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# Overruling INS v. Chadha: Advice on Choreography - A Reply to Professor Sanford Levinson

Seth Barrett Tillman



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## Reply

### Overruling *INS v. Chadha*: Advice on Choreography

SETH BARRETT TILLMAN\*

I should like to thank the editors of *Pierce Law Review* for making this colloquy possible. Additionally, I should like to thank Professor Sanford Levinson for writing on short notice his perceptive and complimentary critique,<sup>1</sup> to which I reply in part below. Indeed, his kind words are not so much a critique, as an invitation for me to further elaborate on my own views.

Professor Levinson voices two different (but closely related) legal objections and one prudential objection to my proposed model statute.<sup>2</sup> I reply to each in turn.

#### I. BICAMERALISM AND *CHADHA*

As Professor Levinson explains, the core of the *Model* is to delegate (a subset of) Congress's legislative power to a single house should one house continue to function after the other house's ability to form a quorum (and organize) is wiped out by an act of God or an act of war. The model statute authorizes the delegation, and any order passed by a single house under delegated authority, like the statute itself, must be (separately) presented to the President. A single house cannot act alone.<sup>3</sup> Professor Levinson

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1. See Sanford Levinson, Comment, *Assuring Continuity of Government*, 4 *Pierce L. Rev.* 201 (2006).

2. See Seth Barrett Tillman, *Model Continuity of Congress Statute*, 4 *Pierce L. Rev.* 191 (2006) [hereinafter Tillman, *Model Statute* or *Model*]. The *Model* is a practical application of the legal and parliamentary principles expounded upon in greater detail in my 2005 publication. See generally Tillman, *infra* n. 5.

3. Cf. *INS v. Chadha*, 462 U.S. 919, 946-51 (1983) (Burger, C.J.) (holding, on different facts, that single-house action, purporting to make binding legal relations, in nonstatutory form, absent bicameral-

rightly notes: “[n]ot only bedrock constitutional structures of bicameralism, but also the *Chadha* case, seemingly defeat his proposal.”<sup>4</sup> I am very glad he distinguishes the two. Here I only address the Constitution’s bicameralism requirement. I will return to *Chadha* at the end of this paper.

In another place, I (very recently) argued at length, in conjunction with opaque (and mind-numbingly long) footnotes, that the Constitution of 1787 *expressly* provided for the waiver of bicameralism (but not presentment), that such waiver had its roots in *general* eighteenth century Anglo-American conceptions of parliamentary supremacy, and that an obscure U.S. constitutional provision *specifically* providing for such waiver was analogous to a then long-practiced and still extant (at least in the Commonwealth) parliamentary procedure: the financial initiative of the Crown.<sup>5</sup>

This is not the place to again rehearse those arguments in any detail. For the purposes of this colloquy, I must ask the reader to willingly suspend disbelief,<sup>6</sup> and to – at a more leisurely opportunity – assess the evidence, and the critique of that evidence, yourself.<sup>7</sup> Here, I will only note that a not insubstantial number of scholars from a variety of fields, including law, history, and political science, have voiced agreement with the new view, and an even larger number of scholars (and legislative officers), although not taking a position one way or another, have cited (or will cite) the new view in their publications: indicating that the new view is within the bounds of reasonable scholarly opinion.<sup>8</sup> Although the larger number

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ism and presentment, is unconstitutional). I point out that in *Chadha* bicameralism was a possibility that Congress *chose* not to make use of. Not so here – the *Model* assumes the loss of one house, and so compliance with bicameralism is not possible.

4. Levinson, *supra* n. 1, at 204.

5. See generally Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3*, 83 Tex. L. Rev. 1265 (2005).

6. See Richard D. Parker, “*Here the People Rule*”: *A Constitutional Populist Manifesto* 27, 48-9 (1994) (asking the reader to reconsider the dominant constitutional narrative through the use of unusual literary devices); see also generally Samuel Taylor Coleridge, *Biographia Literaria* (1817); J.R.R. Tolkien, *Tree and Leaf: On Fairy Stories & Leaf by Niggle*, in *The Tolkien Reader* 1-84 (1966).

7. Compare Tillman, *supra* n. 5, with Gary Lawson, Comment, *Burning Down the House (and Senate)*, 83 Tex. L. Rev. 1373, 1387 (2005) (“[The Orders, Resolutions, and Votes Clause] includes precisely the single-house action pursuant to prior bicameral legislative authorization for which [Tillman] argues. *But . . .*”) (emphasis added), with Seth Barrett Tillman, Reply, *The Domain of Constitutional Delegations Under the Orders, Resolutions, and Votes Clause*, 83 Tex. L. Rev. 1389 (2005).

8. See e.g. Harold Bruff, *Balance of Forces: Separation of Powers Law in the Administrative State* 223, 267, 478 (2006); Edwin Meese III et al., *The Heritage Guide to the Constitution* §§ Article I, Section 7, Clause 3 and Article V (2005); David Brian Robertson, *The Constitution and America’s Destiny* 219 n. 46 (Cambridge U. Press 2005); Ralph A. Rossum & G. Alan Tarr, *American Constitutional Law* vol. 1, 140 (7th ed., 2006); Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 10.8 [8] (3d ed., West 2005); Peter M. Shane & Harold H. Bruff, *Separation of Powers Law: Cases and Materials* 176 n. 1 (2d ed., Carolina Academic Press 2005); John R. Vile, *The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America’s Founding* 621, 949 (ABC-CLIO 2005); Robert F. Williams, *State Constitutional Law: Cases and*

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of these scholars are, I think, people of a traditional or right of center intellectual bent, the very fact that Professor Levinson is willing to engage in this colloquy with me is indicative that the new view also holds substantial promise for those of the moderate and/or populist left.<sup>9</sup> Admittedly, the new view does not enjoy anything approaching universal assent among (otherwise) well-informed and well-meaning scholars.<sup>10</sup>

For those who are unwilling or unable to grasp the (intellectual) nettle, the new view can be concisely summed up as follows:

Every [final] Order, Resolution, or Vote [of a single house] to which the [prior] Concurrence of the Senate and House of Representatives may be necessary [as bicameral congressional authorization for subsequent single-house action] . . . shall be presented to the President [so that his veto might act upon the subsequent sin-

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*Materials* 789 (4th ed., Matthew Bender & Co. 2006); Richard Albert, *The Constitutional Imbalance*, \_\_ N.M. L. Rev. \_\_ n. 6 (forthcoming 2007); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. Rev. 639, 650 n. 52 (2005); Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. Rev. 1, 10 n. 46 (2005); Yvette Barksdale, *Recent Articles of Interest*, 30 Admin. & Reg. Law News 25, 27 (2005); Jack Michael Beermann, *Congressional Administration*, 43 San Diego L. Rev. 61, 126 n. 306 (2006); Kirsten Matoy Carlson, *Is Hindsight 20-20? Reconsidering the Importance of Pre-Constitutional Documents*, 30 Am. Indian L. Rev. 1, 5 n. 20 (2006); Ezra Dodd Church, *Technological Conservatism: How Information Technology Prevents the Law from Changing*, 83 Tex. L. Rev. 561, 589 n. 220 (2004); Jide Nzelibe, *A Positive Theory of the War Powers Constitution*, Nw. U. Law & Economics Research Paper No. 05-03, at 20 n. 62 (2005), and 91 Iowa L. Rev. \_\_ (forthcoming 2006); Robert Sarvis, *Legislative Delegation and Two Conceptions of the Legislative Power*, 4 Pierce L. Rev. 317, 341 n. 82 (2006); see also e.g. Article I, Section 7, Clause 3 and Article V (LEXIS Supp. 2006); Article I, Section 7, Clause 3 and Article V (West Supp. 2006); cf. e.g. Email from Professor George W. Carey to Seth Barrett Tillman (Mar. 1, 2004) (on file with the *Pierce Law Review*) ("I find your analysis simply compelling."); Ltr. from Professor Forrest McDonald to Seth Barrett Tillman (Jan. 13, 2004) (on file with the *Pierce Law Review*) (finding new view "historically absolutely convincing").

The editors of a number of government publications have committed to citing the new view. See e.g. Johnny H. Killian & George A. Costello, Congressional Research Service, eds., *The Constitution of the United States of America: Analysis and Interpretation* §§ Article I, Section 7, Clause 3 and Article V (109th Cong. Pub. forthcoming 2006); John Sullivan & Charles W. Johnson, House Parliamentarians, eds., *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States One Hundred Tenth Congress* §§ Article I, Section 7, Clause 3 and Article V (U.S. GPO Pub., forthcoming 2007).

9. On the other hand, if Professor Levinson's forthcoming book is actually titled: *Our Undemocratic Constitution: Where The Constitution Goes Wrong (And How We The People Can Correct It)*, then I am perhaps mistaken in imagining that Professor Levinson's politics and scholarship are left of center. Would a leftist really commit the *People* to a mere parenthetical? See Levinson, *supra* n. 1, at n. 5.

10. See e.g. Akhil Reed Amar, *America's Constitution: A Biography* 563 n. 33 (Random House 2005) ("Outside the appointments-making context [and the treaty context], joint formal action by the president and Senate alone is simply not contemplated by the Constitution; It is of zero legal effect; cf. *Chadha*"); cf. e.g. Charles L. Black, Jr., *Correspondence: On Article I, Section 7, Clause 3 – and the Amendment of the Constitution*, 87 Yale L.J. 896, 898 (1978) (arguing that *Hollingsworth v. Virginia*, 3 U.S. 378 (1798), was wrongly decided because bicameralism and presentment are hardwired into the Constitution); Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 Yale L.J. 189, 209 (1972) (same).

gle-house action just as it acted upon the prior authorizing legislation] . . . and before the Same [subsequent single-house action] shall take Effect [in conformity with the prior authorizing legislation], 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 Limitations prescribed in the Case of a Bill [which is a different case].<sup>11</sup>

## II. PROFESSOR LEVINSON'S PRUDENTIAL OBJECTION

As Professor Levinson correctly explains the Constitution's floor for a quorum, in the event of an attack, is really quite low. Should only two members of the House survive, and should both show up to work: a majority of the House would constitute a quorum to do business, and a majority of two is two. I have often wondered if one of one is sufficient.<sup>12</sup> In any event, the *Model*, a mere statute, cannot lower that constitutional floor: it cannot countenance a meeting with as few as half the members (then living), but it can raise the bar because the statute sets the terms of the delegation.

In drafting the *Model*, I chose as a lower boundary for the House forty members, and for the Senate twenty members. Professor Levinson suggests that I have set too low a floor. He writes:

There is no good reason to believe that such a rump House would be viewed as legitimate, especially if the forty survivors were overwhelmingly from one political party or one region of the country . . . . Thus I am inclined to require a far higher number than forty in order to legitimate the House as a co-participant in governance. I would prefer that at least one hundred representatives, from a cross-section of our vast country, be available.<sup>13</sup>

I leave aside the fantastic difficulty in framing a written fixed rule controlling a presiding legislative officer's determination that a representative cross-section of the membership remains alive following a catastrophic attack. Instead, I focus only on the numbers. It comes down to this. *Set the bar even one member too high and you have nothing: all your planning*

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11. U.S. Const. art. I, § 7, cl. 3 (bracketed language added); *see also* Lawson, *supra* n. 7, at 1387 (generally agreeing that bracketed language explains the original public meaning of the ORV Clause); *but see supra* n. 10 (collecting contrary scholarly authority).

12. U.S. Const. art. I, § 5, cl. 1 (A "Majority of each [house] shall constitute a Quorum . . ."). Is one of one a majority? I hope we will never know the answer to that question.

13. Levinson, *supra* n. 1, at 205.

*is for naught.* Then you must wait thirty or sixty or as many as ninety days, as determined by varying state election law, for new members to be elected so that a quorum might then be had. *Set the bar low and members, taking then prevailing circumstances into account, will have discretion not to act.*<sup>14</sup> In all candor, I believe twenty and forty are high, too high. In 1789, twelve Senators were sufficient to transact Senate business, and thirty members were sufficient for the House to transact House business. We are not the same people now, this is not 1789: it is the twenty-first century. But although we may have changed, the principles of representative government have not, they are the same today as they were yesterday, and, as they will be tomorrow, should we live until tomorrow and should we plan for our common tomorrows.<sup>15</sup>

Professor Levinson believes that a high bar on House action is likely to cost us little because the Senate could always quickly reform per the appointment process of the Seventeenth Amendment. He goes as far as to suggest that “the Senate could be back up to its full strength of one hundred within a very few days”<sup>16</sup> His point is that there is no good reason to risk a rump or unrepresentative House, when in short order a full, or nearly full, Senate would be up and running. I wish to God he were correct, but I fear he is entirely wrong. If 9-11 has taught us anything, it must be that we must *plan* for that which cannot be *predicted*. We do not know and, indeed, we cannot know the shape or contours a future attack on our country might take. We must therefore give our political institutions all the flexibility that we dare. If the attack were on the Capitol only, or restricted to the environs of the capitol district, then Professor Levinson might be correct. But the attack might be national or even global in scope. Anthrax

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14. See e.g. *The Federalist No. 36*, 178 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (“*There are certain emergencies of nations, in which expedients, that in the ordinary state of things ought to be forborne, become essential to the public weal. And the government, from the possibility of such emergencies, ought ever to have the option of making use of them . . . . And as I know nothing to exempt this portion of the globe from the common calamities that have befallen other parts of it, I acknowledge my aversion to every project that is calculated to disarm the government of a single weapon, which in any possible contingency might be usefully employed for the general defense and security.*”) (emphasis added).

15. Or as Burke put it:

The two principles of conservation and correction operated strongly at the two critical periods of the Restoration and Revolution, when England found itself without a king. At both those periods the nation had lost the bond of union in their ancient edifice; they did not, however, dissolve the whole fabric. On the contrary, in both cases they regenerated the deficient part of the old constitution through the parts which were not impaired. They kept these old parts exactly as they were, that the part recovered might be suited to them. They acted by the ancient organized [assemblies] in the shape of their old organization . . . .

Edmund Burke, *Reflections on the Revolution in France* 29-30 (London 1790).

16. Levinson, *supra* n. 1, at 202.

perhaps. State governors might be dead or incapacitated. State governments, like the national government, might be in considerable disarray. Indeed, the lesson of Katrina might be that such emergencies overwhelm state government who will look to the national government for guidance. It is our job – as Americans, as lawyers – to see that there is some readily identifiable and constitutionally legitimate national government to give them that guidance. To *depend* on a quickly reformed Senate is to unnecessarily throw the dice.

But I grant that Professor Levinson's empirical claim might be correct: the Senate might quickly reform. And, in fact, the *Model* (as written) gives him all that he asks. Under the terms of the *Model*, neither house acting under delegated statutory authority may take unicameral action until ten days have passed following the President's proclamation to meet (or, following any date Congress or its officers schedule a concurrent meeting of both chambers).<sup>17</sup> So the *Model* already gives each of us what we ask: representativeness (at least such as can be had in our malapportioned Senate) and energy.

Perhaps I should stop here, but I think I would be doing Professor Levinson and the reader a great disservice if I left the impression that I shared Professor Levinson's wider moral intuition on this matter. I do not believe that representativeness ought to be the test of good governance in an emergency. If one house were wiped out, but the other could continue to meet, then that would be a tremendous moral and morale victory. If there were enough members to divide and vote, then we will have achieved continuity with our political forms, and we will have denied those that would murder our leadership the added bonus of (even temporarily) stymieing our political system. Should we have floor debate, transparency, and responsibility, then we would have achieved all that could be reasonably desired in such horrific circumstances. Even deliberation should not be a precondition for measuring success. In these circumstances, if we get deliberation, it is merely an added bonus. In an elective assembly, the touchstone of success is decision.

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17. See Tillman, *supra* n. 2, at 192-93, § 1 (building ten day window as a precondition for unicameral action subject to presentment). Obviously, the choice of ten days is likewise an arbitrary selection on my part. The longer you extend the initial period, the greater opportunity you give Congress to reconstitute itself: as incapacitated members recover, as new appointments are made, and as elections fill empty slots. Once reconstituted, under the *Model*, Congress will return to the constitutional default: bicameralism. But the longer the initial period, the longer you delay lawmaking and oversight: both of which may be essential in an emergency. The judgment here is purely a prudential one. Cf. e.g. *The Federalist No. 74*, *supra* n. 14, at 386 (Alexander Hamilton) ("The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal.") (emphasis added).

The primary duty of a legislative body is to act. Debate, even when most valuable, is subsidiary. We ought to have always both debate and action, but, if we must choose between them, action must have the preference, for endless debate without action would soon bring any government into contempt.<sup>18</sup>

The *Model* strives to make decision possible.

Professor Levinson notes that an effort to achieve representativeness which would defeat the *Model*'s unicameralism might leave the country with the Madisonian nightmare:<sup>19</sup> the whole of the government committed to the President or his successor during the interregnum.<sup>20</sup> The Hamiltonian nightmare may be the greater risk: absent express grants of authority from the rump legislature, the President and federal officers may be unwilling to take measures intimately necessary to our safety and survival.<sup>21</sup>

The bicameralism fetish is not demanded by the Constitution's text. If the fear of unicameralism is that the rump legislature might act without sufficient deliberation, then the solution cannot be a temporary presidential dictatorship. The proposed remedy is wholly disconnected from the underlying policy concern. If the fear is lack of representativeness, then the solution is to hold elections with alacrity, not to suspend the remaining remnants of representative government. I readily admit that such fears fully justify limiting the terms of the delegation. The Constitution limits what substantive matters might be subject to unicameral action.<sup>22</sup> Likewise, the *Model* limits the prospective legal effect of any unicameral legislation.<sup>23</sup> I

18. Senator Henry Cabot Lodge, Sr., *Parliamentary Obstruction in the United States*, in *Historical and Political Essays* 169, 179 (Cambridge 1892); see also Lynn M. Sanders, *Against Deliberation*, 25 *Political Theory* 347 (1997).

19. *The Federalist No. 47*, *supra* n. 14, at 249 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny.").

20. And of course, we might not even get the Madisonian nightmare of presidential despotism. Professor Akhil Amar has made unending efforts over many years to convince the widest number that legislative officer succession to the presidency, as required by statute in the event of a presidential and vice-presidential vacancy, is unconstitutional. See generally Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 *Stan. L. Rev.* 113 (1995); Akhil Reed Amar, *America's Constitution: A Biography*, *supra* n. 10, at 170-73, 340-41, 452-53, 556-57, 598, 625. *Why am I not surprised that James Madison is his key early source?* See Tillman, *supra* n. 5, at 1371-72 (decrying longstanding dominance of the Madisonian cult).

I intend to oppose the Amars' view in a forthcoming article. See Seth Barrett Tillman, *The President of the United States is not an "Officer of the United States" and the Affirmative Case for Legislative Officer Succession to the Presidency* (forthcoming circa 2007).

21. See *supra* nn. 14, 17.

22. See e.g. U.S. Const. art. I, § 9, cl. 7 (demanding that appropriations must be made "by law," that is exclusively by statutes, subject to bicameralism and presentment).

23. See e.g. Tillman, *Model Statute*, *supra* n. 2, at 194-195, § 1 (limiting the prospective legal effect of unicameral orders, resolutions, and votes to one hundred and twenty days from when statutory instrument takes effect). There are several other such limitations in the *Model*.



am sure other reasonable restrictions might be crafted. But while debating the other great issues of the day<sup>24</sup> and overfine points relating to congressional continuity, we do not want our epitaph to read:

*He was a patriot who loved representative democracy & prized public liberty  
— He meant well —  
He thought the good was the enemy of the best.*

The goal then is not to have a conversation, but to decide.

### III. CHADHA REDUX

As I am a legal traditionalist, to me the most damning of Professor Levinson's objections is that even if the *Model* were reasonably drafted, Congress, the President, and the public cannot be confident that any action taken under the *Model* will be upheld by the federal courts.<sup>25</sup> Indeed, it is only after the emergency has struck that the *Model* could be put to the test, tried by actual litigation contesting its constitutionality. And then it is too late to correct any defect in the *Model*, *Chadha*-related or otherwise, that the courts might discover.

I am tempted to give a formalistic answer to Professor Levinson's critique. I could point out that there is settled (and recent) supreme court jurisprudence establishing that a point not argued is a point not held.<sup>26</sup> I am tempted to argue that *Chadha*'s bicameralism rationale standing alone

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24. See William Congreve, *The Double Dealer* Act I, Scene I (1694) ("They are at the end of the gallery; retired to their tea and scandal, according to their ancient custom.").

25. See Levinson, *supra* n. 1, at n. 22 and accompanying text.

26. As Chief Justice Marshall put it:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

*Cohens v. Va.*, 19 U.S. 264, 399-400 (1821).

Even more recent supreme court jurisprudence is readily available. See also *e.g. Ashbourne Holdings Ltd. v. An Bord Pleanala & Cork County Council*, [2003] 2 I.R. 114 (Ir.) (Hardiman, J.) ("[T]he question of vires to require public access was never raised or discussed, and a point not argued is a point not decided."); *cf. e.g. U.S. v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment) ("The [common law] rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").

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(and apart from the presentment rationale<sup>27</sup>) need not control any future litigation under the *Model*. I am tempted to do so, but I will not. I regret that formalism carries little weight both with most law review readers and with the largest part of the federal judiciary, including our nine robed masters on high.

So let us assume that Professor Levinson is correct: with regard to the lower federal courts, *Chadha* would control future litigation attacking the *Model* and unicameral orders, resolutions, and votes passed pursuant to the *Model*. The *Model* and subsidiary single-house legislation would be struck down until *Chadha* is overruled or limited by the Supreme Court.

Getting the Supreme Court of the United States to overrule *Chadha* can be achieved relatively quickly, although at first blush, many readers will (wrongly) suspect that my proposed solution is a joke.

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When Congress next authorizes, by statute, salary increases for the upper echelon of the federal civil service and elected federal office-holders, as it does from time to time, Congress should leave out the judges and the Justices.<sup>28</sup>

The latter will get their salary increase, along with everyone else, but not by statute *per se*. Rather, Congress, by a first-in-time statute, should authorize one house by a single-house order or orders (subject to presentment) to raise judicial salaries up to some maximum amount. The statute should further specify that no increase in judicial compensation is to take effect (or to be construed as Congress's intent), that no appropriation from the Treasury is to be made, and that no increased salary is to be paid except as authorized by a constitutionally valid, legally enforceable, and judicially cognizable next-in-time congressional order (or orders), authorized under the terms of the prior statute, and separately presented to the President.<sup>29</sup>

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27. See *supra* n. 3. And it was only *Chadha*'s presentment rationale, not the bicameralism rationale, that had any actual support within roughly contemporaneous originalist materials, i.e., in Madison's federal convention debate notes. See James Madison, *Notes of the Debates in the Federal Convention of 1787*, in *The Debates in the Several States on the Adoption of the Federal Constitution* vol. 5, at 431-32 (Jonathan Elliot ed., 2d ed. 1881).

28. See e.g. *An Act to Authorize Salary Adjustments for Justices and judges of the United States for Fiscal Year 2004*, Pub. L. No. 108-167, § 1, 117 Stat. 2031 (Dec. 6, 2003) (granting a raise in judicial compensation, although not through the vehicle of an appropriations act).

29. *Contra Chadha*, 462 U.S. 919. For this gambit to work, Congress must make absolutely clear that judicial compensation is only raised if the underlying statute and its expenditure order are both valid legal instruments, capable, through joint action, of changing legal relations beyond the confines of Congress, its members and employees. See U.S. Const. art. III, § 1 ("[Judicial] [C]ompensation . . . shall not be diminished . . ."). The message must be: *There are no congressional free lunches*. If

Congress should then pass the relevant order or orders and present it or them to the President.

The President should sign the statute, and the President should sign the single-house order or orders authorizing the pay increase for the judiciary. But *afterwards* the President should seek the advice of the Office of Legal Counsel ("OLC"): the OLC will undoubtedly explain to the President that under settled Supreme Court precedent increasing the judges' salaries by the proposed method is unconstitutional.<sup>30</sup> Acting on the advice of counsel, the President should order the relevant Executive Branch officials not to pay the judges and Justices their statutorily approved but "unconstitutionally" increased wages.

In these circumstances, I am serenely confident that at least *one* federal judge will sue for his wages. I am equally confident that the lower federal courts will hear the suit.<sup>31</sup> And, perhaps, a courageous federal judge might also act as class representative under Federal Rule of Civil Procedure 23 and seek vindication for all of his colleagues.<sup>32</sup> I would advise the class representative not to act as his own counsel, if only because there can be no doubt that litigators from the largest number of very posh firms will rush to volunteer to act *pro bono* on behalf of the very adjudicators to whom they are destined to appear. I have no doubt that the Supreme Court will hear the case, particularly if Congress creates an expedited review procedure or mandatory jurisdiction.<sup>33</sup> And I think it substantially more likely than not that *Chadha* would be overruled, or limited to its facts, particularly if Congress makes pellucidly clear that all future attempts to raise judicial salaries will be made via alternative statutory instruments: single-house orders, resolutions, and votes subject to presentment and authorized

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Congress is unwilling to be bold, quick, loud and clear, then our judicial ruling class might not hear them. See *supra* n. 6.

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

31. See *U.S. v. Will*, 449 U.S. 200, 217 (1980) (holding that the doctrine of necessity permits federal judges to hear cases affecting their own compensation, notwithstanding the inherent conflict of interest); but see Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 Fordham L. Rev. 1657, 1661 (1997) ("Another *deep principle* [of the Constitution] is that a person is not supposed to be a judge in his own case.") (emphasis added); Akhil Reed Amar, *Presidents Without Mandates*, 67 U. Cin. L. Rev. 375, 385 (1999) ("Thus the [Presidential Succession] Act of 1792 had the *obvious potential* for corrupting judicial judgment [in the impeachment context], effectively making [Senator] Wade a judge in his own case [when deciding to vote to convict or to acquit President Andrew Johnson], giving him an obvious conflict of interest [because he would succeed Johnson, if the latter were convicted].") (emphasis added); Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into The Presidency*, 90 Va. L. Rev. 551, 556 n. 13 (2005) ("The Founders had demonstrated a *general awareness* of the problems of asking an official to serve as a judge in his own case.") (emphasis added).

32. There would be those few federal judges who, under a particular view of the Constitution and their oaths (or affirmations), might wish not to participate in this litigation. And, of course, they could opt out. See Fed. R. Civ. P. 23(c)(2)(B) (providing for opt-outs).

33. See *e.g.* 28 U.S.C. § 1253 (2000) (providing for mandatory appeal).

(or ratified) by a prior (or subsequent) statute. (Perhaps Congress might express its considered opinion in the form of a well-reasoned nonbinding concurrent resolution?)

*But why stop there? Both legislation and litigation are difficult, time consuming, and expensive processes. Since we have taken the time to choreograph a lawsuit between the Executive Branch and the judiciary,<sup>34</sup> this would be a particularly appropriate time to seek resolution (no pun intended) of other outstanding constitutional issues by carefully designing multiple (closely related) fact patterns for the Supreme Court to adjudicate.<sup>35</sup>*

Still even with several permutations on appeal to the Supreme Court, I believe the litigation could be wrapped up relatively quickly. Federal district court proceedings will be swift because there will be few, if any, depositions, i.e., the key issue will be a pure matter of law. Perhaps we might even arrange for a caesarian section and bypass the intermediate

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34. I expect that each house of Congress would intervene and/or file amicus briefs in defense of their own legislative authority. Also, in passing the salary increase, Congress must waive Section 8 of the *Model Statute*, else the Executive Branch would be inhibited from making an *ultra vires* or non-delegation doctrine based defense. See Tillman, *Model Statute*, *supra* n. 2, at 199-200, § 8.

Although I hope to see the Executive Branch fail in arguing against the constitutionality of single-house delegation, it is important that the fight be free and fair so that thereafter the new precedent will clearly control the course of all future litigation.

35. Here are a few of my favorite constitutional chestnuts. Let's say Congress ultimately intends to give the federal judges a \$6,000 annual raise. Then \$3,000 should be awarded by House orders and \$3,000 should be awarded by Senate orders. Each house should issue six orders for \$500 each.

The first \$500 order should be presented to the President and signed while Congress remains in session.

The second order should be presented to the President prior to ten days before Congress's end of session adjournment, but it should neither be signed nor vetoed by the President.

The third one should be passed prior to adjournment, but presented and signed shortly after termination of Congress's two year session.

The fourth one should be presented, vetoed, and returned during a session, but overridden by two-thirds of each house.

A fifth one should be pocket vetoed during an intrasession break, "returned" exclusively for congressional record-keeping and informational purposes, but "overridden" when Congress subsequently returns, notwithstanding Congress's technical absence ten days following presentment.

A sixth one should be pocket vetoed during an intersession break, i.e., between two annual sessions of a two-year Congress, "returned" exclusively for congressional record-keeping and informational purposes, but "overridden" when Congress subsequently returns, notwithstanding Congress's absence ten days following presentment.

Of course, a variety of other factual permutations are possible which would allow for adjudication of yet unanswered and unsettled questions pertaining to the constitutional boundaries of the legislative process (or, at least, the high judiciary's distorted views of that process). Cf. *The Federalist No. 48*, *supra* n. 14, at 256-57 (James Madison) (overdramatically describing "[t]he legislative department" as "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.") (emphasis added); but cf. Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. Rev. \_\_\_\_ (forthcoming 2006).

federal court of appeals.<sup>36</sup> With a bit of luck, we could be blessed with a new Supreme Court ruling prior to ever having to use the *Model* in a genuine national emergency.

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On second thought, I have changed my mind. That salary increase by single-house order (subject to presentment) – it should apply exclusively to the lower federal court judges. Congress should grant the Justices of the Supreme Court their salary increase by statute. I am sure the sophisticated reader will readily see that this would only greatly *increase* the pressure on the high court. And if we are going to stick the sword in, we might just as well twist it a bit and have a bit of fun.

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36. See 28 U.S.C. § 1254(2) (2006) (permitting federal intermediate court of appeals to certify question to Supreme Court, and permitting Supreme Court to have the entire case sent up for its decision, notwithstanding that the lower court had not yet issued a final judgment on appeal).