From Chadha to Clinton : the Supreme Court in legislative process separation of powers cases

Christopher B. Brough

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ABSTRACT

FROM CHADHA TO CLINTON: THE SUPREME COURT IN LEGISLATIVE PROCESS-SEPARATION OF POWERS CASES

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Northern Illinois University, 2018
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For nearly fifty years the U.S. Supreme Court’s agenda virtually excluded cases involving structural-separation of powers issues, and especially those surrounding the legislative process. But in the early 1980s structural-separation of powers issues moved back onto the Court’s agenda, with the Court striking down federal legislation in INS v. Chadha (1983) and subsequent cases Bowsher v. Synar (1986) and Clinton v. New York (1998). This research illustrates the ways elected officials benefited from the Court’s reentry into separation of powers issues, and in fact, how members of Congress and executive officials invited the Court to decide the cases. While some scholars argue that the Court was exhibiting judicial independence in this line of cases, it was really acting in the interest, and with the support, of elected elites who had a range of reasons for accepting the Court’s authority in these cases. Over time, path dependent forces reinforced the Court’s role in this issue area, and political actors now routinely defer to the Court’s role in deciding these cases and accept its decisions. While these decisions do not seem to be explained by the ideology of the justices, they do fit a broader pattern of judicialization and jurisprudential regimes theory found by law and courts scholars.
FROM CHADHA TO CLINTON: THE SUPREME COURT IN LEGISLATIVE PROCESS-SEPARATION OF POWERS CASES

BY

CHRISTOPHER B. BROUGH
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A DISSERTATION SUBMITTED TO THE GRADUATE SCHOOL IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE DOCTOR OF PHILOSOPHY

DEPARTMENT OF POLITICAL SCIENCE

Doctoral Director:
J. Mitchell Pickerill
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buddy.
DEDICATION

In loving memory of Nonnie
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INTRODUCTION

In a 1929 address, President Herbert Hoover announced his desire to obtain control over executive agency reorganization because of a “failure of congressional efforts over a period of two decades” (Millett and Rogers 1941, 178). While this (the authority to reorganize executive agencies) had been a desire of previous administrations, the difficulties presented by the Great Depression increased attention to the issue. Obtaining reorganization authority at the expense of congressional power would be a tough sell to members of Congress, but Hoover offered a compromise. President Hoover “recommended that Congress delegate reorganization authority to him, subject to the approval of a joint committee of Congress,” and “[i]n 1932, in the midst of the Great Depression, Congress gave Hoover the authority he wanted. He could submit reorganization plans to Congress, and they would become law within 60 days unless either house disapproved” (Fisher 2007, 139). But this disapproval by Congress, better known as a legislative veto or congressional veto (and in some instances a committee veto), raised serious constitutional concerns related to separation of powers. Specifically, can Congress alter legislation that has already passed the carefully designed legislative process that is detailed in Article I, Section 7 of the United States Constitution through veto.

Even though President Hoover obtained authority over agency reorganization, he was not comfortable with the check Congress was able to place on his ability to reorganize agencies. Presidents Eisenhower, Johnson, Nixon, Ford, and Carter were all against the legislative veto and
all, in some instances, vetoed legislation containing legislative vetoes on the grounds that it was unconstitutional (Tribe 1984, 7). Despite these concerns over the constitutionality of the legislative veto, it took roughly fifty years for it to be challenged before the Supreme Court.

The invalidation of the legislative veto by the United States Supreme Court in *INS v. Chadha* (1983) raises questions about the expansion of judicial authority and its effects. This is important because there can be consequences for the Court if the justices engage in judicial review over a new issue area. The Court could lose the support of the politicians in the elected branches of government if it is seen as the Court overreaching its constitutionally prescribed authority. Additionally, this has been a vexing issue in literature on judicial power. Given these possibilities, how does judicial power expand and what effect does this expansion have on the other branches of government?

One key issue area that can serve as an example to aid in building a theory to explain the expansion of judicial authority as well as test theories on judicial behavior in the United States is issues related to separation of powers, specifically those separation of powers issues related to the detailed process for passing legislation found in Article 1, Section 7 of the United States Constitution. Supreme Court decisions in this issue area are important because they affect how government operates at its most important level, the passing of legislation. Yet the most used models for judicial decision-making based on the ideology of the justices fail to explain the justices’ behavior in these instances. Additionally, research on the Court places a heavy focus on the connections between the judiciary and the political majority, often ignoring important decision-making factors brought about by the political minority.

The general issue of separation of powers has been an important topic of discussion by political theorists, as it is seen as a key function of the government to protect against tyranny. In
1690, John Locke discussed separation of powers in *Two Treatises of Government*, arguing that “because it may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them” (Locke 1988, 364), the legislative and executive branches must be separated. But in addressing the separation of powers, Locke considers the judiciary part of the legislative branch. Additionally, in *The Spirit of the Law*, Montesquieu placed a great deal of importance on separation of powers, stating that “when legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically” (Cohler et al. 1989, 157).

In notes on Thomas Jefferson’s draft constitution in 1788, James Madison wrote,

The power of the Legislature to appoint any other than their own officers departs too far from the Theory which requires a separation of the great Departments of Government. One of the best securities against the creation of unnecessary offices or tyrannical powers is an exclusion of the authors from all share in filling the one, or influence in the execution of the other. (Meyers 1981, 38)

And in Publius 47, Madison wrote, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny” (Meyers 1981, 126).

While separation of powers was vital to the Framers’ organization of government, developments over the course of the twentieth century blurred some of the lines between the branches with Congress delegating increased authority to the executive branch and executive branch agencies. Additionally, the Supreme Court remained quiet on the issue, allowing
separation of powers issues to be dealt with through electoral politics. That is, until the 1980s when the Court began accepting separation of power cases back onto its agenda.

In 1983, the United States Supreme Court invalidated the legislative veto, a tool that allowed Congress to invalidate the actions of the executive branch by one House of Congress, both houses of Congress, or, in some instance, by a congressional committee. This authority had been used by Congress since the 1930s, but in 1983, the Court ruled that the legislative veto was a separation of powers violation that ran counter to the precisely described legislative process detailed in Article 1, Section 7 of the Constitution.

Three years later, the Supreme Court invalidated the Balanced Budget and Emergency Deficit Act of 1985 in *Bowsher v. Synar* (1986). Once again, the Court ruled that the legislation was a separation of powers violation. However, while those arguing against the legislation spent a substantial amount of time arguing that the legislation violated Article 1, Section 7, the Court ruled the legislation, in fact, violated the Appointment Clause of the United States Constitution. And again, in the 1998 case *Clinton v. New York*, the Supreme Court invalidated the Line-Item Veto Act of 1996 as a legislative process-separation of powers violation.

Before the decision in these three cases, the Court had rarely decided separation of powers cases in the previous fifty years. This raises important questions: how are new issues moved onto the Court’s agenda after a long absence and what are the effects of these decisions. In the chapters that follow, I will build a theory to explain how judicial authority expands by moving new issues onto the agenda and test theories that explain the judicial decisions in the above mentioned cases. I argue that new issues are brought to the Court, specifically separation of powers-legislative process issues, because of a combination of increased conflicts over the constitutionality of an issue between the legislative and executive branches coupled with an
increase in salience among political elites. The Court then engaged in activism and policymaking as it struck down laws to expand judicial power. In turn, expansion into a new issue area was accepted by political elites in the form of judicialization that aided in perpetuating path dependence. The decision then created path dependent dynamics perpetuated through political elites’ use of judicialization and the Court’s establishment of a jurisprudential regime. In these instances, members of Congress used the newly created precedent to argue against future legislation and eventually worked to place the newer issues onto the Court’s agenda.

Chapter 1 discusses the existing theory and relevant debate around how issues are moved onto the Supreme Court’s agenda and the effects this process has on all three branches of government. While the existing scholarship properly explains judicial and political elite behavior, it falls short in relation to separation of powers-legislative process issues. I suggest there is a combination of factors taking place. First, new issues are moved onto the Court’s agenda after a conflict and salience increases for a particular issue. Political actors worked to place the issue onto the Court’s agenda so it could be settled once and for all as conflict increased among political actors, the political branches of government, and outside groups. This conflict is different in that it was not partisan conflict but constitutional conflict over a particular issue—the legislative veto. As the conflict increased, so did the salience over the issue. This was not salience among the general public, but salience within the government. The Court then displayed what is argued to be independent policy making behavior but more closely resembles aspects of political regimes theory and jurisprudential regimes.

In Chapter 2, I analyze the debate over the legislative veto in the 1970s and 1980s. The analysis illustrates the growing conflict and salience over the issue that led to its invalidation in *INS v. Chadha*. Additionally, I argue that the *Chadha* ruling was a critical juncture, breaking
from the past, which sent the Court and American politics down a new path. Chapter 3 turns to analysis of the Balanced Budget and Emergency Deficit Act of 1985, better known as Gramm-Rudman-Hollings (hereafter referred to as GRH), and its invalidation in *Bowsher v. Synar* (1986). I discuss and illustrate how a minority within Congress used the ruling in *Chadha* to argue against the passage of GRH, which perpetuated path dependency through judicialization. Analysis of this case heavily relies on the personal papers of Rep. Mike Synar (D, OK) who brought the suit against the legislation. In Chapter 4 I analyze the Line-Item Veto Act of 1996 and its invalidation in *Clinton v. New York* (1998). Here I further illustrate the role the *Chadha* decision played during congressional debate, giving minority members of Congress a judicial precedent to use in an attempt to block the legislation and protect their institution from further delegation of power. Again, as is discussed in the *Bowsher* chapter, a small number of members of Congress used the *Chadha* precedent to, at best, block the legislation from passing and to, at worst, bring about litigation to get the legislation invalidated in court.

Lastly, in the conclusion, I connect all of the case studies together to fully illustrate how *Chadha* was a critical juncture by way of placing structural-separation of powers cases back on the Court’s agenda that then sent the Court and political elites down a path on which members of Congress used the Court precedent to protect their institution from further delegation. Further, I discuss how the dominant theories of judicial politics independently overstate their claims but can be explained through a combination of theories all working together. Thus, theories in their singular form overstate their explanatory power when it comes to separation of powers issues. Ultimately, the decision in *Chadha* established a jurisprudential regime that explains the judicial decision *Bowsher* and *Clinton*. 
CHAPTER 1:
THEORY & RESEARCH DESIGN

The United States Supreme Court’s involvement in separation of powers-legislative process issues is a controversial one. While separation of powers in the broad sense encompasses any issue that involves one branch encroaching on the constitutional authority granted to another branch, there are different sub-fields of separation of powers, most notably questions related to war powers. For the purposes of this study, I will focus specifically on separation of powers issues that call into question the actions of a political branch in the legislative process that is detailed specifically in Article I, Section 7\(^1\) of the Constitution and issues pertaining to the removal and appointment of officials detailed in Article II, Section 2, Clause 2.\(^2\) In other words, this is a dissertation about federal court cases involving national government processes, not

\(^1\) The language of Article 1, Section 7 states: “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves, he shall sign it, but if not, he shall return it with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House, respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”

\(^2\) The language of Article 2, Section 2, Clause 2 states: “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”
national government powers, which are located in Article I, Section 8 and include taxes, commerce, and military.

In 1983, the Court invalidated the legislative veto in *INS v. Chadha*. The legislative veto was an authority first adopted by Congress in 1932 as a compromise with President Hoover who was seeking enhanced authority over agency reorganization in light of the Great Depression. Congress delegated this authority to President Hoover but placed a check in the form of a veto that either the Senate or House could utilize within 60 days of the presidential action. Although Congress used the legislative veto relatively infrequently, Congress began placing legislative vetoes in an increasingly large number of legislation in the 1970s, until it was eventually invalidated in the *Chadha* decision for violating the carefully designed legislation process found in Article I, Section 7.

Three years later in *Bowsher v. Synar* (1986) the Court invalidated the Balanced Budget and Emergency Deficit Act of 1985, better known as Gramm-Rudman-Hollings (hereafter referred to as GRH), which set maximum deficit amounts for each fiscal year. Put simply, if the deficit targets were not met, the Comptroller General was charged with issuing a report to the president detailing the budget cuts needed to bring the budget under control. In turn, the president was charged with issuing a sequestration order containing the budget reduction measures specified in the Comptroller’s report. In *Bowsher*, the Court invalidated the reporting section of GRH because of the executive role authorized to the Comptroller and the appointment clause, which makes the Comptroller’s office a member of Congress. While the Court did not invalidate the legislation because of an Article I, Section 7 violation, the Court and the parties before the Court heavily relied on the *Chadha* precedent.
Then in 1998, the Court invalidated the Line-Item Veto Act of 1996 in *Clinton v. New York* (1998). The Act authorized the president to cancel, in certain situations, spending from bills after enacting them into law. The legislation raised serious constitutional concerns as a violation to the separation of powers and the Presentment Clause of the Constitution. Once again, relying predominantly on *Chadha*, the Court invalidated the legislation as an Article I, Section 7 violation.

These separation of powers cases are a way of getting to broader questions about modern judicial behavior. Specifically, how do new issues get moved onto the United States Supreme Court’s agenda and what effect does the expansion of judicial authority have on the other branches of government? Second, what explains the decisions by the Court in separation of powers cases, specifically *INS v. Chadha*, *Bowsher v. Synar*, and *Clinton v. New York*? These three cases are at the very heart of how government operates and directly impact the policy making process for both Congress and the president in the United States. This question is important because, when specifically analyzing separation of powers cases as displayed in Figure 1, there was a gap between the 1940s and 1980s during which the Court adjudicated very few separation of powers cases.3

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3 Data for Figure 1 were collected from the Supreme Court Database, specifically cases coded as Miscellaneous (legislative veto), Constitution (Article 1, Section 7, Separation of Powers), Constitution (Article 1, Section 1, Delegation of Powers) and cases that dealt with multiple issue areas but were not labeled as any of the above-mentioned issues. For example, *Buckley v. Valeo* (1978) was coded as a campaign finance case but still had an important impact on delegation of powers, and *A.L.A. Schechter v. US* (1935) was coded as economic activity and interstate commerce. This case also had important separation of power implications not represented in the coding scheme.
The gap that began in the 1940s came after the Court adjudicated three important cases: *Panama Refining Co. v. Ryan* (1935), *Schecter Poultry v. U.S.* (1935), and *U.S. v. Curtiss-Wright Export Corporation* (1936). First, in *Panama Refining Co. v. Ryan* (1935), the Court, in an 8 to 1 decision, invalidated the Petroleum Code, which was part of the National Labor Recovery Act of 1933 (NLRA), as a separation of powers violation in the form of an improper delegation of legislative authority. The Petroleum Code authorized the president to halt shipments of petroleum produced in violation of state laws. The Court argued that when Congress delegated this authority, it failed to set rules and standards for the president to follow.

Months later, in *Schecter Poultry v. U.S.* (1935), the Court was asked if Congress had unconstitutionally delegated legislative power to the president in Section 3 of the National Labor
Relations Act (NLRA), which allowed for the president to regulate working hours and wages. The Court, in a unanimous decision, struck down Section 3 of the act as it delegated authority without any set standards in line with the previous decision in *Panama*. Then in *U.S. v. Curtiss-Wright Export Corporation* (1936), the Curtiss-Wright Corporation challenged a joint resolution of Congress in which a presidential proclamation halted Curtiss-Wright’s weapons sale to Bolivia. The Court, in a 7 to 1 decision, upheld the joint resolution and congressional action, arguing that although the president was afforded broad authority under the resolution, there was an important distinction between presidential authority when it came to domestic and foreign affairs.

The three rulings in these cases set clear standards for political elites to follow moving forward. First, to properly delegate authority Congress would have to set clear guidelines on the powers and authority the branch would be handing over to other government actors. Second, the Court set a distinction between foreign and domestic affairs when it came to separation of powers issues. As this period came to a close, there was also a movement by scholars, and as evidence suggests, some on the Supreme Court argued the judiciary should remain silent on particular issues and allow for dispute resolution through electoral politics rather than through the courts (Wechsler 1959, 1954; Choper 2005, 1980). While these cases and arguments were aimed at economic regulations and federalism issues, this movement coincides with the period during which separation of powers cases were no longer moved to the Court for adjudication and is thus important to illustrate the political and judicial climate of the time.

Although the case was about economic regulations and had nothing to do with separation of powers issues, the Court in the 1938 *United States v. Carolene Products Co.* decision signaled through Justice Harlan Stone’s Opinion, in the now infamous Footnote 4, a policy shift away
from structural cases such as separation of powers to a focus on “prejudice against discrete and insular minorities” ("United States v. Carolene Products Co." 1938, 152). Although Carolene Products does not directly relate to separation of powers, specifically issues related to Article I, Section 7 or Article II, Section 2, the case marked an important point for the Court with a shift in the focus of cases being moved onto the Court’s agenda that had an impact on other issue areas. Additionally, the Court’s role, according Justice Stone’s footnote, is the role suggested by legal scholars who argued that structural issues, such as separation of powers, are best handled through electoral politics rather than judicial actions (see Wechsler 1954, 1959; Choper 1980, 2005; Tushnet 1999).

Herbert Wechsler proposed the political safeguards of federalism that asserted “the constitutional limits on national legislative power would be best enforced through the states’ own representation in the national political process rather than through active judicial enforcement” (Keck 2004, 149). While this theory directly speaks to issues of federalism, Jesse H. Choper (1980) took it a step further to suggest a “Separation Proposal,” which states:

The federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President vis-à-vis one another; rather, the ultimate constitutional issues of whether executive action (or inaction) violates the prerogatives of Congress or whether legislative action (or inaction) transgresses the realm of the President should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process. (Choper 1980)4

Thus, if the Court were to refrain from hearing these types of issues and leave them to the political process, this would give the Court the role Justice Stone envisioned in Footnote 4.

There is also real evidence that some justices agreed with these theories and put them into practice from the bench. In Harper et al. v. Virginia Board of Elections et al. (1966), Justice

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4 It should be noted that Choper’s claim is broad and general, arguing that the Court should stay out of all structural questions, including federalism.
Harlan’s dissenting opinion cited Wechsler’s neutral principles of constitutional law. Later, in 1976, Justice Brennan, with Justices White and Marshall joining, cited Wechsler’s political safeguards argument in a dissenting opinion. And in 1985’s *Garcia v. San Antonio Metropolitan Transit Authority*, Justice Blackmun’s opinion of the Court referenced Wechsler and Choper. This illustrates that, at the very least, there were justices who were in agreement with this role for the Court, even if it simply served their political agenda. And again, while these cases are not related to separation of powers, there was still a movement on the Court, for some justices, to let issues play out through the political process rather than within the judiciary.

Further, this argument is consistent with the political questions doctrine, which argues that “courts will not decide what the Constitution means; they leave the task of interpreting a particular constitutional provision to the political branches. . . A political question’s holding means that the language’s meaning is determined by the Senate [or House], not by the courts” (Tushnet 1999, 104-105). The Court attempted to define the political questions doctrine in the *Baker v. Carr* (1962) decision:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. (369 U.S. 217)

The doctrine, which “saw its heyday in the New Deal Court and received its highest measure of devotion from Justice Frankfurter, . . . was perhaps an expression of a wider and deeper mood by Justices appointed to restore judicial self-restraint and allow the elected governors to govern”
However, a precisely defined rule for the application of the political questions doctrine has been the subject of important debate (see Wechsler 1959; Bickel 1961).

Choper’s separation proposal, and others who call for the Court to utilize the political questions doctrine, suggests a political environment in which those in the legislature and executive branch are opposed to the Court exercising judicial authority over questions of separation of powers. However, there are reasons to call their claims into question. First, there are normative arguments supporting the Court’s role in structural issues and cases. While Choper and others (see Yoo 1997; Kramer 2000; Clark 2001; Waldron 2006) argue against the Court’s role in making political decisions, it can be contended that political decisions by the Court are more democratic because “political motivation on the part of the justices is critical to ensuring that the Court exercises its power of judicial review in a responsible, legitimate, and democratic manner” (Peretti 1999, 3). Second, Choper’s argument against the Court’s role in structural issues is based on an empirical idea that the Court is, according to Alexander M. Bickel (1962), a counter-majoritarian institution, and when the Court is engaged in deciding structural issues, the justices are preventing elected officials from carrying out the democratic will of American voters. It is this second point that is of interest in this research.

Judicialization, Judicial Authority and Judicial Decision Making

While scholars argue that judicial supremacy over particular issue areas is an unwelcomed obstacle to the authority of political actors, even when the Court is engaged in

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5 Alexander M. Bickel (1962) argues that the Court and its judicial review authority is counter majoritarian because unelected judges are able to overturn legislation that is passed through the democratic lawmaking process.

6 Although the normative debate is important, we need to get the empirics right or else our normative arguments are based on faulty empirical assumptions.
judicial review, there is substantial evidence arguing that this is not the case and members of Congress and the executive branch welcome or work to get their policy goals affirmed by the judiciary. As Keith Whittington (2007) explains, research often approaches topics of judicial authority as if the judiciary is under threat, but there may also be opportunities in which the court can offer political actors solutions to important problems. One approach that explains how separation of powers was moved to the Court’s agenda is the “judicialization of politics” as discussed by Ran Hirschl (2007) or “juridification” as discussed by Gordon Silverstein (2009). Research into the judicialization of politics argues that “strategic legal innovators – political elites who have compatible interests – determine the timing, extent, and nature of constitutional reform” (Hirschl 2007, 12). Thus, one of the keys to the judicialization of politics is the bringing about of constitutional change by political elites in concert with the judiciary: constitutional change in the interpretative sense, in that, the language of the Constitution is not altered but the understanding of a particular clause or provision is adapted to legitimize a particular policy goal. However, when it comes to separation of powers-legislative process decisions in the 1980s and 1990s, the Court was not bringing about constitutional change but blocking it, which is precisely what Silverstein discussed in his brief case study of these judicial decisions, instances in which the Court said no to constitutional change.

For example, and as I discuss in greater detail in Chapter 3, with GRH, Congress worked to pass legislation to bring the budget deficit under control through automatic cuts that would be triggered if target deficit amounts were not reached. While those challenging the legislation argued that it was unconstitutional and urged for the legislation to be examined by the judiciary, those in favor of the legislation were supportive of this move so the Court would legitimize their policy goals. However, once the legislation was before the Supreme Court, the justices ruled the
Act was unconstitutional. Thus, the Court said no to the constitutional change the congressional majority was attempting to bring through the passage of the legislation.

Silverstein’s work suggests there are multiple reasons why political elites move issues to the judiciary and different patterns for constitutional change. As for reasons for juridification, political elites take this course of action to sidestep political or institutional barriers. However, that does not mean it always leads to political gain. Additionally, there are two patterns for juridification: constructive and deconstructive. Constructive patterns occur when political elites and members of the judiciary work together for a similar policy outcome. In deconstructive patterns, policy makers attempt to build on gaps left behind from the judiciaries’ invalidation of pieces of legislation. No matter the pattern taken, there are instances in which the Court says yes (meaning the Court upholds the new government action by Congress or the president) and aids in bringing about constitutional change and instances in which the Court says no (meaning the Court invalidates the action by Congress or the president) and forces political elites to continue to follow the status quo.

Ultimately, judicialization and juridification come down to judicial authority and political actors’ willingness to give up authority to the courts. As Whittington (2007) argues in relation to reconstructive presidents (but can also be connected to Congress):

The judiciary and the presidency are not simply static entities with potentially conflicting preferences. They are also competing and dynamic institutions struggling for the authority to define the nature of the political regime. The basis for that authority is granted in the Constitution, but the extent of that authority is subject to historical action. The politics of reconstruction hinges on the ability of the president to bolster his authority to define the new regime and to wrest control over the definition of the constitutional order from other political actors, including the judiciary. This contest for authority determines presidential power to reshape the political future and judicial authority to intervene in political affairs. (Whittington 2007, 76)
Thus, it is up to the politicians to decide how much and to what extent they want the judiciary to have authority over a particular issue area. When it comes to instances of judicialization, political actors are handing over authority to the judiciary to decide the outcome with the hope that the decision will come out in their favor.

Additional research on inter-branch relations and how issues are moved to the Court’s agenda focus on the many important roles the Supreme Court plays when exercising judicial review, which further calls into question Choper’s separation proposal. First, there are instances when judicial review is welcomed by members of Congress (see Graber 1993; Lovell 2003; Whittington 2005, 2007). Judicial review can provide important information that shapes future deliberation in Congress (Rogers 2001; Pickerill 2004) and can insulate politicians from having to make decisions that may prove dangerous for reelection (Graber 1993, 36). Additionally, the Court does not have a monopoly on shaping constitutional meaning. Through constitutional dialogue all three branches of government engage in shaping constitutional meaning both before and after the Court acts on particular issues (see Fisher 2007, 1988, 1978).

Conflict also plays an important role as to when and why issues are moved to the Court and judicialized. As John Ferejohn (2002) explains, judicializing politics comes when the legislature is too divided to bring about a solution to a problem and when the courts are able to act on the matter. Most notably, issues are moved to the Court so that national norms can be imposed on regional outliers (Klarman 1997, 1996). For example, settling of conflict between the national norm and regional outliers can be found with racial segregation in 1954, the death penalty in 1972, abortion in 1973, affirmative action in 1978 and sexual orientation in 1986 (Klarman 1997).
But congressional acceptance for judicial review to settle conflict suggests that the majority within Congress is expecting an outcome that is favorable to their cause. As Keith Whittington (2007) explains, “For the Court to compete successfully, other political actors must have reasons for allowing the Court to ‘win’” (Whittington 2007, 26), meaning the authority to decide the issue is moved to the judiciary. Thus, “[t]he president, among others, must see some political value in deferring to the Court and helping to construct a space for judicial autonomy” (Whittington 2007, 26). But how independent is the Court in situations when Congress and political actors are deferring to the judicial branch for legislative clarity or as a bargaining chip? Regimes theory offers a strong argument to explain the behavior of the Supreme Court by asserting claims that run opposite to the counter majoritarian difficulty. Building on Robert Dahl’s (1957) argument that “the policy views on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States” (1957, 285), regimes theory postulates that the Court’s decision making is in line with a political regime in power or the regime that appointed the justices to the Court. Through the judicial appointment process, the system “encourage[s] cooperation between judges and political leaders to obtain common objectives” (Whittington 2005, 584). In a broader sense, “in the literature of American political development, a regime defines a period marked by a combination of political content and the particular ways in which federalism and separation of powers operate in practice” (Richards and Kritzer 2002, 307; see also Orren and Skowronek 1998-99)

The political regimes approach is used to analyze the Court and decision making within the larger political and legal system. Under a political regimes theory framework, “the meaning of ‘the law,’ particularly in cases going to the Supreme Court, is contingent upon the views and relative relationships of institutionalized actors who make up the political system or political
regime at any given time” (Clayton and May 1999, 234). The political regimes approach attempts to bridge the gap between the attitudinal model and those who argue that the Court roots its decisions in normative legal criteria, arguing “a justice may believe that individual institutions are themselves embedded within, and draw meaning from, the larger political regime” (Clayton and May 1999, 244).

Political regimes theory does not simply rest on the behavior of the judiciary but also affects the behavior of politicians. Politicians in a dominant political regime will support judicial review and judicial supremacy to advocate for their preferred policy preferences or on issues they cannot publicly favor (Graber 2008). To an extent, this relates to arguments found in comparative courts literature claiming that judiciaries are empowered as an insurance policy for the political regime in power. In this research, courts are only afforded the authority of judicial review after a second political party emerges that begins to challenge the dominant regime (see Ginsburg 2003).

Regimes theory additionally accounts for judicial expansion. For example, in the late 19th century, activist judges attempted to pursue a conservative agenda but were politically motivated by other political actors (see Gillman 2002). Thus, political regimes theory illustrates an alternate take on judicial and political behavior that accounts for judicial attitudes but argues that there are different motives than simply believing judges make decisions based on their own policy preferences or strategic behavior to maximize their policy goals. But there are instances when this theory cannot explain judicial outcomes, where the Court appears to be engaged in independent policy making.

An additional theory connected to political regimes is jurisprudential regimes (see Richards and Kritzer 2002). Within the jurisprudential regimes framework, the “law at the
Supreme Court level is found in the structures the justices create to guide future decision making: their own, that of lower courts, and that of non-judicial political actors” (Richards and Kritzer 2002, 306) and not in the precedent that courts creates. This research illustrates how jurisprudential regimes do not strictly determine the outcome of a case, but they establish the relevant case facts and level of scrutiny to be used in the decision making process. This research does not completely remove the justices’ attitudinal position when deciding a case, but places it as one factor along with the law that matters in decision making. But there are those who argue against this theory. Segal and Spaeth (2003) suggest that jurisprudential regimes are simply byproducts of the justices’ policy preferences. However, further analysis of jurisprudential regimes has found “only weak evidence that major Supreme Court precedent affect[sic] the way the justices themselves vote in subsequent cases” (Lax and Rader 2010, 282).

Whereas the above discussion of regimes theory suggests the Court will follow the dominant regime when issuing decisions that are salient, there are those who suggest the Court will engage in independent policy making when deciding less salient issues (Gillman 2008). The impact of salience on the Court is an important area of research that argues salience does have an impact on the behavior of justices or the Court as an institution (Epstein and Segal 2000; Rohde 1972; Segal and Spaeth 2002; Wahlbeck et al. 1998, 2000). For example, the Chief Justice is more likely to assign the opinion to a justice who is similar to his ideology, but when salience is low, the Chief Justice is more likely to assign the opinion to a colleague more distant to his ideology (Wahlbeck et al. 2000, 51). As it comes to salience and regimes theory in this context, we might then expect to see the Court engage in independent policy making in cases that relate to salient issues but can be spun in a way that addresses them from a less salient angle. For example, when the Court invalidated the Brady Handgun Violence Prevention Act of 1993 in
Printz v. United States (1997), it did not do so on Second Amendment grounds that would have been a highly salient issue for the public. Instead the Court invalidated the Brady Bill on federalism grounds, which is less important to the average American citizen (Pickerill 2004).

There are four explanations for why we might find the Court engaging in independent policy making from a political regime. First, because judicial appointments typically hinge on the salient issues of the time, we might expect to see judges then act independent of the political regime when it comes to issues of less salience. Second, there may be political conditions that allow for more independent policy making by the Court, such as periods of divided government due the lack of a concise voice to push the agenda. Third, independent policy making occurs, in part, because of American political development, which could explain why a quasi-dependent institution is able to act independently. Fourth, independent policy making could suggest the institution itself gives the judges a sense of purpose and responsibility different from other political actors (Gillman 2008).

As Thomas Keck (2007b) found, partisanship and ideology (the attitudinal model) do not explain many of the cases in which the Court invalidated legislation during the “Ginsburg Court,” specifically separation of powers-legislative process cases. This led him to suggest there are perhaps regime politics dynamics or a sense of duty to the institution that influences justices’ decisions. Additionally, Matthew Hall’s (2011) study found that the Court can engage in independent policy making when the decisions can be easily implemented by lower courts. The same can be said for separation of powers issues; the Court can issue an opinion that clearly spells out what is acceptable for the other branches of government. These separation of powers

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7 Jeffrey Segal and Harold Spaeth (2002) argue that the attitudinal model “holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put Rehnquist votes the way he does because he is extremely conservative” (2002, 86).
cases allow the Court to act as a referee over the other branches in an attempt to uphold the constitutional structure that was so vital to the Framers when creating the American political system.

While the justices may often rule in line with their ideological or partisan coalition in the legislature, “[a]t other times the justices might well act on their own constitutional understandings even when those understandings are not shared by political leaders or when their expression is not desired” (Whittington 2005, 585). This is evident when looking at the Court’s handling of habeas corpus cases, which illustrates how in recent decisions the Court has acted independent of the larger political coalition to which it is attached. Instead of upholding conservative legislation aimed at enemy combatants involved in the War on Terror, the Court, composed of a majority of Republican appointees, ruled against its conservative counterparts, striking down much of the enacted legislation aimed at taking rights away from enemy combatants (Wert 2011). These studies suggest there is something other than ideology and partisanship taking place in Supreme Court decision making. There are institutional and legal factors that in the right situations outweigh the ideological preferences of the justices and allow the Court to act independently.

But more specifically, separation of powers is not generally considered an attractive or salient issue to the general public as it does not have a direct impact on their daily lives. Additional evidence to illustrate the non-salience of separation of powers to the average citizen comes from studies on the American voter, if we approach this as a voting choice scenario. Three conditions must be met to influence voter choice: “1) The issue must be recognized by the voter. 2) The issue must evoke some degree of preference for one policy solution over another. 3) The voter must believe that one candidate is more likely to work for the voter’s preferred policy.
solution” (Lewis-Beck et al. 2008, 163). It is difficult to find a way to structure a separation of powers issue into this framework.

Furthermore, there are reasons the Court may refrain from making certain decisions in connection to the public. First, the Court may refrain from making a decision if the justices believe it will be highly unpopular. Second, the Court may refrain from making certain decisions if it can be perceived as being “inappropriate on procedural rather than substantive grounds” (Baum 2006, 64). Third, the Court may refrain from a decision because it wants to keep it ideologically in line with public opinion. As a former justice remarked, “We read the newspaper and see what is being said – probably more than most people . . . We know if there is a lot of public interest; we have to be careful not to reach too far” (quoted in Clark 2009, 973). Decisions on separation of powers remove these factors because issues dealing with separation of powers have little impact on citizens’ daily lives. Any decision in this issue area may be largely ignored. Separation of powers is not ideological but procedural. Second, separation of powers cases are rarely seen as inappropriate. The Court, as a political branch, was created as the watchdog over the legislative and executive branches. This is precisely the type of issue people would expect the Court to be engaged in, although there are those who would argue differently and call for the Court to focus on civil liberties and civil rights and abandon deciding separation of powers cases (see Choper 1980). Last, separation of powers cases are removed from ideological debates and, for these reasons, aid the Court in acting independent in separation of powers cases.

While I have focused the above discussion on the Court’s role as a decision maker on constitutional issues, that is not to say the Court has a monopoly on separation of powers issues (see Fisher 2007, 1988, 1978), although research into congressional decision making, like research on the Court, focuses on the partisan behavior of members of Congress. The seminal
works on congressional decision making illustrate how members of Congress are single minded seekers of reelection (see Mayhew 2004) who do not take the Constitution into account when making voting decisions (see Kingdon 1989). If members of Congress are only concerned with reelection, then they would not be concerned with the authority they retain or delegate to other branches of government as long as they can win reelection. Over time the delegation of congressional authority became more pronounced and was evident in the role Congress played in the political system. As Thomas E. Mann and Norman J. Ornstein explain, “the absence of regard for the institution among its leaders diminished Congress in the constitutional scheme and encouraged more unilateral and less responsible behavior by the executive” (Mann and Ornstein 2009, 53). This behavior is made more evident when looking at Congress’ attempt to delegate away key budgetary authority in the 1980s and 1990s (see Farrier 2004, 2010, 2016).

While research on congressional behavior illustrates how members are not concerned with the Constitution in their decision making, the United States’ system of government allows for sharing authority when it comes to constitutional interpretation. Under the theory of “coordinated dialogue,’ the President and members of Congress have both the authority and the competence to engage in constitutional interpretation, not only before the courts decide but after as well” (Fisher 1988, 231). As the following chapters will detail, most members of Congress do not typically concern themselves with constitutional issues, but there are those who make it a central theme in their arguments to protect key powers within their institution.

Supreme Court and Separation of Powers-Legislative Process Cases

The aforementioned literature on judicial authority and behavior, while connected, fails to properly account for why this issue area was moved to the Court’s agenda, the behavior of the
Court, and/or the effects of the decisions in separation of powers-legislative process cases in the 1980s and 1990s. During this period, the Court invalidated widely popular legislation by a mixed ideological coalition on the Court. By this I mean both liberal and conservative justices joined in the majority decision. While Choper’s argument is normative, there is evidence that some of the justices had adopted it at least for federalism cases. If this separation theory was adopted by the Court and other political actors, then the issue would have been decided through electoral politics rather than by the Court or, at the very least, the Court would have proclaimed it was a political question and refused to reach a verdict.

Additionally, while Silverstein argues that these cases fit into his framework, there is more to unpack that cannot be done in the single chapter he spent discussing this issue, especially when it comes to illustrating the path dependent dynamics taking place (see Epp 2010). With path dependency I am speaking about how past decisions and/or choices have an effect and influence on future decisions and events. As I illustrate in the chapters that follow, while a large bipartisan majority was attempting to move these issues to the Court to further validate their creative policy proposals, in each instance there was a small, but vocal, minority attempting to move the issue onto the Court’s agenda to protect the constitutional authority given to the institution. However, the motivation of the advocates for and opponents of the legislation was less a political/policy fight and more about the constitutionality of the legislation. Advocates

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9 For the purposes of this project, I borrow Pierson’s (2004) definition of path dependence, which he explains as “social processes that exhibit positive feedback and thus generate branching patterns of historical development” (2004, 21), with positive feedback being the results of the behavior or decisions becoming increasingly attractive as the institution continues down the path (2004, 20). Additionally, conflict takes place through “a dominant political coalition successfully fending off all attempts by minorities to alter the political course” (Peters et al. 2005, 1278) within path dependent situations.
and opponents both willingly accepted the Court’s role in determining the outcome to settle the Constitutional issues being presented. This suggests a third motivation; constitutional conflict judicialization. Under constitutional conflict judicialization theory, political elites who both support and oppose legislation will openly advocate for the constitutional argument/questions to be settled by the judiciary once and for all. Additionally, once the Court decides the issue, opponents of future legislation will further attempt to move similar questions to the judiciary to settle constitutional conflict. This leads to political elites placing an increased focus on institutional duty in their rhetoric, rather than political or ideological purposes, in an attempt to move issues onto the Court’s agenda to block creative policy making that would result in the institution delegating important constitutional authority.

As for decision making, the dominant models that focus on partisanship and ideology fail to explain the judicial outcomes. Keck (2007a) suggests that the decisions in Chadha, Bowsher, and Clinton might be explained through political regimes theory or possibly a sense of duty the justices have that comes from the institution. With regard to political regimes theory, we would expect to see the Court make a decision that furthers the interests of the dominant regime, and there are multiple ways this can be accomplished. However, if there is strong support for the policy, then we would expect to see the Court uphold the legislation. I will discuss in greater detail throughout this project that there was substantial support within Congress for the legislation that was invalidated in the 1980s and 1990s, even in the face of allegations the legislation violated separation of powers, which suggests that regimes theory fails to explain these decisions.

When considering the Court as an independent policy maker, there are many aspects of these cases that point to the Court as an independent policy maker. However, if this were the
case, why did it take the Court as long as it did to place these issues on its agenda? For example, legislative veto was an authority Congress had used since the 1930s, and the executive branch routinely spoke out against its use. It was not until 1983 that the Court officially issued a ruling on congressional power. Additionally, while small, there was an outspoken group of political elites urging the Court to make the decisions it made. As will be illustrated throughout this project, the Court appeared to wait until there was sufficient conflict and could find support for its arguments from a large enough coalition so its decisions would not be attacked and/or possibly overturned.

Ultimately, while political regimes, duty, and independent policy making fail to explain the Court’s decision in Chadha, I will illustrate how jurisprudential regimes theory explains the decisions in Bowsher and Clinton. Jurisprudential regimes theory directly relates to path dependency and juridification. As the Court established a jurisprudential regime in Chadha through the settling of constitutional conflict between Congress and the executive branch, the justices set the stage for how separation of powers issues would be discussed and adjudicated in the future. Members of Congress then used the language of the Court to move future constitutional questions to the judiciary rather than decide them through electoral/partisan politics. The juridification of separation of powers then led to more questions being moved to the Court, which perpetuated path dependency and helped further solidify the Chadha jurisprudential regime.

As Kathleen Thelen (2003) points out in her discussion of institutional evolution, the Court is a perfect institution for examining critical junctures and path dependency.\(^{10}\) The Court

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\(^{10}\) Critical junctures are defined as “brief moments in which opportunities for major institutional reforms appear, followed by long stretches of institutional stability. Junctures are ‘critical’ because they place institutional arrangements on paths or trajectories, which are then very difficult to alter” (Pierson 2004, 134-135).
focused on structural issues in the nineteenth century and shifted to minority rights and individual freedoms in the twentieth century. I seek to further this argument and illustrate how the latter end of the twentieth century marked a return to these structural issues that were so prominent during the early years of the republic. The decision in *Chadha* was the first case in nearly fifty years in which the Court engaged in judicial activism in separation of powers-legislative process issues. In other words, it marked the return to structural issues that were largely abandoned in the 1930s and 1940s, creating a critical juncture that altered the direction of politics in the United States.

Much has been written about the Court and path dependency because of the justices’ reliance on precedent to decide cases. Research illustrates how there is path dependence in law when judges act consistently over time (Che and Yi 1993; Kornhauser 1992; Niblett 2013). When it comes to courts of last resort, such as the Supreme Court, studies illustrate how they are less likely to display path dependent behavior because their unique position allows them to change policy (Kahn 2006; Segal and Spaeth 2002), whereas lower courts and legislative bodies are more strongly confined to follow precedent that has been set (Songer et al. 1994; Segal and Spaeth 1996). But when the Supreme Court gives a broad and emphatic no, it is harder for the Court to break from the path it has set, especially in the short term. Most notably, Silverstein (2009) illustrates the path dependency of law and its effects on politics in these same cases (*Chadha, Bowsher, Clinton*) but focuses on the Court’s formalistic use of the law.

My research adds to this long line of literature to first illustrate the role of constitutional deliberation in Congress through analysis of congressional floor debate and committee hearing transcripts, how it aids in perpetuating the path dependency that takes place within judicial decision making, and how members of Congress who oppose legislation used this deliberation to
judicialize separation of powers-legislative process issues to protect their institutions from further delegation. Additionally, while in typical path dependent situations a political majority is fending off a minority, in these case studies I will illustrate how the political minority (those who opposed the legislation, both liberal and conservative) working with the judiciary was able to fend off a political majority (proponents of the legislation) from taking corrective action. With the decisions favoring the political minority, the Court was, to some degree, engaging in anti-majoritarian behavior.

It is important to understand that “designers ‘do not want their’ agencies to fall under the control of opponents and given the way public authority is allocated and exercised in a democracy, they often can only shut out their opponents by shutting themselves out too. In many cases, then, they purposely create structures that even they cannot control” (quoted in Pierson 2000, 262). The study of separation of powers-legislative process cases is the perfect example of this behavior. Members of Congress and the executive branch were in dispute over certain aspects of legislation that were altering the constitutionally mandated legislative process. Rather than solve the dispute themselves, political elites turned to the Court to resolve the issue. Additionally, members of the majority and members of the executive branch welcomed this approach as they believed the judiciary would validate their preferred policy goals.

Additionally, there is more to critical junctures than simply illustrating an opportunity for institutional reform, it is just as important to understand what precedes a critical juncture to properly understand the implications of a critical juncture (see Soifer 2012). There are critical antecedents, permissive conditions, and productive conditions that help explain how and why a critical juncture occurred (see Figure 2). Critical antecedents are defined as “factors or conditions preceding a critical juncture that combine in a causal sequence with factors operating during that
juncture to produce a divergent outcome” (Slater and Simmons 2010, 889), and are important because they acknowledge conditions that precede the critical juncture that play a causal role on the outcome (Slater and Simmons 2010; Soifer 2012, 1576). During the critical juncture, there then must be permissive and productive conditions. Permissive conditions are factors that alter the current path an institution is following and increase the possibility that the path will be broken.\(^\text{11}\) Whereas productive conditions are factors that shape the outcome of a critical juncture.\(^\text{12}\)

A critical juncture and path dependency framework that examines the importance of what prompts a critical juncture is just as important as the juncture itself and will be used to argue that new issues move onto the Court’s agenda after increased action by a political majority upsets the established constitutional norms, creating conflict. By conflict, I am discussing disagreements between political actors over a particular policy. The conflict I analyze in the following chapters is different in that political elites, while concerned with the policy goals the legislation promoted, focused the conflict on the constitutional issues rather than the policy goals. Congress’s increased incorporation of legislative veto provisions in legislation reached a point where the Court was essentially forced to intervene in \textit{Chadha}. The judicial decision to invalidate the legislative veto then acted as a critical juncture that resulted in path dependency. Path dependency came in the form of what I call protective judicialization, a vocal minority of political elites who engaged in judicialization to protect their institutions’ authority from being further delegated to other branches of government. Protective judicialization is different from the

\(^{11}\) Permissive conditions are defined as “those factors or conditions that change the underlying context to increase the causal power of agency or contingency and thus the prospects for divergence” (Soifer 2012, 1574, italics in original).

\(^{12}\) productive conditions as “the aspects of a critical juncture that shape the initial outcome that diverge across cases” (Soifer 2012, 1575, italics in original).
type of behavior discussed by Hirschl (2008, 2007, 2004) and Silverstein (2010, 2009) in which political elites attempt to further their policy goals through the judiciaries’ positive rulings that further and entrench their policy goals. As for the decision-making aspect, I will illustrate that what appears, at first glance, to be independent policy making more closely resembles a jurisprudential regime in which the Court set a standard in the Chadha decision that in return shaped debate and judicial decisions in cases that follow.

As I seek to further understanding of how and why judicial power expands and the effects of that expansion, I make a two-part argument. First, I argue that a new issue is moved onto the Court’s agenda when there are increased challenges to constitutional norms by a political majority that creates a conflict over a particular policy issue – that issue, in this instance, being separation of powers-legislative process issues. The Court decision then creates a new judicial precedent. Second, I argue that the new precedent creates a jurisprudential regime that brings about path dependent dynamics because political elites engage in judicialization in an effort to use the new precedent to protect their institution from further delegation of power. Additionally, the new precedent gives incentives for political minorities to use the precedent in future debate when further conflict arises. The use of the legal language in debates is a key aspect of Silverstein’s juridification, in which political actors use legal language in debate. This two-step process is further detailed in Figure 2.
As Figure 3 displays, this all begins with a period in which there is a status quo for the type of behavior being displayed by political actors. For separation of powers, the status quo was for the Court to remain silent, effectively deferring the issue to the elected branches of government to settle. This resulted in members of Congress pushing the boundaries of what was constitutionally acceptable when it came to the increased use of the legislative veto. When the judiciary did step in, at the very least, it issued narrow rulings that left the veto upheld in all other instances. This then led to political actors increasing their behavior by way of issuing more legislative veto provisions, which brought about further constitutional objections.
Because of the increased conflict, the Court then intervened and had the option of setting a new precedent or upholding the previous status quo. With Chadha, the Court set a new precedent that marked a critical juncture and brought about a new path, which suggests institutions follow a path based on the decisions and behavior of institutional actors. Critical junctures occur when the path or trajectory of an institution is broken by some type of shock to the system and the institution starts down a new alternative path. After the Court intervened and
struck down the legislative veto, political elites engage in constitutional debate, while the political majority attempted to return to the previous status quo behavior with the passage of GRH. Political elites then pushed the issue to the judiciary to have the debate settled once and for all in the Court. The Court then upheld the new precedent set in Chadha, creating a new status quo. And it is important to note, as is displayed in Figure 1, the institutions can return to the previous status quo at any stage along this path.

In terms of this case study, separation of powers-legislative process cases were virtually absent from the Court’s agenda for nearly fifty years. During this period, it was the status quo for these issues to be resolved through electoral politics. However, there was an increased effort by members of Congress to test the limits of the legislative process through the passage of an increasingly large number of bills containing legislative veto provisions (as will be illustrated in the following chapter). This created political conflict, which can be defined as situations when “challengers contest authorities over the ‘shape’ and governance of ‘institutionalized systems of power’” (Morrill et al. 2003, 393). But this conflict is different than the typically discussed conflict that leads to the Court exercising its judicial review authority (see Ferejohn 2002; Klarman 1997, 1996). Under the conflict theoretical approach, as discussed by John Ferejohn (2002) and Michael Klarman (1997, 1996), the increased debate over the constitutionality of the legislative veto made it more likely that the court would step in to resolve the issue.

The Court engaging in the debate and settling the issue marked a critical juncture for the Court and the other political branches of government. Critical junctures are defined as “brief moments in which opportunities for major institutional reforms appear, followed by long stretches of institutional stability. Junctures are ‘critical’ because they place institutional arrangements on paths or trajectories, which are then very difficult to alter” (Pierson 2004, 134-
Outcomes from these critical junctures are then reinforced through feedback that comes from the behavior of political actors during that particular moment in time (Pierson and Skocpol 2003).

Just as Keck (2002) discussed with the post-New Deal period for the judiciary, the Chadha case offered several paths for the justices to take. First, the Court could have remained silent on the issue and let the lower courts handle the issue. Second, the Court could have issued a narrow decision striking down the legislative veto as applied to this particular case, leaving the overall constitutionality of the veto intact as the lower federal courts had already done in several instances. Third, the Court could have called it a political question and made a political safeguards argument. Fourth, the Court could have heard the case and crafted a deferential doctrine for the Court’s role in these matters. But the Court addressed the issue head on and broadly invalidated the legislative veto in the Chadha decision. While the decision on the legislative veto in Chadha had very little impact on congressional behavior as to legislative veto style provisions (see Fisher 1993), there were important consequences that shaped congressional behavior in future instances through the establishment of a jurisprudential regime. Thus, I will illustrate how this created a critical juncture, adding new issues to the agenda that would have an impact on the political branches for many years to come.

This juncture then resulted in path-dependent dynamics over the next twenty years with the Court reinforcing and furthering the Chadha decision. Further, I illustrate how, over time, path dependent forces reinforced and entrenched the Court’s role in this issue area and political actors now routinely defer to the Court’s authority in deciding these cases and accepting its decisions. Analysis also demonstrates the importance and impact constitutional deliberation in the legislative process has on the judiciary and ultimately the judicial outcome. Lastly, I suggest
there is another side to constitutional conflict judicialization. In asking for protection from the judiciary, the political minority, or opponents to legislation, gave the Court the final authority on separation of powers-legislative process issues and in return limited congressional policy making efforts in the future when it came to creative policy choices, specifically in this instance with budget and deficit policy making and reform.

Case Selection and Methods

In choosing cases, I selected the legislative veto and its invalidation in *INS v. Chadha* (1983), the Balanced Budget and Emergency Deficit Act of 1985 and its invalidation in *Bowsher v. Synar* (1986), and the Line Item Veto Act of 1996 and its invalidation in *Clinton v. New York* (1998). As previous research has illustrated (see Keck 2007b), these cases can be labeled as deviant from an ideological and partisan perspective and crucial when analyzing these cases from an independent policy making perspective. John Gerring (2008) states that “[t]he deviant-case method selects that case(s) which, by reference to some general understanding of a topic (either a specific theory or common sense), demonstrates a surprising value. It is thus the contrary of the typical case” (2008, 655). Because deviant cases are only deviant in that models fail to properly explain them, “the primary purpose of a deviant-case analysis is to probe for new—but as yet unspecified—explanations” (Gerring 2008, 656). Or as Alexander L. George and Andrew Bennet (2005) state, deviant cases “can be useful for heuristic purposes of identifying new theoretical variables or postulating new causal mechanisms” (2005, 81). Thus, the end-game is to identify causal factors that not only explain the cases selected for this study, but are also applicable to other cases. In this instance, the standard models of decision making fail to fully explain their outcome, with each being decided by a large, mixed ideological coalition (see Keck
2007b) and with the Court invalidating legislation that was supported by large bipartisan majorities in Congress. Large judicial coalitions are larger than a minimum winning coalition. Additionally, mixed ideological coalitions consist of members who are both liberal and conservative justices.

On the other hand, crucial cases are defined as cases “that must closely fit a theory if one is to have confidence in the theory’s validity, or, conversely, must not fit equally well any rule contrary to that proposed” (Eckstein 1975, 118). Cases labeled as crucial can either be most-likely or least likely. Most-likely cases are “one[s] that, on all dimensions except the dimension of theoretical interest, is predicted to achieve a certain outcome, and yet does not. It is therefore used to disconfirm a theory” (Gerring 2008, 659). Conversely, least likely cases are “one[s] that, on all dimensions except the dimension of theoretical interest, is predicted not to achieve a certain outcome, and yet does so. It is therefore used to confirm a theory” (Gerring 2008, 659).

Analyzing these cases under a crucial case framework will either illustrate that these judicial decisions were instances of independent policy making (least-likely), meaning there is a complete absence of political influence, or it will illustrate that these judicial decisions are influenced by politics and thus not instances of independent policy making (most-likely).

The benefit of combining these two types of case selection methods allows for not only disproving theory, but also building theory. However, it must be noted that there are many who argue these two forms of case selection are problematic because of selection bias, selecting cases based on the dependent variable. Collier and Mahoney (1996) offer an example, explaining that when analyzing “revolutions, the onset of war, the breakdown of democratic and authoritarian

13 See Goertz and Mahoney (2012, 178-179) for a discussion of literature that claims selecting on the dependent variable is problematic.
regimes, and high (low) rates of economic growth” (1996, 57), the outcome is already known and this creates a bias in the research. But as Barbara Geddes (1990) states, it “is not to say that studies of cases selected on the dependent variable have no place in comparative politics. They are ideal for digging into the details of how phenomena come about and for developing insights” (1990, 149). Choosing cases based on the dependent variable is problematic when the purpose of the research is to study the outcome, which is already known. In this instance, the purpose of the current study is to analyze the process to better explain why and how the outcome was achieved.

To ensure that cases were not left out that deal with separation of powers during this time period, specifically Article I, Section 7 issues, I utilized the Supreme Court Database to select cases that specifically dealt with separation of powers-legislative process issues. Although the database is widely used, it is not without problems. First, the database is not reliable for cases coded specifically as separation of powers. Additionally, the coding of these cases may not be reliable, with many criticizing the issue area and judgment coding (see Keck 2007b; Landes and Posner 2009; Shapiro 2009). For example, in A.L.A Schechter Poultry v. United States (1935), the Court was asked to determine if the National Industrial Recovery Act unconstitutionally delegated legislative authority to the president. Rather than labeling the case a delegation case or a separation of powers case, the database labels the case issue areas as economic activity and interstate commerce. Second, the database only goes back to 1946, which leaves out the period of time when the Court shifted its agenda from structural issues (separation of powers and federalism) to a rights-based agenda.

To overcome these shortcomings, I analyzed of all Court decisions categorized as “miscellaneous” to isolate the specific cases dealing with separation of powers-legislative process. Second, to locate decisions prior to 1946 and cases that may have been mislabeled in the
database, I conducted a search of *Westlaw* using a keyword search of Supreme Court decisions (separation of powers, delegation) and content analysis to locate cases in this issue area. The process produced a total of five cases between 1980 and 2000. Of these cases, three stand out as having significant importance and will be the focus of this research: *INS v. Chadha* (1983), *Bowsher v. Synar* (1986), and *Clinton v. New York* (1998). There is also a scholarly consensus about these cases being significant. For example, Silverstein (2009) illustrates the path dependence that came from the Court’s formalist approach to the decisions, and Farrier (2004) illustrates how the legislation at issue in *Bowsher* and *Clinton* are important instances of Congress attempting to delegate away their constitutional authority. Additionally, the remaining cases, while having to do with separation of powers and delegation are not of the specific subset of cases that dealt directly with the legislative process.

In *Chadha* the Court invalidated the use of the legislative veto by Congress. *Bowsher* builds on the *Chadha* decision, invalidating the Balanced Budget and Emergency Deficit Act of 1985 because the authority delegated to the Comptroller General was executive in nature and, thus, violated separation of powers. Later, in *Clinton*, the Court invalidated the Line Item Veto Act for violating separation of powers and, more specifically, the Presentment Clause of Article I. These three cases will serve as the basis for the research in the following chapters and will be conducted through a multi-method approach consisting of archival research, legislative histories, interviews, and analyses of secondary sources.

The additional two cases, *Mistretta v. US* (1989) and *Metro Washington Airport Authority v. Citizens* (1991), where excluded from this study because they do not address

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questions of the legislative process. *Mistretta* was excluded because the legislation in question created a sentencing board that was to be a part of the judiciary. In *Metro Washington Airport Authority*, the creation of a review board that transferred authority from Congress to the District of Columbia was challenged and struck down as a violation of separation of powers. Thus, neither of these two cases presented an issue that related directly to the legislative process.

To build a theory and illustrate how judicial authority expands when new issues are moved to the Court’s agenda and the effects when the Court embraces new issue areas, I conducted research through an American political development (APD)/historical institutional framework. As Karen Orren and Stephen Skowronek (2004) explain, “political development is a durable shift in governing authority” (Orren and Skowronek 2004, 123). With governing authority meaning “the exercise of control over persons or things that is designated and enforceable by the state,” shifts meaning “a change in the locus or direction of control resulting in a new distribution of authority among persons or organizations within the polity at large or between them and their counterparts outside,” and durable meaning that “the distribution of authority is not fixed, and that its stability or change in any given historical instance must be regarded as contingent” (Orren and Skowronek 2004, 123). With a focus placed squarely on the United States rather than being comparative with other countries, APD allows for research into change and how it comes about in one single country so researchers can gain a fuller understanding of how government and politics develop and change over time.

Just as APD embraces a historical approach to gaining an understanding about how politics develop, historical institutionalism sets out to study “institutional arrangements over time to identify order and change in politics and they search for patterns in successive combinations of old and new elements” (Orren and Skowronek 2004, 79). Thus, applying a historical
institutional approach to APD means there is a focus on the institutions rather than the individual actors. This does not mean that individuals will be ignored. It is individuals who make up these institutions, and it is their behavior that is of importance in how they influence and impact the institutions.

APD proposes three methodological propositions. The first is that when political change takes place, it happens with a pre-established system with rules and actors that are in operation, or as Orren and Skowronek (2004) call it, “site” (Orren and Skowronek 2004, 20). The purpose of this proposition is the “placement of time and space” (Orren and Skowronek 2004, 20) within the research agenda. As has already been noted, the site of this research consists of the period between the 1980s and 2000. The actors being studied consist of political actors within Congress, the executive branch, and the Supreme Court, and the rules consist of the legislative process found in the Constitution under Article 1, Sect. 7.

The second proposition states, “Sites of political change are characterized by ‘full’ or ‘plenary’ authority; rules and agents designated to enforce them cover the territory, however it is defined” (Orren and Skowronek 2004, 22). The authority in this research shifts throughout the site, beginning with Congress assuming full authority over the legislative process and attempting to alter the predetermined legislative process. The rules, however, change over time with the Court limiting the actions of Congress and establishing a new order on how authority will operate.

The third and final proposition states, “Political change ultimately registers its developmental significance in altered forms of governance” (Orren and Skowronek 2004, 24). Put another way, this third proposition seeks the “changes in how people are governed” (Orren and Skowronek 2004, 25). This methodological proposition will be illustrated through analysis.
of how Congress and the Court as institutions have changed over time because of the Court precedent that was set in *Chadha*.

Within an APD/historical institutional framework, this research will be a mix of two types of case studies: heuristic and theory testing (see Lijphart 1971; Eckstein 1975; George and Bennet 2005). Heuristic case studies are performed with deviant cases (as discussed above) and “inductively identify new variables, hypotheses, causal mechanism, and causal paths” (George and Bennet 2005, 75). Whereas “[t]heory testing case studies assess the validity and scope conditions of single or competing theories” (George and Bennet 2005, 75).

While APD and historical institutional research does not typically discuss research methodology in terms of dependent and independent variables, I think it is important to set out the factors I analyzed in an effort to build a theory that explains how new issues are placed onto the Court’s agenda and what effects these decisions have. These factors were operationalized in more general terms rather than through precise definitions that are the standard in much of quantitative research.

Through historical and archival analysis, I focused on four factors. For the legislative veto, my analysis in relation to these factors begins in 1970 and continues until its invalidation. This period of time illustrates how the veto authority shifted and became more frequent. Analysis of GRH begins with its introduction in Congress and continues until it was invalidated by the Court. Last, analysis of the line-item veto only consisted of the debate over the passage of the Line-Item Veto Act and does not cover earlier attempts to pass line item veto legislation.

First, the presence or existence of a vocal congressional minority working to halt the government action is the opposition and includes members of both parties. Thus, I am describing opposition to the legislation that included both Republicans and Democrats. Even though all
three congressional actions being studied were supported and/or passed with bipartisan support, the presence of a vocal congressional minority is important to illustrate the conflict present in Congress regarding the passage of the legislation or government action. Opposition for the legislative veto is less evident because all members of Congress were in favor of the veto power, but is especially true when considering the behavior of the Court as either a part of regime politics or an act of independent decision making by the judiciary. Information on this variable came from analysis of congressional records, floor debates, committee hearing transcripts, archival documents from personal papers and government archives (memos, speech, correspondence), Congressional Research Services (CRS) reports, and newspaper editorials drafted by members of Congress. Analysis of these materials not only illustrates if a minority is working to block the legislation, but more importantly, it helps detail what types of tactics and what types of deliberation the members of Congress engaged in. Specifically, are members of Congress who are in the minority using political arguments or engaging in constitutional debate.

The second factor I analyzed is the executive branch’s stance on the issue, which includes the president and other executive branch agencies. The executive branch position illustrates whether the president and executive branch were working with the political majority passing the legislation or if the president was siding with the political minority on the issue. For the executive branch position, archival documents (drafts of speeches, internal memos, and correspondence), public statements, campaign speeches, and signing statements were analyzed. The archival documents illustrate not only the executive branch’s stance on the issue but also how committed the president and the executive branch were to fighting for or against the issue. Additionally, just as with members of Congress, was the executive branch focused on the political or constitutional arguments.
The third factor I analyzed is outside government groups’ support for political elites who opposed the congressional action – primarily, the legal community but also the general public. As detailed previously, there are reasons to consider the legal community as an important audience not just to judges but also to members of Congress and the executive branch, as they are experts in their field. Information on this variable was collected from law review articles and newspaper editorials. As for the general public, information was collected through polling data to illustrate the level of salience for these issues.

The fourth factor I analyzed is the use of Supreme Court precedent. This variable cut across all categories as I sought to understand how government officials and members of outside groups used previous Court precedent to make their case against or in support of the particular issue. Even if political elites, like members of Congress, are speaking in legal terms through the use of Court precedent in their arguments for political reasons, it is still illustrating how law shapes politics. Using legal arguments and Court precedent in this way shaped the arguments being made.

From analysis of these variables, I illustrate how many of the models overstated their role in the process and argue that independent policy making is influenced and conditioned by regime politics – meaning, independent policy making increases when there is a coalition of political elites that provides protection for the Court. To accomplish this goal, I analyzed archival documents, legislative histories, and Court documents and conducted interviews to find evidence of political actors actively attempting to give the Court a role and place separation of powers-legislative process cases on the Court’s agenda. While there are instances in which politicians come straight out and say that the Court should have a role in or decide the case, for the most part political actors engaged in signaling that was subtler than an outright endorsement. There
are a number of ways politicians can accomplish this, but most notably it happens through the reference of case law during the deliberative process.

I analyzed legislative histories and debates from the Congressional Record and committee hearing transcripts to find evidence of members of Congress using arguments based on constitutional issues and precedent rather than political partisan arguments. Arguments grounded in Court decisions and constitutional arguments illustrate that members of Congress are at some level taking the Constitution seriously, while also providing signals to judges and the Court through the use of precedent. More importantly, arguments against legislation in these instances based on constitutional issues mean there is a political coalition united by constitutional arguments rather than ones grounded in partisan politics that can provide the Court political protection against any attempts of retribution from the majority who supported the legislation. Additionally, I conducted archival research of executive branch documents from the Gerald R. Ford Presidential Library, Jimmy Carter Library, and Ronald Reagan Library to analyze how each administration dealt with issues related to the legislative veto, and for Reagan, his administration’s stance on GRH.

For members of Congress, I collected archival documents from Rep. Mike Synar’s personal papers at the Carl Albert Center and Sen Robert Byrd at the Robert C. Byrd Center for Congressional History and Education. Inter-office memos and draft documents were analyzed to identify how members and their staffs were discussing the constitutional issues involved in the legislation and how those issues shaped their statements during floor debates, committee hearings, and interviews. Additionally, letters received from and addressed to constituents highlight how members of Congress were engaging with their voting base and the impact these constitutional issues had on their correspondence. Overall, I used archival documents from
congressional members’ personal papers to find evidence of how they engaged in and used Court precedent, the effects previous cases had on their decision making, and how they attempted to place this issue area onto the Court’s agenda.

From Court documents and archival documents from the Powell Archives Online hosted by Washington and Lee University School of Law, I illustrate how the Court referenced the arguments made by members of Congress and other political actors. Finding references by the Court to political actors’ constitutional arguments against the legislation in Chadha, Bowsher, and Clinton provided evidence that the Court was influenced by, or at the very least concerned with, political elites. Specifically, when analyzing documents related to Chadha, I first analyzed Court archival documents from Buckley v. Valeo (1976) where Justice Byron White declared his support for the legislative veto in a concurrence and dissenting opinion. The Court had not yet addressed this issue, and I make the argument that White’s opinion in Buckley was both a signal to members in Congress that the legislative veto was constitutionally acceptable and also a contributing factor to the Court adding separation of powers-legislative process cases back onto its agenda. Further, I analyzed debates over the implications of the decision in Chadha and to what degree the Court wanted to get back into separation of powers-legislative process issues. In the subsequent cases, Bowsher and Clinton, I analyzed the Court documents to illustrate the influence Chadha had over these decisions. Findings the Court built on Chadha and the precedents it had set gave further weight to the critical juncture aspect of the Chadha decision and the path dependent dynamics of the precedent in future cases.

I then also conducted interviews with Alan B. Morrison, the attorney who won in Chadha and Bowsher, but lost in Byrd v. New York, and Vincent LoVoi, legislative director to Mike Synar. These interviews supplemented the findings in the archival documents to gain a better
understanding of how these issues were placed onto the Court’s agenda and the effects these
decisions had on the political landscape. These interviews were conducted with IRB approval
from Northern Illinois University, and the interviewees gave approval to be named in the study.

Conclusion

As noted throughout this chapter, research into Court-Congress relations details a great
deal about the behavior of members of Congress and the judiciary and when and why members
of Congress looked to the Court to settle debates. I did not set out to discredit those who have
come before but to illustrate how the accuracy of existing scholarship is overstated when it
comes to separation of powers issues dealing with the legislative process in these three case
studies. The key issue is that these theories rely on ideology and partisan politics. While ideology
and partisanship are present, they are less pronounced because of the nature of the problems
being confronted in these instances – specifically, the problems are not political but are
procedural.
CHAPTER 2: CHADHA AND AN EMERGING PATH

In 1983, the Supreme Court invalidated the use of the legislative veto by Congress in Immigration and Nationalization Services v. Chadha, a tool Congress had been using without any significant legal challenge for over fifty years. The legislative veto was an authority used by Congress to nullify administrative action by the executive branch, passed by a majority but not requiring the signature of the president. As I have already reviewed in the previous chapter, there were strong normative arguments against the Court adjudicating structural issues such as separation of powers cases. Additionally, there is evidence that members of the Court accepted this argument as they routinely referenced these assertions in Court opinions. However, in a heavily criticized decision, the Court struck down the use of the legislative veto and nearly 200 pieces of legislation with it. Senator Carl Levin (D, MI) was quoted as arguing that “[t]his decision is going to cause a lot of conflict and chaos” (quoted in Wheeler 2008, 83-84). Rep. Elliott Levitas (D, GA), who was one of the biggest champions of the legislative veto, described the Court’s decision as a “train wreck” (quoted in Craig 1990, 233).

While it can be argued that Congress has essentially ignored the Court ruling and has continued to utilize legislative veto style provisions to this day, the Court’s invalidation of

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15 For more on this topic see Louis Fisher (2005). Instead of legislative vetoes, Congress has used joint resolutions and informal methods to accomplish the same goals. Additionally, although Congress continues to place legislative vetoes in legislation, presidents continue to sign them into law and argue in signing statements that they are unconstitutional and carry no force of law. However, as will be detailed later, Congress has not acted on any of these legislative veto provisions.
congressional action in a separation of powers-legislative process cases is an important moment for the Supreme Court, members of Congress and the executive branch. This chapter will first discuss the early attempts to invalidate the legislative veto to illustrate the impact these early failures had on setting up the case in Chadha. Second, I analyze how presidents dealt with and handled the legislative veto provisions to detail how, over time, the executive branch became more forceful in its attempts to stop Congress from including veto provisions in legislation. Third, this chapter examines the importance of Justice Byron White’s concurrence and dissent in Buckley v. Valeo (1976) and the impact it had on congressional debate. I then move on to discuss how Congress debated legislative veto provisions over the years and how the inclusion of veto provisions increased in number after the Buckley decision. Next, I analyze the debate that took place in the legal community over the legislative veto through analysis of law review articles. Legal academics are an important audience for justices on the Supreme Court, and these publications will help shed light on influences in the justices’ legal reasoning.

Finally, I discuss the Chadha case, analyzing the briefs presented to the Court, the oral argument and the judicial opinions by the Supreme Court. All of this analysis illustrates how Chadha is a critical juncture, breaking from the previous path by placing a separation of power-legislative process cases back on the Court’s agenda and invalidating legislation. Understanding a critical juncture is more than detailing the specific point that broke the path. Discussing and analyzing the congressional debates, law review articles, and presidential behavior illustrates the political climate of the time that necessitated this issue’s placement on the Court’s agenda.
Litigation over the Legislative Veto

Legislative vetoes are a congressional authority that allows Congress to veto executive branch rulemaking. Veto provisions are included in the language of a bill that passes through Congress and is signed into law by the president. Depending on language, legislative veto could come from the House, the Senate, or a committee and is exercised by Congress after the legislation has been passed into law. Prior to *Chadha*, the Supreme Court had not directly confronted the legislative veto, and even though the veto had been an authority exercised by Congress since the 1930s, lower federal courts had only begun to discuss and rule on the issue in the latter half of the 1970s. Alan Morrison, the attorney who represented Jagdish Rai Chadha in his suit, recalled that he had not heard about of the legislative veto before 1976; “Indeed, although there had been a part of *Buckley v. Valeo*, . . . I had only the faintest recollection of that and never saw it as a particular problem—indeed the Court never reached that question in that case” (quote in Marcus 2009, 71).

Table 1 displays the cases in which the Supreme Court had an opportunity to address the constitutionality of the legislative veto in some way and outcomes regarding the veto in those cases leading up to its invalidation. *Chadha* was not the first or only instance of the legislative veto before the courts; there are numerous instances in which the federal judiciary had the opportunity to invalidate its use.
Table 1
Legislative Veto Cases in the Federal Judiciary

<table>
<thead>
<tr>
<th>Case</th>
<th>Decision Date</th>
<th>Court</th>
<th>Legislative Veto Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Buckley v. Valeo</em> (424 U.S. 1)</td>
<td>Jan. 30, 1976</td>
<td>Supreme Court</td>
<td>Majority did not discuss the legislative veto issue. Only discussed by Justice White in concurrence and dissent. White argued that in most instances the legislative veto is constitutional.</td>
</tr>
<tr>
<td><em>Atkins v. United States</em> (556 F.2d 1028)</td>
<td>May 18, 1977</td>
<td>U.S. Court of Claims</td>
<td>Narrow decision upholding the constitutionality of the legislative veto.</td>
</tr>
<tr>
<td><em>Nixon v. Administrator of General Services</em> (433 U.S. 425)</td>
<td>June 28, 1977</td>
<td>Supreme Court</td>
<td>Court did not address the legislative veto issue.</td>
</tr>
<tr>
<td><em>McCorkle v. United States</em> (559 F.2d. 1258)</td>
<td>July 26, 1977</td>
<td>Court of Appeals, Fourth Circuit</td>
<td>The challenge to the legislative veto provision was not decided because the veto provision was not severable from the President's power to fix salaries.</td>
</tr>
<tr>
<td><em>Chadha v. INS</em> (634 F.2d 408)</td>
<td>Dec. 22, 1980</td>
<td>9th Circuit</td>
<td>Legislative veto violates the separation of powers doctrine.</td>
</tr>
<tr>
<td><em>INS v. Chadha</em> (462 U.S. 919)</td>
<td>June 23, 1983</td>
<td>Supreme Court</td>
<td>Legislative veto found to be unconstitutional because the practice is essentially legislative and thus subject to the constitutional requirements of passage by a majority of both Houses and presentation to the President.</td>
</tr>
</tbody>
</table>

*Buckley v. Valeo* (1976) was the first instance of the Supreme Court and the federal judiciary mentioning legislative vetoes, but the Court refrained from ruling on its constitutionality. *Buckley* questioned the legality of legislation drafted in the wake of the Watergate scandal that attempted to remove corruption from political campaigns through restrictions on campaign contributions to candidates. This legislation created the Federal Election Commission (FEC), which was charged with enforcing the new rules. The central question before the Court was whether the limitations placed on campaign contributions were a violation
of the First Amendment’s freedom of speech and association, but it also questioned the constitutionality of the FEC’s and Congress’s ability to directly appoint members.

Although the Court did not address the veto, it was still a highly debated topic by both parties in their briefs. In *Buckley*, the Attorney General (the appellee) argued that officers of the FEC are not executive but legislative and, therefore, are subject to congressional oversight. In this instance, the Attorney General argued that the legislative veto is constitutional simply because it is not subjecting the executive to the veto, but also members of its own branch:

Plaintiffs also have argued that the “legislative veto” provided for in Section 438(c) is unconstitutional. Whatever constitutional issues might be posed were this a provision for a one-house legislative veto by the executive branch, the Commission is an arm of Congress, so that the “legislative veto” established by Section 438(c) is simply one means by which Congress controls its own instrumentality. It is not an attempt by Congress to control the executive branch or an executive officer, nor is it a method by which Congress or the Commission can change the law without presidential participation. ("Brief for the Attorney General as Appellee and for the United States as Amicus Curiae" 1977, 111-112)

Thus, Congress has oversight authority because the FEC was a congressional agency. If the Commission was of executive function and nature, then the use of the legislative veto over the Commission would have been a constitutional violation.

The Appellants’ conceded to the point that the FEC was an arm of Congress “because of its method of appointment and Congress’ reservation of veto power over its rules” ("Reply Brief of the Appellants" 1977, 6). However, as the Appellants’ brief stated:

Congress has no plenary power, exercisable other than “by law,” with regard to the federal electoral process, nor do the so-called historical “precedents” offered by the FEC support any such argument. . . An agency charged with enforcing a critical area of substantive federal civil and criminal law through interpretative and substantive rulemaking, advisory opinions, investigations, hearings and civil-enforcement actions consists of officers of the United States; thus presidential appointment and Senate confirmation are constitutionally required. . . Astonishingly, Commission counsel disavows powers which the Commission has already exercised and is exercising today. And Congress’ vigorous use of its veto power to protect incumbent advantages vividly
demonstrates why an arm of Congress may not be crowned czar, with vast discretionary power, over the political process. ("Reply Brief of the Appellants" 1977, 6-7)

For the Appellants, the FEC, as an arm of Congress, would have the authority to utilize the legislative veto. However, the powers afforded to the FEC were executive in nature and, thus, could be given to executive agencies and not legislative agencies. And as for the rule making function of the FEC, “If the Commission can validly make rules, those rules have the force of law and are binding on the population. Since Congress has reserved to itself (and is vigorously exercising) the power to veto such rules, 2 U.S.C. §438(c), the rules become effective essentially as actions by Congress itself” ("Reply Brief of the Appellants" 1977, 97). By this, the Appellants argued that the actions taken by the FEC are legislative and must follow the constitutionally prescribed process.

These points were also briefly discussed before the Court during oral arguments, but when it came to the ruling in Buckley, the Court did not take up the issue in the majority opinion. However, in a concurrence and dissenting opinion, Justice Byron White stated his acceptance of legislative vetoes: “I am also of the view that the otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President’s veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress” ("Buckley v. Valeo" 1976, 284). Although the parties before the Court spent very little time discussing this issue in their briefs and the majority opinion completely refrained from discussing legislative vetoes, Justice White took it upon himself to declare that it was his belief that the legislative veto was constitutionally sound:

I would be much more concerned if Congress purported to usurp the functions of law enforcement, to control the outcome of particular adjudications, or to pre-empt the President's appointment power; but in the light of history and modern reality, the provision for congressional disapproval of agency regulations does not appear to
transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto. ("Buckley v. Valeo" 1976, 285-286)

While this was only one paragraph out of a lengthy decision, it can be viewed as a cautionary message to the executive branch to not challenge the legislative veto as long as Congress continues to use it as it has been.

When drafting the opinions for Buckley, the Justices of the Court expressed their concerns and asked Justice White to either write separately on this issue or completely remove it from his opinion all together. In the early draft stages of the opinions, in a memo from Justice White to Chief Justice Burger, White discussed that he was still wrestling with the legislative veto issue, stating, “I should add, however, that if the commissioners had been appointed in accordance with Article II, it is likely that I would not find constitutionally suspect the limited congressional veto of commission regulations which the statute provides. I am not wholly at rest on that question” (White 1975). But after seeing Justice White’s inclusion of language regarding the legislative veto in his opinion, the other justices were not comfortable with its inclusion.

Chris Whitman, a clerk for Justice Powell, drafted a memo addressing concerns about White’s discussion of the legislative veto, stating:

I would urge you also too [sic] concur in Justice White’s opinion, were it not for the legislative veto discussion. I think the discussion of the ‘legislative veto’ is too simplistic. It turns on the argument that the President has the power to veto the bill that provides for the legislative veto and that power is sufficient to protect the interest of the Executive. But what happens if the President vetoes the bill and Congress passes it over his veto? Is White devising a new test for constitutionality dependent on whether the bill was approved by the President or passed over his objection? If not, could Congress approve a bill over a Presidential veto that, say, set up a commission to regulate interstate commerce by regulations and rules subject to a legislative veto? This would take all power over the particular field out of the hands of the Executive permanently. (Whitman 1975)

To this, Justice Powell wrote in the margins, “yes.”
Justice Rehnquist circulated a memo stating, “The reason that I would not decide the question of the one House veto, which Byron would decide, is that it is not necessary to decide it in view of the resolution of the appointment issue, and I think it is a sufficiently doubtful and multi-faceted question that we should not express a view upon it before we are required to do so” (Rehnquist 1975). Later, Justice Potter Stewart echoed these concerns, arguing, “I should suppose that if these drafts are consolidated, the consolidated versions would simply not deal with the one House veto question, and that Byron would set out his views on that issue in a separate opinion, which any of the rest of us would, of course, be free to join” (Stewart 1975).

Justice Powell also weighed in on the discussion in a memo to the Court, stating, “My one reservation (at the moment I think it is my only one of substance) relates to the ‘legislative veto’ issue. I would prefer Potter’s suggestion that we save this for another day. If we must address the issue, I am not yet persuaded by Byron’s view” (Powell 1975). Despite these concerns by his brethren on the Court, Justice White left the language regarding the legislative veto in his final draft opinion, and as it will be illustrated, White’s statements were used in support of legislative vetoes during congressional debates.

It was after the *Buckley* decision that Alan Morrison, who co-founded the Public Citizen Litigation Group with Ralph Nader in 1972, became interested in the legislative veto. Morrison and the Citizen Litigation Group in *Clark v. Valeo* (1977) attempted to take on the issue of the veto found in the FEC that had not been decided in *Buckley*. As Morrison recalled when he had first heard about the veto, “This seemed to me to be complete insanity from a political science perspective—and also unconstitutional. Because I remember from fourth grade civics or fifth grade that the Congress passes a law, you have to have two houses and the president” (quoted in Marcus 2009, 72).
Morrison’s argument was based on three parts that called for the veto to be found unconstitutional no matter how it was approached: “if it’s Legislative, it violates the Presentment Clause because it didn’t go through two houses and the president. If it’s executive, it violates separation of powers because Congress can’t do this. And if it’s Judicial and they’re vetoing it, as in overruling it, it violates Article III because only judges can do it” (quoted in Marcus 2009, 73-74). However, the Court ruled on procedural grounds, in a per curium decision, that the parties lacked Article III standing. The Justices returned the case to the District Court with an order to dismiss.

That same year, in *Nixon v. Administrator of General Services* (1977), the Supreme Court again had the chance to rule on the constitutionality of the legislative veto but remained silent on the topic. In the “Preliminary Memorandum” to the Justices, the only mention of the legislative veto came in the form of a footnote, stating:

The SG believes that the provision for a “one-house veto” in § 104(b) of the Act is an unconstitutional attempt by Congress to participate in the detailed administration of the Act (citing separation of powers and Art. 1, § 7, cl. 3). But the SG says that that provision is not an issue here, since appellant does not challenge it and claims no right under the regulations disapproved by the Senate. (Preliminary Memorandum 1976, 7)

And in the Supreme Court opinions, the legislative veto was only discussed in Chief Justice Burger’s dissent as a question that should be left for later cases: “If and when the one-House veto issue, for example, comes before us, are we to accept the opinion of the Department of Justice as to the effects of that legislative device on the Executive Branch’s operations?” (“Nixon v. Administrator of General Services” 1977, 521).

That very same year the legislative veto was also challenged in the United States Court of Claims. In *Atkins v. United States* (1977), federal judges brought suit against Congress for additional compensation, claiming the legislature had failed to increase their salary during a
period of inflation under the Tucker Act. In addition to ruling that Congress had not violated the compensation clause, the Court of Claims narrowly ruled that the one-House veto contained in the Salary Act was constitutional:

The only ‘one-House veto’ we have before us is that contained in section 359(1)(B). The only instance of its use that is before us occurred in S.Res. 293, which disapproved the whole of the President’s recommendations. We are not to consider, and do not consider, the general question of whether a one-House veto is valid as an abstract proposition, in all instances, across-the-board, or even in most cases. ("Atkins v. United States" 1977, 241)

Ultimately, after analysis of the relevant constitutional provisions, the Court of Claims ruled that “[t]he case before this court does not involve any of the powers enumerated in article II, and we do not see how any of such powers are infringed by this legislative veto” ("Atkins v. United States" 1977, 259). This marked an important moment for proponents of the legislative veto. For the first time a court was directly upholding the use of the veto, even if on very narrow grounds.

In 1981, the Court of Appeals, Ninth Circuit found the legislative veto to be unconstitutional in *Chadha v. INS* (1981). Judge Anthony Kennedy, writing for the Court, argued that

"We cannot accept that definite, uniform, and sensible criteria governing the conferral of government burdens and benefits on individuals should be replaced by a species of nonlegislation, wherein the Executive branch becomes a sort of referee in making an initial determination which has no independent force or validity, even after review and approval by the Judiciary, save and except for the exercise of final control by the unfettered discretion of Congress as to each case. The defects of this procedure are aggravated by the unicameral aspect of the statutory mechanism and the deficiencies of that procedure preclude justifying congressional action as a separate and independent way of adjudicating the status of aliens outside the executive and judicial processes. In such a world, the Executive's duty of faithful execution of the laws becomes meaningless, as the law to be executed in a given case remains tentative until after action by the Executive has ceased. ("Chadha v. INS" 1981, 435-436)

It was this ruling that was then appealed by the INS to the Supreme Court in 1983, where the decision was upheld in a seven to two vote, invalidating the use of the legislative veto and nearly 200 pieces of legislation with it."
Chadha will be discussed in further detail later in this chapter, but it is important to first understand members of Congress, presidents, and legal academics in relation to the legislative veto. In following section, analysis of these actors illustrates how and why the Court invalidated the legislative veto after nearly fifty years of use and provide greater insight into the effects the Chadha decision ultimately had on legislative, executive, and judicial behavior in the twenty years that followed.

Congress and the Legislative Veto

Although the legislative veto had been, for the most part, an acceptable tool used by Congress since the 1930s, as the 1970s progressed into the 1980s, the number of bills introduced and passed containing legislative veto language increased substantially until the veto was invalidated by the Court in the Chadha decision. Figures 4 and 5 provide results for legislative veto provisions using key word searches of legislation introduced and passed from 1973 to 2017 (93rd to 114th Congresses) in Congress.16 Figure 4 displays results of bills introduced by Republicans, Democrats, and the total number in Congress from 1973 to 2017. The Buckley decision and Justice White’s opinion were released in January of 1976. As is illustrated, the number of pieces of legislation in Congress with legislative veto provisions increased substantially starting during the period from 1977 to 1983 before it started to decline. Additionally, there was a substantial increase in veto provisions being introduced during the congressional session immediately leading up to the Chadha decision in 1983. While the decision in Chadha did not completely end members of Congress introducing bills containing

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16 Data for Figure 4 and Figure 5 were collected using key word searches on thomas.gov for “congressional veto,” “legislative veto,” “one-house veto,” and “committee veto” to identify individual pieces of legislation that contained one or a combination of these terms.
veto provisions, there is a clear decline in the years following and a complete end beginning in 2009.

Similarly, Figure 5 displays the results of legislation that successfully passed through Congress. As illustrated, zero veto provisions passed from 1973 to the early part of 1977, but substantially they increased up to 1983 before declining later that year after the Court’s Chadha decision. While there is a noticeable difference between Republican and Democratic legislation passing during this period, it would be unwise to conclude that this was the result of partisan fighting over the legislative veto itself, but simply a result of a dominant Democratic majority in both chambers for much of this period. Democrats held a majority in the House for this entire period and in the Senate for every Congress but the period from 1981 to 1985.
There is a clear increase in legislative veto provisions leading up to the Court’s decision to invalidate it, specifically after White’s *Buckley* opinion and discussion of the issue in lower federal courts. Committee hearings also illustrate this point. Figure 6 displays results for committee hearings in the House and the Senate from 1973 to 1985 (the 93rd to 98th Congresses).17 As displayed, there was a steady increase in discussion over the legislative veto leading up to its invalidation in 1983. As expected, as the number of bills containing veto provisions increased, so did the number of committee hearings. It is also important to note that despite legislative veto provisions being enacted in legislation, Congress did not act on its

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17 Data for Figure 6 was collected through a keyword search for congressional documents containing one or a combination of “legislative veto,” “congressional veto,” and/or “one-house veto” using *Hein Online*. 
authority after its invalidation. As Matthew Hall’s (2011) research indicates, Congress has not used its legislative veto authority since the Chadha decision.

These figures help illustrate the important point about why the Court decided to accept the legislative veto, and with it structural-separation of powers issues, on its agenda. Congress was ever increasingly introducing and enacting legislation containing veto language. For the most part, the legislative veto was widely supported by members of Congress and opposed by those in the executive branch, as will be detailed later. Little time was spent debating the legislative veto or the merits of its use in Congress, and it was not until the 1960s that real discussion started to take place as presidents began vetoing legislation that contained legislative
veto provisions, increasing conflict between the two branches. The increased debate over the years will illustrate how the legislative veto was reaching a tipping point that increasingly encouraged the Supreme Court to take up the issue and settle the constitutionality of the legislative veto once and for all.

Arguments in favor of the legislative veto came in many different forms. Some argued that the veto was needed because the executive and judiciary had been amassing increasingly more authority over Congress and legislative veto was needed to help bring back its authority (Bates 1965, 22967). Others argued that the veto was constitutional when narrowly tailored to specific goals, but reports on legislative vetoes conducted by the House of Representatives warned that veto provisions raised serious constitutional questions (Moss 1978, 219).

While these debates were playing out in the mid to late 1970s and early 1980s, instead of passing legislative veto provisions piecemeal, Congress attempted to enact broad legislative veto legislation regardless of being incorporated into individual bills. The House Subcommittee on Administrative Law and Government Relations in 1976 drafted a legislative veto bill that received 265 votes for and 135 votes against. It was considered under special rules requiring a two-thirds vote, and thus failed passage by only two votes. Congressman Levitas (D, GA) introduced the same legislation yearly. While these bills received broad approval, they were never brought to consideration by the full House. Likewise, in the Senate, Harrison Schmitt (R, NM) routinely attempted to introduce veto legislation that was widely supported but never materialized with a vote.

In 1981, the Senate created the Subcommittee on Agency Administration for the purpose of dealing with, among other things, the legislative veto. In April of that year, the Committee held its first hearing on issues related to the legislative veto over agency regulations. At this
hearing, Senator Paul Laxalt (R, NV) reminded members of the Committee that during other
hearings there were those who argued against the constitutionality of the legislative veto.

However, although “[s]uch testimony is helpful, . . . it must be remembered that the Congress
has a responsibility to make its own judgments about the constitutionality of any particular
measure before it” (Laxalt 1981, 25). Senator Laxalt further clarified his point, arguing that the
constitutionality of the legislative veto is secondary in importance to whether it is “wise policy”
(Laxalt 1981, 25).

For Senator Schmitt, the legislative veto was not legislating or usurping the executive
function of the president, but it was giving Congress additional oversight authority:

Now, what the legislative veto does is put teeth into that oversight. It means that before a
rule becomes law that there will be a fixed period of time under a fixed set of procedures
by which the committee or other Members of the Congress can have a chance to review
that rule, insure its compatibility with legislative intent or other factors considered
important by the Congress; and if necessary, and I repeat if necessary, veto the
implementation of that rule. (Laxalt 1981, 29)

These sentiments calling for greater oversight of agency rule making were repeated by many
during the hearing.18

The growing salience of the legislative veto and its importance to Congress was further
solidified with Justice Sandra Day O’Connor’s nomination hearing before the Senate Committee
on the Judiciary in 1981. Senator Charles Grassley (R, IA) questioned O’Connor regarding her
views on the legislative veto. O’Connor first remarked that she had zero experience with the
legislative veto because it was not an allowed authority in the Arizona legislature. “I would only
say that there may be basic issues of separation of powers involved in a particular enactment, but
I would certainly want to look at the particular enactment that was produced before formulating

18 Members calling for the legislative veto based on needs for greater oversight: Harry F. Byrd, Jr (D, VA), Carl
Levin (D, MI), Orrin Hatch (R, UT).
any conclusion and would also want to have the benefit of brief, arguments, and discussion”

(O’Connor 1981, 208). And she continued by stating:

It strikes me that Congress has a very effective power irrespective of any legislative veto provision that it might want to adopt, and that is the power to take a look at the administrative regulations which the particular agency has adopted, and if Congress feels that that agency has gone beyond the scope of the intended authority of Congress, Congress has the power to directly legislate in such a fashion as to make clear that it was not intended to have that power and to effectively by direct enactment curtail that kind of power. So I assume that that is a very direct means which Congress can also use.

(O’Connor 1981, 207)

O’Connor concluded by admitting that even with her time as an Arizona state senator, she had little experience with legislative vetoes because they were not authorized in the state. Regardless of her answer, it is more evident that this was a growing concern for members of Congress and the Senate was attempting to gauge the future justice’s reactions to the congressional oversight tool.

In addition to constitutional deliberation, many in Congress pointed to White’s opinion as the Court giving its acceptance for the legislative veto. Rep. Levitas (D, GA), who was the champion of legislative vetoes during this period, cited Justice White on multiple occasions, stating that “[i]f Justice White’s dictum is an indication, I think we can expect that congressional veto of regulations will be held constitutional by the Supreme Court when it accepts such a case for review” (Levitas 1978, 178). Rep. Harold T. Johnson (D, CA) addressed the fact that the legislative veto was not ruled on in Buckley, but it still was given a stamp of approval. “Mr. Justice White in a separate opinion strongly endorsed the constitutionality of Congressional veto” (Johnson 1978, 213). Rep. Henson Moore (R, LA), after admitting to being one of the two legislative veto activists who had been attempting to pass more through Congress, argued that “Justice White did express the opinion that the only unconstitutionality he could see in it was if it
violated separation of powers by the legislative body getting involved with the Executive office’s powers” (Moore 1978, 280).

Support for the veto in light of Justice White’s comments also came from the academic legal community. Eugene Gressman, Kennan Professor of Law at the University of North Carolina Law School, appearing as Special Counsel to the House of Representatives to defend the constitutionality of the legislative veto, stated:

One House normally rejects innumerable proposals made to it during any session of the Congress, and it was in that context that Mr. Justice White’s dictum in *Buckley v. Valeo* is significant. In realization of this legislative fact he said that when Congress rejects a recommendation it is not acting legislatively and does not act by way of a bill or resolution that is normally submitted to and enacted by both Houses subject to Presidential approval or veto. (Gressman 1979, 460-461)

Additionally, Joseph Cooper, Dean of the School of Social Science at Rice University, stated that “as argued by Justice White in *Buckley v. Valeo*, veto action simply prevents a change in the law. It is negative in impact. Nothing remains on which the President’s veto could operate” (Cooper 1979, 495).

Further support came from the academic community during various committee hearings between 1977 and 1983. Bernard Schwartz, professor at New York University Law School, testifying before the Subcommittee on Consumer Protection and Finance stated:

Justice White in a concurring opinion went out of his way – it had nothing to do with the case – but he went out of his way to say that in his opinion, the provision, the legislative veto provision as it were . . . the legislative veto provision of the Federal Election Act was constitutional and he said in his concurring opinion that this has nothing to do with the provision of article 1, section 7 which contains the clause subjecting every bill and every order, resolution or vote, which requires the concurrence of both houses, to the President’s veto power. (Schwartz 1979, 154-155)
Collectively, these statements make it clear there were many in and out of Congress who believed Justice White’s statement in *Buckley* was a signal that the Court would uphold the constitutionality of the legislative veto.

However, many testified at committee hearings who expressed their reservations, or outright disapproval, of White’s statement. Rep. John E. Moss (D, CA) reminded members that this was just one justice on the Court and that it might be unwise to take one man’s claims as a statement of acceptance by the entire Court. As Moss stated:

> Justice White in his concurring opinion suggested that such a provision in that law would have his constitutional blessing. But since the view of Justice White is dicta and since the sharply divided *Atkins* decision is self-limiting, the basic question of whether a congressional veto is constitutional is very much unsettled. (Moss 1978, 219)

Similarly, in written remarks, John Harmon, the Assistant Attorney General for the Carter Administration, expressed reservations for this belief that White’s dicta in *Buckley* signified an approval by the Court toward the legislative veto:

> It is true that Justice White, speaking only for himself in *Buckley*, stated, his view that one-House disapproval of regulations issued by “a properly created independent agency” would be constitutional. Assuming that Justice White would adhere to this view in a case in which this issue were actually raised and briefed, it would appear that he would not necessarily reach the same result with regard to regulations issued by Executive Branch – as opposed to independent – agencies. (Harmon 1978, 165)

These same sentiments were expressed by Theodore B. Olson, Assistant Attorney General during the Reagan Administration, stating:

> It is a 294 page opinion. Justice White’s concurring and dissenting opinion is one of six separate opinions. He is the only one of the eight Justices on that Court, at that time, who addressed that issue. His comments span just three of the 294 pages of opinions. The issue of the legislative veto, as I understand it, was not briefed by the Government in that case. Subsequent to Justice White’s comments in that opinion there have been various expressions by scholars and other judges regarding Justice White’s views. (Olson 1981, 81)
During committee questioning, Morrison, who at the time was serving as the Director of Congress Watch, pointed to statements made in the petitioner’s brief for *Consumer Energy Council of America v. Federal Energy Regulatory Commission* (1983), which stated:

> There are several reasons why Justice White’s conclusion does not defeat petitioners’ challenge here. First, he appears to have examined the issue solely from the perspective of Art. I, §7, and hence his views on the other issues are not known. Second, the constitutional question presented was an abstract one, not keyed to the actual veto of any particular rule. (Morrison 1981, 140)

Attorney General Benjamin Civiletti discussed White’s opinion as well, pointing out that White made a distinction between regulatory bodies that are dependent of, or independent to, the executive branch. However, Civiletti stated, “I do not think that distinction will hold up in constitutional analysis” (Civiletti 1981, 431).

Although there was strong support by members of Congress pointing toward the constitutionality of the legislative veto thanks to Justice White’s statements, as is illustrated above, there were those in Congress and other political officials warning that White’s remarks held little to no weight. It is evident that, for the most part, a majority inside Congress had always welcomed and accepted legislative veto authority and the Court had done little to alter that behavior. At the very least, and possibly unintentionally, the Court had signaled an acceptance for legislative vetoes through Justice White’s opinion, which aided in furthering the congressional behavior.

This overview of Congress and the legislative veto illustrates the importance of the veto to members of Congress and the growing salience of the issue throughout the late 1970s and early 1980s. Specifically, after Justice White announced his approval of the veto, members of Congress included vetoes in an increasing number of bills introduced in Congress. More importantly, while members of Congress knew there were questions as to the constitutionality of
the legislative veto, there were strong arguments in favor of it. With Congress delegating more and more power to agencies and agencies were increasingly engaged in rulemaking, Congress needed some type of oversight power; the veto afforded Congress that authority. The following section further illustrates the increased salience and arguments around the constitutionally of the legislative veto through analysis of presidents’ actions in relation to the legislative veto.

**Presidents and the Legislative Veto**

From the first use of the legislative veto, presidents had always been outspoken critics of its inclusion in legislation. The first use of the legislative veto came in 1932 with President Hoover’s plan to reorganize the executive branch, but he feared Congress would not approve. To get around this, Hoover “recommended that Congress delegate reorganization authority to him, subject to the approval of a joint committee of Congress,” and “[i]n 1932, in the midst of the Great Depression, Congress gave Hoover the authority he wanted. He could submit reorganization plans to Congress, and they would become law within 60 days unless either house disapproved” (Fisher 2007, 139). As Lawrence Tribe (1984) discusses, Presidents Eisenhower, Johnson, Nixon, Ford, and Carter all vetoed legislation on the grounds that legislative vetoes were unconstitutional (1984, 7). As time progressed, and Congress increased its use of the legislative veto, presidents became more involved and increasingly concerned over this threat to their authority.

Richard Nixon expressed reservations about the legislative veto in light of his Attorney General advising him against its constitutionality. In a signing statement attached to the Second Supplemental Appropriation Act of 1972, Nixon stated that a legislative veto clause was “infringing on the fundamental principle of the separation of legislative and executive powers”
(Nixon 1972). Additionally, Nixon attempted to challenge the constitutionality of the legislative veto as part of his suit in *Nixon v. Administrator of General Services* (1977). However, this issue was not discussed or decided in the Court opinion.

President Gerald Ford followed suit while in office, issuing signing statements proclaiming his administration’s stance that legislative veto was unconstitutional. At the time Ford was advised against taking action, specifically vetoing legislation containing legislative veto provisions out of fear of a “potentially strong adverse congressional reaction” (Cole 1974, 3). The Department of Justice, IRS, and CIA all expressed their constitutional concerns with legislative veto provisions in memos to Ford, arguing that they were “constitutionally objectionable as congressional infringements upon the legitimate functions of executive agencies” (Lynn 1976, 7). Then Director of the CIA, George Bush, advised President Ford to veto specific legislation containing veto provisions, stating, “[B]y authorizing Congress to overturn an agency head’s determination, the bill raises the question of the propriety of legislative veto of administrative decisions in the Executive branch” (Bush 1976).

Once in office, President Carter received near weekly briefs on legislative veto provisions and was advised on strategies to deal with them if passed through Congress (see Jimmy Carter Library, Presidential Files). In June of 1978, Carter drafted a message to Congress outlining his position on the legislative veto. In his message, Carter explained that the legislative veto was an infringement on the Executive’s constitutional authority to execute the laws, stating that “for both constitutional and policy reasons I strongly oppose legislative vetoes over the execution of programs. The inclusion of such a provision in a bill will be an important factor in my decision to sign or to veto it” (Carter 1978). Additionally, Carter stated that “if Congress subsequently adopts a resolution to veto an Executive action, we will give it serious consideration, but we will
not, under our reading of the Constitution, consider it legally binding” (Carter 1978). This was precisely Carter’s message two years later, in June of 1980, when the administration advised the Department of Education to ignore recent legislative veto action in relation to four of its regulations (Babcock 1980). Whereas in the past, presidents had spoken out against the constitutionality of the legislative vetoes, Carter was taking direct action, advising agencies and departments to ignore any legislative veto that was aimed at their administration of the laws.

Carter was also being advised on legal challenges that could be brought against legislative vetoes. However, Carter’s advisors felt the Atkins and Chadha cases that were working their way through the judicial system were poor vehicles and would not get the desired outcome Carter was hoping for. In 1977, White House Counsel, Robert J. Lipshutz advised Carter on this very issue, stating:

Neither Atkins nor Chadha present what we think would be ‘ideal’ cases for review. It is possible in both cases for the courts to conclude that the exercise of the veto – under the particular statutes involved – was an appropriate exercise of Congress’ constitutional responsibilities without reaching the broader question of the constitutionality of legislative vetoes in other contexts. (Lipshutz 1977, 46)

Additionally, Carter was advised that because he and past presidents had signed legislation into law that contained legislative veto provisions, any lawsuit challenged by the executive branch would be difficult to win. To overcome this barrier, Carter was advised to challenge every piece of legislation that came across his desk containing a veto provision and to treat them as “report and wait” provisions that would accomplish the goal; these “[r]eport and wait provisions require agencies to report certain actions to the appropriate congressional committees before the agency action can take effect” (Funk and Seamon 2009, 51). This then prompted the committee to either pass legislation to force the agency into action or the committee would attempt to apply pressure on the agency to act.
Later the Reagan administration argued against the legislative veto when it was before the Court in *Chadha*, but on the campaign trail Reagan had taken a different approach. During a campaign speech in October of 1981, Reagan stated “that ‘both Congress and the President’ should be granted ‘greater authority to veto regulations approved by executive agencies,’ and a Republican platform provision had supported ‘use of the Congressional veto’ as a ‘means of eliminating unnecessary spending and regulations’” (Taylor 1981). Additionally, in 1981, during his first term in office, leading up to the *Chadha* decision, President Reagan endorsed some forms of legislative veto provisions, “but only if the congressionally popular oversight tool applie[d] to independent regulatory agencies and not to those in the Executive branch” (Brown 1981). Later that year, the Reagan administration announced that it “would be willing to accept legislation giving Congress veto power over regulations issued by executive branch agencies so long as the president ha[d] a voice in the veto process” (Mayer 1981). An administrator within the Office of Management and Budget explained that Reagan would approve of the legislative veto if he were given the opportunity to review and reject or accept the veto before Congress acted (see Mayer 1981). This worried Morrison, who had been working to get the judiciary to rule the legislative veto was unconstitutional. However, Morrison believes Reagan had a change of heart once in office. “He was the president, and looked at all the other places in which this thing was impinging upon his powers and potentially so” (quoted in Marcus 2009, 80)

When signing the Union Station Redevelopment Act of 1981, Reagan issued a signing statement arguing that Section 1192 contains a legislative veto provision which the Attorney General advises is unconstitutional . . . [C]ommittees of Congress cannot bind the executive branch in the execution of the law by passing a resolution that is not adopted by both Houses of Congress and presented to the President for approval or veto. Accordingly, this language of section 114(e) must be objected to on constitutional grounds. The Secretary of
Transportation will not, consistent with this objection, regard himself as legally bound by any such resolution. (Reagan 1981)

In line with these statements, when *Chadha* made it to the Court, the Reagan administration argued for the unconstitutionality of legislative veto provisions.

While the presidents in office initially favored the control they gained over agencies, as time passed, veto provisions were being included in more and more legislation. No longer simply controlling agency reorganization, in the 1970s and early 1980s legislative veto provisions found their way into any piece of legislation that allowed for agency rulemaking. It was also during this period that challenges to the constitutionality of the legislative veto began making their way to the judiciary.

**Law Reviews and the Legislative Veto**

From a regime politics perspective, a political majority is the most direct link to find a connection between a judicial decision and political preferences. A second important audience comes from legal academics. Lawrence Baum (2006) states:

> As a segment of the legal profession, law schools and legal scholars are especially relevant to judges on higher courts. They interact directly with judges in conferences, judges visit law schools, and other settings. More important, they are prominent evaluators of judges’ work. Because law professors have so much prestige, their evaluations of judges carry considerable weight. (2006, 100)

More important are “articles and notes in law reviews, which constitute the most detailed and most widely circulated evaluations of judges’ work. These publications typically focus on specific decisions or sets of related decisions” (Baum 2006, 100). Other than evaluations, when a new issue is making its way through the judicial system, justices can look to the articles for guidance and support for their arguments and justifications.
With law review articles providing an important evaluative component to decision making, judges can also take cues from these sources before making a decision. A state supreme court justice was quoted as telling a group of law review editors, “You grade us and we pay attention!” (quoted in Baum 2006, 100). Another federal court judge stated that “a good number of judges no doubt begin their perusal of a new [law review] issue with the case comments, anxious to see if one of their cases has been reviewed” (quoted in Baum 2006, 100). Further, judges who have held legal academic positions often use their former colleagues as reference groups when working through decisions.

For these reasons, analysis of law review articles published leading up to the Chadha decision offered important insights into a possible influence on the justices’ decision making. Finding evidence of those in the legal academic profession holding negative views toward the legislative veto provides evidence for why the Court invalidated the veto despite the strong support it garnered in Congress. Articles discussing the legislative veto were published as early as 1941, but interest and publications increased substantially in the 1970s and early 1980s leading up to the Chadha decision. These law reviews helped illustrate the change in arguments over time and the increased salience that eventually led to the Court adding the issue to its agenda.

Figure 7 displays the total number of law review articles published from 1970 to 1983. There was an increase in discussion of legislative veto leading up to the decision in Buckley, and it remained steady until increasing again before the Court’s decision in Chadha. Figure 8 then illustrates the positions taken in these law review articles, coding the authors’ stances as “Constitutional,” “Unconstitutional,” and “No Position.” As is illustrated, like discussion in Congress, discussion of legislative vetoes in law review articles also substantially increased
throughout the 1970s leading up to the invalidation of the veto in 1983. We also expected a lag to take place because of the publication process and see the largest increase taking place in 1977, the year after *Buckley* and White’s opinion. There is, again, another increase in law reviews published in 1981, the year *Chadha v. INS* (1981) was adjudicated by the 9th Circuit Court.

![Figure 7: Legislative veto discussion in law reviews, 1970 – 1983.](image1)

![Figure 8: Law review position on legislative veto, 1975-1983.](image2)
Additionally, Figure 8 illustrates that the constitutionality of the legislative veto was not straightforward. A majority of the law reviews published during this period discussed the legislative veto strictly in terms of legislation that had been passed, including veto provisions or proposals being discussed in Congress without taking any position. Of those who did take a position, 21 argued the veto was constitutional, while 19 argued it was an unconstitutional congressional authority. Content analysis of these articles further illustrates the division in the arguments of those who were for and those who were against legislative veto.

In one of the first substantial examinations of legislative veto, John D. Millett and Lindsay Rogers (1941) discussed the legislative veto contained in the Reorganization Act of 1939. With approval for congressional authority, Millett and Rogers stated, “If the legislature wishes to insure that it will have an opportunity to express an opinion upon the exercise of discretion by those who fill in the details of a legislative mandate, then the legislature ought to include in the original law some reservation similar to that of the Reorganization Act of 1939” (1941, 189). As will be detailed throughout this section, most of those who approved of the legislative veto did so in relation to Congress’ further delegation of authority to agencies. However, many in Congress were against further delegation “in a time when dictatorship is said to be a real possibility” (Millett and Rogers 1941, 177). But with increasingly complex situations, Congress continued to delegate, and with this increased delegation, proponents of the legislative veto believed Congress was in need of greater oversight tools legislative veto provided them.

Twenty years later, Joseph Cooper and Ann Cooper (1962) argued:

[The] veto provision constitutes an integral part of the original policy decision. Furthermore, actions taken under the veto provision are limited by the nature of the enabling act itself and they can be limited further by making proposals submitted under
the veto provision non-amendable, whereas the range of policy decisions which can be made by a new law or an amendment is virtually unlimited. (1962, 476)

This remained a strong argument throughout the debates of the late 1970s and early 1980s and was discussed by Justice White in his Buckley opinion.\textsuperscript{19} For those who made this argument, when legislation was enacted, the president had an opportunity at that moment to veto the bill because it contained a legislative veto provision. If the president signed legislation into law that contained a legislative veto, then the president had given his approval for the legislative veto once exercised by Congress.

These remarks serve as evidence in support of legislative veto and give reason to question why the Supreme Court came down on the side it did in Chadha. Approval based on constitutional, policy, and/or governmental efficiency grounds would allow the Court to use these arguments without making it appear partisan. But there were strong arguments against the use and inclusion of legislative veto provisions as well. Harold Bruff and Ernest Gellhorn (1977) examined the history of the legislative veto and the case law surrounding it and speculated about the long term effects broad legislative veto authority would have on government institutions. Building on previous discussions, Bruff and Gellhorn argued that over time the Court and constitutional doctrine have developed in a way to support administrative lawmaking despite constitutional limits on delegating such authority. Although

\begin{quote}
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. (Bruff and Gellhorn 1977, 1372)
\end{quote}

\textsuperscript{19} For additional law review publications that follow this logic see: (Stewart 1976; Abourezk 1977; Javits and Klein 1977; Miller and Knapp 1977).
But even with these standards, Bruff and Gellhorn (1977) assert that the courts have failed to uphold them in practice and has resulted in increased “lawmaking power . . . in administrative hands without any constitutional assurance that the agencies are responsive to the people’s will” (Bruff and Gellhorn 1977, 1373). Thus, instead of following the prescribed path for delegation of power, Congress could use this negative check to control administrative lawmaking.

As for constitutional questions related to separation of powers, Bruff and Gellhorn (1977) contended that “[c]hief among these [questions] 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)” (Bruff and Gellhorn 1977, 1373). Specifically, legislative authority is granted to a bicameral Congress as an “internal check against the aggrandizement of congressional power” (Bruff and Gellhorn 1977, 1374). Thus, through its legislative authority, Congress cannot alter the bicameral legislative process established in the Constitution.

Lee Watson (1978) suggested that legislative veto was unconstitutional for both political and constitutional reasons. First, the “[a]vailability of the legislative veto . . . may tempt Congress to create powers in excess of those it would otherwise allow the President” (Watson 1978, 990). This argument is based on political reasons favoring a more balanced political system rather than placing greater authority with Congress. As for constitutional reasons, Watson considered the legislative veto a violation of a core constitutional value discussed and established by the Framers:

[B]y authorizing action by Congress outside the check of the presidential veto power, or action by the individual House of Congress without operation of the bicameral check, these devices may shift the balance of governmental power toward Congress, and allow
the legislative branch to dominate the executive, a situation greatly feared by the Framers of the Constitution. (Watson 1978, 990) Robert Dixon (1978) similarly disagreed with the legislative veto, describing this expansion as a “troublesome . . . development” (1978, 424). Further, he asserted that the legislative veto, when used as a “device to check day-by-day administration of the government, is both unconstitutional and unwise, but that its use may be harmless in the context of discrete legislation” (1978, 426).

Building on the Framers, Dixon argued, Article I, Section 7 of the Constitution is defined in strict detail, “according to Hamilton, . . . to enable the President to defend himself against being ‘stripped of his authorities by successive resolutions, or annihilated by a single vote,’ and to furnish additional security against enactment of improper laws because of the ‘effect of faction’ or ‘want of due deliberation’” (Dixon 1978, 435). Dixon specifically details five areas in which the legislative veto violates the Constitution:

(1) the provisions of article I, section 7, clauses 2 and 3, making the President a participant in the lawmaking process and according him a veto power; (2) the allocation to the President in the “take care” clause of article II, section 3—perhaps as augmented by article II, section 1, clause 1, vesting in him the “executive power”—of the power of execution of the statutes as enacted; (3) the firmly developed principle that it is the function of the judiciary to interpret unamended statutes, and most certainly to rule on questions of exceeding statutory authority; (4) the disability clause and incompatibility clause in article I, section 6, which separate members of Congress from administrative functions; and (5) the appointments clause of article II, section 2, clause 2, placing in the President and not the Congress power to appoint administrative officials. In addition, if the congressional veto device takes the mode of the one-house veto, or the committee veto, rather than the less common mode of the concurrent resolution, the bicameralism requirement for statute making and statute modification set forth in article I, section 7 is violated. (Dixon 1978, 494)

This left Dixon to conclude that while there may be reasons and theory to support the legislative veto as an appropriate and useful tool, the Framers had their reasons for establishing the system they did and legislative veto is not consistent with that system of government. However, in certain situations, like the Salary and Reorganization Act that was upheld by the Court of Claims
in *Atkins v. United States* (1977), Dixon argues that legislative veto “may be constitutionally harmless and politically insignificant” (Dixon 1978, 494).

The above discussion illustrates the legal academic debate in law review articles throughout the 1970s and early 1980s regarding legislative vetoes and the escalating debate as Congress was increasingly adding veto provisions to legislation. First, the increase in publications discussing some aspect of the legislative veto indicates the increased salience of the issue over time. The issue was becoming more salient as Congress increased their inclusion and use of the legislation. As the issue was receiving more exposure, there was a higher probability that the Court would accept the issue onto its agenda to settle the conflict taking place between Congress and the executive branch as well as the conflict among those in the legal academic community who were debating the constitutionality of the issue.

Second, if legal academics are an important audience to judges, then we can expect to see these debates playing out in the justices’ *Chadha* opinions. Additionally, with the Court invalidating the legislative veto in *Chadha*, the Justices could be encouraged by the knowledge there was a minority of legal academics who agreed legislative veto was unconstitutional, and there is evidence the Justices were aware of these debates with the Justices’ citing many of the articles discussed above in their opinions. First, this illustrates that justices do look to legal academics and their opinions and suggests their legal reasoning does matter. Second, it provides evidence that although the justices were ruling against a large political majority, the justices had and were using an important group for support in their arguments to justify their decision.

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20 Chief Justice Burger’s majority opinion cited Miller and Knapp, and Javits and Klein, among others, in his reasoning as to the unconstitutionality of the legislative veto. In his dissenting opinion, Justice White referenced Bruff and Gellhorn, Cooper and Cooper, Javits and Klein, Miller and Knapp, and Dixon to explain that the debate over the constitutionality of the veto was not as clear cut as the majority opinion would make it seem.
Last, when the Court accepts a new issue onto its agenda, this audience can provide important insight into how the legal community believed a decision should be adjudicated and what dissenting arguments would look like. The justices’ opinions in Chadha mirror those found in the legal community, with those in the dissent taking cues from those who wrote favorably about legislative veto. With increased agency rulemaking, Congress needed a tool that would give them more control over the powers they were delegating away. These arguments take on both constitutional and political positions, believing the veto is not legislation in the constitutional sense and, thus, does not have to follow the precise process detailed in the Constitution.

*Chadha* at the Judiciary

The discussion of the legislative veto thus far has focused on the more general idea of veto authority, but the case that ultimately invalidated its use was brought on much narrower grounds. Even though Jagdish Rai Chadha was simply attempting to get his immigration status approved, his case took on much greater importance in his challenge to the legislative veto. In 1972, Chadha overstayed his student visa, and at his deportation hearing, he admitted to this fact. Subsequently, the hearing was adjourned so he could file for a suspension of deportation. Later that year Chadha’s deportation was officially suspended because “he had resided continuously in the United States for over seven years, was of good moral character, and would suffer ‘extreme hardship’ if deported” (462 U.S. 924). However, under the law, Congress was able to review suspended deportation orders and used congressional veto authority in 1976 to suspend Chadha’s order. As a result, Chadha sued, arguing that Section 244(c)(2), which contained the legislative veto, was unconstitutional. Joining in his attempt to strike down the legislative veto was
Immigration and Naturalization Services (INS), the agency tasked with deporting Chadha. Because the INS, on behalf of the executive branch, was arguing against the legislative veto, the House and Senate were asked to defend the legislation before the Court. While Chadha’s story is an interesting one, the focus of this analysis is on the constitutional arguments made by the various parties before the Court and the legal reasoning handed down by the justices (for a complete and detailed account of Jagdish Rai Chadha's story see Craig 1990).

Section 106(a) of the Act allowed Chadha to file a review of the deportation notice in the U.S. Court of Appeals, which he filed in the Ninth Circuit. The Ninth Circuit ruled in Chadha’s favor, arguing that Section 244(c)(2) was a violation of the Constitution’s separation of powers doctrine. The Supreme Court then unanimously granted certiorari where, like the Circuit Court case, Chadha was joined by the INS arguing against the constitutionality of the legislation and the House and Senate filing briefs in support of the Act.

In the brief for Chadha, the Appellee-Respondent, the attorneys argued that the court of appeals was correct in ruling that Section 244(c)(2) (the legislative veto provision) ran counter to the constitutional separation of powers. Use of the legislative veto, according to the Chadha brief, saw Congress exercising either executive or judicial authority when vetoing Chadha’s relief. Citing *Myers v. United States* (272 U.S. 52, 1962), Chadha’s brief argued that because certain instances specifically discussed in the Constitution give one house of Congress authority to act (the Senate’s advise and consent authority for treaties and appointments), all others not mentioned should be found unconstitutional.

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21 *Myers v. United States* held that legislation was unconstitutional when it restricted the president’s ability to remove executive officers.
Additionally, Chadha’s brief specified three other reasons the legislative veto was unconstitutional. First, Article 1, Section 7 specifies the president must be given an opportunity to veto any legislation that would have an impact on citizens. Second, the legislative veto is in clear violation of the bicameral requirements found in the Constitution. Third, the legislative veto provision in question failed to provide guidance on the delegation. Referencing *Schechter Poultry Corporation v. United States* (295 U.S. 495, 1935), the brief contended that although the delegation doctrine is not typically applied to Congress in this way because both houses of Congress must act to pass legislation, the veto provision in this legislation failed to offer standards and allowed for an unchecked delegation to a single branch of government.

The brief for the INS offered similar arguments related to the unconstitutionality of the legislative veto provision. First, the INS contended that the legislative veto provision of the legislation violated the bicameral requirements found in Article I, Section 7 of the Constitution. As the INS brief stated:

> If Section 244(c)(2) had never been enacted, it is clear that a resolution passed by one House of Congress and not approved by the President or repassed by both Houses over his veto would not bind the Attorney General in his administration of the Act or affect the legal status of an individual alien. ("Brief for the Immigration and Naturalization Service" 1982, 10)

Additionally, as the INS argued, this process violated the Presentment Clause, which “clearly shows that Congress cannot avoid submitting a legally binding resolution to the President simply by attaching a different label to it or by re characterizing the process that led to its passage” ("Brief for the Immigration and Naturalization Service" 1982, 12)

A second reason for the unconstitutionality of legislative veto, according to the INS, was that it violated the separation of powers doctrine because it allowed for one House of Congress to engage in the execution of the Act in question. Referencing *Buckley*, the INS brief argued that if
an officer who has been appointed by Congress cannot be given executive branch authority, it also cannot delegate authority to one House of Congress to do the same thing. And in a third argument the INS stated that allowing this legislation to stand, and more importantly, the legislative veto, would allow one House of Congress the ability to invalidate the actions of any branch of government it wished. In turn, this would completely blur the lines between what is legislative and what is executive.

On the other side of the case, both the House and Senate submitted briefs in favor of the Act and the legislative veto. The House brief argued that the Framers, along with the Court’s own jurisprudence, never argued for a strict separation among the three branches of government. To support this argument, the House brief cited the Court’s own jurisprudence in Buckley, United States v. Nixon (1974) and Nixon v. Administrator of General Services (1977) as examples of the Court, allowing for a weak reading of the separation of powers doctrine. Citing Buckley, the brief stated, “the Framers ‘viewed the principle of separation as a vital check against tyranny’ but ‘likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively’” ("Brief of the United States House of Representatives, Appellee-Petitioner" 1982, 23). And in Nixon v. Administrator of General Services, the Court asserted that the separation of powers was to be flexible and change with the demands that came about over time. Further, the House brief pointed to James Madison’s own references to Baron de Montesquieu as another guiding figure that would not support strict adherence to separation of powers. Additionally, even the Necessary and Proper Clause, according to the House brief, allowed for a mixing of authority rather than a strict line among the branches.
The Senate brief followed logic similar to that of the House. Also referencing *Nixon v. Administrator of General Services*, the Senate brief argued legislative veto was constitutional and not a violation of separation of powers because “[i]t augments, and in no way infringes upon, executive power” ("Brief of the United States Senate, Appellee-Petitioner" 1982, 8). Further, the Senate cited Justice White’s *Buckley* concurrence and dissent to argue that the actions taken by one house of Congress are simply reviews and not actual acts of lawmaking, “The approval or disapproval by the Congress or by one of its Houses under a statute providing for legislative review is not an act of lawmaking. The requirements of bicameralism and presentation are fully satisfied by the enactment of the underlying statute authorizing legislative review” ("Brief of the United States Senate, Appellee-Petitioner" 1982, 33). Thus, just as had been argued during congressional debates on the floor and during committee hearings, because the legislative veto was signed into law by the president, the president was approving the action.

Oral arguments for the case were originally held on February 22, 1982, and then reargued on December 7, 1982. During the first oral, Eugene Gressman argued on behalf of the House of Representatives in support of the legislative veto. This was a first for the Court, having to ask both the House and the Senate to intervene as parties before the Court.

The Supreme Court, in a seven to two decision, struck down the use of legislative veto in a majority opinion delivered by Chief Justice Burger. Justice Burger first began by dispelling the efficiency arguments made in favor of the veto authority:

Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies. ("Immigration and Naturalization Services v. Chadha" 1983, 944)
Efficiency and usefulness are not questions the Court undertakes to answer, as Justice Burger argued, but instead it focuses on whether an act of government is constitutional or unconstitutional.

The Court, through Justice Burger, did not take up the separation of power argument, as both sides spent a majority of their time arguing for it – as the Circuit Court had ruled. Justice Burger’s opinion rested on the Presentment Clause and the bicameral requirements of the Constitution. Addressing the Presentment Clause argument first, the opinion notes that the Framers of the Constitution took this clause so seriously they made sure it could not be bypassed. Giving the president a role in the lawmaking process with the veto served two important purposes. First, giving the president veto power illustrates the Framers envisioned a lawmaking role for the executive branch, even if it was a small one. Second, the veto was important because it placed a check on Congress from enacting oppressive legislation. Thus, legislative veto should not be taken lightly as it alters the very important process put in place by the Framers of the Constitution.

Citing Alexander Hamilton in *Federalist* No. 73, Justice Burger wrote, “The primary inducement to conferring the power in question upon the executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws through haste, inadvertence, or design” (*Immigration and Naturalization Services v. Chadha* 1983, 948). Additionally, Justice Burger’s opinion argued, through *Myers v. United States* (1926), that the Presentment Clause allows for a national perspective injected into the lawmaking process. Having discussed the importance of the Presentment Clause, Justice Burger then turned to the issue of bicameralism.
Justice Burger argued that bicameralism was just as important and was interconnected to the Presentment Clause. Looking to the debates during the Constitutional Convention, Justice Burger illustrated the importance of bicameralism, quoting James Wilson, “If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches” ("Immigration and Naturalization Services v. Chadha" 1983, 949). Alexander Hamilton followed this in Federalist No. 22, arguing that having a single house legislature would have created one of the worst forms of government possible. Hamilton built on this argument in Federalist No. 51 by stating, “In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches” (quoted in "Immigration and Naturalization Services v. Chadha" 1983, 950).

For Justice Burger, these examples illustrate why a single house of Congress should not, constitutionally, have the authority to overturn an action of government without the consent of the other. Further, “the division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings” ("Immigration and Naturalization Services v. Chadha" 1983, 951).

Justice Burger admitted that there is room for the branches of government to mix their authority and they are not completely walled off from each other, as was asserted by the Court in Buckley. Additionally, as was argued by the Court in Hampton & Co. v. United States (1928), “When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it” ("Immigration and Naturalization Services v. Chadha" 1983, 951). However, Article 1, Section 7 of the Constitution details a procedural path that must be followed when legislating and the one house veto that was utilized in this instance, against Chadha, was legislative in
nature. Justice Burger concluded that the one house veto was legislative because both the House and Senate agreed that absent Section 244(c)(2), Congress would have had to act under typical legislative rules to get the same result.

The Constitution details specific instances when one house of Congress can act on its own without the consent of the other house: 1) Art. 1, § 2, cl. 6 authorizes the House to begin impeachments, 2) Art 1. § 3, cl. 5 authorizes the Senate to conduct impeachment trials, 3) Art. II, § 2, cl. 2 authorizes the Senate approve appointments by the president, and 4) Art. II, § 2, cl. 2 authorizes the Senate to ratify treaties. As Justice Burger argued in the majority opinion, the one house veto exercised by the House in this case does not align with any of the above listed powers one branch of Congress is authorized to use. Continuing, Justice Burger stated, “The veto authorized by § 244(c)(2) doubtless has been in many respects a convenient shortcut,” but “[t]here is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process” ("Immigration and Naturalization Services v. Chadha" 1983, 958-959). In closing, Justice Burger asserted, “With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution” ("Immigration and Naturalization Services v. Chadha" 1983, 959).

Thus, while the Court of Appeals found the legislative veto unconstitutional on separation of powers grounds, the Supreme Court, under Justice Burger’s majority opinion, found the legislative veto unconstitutional, as it violated the Presentment Clause and the bicameral nature of the US government.

Justice Powell authored a concurring opinion in the judgment. He argued that legislative veto in this instance was a violation of the separation of powers doctrine because “[w]hen
Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers” ("Immigration and Naturalization Services v. Chadha" 1983, 960).

Further, Justice Powell argued through the words of James Madison that allowing one branch to have legislative, executive, and judicial authority “may justly be pronounced the very definition of tyranny” (quoted in "Immigration and Naturalization Services v. Chadha" 1983, 960). But Justice Powell did agree the Constitution does not establish three branches that are completely sealed off from one another, referencing Buckley, Youngstown Sheet and Tube, J.W. Hampton, Jr. & Co. v. United States (1928). He contended there are two instances in which the doctrine can be violated. First, as was established in Nixon v. Administrator of General Services and United States v. Nixon, one branch cannot interfere with another branch that is exercising its constitutionally delegated authority. The second, as was established in Youngstown Sheet and Tube and Springer v. Philippine Islands (1928), occurs when one branch acts in a way that is the actual authority of another branch. For Justice Powell, in this case, the legislative veto violated the second point, with one branch acting in a capacity constitutionally left to another branch of government. Meaning Congress was engaged in a judicial function when issuing a one house veto to cancel Chadha’s suspended deportation notice. However, unlike Justice Burger, Justice Powell was not comfortable with issuing a broader decision that would invalidate all legislative vetoes. Justice Powell closed by arguing he would not reach a broader decision that rests on the Presentment Clause argument.

Countering Chief Justice Burger and Justice Powell, Justice White delivered a lengthy dissent, as expected after his earlier discussion of the veto in Buckley. Before diving into his legal reasoning about why the veto was constitutional, Justice White argued that the Court
should not have invalidated Section 244(c)(2) on separation of power grounds because now over 200 pieces of legislation have been invalidated with one single Court ruling. For Justice White, invalidating the legislative veto left Congress with a very difficult decision to make “either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape or, in the alternative, to abdicate its law-making function to the executive branch and independent agencies” ("Immigration and Naturalization Services v. Chadha" 1983, 698). Justice White believed that both of these options created even bigger problems.

Referencing Justice Brandeis’s concurring opinion in Ashwander v. Tennessee Valley Authority (1936), Justice White argued the Court should always err on the side of narrow decisions and not engage in rulings that go further than the case before them. Additionally, as was argued by Justice Jackson in Youngstown Sheet & Tube, Justice White argued “[t]he actual governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context” (quoted in "Immigration and Naturalization Services v. Chadha" 1983, 978).

Justice White agreed with the majority opinion in that legislation must follow the defined path stated in the Constitution, but he argued that this was not a problem with the legislation veto. As was the claim by members of Congress, the original act and all legislative veto instances were approved of by both houses of Congress and signed into law by the president. Justice White went into a lengthy discussion of this fact before concluding that in all instances this may not be the case. If a legislative veto is passed but does infringe on the authority that is specifically granted to one branch, then that veto could be found unconstitutional. However, in most
instances the legislative veto is used to keep the growing administrative state in check and without it Congress loses an important oversight tool.

Justice Rehnquist also dissented with Justice White joining. For Rehnquist, the majority erred in its application of severability clause jurisprudence, arguing, “Congress did not intend the one-House veto provision of § 244(c)(2) to be severable” ("Immigration and Naturalization Services v. Chadha" 1983, 1014), and yet the Court held that this was Congress’s intention. In Justice Rehnquist’s opinion, Congress did not legislate into the Act or show any attempt that the legislative veto provision would be severable from the Act.

Discussion

The above analysis first suggests that Chadha marks a critical juncture for the Court and the political process. The legislative veto had been used for over fifty years with consistent objections from the executive branch, although presidents willingly signed legislation containing veto provisions into law. Additionally, it had been nearly fifty years since a significant separation of power case was decided by the Court. After the 1930s, the Court established a norm to defer questions of separation of powers to the elected branches of government, most importantly Congress. But as time passed and Congress began placing veto provisions in any legislation that allowed for agency rule making, the Court was put into a situation in which it had to act to resolve the growing conflict. While the Court invalidated the legislative veto, many have argued that Congress has not truly stopped using the authority, but simply calls it by a different name.  

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22 For further discussion of this point, see Fisher (2005).
Regardless of this point, the ruling in *Chadha* had a significant impact on legislation passed by Congress and on its future behavior, which will be more fully analyzed in the following chapters.

Applying Soefer’s framework, which calls for analysis of the critical antecedent, permissive conditions, and productive conditions, the Court’s hands-off approach to separation of powers issues marked the critical antecedent (see Figure 9). With no one stepping in to stop Congress from passing legislative veto provisions, Congress increased its inclusion of the provisions creating conflict among the branches of government over the constitutionality of the legislative veto. Permissive conditions then came in the form of the increased inclusion of legislative vetoes (due to the critical antecedent), the lower federal courts ruling on legislative veto provisions, Justice White’s opinion in *Buckley*, and the increased debate taking place among multiple concerned parties.

As agencies gained more authority through congressional delegation and Congress sought to find a way to check this authority, members of Congress looked to the legislative veto. However, this authority came at the disapproval of the executive branch and some members of Congress. Presidents began closely monitoring legislative veto and the impact it was having on executive branch authority. President Carter issued numerous signing statements, arguing that the authority was unconstitutional and advised agencies to ignore legislative vetoes unless specifically ordered through congressional legislation.

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23 As previously discussed in Chapter 1, critical antecedents are defined as “factors or conditions preceding a critical juncture that combine in a causal sequence with factors operating during that juncture to produce a divergent outcome” (Slater and Simmons 2010, 889). Whereas, permissive conditions are defined as “those factors or conditions that change the underlying context to increase the causal power of agency or contingency and thus the prospects for divergence” (Soifer 2012, 1574, italics in original), and productive conditions as “the aspects of a critical juncture that shape the initial outcome that diverge across cases” (Soifer 2012, 1575, italics in original).
In public President Reagan discussed his acceptance for the legislative veto as a way to control the growing deficit, but behind closed doors, Reagan was also monitoring the situation and searching for a way to end the use of the congressional power. And just before this increase in use, Justice White announced his acceptance for the legislative veto, which many in Congress spun as the Court giving the veto a stamp of approval. In connection to this increased use of legislative vetoes, Alan Morrison (1990) argues that this issue was placed on the Court’s agenda and invalidated because, as he states, “[I]t seems to me that the principal cause is Congress’ increasing inability or refusal to make hard choices and reach accommodations in a way that actually resolves difficult problems” (1990, 306). It was Congress itself that brought about its invalidation because it became too reliant on the authority.

But there was real debate taking place at multiple levels of government. Congress was holding in-depth hearings as to the constitutionality of the veto, the Attorney General’s office was engaged in these debates with both Congress and the executive branch, and presidents were
issuing statements to Congress arguing that the legislative veto was unconstitutional. More importantly, these debates did not consist of pure partisan politics, but were conducted in a way that put the constitutional arguments first. Political elites who were against the legislative veto argued that the Framers of the Constitution used extreme care when drafting the Presentment Clause, and any alteration to that would have to come in the form of a constitutional amendment and not through standard legislation. This is important because it means members of Congress and the executive branch were speaking in legal terms, setting up and signaling to the Court arguments the justices could take up to justify their decisions.

Additionally, the federal judiciary was hearing legislative veto cases for the first time during this period (latter half of the 1970s). However, the lower federal courts were not willing to make a blanket statement on the constitutionality of the legislative veto. Instead, the lower courts issued narrow rulings that further played into the disagreement that was taking place over the veto authority. Combined, all of these factors created increased conflict between all three branches of government, resulting in the permissive conditions that would bring about the critical juncture.

The production conditions came in the form of the Court’s acceptance to hear a legislative veto case and the decision to invalidate the authority. More importantly, the Court did not invalidate the veto on narrow grounds, but broadly, striking down nearly 200 pieces of legislation with it. The Chadha decision marked the point that moved the institutions down a new path, creating a jurisprudential regime that would later be reinforced in Bowsher and Clinton. Further, Chadha illustrates how new issues are moved onto the Court’s agenda. While there was a movement to keep structural issues off the docket by legal theorists and some of the justices themselves, there was a growing conflict over the legislative veto. Politicians looked to
the Court to make a determination regarding its constitutionality. Both sides were confident in
their arguments and welcomed the Court’s role. Giving the Court a voice on this issue expanded
judicial authority and allowed the Court to have the final say on this issue.

Ultimately, the Court had several options when addressing the legislative veto issue.
First, the Court could have remained silent and allowed the lower federal courts to continue to
invalidate or uphold legislative veto provision on a case by case bases. This would then leave the
overall constitutionality of the legislative veto intact. Second, the Court could have issued a
narrow decision on the veto, just as the lower federal courts had done in previous cases, thus
upholding the overall constitutionality of the legislative veto. This approach would have been a
compromise between the two side, placing a check on Congress so that they did not over use the
authority and return to only including veto provisions when it came to agency reorganization.
Third, the Court could have argued that the case was asking a political question and made a
political safeguards argument. Fourth, the Court could have heard the case and crafted a
deferential doctrine for the Court’s role in these situations. However, the Court approached the
issue head on and released a broad opinion striking down legislative vetoes in all instances. The
above analysis suggests that when it comes to clearly defined roles found in the Constitution, the
justices set aside partisan differences and upheld the will of the Framers rather than the current
functional arguments being made by a majority in Congress.

But would this decision have a lasting effect? The next chapter will discuss the Balanced
Budget and Emergency Deficit Act of 1985 and the decision to invalidate the reporting provision
of the legislation in Bowsher v. Synar. This chapter will illustrate how members of Congress and
the executive branch used the Chadha decision and constitutional debate to argue against the
constitutionality of the Act. Further, this chapter will detail how members of Congress,
specifically Representative Mike Synar (D, OK) used constitutional deliberation in Congress and in the press to argue against the Act and set up his suit to invalidate the legislation before the Supreme Court.
CHAPTER 3

MR. SYNAR GOES TO COURT

One of the most pressing issues facing the United States in the 1980s was the budget deficit. While getting the deficit under control was one area both parties could agree on (Rudder 2009, 268), substantial debate took place over the best means for accomplishing this goal. The growing deficit led to the eventual passage of the Balanced Budget and Emergency Deficit Act of 1985, better known as Gramm-Rudman-Hollings (hereafter referred to as GRH). However, this legislation was not without problems and strong opposition. An anonymous editorial to the Washington Post argued that the “Gramm-Rudman plan would give Ronald Reagan (and his 1989 successor) an unexampled one-man budgetary discretion – possibly the most unbridled of its sort in any English-speaking legislative tradition since King Charles I lost his head” ("Gramm-Rudman: Budget Bungle?" 1985). Democrat Representative Mike Synar (D, OK) argued that GRH took power away from Congress that the Framers specifically gave to the legislature for important reasons: “The Drafters of the Constitution . . . believed Congress should make these hard choices because Congress is the branch of Government closest to the people” (quoted in Roberts 1985). Speaking about earlier versions of GRH, Democratic Speaker of the House, Thomas (Tip) O’Neil “called the measure ‘fake and a fraud,’ and said, ‘it's not going to work.’ By next year, he said, Congress would be so upset with its own handiwork that it would try to change the procedure and soften its impact” (quoted in Roberts 1985). Even when President Reagan signed the bill into law, after expressing his pleasure that GRH would help
reduce the deficit, he was quick to point out that it raised “serious constitutional questions” (Pear 1985).

In sum, GRH set maximum deficit amounts for federal spending from 1986 to 1991. The controversial aspect of GRH came from the reporting stage of the law authorizing the Comptroller General to issue direct reports to the president detailing the extent of the budget cuts needed to bring the deficit under control. In turn, the president was charged with issuing a sequestration order containing the budget reduction measures that were specified in the Comptroller’s report. This reporting provision raised questions from members of Congress and officials in the executive branch as to whether the Comptroller had the authority to force the president into action and whether this was an unconstitutional delegation of legislative authority.

Thanks, in no small part, to a provision in GRH that allowed for expedited judicial review and granted standing to a member of Congress so that the law could be constitutionally analyzed by the judiciary, Rep. Synar challenged the constitutionality of the law. In Bowsher v. Synar (1986), the Supreme Court invalidated the reporting section of GRH because of the executive role authorized to the Comptroller and the appointment clause, which makes the office a member of Congress. The decision triggered a fallback provision that left the law mostly intact but altered the way in which the budget cuts would be addressed.

The passage of GRH and its invalidation by the Court in Bowsher offers important and unique opportunities to analyze how judicial precedent impacts congressional debate and how constitutional debate in Congress influences judicial proceedings. First, through analysis of the legislative history, discussion for and against GRH foreshadowed arguments presented to the Court during litigation. David Mayhew (2004) and John W. Kingdon’s (1989) classic studies argued that neither the Supreme Court or constitutional deliberation has an effect on
congressional members decision making. However, as J. Mitchell Pickerill (2004) argued, constitutional decisions by the Court and constitutional deliberation in Congress do have some impact on the policy choices made by members of the legislature. In this chapter I will illustrate how members of Congress use the legislative process in anticipation of a legal challenge, why members of Congress follow through with threats of a suit, and to what extent congressional debates in anticipation of legal challenges influence the Court.

Further, I will argue that in this situation the Court is acting as a quasi-independent policy maker. Scholarship on the Supreme Court and political regimes would suggest that if Reagan was a reconstructive president (Skowronek 2011), then it may take some time to remake the Court in the image of the regime (see Dahl 1957). However, President Nixon had an important role in shaping the Republican majority on the Court that was further entrenched by Reagan (see McMahon 2011), and with five justices on the Court who were appointed by Republican presidents and GRH being a primarily Republican endeavor, we would expect to see the Court legitimate the policy. In turn, this decision would support the Reagan administration’s balanced budget objectives. But this is not the result that came out of Bowsher. Additionally, the Court did not adopt the predominant constitutional arguments against the bill in Congress or by the executive branch, adopting a secondary justification for invalidating GRH, which further protected the legislative process and the impact the decision would have on independent agencies. The goal of this chapter is to use GRH and Bowsher to advance understanding of the role of constitutional deliberation in Congress and the nature of the Court as an independent policy maker within a political regime.
The budget deficit made GRH one of the most salient issues of the time. In November of 1985, 61 percent of respondents to a *Gallup* survey said that the budget deficit was a very serious problem and 23 percent responded that it was a fairly serious problem (*Federal Budget Deficit 2016*). Out of domestic and economic issues, the deficit and unemployment were considered the two most important problems facing the United States in January of 1985 (Aisch and Parlapiano 2017). Representative Pete Stark (D, CA) described it as a “cancerous deficit” (Stark 1985, S9606). Senator Max Baucus (D, MT) called the budget deficit, “a looming presence in our economy” (Baucus 1985, S12075). Senator Don Riegle (D, MI) argued that the deficit “is a back-breaking load by any measure. We would be fools if we were to allow ourselves to continue to move in this direction to amass that kind of fantastic debt burden” (Riegle 1985, S12080). Even for those against passing GRH, all could agree that something had to be done about the budget deficit. GRH was Congress’s attempt to place a check on budgetary spending without tying the hands of legislators attempting to pass legislation. The ultimate goal of the Act was to create a balanced budget by 1991 through maximum deficit amounts set in place for each fiscal year. Exceeding the maximum deficit amounts triggered automatic cuts to bring the deficit back under the maximum deficit amounts. In the final draft of the legislation these automatic cuts were accomplished through a complex system where the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) would estimate the federal budget deficit for the coming fiscal year. If these estimates exceeded the target, then both offices would issue reports to the Comptroller General detailing the cuts necessary to bring the deficit under the target amount. The Comptroller would then review the suggested cuts and issue a
report to the President, who must then issue a sequestration order mandating the spending reductions that were specified by the Comptroller General.

It is evident from the deliberation that took place in Congress over GRH, there were legislators who were setting up a potential challenge before the judiciary. Although the legislation did not go before the Committee on the Judiciary in either chamber, that is not to say the deliberation was absent of constitutional discussion. A minority of members in both the House and the Senate did not hesitate to object to GRH as a separation of powers violation, and later those who testified offered the individuals who wanted to challenge the legislation strong support and information for their arguments.

Debate and Development of Gramm-Rudman-Hollings

The bill was introduced in the Senate in late September of 1985 as an amendment to a bill to increase the debt ceiling by Senators Phil Gramm (D, TX), Warren Rudman (R, NH), and Ernest Hollings (D, SC). Hollings argued that the amendment was to stop “the fraud that we have all perpetrated on the American people and ourselves in the adoption of the budget” (Hollings 1985, S12569). Further, Rudman claimed that the deficit had doubled over a four-year period because everyone in government was pointing fingers at someone else without anyone acting to fix the problem. The amendment, for Rudman, was an opportunity to stop the finger pointing and allow the politicians to finally take action on the growing deficit (Rudman 1985, S12574).

It was not until the second day of debate that a clear objection was raised over GRH. Many Democrats spoke out against GRH because of what they characterized as a clear bias toward the Republican agenda, such as cutting domestic spending while not allowing for cuts on defense spending. As the debate continued, many who were not comfortable with GRH or were
against it from the start began requesting more time, as they claimed the bill was changing by the minute without any chance for members of the Senate to review those changes. Senator John Johnston (D, LA) described the amendment as “the greatest act of self-deception and wishful thinking that I have ever seen on the floor of the Senate in a long time” (Johnston 1985, S12629) and later, referencing Chadha, claimed the bill was very damaging to the constitutional process:

In the recent Chadha decision of the U.S. Supreme Court, where they outlawed the legislative veto, the Court went on at some length about the separation of powers between the congressional and the executive branches and pointed out that it simply is not constitutionally possible for one branch of Government to exercise the duties of the other . . . This, Mr. President, is nothing less than a total abdication, in my judgment, of legislative power. (Johnston 1985, S12631)

Senator Riegle reiterated these fears over concerns that the bill would continue to pile more responsibility onto the executive branch at the expense of Congress, arguing that regardless of which party holds the executive branch, it is a mistake (Riegle 1985, S12651). He stated:

As I reflect back over my 19 years in the Congress, when I have heard that kind of stampede mentality and verbage used, it has been designed to try to ram something through, poorly designed, poorly thought out, that has not been sufficiently challenged. The hope is that somehow it will get jammed into law before people have a chance to take a close look and perhaps change it and, if not change it, perhaps put it aside altogether. (Riegle 1985, S12650)

Senator Rudman addressed these questions, arguing that the only constitutional question in regard to the bill was whether these powers can be handed over to the executive. Rudman argued that the Executive’s role in GRH was simply ministerial in function and was not delegating any congressional authority to the president (Rudman 1985, S12670). Senator Gramm further justified the bill as being a framework 43 states already used to ensure a balanced budget (Gramm 1985, S12673).

But even with the assurance by multiple members of Congress toward the constitutionality of the bill, Senator Gary Hart (D, CO) believed it was still unconstitutional:
“Under the first option, the Gramm amendment resurrects the ability of the executive branch to impound spending authorized and appropriated by Congress. Such authority was of dubious constitutional validity when it was tried by President Nixon, and it suffers from the same defect today” (Hart 1985, S12708).

The bill eventually passed through the Senate on October 10, 1985 without any committee hearings, which became a focus of discussion when the bill was introduced in the House where it was voted down. On November 1, the House introduced an amended version of GRH, with many changes to ensure that the cuts would be more even across the board than those proposed in the original amendment. But the most noteworthy change was the introduction of the use of the CBO to calculate required spending cuts along with the OMB. Additionally, Synar drafted and urged the adoption of a provision to be placed in GRH so that the legislation could be fast tracked to the judiciary for constitutional review. This expedited review provision was crucial for Rep. Synar’s future suit and according to his legislative director, Vincent LoVoi, easy to be placed in the legislation even if there were some disagreement between those counseling Synar through the process, specifically Alan Morrison the attorney who would eventually represent Synar in his legal challenge and Abner Mikva, a former member of the House who was, at the time, a judge for the United States Court of Appeals for the District of Columbia. As Lovoi explains:

I called Larry Gold the General Counsel of the AFL-CIO, I talked to Larry and said I don’t really know about this area of law and he pointed me to Alan. But Larry even then said you know, Vince, there is a model for expedited review in the Civil Rights laws because those are cases, voting rights for example, you can’t wait three years for the Court to decide. You have to get results quickly. And our concern was that we had budget cuts aimed at low income people and it wouldn’t really help them much if three years from now the Court overturned it. So, he said, just pull one of those models out. So that’s what I began working on and Alan came in and said absolutely we will slide you right in
there. And the fact that Mike’s pay is going to get cut harms him, gives him a “case or controversy” and so we are fine. (LoVoi 2017)

But later, once Mikva began discussing the suit with Synar, he was not as comfortable with members of Congress giving themselves standing. In an interview with LoVoi, he further explained, Sen. Jim McClure (R, ID) sued to block Mikva’s appointment and placed a standing clause for himself or other members of Congress in an appropriations bill (LoVoi 2017). Because of this, LoVoi explains, “Mikva had very strong opinions against just writing standing into legislation” (LoVoi 2017).

Under this original provision for expedited review, if any portion, most importantly the role of the CBO, was found to be unconstitutional, then the entire package would be void. In the final language of GRH, the expedited review provision remained, but it allowed for severability of the reporting provision and an additional fallback clause. The original non-severability clause was urged to ensure that if the CBO’s role was unconstitutional, the entire power of the budget deficit was not handed over to the president (Synar 1985a, H9569). As Synar later discussed, this addition was necessary in light of the many letters and testimony received from scholars detailing the constitutional flaws in the legislation (Synar et al. 1987).

In a “Statement for Conference Report Regarding Judicial Review,” the report discussed this expedited review provision, stating:

While the conferees believe all constitutional concerns have been successfully addressed, it is obvious that some controversy remains. The Conferees want any constitutional issues to be decided as promptly as possible. If any part of the Act is not constitutional, it is in the interest of everyone in the executive and legislative branches as well as the public in general, to know this as promptly as possible. (Synar 1985f)

The report continued, explaining:

An anticipatory review action under paragraph (a)(1) may be brought by any member of Congress against the United States. The choices of a member of Congress as plaintiff was
made for several reasons. First, some members, from their perspective as legislators and without regard to the needs or interest of the executive, believe that provisions such as section 251 of this legislation are harmful to Congress’s ability to carry out the constitutional responsibilities that belong to the legislative branch. These members believe that as soon as the triggering mechanism in this bill is in place, it will undermine the give and take necessary to shape responsible appropriations legislation that takes account of both fiscal realities and the relative priorities of the competing demands on the government’s limited resources. (Synar 1985f)

Unlike the Senate, there was outspoken opposition from the very start of the House debates over GRH. Rep. Jack Brooks (D, TX) argued that it was hard to find a single person who could say with a straight face that GRH, or any version of it, is free of constitutional issues (Brooks 1985a, H9598). Similarly, Rep. Peter Rodino (D, NJ) characterized GRH as an “assault . . . on this fundamental constitutional principle of separation of powers” (Rodino 1985a, H9607) and further argued that the Democrats version in the House did not completely solve the constitutional issues. Rodino explained his reservation about GRH in a letter sent to Rep. Synar, “The Gramm-Rudman proposal seeks to circumvent these constitutional requirements, as did the legislative veto, except that Gramm-Rudman attempts to do so by delegating unconstitutional powers to the President, rather than to one or both Houses of Congress” (Rodino 1985a, H9608). He further argued that Congress can delegate the authority to implement laws, but it is unable to constitutionally delegate authority to repeal laws, which is exactly what he believed GRH would do. Additionally, Rodino was not relying on a single source for his argument but combining both Court precedent in his reference to the legislative veto and legal arguments related to the Chadha decision to argue against GRH.

A letter was also entered into the record from legal scholar Lawrence Tribe to Synar explaining the unconstitutional nature of GRH. Tribe articulated that there were several flaws in the legislation that garnered strong attention. First, GRH (in its original state) required the
president to follow a predetermined deficit reduction schedule, which Tribe argued was an infringement on the president’s constitutional power to draft and recommend legislation. Second, it granted the president legislative power in that it allowed the executive to cut programs passed by Congress. As the Court declared in Chadha, altering legal rights is the sole authority of the legislature. Third, the CBO’s ability to force the president to make cuts gave the legislature executive authority. This type of behavior and authority was previously ruled unconstitutional in Buckley v. Valeo (1976). To this point, Tribe argued that the Court took the appointment clause very seriously, “For the Court, the Constitution’s Appointments Clause is no mere matter of ‘etiquette or protocol’ but a vital structural check upon the power of Congress” (Tribe 1985, H9609).

The entire floor debate in the House over GRH was contentious, and many were fearful of the authority being handed over to the president and the unconstitutional nature found in the formulation of the legislation. As Rep. Charles Rangel (D, NY) argued:

Keeping in mind, it is evident that the Reagan administration would like to push through the Gramm-Rudman deficit reduction package without a thorough debate in Congress. This is obvious when one realizes that the bill was rammed through the other body with little or no in depth scrutiny. The President was given sweeping powers to cut funding for social programs without the advice and consent of Congress. In effect, the executive branch was given the power of the purse. (Rangel 1985, H9606)

Rep. Leon Panetta (D, CA), speaking in regard to Synar’s judicial fast track provision, stated, “We also guarantee that there will be a constitutional test of this proposal which is absolutely essential. This is not an issue on the deficit. We are all concerned about the deficit. This is an issue of the Constitution, of justice and of the balance of powers” (Panetta 1985, H9604). Rep. John Dingell (D, MI) channeled James Madison in arguing:

Whatever the form, Gramm-Rudman is the most extensive giveaway of congressional authority in American history. We, as Members of Congress, should remember that if we
are to retain the power to legislate we cannot allow this power to be diluted. James Madison, in Federalist 58, stated that the power of the purse represents, “the most complete and effectual weapon with which any Constitution can arm the immediate representatives of the people.” Make no mistake about it, Gramm-Rudman would dilute the Congress’ power over the purse. (Dingell 1985, H9613)

In a final example, speaking in both political and constitutional terms, Rep. Theodore Weiss (D, NY) asserted:

And so what they [Republicans] have come up with is this plan which is clearly unconstitutional. It will not only reverse the constitutional checks and balances between the executive and legislative branches but will also in the event of an economic recession probably, through the fiscal straitjacket it mandates, force us into a depression. (Weiss 1985, H9617)

These sentiments were also expressed during committee hearings conducted by the House over the early versions of the legislation that still remained free of the Comptroller General’s role that was ultimately the most discussed aspect of GRH when challenged before the courts.

The first set of committee hearings were conducted by the House Committee on the Budget. During these hearings, Charles L. Schultze of the Brookings Institute; Charles O. Jones, a professor of government at the University of Virginia; and Norman J. Ornstein, resident scholar at the American Enterprise Institute, expressed constitutional concerns regarding the Act during questioning. Schultze expressed his concerns over the formulaic approach, which could severely distort the separation of powers, while Jones argued that Congress should be careful when altering the institutional framework in such a way as the Act would ultimately establish. As Jones stated:

I implore those debating the issue to consider the institutional effects of the Gramm-Hollings-Rudman proposal . . . [I]t is a plea to apply what we already know about structural reform, what we already know about the constitutional separation of powers, and the real roots of the present budget impasse. (Schultze 1985, 36)
Just as Jones, Ornstein followed with arguments on the constitutional effects of GRH, stating that the president would be given “enormous power . . . that is in effect legislative power as contemplated by the authors of the Constitution” (Ornstein 1985, 38). This set the stage for the next round of hearings conducted by the Joint Committee on the Budget, which afforded more members of Congress and the Senate the opportunity to express their concerns over the early version of the legislation.

Alan Blinder, a professor of economics at Princeton University, was confused by Congress’s desire to give away so much power to the executive and urged resistance. Blinder went further, stating, “I think we have almost a cynical game of who is more shrewd going on here. I sense that a lot of people of my political stripe are voting for this turkey because they think that it cuts defense far more than it cuts social programs” (Blinder 1985, 16). Rather than making a constitutional argument, Blinder argued for a political reason as to why GRH should not be adopted.

In a striking statement by the Chairman David R. Obey (D, WI), of the Joint Committee on the Budget, remarked on the intentions of Congress when attempting to pass the legislation and questioned its constitutionality:

> We were also told, incidentally, by staff last week that there was no constitutional workup done on Gramm-Rudman before it was passed. Then it was suggested to us that since we couldn't figure out if it was constitutional before we passed it, we ought to pass it, and we could find out afterwards in the courts whether or not it was constitutional. When you hear comments like that, you have the right to ask whether it is true that the Senate is the greatest deliberative body in the world. (Obey 1985, 32)

This point was echoed by many in Congress during public hearings, but none more than Rep. Synar, who repeatedly questioned witnesses on exactly why there was no constitutional workup
done on the legislation before being passed through the Senate (*see* Subcommittee of the Committee on Government Operations).

The most extensive hearing took place in the House Subcommittee of the Committee on Government Operations. The hearing began with testimony by Rep. Brooks who, as discussed above, questioned why the legislation was able to pass through the Senate without any hearings or testimony from the executive branch or other government officials voicing their opinions on the legislation (Brooks 1985b, 1). A letter presented as testimony from Peter Rodino, the Chairman of the Committee, repeatedly referenced *Chadha, Buckley vs. Valeo* (1975), and *Youngstown Sheet and Tube vs. Sawyer* (1952) as evidence of the unconstitutionality of the legislation. As he argued, “While under the Constitution Congress can delegate the authority to implement laws, it cannot delegate the authority to repeal all laws. This is precisely what the Gramm-Rudman proposal purports to do” (Rodino 1985b, 60 emphasis in original).

The Director of the OMB, Charles C. Miller III, was the first to be questioned during the hearing, and began by reading a statement from President Reagan giving his full support to the legislation:

Over the years, sincere efforts have been made by men and women of good will in both parties to solve the chronic problem of overspending by the Federal Government, but the problem has not been solved. We cannot escape the simple truth that the budget process has failed . . . This legislation will impose the discipline we now lack by locking us into a deficit spending reduction plan . . . If Congress cooperates and passes this legislation, we can send a clear and compelling message to the world that the U.S. Government is not only going to pay its bills, but we are also going to take away the credit cards. (Miller 1985, 67)

Miller continued by arguing that this was the first serious attempt at solving the very real problem of the budget deficit. He further urged the committee to keep in mind that the president is not able to act independently when making cuts and that the legislation is completely different
from line-item veto. The president was not being authorized to pick and choose which programs should have funding cuts because a formula was established. This argument was continued during litigation before the courts in that the president in this instance and later the Comptroller General are not authorized to make predictions as they wish.

Representative Synar’s questioning during this committee hearing is the most telling and informative in regard to the changes made in the legislation and the future challenge in the federal judicial system. Leading up to the hearing, Synar prepared a list of questions that he circulated to other conferees who would be participating, with many of the questions referring to the Chadha decision. First, Synar was curious about whether “Gramm-Rudman’s sequestration trigger involves both OMB and CBO. OMB is in the executive branch and CBO is in the legislative. Is this an unconstitutional sharing of power, in violation of INS v. Chadha, 462 U.S. 19, (1983)?” (Synar 1985c). Additionally, Synar asked, “Gramm-Rudman establishes that cuts may be based on committee reports. Would this violate the explicit law-making process, mandated by Constitution and described in INS v. Chadha, 462 U.S. 919, (1983)?” (Synar 1985c). It was these questions and others that directed Synar in his questioning during the hearing.

In an exchange between Synar and Miller, evidence shows there was little knowledge on the part of the director of the CBO as to any legal discussions regarding the legislation:

Mr. SYNAR. Let's get specifically for the record, has the administration, or the Justice Department, or any recognized legal group considered that Gramm-Rudman may confer unconstitutional law-making powers upon the President under article I, section 1, article I, section 7, clause 2, article I, section 7, clause 3, or case law? Have you considered and analyzed that?

Mr. MILLER. Again, I am not a lawyer. I described it to you— . . .

Mr. SYNAR. Mr. Miller, just give me an answer. Have you done that analysis or not?

Mr. MILLER. When I ask lawyers to review, I hand them a piece of legislation and say, “Will you review this?” I would make a presumption that they would
review it with respect to the entire Constitution. If you ask me have they reviewed it with respect to this specific item or this specific article, I would presume yes, but I do not have them at my table to say, “Did you look at article I, section 7,” or something of that nature. I am trying to be responsive to your question.

Mr. SYNAR. Do you have any written memos?
Mr. MILLER. I do not.
Mr. SYNAR. So you have just talked about it?
Mr. MILLER. Yes. (Synar 1985b, 101-102)

Just as the Senate, who took very little time to debate the legislation or engage in any type of constitutional debate, Synar was finding the agencies charged with executing the legislation had also done little to discuss the constitutionality of how they would carry out the bill once enacted into law.

Louis Fisher (1985), a scholar and specialist in American national government, appeared as the final witness in the hearing to answer questions regarding the constitutionality of the legislation as written at that time, with the reports being sent directly to the president instead of using the Comptroller General as a go between. Fisher’s purpose before the committee was to analyze the bill in regarding to how it would affect the relationship between Congress and the executive branch. Fisher’s testimony was nothing new, echoing the arguments made by many in the House and Senate as to the unconstitutional nature of GRH. Just as Tribe had warned, Fisher did not believe Congress could “constitutionally dictate to the President what aggregates will be in his budget” (Fisher 1985, 198).

Second, Fisher (1985) argued that GRH would subordinate Congress to the president because no one was sure what the bill would do, and therefore, there was going to be power handed over to the executive branch that even those who were for the legislation were unsure of. A more frightening aspect of this, for Fisher, was if too much power was handed over to the president and if Congress wanted to take it back, any attempt would be subjected to a
presidential veto. Using Chadha as precedent, Fisher explained, “Although 2 years ago in the Chadha case it looked as though the instruction was that law would be made by a step-by-step deliberative process, you will be making law through this bill in committee reports that would be binding as though those reports, although the Chamber might not have acted on them, had passed both Chambers and been enacted” (Fisher 1985, 199).

Representative Synar, who eventually spearheaded the suit against GRH, spent a great deal of time in conversation with Fisher during his testimony. Specifically discussing congressional authority to delegate, Fisher (1985) argued, “I think if you look at the vagueness of what is being delegated, and second, the difficulty of recapturing control without a two-thirds majority, and then the particular fiscal prerogatives here that have always been central to Congress, I would say the bill would be unconstitutional” (Fisher 1985, 199). As will be illustrated later, this was the foundation of Synar’s litigation, arguing that although Congress is afforded the authority to delegate power in most instances, this legislation was so vague it must be found unconstitutional. Fisher explained that before Chadha it would have been difficult to invalidate legislation because of an undue delegation of power, but Chadha changed that “prior to Chadha, it looked as though the courts would be unlikely to strike down a delegation. Chadha appears to call for a stricter doctrine of separation of powers” (Fisher 1985, 220). But Fisher also expressed caution for those who claimed the Court would protect them if they made a constitutional misstep:

I hope Members of Congress are not thinking that they may in this bill act in a certain way, and if they gave away too much, that the courts will intervene on their behalf and return it. It is very, very uncertain. I think if you are concerned about your power, you have to protect them right at this point. (Fisher 1985, 220)
Additionally, just as Tribe referenced *Buckley* in his letter to Rep. Synar, Fisher further argued that a legislative actor cannot force the executive into action unless it is through an enacted law.

A final issue Fisher (1985) had with the legislation was the lack of legislative intent. The floor debates up to this point were so contradictory and conflicting that the Court would find it hard to rule in favor of GRH based on legislative intent, Fisher contended. To this, in a moment of humor, Synar replied, “That is why yesterday . . . [it was] recommended that we staple Steve Bell, the Senate staffer who wrote this, to the bill, because it is going to be necessary for us to interpret all of this. That might be the only way to do it” (Subcommittee, 220).

The constitutional debate over GRH continued outside of floor debates and committee hearings. In a memo from Janet Potts, the Assistant Counsel for the Subcommittee on Administrative Law and Government Relations, to Rep. Dan Glickman (D, KS), Potts asserted:

> [GRH] attempts to circumvent the Constitutional lawmaking process by delegating unconstitutional powers to the President. Though its language merely directs the President to issue an “order” requiring a reduction in expenditures – a mandatory duty based on the projected economic conclusions of two bureaucrats, the effect of these so-called orders is to repel duly enacted appropriations statutes. It thus tries to authorize the president to undo a law by something less than a law – and is thus unconstitutional. (Potts 1985)

Potts continued, stating, “The Framers of the Constitution were adamant that spending and taxing be in the hands of the legislative body which would make the decisions and set the priorities.” Ellen Nissenbaum, the Legislative Director of the Center on Budget and Policy Priorities, also weighed in:

> As our analysis indicates, we believe that there are several serious issues regarding Gramm-Rudman such as the way the automatic spending reductions are made, including the fact that low income programs are not exempt; the discretionary authority accorded to the President under this procedure; and the effect of this legislation on the economy. (Nissenbaum 1985)
And not everyone found constitutional fault with GRH. In a memo to the House Committee on Government Operations, the American Law Division of the Congressional Research Office argued that “while many ambiguities exist, the proposal does not delegate unfettered authority to the President. . . The proposal, on its face, thus contains limits and guidelines. Such standards and limits should blunt any delegation problems, particularly given the acceptance by the courts of broad delegation of power to the President and executive officials” (Ehike 1985). Additionally, in a statement about the necessity of GRH rather than from a constitutional angle, the Secretary of the Treasury argued that “we find ourselves in a position where continued Congressional inaction has moved the Treasury’s position from sound financial management to unnecessary crisis management” (Baker 1985).

Concerns over GRH were not limited to the relationship between Congress and the executive branch, as L. Ralph Mecham, the Director of the Administrative Office of the United States, explained in a memo to Rep. Dan Rostenkowski (D, IL), the Chairman of the Committee on Ways and Means:

Because of the status of the Judiciary as a separate and coequal branch of the Government, there are some unique implications to the method of formulating its budget. In recognition of this constitutional reality, it has traditionally been provided by statute that the judiciary budget may not be revised by the President or by OMB but instead shall be included in the overall budget without change. (Rostenkowski 1985)

Thus, GRH would place the judiciaries’ budget in a delicate position, where members of Congress feared the executive branch could use the budget process as leverage over the judiciary.

The debate over the constitutionality of the legislation did not end in the committee rooms or the floor of the House and Senate, overflowing into the press as well through editorials
drafted by members of Congress on both sides of the argument. This back and forth in the press started with an October 4 unsigned editorial in regard to GRH:

Beware. The only way to balance the budget and control the deficit is to cut spending equitably, which neither the President nor Congress seems able to do; or raise taxes, which the President refuses to do; or both. No wonder everyone's rushing to embrace this choice bit of balanced baloney. (The New York Times 1985, Oct. 4)

After this first attack on GRH, it took a little over a week for those working toward passing the Act in the House to fire back with an editorial of their own in defense of the legislation. On the 15th of October, members of Congress – Connie Mack (R, FL), Robert Michel (R, IL), Richard Cheney (R, WY), Trent Lott (R, MS), and Joseph Dioguardi (R, NY) – published an editorial in favor of the Act, “The Gramm-Rudman-Hollings bill in the Senate and the Mack-Cheney companion bill in the House are a clear signal to the American people and the world financial markets that there is indeed a workable blueprint for achieving a balanced-budget by fiscal year 1991” (Mack et al. 1985).

On that same day a competing editorial was published in The Washington Post; the unsigned editorial argued the Act was handing over too much power to the executive:

What is remarkable is that in its embarrassment, Congress is disposed to cancel, at one hasty stroke, the Budget and Impoundment Act of 1974. That act aimed to retrieve usurped spending authority from the Nixon White House, yet now the Gramm-Rudman plan would give Ronald Reagan (and his 1989 successor) an unexampled one-man budgetary discretion -- possibly the most unbridled of its sort in any English-speaking legislative tradition since King Charles I lost his head. (The Washington Post, Oct. 15, 1985)

This was the original version of the Act that Synar and others were most outspoken about during conference hearings, in which the Comptroller General was not yet included, instead allowing the executive branch to make determinations from the reports filed by the CBO and OMB.
Later, Senator Rudman took to the press to defend the legislation, arguing, “The bill does one thing; it forces resolution of these policy differences. Failure of either the Congress or the President to make these decisions will result in an obvious default of constitutional responsibility, thus making accountability more certain” (Rudman 1985, Oct. 26). Two days later, this was again attacked through another unsigned editorial arguing, “‘Something has to be done about the deficit,’ say those who support the Gramm-Rudman-Hollings budget-balancing bill already passed by the Senate. But some things are worse than the deficit, and Gramm-Rudman-Hollings is one of them” (The New York Times 1985, Oct. 28). While these arguments are not constitutional, but instead are more political, they illustrate the growing dissatisfaction among many toward GRH.

Those in Congress and the press were quick to point out that the final version of the legislation, with the inserted role of the Comptroller, was not subjected to any public hearings or debate other than those that took place on the House and Senate floors (Fuerbringer 1985). This is unsurprising given the fast paced nature of GRH in general terms and complaints about zero constitutional markups being performed on the legislation. But that is not to say the early debates and constitutional dialogue did not bring change. It is clear that changes occurred in light of the arguments against the legislation, specifically those arguing that Congress does not have the constitutional authority to delegate powers to the executive. According to Synar, there was a very large call from the electorate to do something about the deficit, and “[t]he members were clear: unless an acceptable alternative were offered, they would support Gramm-Rudman” (Synar, et al. 1987, 679) that led to the final vote and passage of GRH in Congress, which will be discussed in the following section to illustrate the point that while GRH was passed with bipartisan support, it was not as easily passed as one might expect.
At final passage, the Act received bipartisan support with the House passing the legislation by a 273 to 156 vote, and 63 to 33 in the Senate. GRH allowed members of Congress a unique opportunity of both credit claiming and blame avoidance. As others have argued, “The Gramm-Rudman budget-cutting mechanism is a perfect illustration” (Weaver 1986, 387) of blame avoidance. “Congress sets in motion a process which months or years later causes cuts to be made automatically, with no one directly to blame. Even the officials who would be responsible for sequestering funds are simply following a mandated formula, so they cannot be blamed” (Weaver 1986, 387). Members could continue to pass legislation without worrying about the growing deficit and bring funding to their district or state. But if cuts were made through the GRH mechanisms, members of Congress could then avoid blame because of the automatic budget mechanisms put in place in the legislation. It would then be expected that members in competitive districts would be more likely to vote in favor of GRH for this opportunity to claim credit and avoid blame. But statistically, the voting behavior in the House reveals some interesting results. Figure 10 displays the vote in GRH by party. More than half of Democrats in the House voted in favor of the legislation, passing with a large bipartisan majority. Figure 11 displays votes by competitive district and safe district. Figure 12 displays the partisan breakdown of votes based on competitive and safe districts.

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24 Safe seat variable was created from the partisan voting index. This is calculated by subtracting the difference between the percentage who voted for the president nationally and the percentage who voted for the president in a district. The smaller the difference, the more competitive the district.
Figure 10: GRH House votes by party.

Figure 11: GRH House votes: Competitive vs. safe district.
Throughout congressional debate, GRH was more heavily supported by Republicans than Democrats, so these findings are expected. However, as illustrated in Figure 11 and Figure 12, members in competitive districts were more likely to vote against GRH, especially for Democrats. Considering the importance of the budget deficit to the public, it is surprising to find Democrats in competitive districts voting against GRH. Research on voting behavior, such as Mayhew (2004), would suggest that members of Congress would have voted in favor of the legislation because the public was concerned about the budget deficit, and this would have been a visible attempt to accomplish that goal. However, members of Congress could have spun GRH as a measure that would ultimately hurt the district. As Gary Jacobson (1993) argued, “[I]nstead of having to go on record as voting for cuts in specific programs, members of Congress could support deficit reduction in general while taking credit for fighting to prevent cuts that would otherwise occur automatically” (379). But members who voted against the measure could argue...
that deficit reduction is still a top priority but GRH would hurt the district more than help it. This means money flowing into a district is more important than voting in favor of a measure the public would widely support if it meant possible funding cuts to the district.

Specifically looking at Congressional leadership, in the House, both the Democrat majority leadership (Jim Wright, Majority Leader; Tom Foley, Majority Whip) and Republican minority leadership (Robert H. Michel, Minority Leader; Trent Lott, Minority Whip) voted for GRH, with Speaker O’Neill abstaining. Although O’Neill did not vote, his vote would have been for GRH when looking at his comments throughout the legislative process. While he raised concerns over the legislation early in the process, he was part of a coalition arguing in favor of the Act before the Court. In the Senate, Republican majority leadership (Strom Thurmond, President Pro Tempore; Bob Dole, Majority Leader; Alan Simpson, Majority Whip) voted in favor of GRH. However, Democrat minority leaders (Robert Byrd, Minority Leader; Alan Cranston, Minority Whip) voted against GRH.

Once through Congress, on December 12, 1985, President Reagan signed GRH into law, but not without reservations. In a signing statement, Reagan began by expressing his hope that GRH would put the nation on the right path to deficit reduction. But his praise for the law was short, as he was quick to point out, “I am mindful of the serious constitutional questions raised by some of its provisions” (Reagan, 1985). As the executive branch later argued before the Court, officers of the executive branch may only perform executive duties rather than the CBO or the Comptroller General as was called for in GRH. Reagan also addressed the problems raised in light of the recent Chadha decision; however, Reagan “hope[d] that the constitutional problems [would] be promptly resolved so that the vitally important business of deficit reduction can proceed” (Reagan, 1985).
Just as members of Congress, specifically Synar, set up their later constitutional attack on GRH during the legislative process, so did Reagan and the executive branch, who cited case law and precedent to make the claim that the law had serious constitutional problems that must be addressed. As will be discussed in the following sections, these claims are exactly the ones made in briefs and during oral arguments. The key point is that those pushing for the passage of GRH and arguing for it to be upheld in Court had substantial preexisting knowledge of the arguments to come when the case was brought before the judiciary. The following section will illustrate this point in a case study of GRH before the District Court and Supreme Court.

Mr. Synar Goes to Court: Gramm-Rudman is Struck Down

Mere hours after GRH was signed into law by President Reagan, Rep. Synar filed suit against the legislation in the D.C. District Court. This was not surprising as Rep. Synar had been working to build his case against GRH ever since it was submitted to Congress. As Synar stated about the legislation:

My objection is that members of Congress acting on behalf of their constituents should make those critical decisions and not surrender that responsibility to some computer and some bureaucrats, in some basement, in some building here in Washington. And that’s exactly what Gramm-Rudman wanted to do. Phil Gramm has basic distrust for government. In fact, he hates government. I do not hate government. I see a role for government, and that’s where the difference is. That’s the basic philosophical difference that he and I have. (Synar 1986)

LoVoi (2017) further explained, “We felt strongly that Gramm-Rudman was a giveaway of a core constitutional responsibility of Congress. We made two arguments. The broader argument was that it was an undue delegation. That Congress simply can’t give that authority away. It must do its job. The narrower argument was the separation of powers argument.” But, as LoVoi continued, “It wasn’t a grand strategy by any means. It was a late-night conversation at a copy
machine. But his whole purpose was that these were Congress’ responsibilities and they have to do them.” And on top of the mixed support, a long list of interest groups reached out to members of Congress to express their concerns about the legislation.  

These interest groups were concerned that funding they relied on to operate would be cut if the budget deficit targets were not met. The Director of the National Legislative Commission with the American Legion, E. Philip Riggin, urged members to vote against GRH if the constitutional issues were not addressed, stating, “It is unwise, and probably unconstitutional, for Congress to cede a substantial portion of its budgetary decision making to the Office of Management and Budget and the Congressional Budget Office – two agencies which are not accountable to the voting public” (Riggin 1985). The President of the American Public Welfare

Association, Barbara B. Blum (1985), argued, “Our chief concern with Gramm-Rudman is that it prejudice the federal budget process toward making substantial reductions in programs serving low-income people—the very programs that have been disproportionately cut during the past four years.”

Additionally, Executive Director of the American Association of Dental Schools, Richard D. Mumma Jr. (1985), argued that the association understands the importance of fixing the budget deficit; however, “. . . we are deeply concerned that efforts during the past several years to control the budget and reduce deficits have been taken primarily at the expense of non-defense, discretionary programs. . . Alarmingly, the Gramm-Rudman amendment would continue this thrust.” And the United States Catholic Conference’s Department of Social Development and World Peace was concerned with the impact GRH would have on the poor (Hehir 1985), while the AARP argued that “[a]s it currently stands, Gramm-Rudman will cause extreme hardship to those who are most in need” (Brickfield 1985) because most of the cuts targeted domestic social programs. Thus, while Synar was pushing a lawsuit to protect Congress, special interests were backing his attempt to protect the government funding they relied on.

As LoVoi (2017) explained, the constitutional issue was left to Synar, and it was his position to pursue because of his work with Lawrence Tribe. LoVoi recalled:

I was a night law student at the time and Mike had never practiced law in his life. We had no authority, so that is why I reached out to Larry Tribe, because we knew he would have a big footprint. . . What I asked for was a letter issue spotting. . . We don’t need you to resolve anything, . . . But what we need you to do is issue spot and flag as many constitutional issues as possible. So, he got that letter to me in about an hour, maybe a couple hours. Conference was meeting at lunch time, early afternoon and we had that morning to get ready. So, once I got the letter he faxed it to me and then I just made copies for all the conferees and before the conference I just put one at each place setting on the table. So, when the members arrived there was a letter from Larry Tribe saying you guys are on constitutional thin ice.
In a public statement, Rep. Synar explained, in detail, the reason and justification for his lawsuit against the legislation: “I support a balanced budget. I believe dramatic action is needed to achieve that goal. But I also deeply believe that there are basic principles underpinning our system of government which cannot be violated. Further, I recognized the requirement of my oath of office to protect and defend the Constitution” (Synar 1985e). Rep Synar concluded his statement:

> We cannot legislate leadership. Gramm-Rudman tries to insulate Congress from the hard choices our founding fathers gave us and expected us to make. Our constituents deserve no less... The drafters of our Constitution believed Congress should make these hard choices because Congress is the branch of government closest to the people. (Synar 1985e)

Rather than explain this decision in political terms, Rep. Synar framed his lawsuit to Congress and more importantly his constituents, in constitutional and legal terms. Whether this was a political move or not, the use of these constitutional arguments illustrates the importance placed on the law.

That same day, Rep. Synar released a second shorter statement, arguing, “I support a balanced budget. I do not support this political excuse for one, however. Gramm-Rudman will cause procedural chaos and jeopardize national security and the programs vital to Oklahoma such as agriculture, education and transportation. We cannot legislate leadership” (Synar 1985d). Again Rep. Synar focused on his elected role as a member of Congress, explaining how this legislation would not only hurt his constituents but take away his elected duties as a representative of Oklahoma.

But Rep. Synar was aware of the political consequences this suit could bring. In a memo, LoVoi (1986) expressed concerns over the potential repercussion, “Our biggest vulnerability after our lawsuit is a ‘September surprise’ in which members have to vote up or down, get
pissed, and blame [Synar].” LoVoi also suggested there were those within the Democratic party who were not one hundred percent comfortable with Synar’s suit, but they wanted to let him get his chance. As LoVoi (2017) discussed:

Mike and I always had the impression, and I can’t point to anything specific, our sense was there was some in the leadership who didn’t want us doing what we were doing. They kind of saw that if we could blame Gramm and Rudman for a cut process that actually reduces the deficit and lessens the political tension on this issue then it is win-win. Especially if Waxman and Jamie Whitten, and the others can do it in a way that protects our core constituencies somewhat. Nobody ever said it explicitly, but there were some. And there were others who were really believers. Then there were the ones like Gephardt who said Synar is fricken nuts and I love the guy because of this. We want him to do what he is doing.

Additionally, the Democratic party made it a point that this was Rep. Synar doing this and not the official stance of the party:

[I]t was a pretty strong view that this was going to be Synar’s deal. In fact, the Democrat leadership filed a friend of the Court opposing us. If you go through all of the amicus briefs, you will find the Democratic leadership disagreed officially. But they did set it up all along that it was kamikaze Synar’s deal. (LoVoi 2017)

However, Rep. Synar was not left completely alone in his pursuit to get the legislation struck down. As will be discussed later, there were some members of his party who joined in his lawsuit.

While Synar’s rhetoric on his lawsuit focused on the constitutional concerns, political concerns are also important to note. First, as interest groups and members of Congress argued, GRH would disproportionally affect social welfare spending compared to spending on defense, which would be a clear victory for the Republican party. Second, if GRH was a success, it would give a victory for the Republican party that could be used to campaign on in the 1986 election. As LoVoi (2017) discussed, the Democrats wanted to use GRH as a campaign issue, but that would be a moot point if the legislation was a success. Additionally, Synar and Gramm did not
get along, with Synar going so far as to name his congressional softball team “The Grammbusters” (Synar Papers). This conflict between the two members of Congress could have led to Synar’s strong opposition to the legislation.

As for the constitutional arguments, throughout this process, Rep. Synar had help from top legal minds beyond Lawrence Tribe. Helping Synar in his efforts were his future attorney in the case, Alan Morrison, and former House members and at D.C. Circuit nominee Abner Mikva. LoVoi (2017) explained, “I set it up to where Mikva would review everything so Alan on one hand would be talking to me and I would run it all through Mikva.” LoVoi later found out the other side also had a helping hand to guide them through constitutional issues on GRH:

[I]t was literally on Thanksgiving Day I was meeting with Republican Senate staff. We were trying to get the final language put to bed. He turned to somebody on his staff and said go clear this with the judge and I think it will work. I looked at him and said, you have a judge too? And he said I do. I said, well I’ll tell you mine if you tell me yours. And his was Scalia. So, he was consulting with Scalia. Well, months, weeks, later, when the three-judge panel was convened, Scalia was on it. So, I went to Alan and I said we can blow him out of the water. . . I was thinking politically. He is conservative, so he has a red shirt on. And we are blue shirts. And Alan says, don’t mention this to anybody else. I said, why not. He said, he will agree with us. He will be our best advocate. I said, Scalia? And he said, yes.

Thus, both sides were not coming up with these constitutional arguments for or against GRH completely on their own but were enlisting the advice of attorneys and judges to help them work through the arguments.

In his suit, Synar was later joined by the National Treasury Employees Union (NTEU) as a party. Leading up to the District Court decision, Alan Morrison and Katherine A. Meyer, Synar’s attorneys, released a statement explaining their position in the case:

First, [GRH] amounts to an unconstitutional delegation of primary lawmaking powers from the Congress to administrative officials. The brief contends the breadth of the delegation, the fact that it relates to the sacred power of Congress to control the purse, and the absence of any meaningful standards for determining whether the budget will
meet the deficit target all establish that the statute unconstitutionally permits unelected administrative officials to decide questions that the Constitution assigns to our lawmakers. (Morrison and Meyer 1986)

The second reason was the mixing of legislative and administrative officers in making these decisions.

In a three judge per curium decision, drafted by Judge Scalia, the District Court rejected Synar’s argument that GRH violated the delegation doctrine, but invalidated the reporting provision of GRH because the legislation vested executive power in the office of the Comptroller General. Building on Chadha, Scalia argued:

[I]f the present statute had not inserted the Comptroller General between the President and the report of the Directors of the CBO and the OMB, and if the determinations to be made under the Act by the Comptroller General had been assigned instead to the President himself, Congress could not constitutionally provide for legislative veto of those determinations. ("Synar v. United States" 1986, 1402-1403)

This statement tells the most important part of the story from this decision. Scalia’s opinion authorized a great deal of control for the executive over independent agencies, a fear both Synar and many on the Supreme Court were not willing to accept. After the District Court decision, pursuant to §274(b) of GRH, an appeal was brought directly to the Supreme Court.

At the Supreme Court, five distinct parties in Bowsher v. Synar appeared before the Court with various arguments. Representative Mike Synar, the NTEU, and the United States (executive branch) all argued against the legislation, but seeking different outcomes. For Rep. Synar, the end goal was the invalidation of the entire Act. For the United States, the ultimate goal was to invalidate portions of the Act that would ultimately give the executive branch increased authority over independent agencies. On the opposite side of the argument, both the Brief of Bowsher (the Comptroller General) and the Brief of the Speaker and Bipartisan Leadership Group were attempting to persuade the Court to uphold the Act in its entirety. The following subsections will
discuss the various parties’ arguments before the Court and finish with a discussion of the Court’s decision in relation to the arguments presented by the different parties.

Argument by Congressman Synar and the National Treasury Employees Union

Both the brief for Synar and the NTEU mirrored one another in the arguments presented and the order in which they were discussed. With Synar, House members Gary Ackerman (D, NY), Albert Bustamante (D, TX), Silvio Conte (R, MA), Don Edwards (D, Cal.), Vic Fazio (D, CA), Robert Garcia (D, NY), John LaFalce (D, NY), Jim Moody (D, WI), Claude Pepper (D, FL), Robert Torricelli (D, NJ), and James Traficant, Jr. (D, OH) joined in arguing to strike down GRH. For both parties, GRH represented an unconstitutional delegation of power, but the sole difference in their arguments came from where they claimed they gained standing. For Synar standing was awarded thanks to the provision of GRH that specifically gave standing to members of Congress so the Court could analyze the constitutionality of the Act. The NTEU claimed and was awarded standing because its members had their cost of living adjustments for 1986 frozen thanks to GRH.

Because these two briefs followed the same arguments, attention will be focused on Synar’s. Up front his brief conceded there is a long history of the Court upholding acts delegating powers because of a pragmatic approach by Congress.\(^{26}\) As the Synar Brief argued, “One reason that no decision of this Court since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), has overturned a delegation is that in no case since then can it fairly be said that the purpose of the delegation was to enable Congress to evade its lawmakers

responsibilities” ("Brief of Appellees Mike Synar, Member of Congress, et al." 1985, 25).

Further, the argument largely rested on Justice Cardozo’s concurring opinion, which stated “that a proper delegation ‘is born of the necessities of the occasion’” ("Brief of Appellees Mike Synar, Member of Congress, et al." 1985, 26). For Synar and the appellees, GRH was nothing more than blame avoidance so Congress could continue to pass legislation and government programs as they wished and did not have to make the hard decision on what should or should not be funded. More clearly, they were asking the Court to establish a set of rules to follow when delegating authority and not allow delegations the sole purpose to “abdicate their function” ("Brief of Appellees Mike Synar, Member of Congress, et al." 1985, 26).


It is the hard choices and not the filling in of the blanks . . . which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process. ("Brief of Appellees Mike Synar, Member of Congress, et al." 1985, 29)

Thus, the main argument presented by Synar and the other appellees was that Congress was delegating simply to avoid blame on the tough decisions it is constitutionally obligated to make in the budget process. They further reinforced this argument by connecting it to the recent Chadha decision in which the Court had asserted, “The fact that a given law or procedure is efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.... “ ("Brief of Appellees Mike Synar, Member of Congress, et al." 1985, 30).
In a secondary argument, relying on *Buckley v. Valeo* (1976), the Synar brief argued that the roles delegated in the Act could not fall on an official who was controlled by the legislature. As previously discussed, this is precisely the point the District Court made when invalidating the role of the Comptroller General. As for *Chadha*, Synar argued that the sharing of administrative duties authorized to the CBO under GRH constituted a violation of the legislative process as decided in *Chadha*.

**Argument by the United States (Executive Branch)**

The executive branch did not directly come out and express its wish for the Court to rule in its favor so the president could have increased control over independent agencies, and during oral argument, they were clear to point out they were also not calling into question the constitutionality of other independent agencies. But the ultimate goal was to gain increased power over these agencies for the executive branch and the Court was aware of this. The brief’s main focus was centered on the appointment clause and rested on decisions in *Meyers v. United States* (1926), and *Humphrey’s Executor v. United States* (1935). In *Meyers*, as the U.S. argued, the Court determined that the appointment and removal of officers charged with the administration of laws falls on the executive branch. Similarly, in *Humphrey’s*, the Court ruled the president could only remove officers for cause when they performed quasi-legislative or quasi-judicial functions. These cases uphold the argument that if an officer of the U.S. government is given administrative and/or executive duties, the officer is then under the authority of and removable by the president. In the case of GRH, the Comptroller was an officer of Congress and thus could not be given authority that is granted to the executive branch.
Similarly, like Synar, the brief for the U.S. relied heavily on the recent decision in *Chadha* to further support their argument.

While the brief acknowledged that the fallback provision in GRH was constitutional, the U.S. government argued that if Congress wanted to leave the calculations in the hands of the administration, then the power should have been given to the executive branch:

> But if Congress chooses instead to enact a law that provides for administrative calculation of the precise spending cuts required throughout the Executive Branch, the execution of that law is the responsibility of the President, who is the people's elected representative in the Executive Branch. ("Brief for the United States" 1986, 11)

But just because the executive branch was hoping for a ruling that empowered the fallback provision, the result of the argument was in hopes of gaining more control over all independent agencies. As the brief stated, “The result of implying any Senate role in removals would be seriously to undermine the unity and sense of responsibility that were deemed essential to the Office of the President as established by the Constitution” ("Brief for the United States" 1986, 21).

The executive branch’s argument followed the logic addressed by Richard Neustadt (1991), who asserted that Reagan did little by way of stopping the budget deficit from increasing. But what he did do was attempt to use the deficit to his advantage to change the political climate of the time. Reagan never once stopped advocating for a balanced budget; even though many of his own policies were increasing the budget every day, Reagan “denied responsibility and blamed Congress for not cutting social programs more than a bipartisan majority was willing to do” (Neustadt 1991, 278). Thus, just as Synar was arguing that through GRH Congress was attempting to push the blame and responsibility on to the President, Reagan was placing blame on Congress.
Argument by the Comptroller General

The office of the Comptroller General, Charles Bowsher, took a different approach in the argument before the Court. First, in support of GRH, the Comptroller argued that the Court should first look to the Budget and Accounting Act of 1921, which created the Office of the Comptroller General. Under the terms of this Act, the Comptroller is removable only by a joint resolution that then must be signed or vetoed by the president. Because of this, the Comptroller argued this did not make his office subservient to any single branch of government.

Citing *Glidden Co. v. Zdanok* (1962) as precedent, Bowsher argued that if the removal provision of the 1921 Act is incompatible with GRH, then the removal provision in the 1921 Act should be severed and invalidated instead of invalidating the 1985 provisions in GRH. In drafting the 1921 Act, Congress authorized the Comptroller to perform administrative duties. Furthermore, the removal provision, if the Court considered the legislative history, was in no way intended to make the Comptroller subservient to Congress ("Brief for Appellant Comptroller General of the United States" 1986).

Argument by the Speaker and Bipartisan Leadership Group, and the Senate

The final parties presenting arguments before the Court in *Bowsher* came from the Speaker of the House, Tip O’Neil, and a bipartisan leadership group, along with the Senate as a separate party. Both groups issued similar arguments before the Court. The bipartisan leadership group consisted of House Majority leader Jim Wright, Republican Leader Robert Michel, Majority Whip Thomas Foley, and Republican Whip Trent Lott. In their argument before the Court, the Speaker’s brief argued that GRH did not violate any specific provision of the
Constitution. Relying on case law similar to Synar’s, the Speaker agreed with *Humphrey’s* and *Buckley* that Congress and the president may delegate powers to independent offices.

First, the Speaker argued that the functions assigned to the Comptroller under GRH were a suitable nature to an independent officer. Those challenging the Act, according to the Speaker, through *Humphrey’s* and *Buckley* did not allow for independent agencies to perform functions that include interpretation or application of laws. But as the Speaker argued, interpreting and applying law for the Government Accountability Office (GOA) and other independent agencies is “the heart of the functions performed every day for the past century and longer by independent regulatory commissions and their precursors” ("Brief of the Speaker and Bipartisan Leadership Group" 1986, 12). Further, this type of action is exactly what the Federal Trade Commission was doing in *Humphrey’s* and the War Claims Commission was doing in *Wiener v. United States* (1958), which the Court upheld. Before moving on to the next point, the Speaker concluded that if the delegation is constitutional, then the role of the Comptroller falls in line with actions upheld by the current Court in previous cases.

Second, the Speaker claimed that the Court allowed for a more flexible view of separation of powers and has repeatedly rejected claims for an “archaic” view. Quoting *Nixon v. Administrator of General Services* (1977), the Court “rejected the ‘archaic view of the separation of powers as requiring three airtight departments of government’” ("Brief of the Speaker and Bipartisan Leadership Group" 1986, 15). Additionally, when the Court has invalidated legislation on the grounds it violated separation of powers, the Court has had clear textual support for the violation. This was true, according to the Speaker’s brief, in *Chadha, Buckley*, and *Northern Pipeline Construction Co. v. Marathon Pipeline* (1982), but when analyzing GRH, there is no single provision found in the Constitution that restricts the Act.
The third and final argument presented by the Speaker and the Bipartisan Leadership Group further addressed the role of the Comptroller as an independent officer. The Speaker’s brief did however caution the Court against finding support for the Comptroller’s argument in relation to the 1921 Act, arguing that it hurts the stance that the Comptroller is an independent officer. The reason the 1921 Act was signed into law was because of the removal provision of the Comptroller, which ensured that neither branch could encroach on his authority. Thus, invalidating the removal provision from the 1921 Act could place the Comptroller in a difficult situation.

Separately, the Senate made a four-point argument before the Court. First, as an appointee of the president, the Comptroller General is an officer of the United States and citing Buckley, “may exercise ‘significant governmental duty . . . pursuant to a public law’” ("Brief of Appellant United States Senate" 1986, 9). The office was created as an independent office in the 1921 Act. Second, the removal power over the Comptroller was created to ensure the office would be independent to perform the duties authorized to the office. Third, the Court has never decided a case regarding the separation between the legislative and executive branches before any action had been taken. All cases cited to invalidate the legislation (Buckley, Meyers, Chadha) came after action was taken. Fourth, Congress conferred the budget authority to the Comptroller in GRH because of the long-standing history of the Comptroller being an independent office.

Supreme Court Decision

In a seven to two decision, the Supreme Court reaffirmed the District Court ruling, invalidating the role of the Comptroller General in the budget process and thus triggering the
fallback provision. In a mixed ideological coalition with Chief Justice Burger, writing for the majority, and Brennan, Powell, Rehnquist, and O’Connor joining, Burger argued that the removal powers were the “critical factor” in the decision ("Bowsher v. Synar" 1986, 727-728).\(^{27}\)

Referencing Chadha, which struck down the legislative veto, as well as older case law such as Myers vs. U.S. (1925), Humphrey’s Executioner vs. U.S. (1935), Weiner vs. U.S. (1958), and Buckley vs. Valeo (1976) to make arguments regarding both the removal powers of the branches and the legislative process, the Court argued that it has always been clear that the Comptroller General is an officer of the legislative branch and to have the office engaged in executive duties while being removable through impeachment or by joint resolution violates the removal powers of an executive officer.

The Court did not directly address the main argument by Rep. Synar in the majority opinion, instead leaving any discussion about improper delegation of legislative power to a lone footnote:

> Because we conclude that the comptroller General, as an officer removable by Congress, may not exercise the powers conferred upon him by the Act, we have no occasion for considering appellees’ other challenges to the Act, including their argument that the assignment of powers to the Comptroller General in §251 violates the delegation doctrine. ("Bowsher v. Synar" 1986, 736)

Instead of addressing the main argument, the Court followed the District Court’s lead, relying on the removal power provisions to invalidate §251 of the Act. This is the secondary argument made in Synar’s brief.

Synar’s delegation argument was not ignored by all of the justices. In a concurring opinion drafted by Justice Stevens, joined by Marshall, Stevens believed the delegation argument

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\(^{27}\) The coalition consisted of a wide ideological spectrum with two conservatives, two moderates, and one liberal.
was precisely the path the Court should have taken when adjudicating the case. For Stevens, if the Court concluded that the Comptroller is clearly a member of and acting under the authority of the legislative branch – but under this act is engaged in executive action – then §251 should be invalidated because of an improper delegation. Again referencing Chadha, Stevens writes:

[E]ven though it is well settled that Congress may delegate legislative power to independent agencies or to the Executive, and thereby divest itself of a portion of its lawmaking power, when it elects to exercise such powers itself, it may not authorize a lesser representative of the Legislative Branch to act on its behalf. ("Bowsher v. Synar" 1986, 757-758)

Stevens acknowledged that Congress can delegate its powers if it so chooses but not its own powers to a smaller body within itself, as discussed in Chadha.

The majority’s argument was even more problematic, for Stevens, when looking at the fallback provision that was triggered by the majority’s opinion. If the Supreme Court and District Court opinions are correct that the Comptroller’s authority under the Act was executive in nature, then analysis of the fallback provision should also be conducted. The fallback provision would then give the same powers originally handed to the Comptroller to Congress. Those powers were decided to be executive in nature, which leads again to the question of whether this Act is an undue delegation of power ("Bowsher v. Synar"  1986, 751-752). Put in simpler terms, the majority opinion argued that when these functions are performed by the Comptroller, they are executive, but when performed by Congress, they are legislative. Stevens did not believe that this would be considered an undue delegation because the function could be labeled legislative in nature no matter if the Comptroller and/or executive agency was acting.

When addressing the arguments put forward by the United States, the justices on the Court were aware of the executive’s goal to obtain enhanced authority over independent agencies and they took steps to inform Justice Burger over their fears that the Court opinion may give the
executive branch what they wanted. Justice Stevens urged Burger to narrow the language in the original drafts to apply only to the case before the Court to not give the impression that the executive branch had increased control over independent agencies (Harriger 1998, 514). Justice Marshall’s clerk also feared this result in a memo addressed to Marshall:

The most important thing to keep in mind during this case is the hidden agenda of the Reagan Administration and Judge Scalia . . . If they can get this Court to strike down sec. 251 on the ground that it allows executive power to someone not under the President’s control, they will set the stage for an attack on the independence of a host of agencies like the NLRB, the FTC, etc. The SG doesn’t flat out attack Humphrey’s Executor (1935) . . . he merely says that when Congress can actually remove an officer who exercises executive powers, as here, the situation is clearly unacceptable. There is no reason we should buy this argument . . . Moreover, any decision in this direction will give the SG more ammunition when he does attack the independent agencies. (quoted in Harriger 1998, 515)

The Solicitor General refuted this during oral arguments, but the point is clear. A decision that follows this line of logic would leave the door open for the executive branch to have greater control over independent agencies or for further litigation to take place to accomplish this end. This point is addressed in a lengthy footnote in Burger’s majority opinion:

Appellants therefore are wide of the mark in arguing that an affirmance in this case requires casting doubt on the status of “independent” agencies because no issues involving such agencies are presented here. The statutes establishing independent agencies typically specify either that the agency members are removable by the President for specified causes . . ., or else do not specify a removal procedure . . . this case involves nothing like these statutes, but rather a statute that provides for direct congressional involvement over the decision to remove the Comptroller General. Appellants have referred us to no independent agency whose members are removable by the Congress for certain causes short of impeachable offenses, as is the Comptroller General. ("Bowsher v. Synar" 1986, 725)

As many of the Justices on the Court stressed, Burger, through a footnote, made the point clear that this case only relates to the actors before the Court and has no further application to other independent agencies. Further, the evidence presented to come to this result was found to be insufficient to do so.
Just as the District Court, the Supreme Court did not follow the arguments by the Comptroller General. As the majority opinion pointed out, the inclusion of the removal power in the 1921 Act was intended to bring the Comptroller under the sole authority of Congress, “so Congress at any moment when it found he was inefficient and was not carrying on the duties of his office as he should and as the Congress expected, could remove him without the long, tedious process of a trial by impeachment” (quoted in "Bowsher v. Synar" 1986, 728). While Justice White, in dissent, contended that the removal of the Comptroller could not be done at will but only for specific reasons, Justice Burger found that removal due to inefficiency, neglect of duty, or malfeasance was broad and could allow Congress to remove the Comptroller for any number of reasons.

More importantly to the majority, the Comptroller was tasked with heading up the GAO. This office was created by Congress to be an office independent from the executive and as part of the same 1921 Act in question. In addition to the legislative history of the 1921 Act that Bowsher used to argue that his office was independent and not a part of the legislature, previous Comptrollers made clear claims their office was part of the legislative branch. Numerous quotes between 1924 to the present illustrated that Comptrollers believed they were officers of Congress (see "Bowsher v. Synar" 1986, 730-732). Overall, the Comptroller General’s argument before the Court gained very little ground.

Finally, the Speaker and Bipartisan Leadership Group, along with the Senate, used case law similar to the abovementioned parties, but it ultimately worked against their argument in light of Justice Burger’s appointment clause justification. As Burger argued in relation to Humphrey’s, Wiener, and Buckley, “Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment” ("Bowsher v. Synar"
The Court did uphold the duties and responsibilities of independent agencies, but when an officer of those agencies is charged with executive duties and removable by Congress other than impeachment, then the act becomes unconstitutional.

In the end the fallback provision triggered by the Court’s ruling in GRH was found to have little effect on government spending. Both branches found ways to get around provisions of GRH that aimed to stop the increased budget deficit (see Schick 1980; Russo 1990; Fisher 2012). When all was said and done, by the end of GRH’s run, it never once met any of its deficit reduction targets.

Discussion

Gramm-Rudman-Hollings and the decision in Bowsher illustrate important points about constitutional debate in Congress, Court decision making, regime politics and the path dependent dynamics of judicial decisions. Focusing first on Congress, the debate and passage of GRH helps illustrate how legislators engage in blame avoidance and utilize legislative deferrals. Synar and others repeatedly claimed throughout the legislative process, GRH was nothing more than blame avoidance so members could continue to promise their districts whatever they wanted. Even when responding to negative constituent letters, Synar made sure to explain how this automatic process of debt reduction was not the intended process the Framers envisioned for Congress in the budget process (Synar 1985d). As for congressional voting behavior, similar behavior was illustrated in 1990 when Congress passed President Bush’s deficit reduction package. Members who faced considerable opposition during reelection voted against the package, allowing them to avoid blame when budget cuts went into effect. A large enough bipartisan majority was safe to vote for the package without risking their seat (Jacobson 1993). But with GRH, members were
afforded an additional out, the loud claims that it was unconstitutional and the provision for expedited judicial review.

Congressional leadership also defied what would be expected in that when leadership does not consider the authority of the institution and places a greater concern on partisan politics, the authority of the institution is diminished (see Mann and Ornstein 2009). In the House, both the Democrat majority leadership (Jim Wright, Majority Leader; Tom Foley, Majority Whip) and the Republican minority leadership (Robert H. Michel, Minority Leader; Trent Lott, Minority Whip) voted for GRH, with Speaker O’Neill abstaining. Although O’Neill did not vote, his vote would have been in favor of GRH. While he raised concerns over the legislation early in the process, he was part of a coalition arguing in favor of the Act before the Court. In the Senate, Republican majority leadership (Strom Thurmond, President Pro Tempore; Bob Dole, Majority Leader; Alan Simpson, Majority Whip) voted in favor of GRH. However, Democrat minority leadership (Robert Byrd, Minority Leader; Alan Cranston, Minority Whip) voted against GRH. This could suggest that even if the institution is losing authority over a key power granted to Congress, delegating authority over budget cuts to an agency or the executive aids the institution in blame avoidance. Meaning institutional maintenance is not always about keeping power and authority, but about doing what is best for all members when it comes to public opinion and reelection.

The legislative history also illustrates Lovell’s (2003) three criteria for a true legislative deferral. First, members of Congress, both for and against the legislation, did draw attention to the “ambiguities and interpretive questions that judges would later decide” (41). Questions were raised in connection to its constitutionality throughout the floor and committee debates. The second and third criteria were met with the provision allowing for expedited review by the Court.
The expedited review provision gave both a future role for the Court and rejected provision that could “limit the discretion of the courts” (Lovell 2003, 41). Further, deferrals to the Court through expedited review provisions may enable the justices an avenue for independent policy making because it did not simply invite judicial review, it caused judicial review.

As for the Court, the decision in Bowsher illustrates important information about decision making and regime politics. Most importantly, the Court took careful steps to ensure that the Reagan administration was not getting exactly what it wanted with enhanced or complete control over independent agencies. However, it is argued that Clinton, as in Chahda, was a move by Justice Burger to once again protect presidential authority by striking down legislation that would give a congressional agent executive authority (see Chemerinsky 1987). This is supported by early versions of Burger’s opinion that would have gone even further and ruled that independent agencies were unconstitutional, which would have been strongly supported by the Reagan Administration (see Schwartz 1990). But unlike areas such as federalism in which the Court later helped to further the policy interests of the Reagan administration, the Court took steps to ensure that no single branch was afforded greater authority than the other, upholding a clear separation between Congress and the executive branch. Moreover, it built on Chadha, which clearly stated the legislative process cannot be altered.

Just as Keck (2007b) illustrated, Bowsher does not fit into theories based on ideology or regime. A large mixed judicial coalition invalidated the reporting function of GRH, a policy that garnered bipartisan support, was a key policy for the President and was wanted by the public. The justices feared the opinion might authorize excessive authority to the executive branch, suggesting the Court was concerned with its constitutional duty to protect the legislative process. As for the salience of the case, Bowsher did appear on the cover of the New York Times the day
after the decision was announced, and the article stated, “It was one of the Chief Justice's most important rulings since he took office in June 1969” (Taylor 1986, 1a). It was Chief Justice Burger’s opinions in separation of powers cases that were the most important in his career, with the Bowscher opinion marking the last opinion he drafted before retiring from the bench later that year.28

But that is not to say this type of ruling had an impact on U.S. citizens to any great degree to make it an issue that would impact both the public and their representatives in Congress come election time. The Court was not issuing a ruling on the budget deficit itself or arguing that Congress could not take action to fix the deficit. Early in President Reagan’s first term there was debate as to whether a budget deficit mattered much in relation to the success of the United States economy (Atkinson 1981). But by the mid-1980s, it was a universal belief that something had to be done, and a key policy of the Reagan administration. Speaker of the House, O’Neill argued in 1985 that “[t]he main issue in America today is not trade, is not taxes, is not foreign affairs. The main issue is the deficit” (Dewar 1985).

The troubling nature of the deficit was not lost on the citizens of the United States. Gallop Poll surveys illustrate that from December of 1984 to January of 1989 between 54 to 63 percent of those surveyed characterized the federal budget deficit as a very serious problem for the country, which is contrasted with a drop to 40 percent in 1998 of those who characterizing the deficit as a very serious problem (Gallup 2015). Further, in 1980, the list of the most important problems facing the nation, the budget deficit did not appear as a response to this open-ended survey question. But the economic situation was listed as the most important (Gallup

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28 Chief Justice Burger also issued the majority opinion in United States v. Nixon (1974), rejecting executive privilege claims by President Nixon over tapes of conversations in the Oval Office. Additionally, Burger drafted the majority opinion in Chadha.
June 1980). In 1985, the budget deficit was seen as the third most important problem facing the country, behind fear of war and unemployment (Gallup Jan, 1985). The trend continued into 1986, with the top three responses remaining unchanged (Gallup Jan, 1986a). However, in a contrast to these polling numbers, as Rep. Synar explained in an interview a few months after the Bowscher decision, the budget deficit was not as salient as the polling numbers suggest:

I thought there would be an outrage by this time by the American public concerning these deficits. There hasn’t been that outrage; hence, the American public hasn’t focused in on members of Congress and scrutinized how they have dealt with the deficit problem. Again, . . . if you don’t get the American public focused in on the process, political pressures will not develop. (Synar 1986)

But there was clearly a majority within Congress who thought otherwise.

While opinion polling suggests the deficit was a salient issue to the general public, GRH and Bowscher did not reach a point of being salient. As displayed in Figure 13, A Gallup Poll from January of 1986 asked respondents, “Have you heard or read about the Gramm-Rudman-Hollings act, which sets mandatory targets for spending reductions that would cut the federal deficit from about $200 billion at present to zero by 1991? (If ‘yes,’ ask) Do you approve or disapprove of this act?” (Gallup Jan, 1986b). Fifty-five percent responded, “Haven’t heard/read of act.” Of those who had heard of GRH, 26 percent approved of the Act, 9 percent disapproved, with 12 percent holding no opinion (Gallup Jan, 1986b). A similar poll, as displayed in Figure 14, conducted by Money Magazine, found that 80 percent of respondents did not know enough about GRH to explain it to someone else (Magazine May, 1986). With more than half of respondents claiming they had not heard of or read about GRH in one poll and another poll reporting that 80 percent of respondents did not know enough about GRH to explain the Act, there is little evidence to support the idea that the legislation itself was salient enough to garner a response from the public when the Court invalidated a key provision. This helps illustrate the
point that while an issue may be salient, the actions of Congress and the Court may fall outside the scope of public interest.

Figure 13: Have you heard or read about the Gramm-Rudman-Hollings Act, which sets mandatory targets for spending reductions that would cut the federal deficit from about $200 billion at present to zero by 1991? (If ‘yes,’ ask) Do you approve or disapprove of this act?

Figure 14: Do you understand the term “Gramm-Rudman” well enough to explain to someone?
In the immediate aftermath of Bowsher, it received substantial attention regarding the impact it would have on independent agencies, while other sources focused on the formalistic approach the Court used in dealing with separation of powers just as it had done earlier in Chadha (see Fisher 1987; Harriger 1998). What has been missing from the discussion is the independence of the Bowsher decision and how it built on Chadha to set a limit as to how far Congress could delegate and diverge from the legislative process.

In addition to the lack of salience and possibility of the justices feeling a sense of institutional duty suggested from this study, there was a lack of direction from Congress and past case law for the Court to follow, which further added to the Court’s ability to act independently. As Gillman (2008) argued, there may be times of divided government or the absence of a concise voice to guide the Court when searching for an agenda to follow. During the legislative deliberation there was a clear lack of a single voice, with members complaining that the language of GRH was changing by the minute. Even Fisher expressed this point during testimony, arguing that everyone appeared to be confused over what GRH does which will result in the Court finding it difficult to establish the exact legislative intent of the Act.

Most importantly, GRH and the Bowsher decision illustrate the role of path dependency on political actors and the judiciary. Members of Congress, both those who were for and against the legislation, cautioned passage of the legislation in light of the Chadha decision. While typical path dependent cycles are perpetuated by political majorities who attempt to further solidify their policy preferences, in this instance it comes from the political minority that was attempting to protect its institution. For the judiciary, the justices on the Supreme Court had two very viable options. First, the Court could have upheld GRH and marked a return to the previous standard in which the judiciary abstained from getting involved in separation of power disputes to allow
them to be decided through electoral politics. But the Court had enough support in Congress and the legal community to do so and the Court continued down the path it had set in *Chadha*, holding political actors to the very preciously set legislative process integral to the founding of the system of government. Additionally, the expedited judicial review provision appears to have enabled independent policy making by the Court, and arguably judicial supremacy with Congress not just simply inviting judicial review but causing it. This is further evidence of political actors supporting the judicialization of politics and policy, creating a path that leads us to what we are seeing today with lawsuits against the Obama administration.

Conclusion

The above research suggests two important findings. First, constitutional deliberation has an influence on the legislative process and the resulting litigation in Court. Members of Congress were vocal in their worries over the constitutionality of GRH, and with the addition of an expedited judicial review provision, the arguments made during deliberation were discussed before the Court. These concerns, while not exactly what the Court decided, still shaped the legislation and had an influence on the final judicial outcome. Second, the Court was able to act independently in a case, *Bowsher*, deciding a separation of power issue. Because this issue is less salient and was decided by a large mixed judicial coalition, it illustrates that the justices put aside their partisan differences (for the most part) and issued decisions based on institutional duty rather than ideology or strategy.

In the next chapter, I turn to the constitutional debate, passage, and judicial challenges to the Line-Item Veto Act. My analysis further illustrates how members of the minority were able to use *Chadha*, and now *Bowsher*, to argue against the constitutionality of a presidential line-
item veto and the Court, even though a large majority was in favor of the legislation and remained committed to the precedent they had set. Additionally, analysis of the Line-Item Veto Act illustrates how even members of the majority believed they had dealt with all constitutional issues in light of the previously set precedents, but to no avail.
CHAPTER 4

A CONTINUED PATH: *CLINTON V. NEW YORK*

As part of a promise made in the Republicans’ Contract with America, in 1996 Congress attempted to bring the budget and deficit under control through the passage of the Line-item Veto Act. The conference report filed in the House on March 21, 1996, defined the Act as an amendment to the

Congressional Budget and Impoundment Control Act of 1974 to authorize the President to cancel in whole any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit signed into law, if the President: (1) determines that such cancellation will reduce the Federal budget deficit and will not impair essential Government functions or harm the national interest; and (2) notifies the Congress of any such cancellation within five calendar days after enactment of the law providing such amount, item, or benefit. Requires the President, in identifying cancellations, to consider legislative histories and information referenced in law. *(Summary: S.4 — 104th Congress (1995-1996))*

In short, the Act authorized the president to cancel spending from bills after enacting them into law in certain situations, but only in three specific situations: “1) any dollar amount of discretionary budget authority; 2) any item of new direct spending; or 3) any limited tax benefit” *(quoted in "Clinton v. New York" 1998, 436)*. The Act raised serious constitutional concerns as a violation to the separation of powers and the Presentment Clause of the Constitution, allowing the president to veto portions of a bill after it had passed through the House and Senate. But there was also a real belief that the Act was constitutional by those who supported it, even when considering the recent decisions in *INS v. Chadha* (1983) and *Bowscher v. Synar* (1986).
Attempts to pass line-item veto legislation were nothing new, as many presidents and past legislators had called for the authority. As President Clinton stated, “Starting with Ulysses S. Grant, Presidents of both parties have sought the line item veto so they could eliminate waste in the Federal Budget. Most recently, Presidents Reagan and Bush called for its passage, as did many Members of Congress” (Clinton 1995c, 637). In 1985, President Ronald Reagan, in a letter to Robert H. Dole (R, KS), expressed his support for efforts being made in Congress to pass line-item veto legislation: “As the Senate considers S. 43, I wanted you to know and convey to your colleagues my strong support for this initiative. As you know, I asked the Congress to pass this legislation in my State of the Union Address on February 6th. I am pleased that under you leadership the Senate is acting judiciously on this important matter” (Reagan 1985, 912). But not everyone was optimistic about line-item veto legislation. During that same year, the Acting Assistant Attorney General, Ralph Tarr expressed caution regarding the line-item veto:

> It is not a satisfactory answer to this constitutional argument to respond that Congress would have voluntarily imposed this limitation on itself and that Congress would be aware when it adopted an appropriations bill that the President would be able to veto individual parts of it. Congress made the same argument in the Chadha case with respect to the President’s approval of legislative veto statutes, but the Supreme Court expressly stated that it was not permissible to later by legislation the veto provisions of the Constitution. (Tarr 1993, 30)

But that did not stop politicians from promoting the presidential tool. President Reagan’s attorney general, Edwin Meese (1989), expressed his support for the authority in 1989, “As part of the effort to restore a truly independent and energetic executive would come from giving the President . . . the line item veto. This device would help restore the balance between the appropriating functions of Congress and the budget proposing responsibility of the president” (Meese 1989, 189).
George H. W. Bush was also vocal in his calls for line-item veto authority, but from a constitutional amendment rather than a piece of legislation. In 1990, Bush stated, “As President, I repeat the call of many of my predecessors for the line-item veto, and today I am proposing an amendment to the Constitution to accomplish this” (Bush 1990b, 912). Further, Bush believed this was something that would benefit the nation as it was a power most States already afforded their governors:

Amending our national charter is profoundly serious step, and I am fully aware of the great responsibility involved in proposing such an action. My proposal, however, is supported by ample precedent. Today, the Governors of 43 of the 50 States have line-item veto authority, and for more than a century American Presidents have urged the Congress to adopt this reform at the Federal Level. (Bush 1990a)

He also continued these remarks on the campaign trail in 1992, “I am for reforming Government. I am with Newt Gingrich and Strom Thurmond because I want a balanced budget amendment to the Constitution. I want a line-item veto. I want to give you, the people, a taxpayer check-off. So we must compel the Congress to get this Federal deficit down” (Bush 1992, 2013).

In this chapter I illustrate how the precedent set in Chadha and furthered in Bowsher continued into the late 1990s. In this instance, the Court once again upheld the precedent set and further solidified the decision in Chadha. Second, I illustrate the strong role members of the political minority in Congress played in using previous precedent to protect its institution. While members of Congress may have been engaging in partisan politics with their opposition to the legislation, they were still shaping their arguments in constitutional terms. Additionally, in the fight against the line-item veto, it was Democratic members of Congress who were most outspoken against handing over this authority to a president of the same party. I further explain the strength of their constitutional deliberation and how while members of the majority believed they had dealt with all of the constitutional issues in the legislation, those in the minority were
still correct when it came to the Court’s interpretation of the law. Last, I discuss the judicial proceedings and the role the Chadha decision played in the Court’s legal reasoning to strike down the Line-Item Veto Act.

Congressional Debate over Line-Item Veto

Committee hearings and floor debates for the Line-Item Veto Act illustrate the struggle that took place in Congress as to whether the legislation should not only should be passed but whether it was constitutional as well. While attempts to pass line-item veto legislation date back to the late 1800s, this chapter only focuses on the buildup to the passage of the Line-Item Veto Act of 1996.\(^29\) Just as I illustrated in analysis of debates over legislative veto and Gramm-Rudman in the 1980s, members of Congress who were in favor of the legislation, in many instances, urged their fellow members to not become sidetracked with the constitutionality because it was ultimately the Court’s role or it was not important enough to become tangled up with. As Sen. Ernest Hollings argued during hearing before the Committee on the Budget:

> Let me make it very clear what this bill is about and what it is not about. The line-item veto is about eliminating wasteful spending. We are not talking here about some highfalutin principle of Constitutional powers. I just don’t go along with the idea of making a fetish out of legislative prerogatives. The issue here is not the separation of powers; the issue is the sharing of responsibility and accountability. Right now, the responsibility for budget cutting rests almost exclusively on Congress; I want to shift an equal share of that responsibility to the executive branch. (Hollings 1994, 2)

However, in this situation there was also a real belief the Act would pass a constitutional test or even there was no need to pass the legislation because the president already had line-item veto authority. Members who were against the legislation did not shape their arguments in political

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\(^{29}\) For further discussion about the line-item veto and attempts to pass line-item veto legislation prior to 1996 see: Carter and Schap (1990); Crovitz (1990); Dixon (1985); Edwards (1985); Fisher and Devins (1986).
terms, but they used constitutional debate to signal their intentions to vote against the legislation and bring about litigation if passed. Additionally, members against the Act consistently referenced the *Chadha* (and *Bowsher* to a lesser degree) decisions as evidence of the unconstitutionality of the legislation.

During a committee hearing before the Senate Committee on the Budget on October 5, 1994, members were presenting their line-item veto proposals. Senator William Bradley (D, NJ) announced his reasons for supporting a line-item veto proposal:

I have not always supported the line-item veto, but to change our Nation, I have changed my mind. Many times since I first ran for the Senate, I have thought through the arguments and each time I came to the conclusion that the line-item veto would tilt the balance of power farther toward the President than the delicate balance embodied in our Constitution. But I also watched for 12 years as the deficit quintupled, shameless pork-barrel projects persisted in appropriations and tax bills, and our Presidents again and again denied responsibility for the decisions that led to these devastating trends. In 1992, I decided that it was time to change the rules. (Bradley 1994, 15)

Senator John McCain (R, AZ; 1994) also argued for the line-item veto because of problems created by Congress, “given Congress’s predilection for pork barrel spending, omnibus spending bills and continuing resolutions, it would seem only prudent and constitutional to provide the President with functional veto power” (McCain 1994, 147). These statements point to the policy side of the argument, which was the largest focus of the debate with many members ignoring the constitutional problems and placing a focus on the policy side of things.

But this was not an uncommon sentiment throughout this period, as previously discussed and explored in greater detail by Jasmine Farrier (2004, 2010). During the 1980s and 1990s, members of Congress were increasingly willing to save themselves from making the difficult decisions through attacking their own branch “as the symbol of an irresponsible federal
government” (Farrier 2004, 215) when it came to the budget. Thus, those in favor of line item veto legislation focused on policy goals rather than constitutional concerns.

Senator Arlen Specter (R, PA) took a different approach than most in the Senate, arguing that the president already had the authority to issue line-item vetoes. As Sen. Specter argued during the hearing, the president had this authority from “the key clause in the U.S. Constitution, Article I, Section 7, Clause 3, which was copied from the Massachusetts Constitution and duplicated in other State constitutions, under which the chief executive officers of those States exercise the line-item veto” (Specter 1994, 25). This reading of the clause was in response to the fact that Congress was now engaged in omnibus spending bills, while in the past, spending bills were presented to the president as individual pieces of legislation. For example, spending bills that granted money to different state projects would not have passed as a single piece of legislation but as individual bills. Sen. Specter (1994) continued, arguing that the Anti-Federalists also opposed this clause “precisely because it ‘made too strong a line-item veto in the hands of the President’” (Specter 1994, 27). Senator Robert Kasten (R, WI; 1994) later agreed with this line of thought.

But this argument was supported by others in and out of Congress. During questioning of Louis Fisher (1994) of the Congressional Research Services, he argued there was no merit in those who claimed the president had line-item veto authority already found in the Constitution because many of these early suggestions from the Framers mirror something more like judicial

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30 Article 1, Section 7, Clause 3 of the Constitution states “Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitation prescribed in the Case of a Bill.”
review. Additionally, “In 1988, the Office of Legal Counsel of the Justice Department released a 54-page analysis that found no merit to the concept of an inherent item veto” (Fisher 1994, 66). Further, President Bush also addressed this issue, stating that “Attorney General Barr, . . . ‘and my trusted White House Counsel [C. Boyden Gray], backed up by legal opinions from most of the legal scholars, feel that I do not have that line-item veto authority. And this opinion was shared by the Attorney General in the previous administration’” (Fisher 1994, 66).

While the main purpose of the hearing was for line-item veto proposals, there were others who expressed their concerns and objections to any type of legislation. Senator William Cohen (D, MA) was troubled by the constitutional questions the line-item veto posed, and while he and other members were committed to fixing the deficit, there were still “concerns about whether or not the transfer of power associated with the line-item veto is something that we should really encourage and support” (Cohen 1994, 42). Rep. David Skaggs (D, CO) also expressed his concerns, especially in light of the Court’s decision in Chadha:

As the Supreme Court noted in its decision in I.N.S. versus Chadha, “explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.” The Court continues, “These provisions of Article I are integral parts of the constitutional design for the separation of powers.” (Skaggs 1994, 603-604)

But out of all who opposed the legislation, Sen. Byrd was the most vocal in his objections to any type of line-item veto legislation.

Byrd (1994), quoting Madison, discussed the importance the framers placed on the power of the purse and placed it with the people’s branch, “As Madison so eloquently explained, ‘This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people for obtaining a redress of every grievance and for carrying into effect every just and salutary measure’” (Byrd
1994, 47). Just as Rep. Synar was concerned with the power shift in Gramm-Rudman-Hollings, Sen. Byrd expressed the same concerns during committee hearings:

> What it will do, however, and what it is meant to do, is that it will shift the power over the purse from the legislative branch to the executive and thus destroy the delicate balance crafted by the framers of our constitutional system over 200 years ago. I am opposed to the item veto in all of its forms, and I shall at some length, explain why. (Byrd 1994, 163-164)

Additionally, Sen. Byrd was concerned with how Congress would take line item veto power away from the president once given up because the president would have veto power over any legislative attempts to end the authority. The only way he saw this happening was through a legal challenge in the courts because a president would never sign legislation to give it back (Byrd 1994, 56).

The discussion over the constitutional flaws of the line-item veto continued during floor debates. After a discussion of the Chadha ruling and the intention of the Framers, Rep. Skaggs argued:

> The line-item veto proposed in H.R. 2, by providing the President with the authority to veto subsidiary parts of legislation, turns the framework defined in article I, section 7 on its head. What the president might decide to eliminate is simply eliminated, unless the Congress goes through an entire repetition of article I legislative process, including a two thirds vote of both Houses. This would allow the President and a majority in only one House of Congress to frustrate the will of the majority – an outcome that flies in the face of the constitutional principle of majority rule. (Skaggs 1995a, 3794)

But as detailed earlier, not all members believed that Chadha was a controlling precedent when it came to line-item veto legislation – with the small number of members believing the president already had the authority without legislation and those who believed the limitations were enough to pass the constitutional questions.

Sen. Byrd (1995a), referencing Chadha, explained that “in no way would” a line-item veto “coincide with the ‘single, finely wrought and exhaustively considered, procedure,’
contained in Article I” (Byrd 1995a, 8406). Senator Carl Levin (D, MI) argued that the Chadha decision made it clear that Congress could not alter the steps set for in Article I, and Congress could in no way change that through legislation, stating, “We did not have it before Chadha, when the Supreme Court wrote that we cannot amend the Constitution by legislation. And we do not have it after Chadha.” (Levin 1995a, 8421)

On January 24, 1995, the Senate Subcommittee on the Constitution, Federalism, and Property Rights met in a hearing titled “The Line-Item Veto: A Constitutional Approach.” In discussing how the rescission of funds would operate, Timothy E. Flanigan, a former employee of the Office of Legal Counsel, noted:

S. 4, however, would go further by making the proposed rescission effective unless Congress acts within a specified time. It should be noted that under the Supreme Court’s decision in INS v. Chadha, Congress’ disapproval of a rescission must be accomplished through legislation. In other words, Congress must create the bill rescinding that act which is then to be presented to the President, and that, of course, can be vetoed by the President and then overridden. (Flanigan 1995, 72)

Later, when asked directly if the legislation would comply with the bicameral requirements under the Constitution and as set forth in the Chadha decision, Flanigan (1995) stated, “I think it clearly does. As I mentioned in my testimony, as I read S. 4, it does nothing to alter either the presentiment or bicameral requirements under the Constitution for the enactment of legislation” (Flanigan 1995, 85)

Fisher (1995) concurred with Flanigan (1995) but argued there may still be some problems with the legislation. Specifically, when it came to delegation of powers, Fisher stated:

Again, it is a balance of power. The existing rescission system puts on the President the burden of getting approval of both Houses. The enhanced rescission would reverse that. A President’s proposal to rescind money would automatically take effect within ‘x’ number of days unless Congress stops him, and they would have to stop him with a joint resolution of disapproval. Of course, that would go to the President and he could veto that, and now you are in a situation of a two-thirds. Or, putting it differently, on a balance
of power the President’s decision would be final so long as he could have one-third plus 1 in one House to stop the override vote. So the proposal for enhanced rescission is a big shift of power to the President to determine budget priorities, something that people normally associate with Congress. So I don’t think it is a Chadha problem. I think it is a delegation issue and one about the balance between the two branches, especially in the spending power. (Fisher 1995, 85)

When pressed further, Fisher explained that under his assessment of the legislation, the line item veto would be found to be constitutional under the Court’s reading of Chadha and the Court’s interpretation of delegation of powers. However, he argued that Congress should be cautious about whether they want to give up such powers to the president at the expense of their own (Fisher 1995, 85-86).

A report from the Committee on Government Reform and Oversight released on January 29, 1995, argued that over time presidential authority to combat wasteful spending has been limited and the Chadha decision helped restore some of the authority the president should be authorized to carry out. In essence, the report argued that enhanced presidential authority was a good thing, placing a check on Congress who could not be trusted to stop wasteful spending itself, and “As Chief Executive, the President should have a great sense of accountability in spending federal funds and resisting special tax benefits” (CRPT-104, Jan 29, 11).

Later, during floor debates in the House, Rep. John Spratt (D, SC), who ultimately voted in favor of the Line-Item Veto Act, was concerned about the breadth of the legislation in light of the decision in Bowscher, which he argued was a warning about being too broad in legislation (Spratt 1995, 3462). Four days later, Rep. David Skaggs (D, CO) expressed different concerns related to Chadha:

As the Supreme Court noted in its decision in I.N.S. versus Chadha, ‘Explicit and unambiguous provisions of the Constitution prescribed and define the respective functions of the Congress and the Executive in the legislative process.’ The Court continues, ‘These provisions of Article 1 are integral parts of the constitutional design for
the separation of powers.’ The line-item veto proposal in H.R. 2 would impermissibly alter that ‘constitutional design for the separation of powers’ between the executive and legislative branches by allowing the president singlehandedly to amend legislation which Congress has already approved. (Skaggs 1995b, 3794)

Both of these statements clearly show the divide that was taking place, even among individuals of the same party, with some using case law to improve the language and odds of the legislation passing a constitutional test and others using the case law to argue against the legislation.

In a later hearing before the Senate Committee on Government Affairs, Sen. John Glenn (D, OH) stated, “I believe we can craft a proposal that protects the balance of powers laid out in the Constitution while still allowing the President greater latitude in eliminating unnecessary spending” (Glenn 1995, 4). Sen. Peter Blute (R, MA) in reference to those raising concerns over the constitutionality of the line-item veto argued:

I urge you not to get sidetracked with arguments about tilting the balance between Congress and the President. Two hundred years ago, our Founders set up a system in which the Congress would send to the President narrow bills on specific issues, and they gave him a veto power so that he could insert himself into the debate. (Blute 1995, 10)

Sen. Blute added, many scholars and the American Law Foundation also believed the Act was constitutional (Blute 1995, 26). Sen. Joe Lieberman (D, CT; 1995) offered some optimism in the fact that this will be done through legislation and not a constitutional amendment, “So if there is a problem as we go along, we can address it by statute” (Lieberman 1995, 23).

Still there were others who were less than comfortable with the constitutional challenges the legislation would create. Sen. David Prior (D, AR) asserted:

The Constitution specifically gives the power of the purse to Congress. By allowing the President to open up appropriations bills or possibly entitlement programs and use the line item veto would certainly change the entire appropriations process and cause partisan bickering that makes the last 2 months look calm. (Prior 1995, 6)
In reference to the *Chadha* decisions, Sen. Carl Levin (D, MI) expressed his concerns about passing line-item veto legislation:

The Supreme Court said that the presentment clause, as well as bicameral requirement, President’s veto, and the Congress’ power to override a veto, were intended to erect enduring checks on each branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks and maintain the separation of powers, the carefully defined limits on the power of each branch must not be eroded. Bottom line, we can’t give it away. We can’t give away our power by statute if we wanted to. (Levin 1995b, 25-26)

These concerns were addressed in analysis of the Act completed by the American Law Division of the Congressional Research Service that was also entered into the record. This report detailed how the Court, over the course of the previous twenty years, had applied two different tests in separation of powers cases: formalist and functional. As the report stated, “The formalist approach emphasized the necessity to maintain three distinct branches of government through the drawing of bright lines demarcating the three branches from each other determined by the differences among legislating, executing, and adjudicating” (Killian 1994, 16-17). Whereas the functional test allowed for left “a good deal of leeway” (Killian 1994, 17).

The problem that came from these two very different tests was that the Court did not explain when they would apply which test. Specifically, on the same day as the *Bowsher* decision, in which the Court applied the formalist test, the Court applied the functional test in a separate separation of power case. In light of these concerns, the research concluded:

It seems, therefore, on the basis of textual analysis and precedent that it would be constitutionally permissible for Congress to delegate to the President the power to reduce or omit various items from appropriations acts under the terms set out in the draft bill. The power to delegate encompasses the inclusion within delegations of presidential power over appropriations and tax provisions. The standards contained in the draft appear to fall within the unconfining scope of judicial precedents. And the delegation doctrine permits the overturning of statutes by the recipients of the delegation. Only the issue of the five-day period within which the President’s veto must be overridden presents an unsettled question, but this matter seems amendable to a solution supportive of the bill.
However, very little analysis was put into the Presentment Clause question, with the CRS analysis arguing that the only troublesome issue regarding the Presentment Clause came from the five-day period given to Congress to override a veto.

Publicly, President Clinton was also supportive of the line-item veto throughout this entire period. Clinton was not focused on the constitutional questions the authority would raise, but on the benefit it would bring in keeping the budget deficit under control. In March of 1995, Clinton released a statement in support of the line-item veto, stating, “If the Members of Congress from both parties are serious about cutting the deficit, give me this line-item veto, and I will get started right away. This is one area where both parties can and should come together” (Clinton 1995b, 446).

Despite the opposition’s best efforts, the Line-Item Veto Act passed the House with a 294-134 vote and in the Senate 69-29. In a signing statement, President Clinton explained:

This carefully defined authority is also a practical and principled means of serving the constitutional balance of powers. The modern congressional practice of presenting the President with omnibus legislation reduces the President's ability to play the role in enacting laws that the Constitution intended. This new authority brings us closer to the Founders' view of an effective executive role in the legislative process. The President will be able to prevent the Congress from enacting special interest provisions under the cloak of a 500- or 1,000-page bill. Special interest provisions that do not serve the national interest will no longer escape proper scrutiny. (Clinton 1996)

Thus, President Clinton, as others before him (and as those who argued in favor of GRH discussed in the previous chapter), believed, the functional purpose of the Act would outweigh the constitutional issues that the legislation brought about.

After signing the Line-Item Veto Act into law, Clinton gave a lengthy public statement expressing his pleasure to finally have the authority:
We all know that this is needed because too often, as vital bills move through Congress, they can become clogged with items that would never pass on their own. Presidents often have not choice but to sign these bills because of their main purpose. This new law will give the President the power to cancel specific spending items and specific tax loopholes that benefit special interests.” (Clinton 1995a, 635)

But while taking questions, reporters raised concerns over the constitutionality of the legislation.

When asked if the Act “transcend[s] the Founding Fathers’ separation of powers and give[s] the President too much power?” Clinton answered:

I don’t think so. We’ve worked hard to—we anticipate that it will be challenged. We’ve worked hard to provide for a means for it to be resolved quickly. But this leaves ultimate hands in the authority of the Congress. They can take all these separate issues back and vote on them separately. And I think all of us believe that as long as that is done, that we don’t violate the constitutional separation of powers doctrine. (Clinton 1995a, 636)

Clinton was further questioned about whether the power could or would be used to cut special deals with members of Congress, meaning the president could bargain with select members of Congress for the inclusion of particular items in a bill, and in response, the president would not veto parts of a spending bill that would impact those particular members of Congress.

Essentially, this could allow for the president to hold members of Congress hostage. Clinton responded that every power has the ability of being abused, but that is why the system has checks and balances (Clinton 1995a, 636).

This section has highlighted the debates that took place in Congress and the White House over the legislation, illustrating the important role constitutional deliberation played and, as will be illustrated in the next section, the role it played in shaping the litigation. Further, it helps demonstrate how members of Congress used past precedent to make their arguments against the legislation and how it impacted those in favor of the Act. While the concerns were real, members in favor of the Act believed they had carefully considered the judicial rulings and worked out
legislation that would pass the test. The next section turns to litigation over the line-item veto and its ultimate invalidation.

**Line-Item Veto Act at the Judiciary**

In the first judicial action brought against the Line-Item Veto Act, Senator Robert C. Byrd and five other members of Congress filed suit in the D.C. Circuit Court thanks to Section 3 of the Act allowing for expedited judicial review by members of Congress or individuals that were harmed by the enactment. This action was not surprising as Sen. Byrd had been attempting to defeat line item veto legislation for over ten years.

As early as 1982 Sen. Byrd was vocal regarding the constitutional challenges line item veto would create for both separation of powers and checks and balances, and his statements mirror those made by Rep. Mike Synar (D, OK) in his attempt to invalidate GRH in *Bowsher*, while also basing them on constitutional grounds rather than political ones. In a draft memo from 1985, Sen. Byrd argued:

> The line item veto proposed by this bill would fundamentally alter the very checks and balances which have preserved our liberties and protected our people from arbitrary government for nearly two centuries. It is no coincidence that our government – the oldest representative democracy in the world – is also the only one in which the legislative branch is co-equal with the executive branch. (Byrd 1985a)

In a separate memo, Byrd went further, stating, “The history of our republic is one of constant vigilance against the accumulation of power by the executive. To surrender that struggle now

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31 Sen. Byrd was joined in his suit by Sen. Mark O. Hatfield (R, OR), Sen. Daniel Patrick Moynihan (D, NY), Sen. Carl Levin (D, MI), Cong. Henry A. Waxman (D, CA), Cong. David Skaggs (D, CO).

32 Section 3(A) states, “Any Member of Congress or any individual adversely affected by part C of title X of the Congressional Budget and Impoundment Control Act of 1974 may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunction relief on the ground that any provision of this part violates the Constitution.” (*Line Item Veto Act* 1996)
would be to forfeit the trust the citizens of our states placed in us when we were elected” (Byrd 1985b, 1).

At this early stage, Sen. Byrd was also making arguments against line-item veto in connection to recent the decision in Chadha, stating:

I say to my friends who support the line item veto approach, that even if they agree with the goal which this legislation attempts to accomplish, it should be achieved through amending the Constitution, and not by way of legislation cast in the guise of simple rule-making. That is what the Congress attempted to do in creating the legislative veto system, and the Supreme Court told us in 1983, in the Chadha case, that we may not create a legislative process which contravenes the Constitution of the United States. (Byrd 1985b, 15)

Later in a series of editorials published in local papers in 1989, Byrd argued:

In fact, the line-item veto would give a President powers never intended by the Constitution or the Founding Fathers, making him the ‘Chief Legislator,’ as well as the Chief Executive, thus crippling the checks-and-balances system that has proved itself over the past two centuries. (Byrd 1989a)

And the constitutional arguments were not his only problem with the line-item veto, he was also concerned about the ability of members to use it as a tool for blame avoidance, “The line item veto would also lessen the responsibility of Congress. Congressmen could include all of their pet local projects on appropriations bills and let the President take the blame for cutting them” (Byrd 1989b, 6). Sen. Byrd was consistent in his efforts against any line item veto, repeatedly arguing this authority would upend the power of the purse so vital to the Framers of the Constitution.

In a draft version of a statement, Sen. Byrd discussed the constitutional importance of protecting the power of the purse; “The control of the purse is the foundation of our constitutional system of checks and balances of powers among the three departments of government. The Framers were very careful to place that control over the purse in the hands of
the legislative branch” (Byrd 1995b). Sen. Byrd continued by discussing the important nature of these constitutional mechanisms:

[T]he survival of the American constitutional system, the foundation upon which the superstructure of the republic rests, finds its firmest support in the continued preservation of the delicate mechanism of checks and balances, separation of powers, and control of the purse, solemnly instituted by the Founding Fathers. For over two hundred years, from the beginning of the republic to this very hour, it has survived in unbroken continuity. We received it from our fathers. Let us as surely hand it on to our sons and daughters. (Byrd 1995b)

These concerns about the imbalance the Act would place on the constitutional order would later become the basis for his challenge in the courts.

Later, Sen. Byrd continued his attack on line-item veto. Again just as Rep. Synar had previously done, Sen. Byrd made strong constitutional arguments against the legislation and the effect it would have on the balance of power between the branches:

The senate is on the verge of making a colossal mistake, a mistake which we will come to regret but with which we will have to live until January 1 of the year 2005, at the very least. We are about to adopt a conference report which will upset the constitutional system of checks and balances, a system which was handed down to us by the Constitutional Framers 208 years ago, a system which has served the country well during these two centuries, a system which our children and grandchildren are entitled to have passed on to them as it was handed down to us. (Byrd 1996c, 1)

Just after the Act was passed, Sen. Byrd wrote, “In instituting such an enormous change in our constitutional system, the members of the current Congress have demonstrated a reckless lack of regard for both the intent of the Framers of the Constitution and for future generations” (Byrd 1996d). Later, after Sen. Byrd filed his suit, he wrote, “This lawsuit, which was filed in the U.S. District Court, District of Columbia, is based on the simple principle that the plain words of the Constitution mean what they say” (Byrd 1997a).
In response to constituents who supported the Line-Item Veto Act, Sen. Byrd explained his opposition, just as Rep. Synar had done in his letters to constituents in relation to his challenge on Gramm-Rudman in *Bowsher*:

I am opposed to the line-item veto because I believe it would endanger our Constitutional system of government, and because I think it could prove harmful to a state like West Virginia. The line-item veto would vest in a single individual – the President – the power to make or break virtually any federally funded project in any state, county, or municipality in the nation. Roads, bridges, schools, post offices, flood control measures in West Virginia – all could be subject to a line-item veto. (Byrd 1996a)

Additionally, to those who supported Byrd in his opposition to the Act, he argued, “Even a cursory review of history should convince anyone that the shift of power necessarily extending from a line-item veto would inevitably produce the kind of results our constitutional Framers sought to overcome” (Byrd 1996b).

While attempting to get line-item veto ruled unconstitutional in the courts, Sen. Byrd also introduced legislation aimed at repealing the Line-Item Veto Act. In a October 24, 1997, press release, Byrd argued in support of his repeal legislation, stating, “In offering this legislation I am attempting to restore the kind of government, with its separation of powers and checks and balances, that the American people have enjoyed for over 200 years” (Byrd 1997b). He continued, stating, “I am chagrined. I am puzzled. I am disappointed that members of Congress would willingly give to any President this power. But that is what Congress did” (Byrd 1997b).

Whether Sen. Byrd was sincere in his approach to challenge the legislation or was simply applying a technique he had learned from earlier examples, such as *Bowsher*, these arguments translated to what was presented in his court documents. Additionally, only if a political ploy to invoke the constitutional argument, law was shaping his arguments.
Raines v. Byrd

In Sen. Byrd’s challenge, the District Court for the District of Columbia heard Byrd v. Raines (956 F.Supp. 25, 1997), where Sen. Byrd along with three other senators and two members of the House filed suit against the Act. The District Court first addressed the Presentment Clause issue. Citing Bowsher, Judge Jackson argued that the Court does not automatically look to invalidate legislation; however, the judiciary must take the Constitution and the structure established by the Framers seriously. Judge Jackson asserted, again referencing Bowsher, “‘The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.’ . . . Accordingly, the Supreme Court has ‘not hesitated to invalidate provisions of law which violate the separation of powers’” (“Byrd v. Raines” 1997, 33).

Judge Jackson continued, asserting that the Court must view the legislation in light of the Chadha decision, stating:

“[T]he legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority.” . . . It is insufficient, therefore, for defendants to argue that, notwithstanding the resemblance between a cancellation and a statutory repeal, the Act should stand because the same result could be accomplished through clearly constitutional means. Rather, “the purpose underlying the Presentment Clauses … must guide resolution of the question whether a given procedure is constitutional.” ("Byrd v. Raines" 1997, 34-35)

Further, as Judge Jackson argued, affording a president the authority to cancel provisions from a bill that has been signed into law will inhibit both the House and the Senate from performing their constitutional authority prescribed in Art. 1, § 7 of the Constitution.

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Judge Jackson also addressed separation of powers issues raised by the Act. Again referencing *Chadha*, he stated:

The Constitution vests “all legislative powers” of the United States in Congress, U.S. Const. art I, § 1, including the power to repeal. . . As *Chadha* made clear, there are formal aspects of the legislative process that Congress may not alter. Just as Congress could not delegate to one of its chambers the power to veto select provisions of law, it may not assign that authority to the President. Before the question of a delegation’s excessiveness ever arises, then, a court must be convinced that Congress did not attempt to alienate one of its basic functions. ("Byrd v. Raines" 1997, 36)

And in conclusion, Judge Jackson again returned to *Chadha* for guidance, stating, “Cancellation under the Act is simply not the same thing as impoundment, or any other suspension of a statutory provision. Instead, cancellation is equivalent to repeal – and ‘repeal of statutes, no less than enactment, must conform with Art. I.’” ("Byrd v. Raines" 1997, 36).

The case was then appealed to the Supreme Court in *Raines v. Byrd* (521 U.S. 811, 1997), with Appellees Robert C. Byrd arguing to uphold the District Court ruling and Appellants Franklin D. Raines, the Director of the Office of Management and Budget, arguing for the Supreme Court to overturn the lower Court decision. The Appellants argued in their brief that

[T]he Act does not authorize the President to sign into law some provisions of an appropriations bill while ‘returning’ other provisions to Congress. The President remains subject to the constitutional obligation to approve or disapprove, in its entirety, an appropriations bill presented to him by Congress. His cancellation authority under the Act comes into existence only after an appropriations bill has been passed by both Houses of Congress and approved, *in toto*, by the President. ("Brief for Franklin D. Raines" 1997, 16)

The Appellants also brought in historical examples to support the constitutionality of the Act, arguing, “The First Congress, for example, chose to fund the general operations of the federal government through lump-sum appropriations acts that did not require that the full amount of the appropriation be spent” ("Brief for Franklin D. Raines” 1997, 16-17).
To get around the problems posed by the Chadha ruling, the Appellants argued the line-item veto would not conflict with this ruling as it deals with the procedural practice of passing legislation. Under the Act, legislation would still be passed through the constitutionally prescribed process. This Act gets at the implementation of legislation that has already passed through the legislative process, thus “the Act must be scrutinized under the standards governing statutory grants of discretion to the Executive Branch in its administration of duly enacted laws” ("Brief for Franklin D. Raines" 1997, 37). Further, the legislation made a clarification between different types of spending, with appropriations being labeled “discretionary” and “mandatory.” With this, Congress and the president, when enacting legislation, are agreeing to which portions can be cut after the fact by a line-item veto ("Brief for Franklin D. Raines" 1997, 37).

In contrast, Sen. Byrd and the Appellees continued the arguments they made during congressional debates, committee hearings, and in the District Court proceedings. As the Appellees’ brief stated:

The Act is an unconstitutional attempt to do indirectly what the text of Article I forbids. The Act’s purpose, indicated by its title and repeatedly stated throughout its legislative history, is to give the President the line item veto power that the Constitution denies him, and that is exactly its effect. It authorizes the President to cancel items the instant after signing a bill, conceivably in the same breath (and in no event more than five days later). There is no practical difference between giving the President power to strike items at the same time he signs a bill and giving him power to strike them immediately afterwards. ("Brief for Robert C. Byrd" 1997, 19)

Despite this strong argument, the Court ruled in favor of the Appellants, finding that Byrd and his fellow members ultimately lacked standing to bring the case.

The majority opinion, drafted by Justice Rehnquist for the seven to two Court, steered clear of referencing Bowscher on the standing issue, claiming that the members in this current instance lacked a sufficient “personal stake” ("Raines v. Byrd" 1997, 830). While this was the
end of Byrd’s attempt at striking down the Act, the City of New York and Snake River Potato Growers, Inc. each filed a legal challenge against President Clinton’s use of line item veto.

A month after the Court rejected Byrd’s challenge, President Clinton, during a press conference, discussed the issue and announced he would be using the authority for the first time, “Last month the United States Supreme Court, on procedural grounds, rejected challenges to this authority. Today, for the first time in the history of our country, the President will use the line item veto to protect taxpayers and to ensure that national interests prevail over narrow interest” (Clinton 1997, 1225). During this same press conference, Clinton was asked where line-item veto authority is located in the Constitution, to which he responded:

Well, the power is given by legislation. The real question is, does the Constitution permit or forbid the Congress to give the President this kind of power. I believe that since—if you look at the fact that 43 States have this power for the Governor, and it has been upheld in State after State after State, the provisions of most State constitutions are similar to the provisions of the Federal Constitution in the general allocation of executive authority and legislative authority. (Clinton 1997, 1227)

Despite confidence in its constitutionality, the Act was soon challenged again.

*Clinton v. New York*

While Byrd’s challenge failed, President “Clinton, to the surprise of some, did not hesitate to exercise his cancellation power” (quoted in Craig 2004, 350). In *Clinton v. New York* (1998), both the city of New York and the Snake River Potato Growers challenged President Clinton’s use of the line-item veto less than two months after the Court rejected Byrd’s attempt to have the Court invalidate the Act. The Appellants’ Brief (Clinton) argued:

The Line Item Veto Act is constitutional. Its title notwithstanding, the Act does not authorize the President to sign into law some provisions of a tax or spending bill while “returning” other provisions to Congress. The President remains subject to the constitutional obligation to sign or return, in its entirety, a bill presented to him by
Congress. His cancellation authority under the Act comes into existence only after a tax or spending bill has been passed by both Houses of Congress and approved, in toto, by the President. ("Brief for William J. Clinton" 1998, 15-16)

Additionally, the Appellants addressed the Chadha decision in a footnote, stating:

The district court’s reliance . . . on INS v. Chadha . . ., is misplaced. The petitioner for review (plaintiff) in Chadha was himself the direct object of the contested government action (a deportation order); he had already exhausted available administrative procedures to prevent entry of that order; and the order was therefore final and subjected him to immediate injury through removal from the country. Here, by contrast, the appellees are not the object of the cancelled spending provision, and the entity that is – the State of New York – is actively pursuing an administrative process that may afford it (and appellees) complete relief, and that thus far has insulated it (and the appellees) from any financial injury.” ("Brief for William J. Clinton" 1998, 22)

Thus, the Appellants continued the same line of reasoning as the majority in Congress, arguing this legislation was different from legislative veto, and the groups bringing suit did not have the same personal stake found in Chadha.

However, the Appellees did not see it this way. In the Brief for the City of New York, the Appellees asserted:

The Act thus confers upon the President a discretionary power to repeal federal law. It is therefore unconstitutional, for the repeal of a federal law, no less than its enactment, must comply with Article I’s “single, finely wrought and exhaustively considered procedure,” specifically, bicameral passage and presentment to the President. INS v. Chadha . . . The President’s cancellation of section 4722(c) of the Balanced Budget Act is accordingly void. ("Brief for Appellees City of New York, et al." 1998, 8-9)

Further, citing Bowsher, the brief argued, “[W]hen Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I” (quoted in "Brief for Appellees City of New York, et al." 1998, 33). This same sentiment was continued throughout the brief, consistently pointing out how the decision in Chadha was clear, the passage and repeal of a law must follow Article I, and there is no way to legislation around this short of passing a constitutional amendment. The Snake River brief consisted of the same arguments, arguing that
line-item veto “treats the steps prescribed by Article I as ‘empty formalities,’ contrary to Chadha” ("Brief for Appellees Snake River Potato Growers, Inc. and Mike Cranney" 1998, 35).

Continuing with connections to Chadha, the Appellees argued that if the Act was treated as a delegation of power to the executive branch, it would still fail under the previous precedent, specifically that of intelligible principles. As the Court detailed in Chadha, when Congress delegates authority, it must set out specific guidelines, which this Act still fails to accomplish. As the brief states, “By contrast, the Members of Congress (and the President himself when he is acting in his limited Article I role) are not subject to any constraint other than the Constitution and their own best judgments of the nation's interests” ("Brief for Appellees Snake River Potato Growers, Inc. and Mike Cranney" 1998, 45).

Additionally, there were a number of important amicus curiae briefs filed in the case. In support of President Clinton, briefs were filed by: Rep. Dan Burton (R, IN), Gerald Solomon (R, NY), and Rep. Porter Goss (R, FL); the U.S. Senate. In support of the Appellees, amicus briefs were filed by the Bar of the City of New York; Marci Hamilton and David Schoenbrod (law professors); Sen. Byrd, Sen. Moynihan, and Sen. Levin; Rep. Waxman, Rep. Skaggs, and Rep. Louise M. Slaughter (D, NY).

All of the briefs filed in support of the Line-Item Veto Act follow similar logic, arguing that the Line-Item Veto Act was different than anything Congress had attempted in the past and should be upheld under a constitutional challenge. Representatives Burton, Solomon and Goss did not make any reference to the Chadha decision or how this legislation is different from what the Court asserted in that case, but they argued that upholding the lower court decision “freezes into the constitutional firmament the allocation of these concurrent powers found in the Impoundment Control Act of 1974, which was enacted at a time when the relations between the
executive and legislative branches were particularly strained” ("Brief for Congressmen Dan Burton, Gerald Solomon, and Porter Goss as Amicus Curiae" 1998, 7).

Likewise, the Senate Amicus brief argued that appropriations are never a mandate to the president that he must spend all of the funds. Thus, this legislation allows the president to notify when those funds will not be spent ("Brief of the United States Senate as Amicus Curiae" 1998, 1-2). Further, the Senate brief explained how the Chadha decision was now bearing on line-item veto, arguing that “[t]he cancellation authority exercised in these cases does not give the President lawmaking power contrary to Article I, for his sole authority under the Line Item Veto Act remains to execute the laws in fulfillment of Congress’s deficit-reduction policy” ("Brief of the United States Senate as Amicus Curiae" 1998, 2). In direct reference to Chadha, the Senate argued that the cancelation is not a repeal of an act as detailed in Article I but is part of the implementation authority afforded to the president.

However, those amicus briefs against the Line-Item Veto Act viewed things differently, especially regarding the Chadha decision. The Bar Association of New York City argued that the legislation was not only unconstitutional in itself, but also an attempt to reach an unconstitutional end ("Brief for the Association of the Bar of New York as Amici Curiae" 1998, 1). In reference to Chadha, the Brief argued, “The legislative steps outlined in Article I are not empty formalities: they are commands which simultaneously require and limit the participation of both houses of Congress and the President in lawmaking. As such, they may be altered only by the constitutional amendment” ("Brief for the Association of the Bar of New York as Amici Curiae" 1998, 4). And in a final attempt to connect line-item veto to the unconstitutional legislative veto, the brief asserted, “The power to repeal or amend existing law is indisputably a legislative power, which the Constitution vests solely in the Congress. . . The Line Item Veto Act is an
unprecedented attempt by Congress to alienate that basic legislative function” ("Brief for the Association of the Bar of New York as Amici Curiae" 1998, 10).

In a second amicus brief in support of the Court invalidating the Act, Marci Hamilton and David Schoenbrod, law professors who specialized in constitutional and policy prepositives on legislative delegations, argued in reference to Chadha that “there is no question that the Constitution assigns Congress, not the President, the power to enact, and therefore, repeal tax and spending laws. . . Thus, the Act necessarily implicates the nondelegation doctrine” ("Brief Amicus Curiae of Marci Hamilton and David Schoenbrod" 1998, 4). Additionally, in an argument that was reminiscent of Rep. Synar in Bowsher, the brief argued against Congress handing over one of its most important duties – that of making difficult policy choices, “If the Court fails to invalidate those laws in which Congress abdicates its central constitutional role, this Court will have deprived the people, the State, and the Congress of the guidance necessary to bring legislative process within the constitutional fold” ("Brief Amicus Curiae of Marci Hamilton and David Schoenbrod" 1998, 24).

The amicus from Representatives Waxman, Skaggs, and Slaughter discussed the legislative nature of the line-item veto in some detail:

As this Court observed in Chadha, a governmental action is assessed for separation of powers purposes ‘by the character of the … action it supplants.’ . . . Thus, because a cancellation supplants a part of a law, and in turn can only be supplanted by a new legislative act of Congress, passed under Article I, the cancellation power is legislative, in contrast to the vast array of administrative decisions that can be replaced by other administrative decisions made by officials of the executive branch under Article II. ("Brief for Representatives Henry A. Waxman, David E. Skaggs, and Louise M. Slaughter as Amici Curiae" 1998, 26)

The brief filed by Senators Byrd, Poynihan and Levin routinely referenced from Chadha the assertion that the Framers of the Constitution were clear about “a single, finely wrought and
exhaustively considered, procedure” for the passage of legislation (see "Brief of Senators Robert C. Byrd, Daniel Patrick Moynihan, and Carl Levin as Amici Curiae" 1998). Additionally, in citing Chadha, the brief argued, “[A]s this Court has made plain, ‘Amendment and repeal of statutes, no less than enactment, must conform with Art. I’” ("Brief of Senators Robert C. Byrd, Daniel Patrick Moynihan, and Carl Levin as Amici Curiae" 1998, 28).

In the Supreme Court’s decision, Justice Stevens, writing for the six to three Court, agreed with the arguments made by the Appellees. In the majority opinion, Justice Stevens argued there were important differences between vetoing legislation before it is signed into law and cancelling portions of a bill after it has been signed into law by the President. Thus, since the Act allowed the executive to cancel portions of a bill after signed into law, it ran counter to Article I, Sect. 7 of the Constitution. Referencing Chadha, Justice Stevens stated, “Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only ‘be exercised in accord with a single, finely wrought and exhaustively considered, procedure’” ("Clinton v. New York" 1998, 439-440).

As the Court explained, the Act was limited in power by only allowing the “President the power to ‘cancel in whole’ three types of provisions that have been signed into law: ‘(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit’” ("Clinton v. New York" 1998, 436). Additionally, there were precise directions about how the veto would be used, while the cuts had to reduce the federal deficit and not impact the function of government (see "Clinton v. New York" 1998, 436). However, in reference to Chadha, “There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes. Both Article I and Article II assign responsibilities to the
President that directly relate to the lawmaking process, but neither addresses the issue presented by these cases’" ("Clinton v. New York" 1998, 438).

In conclusion, Justice Stevens asserted, “If there is to be a new procedure in which the President will play a different role in determining the final text of what may ‘become a law,’ such a change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution” ("Clinton v. New York" 1998, 449). This case clearly continued the argument the Court had previously detailed to a great degree in Chadha and Bowsher: the legislative can only be altered through the amendment process, not through legislation.

In a concurring opinion, Justice Kennedy reinforced Justice Stevens and echoed the arguments made by the Chadha Court, stating:

A Nation cannot plunder its own treasury without putting its Constitution and its survival in peril. The statue before us, then, is of first importance, for it seems undeniable the Act will tend to restrain persistent excessive spending. Nevertheless, for the reasons given by Justice Stevens in the opinion for the Court, the statute must be found invalid. Failure of political will does not justify unconstitutional remedies. ("Clinton v. New York" 1998, 449)

Not only do these arguments mirror and rely heavily on the Chadha decision, they are also similar to the claims made by members of Congress who were vocal against the passage of the Act.

In dissent, Justice Breyer, with O’Connor and Scalia joining, argued that the Act was not in violation of any specific clause of the Constitution or separation of powers. As Breyer asserted, the authority of the line-item veto could have been afforded to the president as each appropriation could have been given to the president in a separate bill. However, as the country has grown and appropriations have increased, it is impossible for each appropriation to be
separate. Second, this case rests on the definition of legislation, which is not clearly defined in the constitution when it defines legislative authority. As Breyer concludes:

In sum, I recognize that the Act before us is novel. In a sense, it skirts a constitutional edge. But that edge has to be do with means, not ends. The means chosen do not amount literally to the enactment, repeal, or amendment of a law. Nor, for that matter, do they amount literally to the “line item veto” that the Act’s title announces. . . The Constitution, in my view, authorizes Congress and the President to try novel methods in this way. ("Clinton v. New York" 1998, 496-497)

Thus, Breyer took a similar stance to Justice White in Buckley and the dissenting justices in Chadha and Bowsher. The Constitution should be viewed in current terms and in light of the problems facing the nation; these attempts to fix the deficit should be allowed to move forward.

After the decision was announced and the Line-Item Veto Act was invalidated, Sen. Byrd released a statement expressing his pleasure with the Court’s action. In his statement, Byrd asserted, “Now that the Supreme Court has found the Line Item Veto Act to be unconstitutional, it is my fervent hope that the Senate will come to a new understanding and appreciation of our Constitution and the power of the purse as envisioned by the Framers” (Byrd 1998).

Discussion

The Line-Item Veto Act and Clinton v. New York again illustrate the role the Chadha decision played in the legislative debate and the Court proceedings. Members of Congress, primarily lead by Sen. Byrd, fought against the legislation in constitutional terms and pushed the debate to the courts. Members of Congress who were against the Line-Item Veto Act continually referenced previous Court cases and threatened suits to gain concessions on the legislation in the hopes that the bill would be abandoned. Literature on judicialization details how political elites work to place issues on the Court’s agenda to further or reinforce their policy making goals. But
in this instance, there were political elites who were in the minority who sought to place issues on the Court’s agenda to protect their institution, urging the Court to uphold the status quo.

I also illustrate the role constitutional deliberation plays in Congress and how political elites use case law to impact policy making and work to place issues on the Court’s agenda. From the constitutional deliberation in this instance, the decisions in Chadha and Bowsher played a vital role in framing the discussion in Congress, before the Court, and in the opinion of the Court. In Congress, Senator Byrd led the charge against the legislation, consistently referencing Chadha. Others like Senators Cohen, Sen. Levin, and Rep. Skaggs also weighed in, arguing that the Act was unconstitutional in light of the recent Court decision.

Additionally, Clinton ended a twenty-year judicial battle over congressional attempts to delegate budgetary authority away from Congress. In Chadha, the Court invalidated the ability of a minority of Congress from doing what constitutionally prescribed to the entire body. In Bowsher, the Court invalidated the role of a government agency from having authority over Congress and the executive branch in the budget process. Last, in Clinton, the Court invalidated the ability of the executive branch from cancelling out budgetary provisions without the say of Congress.

However, attempts to stop improper delegations were not as productive as the salience and importance of the Court decisions would have you think. As I have discussed in previous chapters, since Chadha Congress has continued to engage in legislative veto style authority and since Bowsher Congress found ways to continue to delegate the deficit cutting mechanisms. But when it comes to Clinton, the line-item veto remains unused after the decision, despite recent claims by the Trump administration that it would like to revive it.
The most important aspect of the analysis of the Line-Item Veto Act and its invalidation in *Clinton v. New York* is continued adherence to the precedent set in *Chadha* and the continuation of the path that was reinforced in *Bowsher*. However, this decision is potentially a break from the path that the original drafter of the *Chadha* decision had in mind. As I have previously argued, there is evidence that some on the Court were attempting to expand executive authority in *Chadha* and *Bowsher*; however, the opposite happened in *Clinton* with the Court invalidating an act of Congress that would have greatly expanded the authority of the President.

The issue with the existing scholarship is the focus on the political majority working to enact the legislation in both steps of the process: getting new issues onto the Court’s agenda and the decision making of the Court. Just as a minority in Congress and the executive branch worked to have the Court invalidate legislation to protect the executive branch and members of Congress have worked to get GRH invalidated to protect congressional authority, with line-item veto a minority within Congress were vocal in its opposition to protect the important budgetary authority of Congress. Thus, political elites do not always work to place issues on the Court’s agenda to further or reinforce policy goals, but do so to protect their institutional authority.
CHAPTER 5
CRITICAL JUNCTURES, PATH DEPENDENCE AND THE CHADHA REGIME

Independently each of the three previous chapters has illustrated how political elites move issues to the judiciary because of constitutional conflict and how political elites engage in constitutional deliberation to effect policy outcomes and the behavior of the Court in structural-separation of powers cases. In this concluding chapter I tie all of the previous case studies together to discuss how Chadha (1) was a critical juncture that established a jurisprudential regime and (2) created path dependent dynamics that were perpetuated by members of Congress engaging in judicialization. Additionally, I discuss what the analysis illustrates: how new issues are moved onto the Court’s agenda and the effects these decisions have on the Court and the elected branches of government. To conclude, I discuss the shortcomings found in current decision-making theories as they relate to separation of powers cases and the need to adopt a theory that relates specifically to separation of powers issues.

Critical Juncture, Path Dependence and Judicialization

This study illustrates how Chadha was a critical juncture that created path dependent dynamics in the Bowscher and Clinton decisions, which were perpetuated through political elites’ use of judicialization. More specifically, the path dependent dynamics came in the form of members of Congress from the political minority (opponents of the legislation) using the Chadha decision to argue against the passage of legislation. The conditions that led to the Chadha
decision are important for understanding how the issue was accepted onto the Court’s agenda, specifically the critical antecedent, permissive conditions, and productive conditions. This is important to understand for a number of reasons. First, structural issues, like separation of powers, were absent from the Court’s agenda between the 1940s and 1980s. During this absence, separation of powers issues were resolved by the elected branches of government. It was this lack of true conflict among the branches of government over separation of powers issues that marks the critical antecedent. The permissive conditions that led to the Court placing the issue back onto its agenda after a long absence were the increased use of the legislative veto coupled with Justice White’s concurrence and dissent in Buckley and the debate that was taking place over the constitutionality of legislative veto in the elected branches of government. Congress was, to put it simply, its own worst enemy when considering this issue from a policy standpoint. As the 1970s progressed, members of Congress increasingly inserted legislative veto provisions into legislation. It was not just the number of provisions, but it was also the types of legislation with which the veto was now associated.

As first introduced in Congress in the 1930s as a compromise between the legislative and executive branches, legislative vetoes were to give Congress a check over the executive branch’s authority to reorganize agencies. As the 1970s progressed, legislative veto language was making its way into any type of legislation that allowed for agency rulemaking. Toward the late 1970s, legislation was introduced on multiple occasions to give members of Congress legislative veto authority over all agency rulemaking without having to place it into each piece of legislation. This behavior increased after Justice White declared his acceptance for the authority as a check on the growing bureaucracy. Coupled with the increased use of legislative veto and Justice White’s opinion, the judiciary, in the late 1970s, was addressing the legislative veto for the first
time. Figure 15 displays the *Chadha* critical juncture and the subsequent cases that furthered the path dependent dynamics established in the *Chadha* ruling.

![Diagram showing the critical juncture and path dependence]

**Figure 15:** *Chadha* critical juncture and path dependence.

The decision in *Chadha* did little to alter congressional behavior as the decision was aimed to do, but it did create a judicial precedent and threat that the Court might strike legislation down which in turn gave opponents ammunition to argue against the legislation. The threat from the Court also gave the constitutional issue more traction in congressional debate. There were numerous cases in which the lower federal courts confronted issues related to the legislative veto. In all instances, the courts took a narrow path in their decision making, issuing rulings that only applied to the law and situation before them, noting the decision would not impact the overall constitutionality of the legislative veto. Although at this early stage, the Supreme Court was still refusing to take up the issue and in cases in which they had the opportunity were
ignoring the issue, there was still that willingness by judges at the lower level to decide on the veto, even if it was on narrow grounds.

Permissive conditions also came from the fact there was debate taking place over the constitutionality of legislative veto in all three branches of government. The stance coming out of the executive branch had been, for decades, that the legislative veto was unconstitutional, but presidents (e.g., Carter and Reagan) leading up to its invalidation were taking a stronger stance than they had during previous administrations. Additionally, as was illustrated through congressional record and committee hearing transcripts, there were members who expressed their concern over the constitutionality of legislative veto. However, as Alan Morrisson argues, no one in Congress cared about the constitutionality of the legislative veto, they continued to use it because they liked it (Morrisson Interview). But for the first time, there was debate among all three branches of government as to the constitutionality of the congressional authority.

These events set the stage for the legislative veto being moved onto the Court’s agenda and its invalidation, which marks the productive condition. The entire critical juncture process and the subsequent path dependency are displayed in Figure 15. While the Court ruling did little to stop Congress from acting, the decision had a long-standing impact on congressional behavior through the empowerment of political minorities who were attempting to protect their institution from further delegation of key constitutional powers. In Bowsher, a small number of political elites used the Chadha decision to engage in judicialization and argue that Congress was violating the legislative process in passing GRH. Although when challenged before the Court, the justices invalidated GRH because it violated the Appointment Clause, the Court still relied heavily on the Chadha decision in its legal reasoning. Later this behavior was reinforced in the
Clinton decision, where once again, a political minority invoked the Chadha ruling to argue against the passage of the line item veto.

As Morrison asserted, Bowsher and Clinton would not have happened without the Chadha ruling, although he admits “it would be impossible to say for sure” (Morrison 2018). And although the ruling in Chadha had very little impact on Congress’ ability to use legislative veto style provisions, it had a significant impact on Congress, specifically for the political minority. The analysis illustrates that in Bowsher (Chapter 3) and Clinton (Chapter 4) minority members of Congress relied heavily on the Chadha precedent to make their arguments against GRH and the Line-Item Veto Act.

This is important because judicialization research and, to some extent, path dependency literature focus on the majority party’s attempts to place issues onto the judiciary’s agenda to further validate their policy goals. In Bowsher and Clinton, although the minority coalition was actively attempting to get the Court to accept the issue onto their agenda, the majority coalition was willing to allow the minority to take these steps as they believed the policies would stand up to the Court’s scrutiny. As Silverstein (2009) illustrates, this was an instance of the Court saying no. This is important, but there is more to it that must be considered. It was also the Court saying yes to a minority who was attempting to protect the institution from further delegation. While this may have been for political and/or partisan goals, those who were working to invalidate the legislation framed their reasoning in constitutional terms and judicial precedent.

Figure 16 and Figure 17 display the percentage of words spent debating Chadha and the larger constitutional issue for GRH and the Line Item Veto. These data were collected through committee hearing transcripts (found on Hein Online) that were conducted in relation to GRH and the Line Item Veto Act. The conversations were coded if members directly discussed the Chadha ruling or discussed broader constitutional issues related to the legislation in questions.

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34 Data for Figure 16 and Figure 17 were collected through committee hearing transcripts (found on Hein Online) that were conducted in relation to GRH and the Line Item Veto Act. The conversations were coded if members directly discussed the Chadha ruling or discussed broader constitutional issues related to the legislation in questions.
analysis of the committee hearings conducted over GRH and the Line Item Veto Act. As displayed in Figure 16, there was very little discussion that was directly related to the Chadha ruling and more with GRH even though the Court did not fully follow the Chadha ruling in its judicial reasoning.

Figure 16: Percentage (of total words) of Chadha deliberation.

Figure 17: Percentage (of total words) of constitutional deliberation.
However, as displayed in Figure 17, there was a larger percentage of time spent debating the overall constitutionality of the legislation in both instances. While it looks as if Chadha was not specifically being discussed, the constitutional debate was framed by the Chadha ruling. The constitutional debate, while not directly citing Chadha, was based on the idea that the legislation in question was, or was not, a direct violation of the legislation process found in the Constitution. Thus, the debate was framed in legal terms as is expected from instances of juridification.

Further, the figures and analysis largely support Pickerill’s (2004) argument that precedent that creates a threat to the constitutionality of legislation makes it more likely that serious constitutional deliberation will occur in Congress and that precedent is likely to shape the content of debate. Similar behavior was found in relation to separation of powers issues, specifically the legislative veto. There are further connections to Pickerill’s findings in relation to federalism. When it came to federalism issues the Court showed deference to Congress and posed little threat to members ability to legislation. This led Congress to assume it had power and legislate with little debate. The increase in the passage of legislative vetoes illustrates the same point. As the Court continued to defer to Congress on the issue, members of Congress increased the passage of veto provisions with little debate on the issue.

The case studies of Chadha, Bowsher, and Clinton also further illustrate occurrences of judicial supremacy on particular issue areas. As Whittington asserts, “the American judiciary has been able to win the authority to independently interpret the Constitution because recognizing such an authority has been beneficial to others” (Whittington 2007, 27). Presidents have two goals: “to advance [their] agenda and to maintain [their] political coalition” (Whittington 2007, 18). But the conflict created by separation of powers when it comes to the legislative veto, GRH,
and the Line Item Veto Act put the president into a particularly difficult situation regarding maintaining their coalition, as all three achieved bipartisan support in Congress.

When political actors are attempting to bring an issue under their control rather than have the Courts settle the issue, framing is important. As seen with abortion, Reagan and conservative politicians framed the issue as a political one rather than a legal one for the Courts to decide (see Whittington 2007, 67). But when it comes to the separation of powers issues discussed in the previous chapters, the issues were not framed politically. All parties involved – including members of Congress, the president, and members of the executive branch – framed the issues as legal ones that should be decided by the judiciary.

Thus, the type of conflict and the framing of the issue directly relate to why the Court achieved supremacy over separation of powers issues. First, the conflict was not over the policy goals, but the constitutionality of the legislation and was framed as a legal problem rather than a political one. Second, because of the nature of the conflict and the policy goals of the legislation in question, there was broad bipartisan support for the legislation and in public discourse even the president spoke out in favor the legislation. However, there were political elites who pushed the constitutional issue and asked for a judicial ruling to settle the matter once and for all. Those who were in favor welcomed the judiciaries’ role in the determining the outcome as they believed the judicial ruling would come out on their side.

Chadha Jurisprudential Regimes

Although the decisions in the three cases cannot be explained through the attitudinal model, there are factors that relate to and point to political regimes, jurisprudential regimes, and independent policy making. However, in the end, these theories fail to adequately explain
judicial decision making in these separation of powers cases. And while these decision-making theories fail to explain the Chadha ruling, the decision in Bowsher and Clinton can be explained through jurisprudential regime theory. For political regimes, if we consider President Reagan a reconstructive president, as discussed by Skowronek (2011), it takes time for regime forces to take hold because of the appointment process to the judiciary (see Dahl 1957). However, when considering President Nixon as a preemptive president and given the fact that he was able to appoint four justices during his tenure in office, Nixon aided in establishing the Republican regime set up by Reagan. During his presidency, Nixon appointed Warren Burger (1969), Harry Blackmun (1970), Lewis Powell (1972), and William Rehnquist (1972). Thus, if these cases were about executive authority, we would then expect these Republican appointed justices to strike down these creative policy attempts by Congress in Chadha and Bowsher and then uphold the line-item veto in Clinton. However, if the conservative justices in Clinton voted to strike down the Line-Item Veto Act because the authority was given to President Clinton, this behavior would support the attitudinal or partisan models of judicial decision making.

Additionally, in Chadha, Rehnquist ruled against the majority and voted to uphold the legislative veto, a decision that goes against the expansion and protection of executive authority. Then in Bowsher, Justice Blackmun ruled against striking down GRH. Many years later, in Clinton, Rehnquist then ruled to strike down line-item veto, once again voting against the expansion of executive power. Thus, there are inconsistencies in the behavior of the conservative justices on the Court that run counter to what would be expected from regime politics.

As for independent policy making, while there are strong arguments these cases are instances of independent policy making and they do fit into many of the theories that suggest when independent policy making by the Court will take place, there is still one large problem –
can a judicial decision be an act of independent policy making by the judiciary when political elites were actively working to place the issue onto the Court’s agenda? As previously discussed, Gillman (2008) suggests there are four situations in which the Court may be able to engage in greater independent policy making from the dominate political regime: 1) less salient issues, 2) lack of a concise voice to push the agenda, 3) functions of American political development that allow for the judiciary to engage in greater independence, and 4) a sense of institutional duty that is different from other political actors. These cases have aspects of all four of these conditions, especially the first two, with the separation of powers issue being less salient to the general public because it does not impact citizens’ daily lives. Additionally, it is evident there was a lack of a concise voice as was illustrated with many different proposals being discussed up until the final votes for GRH and the line item veto.

Furthermore, analysis suggests there was a sense of duty among the justices on the Court when deciding these cases that is different from other political actors. While it is admittedly difficult to truly understand if this is happening (because it is difficult to measure someone’s sense of duty from Court memos and judicial opinions), the justices appear to have been very concerned about the balance of power between the two branches of government and took great care to not upset the delicate balance crafted by the Framers in the Constitution.

While there is strong evidence that illustrates how these three cases were instances of independent policy making by the Court, political elites were actively attempting to place the issue on the Court’s agenda and were willing to give the judiciary the final say. Despite conditions that point to the Court acting in an independent way, it cannot be true independence if this was the desired outcome for a small group of political elites. Additionally, even those in
favor of the legislation were willing to let the Court decide the issue as they believed the constitutional arguments were on their side.

Last is jurisprudential regimes, and while it fails to explain the outcome in Chadha, the subsequent decisions in Bowsher and Clinton can be explained through this theory. Tables 3, 4 and 5 display the justices’ votes in the Chadha, Bowsher, and Clinton decisions, respectively, along with their appointing president (party affiliation), and the justices’ individual Martin-Quinn ideological scores.\textsuperscript{35} With the establishment of the Chadha regime, all but one justice in the majority was appointed by a Republican president, but as the Martin-Quinn scores indicate, this was an ideologically mixed coalition with four justices leaning liberal. The dissenting coalition is mixed by partisanship, with Justice White being appointed by President Kennedy and Rehnquist being appointed by Nixon. However, Justice White leaned conservative at this point in his tenure on the Court.

What is of note are the changes in the behavior of justices. First, Justice Blackmun moved from the majority in Chadha to the minority in Bowsher. In his dissenting opinion, Blackmun argued that the parties lacked standing to bring their suit and that such an important piece of legislation should not be invalidated because of the appointment process of one individual (the Comptroller General). While he argued that the Chadha holding was still the correct decision in that instance, the problems being addressed in Bowsher were not connected and, thus, Chadha should not be a controlling principal in this instance. Blackmun’s position was close to that of Justice White in his Chadha and Bowsher dissents.

\textsuperscript{35} Martin-Quinn Scores are ideological measurements that allow for ideological change in the justices’ positions over time. The scale runs from 6 to -6, with 6 representing the most conservative a justice can be and -6 representing the most liberal a justice can be. Thus, positive represents conservative and negative represents liberal. The closer a justice is to the zero represents the closer that justice is to a moderate position (for further information see: Martin et al. 2005a, 2005b; Martin and Quinn 2002).
### Table 2

**Justices Votes in INS v Chadha (1983)**

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<th>Appointing President (Party)</th>
<th>Martin-Quinn Score</th>
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<td>Burger</td>
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### Table 3

**Justices Votes in Bowsher v. Synar (1986)**

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Of these three cases, only three justices remained on the Court for all three decisions: O’Connor, Rehnquist, and Stevens. Justice Stevens is the only one who remained consistent throughout all three cases. Additionally, in *Bowsher*, Stevens drafted a concurrence, arguing that the Court should rest its decision on the principles established in *Chadha* rather than the Appointment Clause. Justice Rehnquist, dissented in *Chadha*, not because he did not agree that the legislative veto was unconstitutional but because he did not believe the legislative veto clause was severable from the rest of the legislation. In his dissent, Rehnquist argued that the decision by the Court to sever the provision was essentially the Court passing legislation without the approval of Congress or the president.

But in *Bowsher*, Rehnquist joined the majority opinion that, while it issued the ruling on Appointment Clause grounds, still heavily relied on the judicial reasoning established in *Chadha*. And in *Clinton*, Rehnquist once again joined the majority opinion that furthered the ruling in *Chadha*. Justice O’Connor also moved, but in the opposite direction. O’Connor joined the majority opinion in *Chadha* and *Bowsher*, but she joined Justice Breyer and Scalia in dissent in
Clinton. Breyer and Scalia both dissented because under their understanding of the Line-Item Veto Act, the president was not actually vetoing legislation as the name implied; it was essentially an enhanced rescission. Because the president was simply acting on authority Congress had already legally afforded to the office, the dissenting justices did not believe the Chadha decision was binding precedent in Clinton.

Jurisprudential regimes are not strict guidelines that must be followed at all costs for the regime to remain, and that is illustrated in the Chadha, Bowsher, and Clinton case studies. Although the Court failed to rule in line with the Chadha decision in Bowsher, the justices in the majority heavily relied on Justice Burger’s majority opinion from the Chadha decision in the legal reasoning in Bowsher. Additionally, the one concurring opinion in Bowsher would have decided the case in line with the Chadha ruling. Thus, the legal reasoning of the judges and political elites outside of the Court based their arguments and legal reasoning on the ruling the Court issued in the Chadha decision.

Implications

The central questions at the start of this research was how new issues are moved onto the Court’s agenda after prolonged absence and what effects those decisions have had on the Court and other political actors. I have illustrated new issues are moved onto the Court’s agenda because of several factors working in unison to make the issue more salient for the Court. The most important factor for the legislative veto was conflict and growing salience within the government and the legal community. First, there was conflict between Congress and the executive branch over the constitutionality of legislative veto. As members of Congress increasingly attached legislative veto language to legislation, the executive branch became more
forceful in its opposition to the congressional authority. There was also increased conflict on the judiciary as lower federal courts were issuing narrow decisions in relation to the legislative veto that if taken in the broad sense would have conflicted. Additionally, as conflict increased, so did salience within the legal community, as more legal scholars were addressing and discussing the issue in law review articles.

As for the effects, as have been previously discussed, the decision in Chadha established a jurisprudential regime and gave members of Congress a judicial precedent they could use to argue against further delegations of power. This perpetuated both path dependency and judicialization to protect Congress. Members of Congress were attempting to engage in real constitutional debate in light of the Chadha ruling, and while it was not taken as seriously when it came to GRH, Republicans were very careful when drafting the Line-Item Veto Act to ensure it did not violate the Court’s past precedent. But even then, the political majority got it wrong. The Court was not willing to allow even the slightest deviation from the legislative process for a number of reasons.

With the importance that comes from the Chadha decision and the impact it had on all the branches of government and subsequent Supreme Court decisions, there is a greater need to include more accurate coding for structural issues, specifically separation of powers in the Supreme Court Database. To demote an issue area to the miscellaneous category or to have it spread out across multiple categories is a disservice to judicial behavior when the issue area has a profound impact on how the American political system operates.

The analysis also points to the unintended consequences of judicial review. Building on the idea that the early Court rulings in Chadha and Bowsher were attempts to expand and protect executive authority, the justices could not have expected that one day the precedent they had set
would prevent expansion of executive authority by striking down the line-item veto.

Additionally, members in the political majority consistently believed that what they were doing was constitutional, or at the very least did not care, and welcomed the Court’s role in deciding the constitutionality of the legislation, directly giving the Court strong authority over important policy areas.

For decision making, I have illustrated and argued that the dominant models fail to explain the behavior and outcome in the *Chadha* decision. Building on Keck’s work that argued the attitudinal and partisan models failed to explain the judicial behavior, so do political regimes theory and independent policy making. That being said, there are still aspects of these theories that are present, although muted compared to other issue areas. Because issues related to separation of powers bring about questions free of partisan and ideological factors, a decision-making theory is needed that strictly focuses on separation of powers issues.

There are also limitations in the current study that should be addressed in future research. First, legislative process and appointment clause structural issues are but two areas of separation of powers cases during this period that shaped the political system throughout the 1990s and into the 2000s. In future research I will extend this study to all separation of powers cases during this period to analyze the impact of *Chadha* and the legislative debates. Additionally, in all three instances the Court invalidated the congressional act, so it will be important to extend this study to instances in which the Court upheld the congressional action to determine under what conditions separation of powers was permissible.

Further, I will expand this research to analyze how this issue area impacted the federalist revolution that began in the 1990s. As I have discussed, there was a belief by members of the Court that structural issues and, more specifically, federalism questions were best resolved
through the political process. But the Court in the 1990s, through its decisions, began striking down federal legislation to hand power back to the states. In future research I will analyze how and to what extent the Chadha decision led to a return to structural questions that opened a pathway for federalism cases to make their way onto the Court’s agenda.
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