STUDENT NOTES & COMMENTS

CONSTITUTIONAL PROBLEMS WITH THE COBRA AND THE OBRA FEE SCHEDULES?

Congress authorized the Department of Transportation (DOT) and the Federal Energy Regulatory Commission (FERC or Commission) in 1985 and 1986, respectively, to assess various fees and annual charges against the pipelines. The 1985 act, known as the Consolidated Omnibus Budget Reconciliation Act (COBRA), authorized the Secretary of Transportation to establish fees[1] to cover the costs of activities under the Natural Gas Pipeline Safety Act of 1968[2] and the Hazardous Liquid Pipeline Safety Act of 1979.[3] The 1986 Act, known as the Omnibus Budget Reconciliation Act (OBRA), authorized the FERC to recover its costs of administration.[4] The rationale for establishing these fee schedules is to shift the responsibility for funding from the taxpayer to the pipeline industry, since it is the pipelines who substantially benefit from the services.[5] Because the reduction of the federal budget deficit was a major political concern influencing these legislative measures,[6] the fees, there-

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1. 49 U.S.C.A. § 1682a (West Supp. 1987).

> The Secretary of Transportation . . . shall establish a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines. In establishing such schedule, the Secretary shall take into consideration the allocation of departmental resources.
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> . . . .
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> . . . [A]t no time shall the aggregate of fees received for any fiscal year under this section exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees.

Id.

2. 49 U.S.C. §§ 1671-1686 (1982).

3. 49 U.S.C. §§ 2001-2014 (1982).

4. 42 U.S.C.A. § 7178 (West Supp. 1987).

> Except as provided . . . [the FERC] shall . . . assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year.
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> . . . .
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> The fees or annual charges assessed shall be computed on the basis of methods that the Commission determines, by rule, to be fair and equitable.

Id.

5. *Pipeline Safety Authorization: Hearing Before the Subcomm. on Fossil and Synthetic Fuels of the Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 130, 138 (1985) [hereinafter *Subcomm. Hearing*] (written response by M. Cynthia Douglass, Administrator of the Research and Special Programs Administration, in response to questions transmitted subsequent to her testimony before the Subcommittee); H.R. REP. NO. 727, 99th Cong., 2d Sess. 41, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3607, 3637 (report to accompany recommendations from the Committee on Energy and Commerce (energy matters)).

6. HOUSE COMM. ON THE BUDGET, A BILL TO PROVIDE FOR RECONCILIATION PURSUANT TO SEC. 2 OF THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 1986, H.R. REP. NO. 300, 99th Cong., 1st Sess. 492 (1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 756, 1008 [hereinafter HOUSE COMM. ON THE BUDGET]; H.R. REP. NO. 727, *supra* note 5, at 3635, 3637 (letters written by John

fore, are intended to offset the costs of various agency services[7] without adding to the taxpayers' burden.

The constitutionality of such fees raises many questions.[8] If the fees assessed are actually taxes, can Congress constitutionally delegate to an administrative agency the authority to make such assessments? This comment addresses the various tests used to determine whether an assessment is a tax and, if so, whether it is constitutionally permissible for Congress to delegate its power to tax.

I. DETERMINING WHETHER AN ASSESSMENT IS A FEE OR A TAX

A. *Regulation Under the Commerce Clause*[9]

In determining whether an assessment, authorized by statute, is a fee or a tax, a court may find that the statute involves a regulation of commerce, involving a fee, instead of a delegation of the taxing power. A court arriving at this conclusion avoids addressing the constitutional question of whether the delegation is permissible. The taxing power has not been exercised if the funds raised, under an act, are merely incidental to the regulation of commerce,[10] and the primary purpose is to regulate, not to raise revenues.[11] While Congress derives its power to regulate pipelines from the Commerce Clause, the

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D. Dingell, Chairman of the House of Representatives Committee on Energy and Commerce and William H. Gray III, Chairman of the House of Representatives Committee on the Budget).

7. H.R. REP. No. 453, 99th Cong., 1st Sess. 441 (1985) [hereinafter COBRA CONF. REP.]; *See* H.R. REP. No. 727, *supra* note 5, at 3651.

8. *See* Mid-America Pipeline Co. v. Dole, No. 86-C-815-E (N.D. Okla. Aug. 5, 1987) (findings and recommendations of the Magistrate that the fee established under COBRA was instead a tax and, therefore, an unconstitutional delegation of Congress' power to tax). The Magistrate's recommendations have been affirmed and adopted by an order dated December 30, 1987. *See also* Annual Charges Under the Omnibus Budget Reconciliation Act of 1986, 52 Fed. Reg. 21,263, 21,271 (1987) (to be codified at 18 C.F.R. pts. 154, 375 & 382) (many comments stated that the fee was an unconstitutional delegation of Congress' taxing power). On September 25, 1987, the FERC granted a rehearing in part on its final rule regarding the fees established under the OBRA and addressed concerns that the annual charges were unconstitutional. The FERC stated that, in its belief, a delegation of this kind is constitutional since the "assessments are based on the expenses incurred by the Commission in regulating the energy industries." Annual Charges Under Omnibus Budget Reconciliation Act of 1986, 52 Fed. Reg. 36,013, 36,014 (1987) (to be codified at 18 C.F.R. pts. 154 & 382).

9. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.] . . ." *Id.*

10. *See* Head Money Cases, 112 U.S. 580, 595 (1884). The purpose of the Act of August 3, 1882, ch. 376, 22 Stat. 214 (1882), was to protect the immigrants and the citizens of the United States. For the purpose of regulating immigration, a valid exercise of Congress' commerce power, the Act in question imposed a 50¢ duty on ship owners for every passenger brought from a foreign port. The Court held that this action was a valid regulation of commerce with foreign nations. *Head Money Cases*, 112 U.S. at 590-91.

11. *See* Rodgers v. United States, 138 F.2d 992 (6th Cir. 1943). The court found that the Agricultural Adjustment Act of 1938, §§ 348, 372, 7 U.S.C. §§ 1348, 1372 (1982), regulating the production of cotton, was a valid exercise of Congress' power to regulate commerce. The test, proposed in *Rodgers*, requires an examination of the statute's purpose. "[I]f regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax . . . ." *Rodgers*, 138 F.2d at 994. The D.C. Circuit, in 1986, used the same commerce power analysis and found that the primary purpose of the fund established under the Longshoremen's and Harbor Workers' Compensation Act, § 44, 33 U.S.C. § 944 (1982), was to regulate and not to raise money. Brock v. Washington Metro. Area Transit Auth., 796 F.2d 481 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1887 (1987).

language and legislative histories of both the COBRA and the OBRA reveal that the fee schedules' primary purpose is to raise revenues.[12]

B. Defining a Fee and a Tax

In the event the congressional action does not involve the regulation of commerce, the Supreme Court in *National Cable Television Association v. United States*[13] and its companion case, *FPC v. New England Power Co.*,[14] sets forth the difference between a fee and a tax. *National Cable* defined taxation as a legislative function which levies the burden based on one's ability to pay and does not take into consideration which parties benefit from the governmental action.[15] A fee, on the other hand, is described as being "incident to a voluntary act" which "bestows a benefit on the applicant, not shared by other members of society."[16] The Court provided the following examples of fees: permits to practice law or medicine, build a house, and run a broadcast station.[17]

In *New England Power*, the Court further described a fee as a charge levied on an "identifiable recipient" of a specific government benefit that has special value to the recipient.[18] Fees charged as a necessary prerequisite for licensing,[19] or for a right-of-way grant,[20] and fees charged for specific benefits and services provided to identifiable beneficiaries[21] have withstood constitutional attack. However, an additional charge, assessed on an operator already licensed to do business, was designated a tax, since no benefit was conferred different from that enjoyed by the public at large.[22]

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12. *See supra* notes 1 and 4; HOUSE COMM. ON THE BUDGET, *supra* note 6; and H.R. REP. No. 727, *supra* note 5.

13. National Cable Television Ass'n v. United States, 415 U.S. 336 (1974). Under the Independent Offices Appropriation Act (IOAA), 31 U.S.C. § 483a (1970) (revised at 31 U.S.C. § 9701 (1982)), fees charged are "to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." *Id.*

14. FPC v. New England Power Co., 415 U.S. 345 (1974).

15. *National Cable*, 415 U.S. at 340.

16. *Id.* at 340-41. The Court found that since one of the considerations used in determining the amount of the fee was "value to the recipient," this value was something not shared by the public. "A 'fee' connotes a 'benefit' and the Act by its use of the standard 'value to the recipient' carries that connotation." *Id.* at 341.

17. *Id.* at 340.

18. *New England Power*, 415 U.S. at 349.

19. Mississippi Power & Light v. NRC, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980). The IOAA authorizes the NRC to recover all costs of processing licenses. The court found this privilege of obtaining a license a special benefit not shared by the public, since the license was "an absolute prerequisite to operating a nuclear facility." *Id.* at 229.

20. Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983). The Federal Land Policy and Management Act of 1976, § 304(b), 43 U.S.C. § 1734(b) (1982), authorizes the Department of Interior to recover costs for processing applications for rights-of-way. The charges in question were for environmental impact statements which the court reasoned to be "a necessary prerequisite to the receipt by the applicant of a 'special benefit,' the grant of a right-of-way." *Id.* at 930.

21. Phillips Petroleum Co. v. FERC, 786 F.2d 370 (10th Cir.), *cert. denied sub nom.* Interstate Natural Gas Ass'n of Am. v. FERC, 107 S. Ct. 92 (1986) (the IOAA authorizes the FERC to collect fees for specific services provided).

22. United States v. River Coal Co., 748 F.2d 1103 (6th Cir. 1984). The Surface Mining Control and Reclamation Act of 1977, § 401(c)(1), 30 U.S.C. § 1231(c)(1) (1982), allows the Department of Interior to

Although courts have traditionally avoided any constitutional problems by construing the language of legislative acts narrowly,[23] the fee schedules established in both the COBRA and the OBRA closely resemble a tax, as defined by *National Cable*. The fees pursuant to the COBRA[24] are assessed against pipelines to meet the costs of activities authorized under the Natural Gas Pipeline Safety Act of 1968[25] and the Hazardous Liquid Pipeline Safety Act of 1979.[26] To satisfy *National Cable's* definition of a fee, the fee must be "incident to a voluntary act" and must "bestow[ ] a benefit on the applicant, not shared by other members of society."[27] Both of the pipeline safety acts establish programs to enforce safety standards for the natural gas and hazardous liquid pipeline systems.[28] The fees charged for enforcing safety standards are not incident to a voluntary act, but impose additional charges on pipeline operators already permitted to do business.[29]

Under a *National Cable* analysis of the COBRA fee schedule, neither a voluntary act, incidental to the assessments, nor a special benefit, not shared by the public, appears to exist.[30] The establishment of user fees caused only one change to the pipeline safety program. This change shifts the burden of payment from the taxpayers to the pipeline industry.[31] Consequently, the charges appear to be "an involuntary exaction for a public purpose."[32] "Historically, the pipeline safety program has been supported out of general tax revenues on the basis that the entire population was the beneficiary of the public's goal of enhanced public safety."[33] Although there are some benefits to the industry, such as the establishment of industrywide standards and increased public confidence,[34] these benefits are also shared by the general public.

A review of the OBRA fee schedule also fails to reveal any "special benefit" to the pipelines. Under the OBRA, the fees and annual charges are collected to cover "all the costs incurred by the Commission in that fiscal year."[35] The House Conference Report No. 99-1012 states that the FERC "shall endeavor to assess and collect amounts necessary to cover the cost of each of its program areas from those directly affected by the activities of the Commis-

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use the funds collected for the purpose of reclaiming the land affected by coal mining operations. *See also* Mid-America Pipeline Co. v. Dole, No. 86-C-815-E (N.D. Okla. Aug. 5, 1987). The Magistrate was unable to identify any benefit to the pipelines that was not also shared by the public.

23. *See* National Cable Television Ass'n v. United States, 415 U.S. 336 (1974); FPC v. New England Power Co., 415 U.S. 345 (1974).

24. 49 U.S.C.A. § 1682a (West Supp. 1987).

25. 49 U.S.C. §§ 1671-1686 (1982).

26. 49 U.S.C. §§ 2001-2014 (1982).

27. *National Cable*, 415 U.S. at 340-41.

28. *Subcomm. Hearing, supra* note 5, at 131-33.

29. *See* United States v. River Coal Co., 748 F.2d 1103, 1106 (6th Cir. 1984).

30. *See* Mid-America Pipeline Co. v. Dole, No. 86-C-815-E (N.D. Okla. Aug. 5, 1987) (Findings and Recommendations of the Magistrate affirmed and adopted by an order dated December 30, 1987).

31. COBRA CONF. REP., *supra* note 7, at 441.

32. *River Coal*, 748 F.2d at 1106.

33. *Subcomm. Hearing. supra* note 5, at 138.

34. *Id.*

35. 42 U.S.C.A. § 7178 (West Supp. 1987).

sion in each area."[36] However, the Act on its face requires operators to pay "not only for the benefits they receive but for the protective services rendered the public by the Commission."[37] "The fixing of such assessments, it is argued, is the levying of taxes."[38] The FERC is also given authority, under the Act, to waive fees for good cause.[39] This further obscures the ultimate beneficiary of the services charged for by allowing the FERC to charge certain producers proportionately more of the costs to compensate for those who have been granted a waiver.[40]

In conclusion, the fee schedules under the COBRA and the OBRA resemble the Supreme Court's definition of a tax set out in *National Cable*: "Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income."[41] However, a court may avoid any constitutional problems raised by this argument by limiting the fees charged to only those services which have "value to the recipient."[42]

II. DETERMINING WHETHER THE CONGRESSIONAL DELEGATION IS CONSTITUTIONAL

A. The Delegation Doctrine

The wording of article I of the Constitution, that "[a]ll legislative powers shall be vested in a Congress of the United States,"[43] forms the foundation of the delegation doctrine.[44] The rationale behind this doctrine is that article I "prohibits Congress from delegating its legislative powers to any other institution."[45] In the early struggle with delegation, the courts tried to balance the basic notions of accountability and separation of powers with the reality that Congress cannot possibly resolve everything.[46] "Unchecked delegation would undercut the legislature's accountability to the electorate and subject people to rule through ad hoc commands rather than democratically considered general

36. H.R. REP. No. 1012, 99th Cong., 2d Sess. 238-39, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3607, 3883-84 [hereinafter OBRA CONF. REP.].

37. National Cable Television Ass'n v. United States, 415 U.S. 336, 341 (1974).

38. *Id.* at 341-42.

39. OBRA CONF. REP., *supra* note 36, at 3884. The waiver was included because "the imposition of fees could frustrate the purpose of encouraging small power production and cogeneration." *Id.*

40. *See id.*

41. *National Cable*, 415 U.S. at 340 (footnote omitted).

42. *See id.* at 341. The FERC argues that some of the expenses recovered under the OBRA fee schedule which provide "value to the recipient," include "audits, publication of the *FERC Reports*, [and] availability of staff for informal consultation." Annual Charges Under Omnibus Budget Reconciliation Act of 1986, 52 Fed. Reg. 36,013, 36,014 (1987) (to be codified at 18 C.F.R. pts. 154 & 382).

43. U.S. CONST. art. I, § 1.

44. R. PIERCE, JR., S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 51 (1985) [hereinafter ADMINISTRATIVE LAW].

45. *Id.*

46. *See* Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 4-5 (1982) [hereinafter Aranson].

laws."[47]

In practice, however, the courts have rarely relied on the delegation doctrine to declare grants of legislative authority unconstitutional.[48] The question, that must be asked today, is whether the necessities of "modern governance" have eroded the separation of powers doctrine, which is central to the structure of our Constitution.[49]

B. Determining the Various Kinds of Permissible Delegation

The historical development of the delegation doctrine has been a turbulent one. The Supreme Court vacillated over the years between a strict interpretation of the doctrine and a more permissive interpretation. Not until *J. W. Hampton, Jr., & Co. v. United States*[50] did the Court set out the criteria used to uphold congressional delegations.[51] The Court agreed that Congress cannot delegate purely legislative functions.[52] However, "[i]f Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[53] This standard became the basis for upholding broader legislative delegations of power.[54]

The New Deal era brought with it a shift in the philosophy of the Court toward a stricter interpretation of the delegation doctrine.[55] In *A.L.A. Schechter Poultry Corp. v. United States*,[56] the Supreme Court found Congress' delegation under the National Industrial Recovery Act unconstitutional. The Act authorized the President to approve and prescribe "codes of fair competition" for trades and industries.[57] The Court pointed out that some delegation was proper since:

> the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.[58]

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47. Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1224 (1985).

48. Aranson, *supra* note 46, at 5.

49. *Id.*

50. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928). The Court upheld the delegation to the President under the Tariff Act of 1922, § 315, 19 U.S.C. § 154 (1926) (repealed 1930), to adjust, up or down, the duties imposed by the Act. The Court found that Congress had merely conferred upon the President the authority and discretion to execute the law and had not delegated any authority or discretion to the President to make the law. *Hampton*, 276 U.S. at 410-11.

51. Aranson, *supra* note 46, at 7-8.

52. *Hampton*, 276 U.S. at 408.

53. *Id.* at 409 (emphasis added).

54. Aranson, *supra* note 46, at 8.

55. *Id.* The Court has been criticized for its use of the delegation doctrine during the New Deal era, because many felt that the doctrine was used merely to strike down legislation the Court did not approve of. Schoenbrod, *supra* note 47, at n.86.

56. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

57. Act of June 16, 1933, Pub. L. No. 73-67, § 3, 48 Stat. 195, 196-97 (1933) (repealed 1935).

58. *Schechter Poultry*, 295 U.S. at 530.

Without standards and policies, Congress' delegation would authorize the delegate to use "unfettered discretion to make whatever laws he thinks may be needed or advisable."[59] The Court viewed delegations of this type as unconstitutional.[60]

Since the New Deal era, the pendulum has swung in the other direction, finding broader delegations constitutional. *Schechter Poultry* has not been overruled, but the Court has broadly defined the standards and policies that adequately limit any discretion delegated.[61] Standards and policies that merely require the actions authorized to be "fair and equitable and will effectuate the purposes of this Act," are sufficient enough to avoid the "unfettered discretion" concerns of *Schechter Poultry*.[62]

As long as the act sets forth a sufficient guide for administrative decision-making and a guide for judicial determination of whether the delegation has been properly carried out, courts uphold the delegation.[63] The Supreme Court reasoned that "[n]ecessity . . . fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[64]

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59. *Id.* at 537-38.

60. The Act empowered trade and industrial associations to propose codes designed to rehabilitate and expand their trade or industry. *Id.* at 537. The President then had the authority to approve or disapprove the codes depending upon whether they were proposed by industry representatives and whether they created monopoly practices. *Id.* at 538. In addition, the Act gave the President the discretion to "impose his own conditions, adding to or taking from what is proposed, as . . . he thinks necessary 'to effectuate the policy' declared by the Act." *Id.* at 538-39. This attempted delegation has been viewed by many as the broadest legislative delegation ever tried by Congress. Schoenbrod, *supra* note 47, at n.8.

61. *See* FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976); American Power & Light Co. v. SEC, 329 U.S. 90 (1946); Yakus v. United States, 321 U.S. 414 (1944).

62. *Yakus*, 321 U.S. at 420. The Court upheld a delegation to the Price Administrator to control commodity prices in times of war under the Emergency Price Control Act of 1942. In order to prevent wartime inflation the Price Administrator was to set temporary maximum prices for commodities and rents. *Yakus*, 321 U.S. at 419. Since the Act stated the legislative objective (to stabilize prices by preventing speculation and profiteering, etc.), the method of achieving that objective (prices should be fair and equitable and promote the purposes stated), and the standards to guide the implementation of the objective (consideration must be given to prices prevailing during a stated base period), the delegation was found constitutionally permissible. *Id.* at 420-21, 423. In a similar case involving presidential action to protect national security, the Court upheld a delegation under the Trade Expansion Act of 1962, § 232(b), (c), 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862(b), (c) (Supp. IV 1970)), because it clearly established preconditions necessary before the President could act and set out the various factors the President must consider before he could exercise his authority. *FEA v. Algonquin SNG, Inc.*, 426 U.S. at 559.

63. *Yakus*, 321 U.S. at 426; Synar v. United States, 626 F. Supp. 1374, 1389 (D.D.C.), *aff'd on other grounds sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986). The court upheld the delegation under the Balanced Budget and Emergency Deficit Control Act of 1985, §§ 201(a)(1), 251, 257(4,6), 2 U.S.C.A. §§ 622, 901, 907 (West Supp. 1987). The delegation in *Synar* was found permissible since the Act "set[s] forth specific assumptions that are to be used in calculating the budget base" and "provides further guidance and limitation by way of definition." 626 F. Supp. at 1388. "These required assumptions and definitions are given additional meaning by reference to years of administrative and congressional experience in making similar economic projections and calculations." *Id.*

64. American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946). The Court upheld the delegation under the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79k(b)(2) (1982), because it set out

C. *An Analysis of a Possible Change in the Trend*

Some of the more recent decisions concerning the delegation doctrine suggest that another shift toward stricter interpretation is developing.[65] In *Industrial Union Department v. American Petroleum Institute*,[66] a plurality voted to overturn action taken under the authority of the Occupational Safety and Health Act.[67] Four of the Justices avoided any constitutional problem with the delegation by finding that the Secretary of Labor, acting through the Occupational Safety and Health Administration (OSHA), had overstepped his authority under the Act.[68] However, Justice Rehnquist, in his concurring opinion, argued that the Act was an improper delegation of legislative power.[69] Rehnquist reviewed the Act's legislative history, its stated purpose, and whether the rule of necessity should be invoked in reaching his conclusion, but found little guidance.[70] The Act's language gave the Secretary absolutely no guidance in setting safety and health standards.[71] This, in effect, left the difficult decision of "whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths" up to the Secretary; a decision which, Rehnquist argued, was best suited for Congress.[72]

The Court, once again, reviewed section 655(b)(5) of the Occupational Safety and Health Act of 1970[73] in *American Textile Manufacturers Institute v. Donovan*.[74] In a five to three split, the Court found no delegation problems.[75] Justice Rehnquist, in his dissenting opinion, raised the same arguments he presented in *American Petroleum*, but this time Justice Rehnquist

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sufficient standards including the policy behind the Act, standards for new security issues, conditions for acquisitions, and the nature of the contemplated inquiries. In South Carolina *ex rel.* Tindal v. Block, 717 F.2d 874, 887 (4th Cir. 1983), *cert. denied*, 465 U.S. 1080 (1984), the Fourth Circuit found sufficient standards, since the legislative history reveals that the policy objectives were clearly delineated and the statute describes effective dates, amount of deductions and minimum purchase levels.

65. ADMINISTRATIVE LAW, *supra* note 44, at 59-61; J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 93-94 (1978); Schoenbrod, *supra* note 47, at 1226.

66. Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607 (1980).

67. 29 U.S.C. § 655(b)(5) (1982).

68. *American Petroleum*, 448 U.S. at 659.

69. *Id.* at 672 (Rehnquist, J., concurring).

70. *Id.* at 675-85.

71. *Id.* at 675. The Act authorized the Secretary to:

> [S]et the standard which most adequately assures, to the extent *feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

29 U.S.C. § 655(b)(5) (1982) (emphasis added). The Secretary argued that the term "feasible" was "limited to technological and economic feasibility." *American Petroleum*, 448 U.S. at 682. Justice Rehnquist pointed out, however, that "[w]hen Congress has wanted to limit the concept of feasibility in this fashion, it has said so" and he referred to the Clean Air Act, 42 U.S.C. § 7545(c)(2)(A) (1982), which was enacted the same week. *American Petroleum*, 448 U.S. at 682.

72. *American Petroleum*, 448 U.S. at 672.

73. 29 U.S.C. § 655(b)(5) (1982).

74. American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981).

75. *Id.* at 492 (Justice Powell took no part in the decision).

was joined by Chief Justice Burger.[76]

Finally, in *INS v. Chadha*,[77] the Court held that the legislative veto in the Immigration and Nationality Act[78] improperly delegated Congress' legislative power. The majority found that since the type of delegation involved in *Chadha* was clearly a "legislative" action that required approval of the President and both houses of Congress, it was distinguishable from the legislatively delegated authority generally upheld to administrative agencies.[79] Many scholars, however, view *Chadha* as "a significant judicial tightening of the limits within which Congress may entrust *anyone* with lawmaking power."[80]

It remains difficult to predict whether these decisions and increased advocacy of a stricter interpretation of the delegation doctrine[81] foreshadow a new trend in this area despite prior inconsistent treatment of the doctrine. Since the Court's makeup has changed since its 1980 decision in *American Petroleum*, and is in a state of transition today, it is possible that a shift may occur.

III. ALTERNATIVE APPROACHES IN EVALUATING CONGRESSIONAL DELEGATION

Due to the difficulty in predicting the Court's reasoning, concerns of institutional competence and preserving our democratic system of government require the formulation of a clearer approach.

A. Dividing Legislative Functions into Two Classes

One way to strengthen predictability and provide a clearer standard by which to judge delegation, involves dividing legislative functions into two distinct classes:[82] (1) legislative functions that can be delegated when Congress has set forth sufficient standards and policies for guidance;[83] and (2) legislative functions that can never be delegated.[84] To determine which class a particular

76. *Id.* at 543-48 (Rehnquist, J., and Burger, C.J., dissenting). Using only the standard of "feasible," Justice Rehnquist reasoned that the policy decision of whether to conduct a cost-benefit analysis (cost of implementing a safety and health standard vs. the benefit of the workers health) was left to the discretion of the Secretary. *Id.* at 547-48.

77. INS v. Chadha, 462 U.S. 919 (1983).

78. 8 U.S.C. § 1254(c)(2) (1982).

79. *Chadha*, 462 U.S. at 953-54 n.16.

80. Schoenbrod, *supra* note 47, at 1235-36 (quoting Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 17 (1984) (emphasis in original)).

81. *See id.* at 1236.

82. *See* FREEDMAN, *supra* note 65, at 88.

83. *Id.* The following cases are examples when the Court used a "standards" analysis: A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (no sufficient standards were present); Yakus v. United States, 321 U.S. 414 (1944); and American Power & Light Co. v. SEC, 329 U.S. 90 (1946). *See supra* notes 58-64 and accompanying text.

84. FREEDMAN, *supra* note 65, at 88. Examples of cases that fall in this class include National Cable Television Ass'n v. United States, 415 U.S. 336, 341-42 (1974) (the Court stated that the power to tax was one expressly given to Congress by the Constitution and suggested that a delegation of this kind would violate constitutional principles); and INS v. Chadha, 462 U.S. 919 (1983) (the Constitution provides the President with the power to veto, not the legislature—any change would require legislation in accordance with constitutional provisions). The power to impeach is another power that falls within this class. FREEDMAN, *supra* note 65, at 88.

function falls into, courts must decide whether the framers of the Constitution intended the function to be exercised by Congress, and whether the legislative function is resistant to the formulation of standards.[85] Should an analysis of a legislative function invoke an affirmative response to these questions, courts should find a delegation of this function unconstitutional.[86]

B. Prohibiting Any Delegation of a Legislative Function

Another approach to clear up the confusion created by the Court's treatment of the delegation doctrine, prohibits any delegation of legislative functions.[87] One method of distinguishing a legislative function (rulemaking) from an executive function (rule interpretation) is to view statutes as either "rules statutes" or "goals statutes."[88] Rules statutes are examples of proper delegation since they set out permissible and impermissible conduct that involves some interpretation in their application.[89] Goals statutes, on the other hand, improperly delegate legislative power, since the decision is left to the discretion of someone other than Congress.[90]

In some situations involving goals statutes, delegation is proper.[91] One such situation occurs when the scope of the executive power already authorizes discretion over the matter.[92] Examples of areas where the President can exercise broad discretion are in matters concerning war and foreign affairs.[93]

Another example of proper delegation involves a goals statute that gives broad discretion in the management of public property.[94] This type of legislation generally concerns the use of public resources by public officials and does not affect the rights of private persons.[95] Since the property clause of article IV grants this power separately,[96] the same limitations on delegation granted under article I should not apply.[97] Management of public property includes the operation of federal buildings and land, and the postal service, however, should the statute use its power over these public places to regulate private concerns, it will be an improper delegation.[98]

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85. FREEDMAN, *supra* note 65, at 88.

86. *Id.*

87. Schoenbrod, *supra* note 47, at 1251.

88. *Id.* at 1252-53.

89. *Id.* at 1253. Schoenbrod suggests an example of a rules statute as one that might establish a tax at a given rate. *Id.* The rule of conduct involves paying the tax based on the rate schedule provided. *Id.*

90. *Id.* In contrast to the example set out in note 89 *supra*, if the statute required the IRS to levy the taxes necessary to raise a certain amount of revenue, the statute would be classified as a goals statute.

91. *Id.* at 1260.

92. *Id.*

93. *Id.* Since the Court did not rely on the broader executive powers conferred by article II, many of the broad delegations upheld during World War II have provided the basis for upholding broad delegations in times of peace. *Id.* at 1264-65.

94. *Id.* at 1265.

95. *Id.* at 1266.

96. U.S. CONST. art. IV, § 3, cl. 2. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *Id.*

97. Schoenbrod, *supra* note 47, at 1265.

98. *Id.* at 1266-67.

IV. ANALYZING THE COBRA AND THE OBRA REGARDING THE DELEGATION DOCTRINE

If the court determines that the COBRA and the OBRA fee schedules are a tax,[99] the language of article I,[100] and of *National Cable*, strongly supports a finding that a delegation of the taxing power is impermissible. *National Cable* stated that "[t]axation is a legislative function, and Congress . . . is the sole organ for levying taxes . . . ."[101] The first alternative approach to evaluating congressional delegation discussed above also supports this analysis. Under this alternative approach, the power to tax falls into the class of legislative functions that should never be delegated because the framers of the Constitution intended the power to be exercised by Congress.[102]

However, if the language of the statute contained sufficient standards to guide the administrative agency's decisionmaking, a reviewing court may permit a delegation of this kind.[103]

The COBRA fee schedule states the following:

> The Secretary of Transportation . . . shall establish a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines. In establishing such schedule, the Secretary shall take into consideration the allocation of departmental resources.
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> . . . .
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> . . . [A]t no time shall the aggregate of fees received for any fiscal year under this section exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees.[104]

The criteria listed in establishing the fees provide some standards for guiding the Secretary. Congress has made the law and limited the criteria used to apply it. It is up to the Secretary, in his application of the law, to use any combination he deems necessary. This avoids the "unfettered discretion" concerns of *Schechter Poultry*.[105] A delegation "becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of the delegated authority."[106]

A contrary argument is that the COBRA is a goals statute and, therefore, an unconstitutional delegation of legislative power. This argument is based on the premise that Congress' goal, to raise money, is accomplished by giving the Secretary the authority to assess whatever fees are necessary to accomplish the

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99. *See* Mid-America Pipeline Co. v. Dole, No. 86-C-815-E (N.D. Okla. Aug. 5, 1987) (Findings and Recommendations of the Magistrate affirmed and adopted by an order dated December 30, 1987).

100. U.S. CONST. art. I, § 8, cl. 1.

101. National Cable Television Ass'n v. United States, 415 U.S. 336, 340 (1974).

102. FREEDMAN, *supra* note 65, at 88.

103. *See* FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976); American Power & Light Co. v. SEC, 329 U.S. 90 (1946); Yakus v. United States, 321 U.S. 414 (1944); South Carolina *ex rel.* Tindal v. Block, 717 F.2d 874 (4th Cir. 1983), *cert. denied*, 465 U.S. 1080 (1984); United States v. Frame, 658 F. Supp. 1476 (E.D. Pa. 1987); Synar v. United States, 626 F. Supp. 1374 (D.D.C.), *aff'd on other grounds sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

104. 49 U.S.C.A. § 1682a (West Supp. 1987).

105. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-38 (1935).

106. American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

goal.[107] This is the weaker argument. Since Congress expressed that the Secretary could use any combination of the criteria mentioned, it appears that no one criteria is to be given more weight than another. Therefore, the Secretary is not being forced to make any difficult policy choices that would be better left to Congress.[108]

The fee schedule provided for by the OBRA is as follows:

> Except as provided . . . [the FERC] shall . . . assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year.
>
> . . . .
>
> The fees or annual charges assessed shall be computed on the basis of methods that the Commission determines, by rule, to be fair and equitable.[109]

Here the purpose of the Act is to recover the cost of operating the FERC, using "fair and equitable" as the standard to accomplish this purpose. Although the OBRA fee schedule strengthens the goals statute argument above, the "fair and equitable" standard has been upheld by the Court in the past.[110]

V. CONCLUSION

Previous Supreme Court decisions indicate a preference to construe narrowly a statute's language. This construction avoids "hurdles" encountered when faced with a delegation problem.[111] In answering the question of whether the COBRA and the OBRA charges are fees or taxes, the Court could easily narrow the statutes to require the agencies to charge fees for only specific services rendered and not for general oversight functions.[112] A delegation of this type would certainly pass muster under the Court's traditional "standards" analysis. However, if a new trend is in fact beginning, fee schedules, like those provided for in the COBRA and the OBRA, might provide the Court with an opportunity to redefine the delegation doctrine by addressing the concerns of institutional competence and political accountability.[113]

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107. *See* Schoenbrod, *supra* note 47, at 1253.

108. *See* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 547-48 (1981) (Rehnquist, J., and Burger, C.J., dissenting); Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring).

109. 42 U.S.C.A. § 7178 (West Supp. 1987).

110. *See* Yakus v. United States, 321 U.S. 414 (1944).

111. *See* National Cable Television Ass'n v. United States, 415 U.S. 336, 342-43 (1974); FPC v. New England Power Co., 415 U.S. 345, 351 (1974).

112. *See National Cable*, 415 U.S. at 341-44.

113. *See* FREEDMAN, *supra* note 65, at 94.