent judgment when they felt least capable of doing so. This may have resulted in an advantage for the contending lobbies, perhaps especially for the "expert" FEA,<sup>147</sup> rather than the intended disadvantage.

For its part, the FEA did not engage in the detailed negotiation over the substance of proposed rules that typified HEW's practice, perhaps because of the diminished role of the committee process. Instead, the FEA ordinarily tried to defuse political opposition in advance by the substance or timing of its proposals. It then lobbied Congress from a relatively fixed position.<sup>148</sup> This

<sup>142</sup> 41 Fed. Reg. 22591 (1976). See also *id.* at 17512, 24516.

<sup>143</sup> Smith interview, *supra* note 107.

<sup>144</sup> *Id.*

<sup>145</sup> H.R. Res. 1302, 1303, 94th Cong., 2d Sess., 122 CONG. REC. H5927 (daily ed. June 15, 1976); S. Res. 469, 470, 94th Cong., 2d Sess., 122 CONG. REC. S9765 (daily ed. June 17, 1976); *Hearing on S. Res. 469 and 470 Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. (1976); S. REP. Nos. 94-1000 & 94-1001, 94th Cong., 2d Sess. (1976).

<sup>146</sup> 122 CONG. REC. H7230 (daily ed. July 1, 1976) (continuing the proceedings of June 30, 1976); 122 CONG. REC. S11202-09, S11247 (daily ed. June 30, 1976).

<sup>147</sup> Some of the congressional staff feel that the agency has such an advantage. Van Ness interview, *supra* note 121.

<sup>148</sup> *Id.*; Curtis interview, *supra* note 112.

practice seems to reflect a view that Congress would not have the time or the ability to understand and evaluate a proposal fully, so that raw political power would likely carry the day.<sup>149</sup>

*D. The General Services Administration and the Disposition of President Nixon's Papers and Tapes*

A legislative veto provision gives Congress the power to disapprove an agency's rules, not to rewrite them. Within the confines of the veto procedure, Congress can only respond to the agency's initiatives. Thus, irreconcilable disagreement between the agency and Congress can result in a deadlock of considerable duration. Moreover, the danger of deadlock is increased when the agency in question is one within the executive branch and the two branches have opposing political objectives with regard to the agency's program. Such was the case in the efforts of the General Services Administration (GSA) to provide by rule for the disposition of President Nixon's controversial papers and tape recordings.

In September 1974, a month after his resignation from the Presidency, Mr. Nixon made an agreement with General Services Administrator Sampson granting the government custody of the papers and tapes but recognizing title in Mr. Nixon.<sup>150</sup> The agreement provided that the tape recordings were to be destroyed upon Mr. Nixon's death or in 1984, whichever occurred first. Objecting to this agreement because it placed the materials in imminent danger of destruction and overly restricted access of the courts and public to them,<sup>151</sup> Congress speedily passed the

<sup>149</sup> The FEA's later adventures in the 94th Congress deserve brief summary. On July 30, 1976, the Federal Energy Administration Act expired. Act of June 30, 1976, Pub. L. No. 94-332, 90 Stat. 784. After a hiatus during which its functions were performed by a federal energy office created by executive order, Exec. Order No. 11,930, 41 Fed. Reg. 32399 (1976), *revoked by* Exec. Order No. 11,933, 41 Fed. Reg. 36641 (1976), the FEA was reconstituted by the Energy Conservation and Production Act of 1976. Act of August 14, 1976, Pub. L. No. 94-385, 90 Stat. 1125 (codified in scattered sections of 15, 42 U.S.C.). The FEA's decontrol program then continued with the exemption of naphtha jet fuel from price controls in Energy Actions Nos. 6 and 7, which did not arouse substantial congressional displeasure. 41 Fed. Reg. 40451; 122 CONG. REC. S16078 (Sept. 17, 1976). Energy Action No. 5, the exemption of specialty products such as lubricants, had previously passed without controversy. 41 Fed. Reg. 34785 (1976). The final major step, the decontrol of gasoline, was left for after the 1976 elections. *See* 41 Fed. Reg. 51832 (1976) (notice of proposed rulemaking).

<sup>150</sup> The Nixon-Sampson agreement, 120 CONG. REC. S18326 (daily ed. Oct. 4, 1974), resolved the legal issues in accordance with Attorney General Saxbe's opinion of the day before, 43 OP. ATT'Y GEN. 1 (1974).

<sup>151</sup> S. REP. NO. 93-1181, 93d Cong., 2d Sess. 4 (1974); H.R. REP. NO. 93-1507, 93d Cong., 2d Sess. 3 (1974). *See generally* Nixon v. Richey, 513 F.2d 430, 439 n.81 (D.C. Cir. 1975).

Presidential Recordings and Materials Preservation Act to protect and control them.<sup>152</sup>

Title I of the Act directed the Administrator of General Services to take possession of Mr. Nixon's presidential papers and tape recordings and to submit a report to Congress within ninety days, proposing and explaining regulations to provide public access to them. These regulations, which could be disapproved by a resolution of either house within ninety legislative days, were to meet a series of explicit purposes: to provide the public with the full truth about the Watergate scandal at "the earliest reasonable date," to make the materials available to the courts for fair trials, to provide public access to materials of general historical interest unrelated to Watergate, to protect privileged material and information affecting national security, and to return personal materials to Mr. Nixon. Despite this explicit enumeration of statutory objectives, and despite repeated and intensive negotiations with committees of both houses, GSA has not yet promulgated a set of regulations that has survived congressional review. GSA has issued three sets of proposed rules; Congress has vetoed all three.

While formulating the first set of rules, GSA consulted closely with the staffs of a Senate committee and a House subcommittee.<sup>153</sup> In a series of twelve to fifteen meetings with the Senate staff, GSA presented drafts of the regulations for comment and criticism and then revised the drafts for presentation at the next meeting.<sup>154</sup> Significant changes were also made on the early drafts after long line-by-line sessions with House staff.<sup>155</sup> These

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<sup>152</sup> Act of Dec. 19, 1974, Pub. L. No. 93-526, 88 Stat. 1695, reprinted at 44 U.S.C. § 2107 note (Supp. V 1975). The legislative history includes S. REP. NO. 93-1181, 93d Cong., 2d Sess. (1974); S. REP. NO. 93-1182, 93d Cong., 2d Sess. (1974); *Hearings on the "Public Documents Act" Before the Subcomm. on Printing of the House Administration Comm.*, 93d Cong., 2d Sess. (1974). After consideration by a conference committee, both Houses enacted the legislation on December 9, 1974. 120 CONG. REC. H11445, S20809 (daily ed. Dec. 9, 1974). For a chronology of the legislative history, see *Nixon v. Richey*, 513 F.2d 430, 440 (D.C. Cir. 1975).

<sup>153</sup> Interview with Donald P. Young, General Counsel, GSA, and Steven Garfinkel, Chief Counsel, Records and Archives, GSA, in Washington, D.C. (May 27, 1976) [hereinafter cited as Young-Garfinkel interview].

<sup>154</sup> Interview with Eli E. Nobleman, Counsel, Senate Comm. on Gov't Operations, in Washington, D.C. (June 2, 1976) [hereinafter cited as Nobleman interview].

<sup>155</sup> Interview with Edward J. Davey, Jr., Counsel, Subcomm. on Printing, House Administration Comm., in Washington, D.C. (June 1, 1976) [hereinafter cited as Davey interview]; Interview with William E. Sudow, Former Special Assistant to Rep. Brademas, Office of the Majority Whip, and Counsel, Subcomm. on Printing, House Administration Comm., in Washington, D.C. (June 2, 1976) [hereinafter cited as Sudow interview].

negotiations reduced the number of unresolved issues to five or six by the time the regulations formally reached Congress.<sup>156</sup> There was no public participation in the rulemaking because the statute did not require it.<sup>157</sup> And GSA would not have entered negotiations with the committees in the absence of a veto provision.<sup>158</sup> Thus, as with HEW, the existence of a legislative veto gave rise to close consultation between the agency and Congress to determine the substance of regulations.

The first set of proposed regulations appeared on March 19, 1975, the last day permitted by the statute.<sup>159</sup> In the Senate hearings that followed, the function of congressional review was said to be to determine whether the rules conformed to their statutory purpose.<sup>160</sup> The agency argued for restrictions on public access to avoid deterring future Presidents from keeping records.<sup>161</sup> It further argued that the critical decisions on public disclosure should be made by the Administrator, a political appointee, and that the statutory responsibility to make such decisions could not legally be delegated to anyone else.<sup>162</sup> Memoranda on these and other legal issues were exchanged by a Senator, the Administrator, and interested scholars.<sup>163</sup>

In the end, the Senate committee decided that the regulations were inconsistent with the purposes of the statute in eleven particulars and recommended passage of a veto resolution.<sup>164</sup> For each of the eleven offending provisions, the committee report suggested substitute language to guide later GSA submissions. The committee did not assert, however, congressional power to amend GSA's rules without legislation.<sup>165</sup> It did assert the power to veto particular items in a rule, leaving the rest to take effect, but recommended complete disapproval here because the provisions in question were integral to the regulations.

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<sup>156</sup> Sudow interview, *supra* note 155.

<sup>157</sup> Young-Garfinkel interview, *supra* note 153. In addition, the general question of public access to presidential materials was to be examined by a commission created by title II of the statute, Public Documents Act §§ 201-203, 44 U.S.C. §§ 3315-3324 (Supp. V 1975).

<sup>158</sup> Young-Garfinkel interview, *supra* note 153.

<sup>159</sup> 40 Fed. Reg. 2670-71 (1975).

<sup>160</sup> *Hearings on the GSA Regulations Implementing the Presidential Records and Materials Preservation Act Before the Senate Comm. on Gov't Operations*, 94th Cong., 1st Sess. 1 (1975) [hereinafter cited as *1975 Hearings Before the Senate Comm. on Gov't Operations*].

<sup>161</sup> *Id.* at 7-8, 23-24.

<sup>162</sup> *Id.* at 24-25, 76, 344-48, 371-78.

<sup>163</sup> *Id.* at 70-72.

<sup>164</sup> S. REP. NO. 94-368, 94th Cong., 1st Sess. 1 (1975).

<sup>165</sup> *1975 Hearings Before the Senate Comm. on Gov't Operations*, *supra* note 160, at 70-72.

While a similar veto resolution was being considered in a House subcommittee,<sup>166</sup> the Senate vetoed the first set of proposed rules, primarily because they allowed the Administrator to override archivists' decisions on public access to the materials.<sup>167</sup> GSA thereupon revised its rules; a second set of proposed regulations was submitted to Congress on October 15, 1975, Administrator Sampson's last day in office. Under the revised rules, the Administrator was to be only one member of an access review board, the decision of which was to be final. Though Senate committee staff initially objected to the Administrator's presence on the board, after negotiations they acceded to GSA's position.<sup>168</sup> Because the House staff would also have preferred removal of the Administrator from the board, however, his role remained open for negotiation.<sup>169</sup> This episode suggests the potential for delay inherent in tripartite negotiation between an agency and the two houses of Congress.

In the case of the GSA regulations, however, the major obstacle to successful compromise was not the structure of the negotiations, but the political division between GSA and Congress. As an agency within the executive branch, GSA was responsible to a Republican President, while a Democratic majority controlled Congress. Because of the presence of Administrator Sampson, whose agreement with former President Nixon had prompted the legislation, Congress had been suspicious of GSA throughout the rulemaking proceedings. This suspicion grew to formidable proportions when GSA, ostensibly responding to doubts cast by a judicial decision upholding the constitutionality of the Act, tried to withdraw the second set of regulations before hearings in the House could begin.

The decision in question was *Nixon v. Administrator of General Services*,<sup>170</sup> in which a three-judge court rejected a claim

<sup>166</sup> *Hearings on GSA Regulations to Implement Title I of the Presidential Recordings and Materials Preservation Act Before the Subcomm. on Printing of the House Comm. on Administration*, 94th Cong., 1st Sess. (1975). These hearings characterized review as directed to the legality of the rules. *Id.* at 29.

<sup>167</sup> 121 CONG. REC. S15803-08 (daily ed. Sept. 11, 1975); Nobleman interview, *supra* note 154; Sudow interview, *supra* note 155. The House committee shared the Senate's concern over the role of the Administrator in public access decisions, H.R. REP. NO. 94-560, 94th Cong., 1st Sess. 4 (1975), and over GSA's ban on reproduction of tapes (which was meant to avoid commercial exploitation). The House Committee also had an interest not fully shared in the Senate regarding the adequacy of notice to be given to persons mentioned in the tapes before public access occurred. H.R. REP. NO. 94-560, 95th Cong., 1st Sess. 8-9 (1975); Davey interview, *supra* note 155; Sudow interview, *supra* note 155.

<sup>168</sup> Nobleman interview, *supra* note 154.

<sup>169</sup> Davey interview, *supra* note 155.

<sup>170</sup> 408 F. Supp. 321 (D.D.C. 1976) (three-judge court), *prob. juris. noted*, 45 U.S.L.W. 3399 (U.S. Nov. 29, 1976) (No. 75-1605). The decision did not reach



that the Act was unconstitutional on its face and refused to enjoin its enforcement. While the proposed regulations were not in issue, the court discussed in dictum some constitutional constraints on them. First, the court noted that the regulations should preserve the fundamental rights to privacy of Mr. Nixon and others, stating, however, that the proposed rules would provide "not insignificant" protection in this regard.<sup>171</sup> Second, it suggested that the provisions for referral of evidence of crime found in the presidential materials would warrant reexamination in light of the fourth amendment.<sup>172</sup> Although the court did not enjoin enforcement of the Act as a whole, it did enjoin GSA from processing or disposing of the materials pending appeal.

Reading the decision as throwing substantial constitutional doubt on its proposed regulations, GSA concluded that it should review them carefully.<sup>173</sup> Just prior to the scheduled House hearings, Administrator Eckerd attempted to withdraw the proposed rules from further congressional consideration.<sup>174</sup> The congressional reaction was one of anger. This was partly due to the staff's great investment of time in negotiations, which would be wasted if the rules were changed significantly.<sup>175</sup> It was also due to the suspicion and mistrust of the agency's motives that had existed from the outset. There was some feeling among the Senate staff that GSA's chief objective was to delay implementation of the statute to avoid disclosure of the details of the Watergate scandal until after the 1976 presidential election.<sup>176</sup> To the staff of both houses, the withdrawal attempt seemed unjustified and in bad faith.<sup>177</sup> The committees refused to recognize the withdrawal as valid because the statute made no provision for it and because delay would frustrate the statutory aim of providing the public with the truth about Watergate as quickly as possible.<sup>178</sup> The ensuing House hearings were bitter.<sup>179</sup>

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the issue of the constitutionality of the legislative veto provision. See 408 F. Supp. at 338 n.17.

<sup>171</sup> *Id.* at 335-37, 357-58 & n.52, 368 n.65.

<sup>172</sup> *Id.* at 366 & n.61.

<sup>173</sup> Young-Garfinkel interview, *supra* note 153. GSA had responsibility for assisting the Department of Justice in defending Mr. Nixon's lawsuit and was encouraged to reconsider its rules by the Department. *Id.*

<sup>174</sup> Letter from Jack Eckerd to Nelson Rockefeller (Jan. 21, 1976), *printed in* S. REP. NO. 94-748, 94th Cong., 2d Sess. 3 (1976).

<sup>175</sup> Nobleman interview, *supra* note 154; Sudow interview, *supra* note 155.

<sup>176</sup> Nobleman interview, *supra* note 154.

<sup>177</sup> *Id.*; Sudow interview, *supra* note 155.

<sup>178</sup> Letter from Abraham Ribicoff, John Brademas, and Charles Percy to Jack Eckerd (Feb. 5, 1976), *printed in* S. REP. NO. 94-748, 94th Cong., 2d Sess. 4-5 (1976). The withdrawal could produce actual delay in access, of course, only after removal of the court orders preventing GSA from processing the materials.

<sup>179</sup> Sudow interview, *supra* note 155.

In its report on the second set of proposed regulations, the Senate committee argued that the withdrawal was not effective and that the regulations would take effect unless disapproved.<sup>180</sup> The committee report said that the second set of regulations had resolved most of the problems found in the first set.<sup>181</sup> Nevertheless, the committee and GSA had failed to resolve problems involving the composition of the review board, the adequacy of notice to affected individuals prior to public access, the ban on reproduction of tapes, and certain other provisions.<sup>182</sup> As a result, the committee recommended passage of the veto resolution. On April 8, 1976, the Senate vetoed the second set of proposed regulations in seven particulars.<sup>183</sup>

Following this veto, GSA submitted what it regarded as a new, third set of proposed rules. Although the agency had made some concessions on principal issues, these were well short of surrender. Two meetings prior to submission of the rules between the Administrator and Representative Brademas and his staff had produced no changes.<sup>184</sup> On September 14, the House vetoed the third set of rules in six of the seven particulars which the Senate had vetoed in April.<sup>185</sup> After this third veto of its public access regulations, GSA awaited the convening of the Ninety-Fifth Congress for further submissions.

There are several important lessons to be learned from this brief history. First, despite numerous and intense negotiations, a legislative veto may only lead to deadlock and inaction where there are substantial political differences between Congress and the rulemaking agency. In such a case, the delegation of power to the agency becomes an excuse for inaction in Congress, probably making it more difficult for Congress to pass further legislation implementing its views. Thus a recalcitrant agency, by refusing to modify its rules to accord with the desire of Congress,

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<sup>180</sup> S. REP. NO. 94-748, 94th Cong., 2d Sess. 2 (1976).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 5.

<sup>183</sup> S. Res. 428, 94th Cong., 2d Sess., 122 CONG. REC. S5290-91 (daily ed. April 8, 1976).

<sup>184</sup> Davey interview, *supra* note 155; Sudow interview, *supra* note 155; Young-Garfinkel interview, *supra* note 153.

<sup>185</sup> H.R. Res. 1505, 122 CONG. REC. H10043-44 (Sept. 14, 1976). The report of the Committee on House Administration took the position that except for the vetoed items, GSA's rules had already taken effect. H. R. REP. NO. 94-1485, 94th Cong., 2d Sess. (1976). Since the rules could not be implemented without the vetoed provisions and since court orders had stayed implementation, the issue of the legality of their "withdrawal" became largely academic. In other circumstances, however, the attempt to use an "item veto" could leave the legal status of rules in the greatest doubt.

or by refusing to submit new rules after a veto, may bring the process of government to a halt and render the initial delegation ineffectual.

Second, judicial and legislative review of regulations may interact in complex ways. In *Nixon v. Administrator of General Services*, the court remarked on the Administrator's "dilemma" should Congress veto rules he thought necessary to provide adequate constitutional protection.<sup>186</sup> This dilemma suggests the possibility that the courts, in applying the strictures of the Constitution, will create a deadlock which the agency is powerless to break. Similar specters of impasse and legal confusion are raised by the controversy over the effectiveness of GSA's attempt to withdraw its rules from congressional consideration.<sup>187</sup>

Third, GSA's experience with Congress suggests the potential for mischief in the use of an item veto, which could nullify parts of a regulation, leaving the rest to take effect. Functionally, such a result is difficult to distinguish from the disclaimed power to rewrite agency rules without legislation. Further, it could have the practical disadvantage of leaving rules to be administered by an agency not in sympathy with their altered substance.<sup>188</sup> More important, the assertion of item veto power has a constitutional dimension. In most applications an item veto is a lesser intrusion into the administrative function than affirmative congressional amendment of rules without legislation. At the same time, the item veto may represent a more substantial intrusion into the administrative function than does the entire veto of a rule, because it interferes with the particular resolution of policy made by the agency.<sup>189</sup> Thus, if the legislative veto of an entire rule is seen as the limit of congressional power to act without legislation, the item veto may be unconstitutional.

### *E. The Federal Election Commission and Reform of Campaign Expenditures*

Interbranch political differences are not the only source of delay and deadlock in the application of a legislative veto. The

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<sup>186</sup> 408 F. Supp. at 338 n.17.

<sup>187</sup> This issue, however, could easily be settled by explicit statutory provisions permitting or prohibiting withdrawal.

<sup>188</sup> To a certain extent, the same disadvantage exists when a court invalidates sections of a rule on statutory or constitutional grounds. But an agency displeased with judicial nullification of part of a rule may rescind the rule entirely, if it prefers that option. Such a choice will not be freely available to an agency whose rule is subject to an item veto by Congress, whenever any further amendment (including rescission) is also subject to a veto.

<sup>189</sup> Although the veto of an entire rule may seem a greater use of congressional power, it leaves the agency free to recast the rule as it chooses.

same sort of impasse may occur when the agency is independent, especially when the agency's mandate is to perform a politically sensitive function.<sup>190</sup> An agency's formal independence from presidential control may, however, signal an increased dependence on Congress, and a lessened ability to resist congressional demands.<sup>191</sup> Especially when the function of the agency is to regulate conduct of the members of Congress themselves, the legislative veto may be a means of keeping the real power in the hands of Congress while creating the appearance of independent authority in the agency's hands. Congress may use the veto to determine the content of agency policy — or to frustrate statutory purposes entirely — while the political responsibility is lodged formally with the agency. Indeed, this seems to have been Congress' course of action with regard to the Federal Election Commission (FEC) and the establishment of rules for expenditures in presidential and congressional campaigns.

In response to the misuses of campaign contributions during the Watergate era, Congress established the FEC in 1974 to supervise and regulate the acquisition and use of campaign funds by candidates for federal office.<sup>192</sup> The agency was to proceed by requiring reports, investigating, bringing enforcement actions, and making rules pursuant to APA procedures.<sup>193</sup> Both presidential and congressional candidates were within the FEC's jurisdiction. Because of the breadth of its jurisdiction and the political sensitivity of its mission, the agency's authority was carefully circumscribed by checks and balances. Originally, it was to have been composed of two presidential appointees, two House appointees, and two Senate appointees, all to be confirmed by a majority of both houses. This composition was struck down in *Buckley v. Valeo*<sup>194</sup> as violative of the appointments clause of the Constitution.<sup>195</sup> The greatest surviving check on the Commission's power was a legislative veto provision. Proposed rules were to be transmitted to Congress with detailed explanation and justification and could be disapproved at any time within thirty

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<sup>190</sup> Of course, neither independent agencies nor those within the executive branch are divorced from politics. Theoretically, they differ in the greater freedom of the independent agencies from presidential control, but the practical differences in this regard can easily be overstated. See Robinson, *supra* note 1, at 950-52.

<sup>191</sup> See *id.* at 954-55.

<sup>192</sup> Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.). The FEC is established under 2 U.S.C. § 437c(a) (Supp. V 1975).

<sup>193</sup> For the rulemaking procedures, see 2 U.S.C. § 437d(a)(3) (Supp. V 1975).

<sup>194</sup> 424 U.S. 1 (1976).

<sup>195</sup> U.S. CONST. art. II, § 2, cl. 2. See 424 U.S. at 140-41; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 172 n.9 (1976).

legislative days.<sup>196</sup> Rules dealing with congressional campaigns could be disapproved only by the house affected, while those dealing with presidential campaigns could be disapproved by either house.

Although the inclusion of the legislative veto provisions was motivated partly by generalized distrust of the agencies and partly by a desire to insure the conformity of regulations to the statute, those responsible for them also expressed concern about possible control of Congress by the FEC.<sup>197</sup> In fact, under the veto provision, the control which some Congressmen had feared did not materialize. Even though the FEC, by the time of the *Buckley* decision, had produced a complete set of rules to implement the statute except for the criminal code provisions,<sup>198</sup> Congress demonstrated its ability to prevent proposed rules of which it disapproved from becoming effective. For instance, the FEC proposed that reports of contributions and expenditures be filed initially with it, with copies to be forwarded later to the Secretary of the Senate and the Clerk of the House.<sup>199</sup> Members of the House preferred that the reports be filed with Congress first, so that they could be reviewed for errors and illegalities and corrected by their authors.<sup>200</sup> After meetings between the FEC and House members and staff failed to resolve the issue,<sup>201</sup> the House vetoed the proposed rule on the ground that it conflicted with the statute.<sup>202</sup> Although the FEC had felt that the statute

<sup>196</sup> See 2 U.S.C. § 438(c)(2)-(3) (Supp. V 1975). The term legislative day was defined as any day when both houses are in session. There were similar congressional review provisions in the Presidential Election Campaign Fund Act. See 26 U.S.C. §§ 9009, 9039 (Supp. V 1975).

<sup>197</sup> Sudow interview, *supra* note 155.

<sup>198</sup> Interview with Dan Swillinger, Assistant General Counsel, Federal Election Commission, and Barry Shillitoe, Senior Staff Attorney, Office of the General Counsel, Federal Election Commission, in Washington, D.C. (May 28, 1976) [hereinafter cited as Swillinger-Shillitoe interview]. The Commission had extended the time for public comment on its proposed rules. 40 Fed. Reg. 28579 (1975); 121 CONG. REC. S11888 (daily ed. July 7, 1975).

<sup>199</sup> 40 Fed. Reg. 33169 (1975); 121 CONG. REC. H8185, S14944 (daily ed. Aug. 1, 1975).

<sup>200</sup> Interview with James F. Schoener, Minority Counsel, Subcomm. on Privileges and Elections, Senate Comm. on Rules and Administration, in Washington, D.C. (June 4, 1976); Sudow interview, *supra* note 155. For criticism of the rule in the House, see 121 CONG. REC. H10196 (daily ed. Oct. 22, 1975) (remarks of Rep. Hays); *id.* at H10188 (remarks of Rep. Brademas).

<sup>201</sup> See Clark v. Valeo, No. 76-1227, slip op. at 9 (D.D.C. Sept. 3, 1976) ("Stipulation as to Findings of Fact"), *certification of questions dismissed*, 45 U.S.L.W. 2349 (D.C. Cir. Jan. 21, 1977) (en banc), *aff'd mem. sub nom.* Clark v. Kimmitt, 45 U.S.L.W. 3789 (U.S. June 6, 1977).

<sup>202</sup> H.R. Res. 780, 94th Cong., 1st Sess., 121 CONG. REC. H10197-98 (daily ed. Oct. 22, 1975). The Act provided that reports and statements "shall be received by" the Clerk of the House and the Secretary of the Senate "as custodian for the

provided clear authority for its rule,<sup>203</sup> it soon capitulated; a revised rule requiring initial filing with Congress was submitted in December 1975<sup>204</sup> and survived review.

The other salient example of Congress' use of the veto power to protect its own political interests was its treatment of the rule concerning office accounts. As originally proposed by the agency, this rule provided that contributions received by an incumbent federal officeholder to defray the costs of office would be considered subject to the statutory limitations on contributions and expenditures.<sup>205</sup> The Senate committee which considered the rule claimed to support its evident objective—that expenditures which could influence elections but which might not be classifiable as ordinary campaign spending be identified and limited.<sup>206</sup> Nevertheless, its report criticized the rule for treating incumbent governors and other state officials, who were not subject to the statute, differently from incumbent Senators. The committee also criticized the proposed rule for limiting campaign expenditures too drastically.

In response to these criticisms, the FEC transmitted a revised regulation on office accounts.<sup>207</sup> Under this rule, expenditures during the last two years of an incumbent Senator's term and the last year of an incumbent Representative's term were rebuttably presumed to be campaign-related, while a reverse presumption applied to earlier spending. The committee, however, did not think that these provisions removed the inequity between state and federal incumbents. Moreover, since the statute did not explicitly authorize limits on office funds, the committee felt that the FEC "may have exceeded" its statutory authority.<sup>208</sup> Thus, while claiming that a rule drafted to treat every officeholder equally would be acceptable, the committee recommended rejection of the proposed rule, and the Senate complied.<sup>209</sup>

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Commission." 2 U.S.C. § 438(d) (Supp. V 1975). See generally 121 CONG. REC. H10188 (daily ed. Oct. 22, 1975) (remarks of Rep. Brademas).

<sup>203</sup> Swillinger-Shillitoe interview, *supra* note 198. The justification for the rule which was transmitted to Congress cited 2 U.S.C. § 437d(a) (Supp. V 1975), which authorized the Commission to order reports to be made by any person.

<sup>204</sup> H.R. Doc. No. 94-314, 94th Cong., 1st Sess. 1 (1975).

<sup>205</sup> 40 Fed. Reg. 32951 (1975); 121 CONG. REC. S14944 (daily ed. Aug. 1, 1975); 121 CONG. REC. H8046 (daily ed. July 31, 1975).

<sup>206</sup> S. REP. No. 94-409, 94th Cong., 1st Sess. 2 (1975).

<sup>207</sup> *Id.* The FEC explained that the changes were based upon testimony (including that of a Senator) at hearings which it had held after transmitting the proposed rule pursuant to congressional request. *Id.* at 11-12.

<sup>208</sup> *Id.* at 3. Although § 439(a) of the Act requires that money received to help defray activities of a federal officeholder must be disclosed, it is silent on limits.

<sup>209</sup> S. Res. 275, 94th Cong., 1st Sess. (1975).

Not content with a veto of the regulations, the committee expressed reluctance to reject a considered proposal without furnishing some guidelines for redrafting. Its report included recommendations, cast in language suitable for embodiment in a rule, for provisions to "equalize" the impact of the rules.<sup>210</sup> In this way, the committee hoped to use the legislative veto to amend agency rules indirectly without legislation. Another Senate committee had employed the same tactic in attempting to modify the GSA's public access rules, with only limited success.<sup>211</sup>

After the veto, the FEC submitted a revised version of the regulation,<sup>212</sup> explaining that it reflected the Senate report, the Senate debate,<sup>213</sup> and subsequent public comments. The rule conformed to the Senate's wishes in extending coverage to all federal officeholders<sup>214</sup> and to state officeholders on their becoming candidates for federal office. But it retained limits on expenditures from a federal incumbent's office account in the last year of a term, thus testing the Senate's willingness to allow any limits at all.<sup>215</sup> To support its interpretation of the statute as including funds contributed to an office account within the definition of political contributions subject to limitation, the agency cited the tax treatment of those funds as contributions and the legislative history of the tax statutes involved. To support its judgments on policy, particularly that concerning the one-year accounting period for federal incumbents, the FEC relied on its public proceedings, including the testimony of two Senators.

The issue was temporarily rendered moot when the *Buckley* decision eviscerated the statute. Congress responded with statutory amendments to reconstitute the Commission,<sup>216</sup> and the

<sup>210</sup> S. REP. No. 94-109, 94th Cong., 1st Sess. 3-4 (1975).

<sup>211</sup> See p. 1399 *supra*.

<sup>212</sup> H.R. Doc. No. 94-313, 94th Cong., 1st Sess. 1, 4 (1975).

<sup>213</sup> 121 CONG. REC. S17873 (daily ed. Oct. 8, 1975).

<sup>214</sup> The President and Vice President, Senators, Representatives, and Delegates and Resident Commissioners to Congress were embraced by this term. H.R. Doc. No. 94-313, 94th Cong., 1st Sess. 2 (1975).

<sup>215</sup> The Senate committee report had been ambiguous on the point. See S. REP. No. 94-409, 94th Cong., 1st Sess. 3 (1975).

<sup>216</sup> Act of May 11, 1976, Pub. L. No. 94-283, 90 Stat. 475 (to be codified in scattered sections in 2, 26 U.S.C.). The amendments contained provisions to expedite disposition of veto resolutions. *Id.* § 110(b)(1) (amending 2 U.S.C. § 438(c)(2) (Supp. V 1975)). They also attempted to resolve the issue of item vetoes by defining the term "rule" as "a provision or series of interrelated provisions stating a single separable rule of law." *Id.* § 110(b)(2) (amending 2 U.S.C. § 438(c) (Supp. V 1975)). The conference report explained that the provision was not meant to give Congress the power to rewrite proposed regulations "by disapproving a particular word, phrase, or sentence," but only to give each house the power to determine which provisions were distinct enough to be disapproved. H.R. REP. No. 94-1057, 94th Cong., 2d Sess. 51-52 (1976). In

agency proposed a new set of regulations.<sup>217</sup> Sobered by its previous experience, it engaged in extensive public procedures before issuing final regulations and submitting them to Congress. Among these procedures were wide informal dissemination of the proposed rules, informational hearings in various regions of the nation, and four days of formal public hearings producing a 400-page transcript.<sup>218</sup> In addition, members of the FEC staff met with staff of the House and Senate committees concerned with the rules, and adopted some of the changes suggested by the congressional staff.<sup>219</sup>

Despite the FEC's careful preparation, or perhaps because of it, the proposed regulations were again negated by Congress. This time, however, there was no open vote on a veto resolution in one of the houses of Congress, but a legislative version of the "pocket veto."<sup>220</sup> When the Ninety-Fourth Congress adjourned *sine die* on October 1, 1976, the FEC's rules had lain before it for only twenty-eight of the required thirty legislative days. Congress had rejected requests by the Commission that it remain in session for two more days so that the rules could take effect before the 1976 elections;<sup>221</sup> thus the rules were left in limbo. The Commission issued a statement, however, warning that it would treat the lapsed rules as interpretive rules for enforcement purposes and would expect compliance with them during the 1976 elections.<sup>222</sup>

Two lessons can be learned from this history of frustration in statutory implementation.<sup>223</sup> First, Congress can employ all

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conference, Chairman Hays of the Committee on House Administration had complained that the agency was trying to combine a series of unrelated matters, so that Congress would have to accept all or nothing. Conference Transcript, April 8, 1976, at 87-89. The amendment does not speak, however, to the practice of explicit suggestions for agency amendments to rules which would make these rules acceptable to Congress.

<sup>217</sup> 41 Fed. Reg. 21571, 21591 (1976). These included a further revision of the office accounts rule in minor particulars.

<sup>218</sup> See *Clark v. Valeo*, No. 76-1227, slip op. at 11-18 (D.D.C. Sept. 3, 1976) ("Stipulation as to Findings of Fact"), *certification of questions dismissed*, 45 U.S.L.W. 2349 (D.C. Cir. Jan. 21, 1977) (en banc), *aff'd mem. sub nom. Clark v. Kimmitt*, 45 U.S.L.W. 3789 (U.S. June 6, 1977).

<sup>219</sup> *Clark v. Valeo*, slip op. at 15-17. One of the requested changes accepted by the FEC concerned a change in filing practices for office account receipts.

<sup>220</sup> See *Clark v. Valeo*, No. 76-1227, slip op. at 2 n.2 (D.C. Cir. Jan. 21, 1977) (MacKinnon, J., dissenting), *digested at* 45 U.S.L.W. 2349 (1977), *aff'd mem. sub nom. Clark v. Kimmitt*, 45 U.S.L.W. 3789 (U.S. June 6, 1977).

<sup>221</sup> *Washington Post*, Oct. 2, 1976, § A, at 1, col. 1; Letter from FEC Chairman Thomson and Vice Chairman Harris to Speaker of the House Albert (Sept. 29, 1976).

<sup>222</sup> Statement of the Federal Election Commission (Oct. 5, 1976).

<sup>223</sup> Because of the intervention of the *Buckley* decision, Congress and the FEC are not solely chargeable with the delays in implementing the 1974 statute.



the provisions of a legislative veto, including the time limit for its exercise, to influence or delay the implementation of a statute. And in doing so, Congress may be able to avoid taking the political responsibility for its actions. Once an "independent" agency is created, it is the natural focus for public criticism. To the extent that committee suggestions on the content of acceptable rules or legislative vetoes of proposed rules receive less publicity than the passage of the implementing statute, Congress can hide behind the structure it has created. In the case of the "pocket veto," Congress can achieve its political objectives merely by inaction, as it did in evading a vote on the FEC's final office accounts rule.

The second lesson is that public comment at the agency level, even combined with the pressures of interest groups on Congress, may not be sufficient to overcome congressional self-interest. In presenting its first office accounts rule to Congress before the *Buckley* decision, the FEC had been confident that pressure on Congress would force acceptance of the rule.<sup>224</sup> This confidence was misplaced, since sufficient pressure did not materialize. The FEC's later attempt to build a strong record of public comment for its post-*Buckley* set of rules was unavailing because Congress found a way to work its will indirectly. This history thus demonstrates that, where procedures of low public visibility operate parallel to procedures for open public participation, the former can be used to subvert the latter.

### III. AN APPRAISAL OF THE EXPERIENCE TO DATE

#### A. *The Negotiation Process*

Although the administrative programs in the case histories were quite different, they had certain common characteristics. Each was in an area of considerable public concern, if not controversy. In all the programs except that administered by the GSA, there was repeated major legislation during the period under study. Congress could have used such legislation to resolve issues that had emerged in rulemaking programs subject to legislative vetoes.<sup>225</sup> Whether for reasons of indecision or deadlock,

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But still further delays impended as this history closed. Although the Commission planned to resubmit its rules after the convening of the 95th Congress, it concluded that it could not count the 28 legislative days already passed for purposes of the resubmission. Letter from Daniel J. Swillinger, Asst. General Counsel, FEC, to H. Bruff (Nov. 8, 1976).

<sup>224</sup> Swillinger-Shillitoe interview, *supra* note 198.

<sup>225</sup> Congress availed itself of this opportunity in one major instance in the case studies. The first energy statute, the EPAA, did not provide guidance on the important issue of the timing of decontrol, see 15 U.S.C. § 753 (Supp. III

however, it ordinarily chose to leave these issues open in the revised statutes<sup>226</sup> and to rely on the legislative veto mechanism to maintain control over agency policy initiatives. Therefore, the process of review was an active one, not one marked by congressional inattention to forthcoming rules.

Given such conditions, it is not surprising that the veto power gave rise to negotiation and compromise over the substance of rules between the agencies and the congressional oversight committees. Significant negotiation occurred in all five programs despite their disparate natures, and it was often intense.<sup>227</sup> Since the statutes generally created new programs requiring broad implementing regulations, the initial focus of the negotiations was correspondingly broad. As the negotiations progressed, however, the issues in controversy were reduced to a small number for ultimate consideration by Congress. This narrowing process gave the committees and especially their staff substantial power to define the issues that would be likely to receive the attention of Congress as a whole.

Since the agencies demonstrated varying abilities to resist congressional demands for changes in the substance of rules, it cannot be said that the committee staffs dictated changes to the agencies. On two occasions, committees did try to amend agency rules indirectly through the suggestion of acceptable language in their reports.<sup>228</sup> The agencies did not accept these suggestions entirely, however, even at the cost of repeated vetoes.<sup>229</sup> Although Congress sometimes reserved the right to make item vetoes,<sup>230</sup> it did not attempt to use them to delete words or clauses from a regulation and leave it in effect despite agency objections.<sup>231</sup> When

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1973), and vetoes resulted. The EPCA of 1975 provided a schedule. 15 U.S.C. § 757 (Supp. V 1975).

<sup>226</sup> For example, HEW's broad title IX delegation was not clarified by the amendments adding legislative veto authority. See p. 1389 *supra*.

<sup>227</sup> The FEA seems to have had the least negotiation; the reduced role of the committee in the review of its rules, due partly to the short review period, led it to lobby Congress directly. For the most intense negotiations, see pp. 1383-84, 1386 *supra* (OE); pp. 1398-99 *supra* (GSA). See also p. 1389 *supra* (title IX); pp. 1391, 1393 & note 109 *supra* (FEA); p. 1408 *supra* (FEC).

<sup>228</sup> See p. 1399 *supra* (GSA); pp. 1406-07 *supra* (FEC).

<sup>229</sup> GSA suffered more vetoes after refusing to accede to congressional demands. See p. 1402 *supra*. The FEC suffered the "pocket veto" that occurred at the adjournment of the 94th Congress. See pp. 1407-08 *supra*.

<sup>230</sup> See p. 1399 *supra*.

<sup>231</sup> The closest example of such an attempt was Congress' item vetoes of GSA's public access regulations, but these would have prevented implementation of the program were it not already stayed by judicial order. See pp. 1399, 1401-02 & note 185 *supra*.

there was really basic disagreement between Congress and the agency, the result was impasse.

Still, the negotiation process between the committees and the agencies always resulted in some compromise, if not agreement. One reason for compromise may have been doubts concerning the constitutionality of veto provisions, which deterred Congress from issuing ultimatums to the agencies.<sup>232</sup> The major determinant of the substantive effect of the veto provisions, however, seems to have been the amount of bargaining power the particular agency had with Congress. The fact that the strength of federal agencies vis-à-vis Congress varies suggests that a general veto provision might have a greater substantive impact on some agencies than on others and that this impact might depend partly on factors extrinsic to the veto process. In the case studies, the GSA showed the greatest resistance to congressional pressure because its position on public access to the Nixon presidential materials was more conservative than that of Congress, so that it did not have a strong desire to obtain acceptance of congressionally modified access rules. And GSA was buttressed on some of the issues by pressure from the courts to protect privacy interests.<sup>233</sup> In a middle range of bargaining power were the FEA and HEW: the FEA had the advantages of expertise on technical rules, a reduced committee role, and a short review period, while HEW could rely on popular pressure to keep its grant programs functioning to moderate congressional demands.<sup>234</sup> The FEC, having the least bargaining power of these agencies because of strong congressional self-interest in its rules, has been unable to resist Congress with much success.

Negotiations are also apparently affected by whether the particular agency program requires periodic or single promulgation of rules. For example, the cyclical nature of the federal grant process affected the Office of Education's strategy, and probably its success in negotiating as well. Because the issues could be temporarily compromised, to be revived the next year, the OE could offer the committees some concessions each year, and persuade them to defer others. In contrast, where rules were to be reviewed only once, negotiations were much more likely to fail. When a veto did occur, it was often followed by another veto of a modified rule that remained unacceptable to Congress.<sup>235</sup>

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<sup>232</sup> See, e.g., p. 1387 & note 74 *supra*.

<sup>233</sup> See pp. 1401-02 *supra*.

<sup>234</sup> See p. 1385 *supra*.

<sup>235</sup> For example, Congress simply refused to accept the FEA's decontrol program until after the EPCA of 1975, see pp. 1391-93 *supra*, and the GSA suffered repeated vetoes on issues under negotiation since the outset of the public access program, see pp. 1398-402 *supra*.

On the basis of the overall success of the negotiations, the case studies can be divided into two groups. All of HEW's programs and the FEA's oil decontrol program were eventually implemented, despite the controversial nature of HEW's title IX rule and Congress' initial refusal to countenance oil decontrol. On the other hand, the development of GSA's rules for public access to President Nixon's records and the FEC's regulations for office accounts has been hindered by such disagreement, obstruction, and acrimony that neither set of rules is yet in effect. Where negotiation was successful, the statute applied to persons and institutions outside of government — students, educational grant recipients, and producers and consumers of oil. The unsuccessful programs, on the other hand, attempted to regulate the internal affairs of a branch of government in areas of heightened political sensitivity.

The failure of the latter group of programs is not difficult to explain. Whenever agencies attempt to regulate the internal affairs of a branch of government, the interests evoked by the rulemaking process may be politically irreconcilable for two reasons. First, the self-interest of the regulated branch may be directly in issue, and the strength of that self-interest may preclude compromise. Thus, it is not surprising that GSA refused to propose rules which it felt would threaten the autonomy of the executive branch. Nor is it difficult to understand Congress' refusal to accept rules which would make its members' campaigns financially more difficult and politically more risky. Second, in programs regulating internal governmental matters, there may not be enough outside pressure by directly affected interest groups to bolster the agency and break the deadlock.<sup>236</sup>

### *B. Public Participation and Interest Group Influence*

A vital aspect of rulemaking is the opportunity for participation by all interested parties through notice-and-comment proceedings. The presence of a legislative veto could reduce public participation before the agencies by shifting the focus of attention to congressional review. But in the case studies, public participation before the agencies continued unabated.<sup>237</sup> Two reasons for this are apparent. First, the initial formulation of rules by the agency remains a critical stage in determining their substance.

<sup>236</sup> See, e.g., p. 1409 *supra*.

<sup>237</sup> The sole exception was GSA, which did not provide for public participation in its rulemaking, see p. 1399 & note 157 *supra*, but which did provide a limited substitute in the form of selective consultation with those knowledgeable about presidential papers. For HEW, there seems to have been no diminution in public participation after the veto's application. Interview with Theodore Sky, Assistant General Counsel for Education, HEW, in Washington, D.C. (May 19, 1976).

Public pressure at this stage may prove dispositive if the resulting rule does not awaken congressional interest. Second, even if Congress does stir, a record of considerable public interest and comment can buttress the agency in its negotiations with congressional committees, counterbalancing competing lobbying pressures.<sup>238</sup> This suggests, however, that public participation before the agencies in programs subject to the veto might eventually shift its emphasis from reasoned debate over policy to a showing of political strength meant to impress both the agency and Congress.

Although public comment remained a vital and effective part of the rulemaking process in the case studies, there were indications that the veto machinery may have created opportunities for circumvention of public participation. In certain subtle ways, the presence of congressional review allowed the influence of special interest groups in Congress to affect the substance of rules outside the comment process. When an agency knew of the influence and was aware of the desires of the interest groups, it sometimes attempted to avoid unfavorable review by drafting its rule to satisfy those desires. For example, the FEA took this precaution in attempting to appease the small refiners in its formulation of Energy Action No. 2.<sup>239</sup> Even when the agency did not try to anticipate influence in the hope of less stringent review, the influence, if real, could make itself felt in negotiations with the oversight committee. For instance, pressure directed through the committees helped to force increases in the asset reserves for home and farm equity under HEW's basic grants programs<sup>240</sup> and to insure the inclusion of self-evaluation requirements desired by women's organizations under title IX.<sup>241</sup>

Both of the practices observed in these studies — agency speculation on the effects of pressure on Congress and the application of actual pressure on Congress during negotiations with the agency — contravene the purposes of public comment. The essence of a notice-and-comment proceeding is a public forum in which all interested parties participate openly and on equal footing. Yet an agency's internal drafting decisions and its negotiations with congressional committees are of low visibility,<sup>242</sup> so that both the existence and the effect of special influence are likely to be off the record. The resultant secrecy violates two of the

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<sup>238</sup> Such use of public comment by the agency as a source of bargaining power was evident during review of the title IX regulations, *see* pp. 1389–90 *supra*, and the FEC's office account rules, *see* pp. 1408–09 *supra*.

<sup>239</sup> *See* p. 1394 *supra*.

<sup>240</sup> *See* pp. 1384–85 *supra*.

<sup>241</sup> *See* pp. 1389–90 *supra*.

<sup>242</sup> Recently, however, HEW has made some efforts to open up its drafting process. *See* 41 Fed. Reg. 34811 (1976).

fundamental standards for informal rulemaking: reasoned decisionmaking based on a record and the opportunity for public participants to contest opposing presentations.<sup>243</sup> Moreover, when an agency seeks support for one of its rules from an interest group, that group may later demand a quid pro quo, such as abandonment of another proposed rulemaking. Not only would such a tradeoff violate the canons of open rulemaking, but it also might escape congressional scrutiny.

In addition to destroying the openness of rulemaking, the practices observed here violate the ideal of equal access to the rulemaking process. Not all interested parties have the resources both to participate in the public comment proceedings and to lobby the committees effectively in the review process. Those groups having greater resources or prior influence with congressional committees have an additional chance to affect agency action not available to those without such resources or influence.<sup>244</sup> To the extent that the negotiation phase of rulemaking subject to legislative veto authority is determinative, this additional chance constitutes an important special advantage for the few. Indeed, the dynamics of the review process may make a negotiated rule substantially harder to change through subsequent public comment. Once time and energy have been spent in negotiations between an agency and Congress, both the agency and the committee may be reluctant to revise the rules that have been thrashed out.<sup>245</sup>

### C. Time Constraints and Delay

Because the legislative veto involves the review of ongoing agency programs rather than the promulgation of legislation, the implementing statutes have required that review take place, if at all, within a limited period of time. While in the case studies an agency's promulgation of rules was ordinarily a slow process, including both comprehensive public comment proceedings and extended internal deliberations, consideration at the review stage was necessarily more abbreviated. Congress had at most several months to review rules that may have taken the agency years to promulgate. The resulting time pressures on Congress significantly affected the quality and thoroughness of congressional review.<sup>246</sup>

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<sup>243</sup> See pp. 1433-37 *infra*.

<sup>244</sup> For examples in the case studies of such a second chance to affect a rule, see pp. 1389-90 *supra* (title IX); pp. 1393, 1394 *supra* (FEA).

<sup>245</sup> See p. 1385 & note 59 *supra* (OE); p. 1401 *supra* (GSA).

<sup>246</sup> Even if the review period is adequate for thorough congressional scrutiny, in practice Congress is likely to wait until the last minute to undertake formal action on a rule, especially a controversial one. Consequently, extending the

Often, the agency's supporting materials were too voluminous to send to Congress; considerable selection was necessary.<sup>247</sup> Hence, agency explanations and justifications amounted to position papers rather than careful explorations of policy alternatives.<sup>248</sup> Under these circumstances, the review process was necessarily an attempt by Congress to second-guess the agency without the benefit of all the facts the agency had developed. The capacity of Congress to exercise critical review of submissions supporting rules varied not only according to whether the subject was technical,<sup>249</sup> but also according to the time required to obtain critical analysis. For example, FEA submissions amenable to computer evaluation were more readily reviewable than those dependent upon empirical investigation.

Aside from time constraints, another significant restriction on the thoroughness of review was the heavy workload of the members and staff of Congress. At times, work on legislation pending before the committees entirely precluded review of potentially controversial rules.<sup>250</sup> More often, the work of the review process, much of which fell to the congressional staff, placed a severe burden on Congress' resources. The negotiations observed in our case studies between the staffs of the committees and the agencies imposed a greater burden on the congressional staff than much legislation. Moreover, there is some evidence that even with the present sporadic application of veto authority, an increase in staff alone would not have allowed the limited number of Congressmen to discharge their review functions effectively.<sup>251</sup>

As a consequence of Congress' heavy workload, even the committee members were not normally as familiar with a rule under review as agency personnel, or as a reviewing court would be.<sup>252</sup> This suggests that technical rules may not be the only ones likely to cause substantial difficulties in congressional review. Given the complexity characteristic of much administrative regulation,

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review period does not necessarily relieve congressional haste, as events surrounding review of HEW's title IX regulations demonstrate. See pp. 1389-90 *supra*.

<sup>247</sup> See, e.g., p. 1389 & note 87 *supra* (title IX); pp. 1394-95 *supra* (FEA); p. 1408 *supra* (FEC).

<sup>248</sup> See pp. 1394-95 *supra* (FEA); p. 1407 *supra* (FEC). Indeed, one way an agency can forestall critical review of its rules by Congress is by defining the issues and drawing attention away from alternatives.

<sup>249</sup> Compare p. 1384 *supra* (OE) with p. 1395 *supra* (FEA).

<sup>250</sup> See notes 55, 56 *supra* (OE).

<sup>251</sup> Congressional staff perform much of Congress' oversight function at present, in the absence of veto provisions. 2 STUDY ON FEDERAL REGULATION, *supra* note 35, at 17. It does not seem wise to increase existing dependence on them.

<sup>252</sup> See, e.g., *Hearings on the GSA Regulations Implementing the Presidential Records and Materials Preservation Act Before the Senate Comm. on Gov't Operations*, 94th Cong., 1st Sess. 25 (1975).

even legal issues — normally well within the expertise of Congressmen — may require substantial amounts of time and effort to resolve. The need to commit this time and effort may in practice place complex legal issues beyond the capacity of Congress to review.<sup>253</sup>

While the time limits for review may test Congress' ability to review rules carefully, the process of review itself may delay or disrupt an agency's programs. In the case studies, the disadvantages of delay caused merely by having rules lie before Congress varied substantially. The greatest disruption to an agency's program occasioned by the very existence of a review requirement was the lapse of the FEC's rules for the 1976 election, due to the adjournment of the Ninety-Fourth Congress before the review period expired. This incident illustrated how congressional recesses or adjournments can increase delays substantially if the period for review is defined in terms of legislative rather than calendar days. For HEW, whose grant programs were subject to review periods based either on calendar deadlines or on legislative days, delay was a pervasive problem because the agency had to complete the rulemaking process within both statutory deadlines and the constraints of the fiscal year. Delay seemed to be less of a problem for the FEA, because its rules were subject to very short review periods. There was some delay, however, from FEA hesitation to submit a completed rule to Congress while it awaited a politically propitious moment to do so. This kind of delay might have important costs, but they are likely to remain unseen.

Although shortening the review period reduces delay inherent in the review process, a long review period may produce prolonged uncertainty regarding a rule's fate. For example, all three vetoes of the GSA rules occurred from five to six months after their submission. Similar uncertainty may be produced by protracted informal negotiations between the agency and congressional committees. When review does occur, as GSA's experience also demonstrates, there arise possibilities for indefinite interruptions in agency programs, with no effective rules in the interim.

One means of ameliorating delay problems is suggested by HEW's short-lived practice of submitting proposed rather than final rules to Congress, so that the periods for notice and comment and for congressional review would run concurrently.<sup>254</sup> HEW's

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<sup>253</sup> Lack of time is not the only factor impairing the quality of review, however. Congress has not excelled in its function of general oversight of agency action, *see generally* 2 STUDY ON FEDERAL REGULATION, *supra* note 35, and it has yet to decide exactly how it should review particular agency rules under a legislative veto provision. *See* pp. 1429-30 *infra*.

<sup>254</sup> *See* p. 1388 *supra* (OE).



experience revealed several disadvantages of the practice, however. To the extent that the agency changes its rule other than to reflect congressional views, the procedure seems a waste of time for Congress. Also, the agency's fear of renewed congressional review could deter rule changes in response to public comment.<sup>255</sup> On the other hand, if the agency believes that congressional approval is forthcoming, it will be tempted to conduct the public comment proceeding merely as a formality to support rules that it already plans to adopt. HEW's efforts to compress the review period suggest the further possibility that time pressure may deter agencies from employing public participation in rulemaking. Although reduction of public comment periods was usually forbidden by statute in the case studies, there is no guarantee that agencies lacking such constraints would not curtail public comment. In any event, the presence of a review period is a deterrent to the common agency practice of extending public comment periods beyond statutory minimums.<sup>256</sup>

#### *D. Political Accountability*

A primary purpose of the legislative veto is to increase the political accountability of administrative regulation. In theory, the veto power insures that agency rulemaking is consistent with the intent of Congress. Experience under existing vetoes, however, reveals that political accountability is likely to be attenuated in practice. Although the veto power is meant to be exercised by one or both of the houses of Congress, floor votes of an entire house on the merits of a veto resolution were rather infrequent. Most of the effective review occurred at the committee or subcommittee level, often focusing on the concerns of a single chairman or member.<sup>257</sup> Indeed, much settlement of policy occurred in behind-the-scenes negotiations between the staffs of the

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<sup>255</sup> HEW planned to resubmit rules whenever a "substantial" change occurred after congressional review. See note 77 *supra*.

<sup>256</sup> Congress could minimize delay problems by means of a simple procedural device, such as a statutory provision that rules would take effect after the usual 30-day period absent an action to trigger review by a congressional committee. In fact, this is the British practice. See, e.g., J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 90-92 (5th ed. 1973). Such a rule could confine delay to rules actually given some scrutiny by Congress. It would not resolve, however, the problem of policy impasse following the exercise of a veto, as occurred with GSA's rules.

<sup>257</sup> Thus, a veto provision tends to increase an already considerable congressional dependence on committees both for the substance of legislation, HOUSE SELECT COMM. ON COMMITTEES, REPORT ON COMMITTEE REFORM AMENDMENTS OF 1974, H.R. REP. NO. 93-916, 93d Cong., 2d Sess., pt. 2, at 9-12 (1974), and for oversight, Robinson, *supra* note 1, at 954-55.

committees and the agencies.<sup>258</sup> There were even signs that committees engaging in relatively intense negotiations with an agency tended to keep matters within committee in order to preserve their negotiating stance, although the issues might merit floor review.<sup>259</sup> Under these circumstances, the power of review was really exercised by congressional committees and their staffs, rather than by either house as a whole. By reducing the number of issues reaching Congress as a whole through negotiations, the committees and their staff could thus settle policy issues in a way in which the house as a whole might not, were it asked to decide.

Despite recent attempts in Congress to broaden the perspective and makeup of its committees,<sup>260</sup> they inevitably are bodies of relatively narrow composition compared to Congress as a whole.<sup>261</sup> Each member of a committee is responsible only to his or her own constituency, and the total constituency of any one committee is far from national in scope. Moreover, the "stacking" of oversight committees with members favorable to an agency or to the group it regulates is not unknown;<sup>262</sup> this practice can forge agency-committee alliances which reinforce the capture of agencies by the interest groups they purport to regulate.<sup>263</sup> Whenever it does not report a veto resolution to the floor of a house, the committee, with its narrow constituency, wields all of Congress' review power. In such a case, the ideal of *The Federalist*<sup>264</sup> — national responsibility to a national constituency — is not achieved. Furthermore, if committee negotiations receive no national publicity, as has so far been the case, those few members exercising the power of Congress may not be called to account even by their own constituencies.

This committee-based review may result in the effective amendment of statutes, whether or not those involved realize it. For a process of negotiation, once initiated, is likely to take on a life of its own. Thus, in the case studies a committee and an agency seemed sometimes to find themselves drifting over time

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<sup>258</sup> These negotiations gave the committee staffs a considerable amount of real power to affect policy because staff members could often determine which issues would reach the attention of members of Congress.

<sup>259</sup> See p. 1385 *supra* (OE).

<sup>260</sup> See, e.g., 123 CONG. REC. S2276-316 (daily ed. Feb. 4, 1977). See also Adams, *supra* note 2, at 539 (1976). See generally H.R. REP. NO. 93-916, *supra* note 257; *Committee Organization in the House: Hearings Before the House Select Comm. on Committees*, 93d Cong., 1st Sess. (1973).

<sup>261</sup> See H. FRIENDLY, *supra* note 1, at 169-70; Watson, *supra* note 6, at 1054.

<sup>262</sup> See 2 STUDY ON FEDERAL REGULATION, *supra* note 35, at 109.

<sup>263</sup> See *id.*

<sup>264</sup> THE FEDERALIST NO. 10 (J. Madison).

to a position having no necessary relationship to the original statutory intent.<sup>265</sup>

Although the ripening of informal negotiations into committee hearings might have been expected to increase the political accountability of the review process, in fact its effects were not striking. Hearings provided some visibility for the issues discussed, but they were not always effective in awakening the attention of members of Congress outside the oversight committee. As reactive rather than creative measures, veto resolutions both deserved and received less attention than legislation. Moreover, when a change wrought by a committee at the instance of an interest group had only a diffuse impact on the public at large, the classical logic of lobbying dictated that the change would evoke little outcry.<sup>266</sup>

One other factor affected the political accountability of the veto process. In all the cases studied except that of the FEA, Congressmen characterized their role as limited to reviewing the legality of the agency's rule, that is, its conformity with statutory purpose. Nevertheless, in all cases congressional review was primarily based on policy. The reason is not hard to divine: the traditional and constitutional role of Congress is the formulation and alteration of policy. Moreover, a major reason for imposition of veto authority has been the indecision of Congress on policy issues, and a desire to check the agency's later resolution of them.<sup>267</sup> Members of Congress are unaccustomed, and the institution is ill-equipped, to make a restrained and judicious examination of a rule's subservience to statutory purpose. Yet Congress' profession, despite these institutional realities, to review rules only for conformity with statutory intent has serious implications for the political accountability of the veto process. Review on the putative basis of legality implies that Congress is forming no new policy but is merely making sure that the conditions of the original delegation are met. The result is that veto resolutions receive less public visibility and less attention from members of Congress outside the oversight committees than, as policy decisions, they deserve.

In the case studies, congressional review had either of two

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<sup>265</sup> The OE's basic educational grants program, GSA's public access rules, and the FEC's office accounts rule seem the best examples of this.

<sup>266</sup> This was the case in the HEW basic grants program, in which the increase in exemptions for home and farm equity and the consequent reduction in funding for students whose families had no substantial real assets was not perceptible enough to evoke sufficient complaint to attract the attention of Congress. See pp. 1384-85 *supra*.

<sup>267</sup> This purpose of veto provisions is incompatible with legality review, since a statutory standard against which to measure the agency action will be lacking.

results. One was successful compromise between the committees and the agency on the content of the rules, as was normally the case with HEW. The other was the failure of negotiations and a veto, with the likelihood of impasse for an indefinite period. In either case, Congress did not form policy as a whole and in a politically accountable way. Instead, either a committee formed policy in conjunction with the agency, or one house of Congress rejected the policy made by the agency, requiring the agency to try again. In the former case, the negotiations were not publicized and the power of Congress was exercised by a few. In the latter case, because veto resolutions were negative in effect and because review was often explained as limited to the consistency of a rule with an earlier statute, a Congressman's vote did not seem to carry the responsibility of a vote on legislation. In both cases, the accountability of Congress to the people fell short of the ideal of national responsibility to a national constituency.

*E. The Relationship of the Agencies and Congress in  
the Absence of Veto Provisions*

Most of the characteristics of the legislative veto process found in the case studies do not typify the current relationship between Congress and the agencies in the absence of veto authority. The principal difference is the negotiating process between congressional committee staffs and agencies, which seldom occurs in the absence of a veto provision.<sup>268</sup> Indeed, the chief effect of the veto power seems to be an increase in the power of congressional committees and in the practice of negotiating over the substance of rules. It is difficult to be precise here, because many of the differences are matters of degree and the phenomena under discussion are of low visibility. Consequently much existing information is anecdotal.<sup>269</sup> Nevertheless, the case studies confirm that the legislative veto power significantly alters the working relationship between Congress and the agencies.

In the absence of veto power, congressional committees have occasionally paid close attention to the substance of particular agency rules, either in their oversight capacity or during the appropriations process. Perhaps the most vivid example is that

<sup>268</sup> The case studies unearthed instances of negotiation by HEW staff and committee staff in programs without veto provisions, *see* pp. 1386, 1389 *supra*. But all of them occurred after the OE's basic grants program, which has a veto provision, had initiated negotiations between HEW and the committees.

<sup>269</sup> For instance, the Chairman of the House Commerce Committee once spent many hours with the Chairman of the FCC in "working over" the cable television regulations before their issuance. *See* K. DAVIS, *DISCRETIONARY JUSTICE* 148 (1971). The literature on congressional oversight of the agencies does not usually refer to such a process of negotiation. *See* materials cited in note 279 *infra*.

of the House Commerce Committee's oversight of the regulation by the Federal Communications Commission (FCC) of pay television. For more than a decade, the committee succeeded in preventing the FCC from authorizing pay television.<sup>270</sup> After the FCC proposed authorizing pay television in 1957, the committee, under heavy pressure from broadcasters and theater owners, passed a resolution requesting delay. Through threats, letters, resolutions, and hearings, it forestalled action until 1968 without reporting any legislation to the House. These actions surely affected not only the timing but also the substance of the FCC's regulations, which ultimately authorized pay television only under heavy restrictions.<sup>271</sup>

In another case of close congressional oversight, the FCC used proposed rulemaking to bargain for legislation in the well-known deintermixture controversy, which resulted from the FCC's attempts to alleviate the congestion of television channels by assigning VHF and UHF channels to separate cities. At the cost of abandoning its experiments on the deintermixture of these two modes of broadcasting in certain communities, the FCC was able to obtain long-sought legislation authorizing it to require the makers of television sets to provide both UHF and VHF reception.<sup>272</sup> This case, of course, is ultimately an example of an agency's success in dealing with Congress as a whole, and not simply with a committee seeking to stall its programs.<sup>273</sup>

There are other examples of committee pressure to suspend an agency rulemaking program. For example, after the Federal Power Commission (FPC) asserted jurisdiction to regulate the sale of natural gas to pipeline companies, it terminated its rulemaking program despite clear Supreme Court sanction of its authority to continue,<sup>274</sup> because opposition in Congress was strong enough to pass a bill in the House.<sup>275</sup> In another case, an appropriations committee, which felt it had been defied for at least a year by the FPC, directed the agency not to spend its

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<sup>270</sup> Robinson, *supra* note 1, at 955 n.24.

<sup>271</sup> In a rather similar situation, the FCC proposed a rule on the frequency of broadcast commercials, but abandoned its rulemaking after the industry pressured the House Commerce Committee, which held hostile hearings and reported a bill. See W. CARY, *POLITICS AND THE REGULATORY AGENCIES* 46-47 (1967).

<sup>272</sup> G. ROBINSON & E. GELLHORN, *supra* note 9, at 156-57.

<sup>273</sup> There is some doubt, however, that this episode reflects a deliberate and effective effort on the FCC's part to trade rulemaking for legislation, as opposed to a fortuitous resolution. See Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 532-35 (1970).

<sup>274</sup> See *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947).

<sup>275</sup> W. CARY, *supra* note 271, at 50-51.

funds to establish regulation of cooperatives until legislation settled the issue.<sup>276</sup>

These examples bear out William Cary's observation that agencies seldom take controversial steps in rulemaking without some support in Congress, especially in the committees.<sup>277</sup> Yet they have certain similarities to one another which distinguish them from the review process characteristic of the case studies. First, committee review in the absence of a veto provision frequently applies pressure at the instance of regulated interests to stop an agency rulemaking program entirely. It does not engender a detailed bargaining process over the substance of rules, since the industry pressure is directed toward not having any at all. Also, committee attempts to stall an agency program in the absence of the veto power usually occur when legislation that may affect the program is under serious consideration.<sup>278</sup> Legislation was considered less frequently in the case studies because the committees had an alternative available to resolve their disputes with the agencies — the veto of a rule.

These differences in practice reflect the existing structure of congressional oversight of the agencies,<sup>279</sup> which does not foster detailed negotiations over the substance of impending rules. Review of rules is not presently a systematic process but is triggered by controversial rules.<sup>280</sup> While a legislative veto requires routine submission of rules to Congress for review, in its absence oversight committee hearings occur sporadically and thus do not provide a regular opportunity to negotiate the substance of rules with agency personnel.<sup>281</sup> The appropriations process does provide a regular opportunity for scrutiny of agency programs, but its focus is on

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<sup>276</sup> S. REP. NO. 1-269, 88th Cong., 2d Sess. 8 (1964).

<sup>277</sup> W. CARY, *supra* note 271, at 53.

<sup>278</sup> In a well-known example, the FTC postponed its proposed cigarette rule until the issue was settled by legislation. H. LINDE & G. BUNN, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* 915-48 (1976).

<sup>279</sup> For discussions of existing oversight practices, see W. CARY, *supra* note 271; H. FRIENDLY, *supra* note 1, at 163-73; H. LINDE & G. BUNN, *supra* note 278; M. OGUL, *CONGRESS OVERSEES THE BUREAUCRACY* (1976); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953).

<sup>280</sup> See 2 *STUDY ON FEDERAL REGULATION*, *supra* note 35, at 120-21. There are very frequent informal contacts between congressional members and staff and the agencies, *see id.* at 65-66, 81, which may help to identify controversial issues warranting the members' attention. *See also* Clark v. Valeo, 45 U.S.L.W. 2349 (D.C. Cir. Jan. 21, 1977) (Leventhal, J., concurring), *aff'd mem. sub nom.* Clark v. Kimmitt, 45 U.S.L.W. 3789 (U.S. June 6, 1977). *See generally* Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 AD. L. REV. 415, 419-21 (1976).

<sup>281</sup> Oversight hearings have, however, increased in frequency in recent years. *See 2 STUDY ON FEDERAL REGULATION*, *supra* note 35, at 80-81.

funding, not on the details of policy.<sup>282</sup> As for intervention by individual Congressmen on behalf of constituents, it is by definition sporadic and irregular. Finally, the review of appointments deals with personal qualifications and broad policy and only obliquely with proposed rules.<sup>283</sup> In contrast with these traditional oversight techniques, review under a legislative veto scheme is specifically and narrowly focused on the substance of proposed rules. Thus the veto, unlike any of the traditional oversight techniques, permits regular and systematic examination of the substantive details of an agency's program.

Without the veto, a committee displeased with an agency rule has two major options. It may stage an embarrassing oversight hearing, or it may propose legislation to rectify the problem it perceives. But any legislation it proposes must obtain passage in both houses of Congress and approval by the President or a veto override. Until the proposed legislation is adopted, a controversial agency rule, if issued, remains in effect. If the committee chooses to hold a hearing, the agency may resist, testing the committee's power to obtain legislation. With the legislative veto, committee power is greatly enhanced. If a veto resolution is reported out of committee, it may need to pass in only one house, and a vote by other Congressmen for it does not entail the same responsibility as a vote for legislation affirmatively forming policy. Congressmen may be persuaded to support a committee recommendation for a veto as a low-cost endorsement of the oversight power of Congress without fully considering the cost to the interrupted program. Since the veto provides an easier method for altering agency policy, it reduces the incentive of the oversight committees to sponsor legislation. Because the veto is negative, and because it reduces pressure on committees to report legislation affirmatively resolving policy disputes with agencies, it increases substantially the chance that no policy will be formed by Congress or by the agency.

#### IV. THE DESIRABILITY OF A GENERAL LEGISLATIVE VETO FOR RULEMAKING

An initial question in evaluating the desirability of a statute subjecting most informal rulemaking to legislative veto authority is the extent to which our case studies provide a valid model for analysis. At first glance, there seems to be one obvious distinguishing feature. In the case studies Congress selected a group of pro-

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<sup>282</sup> *Id.* at 18-43.

<sup>283</sup> See generally SEN. COMM. ON COMMERCE, 94TH CONG., 2D SESS., APPOINTMENTS TO THE REGULATORY AGENCIES 375-418 (Comm. Print 1976).

grams for which it had special concern, and subjected them to active review. Given the vast amount of rulemaking activity in the federal government,<sup>284</sup> it seems clear that Congress has neither the time nor the inclination to extend active review under a general veto power to more than a few highly controversial rules. Even a substantial increase in congressional staff to canvass forthcoming agency rules would not necessarily lead to frequent review by Congressmen, because their number is fixed and their time is limited. Meaningful review, whether by Congressmen or their staff, seems likely to be episodic, because much agency rulemaking is routine, technical, or otherwise noncontroversial.<sup>285</sup>

Reflection suggests, however, that a view which minimizes the practical impact of a general veto provision is oversimplified. It does not adequately account for the nature of rulemaking and the nature of the agencies' present relations with other branches of government. Under a general legislative veto provision, agencies may be inclined to abandon rulemaking in favor of other procedures less vulnerable to congressional scrutiny for the development of policy. Moreover, if in practice Congress does not exercise the veto power assiduously, the broader delegations of authority which it fosters may result, contrary to expectations, in a net decrease in control over agency discretion. Partial duplication of the judicial function by Congress may create profound problems for the courts in their review of both congressional action and agency rules. Finally, in its use of the veto power Congress may in practice venture beyond mere supervision to improper interference in the administrative function.

#### A. Effects on Agency Behavior

The agencies have been repeatedly criticized for pursuing an ad hoc, "rudderless" course that emphasizes adjudication, rather than moving decisively to form policy by rulemaking.<sup>286</sup> Rulemaking is frequently relegated to relatively technical or noncontroversial aspects of an agency's mission precisely because the agency does not choose to resort to it for resolution of hard policy

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<sup>284</sup> *Congressional Review Hearings*, *supra* note 4, at 143 (statement of Rep. Levitas).

<sup>285</sup> Proponents of general veto provisions often recognize this, and argue that the veto is meant for egregious agency rules. *E.g.*, *id.* at 142; *id.* at 166 (statement of Rep. Clausen); *id.* at 178 (statement of Rep. Hutchinson).

<sup>286</sup> See generally Freedman, *supra* note 32, at 1054; Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 53 (1969); Robinson, *supra* note 1, at 957, 967. The use of rulemaking does not guarantee vigorous policy formation, of course, but it provides the opportunity for it. See Robinson, *supra* note 273, at 526-28.



issues.<sup>287</sup> The reasons for this practice are instructive in evaluating a general veto provision.

Currently, strong incentives for agencies to avoid vigorous policymaking inhere in the relations of the agencies to Congress.<sup>288</sup> Many of the policy issues that agencies do not currently resolve arise under broad delegations by a Congress which was unwilling or unable to resolve the issues itself. Political pressures or uncertainties that prevented a statutory resolution of policy in Congress also hamper resolution by the politically weaker agencies.<sup>289</sup> A vigorous agency assertion of policy is likely to meet with countervailing pressure from interest groups lobbying congressional committees. Consequently, agencies may resort to adjudication — which is constitutionally protected from direct congressional supervision — for the making of policy.<sup>290</sup>

The case studies suggest that a general veto provision will increase the power of interest groups to block or deflect agency policy initiatives through pressure on congressional committees. Such pressure would not always require the detailed and time-consuming negotiation process that occurred in the case studies. A committee not having the time or inclination to negotiate a given set of rules could simply report a veto resolution, which, if passed by the entire house, could lead to the kind of indefinite policy impasse found repeatedly in the case studies. Alternatively, it could attempt to deter agency submission of a rule altogether.<sup>291</sup> Whenever an agency is not statutorily restricted to policymaking by rule, the threat of such pressure is likely to drive it toward greater use of adjudication. Unlike the agencies involved in the case studies, many federal agencies are free to choose adjudication. Thus, by increasing agency reliance on adjudication, a general legislative veto provision might have pervasive effects on the nature of policymaking in federal agencies.

To the extent that a general veto power would increase reliance on adjudication at the expense of rulemaking, it would have the reverse of the effect intended, for it would encourage the agencies to act in ways that are even less amenable to congressional oversight than rulemaking is now. Other disadvantages of excessive adjudication would also be increased, principally delay in forming overall policy. Congress could attempt to avoid excessive resort to adjudication by requiring the agencies to engage in rulemaking for the formulation of policy. But both Con-

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<sup>287</sup> See Freedman, *supra* note 32, at 1054–55; Posner, *supra* note 286, at 60, 71.

<sup>288</sup> See generally W. CARY, *supra* note 271, at 57–59; pp. 1420–23 *supra*.

<sup>289</sup> L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 25 (1965).

<sup>290</sup> See Wright, *Beyond Discretionary Justice*, 81 *YALE L.J.* 575, 578–79 (1972).

<sup>291</sup> For examples of this in the case studies, see pp. 1391–92 *supra* (FEA).

gress and the courts have traditionally recognized broad discretion in the agencies to proceed by adjudication or rulemaking as their judgment dictates.<sup>292</sup> Any requirement to proceed exclusively by rulemaking could sensibly be imposed only after careful study of each program involved and might be overly rigid even then.

A general legislative veto might have a particularly disturbing effect on the independent regulatory agencies, since their freedom from presidential supervision may make them more susceptible to congressional control than the executive agencies dominating the case studies.<sup>293</sup> They currently operate under broad delegations and have traditionally relied heavily upon adjudication. These agencies have recently shown encouraging signs of moving away from full adjudicative procedures toward rulemaking for the formulation of policy. It would be unfortunate if the indirect effects of a general veto provision were to reverse this trend. In addition to increasing their reliance on adjudication, a general veto provision might adversely affect the independent agencies in two ways. First, it might produce frequent policy impasse between these agencies and Congress due to vetoes, because most of their rules are of the kind that would be subject to review only once, and because the congressional committees overseeing them have demonstrated their capacity to stall rulemaking through informal pressure.<sup>294</sup> Second, the presence of a veto provision would provide another opportunity, after public comment, for regulated interests to obtain changes in a rule or to block passage of a rulemaking program. This opportunity would exacerbate current problems of the "capture" of the independent commissions by their regulated constituencies.

### *B. Effects on Congressional Delegations of Rulemaking Authority*

However ineffective the delegation doctrine has been in limiting broad grants of legislative power,<sup>295</sup> its underlying purposes have not lost their force, and it still imposes some constraints upon statutory delegations. Nevertheless, the courts have realized

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<sup>292</sup> *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974). In some instances, Congress has required rulemaking by statute, but it has not done so for the independent regulatory agencies. See *Congressional Review Hearings*, *supra* note 4, at 426, 478, 480.

<sup>293</sup> It is, however, easy to overstate the differences between executive and independent agencies in terms of actual freedom from presidential control. See Robinson, *supra* note 1, at 950-52. Nevertheless, Congress may pay special attention to the independent agencies. *Id.* at 954-55.

<sup>294</sup> See pp. 1420-22 *supra*.

<sup>295</sup> See pp. 1372-73 *supra*.

that the requirement for policy standards in legislation can be overemphasized at the expense of other means of confining administrative discretion.<sup>296</sup> Unwilling to require Congress to decide complex policy questions in advance under the delegation doctrine, the courts have emphasized various means of assuring that agency action is authorized and that agency procedures are accurate and fair. This is illustrated by *Amalgamated Meat Cutters v. Connally*,<sup>297</sup> which upheld a grant of authority to the President to establish wage and price controls, even though the statute established no clear standard for the level or timing of their imposition. The court derived adequate limits on the President's discretion from several sources. From the historical context and other wage-price control statutes it was able to divine a congressional purpose of fair and equitable stabilization sufficient to guide the President. Further, it noted statutory limits on the President's power to single out an industry for special treatment and the limited time for which controls could be applied. Finally, the court incorporated the procedures of the Administrative Procedure Act and expanded the scope of judicial review. As Judge Leventhal emphasized in *Meat Cutters*, the delegation doctrine should be viewed as a requirement that Congress impose controls of any appropriate sort on the exercise of delegated power.<sup>298</sup> Since legislative vetoes are designed to provide controls on agency power delegated by Congress, this approach suggests strongly that Congress has not only the right but a constitutional duty to oversee the exercise of its delegated powers through some technique such as the veto.

Further consideration, however, suggests that in practice the legislative veto may fail to define more exactly the limits of agency discretion. Existing veto provisions, particularly those in the energy statutes, often accompany broader grants of power than Congress would have made without having the veto power as a check upon their exercise. And Congress has forgone subsequent opportunities for legislative resolution of issues emerging in rule-making programs subject to veto, preferring instead to react to the agency's policy initiatives.<sup>299</sup> These facts, coupled with Congress' frequent difficulty in resolving policy by statute, indicate that a general veto provision might encourage Congress to make broader delegations than it would otherwise. If this occurs, the veto will produce a net increase in congressional control of the agencies only to the extent that there actually is close review

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<sup>296</sup> See generally G. ROBINSON & E. GELLHORN, *supra* note 9, at 102-06.

<sup>297</sup> 337 F. Supp. 737 (D.D.C. 1971) (three-judge court) (Leventhal, J.).

<sup>298</sup> *Id.* at 746-47.

<sup>299</sup> See pp. 1409-10 *supra*.

pursuant to it. Yet under a veto statute broadly applicable to rulemaking, limits on time and resources would make it impossible for Congress to exercise continuing, close review, even with a massive increase in staff. It therefore seems likely that only a few rules would receive the careful scrutiny necessary to fulfill the assumptions underlying broad original grants of power.

Thus, this proposed technique for increasing congressional controls on delegated powers may actually result in *decreasing* those controls in practice. As *Meat Cutters* emphasized, constraints on the agencies in statutes may be quite diverse, but they should work together, and not against one another, to satisfy the ultimate goals of the delegation doctrine.<sup>300</sup> Offered as a means of implementing the requirements of the delegation doctrine, legislative veto schemes might ultimately be viewed as violating it.

Whatever the requirements of the delegation doctrine, the legislative veto may be ill-suited as an aid to the final resolution of policy for several reasons. First, it is negative in its impact. Unlike legislation, it does not promulgate a new rule, but merely leaves a void. Second, under a one-house veto, irreconcilable disagreement between the houses of Congress may prevent the formulation of any effective policy by the agency. Finally, as experience shows, some controversies between the agencies and Congress are long-standing, leaving a policy vacuum without any strong impetus toward a final resolution. Indeed, the legislative veto may contribute to a vicious circle now present in regulatory policymaking. Congress, beset by conflicting political pressures or uncertain of the best approach to a new problem, makes a broad delegation to an agency without resolving policy. The agency, subject to the same pressures or uncertainties, then proceeds to deal with issues in an ad hoc fashion, emphasizing adjudication, without forming any clear policy. This failure of the agency to resolve the original issues leaves Congress with nothing concrete to consider, thereby disadvantaging it in later attempts to meet the policymaking responsibility it did not discharge in the original delegation.<sup>301</sup> To the extent that the legislative veto encourages Congress to make broad delegations in the first instance with the hope of resolving policy upon executive initiative, there is a danger that it will exacerbate current problems.<sup>302</sup>

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<sup>300</sup> 337 F. Supp. at 748.

<sup>301</sup> H. FRIENDLY, *supra* note 1, at 163-72; Freedman, *supra* note 32, at 1054-55; Wright, *supra* note 290, at 585-86.

<sup>302</sup> Even if a rule undergoes full congressional review and escapes a veto, this may not indicate a determination by Congress that it is optimum policy, but only that it is not unacceptable enough to be vetoed.

*C. Effects on Judicial Review*

The federal courts have yet to confront the question of how to review an agency's rules when they are subject to a legislative veto.<sup>303</sup> The question is a complex one, involving the relationships between the three branches of government and in some cases the "fourth branch" — the independent regulatory agencies — in all their permutations. To what extent should courts defer to congressional judgments on the legality of a rule, especially if they seem mixed with policy considerations? Although congressional review is often ostensibly based on legality, consideration of policy in a legislative body is inevitable.<sup>304</sup> To what extent should courts intervene if congressional review is explicitly based on policy? These are delicate questions freighted with separation of powers concerns.

It is fundamental that the courts, not Congress, have the ultimate responsibility to interpret the law.<sup>305</sup> To the extent that congressional review of rules duplicates the function of the courts, it does not seem a wise use of congressional time. Moreover, Congress is ill-equipped, both by inclination and competence, to determine its own former intent with the care and restraint customary in judicial review. The members of Congress have less time and no better resources (briefs, memoranda of law) than the federal courts. One might suggest that Congress has better access to "real" legislative history than the courts or the agencies. But the subjective intent of committee members not recorded in publicly available committee hearings or reports and not reflected in floor debates seems better characterized as views on policy than as evidence of the intent of Congress. It is not a part of the formal legislative history that can legitimately be read into the statutory language as having been accepted by Congress as a whole. For this reason, when Congress is unclear initially in forming legislative history, it is unlikely to contribute more than the agencies or the courts in later attempts to reconstruct it. Furthermore, the validity of a legislative purpose that is pur-

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<sup>303</sup> *Clark v. Valeo*, 45 U.S.L.W. 2349 (D.C. Cir. Jan. 21, 1977) (en banc), *aff'd mem. sub nom. Clark v. Kimmitt*, 45 U.S.L.W. 3789 (U.S. June 6, 1977), did not reach the issue; nor has the GSA litigation, see note 170 *supra*.

<sup>304</sup> An example of policy review masquerading as legality review occurred in hearings on GSA's public access rules. The question of the appropriate role for the Administrator was argued as a matter of the legality of subdelegation within the agency. See p. 1399 *supra*. GSA's legal argument against the validity of a subdelegation sought by the committees seemed weak enough to suggest that it was a cover for a power struggle. On the other side, congressional focus on archivists' expertise on questions of public access may have been a ruse for distrust of the Administrator.

<sup>305</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

portedly part of the law but not reflected in ordinary sources of legislative history diminishes as time passes and a new Congress with new members convenes.<sup>306</sup>

The more appropriate role for congressional review is policy review, because it is a natural part of the legislative process that is not engaged in by the courts. Even policy review, however, may not have the characteristics claimed for it in veto proposals. The level of congressional interest in a rule will depend on its political sensitivity, not the persuasiveness of the agency's justifications for it or even its consistency with other regulatory programs. This means that the process is not necessarily a coherent one. Although the same inattention to coherent and reasoned formulation of policy may be present in the legislative process, it is likely to be more pervasive in the context of oversight. This is true because oversight has had a lower priority in Congress than legislation and Congress has traditionally been weak in its exercise.<sup>307</sup> Yet despite its shortcomings in the context of the legislative veto, policy review is clearly more appropriate than legality review for purposes of congressional oversight.

Hence, if Congress treads on judicial ground by declaring a rule *ultra vires* in a resolution, it seems appropriate for a court to disagree. That would restore the rule's effectiveness, subject to an authorized veto on policy grounds or to statutory change. On the other hand, if Congress voids a rule on policy grounds, the wisdom of its judgment should ordinarily be beyond judicial review.

Occasionally, the statute governing congressional review requires not only that a veto be for *ultra vires* action, but that Congress make findings.<sup>308</sup> This latter requirement is not likely to prove enforceable in court. Consider the extent to which the findings should have to be adequate explanations in the typical administrative law sense.<sup>309</sup> For example, the required findings in the veto resolution for HEW's title IX regulation would be considered unacceptably conclusory if they came from an agency.<sup>310</sup> Yet it would be difficult for a court to ask for more detailed explanation without making an extraordinary intrusion on the legislative process. Thus, a court's reluctance to direct Congress to speak coherently in giving reasons for a veto would arise from sensitivities that have led to the demise of the standards requirement of the delegation doctrine.<sup>311</sup> This sug-

<sup>306</sup> See *Congressional Review Hearings*, *supra* note 4, at 376.

<sup>307</sup> See, e.g., Ribicoff, *supra* note 280.

<sup>308</sup> See p. 1386 *supra*.

<sup>309</sup> See generally B. SCHWARTZ, *ADMINISTRATIVE LAW* §§ 140-142 (1976).

<sup>310</sup> For a reprint of the findings, see *Title IX Hearings*, *supra* note 74.

<sup>311</sup> See pp. 1372-73 *supra*.

gests that when a veto occurs, the comparative persuasiveness of Congress' findings with those of the agency will not be reviewed.

If Congress does not veto an administrative rule, a court can review its legality in the normal way. But what inference is it to make if the rule has received attention but no veto from Congress? Some statutes provide that the failure of Congress to veto a rule shall not be construed as ratification; such provisions must be considered.<sup>312</sup> Certainly rules that receive little or no attention from Congress should not be viewed as ratified by it.<sup>313</sup> However, when a floor vote is held in both houses and the rule survives, it could be argued that Congress has ratified the rule. Nevertheless, if congressional review is based on legality, the courts should retain a duty to determine that question. Even on policy review, Congress' failure to veto a rule does not necessarily mean there has been attention to legality, or that Congress should be viewed as an authority regarding that determination. Thus, judicial review would be appropriate in either case. If the veto process has not reached the stage of producing committee reports or findings by one or both houses of Congress, there is no basis on which a court can identify even an implied judgment by Congress as a whole. In the end, the irony of a ratification doctrine is that it would give legitimacy to precisely those rules raising the greatest congressional displeasure short of veto. This too suggests its inappropriateness.

Congress may impose statutory limits on judicial review of rules subject to veto. For instance, the FEA's legislation contains a provision forbidding judicial invalidation of its rules for arbitrariness or for the absence of sufficient factual foundation.<sup>314</sup> This provision was designed to make the substance of rules a matter for internal resolution between the Executive and Congress.<sup>315</sup> Broad use of similar provisions limiting judicial review could insulate great numbers of rules from scrutiny by the judiciary without subjecting them to close scrutiny in Congress as a substitute. If increased accountability of administrative rules is the goal of veto provisions, restricting judicial review without ensuring congressional review is a backward step.

Recent developments affording closer judicial review of agency

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<sup>312</sup> *E.g.*, note 64 *supra*.

<sup>313</sup> *But see* note 38 *supra*. If ratification is thought possible, the most common and effective form of congressional review, committee action, might receive some weight.

<sup>314</sup> *See* note 118 *supra*.

<sup>315</sup> While ordinarily the courts defer to rational congressional judgments on policy, such deference assumes that Congress has actually made a judgment. When a rule has received less attention in Congress than a floor vote in both houses, no determination by Congress as a whole has occurred.

action, in rulemaking as well as other areas,<sup>316</sup> are fundamentally inconsistent with the likely consequences in practice of a general legislative veto. We argued above that the courts should not regard congressional action short of a veto as the ratification of a rule. Perhaps, therefore, the courts will review rules not vetoed in the usual fashion. But to the extent that the presence of the veto causes the agencies to draft rules to meet political considerations unrelated to public procedures, as occurred frequently in the case studies, review by the courts will be made more difficult. Courts will be less sure that an agency rule is what it purports to be if unknown considerations may be the ground of decision. Courts have not prospered in their searches for motivation underlying official action; situations encouraging or necessitating that search are to be avoided.<sup>317</sup> Perhaps legislative veto procedures could be altered to protect the courts' capacity to review agency rules.<sup>318</sup> Existing procedures, however, do not seem to suffice.

One obvious but important practical effect of the combination of congressional and judicial review is the increased potential for impasse. As a separate branch of government, the courts have a duty to insure that agencies adhere to constitutional and statutory norms and that the actions of Congress remain within constitutional bounds. In the process of fulfilling this duty, the courts may create obstacles to policy accommodation between Congress and the agencies. For example, the Supreme Court's decision in *Buckley v. Valeo*,<sup>319</sup> which invalidated the composition of the FEC on constitutional grounds, caused much of the prior accommodation between the FEC and Congress to be wasted.<sup>320</sup> Such obstacles are not created solely by decisive constitutional rejection of the governing statute. As the GSA's response to *Nixon v. Administrator of General Services*<sup>321</sup> demonstrates, mere dicta may provoke or exacerbate conflict between the agency and committees charged with the responsibility for congressional review.<sup>322</sup> The possibilities are endless. Repeated remands are common in administrative law; their potential for

<sup>316</sup> See pp. 1375-76 *supra*.

<sup>317</sup> See generally Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205 (1970).

<sup>318</sup> This could be done by requiring negotiations between the agency and Congress to be on the record or by attempting to prevent informal interaction between the agency and Congress during the rulemaking process. See pp. 1437-39 *infra*.

<sup>319</sup> 424 U.S. 1 (1976).

<sup>320</sup> See pp. 1407-08 *supra*.

<sup>321</sup> 408 F. Supp. 321 (D.D.C. 1976) (three-judge court), *prob. juris. noted*, 45 U.S.L.W. 3399 (U.S. Nov. 29, 1976) (No. 75-1605).

<sup>322</sup> See pp. 1400-01 *supra*.



disruption of emerging political accommodations between an agency and Congress is obvious. Finally, there is the possibility that a court will invalidate the only rules which can survive a congressional veto, creating a deadlock that the agency cannot break.<sup>323</sup> It could be argued that this potential for disruption and wasted effort is the price of government by reasoned judgment. Certainly delay and disruption are common features of the political and judicial processes. Yet at present the interactions between the agencies, Congress, and the courts are primarily two-sided. Congress delegates, the agency executes, and the courts review. Legislative vetoes, by placing Congress and the courts in similar roles, make possible a three-sided interaction, with heightened potential for delay, disruption, and unforeseeable results.

#### *D. Congressional Interference in Rulemaking*

The congressional procedures required to bring a legislative veto resolution to the floor of either house are cumbersome and time-consuming. It is therefore in the interest of both the agency and its congressional oversight committees to avoid resorting to these procedures by resolving policy issues informally. As the case studies show, informal negotiations with compromise on both sides is characteristic of the review process under a legislative veto provision. These negotiations are a highly efficient review technique in the sense that they resolve policy differences between the agency and the committees relatively quickly, and without destroying the coherence of the resulting rule as an item veto might. Indeed, it is when negotiations fail and the formal machinery is invoked that policy impasse threatens.

Yet however efficient review by negotiation and compromise may be, it has one critical feature: it involves congressional committees and staff deeply in the rulemaking process. In a series of decisions, the federal courts have subjected similar *ex parte* influences in agency decisionmaking to increasing scrutiny.<sup>324</sup> The principles and reasoning of these decisions do not readily permit an exemption for congressional interference. The case law is still sparse, but developments indicate that judicial scrutiny once reserved for adjudication and informal executive actions may be extended to rulemaking.

*Pillsbury Co. v. Federal Trade Commission*<sup>325</sup> is the leading case on judicial scrutiny of congressional interference in adjudi-

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<sup>323</sup> This possibility is noted in *Nixon v. Administrator of General Services*, 408 F. Supp. at 338 n.17.

<sup>324</sup> The underlying premises of these decisions are essentially those described at pp. 1375-78 *supra*.

<sup>325</sup> 354 F.2d 952 (5th Cir. 1966).

cation. In open hearings, Congressmen importuned Commissioners and agency counsel to accept a certain interpretation of an antitrust law. Because the hearings focused on a case pending before the agency, the reviewing court felt that congressional influence was improper: "[W]hen . . . [a congressional] investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's *legislative* function, but rather in its *judicial* function."<sup>326</sup> The court feared that adjudicative proceedings held under overt and heavy congressional pressure might not be impartial.<sup>327</sup>

Until recently, any attempt to extend the reasoning of *Pillsbury* to the quasi-legislative rulemaking functions of an agency would have encountered a nearly insuperable barrier. For legislative processes have traditionally been immune from the type of due process scrutiny to which adjudication is subject.<sup>328</sup> Courts and commentators have lately begun to recognize, however, that a strict theoretical dichotomy between legislative and adjudicative functions is untenable.<sup>329</sup> The line between the two categories is indistinct: there are many agency actions which do not fit neatly into either category. And the justifications for disapproval of secret *ex parte* contacts in the adjudicative context — fairness, openness, reasoned decisionmaking based on a record, and ease and accuracy of judicial review — are now seen to apply in rulemaking proceedings as well.

Two decisions by the District of Columbia Circuit well illustrate the imprecision of the strict dichotomy between adjudicative and legislative functions in administrative proceedings. One of these is *D.C. Federation of Civic Associations v. Volpe* (*Three*

<sup>326</sup> *Id.* at 964 (emphasis in original).

<sup>327</sup> *Pillsbury* must be understood, however, in light of the earlier doctrine that a commissioner's general, abstract views on legal issues — even if those views are strongly held or have been probed at a congressional hearing — do not constitute prejudice for which he should be disqualified. See *FTC v. Cement Institute*, 333 U.S. 683 (1948) (despite general preconceptions expressed at congressional hearing, commissioners remained qualified to decide whether particular respondent had engaged in prohibited conduct as long as their minds were open on that issue).

<sup>328</sup> See Nathanson, *supra* note 25, at 724–27.

<sup>329</sup> See *id.*; Friendly, *supra* note 26, at 1309–10. The Supreme Court, however, citing the classic cases for the distinction, *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), and *Londoner v. Denver*, 210 U.S. 373 (1908), has suggested that the due process clause remains unavailable in rulemaking:

While the line dividing them may not always be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.

*United States v. Florida East Coast Ry.*, 410 U.S. 224, 245 (1973).

*Sisters Bridge*),<sup>330</sup> which involved informal executive action. A Congressman had threatened to block appropriations for Washington's new subway system until the Secretary of Transportation approved the construction of Three Sisters Bridge across the Potomac River. Because the Congressman's pressure had introduced a factor not authorized by statute into the Secretary's decision, the reviewing court invalidated his approval. The court noted that, if the Secretary's action had been "purely legislative," it might have been allowed to stand despite a finding that "extraneous pressures" had been considered.<sup>331</sup> The action was not purely legislative, however, because Congress had already established the boundaries of the Secretary's discretion. Thus, the action "fell between [the] two conceptual extremes" and should have been based only on factors which Congress had intended to make relevant — a principle the court thought "elementary and beyond dispute."<sup>332</sup>

A second case in which strict categorization of administrative actions was disapproved was *Sangamon Valley Television Corp. v. United States*.<sup>333</sup> An order of the Federal Communications Commission changing the allocation of VHF and UHF television channels was set aside because of secret ex parte contacts and minor favors granted Commissioners by interested parties. The Commission insisted that the order had been based on a rulemaking proceeding and that therefore the ex parte contacts should be ignored. The court responded that "whatever the proceeding may be called," if it involves "the resolution of conflicting private claims to a valuable privilege . . . basic fairness requires [that it] be carried on in the open."<sup>334</sup> The court implied that it could scrutinize undisclosed ex parte contacts on constitutional grounds where the interests at stake in a rulemaking proceeding resemble those normally dealt with in adjudication.<sup>335</sup>

The trend toward careful scrutiny of influences surrounding nonadjudicative actions that began in *Sangamon* and *Three Sisters Bridge* has been continued and elaborated by the same court in the recent case of *Home Box Office, Inc. v. FCC*.<sup>336</sup> In that case the FCC's rules for pay television were set aside, in part because members of the FCC had been party to repeated off-the-

<sup>330</sup> 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972).

<sup>331</sup> *Id.* at 1247.

<sup>332</sup> *Id.*

<sup>333</sup> 269 F.2d 221 (D.C. Cir. 1959).

<sup>334</sup> *Id.* at 224.

<sup>335</sup> The precise basis of the court's decision in *Sangamon* is uncertain because of its alternative holding that the ex parte contacts violated the agency's own rules. *Id.* at 224-25.

<sup>336</sup> No. 75-1280 (D.C. Cir. March 25, 1977), petition for cert. filed, 45 U.S.L.W. 3808 (U.S. June 4, 1977) (No. 76-1724).

record contacts by both private interests and Congressmen.<sup>337</sup> The FCC admitted that ex parte activity was often present in its rulemaking proceedings. Although the agency attempted to allocate time for oral argument fairly among competing interests, arguments often continued ex parte, with compromise positions and the "real facts" reserved for the private sessions.<sup>338</sup> The court disapproved these off-the-record sessions on several grounds. First, it noted that if actual positions were not revealed in public comment but only in private discussions, the public procedures required by statute and the agency's own rules would be reduced to a sham. Second, the court observed that a complete administrative record is necessary for a reviewing court to test an agency's decision for arbitrariness or inconsistency with statutory authority. Since such tests are impossible when the agency's record does not contain "relevant information that has been presented to it," the agency is not entitled to the usual presumption that its action is proper.<sup>339</sup> Third, the inability of opposing parties to respond to secret presentations deprives the agency of the benefit of the "adversarial discussion" which is a primary purpose of statutory notice-and-comment procedures.<sup>340</sup> Finally, the court observed that secrecy in communications with the agency is inconsistent with "fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."<sup>341</sup> Thus, although a constitutional ground was not necessary for the decision, the court asserted that one was available.<sup>342</sup>

Nowhere in its opinion did the *Home Box Office* court attempt to distinguish between the ex parte contacts made by private interests and those made by Congressmen. Even in prescribing ground rules for future presentations to the agency, the court made no exception for members of Congress.<sup>343</sup> It would have

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<sup>337</sup> There had been a series of meetings between the Commissioners and private interests, from which the public intervenors had been conspicuously absent. See slip op. at 87-88. In addition, broadcasters had approached "key members of Congress," who had pressured the FCC to maintain its restrictions on pay television's access to movies. *Id.* at 85 n.109, 86 n.112. Against a background of longstanding congressional pressure on behalf of broadcasting interests to restrict pay television, see Robinson, *supra* note 1, at 955 n.24; pp. 1420-21 *supra*, the Congressmen made it known in "no uncertain terms" that they opposed important policymaking by the FCC without congressional guidance. *Home Box Office, Inc. v. FCC*, No. 75-1280, slip op. at 86 n.112 (D.C. Cir. March 25, 1977).

<sup>338</sup> *Id.* at 88 n.117 (quoting FCC Mimeo No. 21343, at 4 (April 30, 1970)).

<sup>339</sup> Slip op. at 90-91.

<sup>340</sup> *Id.* at 91-92.

<sup>341</sup> *Id.* at 94.

<sup>342</sup> *But see* note 329 *supra*.

<sup>343</sup> As a prospective remedy, the court ordered that once a notice of proposed rulemaking issues, agency members involved in the decision must refuse to engage

been hard pressed to justify such an exception, for its opinion was based on the fact that the substance of unrecorded ex parte contacts is unavailable to both opposing parties and the reviewing court — and this is true regardless of the source of the contacts or the status of the parties making them. Moreover, both *Pillsbury* and *Three Sisters Bridge* make clear that Congressmen have no special license to interfere with agency decisionmaking. Thus, both the principles and the reasoning of *Home Box Office* seem to apply to ex parte contacts by members and subunits of Congress whenever those contacts are off the record.

Read together, these cases suggest growing judicial disapproval of informal congressional pressure on an agency during rulemaking. There is no reason why this disapproval should not extend to off-the-record negotiations between Congress and an agency over the substance of a proposed rule. Since most of the decisions condemning congressional interference rest primarily on statutory grounds, Congress might be able to remove the objections by making congressional displeasure a relevant and authorized ground for an agency's decision. Indeed, statutes implementing legislative vetoes could authorize negotiation expressly. This, however, may only succeed in forcing courts to explicitly constitutional grounds in order to disapprove improper influence in the administrative decisionmaking process. In any case, the statutory basis for disapproval of informal contacts — ease of judicial review, fairness to interested parties, and reasoned decisionmaking based exclusively on a record — is solidly grounded in policy. These policies, relied on by the court in *Home Box Office*, are central to the scheme of administrative law developed over decades. Even if Congress has the constitutional power, it should think twice before undermining them in order to implement a legislative veto.

### *E. Modifications and an Alternative*

Traditional devices for congressional oversight of agency action have not furnished a means for systematic review of agency rulemaking. The legislative veto is designed to fill that need, and the case studies reveal that it has significant impact on agency rules, at least for programs in which Congress has an active interest. The case studies also reveal, however, serious problems in current practice under the veto procedure, principally in its fairness to interested parties, its consistency with effective judi-

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in private discussions until a final rule is promulgated. Should an ex parte contact occur, the document or a summary of an oral presentation must be placed in the public file for comment. *Home Box Office, Inc. v. FCC*, No. 75-1280, slip op. at 97-98 (D.C. Cir. March 25, 1977).

cial review, its furtherance of broad political accountability, and its overall impact on effective policymaking in Congress and the agencies. Despite lingering theoretical doubts that due process applies to rulemaking, the courts are likely to insist that any negotiations be carried on in the open, and they should do so. Policies central to the function of rulemaking in administrative law, which we have pointed out above, demand no less. Moreover, it seems a small intrusion on the flexibility and efficiency of negotiations to require them to be in open session and transcribed as part of the rulemaking record.

Secrecy, however, is not the only problem with the legislative veto as it is currently used in practice. The congressional review process adds a second stage to rulemaking, one in which not all interested persons now participate, and in which not all interests receive equal attention. Thus there is a problem of substantive as well as procedural fairness to those affected by a rule, deriving from the narrow political accountability implicit in a committee-dominated review system. Opening the negotiations to public scrutiny and placing them on the record might lead to broader accountability than is present now, by attracting more attention in Congress and increasing pressure on the committees from a wider range of private interests. This alternative, however, would not eliminate the effects of pressure on the committees by those interest groups most affected by a rule and best organized—typically the regulated industries. The capture of agencies by their regulated constituency to the disadvantage of the general public is presently reinforced by pressure on the agencies through congressional committees having members sympathetic to that constituency. The informal negotiation process surrounding legislative veto provisions seems likely to exacerbate this problem, even if it is required to be open.

In essence, the problem of equal access to the agency is a political one. It exists under the present system of administration and may inhere in the quasi-legislative nature of administrative rulemaking. Nevertheless, the special advantages which financial resources or influence give certain private interests are discordant with the basic theme of democratic government—especially if those interests are the very ones to be regulated. One of the fundamental principles of American political democracy is the negation of faction. Congress' broad constituency, encompassing virtually all regional and special interest groups, is expected to average out the demands of the various factions to produce a fair result.<sup>344</sup> To the extent that legislative veto authority allows special interests to achieve their ends by pressur-

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<sup>344</sup> See Watson, *supra* note 6, at 1032-43.

ing administrative agencies through congressional committees, such authority works to promote, rather than negate, faction.

Perhaps agency-committee negotiations should be opened not only to public scrutiny but to public participation as well. However, such a change would not remedy unequal financial ability to participate, and the efficiency of present negotiations would be lost as they became multilateral. Ultimately, open negotiations in which the public participates would tend merely to duplicate notice-and-comment proceedings. In any case, it is unlikely that Congress would assent to such drastic changes in the ground rules of review.

An alternative response to these problems of substantive fairness would be to forbid negotiations between congressional committees and the agencies, while retaining veto authority. To keep a proper distance from the executive resolution of delegated policymaking, Congress could abjure bargaining over the substance of proposed rules, awaiting their arrival in final form. It would then rely on formal veto resolutions to void rules objectionable to either house as a whole. Since negotiations involve the members of Congress rather deeply in the essentially executive function of implementing statutes, such a restriction would have a constitutional underpinning in the separation of powers.<sup>345</sup> Such an arrangement, however, could have serious disadvantages. By eliminating the chief current technique for reaching policy accommodation, it might increase the probability of impasse between agency and Congress. Moreover, it would fail to reduce the veto's present disincentive to affirmative resolution of policy in Congress by legislation. Finally, it would relegate the legislative veto to the cumbersome and inefficient congressional machinery which gave rise to negotiations in the first place.

Since the disadvantages of the legislative veto inhere in its very nature, no combination of ameliorating techniques can eliminate them all. Congress should abandon it as a device for the oversight of agency rulemaking. There are other means by which Congress can exercise its oversight responsibility effectively without exceeding the proper bounds of its authority. Informal consultation between agency staff and congressional committee members or staff is certainly appropriate to inform Congress of agency action and to initiate a dialogue on policy; the problem is one of limits. Existing procedures allow congressional participation in rulemaking to occur in a perfectly appropriate fashion. The notice-and-comment period preceding formulation of a final rule provides an opportunity for any member of Congress, any

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<sup>345</sup> *Id.* at 995.

staff member, or even a committee or a house as a whole to state its views on the legality or wisdom of a proposed agency rule. While such presentations by Congress before an agency may seem anomalous in light of the agency's ostensibly subordinate role, they have occurred in the past,<sup>346</sup> and there is no reason that they ought not to continue. Congressional views can be made part of the rulemaking record through the kind of written submission typical of notice-and-comment rulemaking, or by open congressional testimony at an agency's public hearing.

Perhaps Congress should alter some agency procedures to facilitate this kind of congressional activity. For example, new requirements for more elaborate explanations of rules proposed by the Federal Trade Commission may better alert congressional staff to issues of importance to the members.<sup>347</sup> If Congress makes open submissions within established boundaries of fair procedures for agency rulemaking, neither its expertise nor its political views will be lost. It seems unlikely that an agency would fail to respond in its reasons for a final rule to an explicit and reasoned congressional submission.<sup>348</sup> The courts could then decide whether the agency's resolution of the problem is within existing parameters of agency discretion. This arrangement would have the prime virtue of encouraging policy dialogue between Congress and the agencies consistently with the fundamental responsibilities implicit in a scheme of separate but interdependent powers.

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<sup>346</sup> See, e.g., H. FRIENDLY, *supra* note 1, at 168 n.85.

<sup>347</sup> See 15 U.S.C. § 57a (Supp. V 1975). Congressional staff do not presently monitor the Federal Register systematically for new rules. See 2 STUDY ON FEDERAL REGULATION, *supra* note 35, at 66-67.

<sup>348</sup> See, e.g., p. 1407 *supra*.