



One line that stood out in the Supreme Court's opinion in the tariff case, [Learning Resources v Trump](#), was this one from Neil Gorsuch:

Once this Court reads a doubtful statute as granting the executive branch a given power, that power may prove almost impossible for Congress to retrieve. Any President keen on his own authority (and, again, what President isn't?) will have a strong incentive to veto legislation aimed at returning the power to Congress. Perhaps Congress can use other tools, including its appropriation authority, to influence how the President exercises his new power. Maybe Congress can sometimes even leverage those tools to induce the President to withhold a veto. But retrieving a lost power is no easy business in our constitutional order.

Gorsuch then goes on for typically disingenuous attack on Justice Kagan and defense of an amorphous Major Questions Doctrine, but that is not what I want to focus on here. I don't say this very often, but Gorsuch nails it in this passage: barring overwhelming Congressional opposition, Presidential powers under the IEEPA would never expire because the President would veto any attempt to do so.

But what gets lost in the whole discussion is that when originally enacted, Congress had devised a way around this problem: the legislative veto. [The original text of IEEPA stated](#):

The authorities described...may not continue to be exercised under this section if the national emergency is terminated by the Congress by concurrent resolution pursuant to Section 202 of the National Emergencies Act and if the Congress specifies in such concurrent resolution that such authorities may not continue to be exercised under this section.

Under the original IEEPA, Congress could overturn Presidential Emergency decrees with a concurrent resolution, and under the National Emergencies Act, [such a resolution could not be filibustered](#) because it specifies that each House of Congress “shall vote” on a such a concurrent resolution after three days of debate.



Jagdish Chadha

We all know what happened (or at least law nerds do): in 1983, the Supreme Court struck down all legislative vetoes in [INS v Chadha](#). *Chadha* held that legislative vetoes are unconstitutional because the subsequent Congressional resolution became effective without being presented to the President for his signature or veto. And just like that, hundreds of legislative vetoes that had existed for decades in the US Code just disappeared, essentially rewriting vast swathes of federal law. It destroyed the Congressional-Executive deal, i.e. the Executive gets discretionary power that Congress can claw back

*Chadha* did not seem to be a particularly ideological decision: authored by Burger, it

was joined by Brennan and Marshall among others. The dissenters were White and Rehnquist. (Powell concurred separately). And for a while, it seemed like the worries of some scholars that the decision could disrupt the balance of power between the President and Congress were misplaced. My friend Jessica Korn Leibowitz [wrote a fine book arguing](#) that Congress maintained control over policymaking even without the legislative veto.

But such an assessment, in my view, has not aged well, and the IEEPA is just one indicator of it. Congress was completely transformed by the 1994 midterms (after Korn Leibowitz completed her research): it became extremely partisan, and it has only gotten worse since then. It is no longer a place where serious policy work gets done. Joe Biden did get some major legislation passed (CHIPs, ARP) the old-fashioned way, but at this point, we now find ourselves in a Presidential system with Parliamentary parties. It is little wonder that virtually all significant legislation nowadays gets done through reconciliation, which cannot be filibustered. Reconciliation, though, cannot be used for huge swathes of policy tasks. And because we are in an era of extreme partisanship, the chances of Congress ever overriding a Presidential veto are vanishingly small: even if the President lacks Congressional majorities, his co-partisans in Congress will have enough votes to block the override.

The Constitution presumes that Congress will be the active policymaking body: that's why its powers are specified in Article I. And for its basic intellectual dishonesty, so does the Major Questions Doctrine: get Congress to move. But over the past two decades — basically since Mitch McConnell decided to make the filibuster routine and paralyze the Senate — Congress has been, in Tim Wu's words, a "dead Congress." It needs to be resuscitated, and the legislative veto can be part of that process.

The most vital lever for re-energizing Congress would, of course, be ending the filibuster. But that is a step that Senators from both parties are really loathe to take, for both good and bad (mostly bad) reasons. Recovering the legislative veto, however, could be a step in a bigger journey: it would be one way in which Congress could "work" without moving so fast.

We should not assume that simply bringing back the legislative veto would restore Congressional-Executive balance: the supineness of the current Republican Congress to Trump demonstrates that. But think for a moment about what would have happened to Trump's "Liberation Day" tariffs had a legislative veto existed:

immediately massive political pressure would descend on Congress to reverse them *because with a legislative veto it could do so*. Right now, Mike Johnson can say something like, “the President will veto our repeal so there is no point.” With the legislative veto, a Presidential veto does not exist: a concurrent resolution would end the White House’s arbitrary behavior.

Since this is Legal Planet, I must answer the question: so what does any of this have to do with the environment? Potentially something important.

Restoring the legislative veto might even get some Republicans to consider positive environmental legislation. I realize that this is assuming some basic good faith where so far none has existed, but consider a Republican member of Congress who knows that something must be done about climate, but is worried about what an executive agency would do — and not coincidentally, how special interests might punish him if he votes for granting that agency authority. With a legislative veto, he or she can say, “look, if EPA goes rogue we can veto it here.” That won’t generate the kind of big legislation necessary, but it might allow for smaller yet constructive steps because Congressmembers will worry less about never getting power back. It could also begin to generate some trust if an agency really *does* do something wrong and the Republican Congressman’s Democratic colleagues agree to veto an agency action. They will be more likely to grant authority if they know that they can take it back.

France is currently operating under the “Fifth Republic,” so-called because of the other constitutional dispensations that have previously governed the country. Whatever comes out of our current phase of [competitive authoritarianism](#) will be a New Republic — and it must have updated, stronger democratic institutions to ensure that we can never again have a Mad King.