Congress' understanding of the "law of nations" in 1789 is relevant to a consideration of whether Congress, by enacting section 1350, intended to open the federal courts to the vindication of the violation of any right recognized by international law. Examining the meaning of the "law of nations" at the time does not, contrary to my colleague's charges, "avoid the dictates of *The Paquete Habana*" and "limit the 'law of nations' to its 18th Century definition." Edwards' op. at 29. The substantive rules of international law may evolve and perhaps courts may apply those new rules, but that does not solve the problem of the existence of a cause of action. If plaintiffs were explicitly provided with a cause of action by the law of nations, as it is currently understood, this court might—subject to considerations of justiciability—be required by section 1350 to entertain their claims. But, as discussed below, *see infra* pp. 816-819, international law today does not provide plaintiffs with a cause of action.[24]

Recognition of suits presenting serious problems of interference with foreign relations would conflict with the primary purpose of the adoption of the law of nations by federal law—to promote America's peaceful relations with other nations. *See The Federalist* No. 80 (A. Hamilton); *The Federalist* No. 83 (A. Hamilton). Judge Edwards cites this rationale as a reason for reading section 1350 as creating a cause of action for private parties. The inference from that rationale seems to me, however, to run in precisely the opposite direction. Adjudication of international disputes of this sort in federal courts, disputes over international violence occurring abroad, would be far more likely to exacerbate tensions with other nations than to promote peaceful relations.

Under the possible meaning I have sketched, section 1350's current function would be quite modest, unless a modern statute, treaty, or executive agreement provided a private cause of action for violations of new international norms which do not themselves contemplate private enforcement. Then, at least, we would have a current political judgment about the role appropriate for courts in an area of considerable international sensitivity.

V.

Whether current international law itself gives appellants a cause of action requires more extended discussion. Appellants' claim, in Count II of their complaint, is that appellees have committed the "torts of terror, torture, hostage-taking and genocide," Brief for Appellants at 29, in violation of various customary principles of international law. Such principles become law by virtue of the "general assent of civilized nations." *The Paquete Habana*, 175 U.S. at 694, 20 S.Ct. at 297. Unlike treaties and statutes, such law is not authoritatively pronounced by promulgation in a written document but must be found in the "customs and usages of civilized nations" as evidenced by the works of "jurists and commentators." *Id.* at 700, 20 S.Ct. at 299; *see* Statute of the International Court of Justice, art. 38, 59 Stat. 1055 (1945), T.S. No. 993; *Restatement of the Foreign Relations Law of the United States (Revised)* §§ 102-103, at 24-38 (Tent. Draft No. 1, 1980). Consequently, any cause of action that might exist, like the precise meaning of the customary principles themselves, must be inferred from the sources that are evidence of and attempt to formulate the legal rules. The district court found, and appellants have not argued to the contrary, that none of the documents appellants have put forth as stating the international legal principles on which they rely expressly state that individuals can bring suit in municipal courts to enforce the specified rights. *See* 517 F.Supp. at 548-49. Moreover, we have been pointed to nothing in their language, structure, or circumstances of promulgation that suggests that any of those documents should be read as implicitly declaring that an individual should be able to sue in municipal courts to enforce the specified rights. In any event, there is no need to review those documents and their origins in further detail, for, as a general rule, international law does not provide a private right of action, and an exception to that rule would have to be demonstrated by clear evidence that civilized nations had generally given their assent to the exception. Hassan, *supra*, 4 Hous.J.Int'l L. at 26-27.

24. Nor is there any significance to the fact that in *The Paquete Habana* the court assumed a private cause of action to exist. That case involved a branch of the law of nations—prize jurisdiction under maritime law—which had long recognized the right of private enforcement. That, as will be shown, is not universally true of international law and most particularly is not true of the area in which this case falls.

International law typically does not authorize individuals to vindicate rights by bringing actions in either international or municipal tribunals. "'Like a general treaty, the law of nations has been held not to be self-executing so as to vest a plaintiff with individual legal rights.'" *Dreyfus v. Von Finck*, 534 F.2d at 31 (quoting *Pauling v. McElroy*, 164 F.Supp. at 393). "[T]he usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 422-23, 84 S.Ct. at 937-38.

This general relegation of individuals to a derivative role in the vindication of their legal rights stems from "[t]he traditional view of international law . . . that it establishes substantive principles for determining whether one country has wronged another." 376 U.S. at 422, 84 S.Ct. at 937. One scholar explained the primary role of states in international law as follows:

> Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.

1 L. Oppenheim, *International Law: A Treatise* 19 (H. Lauterpacht 8th ed. 1955). Even statements of individuals' rights or norms of individual conduct that have earned the universal assent of civilized nations do not become principles of international law unless they are "used by . . . states for their common good and/or in dealings *inter se*." *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292, 297 (E.D.Pa. 1963) (footnote omitted). *See Cohen v. Hartman*, 634 F.2d 318, 319 (5th Cir.1981) ("The standards by which nations regulate their dealings with one another *inter se* constitute the 'law of nations.'"); *IIT v. Vencap, Ltd.*, 519 F.2d at 1015 (ten commandments not international law for this reason).[25]

If it is in large part because "the Law of Nations is primarily a law between States," 1 L. Oppenheim, *supra*, at 636, that international law generally relies on an enforcement scheme in which individuals have no direct role, that reliance also reflects recognition of some other important characteristics of international law that distinguish it from municipal law. Chief among these is the limited role of law in the international realm. International law plays a much less pervasive role in the ordering of states' conduct within the international community than does municipal law in the ordering of individuals' conduct within nations. Unlike our nation, for example, the international community could not plausibly be described as governed by laws rather than men. "[I]nternational legal disputes are not as separable from politics as are domestic legal disputes. . . ." *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. at 775, 92

25. Further evidence that "the Law of Nations is primarily a law between States" is the key role played by nationality in the availability to individuals of international legal protection. 1 L. Oppenheim, *supra*, at 640. Even nationals, however, cannot themselves generally invoke that protection. "If individuals who possess nationality are wronged abroad, it is, as a rule, their home state only and exclusively which has a right to ask for redress, and these individuals themselves have no such right." *Id.* (footnote omitted).

S.Ct. at 1816 (Powell, J., concurring in the judgment).

International law, unlike municipal law (at least in the United States), is not widely regarded as a tool of first or frequent resort and as the last word in the legitimate resolution of conflicts. Nations rely chiefly on diplomacy and other political tools in their dealings with each other, and these means are frequently incompatible with declarations of legal rights. Diplomacy demands great flexibility and focuses primarily on the future rather than on the past, often requiring states to refrain, for the sake of their future relations, from pronouncing judgment on past conduct. *Cf. International Association of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358 (9th Cir.1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1036, 71 L.Ed.2d 319 (1982). Since states adopt international law to improve their relations with each other, it is hardly surprising in the current world that they should generally retain for themselves control over the ability to invoke it. Nor is it surprising that international law is invoked less often to secure authoritative adjudications than it is to bolster negotiating positions or to acquire public support for foreign-relations policies. "By and large, nations have resisted third-party settlement of their disputes and adjudicative techniques have played a very limited role in their relations." Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 Va.J.Int'l L. 1, 1 (1982) (footnote omitted). One consequence is that international law has not been extensively developed through judicial decisions. *See* L. Henkin, R. Pugh, O. Schachter & H. Smit, *supra*, at 88 ("The strongly political character of many international issues accounts for the relative paucity of judicial decisions in contemporary international law.").

This remains true even as international law has become increasingly concerned with individual rights. Some of the rights specified in the documents relied upon by appellants as stating principles of international law recognizing individual rights are clearly not expected to be judicially enforced throughout the world. *E.g.*, Universal Declaration of Human Rights, G.A.Res. 217, 3 U.N.GAOR, U.N.Doc. 1/777 (1948) (right to life, liberty, and security of person; right to freedom from arbitrary detention; right to leave country; right to practice religion; right to speak and assemble; right to freely elected government); International Covenant on Civil and Political Rights, Annex to G.A.Res. 2200, 21 U.N.GAOR Supp. (No. 16) at 52, U.N.Doc. A/6316 (1966) (similar list of rights); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, *reprinted in* 9 I.L.M. 101 (1970), 65 Am.J.Int'l L. 679 (1971) (similar list of rights). Some of the key documents are meant to be statements of ideals and aspirations only; they are, in short, merely precatory. *See* 1 L. Oppenheim, *supra*, at 745; 19 Dep't St.Bull. 751 (1948) (Universal Declaration on Human Rights "is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation") (remarks of U.S. representative to U.N. General Assembly) (quoted in L. Henkin, R. Pugh, O. Schachter & H. Smit, *supra*, at 808). Some define rights at so high a level of generality or in terms so dependent for their meaning on particular social, economic, and political circumstances that they cannot be construed and applied by courts acting in a traditional adjudicatory manner. *E.g.*, Universal Declaration of Human Rights, *supra* (rights to work, to just compensation, to leisure, to adequate standard of living, to education, to participation in cultural life). Declaration of the Rights of the Child, G.A.Res. 1386, 14 U.N.GAOR Supp. (No. 16) at 19, U.N.Doc. A/4354 (1959) (rights to opportunity to develop in normal manner, to grow up in atmosphere of affection and of moral and material security, to develop abilities, judgment and sense of moral and social responsibility, and to play). Some expressly oblige states to enact implementing legislation, thus impliedly denying a private cause of action. *E.g.*, International Covenant on Civil and Political Rights, art. 2, *supra*;[26] American Convention on Human Rights, art. 2, *supra*.

It may be doubted that courts should understand documents of this sort as having been assented to as law by all civilized nations since enforcement of the principles enunciated would revolutionize most societies. For that reason, among others, courts should hesitate long before finding violations of a "law of nations" evidenced primarily by the resolutions and declarations of multinational bodies. *See* Note, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 Colum.L.Rev. 751, 772-74, 780-83 (1982). In any event, many of the rights they declare clearly were not intended for judicial enforcement at the behest of individuals. The express provision in the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 25, 213 U.N.T.S. 221, E.T.S. 5, of an international tribunal to which individuals may bring claims, thus evidencing states' ability to provide private rights of action when they wish to do so, is an extraordinary exception that highlights the general absence of individual-complaint procedures. Even that exception, moreover, is a far cry from the authorization of ordinary municipal-court enforcement. Current international human rights law, in whatever sense it may be called "law," is doubtless growing. But it remains true that even that branch of international law does not today generally provide a private right of action.

Appellants, therefore, are not granted a private right of action to bring this lawsuit either by a specific international legal right or impliedly by the whole or parts of international law.

VI

In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980), the Second Circuit, which did not address the issue of the existence of a cause of action, held that section 1350 afforded jurisdiction over a claim brought by Paraguayan citizens against a former Paraguayan official. The plaintiffs, a father and daughter, alleged that the defendant had tortured his son, her brother, in violation of international law's proscription of official torture. To highlight what I believe should be the basis for our holding, it is worth pointing out several significant differences between this case and *Filartiga*.

First, unlike the defendants in this case, the defendant in *Filartiga* was a state official acting in his official capacity. Second, the actions of the defendant in *Filartiga* were in violation of the constitution and laws of his state and were "wholly unratified by that nation's government." 630 F.2d at 889. Third, the international law rule invoked in *Filartiga* was the proscription of official torture, a principle that is embodied in numerous international conventions and declarations, that is "clear and

26. The International Covenant on Civil and Political Rights directs states to provide a forum for private vindication of rights under the Covenant. That provision, however, should not be taken to suggest the Covenant grants or recognizes a private right of action in municipal courts in a case like this. First, the Covenant directs states to provide forums only for the vindication of rights against themselves, not for the vindication of rights against other states. It is only the latter that raises all the political, foreign relations problems that lie behind international law's general rule against private causes of action; thus, even if the Covenant suggests recognition of a private cause of action for the former, it does not do so for the latter. Second, the Covenant does not itself say individuals can sue. Rather, it leaves to states the fulfillment of an obligation to create private rights of action.

It is worth noting that the Human Rights Committee established by article 28 of the Covenant provides for complaints about a state's conduct to be brought only by another state and then only if the "defendant" state consents to the Committee's jurisdiction. An Optional Protocol, Annex to G.A.Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 59, U.N.Doc. A/6316 (1966), provides for individuals' complaints. As of 1980, it had been ratified by thirty states; the United States is not among them. *See* L. Henkin, R. Pugh, O. Schachter & H. Smit, *Basic Documents Supplement to International Law* 236 (1980). *See generally* Schitt, *The New International Law Protection of the Rights of Individuals Rather than States*, 32 Am.U.L.Rev. 1, 21-24 (1982).

unambiguous" in its application to the facts in *Filartiga*, *id.* at 884, and about which there is universal agreement "in the modern usage and practice of nations." *Id.* at 883.

Thus, in *Filartiga* the defendant was clearly the subject of international-law duties, the challenged actions were not attributed to a participant in American foreign relations, and the relevant international law principle was one whose definition was neither disputed nor politically sensitive. None of that can be said about this case. For these reasons, not all of the analysis employed here would apply to deny a cause of action to the plaintiffs in *Filartiga*.

I differ with the *Filartiga* decision, however, because the court there did not address the question whether international law created a cause of action that the private parties before it could enforce in municipal courts. For the reasons given, that inquiry is essential.

VII.

The opinions in this case are already too long and complex for me to think it appropriate to respond in detail to Judge Edwards' and Judge Robb's arguments. A few points ought to be made, however, with respect to each of the other concurring opinions.

A.

First, Judge Edwards attributes to me a number of positions that I do not hold. *See* Edwards' op. at 777. For example, far from rejecting the four propositions he extracts from *Filartiga*, I accept the first three entirely and also agree with the fourth, but in a more limited form – namely, "section 1350 opens the federal courts for adjudication of rights already recognized by international law" but only when among those rights is that of individuals to enforce substantive rules in municipal courts.

Second, as noted earlier in this opinion, section 1350 provides jurisdiction for tort actions alleging violations of the "law of nations" and "treaties of the United States." No process of construction can pry apart those sources of substantive law; in section 1350, they stand in parity. If, as Judge Edwards states and *Filartiga* assumes, section 1350 not only confers jurisdiction but creates a private cause of action for any violation of the "law of nations," then it also creates a private cause of action for any violation of "treaties of the United States." This means that all existing treaties became, and all future treaties will become, in effect, self-executing when ratified. This conclusion stands in flat opposition to almost two hundred years of our jurisprudence, and it is simply too late to discover such a revolutionary effect in this little-noticed statute. This consideration alone seems to me an insuperable obstacle to the reading Judge Edwards and *Filartiga* give to section 1350.

Third, the implications of Judge Edwards' theory—that section 1350 itself provides the requisite cause of action—cause him so much difficulty that he is forced to invent limiting principles. Thus, the law enunciated in *Filartiga* is said to cover only those acts recognized as "international crimes," a category which he supposes not to be as broad as the prohibitions of the law of nations. This restriction may allay some, though by no means all, apprehensions about what courts may get themselves and the United States into, but it comes out of nothing in the language of section 1350. According to that statute, jurisdiction exists as to any tort in violation of the law of nations.

The "alternative formulation" my colleague espouses requires even more legislation to tame its unruly nature. Recognizing that this "alternative formulation" would open American courts to disputes "wholly involving foreign states," the concurrence erects a set of limiting principles. Three kinds of suits only are to be allowed: (1) by aliens for domestic torts committed on United States territory and that injure "substantial rights" under international law; (2) by aliens for "universal crimes" (no matter where committed), and (3) by aliens against Americans for torts committed abroad, "where redress in American courts might preclude international repercussions." Edwards' op. at 788. Aside from the unguided policy judgments which these definitions require, and whatever else may be said of them, it is clear that these limitations are in no way prescribed, or even suggested, by the language of section 1350. Rather, they are imposed upon that language for reasons indistinguishable from ordinary legislative prudence. The necessity for these judicially invented limitations merely highlights the error in the reading given section 1350.

Finally, in assessing a statute such as this—one whose genesis and purpose are, to say the least, in considerable doubt—some perspective is required. For a young, weak nation, one anxious to avoid foreign entanglements and embroilment in Europe's disputes, to undertake casually and without debate to regulate the conduct of other nations and individuals abroad, conduct without an effect upon the interests of the United States, would be a piece of breathtaking folly—so breathtaking as to render incredible any reading of the statute that produces such results.

It is anomalous to suggest that such a reading is supported by Alexander Hamilton's concern, expressed in *The Federalist* No. 80, that aliens' grievances be redressable in federal courts. Hamilton was defending judicial authority which extended "to all those [cases] which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves." *The Federalist* No. 80 (A. Hamilton). His concerns were very largely met by federal diversity jurisdiction, and, it would seem, would be entirely met by a section 1350 which had the historical meaning I have suggested above as plausible.

If section 1350 had been designed to provide aliens with redress in order to place in federal courts all those disputes about treaties and international law that might provoke international incidents, the jurisdiction given would not have been limited to torts only. The concurrence's response to this observation is to surmise a "compromise" for which there is absolutely no historical evidence.

But the trouble goes deeper than this. Judge Edwards' reading of the statute gives federal jurisdiction to suits between aliens for violations of international law and treaties of the United States. He suggests that this is proper because "[a] denial of justice might create the perception that the United States is siding with one party, thereby affronting the state of the other." Edwards' op. at 781 n. 13. This turns Hamilton's argument on its head. A refusal by a United States court to hear a dispute between aliens is much less offensive to the states involved than would be an acceptance of jurisdiction and a decision on the merits. In the latter case, the state of the losing party would certainly be affronted, particularly where the United States' interests are not involved. The United States would be perceived, and justly so, not as a nation magnanimously refereeing international disputes but as an officious interloper and an international busybody.

Indeed, it seems to me that Judge Edwards' interpretation would require us to hear this case, thus thrusting the United States into this improper and undesirable role. It can be argued that appellants here have alleged "official" torture: the complaint alleges that the PLO, in carrying out its attacks, which the complaint alleges to have included torture, was acting at the behest of and in conjunction with Libya. Viewed this way, this case is indistinguishable from *Filartiga*, and as such, Judge Edwards' approach would force us to hear it. In entertaining such a suit, one of the issues would be whether the relationship between the PLO and Libya constituted that of agent and principal, so that Libya should be held responsible for the PLO's actions. The prospect of a federal court ordering discovery on such an issue, to say nothing of actually choosing it is, or ought to be, little short of terrifying. If anything is likely to

disturb the "PEACE of the CONFEDERACY," this is.

If more needs to be said against the construction my colleague and the *Filartiga* court would give section 1350, it may be observed that their interpretation runs against the grain of the Constitution. It does so by confiding important aspects of foreign relations to the Article III judiciary despite the fact that the Constitution, in Article II and Article I, places that responsibility in the President and Congress. That is the fundamental reason I have argued that it is improper for judges to infer a private cause of action not explicitly granted.

B.

Judge Robb misapprehends my position, equating it, in many respects, with Judge Edwards'. I have not read section 1350 as authorizing the courts to enter into sensitive areas of foreign policy: quite the contrary. As I have suggested, the statute probably was intended to cover only a very limited set of tort actions by aliens, none of which is capable of adversely affecting foreign policy. Since international law does not, nor is it likely to, recognize the capacity of private plaintiffs to litigate its rules in municipal courts, as a practical matter only an act of Congress or a treaty negotiated by the President and ratified by the Senate could create a cause of action that would direct courts to entertain cases like this one. Should such an improbable statute or treaty come into existence, it will be time to ask whether the constitutional core of the political question doctrine precludes jurisdiction. That inquiry would necessarily be constitutional in scope, for the prudential aspect of the doctrine would be insufficient to deny jurisdiction if Congress had tried to do what *Filartiga* supposes. Judge Robb apparently thinks that the constitutional core applies, since he invokes the political question doctrine without even inquiring whether the statute applies to a case like this.

Judge Robb chides me for stating that the PLO "bears significantly upon the foreign relations of the United States." He states that I thereby give that organization "more in the way of official recognition than [it] has ever before gained from any institution of the national government." As it happens, that is not correct. Numerous officials of the United States have discussed the problems posed by the PLO for American foreign policy, including the President and the Secretary of State.[27] Judicial circumspection is certainly an admirable quality, but a court need not be so demure that it cannot even mention what the world knows and the highest officials of our government publicly discuss. It is, moreover, particularly startling to see the case for such extraordinary prudence made in an opinion that itself contains clear implications of responsibility for worldwide terrorism. It is surely self-defeating to engage in such speculations in order to avoid making the milder observation that the PLO affects our foreign relations.

Were the matter mine to decide, I would probably agree that the constitutional core of the political question doctrine bars this or any similar action. But I am bound by Supreme Court precedent and that precedent, in general and as it bears in particular upon the constitutional component of the doctrine, is most unclear. For that reason,

27. *See, e.g.*, Meeting with Hispanic, Labor, and Religious Press, 19 Weekly Comp.Pres.Doc. 1215, 1248-49 (Sept. 14, 1983) (President Reagan's response to question: "[O]ne of the reasons why we would never negotiate with the PLO [is] because they openly said they denied the right of Israel to be a nation"); Foreign and Domestic Issues, Question-and-Answer Session with Reporters, 19 Weekly Comp.Pres.Doc. 643, 647-48 (May 1, 1983) (President Reagan's response to question: "[A]re they going to stand still for their interests being neglected on the basis of an action taken by this group, the PLO, which, as I say, was never elected by the Palestinian people?"); N.Y. Times, Nov. 10, 1983, at A12, col. 5 (remarks of Under Secretary of State for Political Affairs Lawrence S. Eagleburger): And, most recently, the New York Times reported on its front page Secretary of State George P. Shultz's comments that "the outcome of the struggle within the Palestine Liberation Organization was certain to have 'major implications' for the future of the American-sponsored peace efforts in the Middle East." N.Y. Times, Nov. 20, 1984, at A1, col. 5.

and others I have specified, see *supra* pp. 803 & note 8, it seems better to rest the case upon the grounds I have chosen. The result is the same. I would have said that this course has the additional virtue of giving guidance to the bar, but, as matters have turned out, the three opinions we have produced can only add to the confusion surrounding this subject. The meaning and application of section 1350 will have to await clarification elsewhere. Since section 1350 appears to be generating an increasing amount of litigation, it is to be hoped that clarification will not be long delayed. In the meantime, it is impossible to say even what the law of this circuit is. Though we agree on nothing else, I am sure my colleagues join me in finding that regrettable.

ROBB, Senior Circuit Judge:

I concur in the result, but must withhold approval of the reasoning of my colleagues. Both have written well-researched and scholarly opinions that stand as testaments to the difficulty which this case presents. Both agree that this case must be dismissed though their reasons vary greatly. Both look backward to *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980), and forward to the future efforts of others maimed or murdered at the hands of thugs clothed with power who are unfortunately present in great numbers in the international order. But both Judges Bork and Edwards fail to reflect on the inherent inability of federal courts to deal with cases such as this one. It seems to me that the political question doctrine controls. This case is nonjusticiable.

A. *This case involves standards that defy judicial application.*

Tort law requires both agreement on the action which constitutes the tort and the means by which it can be determined who bears responsibility for the unlawful injury. Federal courts are not in a position to determine the international status of terrorist acts. Judge Edwards, for example, notes that "the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus." Edwards Opinion at 795. This nation has no difficulty with the question in the context of this case, of course, nor do I doubt for a moment that the attack on the Haifa highway amounts to barbarity in naked and unforgivable form. No diplomatic posturing as reported in sheaves of United Nations documents no matter how high the pile might reach could convince me otherwise. But international "law", or the absence thereof, renders even the search for the least common denominators of civilized conduct in this area an impossible-to-accomplish judicial task. Courts ought not to engage in it when that search takes us towards a consideration of terrorism's place in the international order. Indeed, when such a review forces us to dignify by judicial notice the most outrageous of the diplomatic charades that attempt to dignify the violence of terrorist atrocities, we corrupt our own understanding of evil.

Even more problematic would be the single court's search for individual responsibility for any given terrorist outrage. International terrorism consists of a web that the courts are not positioned to unweave. To attempt to discover the reach of its network and the origins of its design may result in unintended disclosures imperiling sensitive diplomacy. This case attempts to focus on the so-called P.L.O. But which P.L.O.? Arafat's, Habash's, or Syria's? And can we conceive of a successful attempt to sort out ultimate responsibility for these crimes? Many believe that most roads run East in this area.[1] Are courts prepared to travel

1. *See, e.g. Implementation of the Helsinki Accords, Hearing Before the Commission on Security and Cooperation in Europe, The Assassination Attempt on Pope John Paul II*, 97th Cong., 2d Sess. 20 (Statement of Michael A. Ledeen) ("[M]any terrorist organizations get support from the Soviet Union and its many surrogates around the world. I do not think there should be much doubt about the matter. The Russians train PLO terrorists in the Soviet Union, supervise the training of terrorists from all over the world in Czechoslovakia—or at

these highways? Are they equipped to do so? It is one thing for a student note-writer to urge that courts accept the challenges involved.[2] It is an entirely different matter for a court to be asked to conduct such a hearing successfully. The dangers are obvious. To grant the initial access in the face of an overwhelming probability of frustration of the trial process as we know it is an unwise step. As courts could never compel the allegedly responsible parties to attend proceedings much less to engage in a meaningful judicial process, they ought to avoid such imbroglios from the beginning.

B. *This case involves questions that touch on sensitive matters of diplomacy that uniquely demand a singlevoiced statement of policy by the Government.*

Judge Bork's opinion finds it necessary to treat the international status of the P.L.O., and to suggest that that organization "bears significantly on the foreign relations of the United States." Bork Opinion at 805. This is considerably more in the way of official recognition than this organization has ever before gained from any institution of the national government. I am not in a position to comment with authority on any of these matters. There has been no executive recognition of this group, and for all our purposes it ought to remain an organization "of whose existence we know nothing . . ." *United States v. Klintock*, 18 U.S. 144, 149 (5 Wheat.) 5 L.Ed. 55 (1820). As John Jay noted: "It seldom happens in the negotiations of treaties, of whatever nature, but that perfect secrecy and immediate *dispatch* are sometimes requisite." *The Federalist*, # 64, Jay (Paul L. Ford, ed.). What was then true about treaties remains true for all manner of modern diplomatic contacts. It may be necessary for our government to deal on occasion with terrorists. It is not, however, for courts to wonder aloud as to whether these negotiations have, are, or will be taking place. Western governments have displayed a near uniform reluctance to engage in much discussion on the organization and operation of terrorist groups, much less on any hidden contacts with them.[3] When a genre

least they did until recently, according to a leading detector, General Jan Sejna—and work hand in glove with countries like Libya, Cuba, and South Yemen in the training of terrorists.") *See also* Adams, *Lessons and Links of Anti-Turk Terrorism*, Wall St.J., Aug. 16, 1983, at 32, col. 6 (The Armenian Secret Army for the Liberation of Armenia "remains a prime suspect for the charge of KGB manipulation of international terror. But in this area one researcher in the field advises, 'You will never find the smoking gun'"). Barron, *KGB* 151, 255-257 (1974). Barron, *KGB Today: The Hidden Hand*, 21-22, 255-256 (1983).

2. Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 Fordham Int'l L.J. (1982).

3. C. Sterling, *The Terror Network* (1981). Sterling repeatedly points out, and often criticizes, the reluctance of Western governments to openly detail the international cooperation that girds most terrorist activities. She writes:

> No single motive could explain the iron restraint shown by Italy, West Germany, and all other threatened Western governments in the face of inexorably accumulating evidence. . . . Both, and all their democratic allies also had compelling reasons of state to avoid a showdown with the Soviet Union. . . . All were certainly appalled at the thought of tangling with KGB rulers. . . . [P]olitical considerations were almost certainly paramount for government leaders under seige who . . . wouldn't talk.

Id. at 291, 294. Whatever the merits of Sterling's criticisms of this near uniform silence, the fact remains that our government, like those of its closest allies, is extremely wary of publicity in this area. Commenting on the refusal of Western governments to openly discuss the possibility of Soviet complicity in the attempt to assassinate Pope John Paul II, Congressman Ritter, a member of the bipartisan commission drawn from both the executive and legislative branches which is charged with monitoring compliance with the Helsinki Accords, commented that "[t]he involved governments have stayed away from this hot potato for a variety of reasons." *Implementation of the Helsinki Accords, Hearing Before the Commission on Security and Cooperation in Europe, The Assassination Attempt on Pope John Paul II, supra*, at 16. Both Sterling's book and the hearings in which Congressman Ritter participated are indispensable background reading for a court confronted with a question such as the one before us. These and other texts bring home the hopelessness of any attempt by an American court to trace a reliable path of responsibility for almost every terrorist outrage. These labyrinths of international intrigue will admit no judicial Theseus.

of cases threatens to lead courts repeatedly into the area of such speculations, then that is a signal to the courts that they have taken a wrong turn. The President may be compelled by urgent matters to deal with the most undesirable of men. The courts must be careful to preserve his flexibility and must hesitate to publicize and perhaps legitimize that which ought to remain hidden and those who deserve the brand of absolute illegitimacy. By jumping the political question threshold here, my colleagues appear to be leading us in just the opposite direction.

C. *Questions connected to the activities of terrorists have historically been within the exclusive domain of the executive and legislative branches.*

The conduct of foreign affairs has never been accepted as a general area of judicial competence. Particular exceptions have, of course, arisen. When the question is precisely defined, when the facts are appropriately clear, the judiciary has not hesitated to decide cases connected with American foreign policy.[4]

But cases which would demand close scrutiny of terrorist acts are far beyond these limited exceptions to the traditional judicial reticence displayed in the face of foreign affairs cases. That traditional deference to the other branches has stemmed, in large part, from a fear of undue interference in the affairs of state, not only of this nation but of all nations. Judge Mulligan, writing in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied* 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977), warned that a "Serbian Bog" awaits courts that inquire into the policies of foreign sovereigns. *Id.* at 77. A model of judicial deference, appropriately invoked, is *Diggs v. Richardson*, 555 F.2d 848 (D.C.Cir.1976). In that case this court was asked to enforce a United Nations Security Council Resolution. This court ruled, in effect that the matter was nonjusticiable, and a part of the reasoning supporting that conclusion was that the Resolution did not provide specific standards suitable to "conventional adjudication". *Id.* at 851. The court added that the standards that were supplied were "foreign to the general experience and function of American courts". *Id.* In refusing to allow the case to be jammed into our judicial process, the court was fully aware that its deference did not abdicate all American participation in the issues raised by the Resolution. Our nation's involvement in the diplomatic arena was in no way circumscribed by judicial circumspection.

Similarly, the issues raised by this case are treated regularly by the other branches of the national government. One need only review the work of the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary to recognize that the whole dangerous dilemma of terrorism and the United States response to it are subjects of repeated and thorough inquiry. *See, e.g., Historical Antecedents of Soviet Terrorism Before the Subcomm. on Security and Terrorism of the Senate Comm. on Judiciary*, 97th Cong., 1st Sess. 1 (1981). *See also, Extradition Reform Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 1 (1982). The executive branch is also deeply involved in the monitoring and attempted control of terrorist activities. *See, e.g., The Role of Cuba in International Terrorism and Subversion, Intelligence Activities of the DGI, Before the Subcomm. on Security and Terrorism of the Senate Comm. on Judiciary*, 97th Cong., 2d Sess. 85 (1982) (statement of Fred C. Ikle, Undersecretary of Defense for Policy). The President has repeatedly demonstrated his concern that terrorism be combatted, both in his statements at home, and in the declarations that have accompanied his meetings with our allies. *See* 18 *Weekly Compilation of Presidential Documents*, 55, 575, 763, 783, 1352 (1982). It is thus obvious that even with this declaration of nonjusticiability by the court, the work of tracing and assessing responsibility for terrorist acts will continue by those parts of the government which by

4. *See, e.g., Haig v. Agee*, 453 U.S. 280, 292, 101 S.Ct. 2766, 2774, 69 L.Ed.2d 640 (1981) ("Matters intimately related to foreign policy are [not] per se objects for judicial intervention. *Dunn & Shoaf, P. A. v. Meyer*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed. [illegible] (1981)

tradition and accumulated expertise are far better positioned than the courts to conduct such inquiries.

D. *Cases such as this one are not susceptible to judicial handling.*

As noted above in section A, the pragmatic problems associated with proceedings designed to bring terrorists to the bar are numerous and intractable. One other note must be added. Courts have found it extremely difficult to apply the "political exception" doctrine in extradition proceedings when those proceedings have concerned prisoners who are accused of terrorist activities. *See Abu Eain v. Adams*, 529 F.Supp. 685 (N.D.Ill.1980) *and McMullen v. Immigration and Naturalization Service*, 658 F.2d 1312 (9th Cir.1981). This difficulty is so pronounced that one member of the executive branch has testified to Congress that there is simply "no justiciable standard to the political offense," and that when courts have been confronted with such situations, "there has been a tendency for a breakdown in the ability of our courts to process extradition questions," with the result that courts "tend to beg the question . . .". *Extradition Reform Act of 1981, Hearings on H.R. 5227 Before Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 24-25 (Testimony of Roger Olson, Deputy Asst. Attorney General, Criminal Division, U.S. Dept. of Justice). If courts are vexed by these questions within the limited context of extradition proceedings—an area in which there is considerable judicial experience—it is easy to anticipate the breakdowns that would accompany proceedings under 28 U.S.C. § 1350 if they are allowed to go forward. Sound consideration of the limits of judicial ability demands invocation of the political question doctrine here. This is only common sense and a realistic measure of roles that courts are simply not equipped to play.

E. *The possible consequences of judicial action in this area are injurious to the national interest.*

The certain results of judicial recognition of jurisdiction over cases such as this one are embarrassment to the nation, the transformation of trials into forums for the exposition of political propaganda, and debasement of commonly accepted notions of civilized conduct.

We are here confronted with the easiest case and thus the most difficult to resist. It was a similar magnet that drew the Second Circuit into its unfortunate position in *Filartiga*.[5] But not all cases of this type will be so easy. Indeed, most would be far less attractive. The victims of international violence perpetrated by terrorists are spread across the globe. It is not implausible that every alleged victim of violence of the counter-revolutionaries in such places as Nicaraugua and Afghamstan could argue just as compellingly as the plaintiffs here do, that they are entitled to their day in the courts of the United States. The victims of the recent massacres in Lebanon could also mount such claims. Indeed, there is no obvious or subtle limiting principle in sight. Even recognized dissidents who have escaped from the Soviet Union could conceivably bring suit for violations of international law having to do with the conditions of their earlier confinements. Each supposed scenario carries with it an incredibly complex calculus of actors, circumstances, and geopolitical considerations. The courts must steer resolutely away from involvement in this manner of case. It is too glib to assert simply that courts are used to dealing with difficult questions. They are not used to this kind of question.

5. I do not doubt for a moment the good intentions behind Judge Kaufman's opinion in *Filartiga*. But the case appears to me to be fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure. The refusal to separate rhetoric from reality is most obvious in the passage which states that "for the purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." 630 F.2d at 890. This conclusion ignores the crucial distinction that the pirate and slave trader were men without nations, while the torturer (and terrorist) are frequently pawns and well-controlled tools in international politics. When Judge Kaufman concluded that "[o]ur holding today giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence," *id.*, he failed to consider the possibility that *ad hoc* intervention by courts into international affairs may very well rebound to the decisive disadvantage of the nation. A plaintiff's individual victory, if it entails embarrassing disclosures of this country's approach to the control of the terrorist phenomenon, may in fact be the collective's defeat. The political question doctrine is designed to prevent just this sort of judicial gambling, however apparently noble it may appear at first reading.

The more arcane aspects of international law connected to this case are dealt with by my colleagues. Their review of the subject are quite exhaustive and their speculations on the riddle of § 1350 are innovative. But it is all quite unnecessary. Especially inappropriate is their apparent reliance for guidance on the distinguished commentators in this field. I agree with the sentiment expressed by Chief Justice Fuller in his dissent to *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900), where he wrote that it was "needless to review the speculations and repetitions of writers on international law. . . . Their lucubrations may be persuasive, but are not authoritative." *Id.* at 720, 20 S.Ct. at 307 (Fuller, J. dissenting). Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. Yet this appears to be the clear result if we allow plaintiffs the opportunity to proceed under § 1350. Plaintiffs would troop to court marshalling their "experts" behind them. Defendants would quickly organize their own platoons of authorities. The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international "law".

Judge Edwards writes that "[t]his case deals with an area of law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the 'law of nations'." Edwards Opinion at 775. I must disagree. When a case presents broad and novel questions of this sort, courts ought not to appeal for guidance to the Supreme Court, but should instead look to Congress and the President. Should these branches of the Government decide that questions of this sort are proper subjects for judicial inquiry, they can then provide the courts with the guidelines by which such inquiries should proceed. We ought not to parlay a two hundred years-old statute into an entree into so sensitive an area of foreign policy. We have no reliable evidence whatsoever as to what purpose this "legal Lohengrin", as Judge Friendly put it, was intended to serve. *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir.1975). We ought not to cobble together for it a modern mission on the vague idea that international law develops over the years. Law may evolve, but statutes ought not to mutate. To allow § 1350 the opportunity to support future actions of the sort both countenanced in *Filartiga* and put forward here is to judicially will that statute a new life. Every consideration that informs the sound application of the political question doctrine militates against this result. My colleagues concede that the origins and purposes of this statute are obscure, but it is certainly obvious that it was never intended by its drafters to reach this kind of case. Accordingly, I concur in the decision to affirm the dismissal of this case.

Ayub K. OMMAYA, Petitioner,

v.

NATIONAL INSTITUTES OF HEALTH, Department of Health and Human Services, Respondents.

No. 82-1818.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 14, 1983.

Decided Feb. 3, 1984.

Government physician petitioned for review of decision of the Merit Systems

DECISIONS WITHOUT PUBLISHED OPINIONS—Continued

Title	Docket Number	Date of Decision	Disposition	Appeal from and Citation (If reported)
*U.S. v. Borlick	84–1673	3/25/85	AFFIRMED	W.D.Tex.
*U.S. v. Nokes	84–1868	3/25/85	AFFIRMED	N.D.Tex.
*Campbell v. Caldwell	84–2279	3/25/85	AFFIRMED	S.D.Tex.
*Worthington v. Utility Trailer	84–2390	3/25/85	AFFIRMED	S.D.Tex.
*Phillips Petro v. Circle Bar Drilling	84–3595	3/25/85	DISMISSED	E.D.La.
*Rasberry v. Smith	83–2209	3/26/85	AFFIRMED IN PART	S.D.Tex.
*Rasberry v. Herklotz	83–2434	3/26/85	AFFIRMED	S.D.Tex.
U.S. v. Revco	84–1456	3/26/85	AFFIRMED	W.D.Tex.
*Dill v. Maggio	84–3686	3/26/85	AFFIRMED	E.D.La.
*U.S. v. Barksdale	84–3835	3/26/85	AFFIRMED	E.D.La.
*Hebert v. Mallard	84–4337	3/26/85	AFFIRMED	W.D.La.
*Herrera-Ceballos v. U.S. Dept. Justice	84–4600	3/26/85	AFFIRMED	I.N.S.
*†Levingston v. Hammett	84–4742	3/26/85	AFFIRMED	N.D.Miss.
*Nat'l Bk of Commerce v. Schott	84–4743	3/26/85	AFFIRMED	N.D.Miss.
U.S. v. Williams	84–1440	3/27/85	AFFIRMED	N.D.Tex.
*U.S., In re	84–2758	3/27/85	VACATED	E.D.Tex. 595 F.Supp. 731
*Lefort v. Heckler	84–3237	3/27/85	REVERSED	E.D.La.
*U.S. v. Parker	84–4355	3/27/85	AFFIRMED	S.D.Miss.
*Jacobs v. Bolger	84–4476	3/27/85	AFFIRMED	W.D.La., 587 F.Supp. 374
*Aguilar v. Onion	84–1748	3/28/85	REVERSED	W.D.Tex.
*Payne v. Intern'l Harvester Co.	84–4740	3/28/85	AFFIRMED	S.D.Miss.
*U.S. v. Peinado	84–1426	3/29/85	AFFIRMED	W.D.Tex.

* Fed.R.App.P. 34(a); 5th Cir.R. 34.2.
† Local Rule 47.6 case.

Michael D. BARNES, individually and as a member of U.S. House of Representatives, et al., and United States Senate, et al., Appellants,

v.

Ray KLINE, individually and in his capacity as Administrator, General Services Administration, et al.

No. 84–5155.

United States Court of Appeals, District of Columbia Circuit.

Argued June 4, 1984.

Decided Aug. 29, 1984.

Opinions Filed April 12, 1985.

As Amended April 12, 1985.

Thirty-three individual members of the House of Representatives, joined by the United States Senate and the Speaker and Bipartisan leadership of the House of Representatives sued the Executive Clerk of the White House and the Acting Administration of General Services seeking declaratory and injunctive relief that would nullify the President's attempted pocket veto of certain legislation. The United States District Court for the District of Columbia, 582 F.Supp. 163, found for defendants. The Court of Appeals, 743 F.2d 45 reversed and remanded. In a subsequently announced opinion, the Court of Appeals, McGowan, Senior Circuit Judge, held that: (1) plaintiffs had standing; (2) dispute was not one beyond the court's authority and was not one as to which the court was to shirk its duties merely because the parties were coordinate branches of government; and (3) adjournment of the Ninety-Eighth Congress at end of its first session did not prevent return of a bill presented to the President on the date of adjournment so as to create opportunity for a pocket veto.

Reversed and remanded.

Bork, Circuit Judge, filed dissenting opinion.

1. Federal Courts ⇐724

Fact that since filing of appeal involving application of pocket veto to bill presented to the President on day of adjournment of first session of Ninety-eighth Congress concerning human rights certification requirement as condition of continued military assistance to El Salvador the Congress passed and the President signed a supplemental appropriation bill that differed somewhat from bill at issue did not moot the appeal and a live controversy remained as Congress might make further appropriations to which certification requirement of subject bill might apply if it became law. U.S.C.A. Const. Art. 1, § 7, cl. 2; International Security and Development Cooperation Act of 1981, §§ 728, 728(b-c), 22 U.S.C.A. § 2370 note; 1 U.S.C.A. § 106.

2. Constitutional Law ⇐42.3(3)

Thirty-three individual representatives, the House Bipartisan Leadership Group and the United States Senate had standing to maintain action challenging constitutionality of the pocket veto as applied to legislation presented to the President on the day on which the Ninety-eighth Congress adjourned its first session sine die and agreed by joint resolution to convene for a second session approximately two months later. U.S.C.A. Const. Art. 1, § 7, cl. 2.

3. Federal Courts ⇐12.13

When a proper dispute arises concerning respective constitutional functions of the various branches of government it is the province and duty of the judicial department to say what the law is and the courts may not avoid resolving genuine cases or controversies simply because one or both parties are coordinate branches of government and, hence, the court had authority to decide and would not refrain from deciding issue of congressional challenge to President's invocation of the pocket veto power. U.S.C.A. Const. Art. 1, §§ 1 et seq., 7, cl. 2; Art. 3, § 1 et seq.

4. Statutes ⇐31

Pocket veto clause is intended not as an affirmative grant of power to the Execu-

ive, but rather as a limitation on the prerogative of Congress to reconsider a bill on presidential disapproval. U.S.C.A. Const. Art. 1, § 7, cl. 2.

5. Statutes ⇐34

The President must truly have been deprived of his opportunity to exercise his qualified veto power under the pocket veto clause before it may be held that return of a bill was prevented by adjournment of Congress. U.S.C.A. Const. Art. 1, § 7, cl. 2.

6. Statutes ⇐34

Mere absence of the originating house does not prevent the President's return of a bill, for purposes of the pocket veto, if there is an authorized agent to accept delivery of a veto message and such a procedure would not entail the delay and uncertainty justly feared by the Court in the *Pocket Veto Case*. U.S.C.A. Const. Art. 1, § 7, cl. 2.

7. Statutes ⇐34

Neither past practice of the Executive Branch nor Congress' acquiescence in practice concerning exercise of presidential pocket veto during intersession adjournment of Congress was conclusive of issue whether adjournment of Ninety-eighth Congress at end of its first session prevented return of a bill presented to the President beyond date of adjournment and past practice was not particularly relevant, given that it developed under adjournment conditions markedly different from those prevailing today. U.S.C.A. Const. Art. 1, § 7, cl. 2.

8. Courts ⇐90(2)

One panel of Court of Appeals is not free to reconsider a decision by another panel, and until decision of the other panel is overruled by the full court sitting en banc it remains the law of the circuit.

9. Statutes ⇐34

It is not the rule that if the tenth day after presentment of a bill to the President falls during an adjournment of Congress of over three days a bill that has not yet been returned expires by the pocket veto regardless of existence of procedures that would ensure actual return to the originating house and it is only those adjournments that actually prevent return that create opportunity for a pocket veto and a court must examine the conditions surrounding that type of adjournment and determine whether any obstacle to exercise of the President's qualified veto is imposed. U.S.C.A. Const. Art. 1, § 7, cl. 2.

10. Statutes ⇐34

The pocket veto clause necessarily applies to the final adjournment by a Congress because under the Constitution, that Congress has gone permanently out of existence and therefore cannot reconsider a vetoed bill. U.S.C.A. Const. Art. 1, §§ 2, cl. 1, 7, cl. 2.

11. Statutes ⇐34

Existence of an authorized receiver of presidential veto messages, the congressional rules providing for carry-over of unfinished business and the duration of modern intersession adjournments of Congress meant that when Congress adjourned its first session sine die on the date it presented a bill to the President, return of that bill to the originating house was not prevented and such bill became law though it was not returned to its originating house by the president, with objections noted, within ten days after presentment. U.S.C.A. Const. Art. 1, § 7, cl. 2.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 84-00020).

Michael Davidson, Washington, D.C., with whom M. Elizabeth Culbreth, Morgan J. Frankel, Michael Ratner, Washington, D.C., Morton Stavis, Hoboken, N.J., Peter Weiss and John Privitera, Washington, D.C., were on the brief, for appellants Michael Barnes, et al. and the United States Senate, et al. Steven R. Ross and Charles Tiefer, Washington, D.C., were on the brief, for appellants Speaker and Bipartisan Leadership Group of the United States House of Representatives.

Richard K. Willard, Acting Asst. Atty. Gen., Dept. of Justice, Washington, D.C., with whom Joseph E. diGenova, U.S. Atty., William Kanter and Marc Johnston, Attys., Dept. of Justice, Washington, D.C., were on the brief, for appellees.

Before ROBINSON, Chief Judge, BORK, Circuit Judge, and McGOWAN, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge McGOWAN.

Separate dissenting opinion filed by Circuit Judge BORK.

McGOWAN, Senior Circuit Judge:

This appeal from the District Court[1] requires us to determine when legislation presented to the President for his review is subject to a "pocket veto" under Article I, section 7, clause 2 of the United States Constitution. That clause provides, in part, that if the President disapproves of a bill but fails to return it to its originating house, with his objections noted, within ten days after presentment to him, the bill becomes a law "unless the Congress by their adjournment prevent its Return, in which Case it shall not be a law." The precise issue at stake is whether adjournment of the Ninety-eighth Congress at the end of its first session "prevented" return of a bill presented to the President on the day of adjournment and thus created an opportunity for a pocket veto of that bill.

Appellants are thirty-three members of the House of Representatives,[2] joined by the United States Senate and the Speaker and bipartisan leadership of the House of Representatives.[3] Appellees are Ray Kline, Acting Administrator of General Services,[4] and Ronald Geisler, Executive Clerk of the White House. In the District Court, appellants sought declaratory and injunctive relief that would have nullified the President's attempted pocket veto in this case and required appellees to deliver and publish as law the bill that forms the subject matter of this litigation. On cross-motions for summary judgment, the court found for appellees on the ground that intersession adjournments[5] inherently prevent the return of disapproved legislation. *Barnes v. Carmen*, 582 F.Supp. 163 (D.D.C.1984). Our judgment was announced by order entered August 29, 1984, reversing the District Court's decision and remanding the case with instructions to enter summary declaratory judgment for appellants. 743 F.2d 45 (C.A.D.C.). The same order noted that this opinion would follow.

I

On September 30, 1983, the House of Representatives passed H.R. 4042, 98th Cong., 1st Sess. (1983). 129 Cong.Rec. H7777 (daily ed. Sept. 30, 1983). The purpose of the bill was to renew, for the fiscal year ending September 30, 1984, the human

1. *Barnes v. Carmen*, 582 F.Supp. 163 (D.D.C. 1984).

2. They have sued both in their individual capacities and as members of the House. Thirty-one of the thirty-three members voted in favor of the legislation in question; two took no part in the measure's final adoption on the floor. 582 F.Supp. at 164.

3. The Senate intervened in the District Court pursuant to Fed.R.Civ.P. 24(a)(1) and 2 U.S.C. §§ 288b(c), 288e(a), 288l(a) (1982). The resolution directing Senate Legal Counsel to undertake intervention was jointly sponsored by Senators Howard Baker and Robert Byrd, Majority and Minority Leaders, respectively, of the Senate. S.Res. 313, 98th Cong., 2d Sess. (1984), 130 Cong.Rec. S223-24 (daily ed. Jan. 26, 1984) (remarks of Sen. Baker). The Speaker of the House of Representatives and the House Bipartisan Leadership Group, which includes the Majority and Minority Leaders and Whips, intervened in their official capacities pursuant to Fed.R.Civ.P. 24(a)(2), or in the alternative under Fed.R.Civ.P. 24(b)(2). All applications of intervention were granted without opposition in the District Court, 582 F.Supp. at 164 n. 1.

4. Mr. Kline has been substituted for his predecessor, Gerald P. Carmen, who was the General Services Administration defendant in the District Court.

5. "Intersession" adjournments separate the first and second sessions of each Congress, in contrast to "intrasession" adjournments (those within a session) and "final" adjournments (those at the end of a Congress).

rights certification requirements of the International Security and Development Cooperation Act of 1981 ("ISDCA"), Pub.L. No. 97-113, § 728, 95 Stat. 1519, 1555-57 (1981), *reprinted as amended in* 22 U.S.C. § 2370 note, at 460-61 (1982) (Restrictions on Military Assistance and Sales to El Salvador).[6] On November 17th, the Senate passed the bill without amendment. 129 Cong.Rec. S16,468 (daily ed. Nov. 17, 1983). The following day, the Speaker of the House and the President Pro Tempore of the Senate signed the bill, *see* 1 U.S.C. § 106 (1982), and the House Committee on Administration presented it to the President for his consideration. 129 Cong.Rec. H10,663 (daily ed. Dec. 14, 1983).

On the same day, November 18th, the Ninety-eighth Congress adjourned its first session *sine die*,[7] and agreed by joint resolution to convene for its second session on January 23, 1984.[8] By standing rule of the House of Representatives, the Clerk of the House is authorized to receive messages from the President whenever the House is not in session. *See* Rules of the House of Representatives, Rule III, cl. 5, *reprinted in* H.R.Doc. No. 271, 97th Cong., 2d Sess. 318 (1983); 129 Cong.Rec. H22 (daily ed. Jan. 3, 1983). Prior to adjourning, the Senate conferred similar, temporary authority on the Secretary of the Senate. 129 Cong. Rec. S17,192-93 (daily ed. Nov. 18, 1983).

The President took H.R. 4042 under consideration, but neither signed the bill into law nor returned it to the House of Representatives with a veto message. Instead, on November 30th, he issued a statement announcing that he was withholding his approval of the bill. 19 Weekly Comp.Pres. Doc. 1627 (Nov. 30, 1983). Taking the position that the President's action constituted a valid exercise of the pocket veto power, appellees failed to deliver and publish H.R. 4042 as a public law of the United States.

Five weeks later on January 4th, appellants filed suit in the District Court to overturn the President's attempted pocket veto as constitutionally invalid and to compel the delivery and publication of H.R. 4042 as law. After the District Court advanced and consolidated the trial on the merits with appellants' application for preliminary relief, the Senate and the Speaker and bipartisan leadership of the House joined the action as intervenors likewise opposed to the President's action. *See supra* note 3.

In the District Court, appellants contend: (1) that adherence to constitutional purpose requires limiting the opportunity for a pocket veto to final adjournments between Congresses or to adjournments during which the houses of Congress have prevented return by failing to appoint agents to receive presidential messages during their absence; (2) that consequently President Reagan's failure to return H.R. 4042 to the House of Representatives within ten days of its presentment to him had resulted in the bill's becoming law under the Constitution; and (3) that appellees therefore are under an obligation to deliver and publish the bill as law pursuant to 1 U.S.C. §§ 106a, 112 (1982). In support of their

6. Those requirements made semi-annual certification by the President that El Salvador is progressing in protecting human rights a pre-condition to continued military aid to the government of that country. ISDCA § 728(b)-(e). H.R. 4042 sought to extend those requirements through fiscal year 1984 or until Congress enacted new legislation governing the subject. H.R. 4042, 98th Cong., 1st Sess., 129 Cong.Rec. H7777 (daily ed. Sept. 30, 1983). Under the bill, the President was required to make certification on January 16, 1984, and again 180 days thereafter. *See* Joint Brief for the Plaintiff-Appellants and Senate Intervenor-Appellant at 5 n. 2.

7. 129 Cong.Rec. H10,169, S16,759 (daily ed. Nov. 18, 1983). Although the duration of a *sine die* adjournment is by definition unspecified, Congress in this instance followed its usual end of session practice of vesting joint authority in the Speaker of the House and the Majority Leader of the Senate to reassemble the Congress "whenever, in their opinion, the public interest shall warrant it." H.Con.Res. 221, § 2, 98th Cong. 1st Sess., 129 Cong.Rec. H10,105 (daily ed. Nov. 16, 1983); *id.* at S16,858 (daily ed. Nov. 18, 1983).

8. H.J.Res. 421, 98th Cong., 1st Sess., 129 Cong.Rec. H10,105 (daily ed. Nov. 16, 1983); *id.* S16,858 (daily ed. Nov. 18, 1983). The Ninety-eighth Congress convened its second session as scheduled on January 23, 1984.

position, appellants cited *Wright v. United States*, 302 U.S. 583, 58 S.Ct. 395, 82 L.Ed. 439 (1938), in which the Supreme Court held that no opportunity for a pocket veto arises when, on the tenth day after presentment, the originating house is in an intrasession adjournment of three days or fewer, and *Kennedy v. Sampson*, 511 F.2d 430 (D.C.Cir.1974), in which this circuit held *Wright* to apply to all intrasession adjournments by one or both houses of Congress, as long as a congressionally authorized agent remains to receive veto messages from the President. The Legislative Branch argued that, because intersession and intrasession adjournments are indistinguishable under modern congressional practice, *Wright* should be further extended to intersession adjournments.

Appellees responded that the appointment of congressional agents to receive presidential messages while Congress is in adjournment has no constitutional significance, and that in any case the Supreme Court's ruling in the *Pocket Veto Case*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894 (1929), which upheld a pocket veto during an intersession adjournment of the Sixty-ninth Congress, squarely governs this case. Moreover, while agreeing with appellants that no practical difference exists today between intersession and intrasession adjournments, appellees argued that there is a constitutionally significant distinction between adjournments for three days or less and those for a longer period, as evidenced by Article I, section 5, clause 4, under which neither house may adjourn for more than three days without the consent of the other. Any adjournment of over three days would, according to appellees, create an opportunity for a valid pocket veto.[9] Appellees contend that either construction of the congressional adjournment involved here—as an intersession adjournment or as one for more than three days—supports a finding that the President validly exercised his pocket veto power in this instance.

[1] Accepting the first of the two alternative arguments raised by appellees, the District Court found the *Pocket Veto* decision "the only case directly in point" and concluded that "[u]nless and until the Supreme Court reconsiders the rule of that case," intersession adjournments would be deemed inherently to prevent the return of disapproved legislation to Congress. 582 F.Supp. at 168. Summary judgment was accordingly entered for appellees, whereupon the Legislative Branch filed its present appeal to this court.[10]

II

[2] Before examining the merits of this dispute, we address the question of whether appellants have standing to come before a federal court for resolution of the claims they press in the present litigation. In *Kennedy v. Sampson*, this court held that a single United States Senator had standing to challenge an unconstitutional pocket veto on the ground that it had nullified his original vote in favor of the legislation in question.[11] At the same time, the court

9. Appellants accordingly take the position that the merits aspect of *Kennedy v. Sampson* was incorrectly decided. *See* Brief for the Appellees at 57-63.

10. Since the appeal was filed, Congress passed, and the President signed, a supplemental appropriations bill, Pub.L. No. 78-332, which approved disbursement of certain funds for military assistance to El Salvador upon the President's meeting certification requirements that differ somewhat from those imposed by H.R. 4042. *See* Supplemental Brief for the Plaintiff-Appellants and Senate Intervenor-Appellant. Because the new law supersedes H.R. 4042 only with respect to the particular funds appropriated thereunder, and because Congress may make further appropriations to which the certification requirements of H.R. 4042 might apply if that bill became law, a live controversy remains for us to resolve.

11. 511 F.2d at 433-36. The Senator himself characterized the injury as a deprivation of his constitutional prerogative of voting to override the President's veto. *Id.* at 434 n. 13. The court noted that, strictly speaking, the opportunity to override never arose because the President had not attempted a return veto. *Id.* Under either characterization, however, the result of the President's inaction was a diminution of the Senator's power to participate in the enactment of legislation through voting on proposed or returned bills. *See id.* at 435-36.

stated that either house of Congress clearly would have had standing to challenge the injury to its participation in the lawmaking process, since it is the Senate and the House of Representatives that pass legislation under Article I, and improper exercise of the pocket veto power infringes that right more directly than it does the right of individual members to vote on proposed legislation. 511 F.2d at 434–36 & nn. 13 & 17.

In the present action, the thirty-three individual Representatives allege an injury identical to that of the individual lawmaker in *Kennedy v. Sampson*. The House Bipartisan Leadership Group and the United States Senate assert an injury of the second, more direct type described in that opinion, that is, an injury to the lawmaking powers of the two houses of Congress.[12] Under the law of this circuit,[13] therefore, all the appellants are properly before this court.

[3] In a wide-ranging dissent from this panel's decision on standing, Judge Bork propounds the view that neither individual congressmen nor the houses of Congress may challenge in federal court the President's invocation of the pocket veto power. More broadly, the dissent reads Article III to bar ***any*** governmental official or body from pursuing in federal court any claim, the gravamen of which is that another governmental official or body has unlawfully infringed the official powers or prerogatives of the first. The dissent contends that previous decisions of this court permitting congressional standing do not bind this panel because they are the result of the court's failure to give proper regard to the underpinnings of Article III's standing requirement, namely, the separation of powers. While we are largely content to let this court's opinions speak for themselves, we wish to make clear the error in the dissent's understanding of Article III and the doctrine of separation of powers.

It is beyond contention that Article III's standing requirement is intended to "limit the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 97, 88 S.Ct. 1942, 1951, 20 L.Ed.2d 947 (1968)); *accord Allen v. Wright*, — U.S. —, 104 S.Ct. 3315, 3324–25, 82 L.Ed.2d 556 (1984); *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975). It is also indisputable that in matters involving another branch of the government, the courts must be especially wary of overstepping their proper role, for "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either." *United States v. Richardson*, 418 U.S. 166, 188, 94 S.Ct. 2940, 2952, 41 L.Ed.2d 678 (1974) (Powell, J., concurring); *accord Valley Forge*, 454 U.S. at 473–74, 102 S.Ct. at 759; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222, 94 S.Ct. 2925, 2932, 41 L.Ed.2d 706 (1974).

Nonetheless, when a proper dispute arises concerning the respective constitutional functions of the various branches of the government, "[i]t is emphatically the

12. The Senate has intervened in this action to protect "a direct constitutional interest in the efficacy of its legislative action," *see* Motion of the United States Senate to Intervene at 2, *Barnes v. Carmen*, 582 F.Supp. 163 (D.D.C. 1984) [illegible]

13. *See also Moore v. United States House of Representatives*, 733 F.2d 946, 950–54 (D.C.Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 779, 83 L.Ed.2d 775 (1985) (holding that individual members of House of Representatives have standing to sue for declaration that a tax law was unconstitutional because it originated in the Senate rather than the House).

province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). Courts may not avoid resolving genuine cases or controversies—those "of a type which are traditionally justiciable"—simply because one or both parties are coordinate branches. *United States v. ICC*, 337 U.S. 426, 430, 69 S.Ct. 1410, 1413, 93 L.Ed. 1451 (1949). As Justice Rehnquist has stated:

> Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.

Valley Forge, 454 U.S. at 474, 102 S.Ct. at 759. Thus, Supreme Court precedent contradicts the dissent's sweeping view that Article III bars any governmental plaintiff from litigating a claim of infringement of lawful function. *See Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 2778, 2780, 77 L.Ed.2d 317 (1983) (Congress's intervention in litigation over the constitutionality of the one-house veto established requisite concrete adverseness); *Nixon v. Administrator of General Services*, 433 U.S. 425, 439, 97 S.Ct. 2777, 2788, 53 L.Ed.2d 867 (1977) (indicating that incumbent President would "be heard to assert" claim that Presidential Recordings and Materials Preservation Act unconstitutionally impinged upon the autonomy of the Executive Branch); *National League of Cities v. Usery*, 426 U.S. 833, 837 & n. 7, 96 S.Ct. 2465, 2467 & n. 7, 49 L.Ed.2d 245 (1976) (cities and states had standing to sue federal government over alleged infringement of "'a constitutional prohibition' running in favor of the States *as States*"), *overruled on other grounds*, *Garcia v. San Antonio Metropolitan Transit Authority*, — U.S. —, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985); *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 154–56, 73 S.Ct. 609, 611–12, 97 L.Ed. 918 (1953) (Secretary of Interior had standing to press a claim against the Federal Power Commission for alleged infringement of the Secretary's role); *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939), *discussed infra* pp. 28–29; *see also Goldwater v. Carter*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) (suit by congressional plaintiffs claiming an injury to their constitutionally mandated powers was dismissed on ripeness and political question grounds, but not on standing grounds, despite lower court opinions addressing standing issue).[14]

14. *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), heavily relied upon by the dissent is in no respect to the contrary. That case involved a Tenth Amendment challenge by Massachusetts to a federal statute that established certain standards for reducing maternal and infant mortality and provided for grants of funds to states complying with the standards. The Court stated:

> [T]he complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States *by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent*; and it is plain that that question, as it is thus presented, is political and not judicial in character.

Id. at 483, 43 S.Ct. at 599 (emphasis added). The Court was moved to dismiss the suit, not because it was brought by a state, but because no invasion of any state's power had occurred. The Court distinguished the case from, among other cases, *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920), a suit brought by a state in which "there was an invasion, by acts done and threatened, of the quasi-sovereign right of the State to regulate the taking of wild game within its borders." 262 U.S. at 482, 43 S.Ct. at 599. The Court concluded: "No rights of the State falling within the scope of the judicial power have been brought within the actual or threatened operation of the statute and this Court is . . . *without authority to pass abstract opinions* upon the constitutionality of acts of Congress." *Id.* at 485, 43 S.Ct. at 600 (emphasis added). Clearly, then, *Massachusetts v. Mellon* did not establish that governmental officials and entities necessarily and always lack standing to raise claims of infringement of lawful functions. Rather, the case explicitly leaves open the possibility of suit by a state when "rights of the State falling within the scope of the judicial power" are at stake, a possibility later to become an actuality in, e.g., *National League of Cities*, *supra*.

In congressional lawsuits against the Executive Branch, a concern for the separation of powers has led this court consistently to dismiss actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view, and who seek the court's aid in overturning the results of the legislative process. *See, e.g., Moore v. United States House of Representatives*, 733 F.2d 946, 956 (D.C.Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 779, 83 L.Ed.2d 775 (1985); *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 454 U.S. 1082, 102 S.Ct. 636, 70 L.Ed.2d 616 (1981); *Harrington v. Bush*, 553 F.2d 190, 214 (D.C.Cir.1977). Similarly, in *Goldwater v. Carter*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979), Justice Powell, concurring in the judgment, would have dismissed as unripe a claim by several members of Congress that the President's action in terminating a treaty infringed their constitutional role: "Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual controversy between the Legislative and Executive Branches." *Id.* at 998, 100 S.Ct. at 534. As Justice Powell also stated, however, a dispute between Congress and the President *is* ready for judicial review when "each branch has taken action asserting its constitutional authority"—when, in short, "the political branches reach a constitutional impasse." *Id.* at 997, 100 S.Ct. at 533.

There could be no clearer instance of "a constitutional impasse" between the Executive and the Legislative Branches than is presented by this case. Congress has passed an Act; the President has failed to sign it, and has declared it not to be a law; Congress has challenged the validity of that declaration. The court is not being asked to provide relief to legislators who failed to gain their ends in the legislative arena. . Rather, the legislators' dispute is solely with the Executive Branch. And it cannot be said that Congress is asking for an advisory judicial opinion on a hypothetical question of constitutional law; Congress is seeking a declaration, not about the legal possibility of pocket vetoes during intersession adjournments, but about the validity of a particular purported veto. Congress has raised a claim that is founded on a specific and concrete harm to its powers under Article I, section 7—a "[d]eprivation of a constitutionally mandated process of enacting law" that has actually occurred. *Moore*, 733 F.2d at 951; *see United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1381–82 (D.C.Cir.1984); *Dennis v. Luis*, 741 F.2d 628, 630–31 (3d Cir.1984). That such injury is judicially cognizable has been clear since the Supreme Court held in *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939), that state legislators had standing to litigate the question of whether the legislature had ratified a constitutional amendment, within the meaning of Article V: "We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.... They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect ...."[15] As the Executive Branch itself concedes, Congress clearly has standing to litigate the specific constitutional question presented.[16]

The dissent believes, however, that the separation of powers would be better served in this case by remitting the question involved to a political solution, rather than a judicial one. The dissent understandably leaves unspecified the precise course of events contemplated: a "political solution" would at best entail repeated, time-consuming attempts to reintroduce and repass legislation, and at worst involve retaliation by Congress in the form of refusal to approve presidential nominations, budget proposals, and the like. That sort of political cure seems to us considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case. To quote again from Justice Powell's opinion in *Goldwater:*

> Interpretation of the Constitution does not imply lack of respect for a coordinate branch. *Powell* v. *McCormack*, [395 U.S. 486, 548, 89 S.Ct. 1944, 1978, 23 L.Ed.2d 491 (1969)].... The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution

Similarly misplaced is the dissent's reliance on *Allen v. Wright, supra*. In *Allen*, the Court held that parents of black school children lacked standing to bring a suit against the I.R.S. alleging that I.R.S. regulations governing the tax-exempt status of racially discriminatory private schools interfered with the ability of the plaintiffs' children to obtain an education in desegregated schools. The Court reiterated the traditional [illegible] that [illegible]

[illegible]

case has nothing to do with "governmental standing," nor does the Court mention the subject.

15. *Id.* at 438–42, 59 S.Ct. at 975–77. That *Coleman* cannot fairly be distinguished on the ground that it concerned state, rather than federal, legislators' standing is clear from the Court's emphasis of "the legitimate interest of public officials and administrative organizations federal and state to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties." *Id.* at 442, 59 S.Ct. at 977.

Not only do we [illegible] the dissent's argument that *Coleman*'s finding of cognizable injury was premised on a grant of standing by the state supreme court below and thus is inapposite to cases originating in federal court. A pair of earlier Supreme Court cases, cited in *Coleman*, is instructive in this respect. In *Fairchild v. Hughes*, 258 U.S. 126, 42 S.Ct. 274, 66 L.Ed. 499 (1922), a citizen of New York brought suit in the Supreme Court of the District of Columbia to challenge the effectiveness of the ratification of the Nineteenth (women's suffrage) Amendment. The court found the plaintiff to assert no judicially cognizable injury, and dismissed the suit. The same day, in *Leser v. Garnett*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505 (1922), the Court reached the merits of a similar challenge initiated in state court by a Maryland citizen. The fact that one case was brought in federal court while the other originated in state court, however, does not account for the differing results. The *Fairchild* Court stated the basis for its jurisdictional holding as follows:

> [P]laintiff is not an election officer; and the State of New York, of which he is a citizen, had previously amended its own constitution so as to grant the suffrage to women and had ratified this Amendment. Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute if passed, or a constitutional amendment about to be adopted, will be valid.

258 U.S. at 129–30, 42 S.Ct. at 275 (citations omitted). By contrast, in *Leser*, the Court pointed out that "the constitution of Maryland limits the suffrage to men," 258 U.S. at 135, 42 S.Ct. at 217, and the "Legislature of Maryland had refused to ratify" the Nineteenth Amendment. *Id.* at 136, 42 S.Ct. at 217. The plaintiff in *Leser* thus could correctly claim that his vote would be diluted by adoption of the Nineteenth Amendment, whereas in *Fairchild*, that same claim was clearly false. That difference, we think, provides a more plausible basis for distinguishing the two cases than does the difference between the respective courts in which the suits originated.

Similarly, we believe, the *Coleman* Court thought *Leser* a "controlling authority," 307 U.S. at 441, 59 S.Ct. at 976, not because both cases had come up from state courts, but rather because the plaintiffs in both asserted injury to their legal interest in an effective franchise. The majority stated: "The interest of the plaintiffs in *Leser v. Garnett* as merely qualified voters at general elections is certainly much less impressive than the interest of the twenty senators in the instant case." 307 U.S. at 441, 59 S.Ct. at 976. And Justice Frankfurter, writing separately, characterized the majority opinion thus: "The right of the Kansas senators to be here is rested on recognition by *Leser* v. *Garnett*, 258 U.S. 130, of a voter's right to protect his franchise." 307 U.S. at 469, 59 S.Ct. at 980. *See also Dyer* v. *Blair*, 390 F.Supp. 1291, 1297 n. 12 (N.D.Ill.1975) (three-judge court, per Stevens, J.) (reading *Coleman* as direct support for granting legislators standing to pursue in federal court claims of infringement of official role).

16. The concession was in terms based on the participation in this case by a single house of Congress, namely the Senate. *See* Tape Recording of Oral Argument at 204–11. Similarly, in *Kennedy v. Sampson*, 511 F.2d at 434, the Executive Branch noted that either or both houses would have standing to challenge a purported pocket veto. While, as the dissent correctly observes, parties may not create jurisdiction by mere stipulation, an interpretation of Article III's "case or controversy" requirement by a coordinate branch of the federal government must not be wholly disregarded.

pursuant to our duty "'to say what the law is.'" *United States* v. *Nixon*, 418 U.S. 683, 703, 94 S.Ct. 3090, 3105 (1974), quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

Goldwater, 444 U.S. at 1001, 100 S.Ct. at 536 (Powell, J., concurring in the judgment). By defining the respective roles of the two branches in the enactment process, this court will help to preserve, not defeat, the separation of powers. We turn, therefore, to the merits of this dispute.

III

The respective roles of Congress and the President in the enactment of legislation are set forth in Article I, section 7, clause 2 of the Constitution, the first of the presentment clauses, which provides as follows:

> 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 approve 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. . . . 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.

Thus, once a bill has been passed by both houses of Congress and presented to the President, he has ten days (not including Sundays) in which he may either sign the bill into law or return it to the originating house with his objections noted. If at the end of the time allotted he has done neither, the bill automatically becomes law as long as Congress has not by its adjournment prevented the President from returning the bill. If Congress's adjournment has prevented return, however, the bill automatically expires, in what has come to be known as a "pocket veto."

The question we confront is whether H.R. 4042 became law when the President failed to return it to the House of Representatives (where it originated) within the allotted time, or whether the bill expired because return was prevented by Congress's having adjourned its first session *sine die* on the day of presentment of the bill. We believe this question has a clear answer. Given that both the House of Representatives and the Senate had expressly arranged before adjourning for an agent specifically authorized to receive veto messages from the President during the adjournment, it is difficult to understand how Congress could be said to have prevented return of H.R. 4042 simply by adjourning. Rather, by appointing agents for receipt of veto messages, Congress affirmatively *facilitated* return of the bill in the eventuality that the President would disapprove it.

The District Court held, however, that Congress's adjournment must be deemed to have "prevented" return of H.R. 4042 to the House, notwithstanding the existence of an agent authorized to receive the President's veto, and that H.R. 4042 thus expired through a pocket veto. The court rested the decision on its reading of the two Supreme Court opinions and the one opinion by this court that have construed the pocket veto clause. We believe that the District Court has misapplied these precedents and that its decision consequently frustrates the recognized purpose behind the pocket veto clause.

An examination of the Framers' intent with respect to the pocket veto clause is a natural place to begin our analysis. Nowhere in the records of the Federal Convention of 1787, however, is there any reference to the concept of a pocket veto, or for that matter, to any of the specifics of

the enactment process. Rather, the delegates were concerned with the broad issues of whether the President ought to have the power to veto legislation and, if so, whether Congress should be able to override a presidential veto.[17] On these issues, however, the records speak plainly and decisively. The delegates were firmly convinced that the President must have some power to revise legislative acts. But an absolute veto, they equally strongly believed, was dangerous and unwarranted. As James Madison put it: "To give such a prerogative would certainly be obnoxious to the temper of this country." 1 M. Farrand, The Records of the Federal Convention of 1787, at 100 (rev. ed. 1966).[18] Thus, the delegates unanimously voted down an absolute veto, *id.* at 103, and eventually approved a resolution stating, "That the national Executive shall have a Right to negative any legislative Act, which shall not be afterwards passed, unless by two third Parts of each Branch of the national Legislative." 2 *id.* at 132.

[1] The precise means of providing for a qualified presidential veto were devised by the Committee of Detail in what, with minor modifications,[19] would ultimately constitute Article I, section 7, clauses 2 and 3 of the Constitution. The Committee's product reflects the recognition that to safeguard the qualified veto requires more than simply a set of rules directing Congress to present bills to the President and directing the President to approve or return such bills. For in the absence of any sanctions for violation of such rules, the President might simply decline to act upon a duly presented bill in order to block congressional reconsideration and thereby achieve through inaction what the Framers refused to permit him, namely, an absolute veto. The veto provision therefore mandates that a bill becomes law at the end of a ten-day period if not returned. Without more, however, Congress, which controls its own calendar,[20] could in turn vitiate the President's qualified veto by cutting short or entirely eliminating, through adjournment, the period of time alloted the President to return a bill with his objections. It is that evil which the pocket veto clause forestalls by withholding the status of law from a bill whose return Congress prevented.[21] The pocket veto clause thus is intended, not as an affirmative grant of power to the Executive, but rather as a limitation on the prerogative of Congress to reconsider a bill upon presidential disapproval, a limitation triggered when Congress "by their Adjournment prevent [the bill's] Return."

17. *See Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 2782 n. 14, 77 L.Ed.2d 317 (1983) (citing historical sources). Also debated were the fraction of Congress necessary to override a veto and the question of whether the Judicial Branch ought to have a voice in the veto process. *Id.*

18. Other comments are also enlightening. Elbridge Gerry saw "no necessity for so great a controul over the legislature as the best men in the Community would be comprised in the two branches of it." 1 M. Farrand, *supra*, at 98. Similarly, Roger Sherman objected to "enabling any one man to stop the will of the whole" on the grounds that "[n]o one man could be found so far above all the rest in wisdom. . . . [W]e ought to avail ourselves of his wisdom in revising the laws, but not permit him to overrule the decided and cool opinions of the Legislature." *Id.* at 99. Benjamin Franklin, drawing on his experience with the government of Pennsylvania, voiced the specific fear that an absolute veto power would lead to a situation in which "[n]o good law whatever could be passed without a private bargain with [the Executive]." *Id.* at 99. Only two members—James Wilson and Alexander Hamilton—spoke in favor of an absolute negative. *Id.* at 98–100. Later, Hamilton himself eloquently defended the qualified veto as against the "more harsh" absolute veto power. *See* The Federalist No. 73 (A. Hamilton).

19. The only significant modification undergone by the Committee's draft after being reported back to the convention was in the time allotted to the President to consider bills, which was increased from seven to ten days.

20. The only exception to Congress's control over its own adjournments is in case of a disagreement between the two houses "with Respect to the Time of Adjournment," in which case the President "may adjourn them to such Time as he shall think proper." U.S. Const art. II, § 3.

21. *See Edwards v. United States*, 286 U.S. 482, 486, 52 S.Ct. 627, 628, 76 L.Ed. 1239 (1932); J. Story Commentaries on the Constitution of the United States § 891, at 652 (5th ed. 1905) (1st ed. Cambridge 1833).

The manifest purpose of the pocket veto clause has guided application of the clause by the Supreme Court, as well as this circuit.[22] In *The Pocket Veto Case*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894 (1929), the earliest judicial discussion of the pocket veto clause, the Supreme Court confronted the issue of whether return of a bill to the Senate, where it originated, had been prevented when the Sixty-ninth Congress adjourned its first session *sine die* fewer than ten days after presenting the bill to the President. Justice Sanford's opinion for the Court began by declaring that the term "adjournment" is used in the Constitution to refer to any occasion on which a house of Congress is not in session, and dismissed the contention that the term refers solely to final adjournments of a Congress:

> We think that under the constitutional provision the determinative question in reference to an "adjournment" is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that "prevents" the President from returning the bill to the House in which it originated within the time allowed.[23]

An earlier case, the Court then noted, had held that a house of Congress is only constituted when a quorum of the membership is present. Because the veto provision specifies that the President must return a disapproved bill to its originating house, and because neither house was in session to receive delivery of the returned bill in that instance, the Court reasoned, return must be deemed to have been prevented.

Counsel for the House of Representatives had argued that, when the originating house is not in session, return may be made consistently with the constitutional provisions by delivering the bill, with the President's objections, to a proper agent of the house of origin, for subsequent delivery to that house when it reconvenes. Addressing itself to this argument, the Court noted first "the fact that Congress has never enacted any statute authorizing any officer or agent of either House to receive for it bills returned by the President during its adjournment, and that there is no rule to that effect in either House." *Id.* at 684, 49 S.Ct. at 468. Moreover, the Court stated, "delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate." The Court explained its position thus:

> Manifestly it was not intended that, instead of returning the bill to the House itself, as required by the constitutional provision, the President should be authorized to deliver it, during an adjournment of the House, to some individual officer or agent not authorized to make any legislative record of its delivery, who should hold it in his own hands for days, weeks or perhaps months,—not only leaving open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all, but keeping the bill in the meantime in a state of suspended animation until the House resumes its sittings, with no certain knowledge on the part of the public as to whether it had or had not been seasonably delivered, and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid.

Id. at 684, 49 S.Ct. at 468. Two concerns thus led the Court to believe that return to an agent of the original house would not adequately guarantee the President the opportunity to exercise his qualified veto: (1) delivery to an agent unauthorized to make an official record of delivery would engender uncertainty over whether timely return had in fact been made and thus whether the bill had or had not become law; and (2) such a return would be followed by lengthy delay before possible reconsideration by the originating house.

That the Court was not categorically denying the use of agents for delivery of veto messages was made clear in the Court's next, and last, encounter with the pocket veto clause. In *Wright v. United States*, 302 U.S. 583, 58 S.Ct. 395, 82 L.Ed. 439 (1938), the Court was called upon to determine the effectiveness of the return of a bill on the tenth day after presentment, during a three-day adjournment by the originating house only. The Court, speaking through Chief Justice Hughes, held that return to that house had not been prevented and that, therefore, delivery of the veto message to the Secretary of the Senate constituted an effective return.

In the first place, the Court noted, the Senate alone had adjourned, not "the Congress." Under the pocket veto clause, only an adjournment by "the Congress" can prevent return of a bill. *Id.* at 587, 58 S.Ct. at 397. The Court then dismissed the notion that a bill cannot be returned by the President to the originating house if that house is in an intrasession adjournment. In this instance, the Court stated, there clearly was no "practical difficulty" in making return during the adjournment: "The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive, the bill." *Id.* at 589–90, 58 S.Ct. at 397–98. More importantly, the Court held that "[i]n returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution. *The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return.*" *Id.* at 589, 58 S.Ct. at 397 (emphasis added).

As the *Wright* Court explained, the *Pocket Veto Case* was not to the contrary. Although the opinion in the earlier case had expressed the view that return can only be made to a house that is actually assembled and not to an agent of the house, that view did not control this case because it was grounded in concerns that were wholly inapplicable to a brief, intrasession adjournment by the originating house:

> In such case there is no withholding of the bill from appropriate legislative record for weeks or perhaps months, no keeping of the bill in a state of suspend-

22. The recognition of the purpose of the veto provision also underlies the Supreme Court's treatment of an issue related to the pocket veto, namely, whether the President may sign a bill into law during an adjournment of Congress. *In La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 20 S.Ct. 168, 44 L.Ed. 223 (1899), the Court held that an intrasession adjournment does not preclude presidential approval of a bill. The Court reasoned:

> [I]n order that his refusal or failure to act may not defeat the will of the people, as expressed by Congress, if a bill be not approved *and* be not returned to the House in which it originated within that time, it becomes a law in like manner as if it had been signed by him. We perceive nothing in these constitutional provisions making the *approval* of a bill by the President a nullity if such approval occurs while the two Houses of Congress are in recess for a named time.

Id. at 454, 20 S.Ct. at 178.

Later, in *Edwards v. United States*, *supra*, the Court extended the reasoning and holding of *La Abra* to final adjournment of Congress. The Court stated:

> The last sentence of [Article I, section 7, clause 2] clearly indicates two definite and controlling purposes. *First*. To insure promptness and to safeguard the opportunity of the Congress for reconsideration of bills which the President disapproves; hence, the fixing of a time limit so that the status of measures shall not be held indefinitely in abeyance through inaction on the part of the President. *Second*. To safeguard the opportunity of the President to consider all bills presented to him, so that it may not be destroyed by the adjournment of the Congress during the time allowed to the President for that purpose.

286 U.S. at 486, 52 S.Ct. at 628. Emphasizing that "[r]egard must be had to the fundamental purpose of the constitutional provision to provide appropriate opportunity for the President to consider the bills presented to him," *id.* at 493, 52 S.Ct. at 631, the Court concluded:

> No possible reason, either suggested by constitutional theory or based upon supposed policy, appears for a construction of the Constitution which would cut down the opportunity of the President to examine and approve bills merely because the Congress has adjourned. No public interest would be conserved by the requirement of hurried and inconsiderate examination of bills in the closing hours of a session, with the result that bills may be approved which on further consideration would be disapproved, or may fail although on such examination they might be found to deserve approval.

Id. at 493–94, 52 S.Ct. at 631.

23. 279 U.S. at 680, 49 S.Ct. at 466. The Court also rejected the argument that "within ten days" refers to ten legislative days rather than ten calendar days. *Id.* at 679–80, 49 S.Ct. at 466.

ed animation with no certain knowledge on the part of the public whether it was seasonably delivered, no causing of any undue delay in its reconsideration. When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may be reconsidered immediately after the short recess is over. The prospect that in such a case the public may not be promptly and properly informed of the return of the bill with the President's objections, or that the bill will not be properly safeguarded or duly recorded upon the journal of the House, or that it will not be subject to reasonably prompt action by the House, is we think wholly chimerical.

Id. at 595, 58 S.Ct. at 400. Given "the manifest realities of the situation," the Court held, return to an agent of the originating house was wholly effective. *Id.* Moreover, other adjournments might well not prevent return, although the Court declined to speculate as to which would or would not:

> [C]ases may arise in which ... a long period of adjournment may result. We have no such case before us and we are not called upon to conjecture as to the nature of the action which might be taken by the Congress in such a case or what would be its effect.

Id. at 598, 58 S.Ct. at 401. Thus, the Court expressly left open the possibility that its analysis would apply to render return to an agent effective in adjournments other than brief, one-house, intrasession adjournments. The Court, however, did not leave future courts without guidance in applying the veto provisions, for it made clear that those provisions are to be interpreted in the light of their "two fundamental purposes." *Id.* at 596, 58 S.Ct. at 400. Although we have already set these forth at length, the *Wright* Court's formulation is important. On the one hand, the Court stated, the veto provisions are meant to ensure that "the President shall have suitable opportunity to consider the bills presented to him .... It is to safeguard the President's opportunity that Paragraph 2 of § 7 of Article I provides that bills which he does not approve shall not become laws if the adjournment of the Congress prevents their return." *Id.* (citation omitted). At the same time, the provisions ensure "that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes." *Id.* The Court plainly stated: "*We should not adopt a construction which would frustrate either of these purposes.*" *Id.* (emphasis added).

[5, 6] *Wright* thus has twofold significance. First, and most important, its rule of construction requires a court to find that the President was truly deprived of his opportunity to exercise his qualified veto power before it may hold that return was "prevented"; a court that fails in this responsibility ends up sacrificing, without justification, Congress's right to reconsider disapproved legislation. Second, *Wright* indisputably establishes that mere absence of the originating house does *not* prevent return if (1) there is an authorized agent to accept delivery of a veto message, and (2) such a procedure would not entail the delay and uncertainty justly feared by the Court in the *Pocket Veto Case*.

Ten years ago, in *Kennedy v. Sampson*, 511 F.2d 430 (D.C.Cir.1974), this circuit applied the teaching of *Wright* to hold that return is not prevented by an intrasession adjournment of any length by one or both houses of Congress, so long as the originating house arranged for receipt of veto messages. Dismissing the argument distinguishing *Wright* on the ground that only the originating house had adjourned in that case, this court stated: "To hold that a return veto is possible while the originating House alone is in brief recess but not when both Houses are in recess would embrace ritual at the expense of logic." *Id.* at 440 (footnotes omitted). As did the Court in *Wright*, this court demonstrated that the concerns that had led the Court in the *Pocket Veto Case* to disapprove return to a house not in session were simply unjustified in the context of the particular type of adjournment at issue. This court stated: "The modern practice of Congress with respect to intrasession adjournments creates neither of the hazards—long delay and public uncertainty—perceived in the Pocket Veto Case." *Id.* This court noted that, whereas at the time of the *Pocket Veto Case* "intersession adjournments of five or six months were still common," *id.* at 441 (footnote omitted), in the past decade Congress's intrasession adjournments have typically consisted of "several recesses of approximately five days for various holidays and a summer recess (or recesses) lasting about one month." *Id.* (footnote omitted). Thus, this court concluded, "intrasession adjournments of Congress have virtually never occasioned interruptions of the magnitude considered in the *Pocket Veto Case*." *Id.* (footnote omitted).

As to the concern for public uncertainty, this court stated:

> Modern methods of communication make it possible for the return of a disapproved bill to an appropriate officer of the originating House to be accomplished as a matter of public record accessible to every citizen. The status of such a bill would be clear; it has failed to receive presidential approval but may yet become law if Congress, upon resumption of its deliberations, passes the bill again by a two-thirds majority. This state of affairs generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session.

Id. (footnote omitted). Indeed, the *Sampson* court observed, "[t]he only possible uncertainty about this situation arises from the absence of a definitive ruling as to whether an intrasession adjournment 'prevents' the return of a vetoed bill. Hopefully, our present opinion eliminates that ambiguity." *Id.* (footnote omitted).

In addressing ourselves to the issue in this appeal, we are of course cognizant of the fact that the *Pocket Veto Case* remains the only decision concerning the ty *vel non* for a pocket veto a[illegible] an intersession adjournment. It was the District Court's belief that the *Pocket Veto Case* is therefore "the only case directly in point." 582 F.Supp. at 168. Emphasizing that *Wright* did not purport to approve of delivery to agents during anything other than a three-day adjournment and that even *Sampson*'s expansion of *Wright* did not reach beyond the line between intrasession and intersession adjournments, the District Court concluded that "neither *Wright* nor *Kennedy v. Sampson* give it license to depart from ... *Pocket Veto*." *Id.* The court accordingly held, in essence, that intersession adjournments per se create an opportunity for a valid pocket veto.

We appreciate the District Court's desire to remain within the boundaries of precedent. We disagree, however, with its assessment of where those boundaries lie. Moreover, we believe that the District Court's holding fails to serve the essential purposes of the veto provisions.

The principle that we believe runs through *Pocket Veto* and *Wright* is a simple one: whenever Congress adjourns, return of a veto message to a duly authorized officer of the originating house will be effective *only* if, under the circumstances of that type of adjournment, such a procedure would not occasion undue delay or uncertainty over the returned bill's status. Thus, in *Pocket Veto*, the Court disapproved delivery to a congressional officer during intersession adjournments because of the length of such adjournments—then five months or longer—as well as the uncertainty resulting from the lack of any regularized procedure for recording returns. By the same token, the brief duration of the one-house adjournment in *Wright* as well as the continued functioning of the entire congressional apparatus led the Court to an opposite result in that case. Finally, in *Sampson*, this court, following *Wright*'s lead, reasoned that the pocket veto clause did not apply to any intrasession adjournments, because they did not pose either of the problems cited in *Pocket Veto* to any greater degree than did the three-day adjournment in *Wright*.

Nor, we are convinced, do intersession djournments pose either of those problems, for as appellees freely conceded before the District Court,[24] such adjournments do not differ in any practical respect from the intrasession adjournments at issue in *Wright* and *Kennedy v. Sampson*. To be sure, an intersession adjournment delays possible reconsideration of a returned bill. But the delay is not substantial. In stark contrast to the five or six month intersession adjournments typical at the time of the *Pocket Veto Case*, intersession adjournments of the modern era have an average length of only four weeks, and are thus often even shorter than intrasession adjournments.[25] In this case, the adjournment was for nine weeks, somewhat longer than the average but still considerably shorter than the half-year-long adjournments common at the time of the *Pocket Veto Case*.[26]

The opportunity for immediate reconsideration after the intersession adjournment is guaranteed by the rules of each house of Congress, which mandate that all business unfinished at the end of the first session shall be resumed at the start of the second.[27] Moreover, because in this case, as is typical, the adjournment resolution provided that Congress could be reassembled at any time, and because the rules of the two houses permit the convening of congressional committees during adjournments,[28] reconsideration of a bill returned during an intersession adjournment is not necessarily delayed even the several weeks that such an adjournment lasts.

Uncertainty no more characterizes return during adjournment than does delay. As in

24. 582 F.Supp. at 165–66.

25. *See* Joint Brief for the Plaintiff-Appellants and Senate Intervenor Appellant, apps. I & II, at 63–70.

26. The adjournment in *Pocket Veto* differs from that at issue here, not only in its much greater duration, but also in that it divided two very different sessions of Congress, a "long" session and a "lame-duck" session. Before passage of the Twentieth Amendment in 1933, each Congress lasted from March 4 of the odd-numbered year to March 3 of the next odd numbered year. The first session of each Congress began on the first Monday in December, as provided in U.S. Const., art. I, § 4, cl. 2, and usually lasted well into spring. The second session commenced the following December, after the November congressional elections, and had to be adjourned by March 3. With many of its members having given up or lost their seats for the following term and with only a few months in which to work, Congress during its second session was unable to give serious consideration to many of the items before it. Adjournment of the first session hence in fact often precluded reconsideration.

27. Rule XVIII of the Standing Rules of the Senate, S. Doc. No. 10, 98th Cong., 1st Sess. 13 (1983), provides:

> At the second or any subsequent session of a Congress the legislative business of the Senate which remained undetermined at the close of the [illegible] session of that Congress [illegible]

House Rule XXVI states: "All business before committees of the House at the end of one session will be resumed at the commencement of the next session of the same Congress in the same manner as if no adjournment had taken place." Constitution, Jefferson's Manual and Rules of the House of Representatives, H. Doc. No. 271, 97th Cong., 2d Sess., § 901, at 610–11 (1983). Further, "[t]he business of conferences between the two Houses is not interrupted by an adjournment of a session which does not terminate the Congress, and even where one House asks a conference at one session the other may agree to it in the next session." *Id.* at 611 annotation (citations omitted).

In light of the carryover rules, it would be difficult to justify finding that return was prevented simply by delay alone. Because neither the Constitution nor the rules of either house place any time limit on reconsideration of returned bills, reconsideration of a bill returned during session could easily be delayed longer than reconsideration of a bill returned during adjournment.

28. Congressional committees, "which, in the legislative scheme of things, [are] for all practical purposes Congress itself," *Doe v. McMillan*, 412 U.S. 306, 344, 93 S.Ct. 2018, 2040, 36 L.Ed.2d 912 (1973) (Rehnquist, J., concurring and dissenting), are authorized during adjournments to continue to sit, to hold hearings, to conduct investigations, and to compel testimony and the production of documents. S.Doc. No. 10, *supra* note 27, at 33–34 (Rule XXVII); H.Doc. No. 271, *supra* note 27, § [illegible] at 275.

the case of intrasession adjournments, the organization of each house of Congress remains unchanged, and their respective staffs continue to function uninterrupted.[29] More importantly, neither house any longer lacks an authorized procedure for acceptance of veto messages during adjournment. The House of Representatives provides by rule that return may be made to the Clerk of the House; the Senate, by resolution, provides for acceptance of veto messages by the Senate Secretary.[30] In both cases, the time of delivery is recorded on the journal of the respective house, and the message is retained by the authorized officer for presentation on the floor of the house immediately upon the house's reconvening. The return may thus "be accomplished as a matter of public record accessible to every citizen." *Kennedy v. Sampson*, 511 F.2d at 441. The status of a bill returned during an intersession adjournment therefore "would be clear; it has failed to receive presidential approval but may yet become law if Congress, upon resumption of its deliberations, passes the bill again by a two-thirds majority. This state of affairs generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session." [31]

That intersession adjournments no longer present any real obstacle to the President's exercise of his qualified veto power was recognized by Presidents Ford and Carter, both of whom assumed the effectiveness of return vetoes made during such an adjournment.[32] To conclude otherwise

29. *Wright*, 302 U.S. at 595, 58 S.Ct. at 400. Congressional practice conforms to the modern understanding under the Twentieth Amendment that the houses of each Congress constitutionally exist from January 3 of each odd-numbered year through January 3 of the next odd-numbered year, regardless whether the houses are sitting or in adjournment. Thus, even when the houses are not in session, they can exchange messages and have bills enrolled, signed, and presented to the President. H.Doc. No. 271, *supra* note 27, § 560, at 263 annotation (messages); *id.* §§ 574–577, at 268–70 (enrollment, signing, and presentation); *see, e.g.*, 129 Cong Rec. S17,192 (daily ed. Nov. 18, 1983); 127 Cong Rec. S15,632 (daily ed. Dec. 16, 1981); 125 Cong Rec. 37,317, 37,475 (1979); 123 Cong Rec. 38,948, 39,081 (1977); 121 Cong Rec. 41,975, 42,276–77 (1975); 119 Cong Rec. 43,327 (1973).

30. *See supra* p. 24.

31. *Id.* The procedure for return during intersession adjournment is in every respect identical to the procedure used in intrasession adjournments, the constitutional effectiveness of which has been clear to both the Executive and the Legislative Branches since *Wright*. President Reagan himself has frequently delivered veto messages during an adjournment of Congress, by using this procedure. *See* Joint Brief for the Plaintiff-Appellant app. III, at 71–72.

No more uncertainty surrounds this procedure than accompanies the corresponding procedure by which the Executive Clerk receives bills for the President and returns them to Congress. *See Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624, 167 Ct.Cl. 665 (1964) (delivery of bill to the Executive Clerk while the President is overseas constitutes effective "presentment"), *cert. denied*, 380 U.S. 950, 85 S.Ct. 1082, 13 L.Ed.2d 968 (1965).

32. The Ford Administration made its position on intersession pocket vetoes clear in the aftermath of *Kennedy v. Jones*, 412 F.Supp. 353 (D.D.C.1976), a case arising shortly after *Sampson* that involved a challenge by Senator Kennedy to two pocket vetoes, one during the intersession adjournment of the Ninety-third Congress and the other during a one-month intrasession adjournment of that Congress. The Executive Branch conceded to the entry of summary judgment in Senator Kennedy's favor. Attorney General Levi announced the President's decision that he would thereafter return disapproved bills during any intrasession and intersession adjournments of Congress, as long as appropriate arrangements for receipt of veto messages were made. 122 Cong Rec. 11,202 (1976). On December 31, 1975, and January 2, 1976, during Congress's intersession adjournment, President Ford vetoed, respectively, S. 2350 and H.R. 5900, which had been passed during the first session of the Ninety-fourth Congress. House Calendar, 94th Cong. 130–31 (final ed. 1977). The vetoed bills were accepted by the appointed officers of the respective houses and were noted in the respective journals. Senate Journal, 94th Cong., 1st Sess. 1431 (1975); House Journal, 94th Cong., 1st Sess. 2246–47 (1975). Upon the convening of the second session, the messages were laid before the houses. 122 Cong Rec. 2, 145 (1976). Both vetoes were sustained. House Calendar, 94th Cong. 130–31 (final ed. 1977).

Like President Ford, President Carter also refrained from using the pocket veto during intersession adjournments. He returned S. 2096, 96th Congress, to the Senate, by delivery to the Secretary of the Senate, after the Senate had adjourned its first session *sine die*. 126 Cong Rec. 6–7 (1980).

is "to ignore the plainest practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right." *Wright*, 302 U.S. at 590, 58 S.Ct. at 398. For the line that divides the first session of a Congress from the second has ceased to have any practical significance. Were it not for the Article I, section 4, clause 2 requirement that "[t]he Congress shall assemble at least once in every Year," that line, it seems to us, would completely dissolve.[33]

We fully recognize that clear rules respecting the pocket veto are vitally necessary in order that the status of bills in presidential disfavor be promptly resolved. In seeking clarity, we must be careful not to stray into arbitrariness by drawing an irrational line between intrasession and intersession adjournments. For we must be guided by the evident purpose of the pocket veto clause, which is simply to ensure that the President not be deprived of an opportunity to disapprove legislation. Manifestly, the president is no more deprived of that opportunity by a modern intersession adjournment than he was by the adjournments in *Wright* and *Sampson*. The line between intersession and intrasession adjournments, although a bright one, in no way furthers the intent behind the pocket veto clause, and it therefore fails to comport with the authorities interpreting the clause. Nothing is gained by drawing such a line. And what is lost is substantial, for a rule based on such a line deprives Congress of the final word on a significant portion of its legislation and grants the President an absolute veto, even though Congress has shown no disrespect for the President's role in the enactment process.

Appellees contend, nonetheless, that failure to recognize the intersession-intrasession line constitutes a departure from an historical understanding that the pocket veto clause is to apply during intersession adjournments. Brief for the Appellees at 29–30. In support of their argument they point to a change made between two drafts of the clause in the Committee of Detail. The clause, as taken from the New York Constitution, originally stated that an unreturned bill would become law, "unless the Legislature by their Adjournment prevent [the bill's] Return; in which Case it shall be returned on the first Day of the next Meeting of the Legislature." 2 M. Farrand, *supra* p. 31, at 167. This language would presumably have precluded the pocket veto entirely. The concluding phrase of the clause was stricken, however, and in its place were substituted the words "in which case it shall not," that is, it shall not become a law. *Id.* The change, appellees contend, evidences a conception on the part of the drafters that intersession adjournments would prevent return.

We would not deny the plausibility of appellees' explanation of the deletion of one phrase and the substitution of another in the Committee of Detail's early drafts of the veto provision. Indeed, that explanation receives indirect support from evidence indicating that the Framers envisioned that Congress would convene its annual session, complete its business within several months, and adjourn for the remaining

33. The District Court apparently believed that to take the reality of intersession adjournments into consideration in determining whether they prevent return of disapproved bills would run afoul of the Supreme Court's recent statement that the fact that a practice might be "efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 2780, 77 L.Ed.2d 317 (1983). We [illegible] contrary to the dictates of the Constitution. By contrast, the issue here is whether the constitutional provision applies at all. No court can blind itself to the facts of a situation in determining whether it falls within the intended scope of a particular provision, as both the *Pocket Veto Case* and *Wright* plainly demonstrate. *See also Edwards v. United States*, 286 U.S. 482, 493, 52 S.Ct. 627, 631, 76 L.Ed. 1239 (1932) (construing veto provisions to permit President to approve bills after Congress has adjourned "in the ground that [n]o public interest would be conserved by a contrary rule"). *Accord, supra* at [illegible]

three-fourths of the year.[34] As was the rule in the English Parliament of the era, business unfinished in the first session of a Congress was likely thought not to carry over to the second session.[35] With such a calendar in mind, members of the Committee of Detail may well have been of the view that adjournment at the end of the first session would prevent return of a bill.

But the adjournment practices of Congress as envisioned by members of the Committee bear no resemblance to the actual adjournment practices of the modern-day Congress, and to accord determinative weight to the Committee's supposed views on whether intersession adjournments prevented return would therefore seriously disserve the larger purpose of the pocket veto clause as understood by the Supreme Court.[36] Given that under the principles of *Wright* and the *Pocket Veto Case*, intersession adjournments no longer pose the least obstacle to the President's exercise of his qualified veto, it cannot be dispositive that the Committee of Detail may have believed they would.

[7] Appellees point out that the view that intersession adjournments do create an opportunity for a pocket veto has been accepted throughout most of the history of the Republic by both the President and Congress. Brief for the Appellees at 22–29. Beginning with President Jefferson and continuing through President Nixon, twenty-five of the thirty Presidents who have exercised the pocket veto power at all have done so during intersession adjournments. In each of these pocket vetoes—272 in all—Congress has acquiesced. What is more, appellees argue, Congress in 1868 would have codified this practice of acquiescence into law with a bill to limit pocket vetoes to intersession adjournments, were it not for successful objections that so limiting *intra*session pocket vetoes would be unconstitutional.

Clearly, however, neither the past practice of the Executive nor Congress's acquiescence in that practice is conclusive in this case. *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 2780–81, 2784, 77 L.Ed.2d 317 (1983). Nor is that practice particularly relevant here, given that it developed under adjournment conditions markedly different from those prevailing today.

[8, 9] Appellees raise a final argument in support of the result arrived at by the District Court. Conceding the absence of any practical difference between intrasession and intersession adjournments, they contend that the truly correct "bright line" must be drawn at the three-day mark. Thus, if the tenth day after presentment falls during an adjournment of over three days, a bill that has not yet been returned expires by pocket veto, regardless of the existence of procedures that would ensure

34. *See* 2 M. Farrand, *supra* p. 31, at 199–200 (debate over whether Congress should sit during Winter or Spring); Kennedy, *Congress, the President, and the Pocket Veto*, 63 Va.L.Rev 355, 362 (1977).

35. *See* Note, *The Presidential Veto Power: A Shallow Pocket*, 70 Mich.L.Rev 148, 165 (1971).

36. As Senator Ervin remarked:

> [A]t the time the Constitution was written and for many years thereafter, it was the custom of the Congress to meet only during the first few months of each year and then to go home. The 10-day provision obviously was written into the Constitution to cover the adjournments at the end of a session, since Congress would be absent from the Capitol for many months. Today, of course, we have a different situation entirely. The Founding Fathers ... did not foresee that Congress would become a year-round operation, often straining to finish its business before the constitutional end of a Congress.

Constitutionality of the President's "Pocket Veto" Power: Hearing Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, United States Senate, 92d Cong., 1st Sess. 3 (1971); *see* Comment, *The Veto Power and Kennedy v. Sampson: Burning a Hole in the President's Pocket*, 69 Nw.U.L.Rev 587, 610 (1974) ("[I]mproved transportation and a more burdensome workload have drastically altered the character of the congressional schedule. Journeys which in past years lasted days are now measured in hours. The modern Congress works almost year round to complete a staggering agenda. These factors have produced congressional calendars marked by numerous short recesses rather than a single lengthy one.").

actual return to the originating house. Appellees contend that this principle is, in fact, revealed by reading *Pocket Veto* and *Wright* together; the former case established the legal irrelevance of procedures that ensure return during the absence of Congress; the latter, it is suggested, declared that the only adjournments that do not prevent return are those of three days or fewer. Appellees also argue that the three-day rule correctly captures the intent of the Framers regarding operation of the pocket veto clause. That clause, they assert, must be read in conjunction with clause 4 of Article I, section 5 of the Constitution, which provides, in part, that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." Appellees argue that, because every adjournment of over three days is, by the terms of that provision, necessarily either a simultaneous adjournment of both houses or an adjournment of one house pursuant to joint action by both houses, every such adjournment is one by "the Congress." When, therefore, the Framers mandated that an unreturned bill expires if "the Congress by their Adjournment prevent its Return," they must have been referring to all adjournments of over three days.

As appellees readily admit, under their interpretation of the pocket veto clause, *Kennedy v. Sampson*, which denied the use of the pocket veto in all intrasession adjournments of any length, was wrongly decided and should be overruled. Of course, as appellees must also be aware, this panel is not free to reconsider a decision by another panel of this court. Until it is overruled by the full court sitting *en banc*, *Kennedy v. Sampson* will remain the law of this circuit. *Brewster v. Commissioner*, 607 F.2d 1369, 1373 (D.C.Cir.), *cert. denied*, 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed.2d 420 (1979).

But even if *Sampson* had never been decided, we would be compelled to reject appellees' three-day rule, for we cannot agree that any special connection exists between the pocket veto clause and the clause governing adjournments by one house. Indeed, there is strong reason to believe that the Framers intended no such connection whatsoever. The pocket veto clause speaks of adjournment by "the Congress." The phrase "by their Adjournment" by itself plainly refers to *any* adjournment by Congress, including an adjournment of one day, two days, or three days. Thus, the words of the pocket veto clause cannot support the three-day rule. But neither can reference to clause 4 of Article I, section 5, for that provision relates only to one-house adjournments. Appellees' choice of three days as a bright line thus appears to have no textual grounding at all.

Appellees propose the three-day rule, it seems likely to us, because they could not credibly argue for the extreme position that *every* adjournment by the Congress, no matter how short, creates an opportunity for a valid pocket veto. Such an argument would render nugatory the phrase "prevent its return"; the pocket veto clause would operate as if it read "unless the Congress adjourn, in which case the bill shall not become a law." That reading, in direct contravention to the purpose of the clause, would permit the President an absolute veto whenever Congress is not physically within the walls of the Capitol. *Wright*, 302 U.S. at 594, 58 S.Ct. at 399. Such an interpretation would also plainly contravene the Supreme Court's statement in *Pocket Veto* that "the determinative question in reference to an 'adjournment' is ... whether it is one that 'prevents' the President from returning the bill." 279 U.S. at 680, 49 S.Ct. at 466. Only those adjournments that actually prevent return create the opportunity for a pocket veto. Appellees argue that every adjournment of four days or more does precisely that. But the Supreme Court's cases plainly teach us that it is impossible to know whether an adjournment prevents return merely from the fact that it is a particular type of adjournment. Rather, a court must examine the conditions surrounding that type of adjournment and determine whether any obstacle to exercise of the President's qualified veto is posed.[37] To choose a three-day line, or any line, simply because it is a line ignores the Court's mandate and the purpose of the pocket veto clause.

[10, 11] The distinction between a three-day adjournment and a four-day adjournment is no more worthy of constitutional significance than is the distinction between modern intrasession and intersession adjournments. Neither distinction finds any support in Article I, section 7, clause 2. Both are arbitrary and frustrate the goal of protecting Congress's right to overrule presidential disapproval without furthering the goal of protecting the President's opportunity to disapprove of legislation. By rejecting these distinctions we do not by any means read the pocket veto clause out of the Constitution. The clause necessarily applies to the final adjournment by a Congress, because under Article I, section 2, clause 1, that Congress has gone permanently out of existence and therefore cannot reconsider a vetoed bill. *See* Kennedy, *supra* note 34, at 381. Moreover, we do not hold that intersession adjournments can never prevent return. Congress might someday revoke the existing authority of its agents to receive presidential veto messages, or rescind its rules mandating the carryover of unfinished business from the first session to the second, or resume its early practice of half-year intersession adjournments. In such a case, an intersession adjournment would resemble that involved in the *Pocket Veto Case*, and that case would unquestionably govern. But the present case is not a second *Pocket Veto Case*. The existence of an authorized receiver of veto messages, the rules providing for carryover of unfinished business, and the duration of modern intersession adjournments, taken together, satisfy us that when Congress adjourned its first session *sine die* on the day it presented H.R. 4042 to the President, return of that bill to the originating house was not prevented. We therefore hold that H.R. 4042 became law, and accordingly reverse and remand the decision of the District Court with instructions to enter summary declaratory judgment for appellants.

It is so ordered.

BORK, Circuit Judge, dissenting:

The phenomenon of litigation directly between Congress and the President concerning their respective constitutional powers and prerogatives is a recent one. It was unknown through more than a century and three quarters of our jurisprudence—until this court accepted the invitation to umpire such disputes in *Kennedy v. Sampson*, 511 F.2d 430 (D.C.Cir.1974).

This fact alone, the complete novelty of the direct intermediation of the courts in disputes between the President and the Congress, ought to give us pause. When reflection discloses that what we are asked to endorse is a major shift in basic constitutional arrangements, we ought to do more than pause. We ought to renounce outright the whole notion of congressional standing.

I write at some length because of the importance of the constitutional issue and because in this case, unlike those in which similar protests have been lodged, the error in analysis produces an error in result. *See Vander Jagt v. O'Neill*, 699 F.2d 1166, 1177 (D.C.Cir.) (Bork, J., concurring), *cert. denied*, — U.S. —, 104 S.Ct. 91, 78 L.Ed.2d 98 (1983), and *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956 (D.C.Cir.1984) (Scalia, J., concurring), *cert. denied*, — U.S. —, 105 S.Ct. 779, 83 L.Ed.2d 775 (1985). To date these protests have been unavailing. With a constitution-

37. Thus, contrary to appellees' understanding, whether return was prevented within the meaning of the pocket veto clause and whether return was practically impossible are not two "very different" questions, Brief for the Appellees at 58, but rather are one and the same question. To determine "constitutional prevention" is, as the Court's approach in *Pocket Veto* and *Wright* makes clear, precisely to determine "actual prevention"; such a determination cannot be made without regard for "the manifest realities of the situation." *Wright*, 302 U.S. at 595, 58 S.Ct. at 400. The distinction appellees draw between the two issues simply defies logic and common sense.

al insouciance impressive to behold, various panels of this court, without approval of the full court, have announced that we have jurisdiction to entertain lawsuits about governmental powers brought by congressmen against Congress or by congressmen against the President. That jurisdiction floats in midair. Any foundations it may once have been thought to possess have long since been swept away by the Supreme Court. More than that, the jurisdiction asserted is flatly inconsistent with the judicial function designed by the Framers of the Constitution.

Appellants seek judicial review of a dispute between the Legislative and Executive Branches over the validity of the presidential "pocket veto" as applied to bills presented to the President less than ten days before an intersession adjournment of Congress. The individual appellants—individual members of Congress—allege that they have been injured by this use of the pocket veto because the veto nullified their original votes in favor of the bill in question. The institutional appellants—the Senate and the leadership of the House—allege injury to their "participation in the lawmaking process, since it is the Senate and the House of Representatives that pass legislation under article I, and improper exercise of the pocket veto power infringes that right...." Maj. op. at 26. The majority describes the individual appellants' injury as "a diminution of the ... power to participate in the enactment of legislation through voting on proposed or returned bills," *id.* at 6 n. 11, and the institutional appellants' injury as "an injury to the lawmaking powers of the two houses of Congress." *Id.* at 6.

It is clear, then, that appellants are suing not because of any personal injury done them but solely to have the courts define and protect their governmental powers. Until this circuit permitted such actions eleven years ago, this suit would have been impossible. Indeed, for most of our history this suit would have been inconceivable. The respective constitutional powers of Congress and the President could have been given judicial definition only when a private party, alleging a concrete injury, actual or threatened, brought those powers necessarily into question. No doubt it appears more "convenient" to let congressmen sue directly and at once; in actuality, that convenience is purchased at the cost of subverting the constitutional roles of our political institutions.[1]

Major alterations in the constitutional system can be accomplished through what seem to be minor adjustments in technical doctrine. That is the case here. By according congressmen standing to sue the President, this court proposes a new and much different answer to the question of the proper role of the federal courts in American constitutional disputation. Changing the constitutional role of the federal courts, moreover, necessarily also alters that of Congress and the President, and seems, on the rationale the majority advances, destined to alter that of the States as well. All of these changes work to enhance the power and prestige of the federal judiciary at the expense of those other institutions.

1. The Executive Branch conceded at oral argument that the Senate has standing to sue in this suit. Similarly, in *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C.Cir.1974), the Executive Branch conceded that either House of Congress would have standing to sue based on injury to its lawmaking powers. That concession does not, of course, remove the issue from this dispute, for it is axiomatic that parties cannot confer subject matter jurisdiction by waiver. No reason appears why the Executive should oppose standing for individual legislators but concede as to a House. The constitutional problems would seem to be identical. More important is the misunderstanding of the importance of the issue that underlies this concession. According to counsel, the Executive Branch is pursuing decision on the merits to vindicate its governmental interest in constitutional governance. While this is undoubtedly true, I suggest that, given this concern, appellees have misordered the priorities. By conceding the standing issue appellees endanger a constitutional principle far more momentous than the scope of the pocket veto power, especially since the latter issue can arise and be decided later in a private suit.

Fortunately, the question is not an open one. It is clear upon several lines of analysis that appellants have no standing to litigate the issue they would place before us. Because the significance of what is taking place through this circuit's reshaping of standing doctrine appears to be inadequately appreciated, however, I first undertake to demonstrate that the rationale which underlines congressional standing doctrine also demands that members of the Executive and the Judicial Branches be granted standing to sue when their official powers are allegedly infringed by another branch or by others within the same branch. In addition, states would have standing to protect their powers of governance against the national government on the same theory. The consequences of this expansion of standing, which will bring an enormous number of inter- and intra-government disputes into the federal courts (usually, one supposes, into this physically convenient court) will be nothing short of revolutionary. I next demonstrate that three separate strands of Supreme Court precedent, and the philosophy underlying them, foreclose the possibility of standing here. The criteria articulated by the Supreme Court to govern cases such as this, the argument proceeds, carry out the intentions of the Framers of the Constitution with respect to the role of the federal courts in disputes between or within the political branches. I then show that the aggrandizement of the powers of the judiciary inherent in the doctrine of governmental standing is not made more palatable by the doctrine of "circumscribed equitable discretion" or "remedial discretion" this court has invented precisely to compensate in part for the deficiencies in its standing doctrine. Finally, I explain why the Supreme Court decisions the majority relies upon are inapposite and why we are not, at present, bound by prior decisions of this court that created and sustained the doctrine under review.

I.

The issue of standing is jurisdictional. If a court concludes that a party lacks standing, the court may not proceed to decide the merits of the suit. Though it is sometimes said that standing raises the question whether the party is fit to litigate an issue, whether he has been injured directly so that he possesses "that concrete adverseness which sharpens the presentation of issues," *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), it is clear that much more is involved. The standing requirement, at bottom, has to do with what kinds of interests courts will undertake to protect. As Justice Powell put it in *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975):

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions [*standing*] *is founded in concern about the proper—and properly limited—role of the courts in a democratic society.*

(Citations omitted; emphasis added.)

This should make it clear that the jurisdictional requirement of standing keeps courts out of areas that are not properly theirs. It is thus an aspect of democratic theory. Questions of jurisdiction are questions of power, power not merely over the case at hand but power over issues and over other branches of government. Article III of the Constitution confers the "judicial Power of the United States" and limits that power in several ways. Among the most important limitations is that expressed in section 2 of article III, confining our jurisdiction to "Cases" and "Controversies." The meaning of those terms, however, is decided by federal courts. It follows that judges can determine the extent of their own power within American government by how they define cases and controversies. It is for this reason that the proper definition of those terms is crucial to the maintenance of the separation of

powers that is central to our constitutional structure.

"Standing" is one of the concepts courts have evolved to limit their jurisdiction and hence to preserve the separation of powers. A critical aspect of the idea of standing is the definition of the interests that courts are willing to protect through adjudication. A person may have an interest in receiving money supposedly due him under law. Courts routinely regard an injury to that interest as conferring upon that person standing to litigate. Another person may have an equally intensely felt interest in the proper constitutional performance of the United States government. Courts have routinely regarded injury to that interest as not conferring standing to litigate. The difference between the two situations is not the reality or intensity of the injuries felt but a perception that according standing in the latter case would so enhance the power of the courts as to make them the dominant branch of government. There would be no issue of governance that could not at once be brought into the federal courts for conclusive disposition. Every time a court expands the definition of standing, the definition of the interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts. That is what is happening in this case. My disagreement with the majority, therefore, is about first principles of constitutionalism.

The contours of the standing concept are often fuzzy and ill-defined, but it is not the less fundamental for that. As I wrote in *Vander Jagt*, 699 F.2d at 1178–79, "[a]ll of the doctrines that cluster about article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."

There may be doubts about what this political-legal idea means for the standing requirement in many cases. This is not such a case. Here it is clear that according these appellants and appellant-intervenors standing is a flat violation of our basic ideas about "the proper—and properly limited—role of the court in a democratic society."

The concept of congressional standing, as the majority opinion makes clear, rests upon the idea that members or Houses of Congress must be able to sue to vindicate powers or rights lodged in them by the Constitution. *See* maj. op. at 25–26, 28. Nothing else is required to confer standing under the doctrine as it has been enunciated by this court. It follows, according to the majority, that appellants have standing to maintain an action against an officer of the Executive Branch to establish that the President's exercise of his pocket veto power was not within the terms set by the Constitution. This may sound unexceptional; it is, in fact, a constitutional upheaval.

The first problem with this court's doctrine of congressional standing is that, on the terms of its own rationale, the concept is uncontrollable. Congress is not alone in having governmental powers created or contemplated by the Constitution. This means that the vindication-of-constitutional-powers rationale must confer standing upon the President and the judiciary to sue other branches just as much as it does upon Congress. "Congressional standing" is merely a subset of "governmental standing." This rationale would also confer standing upon states or their legislators, executives, or judges to sue various branches of the federal government. Indeed, no reason appears why the power or duty being vindicated must derive from the Constitution. One would think a legal interest created by statute or regulation would suffice to confer standing upon an agency or official who thought that interest had been invaded.[2]

2. Indeed, this court has so held on the authority of *Kennedy v. Sampson*. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178–79 (D.C.Cir.1983); *Crockett v. Reagan*, 720 F.2d 1355, 1356–57 (D.C.Cir.1983); *Harrington v. Bush*, 553 F.2d 190, 205 n. 88 (D.C.Cir.1977); *AFGE v. Pierce*, 697 F.2d 303, 305 (D.C.Cir.1982). In *Pierce*, employees of a federal agency, their union, and Congressman Sabo sued to enjoin a proposed reduction-in-force on the grounds that it was a reorganization of the agency barred by statute in the absence of prior approval by the House Appropriations Committee. *Id.* at 304. The district court held that Congressman Sabo had standing and did not decide whether the employees or their union could sue. The case was taken as an emergency expedited appeal, and the panel, on which I sat, held that Congressman Sabo did not have standing as a member of the House of Representatives, but did have standing as a member of the Appropriations Committee. *Id.* at 305. Citing *Kennedy*, the per curiam opinion held that the statute gave each member of the Appropriations Committee the right to participate in approval of any reorganization of the agency. Hence "[t]he Secretary's actions injured him by depriving him of that specific statutory right to participate in the legislative process." *Id.* Since Congressman Sabo had standing, the panel did not decide "the question whether the district court was the appropriate forum for the employees' complaint." *Id.* at 304. My vote in *Pierce* is, of course, inconsistent with the position I adopt in this dissent and previously adopted in my concurrences in *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1177 (D.C.Cir. 1983), and *Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C.Cir.1983). I overlooked the latent separation-of-powers issues in that case, which was my first encounter with this court's congressional standing doctrine, and in which, because of the emergency nature of the appeal, the opinion was released one day after oral argument. *See Pierce*, 697 F.2d at 303.

These points become obvious upon examination of the court's doctrine. If this extrapolation of that doctrine at first seems far-fetched, that is only because it points to a new and wholly unfamiliar legal and constitutional world. Yet such a world is precisely what the rationale of the congressional standing doctrine, honestly applied, will create. No avoidance of these implications is possible unless courts lay down fiats, resting upon no discernible principle, that arbitrarily limit those institutions whose members may vindicate constitutional and legal interests. Because the implications of what is being done here are unfamiliar, it will be well to offer a few examples of governmental standing that flow directly from the majority's rationale.

We may begin with Congress. Members of Congress, dissatisfied with the President's performance, need no longer proceed, as historically they always have, by oversight hearings, budget restrictions, political struggle, appeals to the electorate, and the like, but may simply come to the district court down the hill from the Capitol and obtain a ruling from a federal court. *The Pocket Veto Case*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894 (1929), for example, need not have awaited suit by persons who thought themselves unlawfully deprived of monies: had the congressmen and courts of that time understood what this court now understands, an abstract ruling on the principle of the thing could have been obtained immediately after the President failed to sign the bill. Members of Congress would have standing to sue the President whenever he committed troops, as in Lebanon, on the allegation that there had been a violation of the War Powers Resolution or of Congress' power to declare war under article I, section 8. Members could sue the President about his law enforcement policies and priorities, claiming that their power to make laws under article I, section 8, and his duty, arising under article II, section 3 to "take Care that the Laws be faithfully executed," had both been infringed.[3] Examples of this sort could be multiplied indefinitely.

3. This court has rejected some efforts by legislators to sue on the basis of "the allegedly improper execution of an enacted law," on the grounds that "[t]he injury to the legislator was a generalized grievance about the conduct of government, not a claim founded on injury to the legislator by distortion of the process by which a bill becomes law." *Moore v. U.S. House of Representatives*, 733 F.2d 946, 952 (D.C.Cir.1984) (explaining *Harrington v. Bush*, 553 F.2d 190 (D.C.Cir.1977), and *AFGE v. Pierce*, 697 F.2d 303 (D.C.Cir.1982), as involving only generalized complaints). The attempted distinction is untenable. If a President refused to enforce a law Congress had validly enacted, that would nullify legislators' votes and impair the lawmaking powers of Congress just as surely as if the President had employed the pocket veto. Yet, under the distinction drawn in *Moore*, a refusal to enforce would be treated as giving rise to nothing more than a generalized grievance, while the pocket veto would be treated as occasioning an injury "to the members' rights to participate and vote on legislation in a manner defined by the Constitution." 733 F.2d at 951. The grounds for this difference in treatment are that a legislator has "a right and a duty to participate" in the process by which a bill becomes

But the transformation this court has wrought in its own powers necessarily runs much farther than that. If Congress, its Houses, or its members can sue the President for a declaration of abstract legal right, it must follow that the President may, by the same token, sue Congress. For example, Presidents at least since Franklin Roosevelt have objected to the device known as the congressional veto on the grounds of its unconstitutionality. Had they understood our constitutional system as this court now understands it, these Presidents need not have waited for a private person to raise the issue in *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), to obtain a declaration of the unconstitutionality of that device, but could have sued Congress at any time. This court may become a potent supplement to the checks and balances the Constitution provides. Under the majority's reasoning, whenever the President vetoes a bill that, in his judgment, requires him to execute an unconstitutional law or invades his legitimate constitutional powers and Congress overrides his veto, the President may sue before the ink is dry for a judicial declaration of unconstitutionality. We will become not only a part of the legislative process but perhaps the most important part.

Indeed, if unlawful interference with one's official powers is enough to confer standing I do not know why members of the judiciary should not join in the game, with the added advantage, of course, that one federal judge's lawsuit claiming a right to powers denied would be heard and decided by other federal judges. Thus, when Congress limited the habeas corpus jurisdiction of the District Court for the District of Columbia, there is no reason, under the majority's rationale, why a district court judge, or a judge of this court who had lost appellate jurisdiction, should not have sued Congress and the President for a declaration of unconstitutionality. In this court he would, apparently, have won, *see Pressley v. Swain*, 515 F.2d 1290 (D.C.Cir.1975) (en banc); *Palmore v. Superior Court of the District of Columbia*, 515 F.2d 1294 (D.C. Cir.1975) (en banc), though he would not have succeeded in the Supreme Court, *see Swain v. Pressley*, 430 U.S. 372, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977).

Intra-branch disputes also must succumb to this court's plenary interpretation of its own powers. *See, e.g., Vander Jagt*, 699 F.2d 1166. Individual legislators now have standing to sue each other, the Houses of Congress, other bodies composed of legislators, such as committees and caucuses, and so on. Virtually every internal rule, custom, or practice by which the internal operations of Congress are regulated is reviewable at the discretion of this court at the behest of disgruntled legislators. That means, for example, that the opponents of a filibuster have standing to sue for an injunction directing the filibuster to cease. Legislators who were not selected to serve on the committees of their choice have standing to challenge the manner in which the selection process was conducted. Indeed, this court has so held. *Vander Jagt*, 699 F.2d at 1170. No matter how intrusive the relief sought, this court has jurisdiction so long as the legislator can show some relationship between the congressional behavior he challenges and his own influence and effectiveness as a legislator. Congress, in short, is subject to judicial oversight to whatever degree this court, exercising its newly-invented powers of equitable discretion, decides supervision is warranted, or, as one of our cases puts it, not "startlingly unattractive." *Vander Jagt*, 699 F.2d at 1176 (*quoting Davids v. Akers*, 549 F.2d 120, 123 (9th Cir.1977)). It appears that our constitutional jurisdiction

law. *Id.* at 952. That may be, but the legislator whose vote is nullified by a pocket veto *has* [illegible] and fulfilled his duty. It is [illegible] as to any power that [illegible] binding to [illegible] Pocket [illegible] Congress

intended it, enforcement challenges must be heard if this court's rationale is to be fairly applied. Thus this court's view of standing, applied in a principled fashion, would move the obligation to "take Care that the Laws be faithfully executed" out of article II and the Constitution and divide it between articles I and III

now rests less upon law than upon aesthetic judgments.

The same reasoning, of course, applies to disputes within the Executive and Judicial Branches. The head of an agency who believes that another agency has improperly encroached on an area confided to his administration by statute or regulation no longer need bring the dispute before the President, for the courts stand ready to resolve it.[4] Beyond that, a cabinet officer aggrieved by an Executive Order or any other exercise of presidential power, one which arguably requires him to violate an act of Congress, can proceed to challenge the offending directive in federal court, where declaratory judgment and injunctive relief are available to set the President right. Presumably, a district judge whose jurisdiction had been limited by a court of appeals decision could seek rehearing *en banc* or petition the Supreme Court for a writ of certiorari. According to this court's rationale, I should be able to petition the Supreme Court for a writ of certiorari or of mandamus to overturn the result in this case because it unconstitutionally alters my duties and powers as an article III judge.[5]

Nor must it be forgotten that the Constitution contemplates areas of authority for the states, areas in which the national government is not to impinge. Should Congress enact a law that arguably is beyond its powers and that has an impact upon citizens of the several states, it would seem, under this court's reasoning, that members of a state legislature, whose jurisdiction had been ousted, would have standing to sue the national executive to enjoin enforcement of that law. Certainly the State itself would have standing. States, after all, have constitutional functions and powers as surely as does.

Enough has been said perhaps to indicate the breathtaking transformation of the judicial function, the relationships between the branches of the national government, and the relationships between federal and state governments that waits at the end of the road upon which this court has set its foot. It is clear from the cases that even this first step is illegitimate.

II.

It is easily demonstrated from several different lines of cases that the doctrine of congressional standing is ruled out by binding Supreme Court precedent. These lines of authority will be examined separately, and I will then suggest that they are but facets of the same set of considerations.

A.

It has been noted already that the rationale upon which the majority accords standing to members of Congress and the Senate in this case would equally permit suits by states to challenge federal laws or actions that seem to impinge upon their sovereignty. But this result, of course, contravenes *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), and does so in a way that shows both the impropriety of the doctrine of governmental standing and the impropriety of that doctrine even if confined, illogically, to suits by congressmen.

In *Massachusetts v. Mellon*, the Commonwealth of Massachusetts brought an original action in the Supreme Court against various federal officials to enjoin, as unconstitutional, enforcement of the Maternity Act. 262 U.S. at 478, 43 S.Ct. at

4. The majority clearly believes that *Chapman v. FPC*, 345 U.S. 153, 73 S.Ct. 609, 97 L.Ed. 918 (1953), establishes that this is already the law, but as shown *infra* at pp. 64–66, that case does not at all have the import the majority ascribes to it.

5. Lest this be regarded as fantasy or burlesque, it should be noted that this very sort of litigation within the judicial branch is being attempted. *See In re Robson and Will, petition for mandamus or in the alternative for cert. filed*, 53 U.S.L.W. 3552 (U.S. Feb. 5, 1985) (No. 84-1127) (United States District Judges seeking relief against Court of Appeals on grounds that Court of Appeals improperly substituted its discretion for that of the District Court, and exceeded its authority by ordering a remedy that is contrary to law). The possibilities seem boundless.

596. The statute provided appropriations to be apportioned among states that would comply with the law's provisions for the purpose of federal-state cooperation to reduce maternal and infant mortality and protect the health of mothers and infants. *Id.* at 479, 43 S.Ct. at 598. Massachusetts, in an argument exactly parallel to that the majority advances here, claimed that the Maternity Act was a usurpation of power not granted to Congress, but reserved to the States, by the Constitution. The State asserted standing because its "rights and powers as a sovereign State ... [had] been invaded." *Id.* The Supreme Court responded that

> in so far as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government.... [T]his Court is ... without authority to pass abstract opinions upon the constitutionality of acts of Congress ...

Id. at 484–85, 43 S.Ct. at 600.

In the present case we are asked to pass an abstract opinion upon the constitutionality of an act of the President. Unlike the Supreme Court, the majority here complies with that request. But, if *Massachusetts v. Mellon* is right, the majority is wrong. If, on the other hand, the majority is right, its rationale would, as already noted, lead to the overruling of *Massachusetts v. Mellon*, not merely in its general approach, but on the specific situation presented there: all states would have standing to challenge any action by any branch of the federal government even though nothing more concrete than disagreement about constitutional powers was at stake. Since this court is not empowered to overrule *Massachusetts v. Mellon*,[6] I think the reasoning of that case requires a conclusion that there is no standing here.

B.

The Supreme Court's decisions about suits over "generalized grievances" are closely related to *Massachusetts v. Mellon* and require the same result here. The merits of the dispute offered us turn upon the interpretation of article I, section 7, clause 2 of the Constitution. That is a task for which courts are suited, and I would have no hesitation in reaching and deciding the substantive question if this were a suit by a private party who had a direct stake in the outcome. *The Pocket Veto Case*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894 (1929), was, of course, just such a suit.[7] This action, however, is not. This is an action by representatives of people who themselves have no concrete interest in the outcome but only a "generalized grievance" about an allegedly unconstitution of government. It is well settled that citizens, whose interest is here asserted derivatively, would have no standing to maintain this action.[8] That being so, it is impossible that these representatives

6. The majority claims that *Massachusetts v. Mellon* is "in no respect contrary" to the majority's position. Maj. op. at 27 n. 14. But the majority then proceeds to explain that case and cases that came afterward, such as *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), *overruled on other grounds*, *Garcia v. San Antonio Metropolitan Transit Authority*, — U.S. —, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), in a way that shows *Massachusetts v. Mellon* to be contrary to its position in every respect. Thus, the majority quotes a passage from that decision pointing out that Massachusetts complained of federal usurpation of the reserved powers of the states "by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent." Maj. op. at 27 n. 14 (quoting 262 U.S. at 483, 43 S.Ct. at 599). The majority then finds that decision consistent with the state [illegible] *Mellon*. We should not [illegible]

claims of infringement of lawful functions. Rather, the case explicitly leaves open the possibility of suit by a state when 'rights of the State falling within the scope of the judicial power' are at stake, a possibility later to become an actuality in, e.g., *National League of Cities*." Maj. op. at 27 n. 14. That neatly expresses my point, not the majority's. The difference between *Massachusetts v. Mellon* and *National League of Cities* is that in the former only an injury to governmental powers was alleged while in the latter states and cities were required by federal statute to expend money. *See National League of Cities*, 426 U.S. at 846–47, 96 S.Ct. at 2471–72. That was the concrete injury in fact that conferred standing. The case now before us alleges only a usurpation of governmental powers and hence, on the teaching of the two Supreme Court decisions cited, is outside our jurisdiction. In short, *Massachusetts v. Mellon* is to *National League of Cities* as the present case is to the *Pocket Veto Case*.

7. In *The Pocket Veto Case*, Congress passed a bill authorizing certain Indian tribes to present their claims against the United States to the Court of Claims. 279 U.S. at 672, 49 S.Ct. at 463. The bill was presented to the President less than ten days before an intersession adjournment, *id.*; the President neither signed the bill nor returned it to the originating house, and the bill was not published as a law. *Id.* at 673, 49 S.Ct. at 464. The Indian tribes took the position that the bill became law, and filed a petition in the Court of Claims raising various claims in accordance with the terms of the bill. The United States defended on the ground that the bill had not become law under article I, section 7, and the Court of Claims dismissed the petition for that reason. *Id.* The Supreme Court allowed a member of the House Committee on the Judiciary to appear as an amicus, but there was no suggestion that any legislator had standing to sue. *Id.*

Wright v. United States, 302 U.S. 583, 58 S.Ct. 395, 82 L.Ed. 439 (1938), followed the same format. Congress passed a bill giving the Court of Claims jurisdiction to adjudicate Wright's claim against the United States. 302 U.S. at 586, 58 S.Ct. at 396. The United States opposed Wright's petition, arguing that the bill had never become law, and the Court of Claims agreed. *Id.* Moreover, the same pattern is evident in the other Supreme Court cases that have interpreted the presentation clause. *Edwards v. United States*, 286 U.S. 482, 52 S.Ct. 627, 76 L.Ed. 1239 (1932), involved a private bill giving the Court of Claims jurisdiction to adjudicate Edwards' claim against the United States; the Court of Claims certified to the Supreme Court the question whether the bill became law, given that it had been signed by the President after a final adjournment but within ten days of presentation. *Id.* at 485, 52 S.Ct. at 628; *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 20 S.Ct. 168, 44 L.Ed. 223 (1899), differs only in that there Congress passed a bill authorizing the Attorney General to bring suit in the Court of Claims to determine whether an award made by a United States Commission to La Abra had been obtained by fraud. 175 U.S. at 441, 20 S.Ct. at 175. Consequently, in *La Abra* the private party, rather than the government, raised the defense that the bill had not become law, because signed by the President during a congressional recess. *Id.* at 446, 451, 20 S.Ct. at 176, 177. These cases provide no support for conferring standing to raise presentation clause issues on congressional plaintiffs.

8. It is also well settled that the states would not have standing to assert such generalized grievances on behalf of their citizens. *Massachusetts v. Mellon* also holds that a State, as *parens patriae*, may not "institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof," because "it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government." 262 U.S. at 485–86, 43 S.Ct. at 600–01. The Supreme Court recently reaffirmed that holding in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n. 16, 102 S.Ct. 3260, 3270 n. 16, 73 L.Ed.2d 995 (1982), while indicating that a state would have standing as *parens patriae* to "secure the federally created interests of its residents against private defendants." *Id.* This illustrates, rather dramatically one would think, that what is a sufficient injury in fact when asserted against a private defendant may, for reasons of separation of powers and federalism, be deemed insufficient to confer standing against a branch of the federal government. It is precisely these reasons of separation of powers and federalism that compel the parallel conclusion that injury to governmental powers does not constitute an injury in fact or a judicially cognizable injury, as the Supreme Court has elaborated those terms in connection with the article III standing requirements.

Lest this point be misunderstood, I emphasize that I do not read either *Mellon* or *Snapp* as holding that the prohibition on state *parens patriae* suits against the federal government is in all cases a constitutional limitation rather than a prudential one. In my view, that prohibition is a constitutional requirement where, as in *Mellon*, individuals within the state would lack standing to sue because they have suffered no injury that is judicially cognizable under article III. To permit Congress to confer standing on a state in such a case would be to authorize evasion of the constitutional standing requirements by allowing the state as a representative of its citizens to sue when those who are represented could not. But where private individuals could satisfy the injury in fact requirement of article III, there is no threat to separation of powers or to federalism in allowing Congress to confer *parens patriae* standing on the state as the representative of persons who have suffered a concrete injury and would themselves have standing. Consequently, in this second category of cases the rule is prudential and, although fully binding on the courts until Congress acts, may be eliminated by congressional enactments.

should have standing that their constituents lack.

The Supreme Court has repeatedly rejected the proposition that one who sues as a citizen or taxpayer, alleging nothing more than that the government is acting unconstitutionally, has standing to sue. A naked claim that a constitutional violation has occurred, the Court has said, "would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury." *Schlesinger v. Reservists Committee To Stop the War*, 418 U.S. 208, 217, 94 S.Ct. 2925, 2930, 41 L.Ed.2d 706 (1974). *See United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972); *Ex parte Levitt*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937). This is true even though "citizens are the ultimate beneficiaries of those [constitutional] provisions," *Reservists*, 418 U.S. at 227, 94 S.Ct. at 2935. Taxpayers face the same bar. In *Frothingham v. Mellon*, 262 U.S. 447, 486, 43 S.Ct. 597, 600, 67 L.Ed. 1078 (1923), the Court denied standing to a federal taxpayer who alleged that a spending bill was unconstitutional. Despite the fact that such bills may have the effect of taking money from the individual taxpayer and putting it to a purpose the Constitution interdicts, the general rule is still that the taxpayer lacks standing because he "suffers in some indefinite way in common with people generally." *Id.* at 488, 43 S.Ct. at 601. *See Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 476–81, 102 S.Ct. 752, 760–63, 70 L.Ed.2d 700 (1982). Thus, these legislators lack standing in their individual, as opposed to their representative, capacities. The majority appears to concede that, insisting only upon representative standing.

Yet, the legislators on whom this court has bestowed standing have alleged only two things—an unconstitutional act and an impairment of their constitutional powers as a result of that act. It is clear that the citizens and taxpayers these legislators represent would not have standing if they alleged that the same unconstitutional act had impaired the official powers of their representatives. That would be true despite the fact that citizens and taxpayers are the "ultimate beneficiaries" of the constitutional powers their representatives possess. Indeed, that was precisely the argument that was rejected in *Reservists*, where the plaintiffs alleged that they, as citizens and taxpayers, had been deprived "of the faithful discharge by members of Congress ... of their duties as members of Congress, to which all citizens and taxpayers are entitled." 418 U.S. at 212, 94 S.Ct. at 2927 (*quoting* Petition for Certiorari at 46).

If the people of the United States would not have standing to bring this action (and it is undeniable that they would not), then how can the representative of the people have standing that their constituents do not? The only possible answer is that elected representatives have a separate private right, akin to a property interest, in the powers of their offices. But that is a notion alien to the concept of a republican form of government. It has always been the theory, and it is more than a metaphor, that a democratic representative holds his office in trust, that he is nothing more nor less than a fiduciary of the people. Indeed, as I show in Part III below, the Framers of the Constitution most certainly did not intend to allow suits such as this, which means they did not conceive of the powers of elected representatives as apart from the powers of the electorate. It is for that reason that Judge Scalia was entirely correct in stating that "no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold." *Moore*, 733 F.2d at 959 (Scalia, J., concurring).

Justice Frankfurter's separate opinion in *Coleman v. Miller*, 307 U.S. 433, 460, 59 S.Ct. 972, 985, 83 L.Ed. 1385 (1939), made the same point on behalf of himself and Justices Black, Roberts, and Douglas:

> We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it. The Kansas legislators [who challenged the state's ratification of an amendment to the United States Constitution] could not bring suit explicitly on behalf of the people of the United States to determine whether Kansas could still vote for the Child Labor Amendment. They can not gain standing here by having brought such a suit in their own names.

Id. at 467, 59 S.Ct. at 988. He said that injuries to voting procedures "pertain to legislators not as individuals but as political representatives executing the legislative process." *Id.* at 470, 59 S.Ct. at 989. The Court majority did not disagree with this so far as suits in federal courts were concerned, but found an interest sufficient to confer standing only because the suit came from a state court that had found standing under state law. *Id.* at 446, 59 S.Ct. at 978. Justice Frankfurter's analysis thus remains fully applicable to the action before us now.

This court now necessarily adopts as a premise to its reasoning that legislators, and other members of government, have a private individual stake in their official powers that is separate from their fiduciary role. If not, it is utterly anomalous to allow the representative to sue when those he represents may not. One might as well drop the pretense, allow not only legislators but citizens and taxpayers to sue, and declare *Richardson*, *Reservists*, and *Frothingham* overruled and Justice Frankfurter's *Coleman* analysis rejected. Though the majority does not declare it, that is what it has effectively accomplished for this circuit with the doctrine of congressional standing.

C.

The Supreme Court last Term handed down a decision that makes clear both the foundations of standing doctrine and the utter incompatibility of those foundations with this court's congressional-standing superstructure. In *Allen v. Wright*, — U.S. —, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), Justice O'Connor, writing for the Court majority, restated fundamentals to which we should revert every time an expansion of standing is contemplated.

> Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." As the Court explained in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471–476 [102 S.Ct. 752, 757–760, 70 L.Ed.2d 700] (1982), the "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975).

Id. 104 S.Ct. at 3324. She specified the foundations of the doctrine: "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Id.* at 3325. Moreover,

> the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only "in the last resort, and as a necessity," *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 [12 S.Ct. 400, 402, 36 L.Ed. 176] (1892), and only when adjudication is "consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process," *Flast v. Cohen*, 392 U.S. 83, 97, 88 S.Ct. 1942, 1951, 20 L.Ed.2d 947 (1968). See *Valley Forge*, 454 U.S., at 472–473, 102 S.Ct. at 758–759.

Id. The concept of congressional standing, born in this circuit and relied upon by the

majority today, is inconsistent with every one of the criteria laid down in this passage from *Allen v. Wright*.

This may be seen by contrasting two opposing conceptions of the role of the federal courts in our polity. The first, and more traditional, view is that federal courts sit to adjudicate disputes between litigants; the power of the courts derives entirely from the necessity to apply the law to concrete controversies. Judges interpret the Constitution and apply it only out of necessity, and as a last resort, because the Constitution is law and may not be ignored by a court of law. In the course of adjudication, the court may have to declare a statute enacted by Congress unconstitutional or it may have to make the same declaration concerning an act of the President. That is an awesome power, but it is confined, limited, and tamed because it is exercised only when the need to decide a concrete controversy makes it inevitable. It is "merely the incidental effect of what *Marbury v. Madison* took to be the judges' proper business—'solely, to decide on the rights of individuals.'" Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L.Rev. 881, 884 (1983) (footnote omitted). This view of the powers of the federal judiciary is the one reiterated by the Supreme Court in *Allen v. Wright*.

Tocqueville understood the genius that underlay this definition of the judicial role:

> [B]y leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.
>
> ....
>
> [T]he American judge is brought into the political arena independently on his own will. He judges the law only because he is obliged to judge a case.... It is true that, upon this system, the judicial censorship of the courts of justice over the legislature cannot extend to all laws indiscriminately, inasmuch as some of them can never give rise to that species of contest which is termed a lawsuit .... The Americans have often felt this inconvenience; but they have left the remedy incomplete, lest they should give it an efficacy that might in some cases prove dangerous.

1 A. De Tocqueville, *Democracy In America* 106–07 (T. Bradley ed. 1945).

The competing view, which this court adopted with the congressional standing doctrine, is that "the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor." *Valley Forge*, 454 U.S. at 489, 102 S.Ct. at 767. The *Valley Forge* Court could not have been clearer in rejecting this position: "This philosophy has no place in our constitutional scheme." *Id.* Yet, by means of its invention of standing for officials or branches of government to seek the continual arbitration of this court in their legal disputes with one another, this court has adopted, as the law of this circuit, the philosophy decisively rejected in *Valley Forge* and *Allen v. Wright*.[9]

9. The majority insists that *Allen v. Wright* has "nothing to do with 'governmental standing,'" but it concedes that *Allen v. Wright* emphasized that "the traditional standing criteria" are "grounded in, and are to be applied with reference to, the principle of separation of powers." Maj. op. at 28 n. 14. The majority cannot have it both ways. My disagreement with the majority, put in the technical terms of traditional standing criteria, is over whether impairment of governmental powers is a judicially cognizable injury, that is, an "injury in fact" for purposes of article III. Just as *Massachusetts v. Mellon* demonstrates that considerations of federalism limit the category of judicially cognizable injury in controversies between a state and the United States, *Valley Forge* and *Allen v. Wright* show, not only in their general approach but in their specific application of the "traditional standing criteria," that considerations of separation of powers have the same limiting effect. In *Valley Forge* the Court held that the unconstitutional government conduct plaintiffs had alleged did not constitute a judicially cognizable injury, because "[a]lthough [they] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by the plaintiffs *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485, 102 S.Ct. at 765. Yet, as the *Valley Forge* Court undoubtedly was aware, psychological consequences are familiar bases for claims in other legal contexts. The Supreme Court's refusal to treat the psychological effects of allegedly unconstitutional government conduct as judicially cognizable "can only mean that the Court perceives that to confer standing in such cases would impermissibly alter its function." *Vander Jagt*, 699 F.2d at 1178 (Bork, J., concurring).

Similarly, in *Allen v. Wright*, although recognizing that the stigmatizing injury caused by racial discrimination will confer standing in some circumstances, 104 S.Ct. at 3327, the Court held that the plaintiffs did not have standing because they were not personally subject to the discrimination they challenged. *Id.* To treat this "abstract stigmatic injury" as cognizable, the Court stated, would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *Id.* (*quoting United States v. SCRAP*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973)).

The *Allen v. Wright* Court's treatment of the "fairly traceable" requirement even more clearly takes a separation-of-powers approach. The "fairly traceable" requirement "examines the causal connection between the assertedly unlawful conduct and the alleged injury." 104 S.Ct. at 3326 n. 19. Yet, though the Court recognized that the challenged IRS tax-exemption practices might make some difference to the ability of plaintiffs' children to receive a desegregated education, and though it conceded that that harm is not only judicially cognizable but "one of the most serious injuries recognized in our legal system," *id.* at 3328, it nonetheless held that the causation requirement was not met. Why? Because, the Court said, "we rely on separation of powers principles to interpret the 'fairly traceable' component of the standing requirement." *Id.* at 3330 n. 26. It is evident, then, that the majority's assertion that *Allen v. Wright* is irrelevant to governmental standing is unsupportable, and ignores both that opinion's general approach to the purposes of the standing doctrine and its application of the technical standing criteria.

The difference between the two conceptions of the judicial power may be stated more succinctly. In the traditional view, it is the necessity to decide a case that creates a court's duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). In the new view, it is the court's desire to pronounce upon the law that leads to the necessity to create a case. This is a case created by the court. There would be no case or controversy here but for fabrication of the doctrine of congressional standing.

The court has fashioned a doctrine, in contradiction of *Allen v. Wright*, that transforms it from a tribunal exercising its powers "only in the last resort, and as a necessity" to a governing body for the entire federal government, available upon request to any dissatisfied member of the Legislative, Executive or Judicial Branch. Plainly, the courts of this circuit, if no other, are now not the last but the first resort. We have abandoned concern that our performance be "consistent with a system of separated powers" for a role of continual and pervasive intrusiveness into the relationships of the branches and, indeed, relationships within the branches. Nor can it be said even that the disputes we invite are those "traditionally thought to be capable of resolution through the judicial process," for no one ever thought, until we did, that courts should step directly between the other branches and settle disputes, presented in the abstract, about powers of governance. Moreover, as Alexander M. Bickel said, "the 'standing' and 'case' requirement creates a time lag between legislation and adjudication, as well as shifting the line of vision. Hence it cushions the clash between the Court and any given legislative majority...." A. Bickel, *The Least Dangerous Branch* 116 (1962). In this respect, the standing requirement is like the requirement of ripeness, another of the traditional aspects of dispute resolution through the judicial process.

Congressional standing, which must expand into governmental standing for the President, the judiciary, and the states, if its rationale is honored, completely dispenses with the traditional, limited function of

the judiciary and violates every one of the criteria for constitutional standing laid down by the Supreme Court in *Allen v. Wright*.

D.

Just as *Allen v. Wright* teaches that standing requirements are built around the constitutional concept of "separation of powers," *Massachusetts v. Mellon* suggests that those same requirements also play a vital part in the parallel constitutional concept of federalism. As separation of powers and federalism apply in a context like this one, the fundamental consideration appears to be the need to limit the role of the courts in the interplay of our various governmental institutions. The role of the courts is limited, not excluded, since a person denied a monetary benefit or other concrete interest could invoke the authority of the courts by asserting that a bill had become law because of the invalidity of a pocket veto. The difference between a judicial function limited by the doctrine of standing and one not so limited lies in the relative dominance of the judicial branch, in the timing of judicial action, and in the number of constitutional principles generated that curb the powers and freedoms of other governmental units.

As Judge Scalia recently observed, "[t]he degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon *when* and *at whose instance* they are permitted to address them." Scalia, *supra*, 17 Suffolk U.L.Rev. at 892. A federal judiciary that is available on demand to lay down the rules of the powers and duties of other branches and of federal and state governments will quickly become the single, dominant power in our governmental arrangements. The concept of the fragmentation of power, upon which both the ideas of the separation of powers and of federalism rest, will be, if not destroyed, at least very seriously eroded. *See generally The Federalist* No. 51, at 351 (J. Madison) (J. Cooke ed. 1961) (explaining that both separation of powers and the division of power between state and federal governments serve to protect the liberty of the governed by dividing the power of government). A majority of Supreme Court Justices will have something very like the power to govern the nation by continuously allocating powers and inhibitions to every other governmental institution. As Chief Justice John Marshall put it in a speech to Congress:

> A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States, it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the judiciary.

Speech of the Honorable John Marshall to the United States House of Representatives, 18 U.S. (5 Wheat.) Appendix at 3, 16 (1820). The concept of standing prevents this undesirable centralization of authority by severely limiting the occasions upon which courts are authorized to lay down the rules for governments and institutions of government.

Standing requirements, like the requirement of ripeness, also delay the invocation of judicial power. This means that there is time for the real impact of laws and actions to become clear, thus making the constitutional inquiry less abstract and more focused. The law is given a chance to go into effect and have some impact upon persons in the society so that its constitutionality can be judged according to its real effects upon real persons in real circumstances. The courts are enabled to think about real interests and claims, not words. Constitutional adjudication should operate upon the basis of realities, not general propositions.

A firm standing concept also decreases the number of occasions upon which courts will frame constitutional principles to govern the behavior of other branches and of states. There will thus be fewer constitutional principles of that sort in the system. That, too, is a benefit. The business of government is intensely practical and much is accomplished by compromise and accommodation. The powers of the branches with respect to one another, as well as the reciprocal powers of the federal and state governments, ebb and flow as the exigencies of changing circumstances suggest. It is proper and healthful that this should be so. These matters should not be always settled at the outset by declarations of abstract principle from an isolated judiciary not familiar with the very real and multitudinous problems of governing. Fluid relationships should not be frozen and the play removed from the joints of government. That is precisely the tendency that must come into being, however, if elimination of standing requirements permits the explosive proliferation of constitutional declarations about governmental powers.

Our democracy requires a mixture of both principle and expediency. As Professor Bickel put the matter:

> [T]he absolute rule of principle is ... at war with a democratic system....
>
> No society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden.

A. Bickel, *supra*, at 64. While all branches of government are obliged to honor the Constitution, the declaration of constitutional principle with binding effect is primarily the task of the federal courts. If the federal courts can routinely be brought in to pronounce constitutional principle every time the branches of the federal government disagree, every time the federal and the state governments contend, then we will indeed become a "principle-ridden," in fact a judge-ridden, society. Traditional standing requirements are a principal barrier between us and that unhappy condition.

The arguments just made indicate that, except where a conventional lawsuit requires a judicial resolution, much of the allocation of powers is best left to political struggle and compromise. Indeed, it was to facilitate and safeguard such a continuing process that the checks and balances of the Constitution were created. It was to allow room for the evolution of the powers of various offices and branches that the Constitution's specification of those powers was made somewhat vague. The Framers contemplated organic development, not a structure made rigid at the outset by rapid judicial definition of the entire subject as if from a blueprint. The majority finds this plan inadequate and the idea of political struggle between the political branches distasteful, at best "time-consuming," at worst involving "retaliation." Maj. op. at 16. Just so. That is what politics in a democracy is and what it involves. It is absurd to say, as the majority does, that a "political cure seems to us considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case." *Id.* That is a judgment about how the Constitution might better have been written and it is not a judgment this or any other court is free to make. Moreover, I know of no grave consequences for our constitutional system that have flowed from political struggles between Congress and the President. This nation got along with that method of resolving matters between the branches for 185 years, until this court discerned that the nation would be better off if we invented a new role for ourselves. And, of course, it is true that matters of government will be much neater, if less democratic, to the extent that judges undertake to decide them in the first instance. One must not, furthermore, take seriously the majority's promise that this court's congressional standing doctrine "will help to preserve, not defeat, the separation of powers." Maj. op. at 30. As I have shown,

there is no principled way to limit the judicial power the majority would have us take for our own, and the result must inevitably lead to the destruction, not the preservation, of the separation of powers.

As I show next, those who framed, proposed, and ratified our Constitution chose a different mixture of principle and compromise for our polity, a different process of growth, struggle, and accommodation when they chose the role to be played by courts.

III.

Though we are obligated to comply with Supreme Court precedent, the ultimate source of constitutional legitimacy is compliance with the intentions of those who framed and ratified our Constitution. The doctrine of congressional or governmental standing is doubly pernicious, therefore, because it flouts not only the rules enunciated and applied by the Supreme Court but the historical meaning of our basic document as well. The criteria of *Allen v. Wright* are not simply Court-made; they reflect and express the design of the Framers of the Constitution. No other conclusion is possible from a consideration of what the Framers did and did not do.

At the outset of the Constitutional Convention, Governor Randolph presented a series of resolutions framed by the Virginia delegation and commonly called the Virginia Plan. As Farrand says, "[t]hese resolutions are important, because amended and expanded they were developed step by step until they finally became the constitution of the United States." M. Farrand, *The Framing of the Constitution of the United States* 68 (1913). The eighth resolution proposed that the new national legislature be controlled by placing a veto power in a Council of Revision consisting of the executive and "a convenient number of the National Judiciary." 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 21 (1st ed. 1911). A Council so composed would be controlled by the votes of the judiciary, and the latter would in that way heavily influence, and often control, the relationship between the President and Congress. By vetoing or refusing to veto, the judiciary could uphold one branch against the other and make itself the umpire of the constitutional system, not in the last resort or as a necessity, but on a continuing, front-line basis. The judiciary would, as well, be drawn up immediately next to the legislative process and decide what was to be law and what was not on the basis of abstract reasoning, without the benefit conferred by the passage of time, the cooling of passions, and an issue framed in a concrete factual setting.

We do not, of course, know all of the reasons why the members of the Convention repeatedly defeated the proposal for a Council of Revision.[10] But we do know the effect the Council would have had upon our constitutional arrangements and upon the role of the courts—effects remarkably similar to those that would result from the final adoption of this circuit's doctrine of governmental standing—and we do know that the idea was rejected.

There are, however, more, and stronger, inferences to be drawn from the work of the Convention than merely those that may be drawn from the rejection of the Council of Revision. We know, for example, that the Convention drafted article III of the Constitution in a way that does not contemplate suits directly between the branches of government. Article III extends "judicial power" to various categories of "cases" and "controversies," which itself indicates the Framers had in mind a role for the judiciary similar to the common-law function with which they were familiar. It is perhaps more noteworthy that article III creates, as specific, independent categories of federal judicial power, "controversies" between states, between a state and citizens of another state, and so on. Given that listing, it is incredible that Framers who intended to extend judicial power to direct controversies between Congress and the President failed to include so important a category in their recitation.

The drafters, moreover, singled out especially sensitive categories of judicial power for the original jurisdiction of the Supreme Court. Thus, article III gives the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." Had they contemplated that the federal courts would regularly supervise relationships between Congress and the President, the Framers would undoubtedly have placed that class of cases within the Supreme Court's original jurisdiction. That inference is made certain by the fact that article III contemplated that "inferior [federal] courts" might not be established at all. In fact, federal question jurisdiction was not given to the lower federal courts for almost a century after the framing of the Constitution. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. That fact also demonstrates that the political branches were not to sue each other. The Framers simply cannot have contemplated that disputes directly between Congress and the President would be decided in the first instance by one of the thirteen existing state court systems.

It is notorious that the Constitution nowhere mentions any power of judicial review. That fact has been much bruited in the never-ending debate over the legitimacy of the power asserted in *Marbury v. Madison*. It is entirely conceivable, of course, that Framers who thought the Constitution would be law, and who made it supreme law in article VI of the Constitution, simply assumed that the Constitution would be applied by the courts when cases arose requiring it. Indeed, there are a number of comments preserved from the Convention debates that suggest this is precisely what some members did assume.[11] But it is absolutely inconceivable that Framers who intended the federal courts to arbitrate directly disputes between the President and Congress should have failed to mention that function or to have mentioned judicial review at all. The statesmen who carefully spelled out the functions of Congress and the President and the details of how the executive and legislative branches might check each other could hardly have failed even to mention the judicial lynchpin of the constitutional system they were creating—not if they had even the remotest idea that the judiciary was to play such a central and dominant role.

The intentions of the Framers need not be derived entirely from the records of the Constitutional Convention, nor even from the structure and language of the document itself. Courts may and frequently do look to evidence of what was said and done immediately after the original act of composition. Consider, for example, Hamilton's well-known defense of the institution of judicial review in *The Federalist* No. 78. That defense, in essence, is that the limitations on the constitutional powers of Congress "can be preserved in practice no other way than through the medium of the

10. The Council of Revision was initially rejected when Gerry's motion "which gave the Executive alone without the Judiciary the revisionary control on the laws" was adopted. 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 104 (1st ed. 1911) (June 4, 1787). On three occasions thereafter Madison and Wilson renewed the proposal for the Council of Revision, each time without success. 1 M. Farrand, *supra*, at 138, 140 (June 6, 1787); 2 M. Farrand, *supra*, at 73, 80 (July 21, 1787); 298 (Aug. 15, 1787). Gerry raised the objection that the power of judicial review was sufficient to protect the judiciary [illegible] Madison argued that such review was inappropriate because it [illegible] public policy was no part of the judicial function. 1 M. Farrand, *supra*, at 97–98. King and Dickinson argued in addition that the proposal would dilute the executive's unitary character and make it less accountable for the use to which this power was put. *Id.* at 139, 140. Strong worried that the judges might be unable to be impartial in interpreting the laws if they were given a part in making them. 2 M. Farrand, *supra*, at 75. Luther Martin pointed out that the judges could not be presumed more expert in legislative affairs than the legislators, *id.* at 76, and Ghorum urged that the judges might well advise the executive rather than support him against the legislature. *Id.* at 79.

11. *See, e.g.*, 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 97 (1st ed. 1911) (remarks of Gerry); 109 (remarks of King); 2 M. Farrand, *supra*, at 76 (remarks of L. Martin); 93 (remarks of Madison); 299 (remarks of Gouverneur Morris). *But see* 2 M. Farrand, *supra*, at 298 (remarks of Mercer); 299 (remarks of Dickenson).

courts of justice duty it must be to declare all acts contrary to the manifest tenor of the constitution void." *The Federalist* No. 78, at 524 (A. Hamilton) (J. Cooke ed. 1961). It is important that Hamilton's discussion of judicial review is immediately preceded by a passage in which he repeatedly emphasizes the comparative impotence of the judiciary. The enormous power that the judiciary would acquire from jurisdiction over inter- and intra-branch disputes would have made a mockery of his quotation of Montesquieu to the effect that "of the three powers above mentioned [the others being the legislative and the executive], the JUDICIARY is next to nothing." *Id.* at 523 n. * (*quoting* Spirit of Laws, vol. 1, at 186). Had Hamilton even suspected that disagreements between the popular branches over their respective powers were "cases" or "controversies" within the meaning of article III, it is not to be believed that he would have described the judiciary as "from the nature of its functions, ... always ... the least dangerous to the political rights of the constitution...." *Id.* at 522. In fact, the judiciary would be the branch most dangerous to those political rights.

Indeed, the only discussion in The Federalist of possible judicial involvement in disputes between the President and Congress comes in connection with the impeachment power. The problem, Hamilton says, was to create "[a] well constituted court for the trial of impeachments." *The Federalist* No. 65, at 439 (A. Hamilton) (J. Cooke ed. 1961). He defines that court's jurisdiction in terms of those offenses that derive from "the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself." *Id.* He then considers, and rejects, the proposal that the Supreme Court should have been given this jurisdiction, in part on the grounds that it lacks the independence and authority to discharge this delicate task without a dangerous confrontation with one branch or the other. *Id.* at 441. The majority's doctrine of congressional standing brings the two political branches before us as adversaries just as much as would giving trials of impeachments to the judiciary. Today's dispute is only over a pocket veto that has little continuing importance, but the invitation we now issue will ultimately bring before us the most profound and agitated issues of politics and government. The task of umpiring disputes between the coordinate branches which this court has agreed to undertake is no more suited to judicial competence than trial by impeachment, and raises the same or greater dangers of repeated and head-on confrontation with the other branches that underlie Hamilton's objections.[12] Thus, the whole tenor of Hamilton's authoritative discussion of the Judicial Branch is completely inconsistent with the existence of the jurisdiction the majority claims to possess.

A similar point may be made about Hamilton's discussion of the President's veto power in *The Federalist* No. 73. Hamilton asserts that the use of the veto power to prevent "the passing of bad laws" was only a secondary purpose of its adoption by the Framers. "The primary inducement to conferring the power in question upon the executive," he says, "is to enable him to defend himself." *The Federalist* No. 73, at 495 (A. Hamilton) (J. Cooke ed. 1961). The risk is that "he might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote." *Id.* at 494.

12. Tocqueville saw this point as well. After speaking of the American practice of leaving the invocation of judicial power to contests of private interest, he said:

> I am inclined to believe this practice of the American courts to be at once most favorable to liberty and to public order. If the judge could attack the legislation only openly and directly, he would sometimes be afraid to oppose him; and at other times party spirit might encourage him to brave it at every turn. The laws would consequently be attacked when the power from which they emanated was weak, and obeyed when it was strong; that is to say, when it would be useful to respect them, they would often be contested, and when it would be easy to convert them into an instrument of oppression, they would be respected.

1 A. de Tocqueville, *supra*, at 107.

Thus, "the case for which the veto power is chiefly designed [is] that of an immediate attack upon the constitutional rights of the executive." *Id.* at 497. But, if this court's governmental standing doctrine is correct, Hamilton has described a power that is largely superfluous. The President would not need to defend himself through the veto power—he could at once challenge any "vote[s]" or "resolutions" that endangered his "constitutional rights" as President in the courts.

Even the Anti-Federalists did not urge the existence of such unbounded judicial power as an objection to the proposed constitution. The most detailed Anti-Federalist critique of judicial review was supplied by the pseudonymous Brutus, whose principal argument was that the federal courts would by constitutional interpretation bring about "an entire subversion of the legislative, executive and judicial powers of the individual states." H. Storing, *The Complete Anti-Federalist* 2.9.139 (1981). His description of judicial review is revealing: when the legislature enacts laws that the court judges to be unconstitutional, "the court will take no notice of them," and this will discourage the legislature from passing "laws which they know the courts will not execute." *Id.* at 2.9.148. Had Brutus thought the courts were free not only to refuse to execute an unconstitutional law, but to review it for unconstitutionality where no question of execution had arisen, his argument would have gained immeasurably from some mention of that fact. There is none.

It must be concluded, therefore, that those who drafted, proposed, and ratified the Constitution did not intend that the judiciary should entertain suits directly between the political branches of the national government. The judiciary they envisioned was to play no such dominant role in affairs of state. Their intention precludes the doctrine of standing devised by this court to thrust the judiciary into the adversary position.

IV.

To make its standing doctrine more palatable this court has adopted a doctrine of remedial or equitable discretion. This doctrine permits the court to say that a congressional plaintiff has standing, and hence that the court has jurisdiction, and yet refuse to hear the case because the court is troubled by the separation-of-powers implications of deciding on the merits. We have no such equitable discretion, however, for "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821). By claiming that discretion, the court has created for itself a kind of certiorari jurisdiction—which it took an act of Congress to create for the Supreme Court. There would be no need to violate the settled principle of federal jurisprudence that a court with jurisdiction may not decline it if the article III limits on this court's jurisdiction were adhered to.[13]

The introduction of discretion into the standing inquiry is therefore an attempt to change the very nature of that doctrine. Indeed, this court has plainly indicated as much: "The most satisfactory means of translating our separation-of-powers concerns into principled decision making is through a doctrine of circumscribed equitable discretion.... [T]his test avoids the problems engendered by the doctrines of standing, political question, and ripeness." *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881 (D.D.Cir.), *cert. denied*, 454 U.S. 1082, 102 S.Ct. 636, 70 L.Ed.2d 616 (1981). Indeed it does. The equitable discretion doctrine avoids the problems of standing, political question, and ripeness by ignoring them. But those problems are real; they relate to the properly limited role of the courts in a democratic polity. To avoid them in this way is

13. The standing requirements of article III are jurisdictional—discretion plays no part in their application. The prudential standing requirements are no less jurisdictional. I am aware of no case in which the Court has held that a lower federal court may decide that those requirements need not be satisfied if the court thinks it would be inequitable to deny standing.

to say that the limit upon the courts' capacity to intrude upon areas of democratic governance comes not from the Constitution but entirely from the courts' sense of fitness. That is hardly an adequate safeguard. Moreover, this court has no right to avoid the problems of standing. They arise in large part from the Constitution and the Supreme Court has made it abundantly clear, in cases such as *Valley Forge* and *Allen v. Wright*, that they must be addressed, and addressed with the separation of powers in mind.[14] The doctrine of remedial discretion removes separation-of-powers considerations from the jurisdictional inquiry and converts them into mere interests to be balanced. Thus, the doctrine relegates separation of powers to second-class status and subordinates the structure of our constitutional system to the discretion of this court. It is impossible for me to view that prospect with equanimity.

It is plain on the face of these developments that what we are observing constitutes a major aggrandizement of judicial power. Any lingering doubts on this score are laid to rest by this court's stated presumption in favor of exercising discretion to decide a case when, if a decision on the merits were withheld, "non-frivolous claims of unconstitutional action would go unreviewed by a court." *Riegle*, 656 F.2d at 882; *see also Moore*, 733 F.2d at 956; *Vander Jagt*, 699 F.2d at 1170, 1174 n. 23. The function of the article III case-or-controversy limitations, including the standing requirement, is, however, precisely to ensure that claims of unconstitutional action will go unreviewed by a court when review would undermine our system of separated powers and undo the limits the Constitution places on the power of the federal courts. The Supreme Court has repeatedly said that standing is not "a requirement that must be observed only when satisfied." *Valley Forge*, 454 U.S. at 489, 102 S.Ct. at 767. *See also Reservists*, 418 U.S. at 227, 94 S.Ct. at 2935 ("[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing"); *Richardson*, 418 U.S. at 179, 94 S.Ct. at 2947 ("the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process"). In each of these cases the Court was faced with the contention that if the plaintiff was not permitted to litigate the issue, no one could. In none of those cases did the Court make the response which, if the governmental standing doctrine were correct, would have been most natural, obvious and ready to hand: that, while citizens or taxpayers have no standing to raise abstract claims about the allegedly unconstitutional operation of government, their representatives undoubtedly would. If the doctrine of governmental standing were correct, there would always be some governmental official or entity whose powers were affected by alleged violations of any particular constitutional provision. In *Richardson*, to take a single example, members of Congress could have sued to force the President to publish the budget of the Central Intelligence Agency, or to force Congress to force the President to do so, on the grounds that they had been denied an opportunity to vote to appropriate or not to appropriate funds for specific CIA programs by virtue of the statute permitting the Agency to account for its expenditures "solely on the certificate of the Director." 50 U.S.C. § 403j(b). A similar analysis would apply to *Reservists* and *Valley Forge*. The concession that there are constitutional questions that cannot be litigated because of standing requirements is, therefore, an additional proof that there is no congressional or governmental standing.

The limits that standing places upon judicial power do not mean that many important questions of constitutional power will forever escape judicial scrutiny. Many of the constitutional issues that congressional or other governmental plaintiffs could be expected to litigate would in time come before the courts in suits brought by private plaintiffs who had suffered a direct and cognizable injury. That is entirely appropriate, and it belies the argument that this court's governmental standing doctrine is necessary to preserve our basic constitutional arrangements.

At bottom, equitable discretion is a lawless doctrine that is the antithesis of the "principled decisionmaking" that was invoked to justify its manufacture. A doctrine of remedial discretion more than "suggests the sort of rudderless adjudication that courts strive to avoid," *Vander Jagt*, 699 F.2d at 1175—it *is* rudderless adjudication. A sampling of the cases in which this doctrine has been invoked makes that quite clear. For example, in *Riegle* the court suggested that the equitable discretion doctrine should apply only to congressional plaintiffs, not to private plaintiffs. 656 F.2d at 881. Indeed, the *Riegle* court said that the fact that a private plaintiff would have standing to sue would weigh against hearing the congressional plaintiff on the merits, because under those circumstances the unconstitutional action or statute would not go unreviewed. *Id.* In *Vander Jagt*, a group of congressmen sued their fellow legislators, and they sued both as congressmen and as individual voters—that is, as private plaintiffs. 699 F.2d at 1167 n. 1. The court held that the plaintiffs had standing both as congressmen and as voters. *Id.* at 1168. Nonetheless, the court dismissed claims because "this case raises separation-of-powers concerns similar to *Riegle*'s." *Id.* at 1175. Had it followed *Riegle*, the *Vander Jagt* court would have reached the merits of the private plaintiffs' claims—a result I would have found even more objectionable than what the court actually did, *see id.* at 1183 n. 3 (Bork, J. concurring), but one which would at least have had the virtue of predictability. It is hardly an argument in favor of remedial discretion that whatever standards one panel fashions the next is free to disregard on "equitable" grounds.

Ultimately, the doctrine of equitable discretion makes cases turn on nothing more than the sensitivity of a particular trio of judges. One cannot, unfortunately, have any solid grounds for supposing that these aesthetic judgments, though subjective and varying, will at least mark out an irreducible realm of "startling[ ] unattractive[ness]." *Vander Jagt*, 699 F.2d at 1176. As the spectacle of public officials suing other public officials over abstract constitutional questions becomes familiar, the taint will wear off, and what seemed unattractive will appear inevitable. Alexander Pope's dictum, though grown trite, is too apt to ignore: "Vice is a monster of so frightful mien/As to be hated needs but to be seen;/ Yet seen too oft, familiar with her face,/We first endure, then pity, then embrace." *An Essay on Man, Epistle II*, l. 217. The combination of congressional standing and equitable discretion will very probably prove to have been but a way-station to general, continual, and intrusive judicial superintendence of the other institutions in which the Framers chose to place the business of governing.

V.

The majority maintains that its holding that appellants have standing is supported by decisions of the Supreme Court and required by binding precedent in this cir-

14. The only justification for *Riegle*'s claim that separation-of-powers considerations are irrelevant to the standing inquiry was an inference from the fact that the Supreme Court vacated our judgment finding standing in *Goldwater v. Carter*, 617 F.2d 697 (D.C.Cir.), *judgment vacated on other grounds*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979), on grounds of nonjusticiability, with some Justices relying on the ripeness doctrine and others on the political question doctrine *Riegle*, 656 F.2d at 880. That inference was dubious to begin with, for Justices who found the case nonjusticiable on other grounds had no need to discuss standing. The evidence, which I have already recited in Part II–C *supra*, that the Court now regards separation-of-powers considerations as inseparable from the constitutional component of standing analysis, consists of explicit statements by the Court, rather than inferences from statements the Court did not make because there was no need to make them. Therefore, even if *Riegle* was a justifiable departure from this court's established standing analysis, which I do not believe, there is no warrant whatsoever for adhering to that departure in the wake of the invalidation of the premise on which it rested.

cuit. Neither of those claims withstands analysis.

A.

The principal Supreme Court decisions the majority deploys in support of its position are *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939); *United States v. ICC*, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451 (1949); *Chapman v. FPC*, 345 U.S. 153, 73 S.Ct. 609, 97 L.Ed. 918 (1953); *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); and *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). An inspection of these cases, however, reveals that they do not support the revolutionary proposition for which they are conscripted.

The majority states that *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939), proves that "a claim that is founded on a specific and concrete harm to [lawmaking] powers" is "judicially cognizable." Maj. op. at 28. *Coleman* proves nothing of the kind. But the case is not merely inapposite to the point for which the majority cites it. In fact, the Supreme Court's reasoning affirmatively demonstrates that the majority is wrong and that the appellants before us have no standing to maintain this action.

In *Coleman*, a group of Kansas State Senators who had voted to reject a proposed amendment to the federal Constitution challenged in the state courts the validity of the Lieutenant Governor's tie-breaking vote in favor of ratification. 307 U.S. at 436, 59 S.Ct. at 974. The Supreme Court found that they had standing, upon a grant of certiorari, to contest the merits of an adverse decision by the Kansas Supreme Court. But Chief Justice Hughes' opinion for the majority made it clear that the Court accorded standing to obtain review of a federal constitutional question only because there existed a legal interest accepted as sufficient for standing by the highest state court. Thus, the opinion held that the state senators had "an interest in the controversy which, *treated by the state court as a basis for entertaining and deciding the federal questions*, is sufficient to give the Court jurisdiction to review that decision." *Id.* at 446, 59 S.Ct. at 978 (emphasis added).

The critical importance of state court standing to obtain federal constitutional review was made even clearer by the distinction the Chief Justice drew between *Leser v. Garnett*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505 (1922), and *Fairchild v. Hughes*, 258 U.S. 126, 42 S.Ct. 274, 66 L.Ed. 499 (1922). Both cases involved suits by citizens to have the nineteenth amendment declared not a part of the Constitution. The only difference between the cases relevant to the standing issue was that *Leser* was brought in the Maryland courts and *Fairchild* was brought in a federal court.[15]

15. The majority offers a different basis for distinguishing between *Leser* and *Fairchild*—the fact that the plaintiff in *Leser* was a citizen of Maryland, which had refused to extend suffrage to women, while the named plaintiff in *Fairchild* was a citizen of New York, which had amended its constitution to grant women suffrage. *See* maj. op. at 28 n. 15. The majority finds this difference a "more plausible basis for distinguishing the two cases," but that would be irrelevant even if it were true. The question is not how we would distinguish those cases, but how the *Coleman* Court distinguished them, and it is clear that the basis offered by Chief Justice Hughes was that in *Leser* the citizen's suit was commenced in state court and allowed to go forward under the laws of the state, whereas in *Fairchild* the suit was brought in federal court. Indeed, the Chief Justice made no mention whatsoever of the fact that the only named plaintiff in *Fairchild* was a citizen of New York. He described *Fairchild* as simply "a suit by citizens of the United States," 307 U.S. at 440, 59 S.Ct. at 976.

The majority concludes that the *Coleman* Court shared its novel rationale for distinguishing *Leser* from *Fairchild*, because the Court said that "[t]he interest of the plaintiffs in *Leser v. Garnett* as merely qualified voters at general elections is certainly much less impressive than the interest of the twenty senators in the instant case." 307 U.S. at 441, 59 S.Ct. at 976. The quoted language implies, at most, only that the *Coleman* Court was unwilling to take the position that in any case in which a state court determined that the plaintiffs had standing, no matter how remote, abstract, or generalized the plaintiffs' grievance might be, the Supreme Court would be bound to review the state court's decision if it fell within the Court's statutory jurisdiction. That does not alter the fact that the *Coleman* Court perceived the interest of the Kansas legislators as of a type that would not give them standing to bring suit in federal court.

As the Chief Justice pointed out, the Supreme Court on the same day in opinions written by the Jame Justice (Brandeis, J.) took jurisdiction over the Maryland case, stating that the laws of Maryland authorized the suit, but held that the federal court was without jurisdiction because plaintiffs, having only a general interest in government according to law, an interest possessed by every citizen, had no standing. 307 U.S. at 440, 59 S.Ct. at 976.

Justice Frankfurter wrote separately for himself and three other Justices to deny that the plaintiffs in *Coleman* had standing. Frankfurter clearly thought that a legislator's interest in his official powers could not confer standing in federal courts because such interests were not "matters of 'private damage.'" 307 U.S. at 470, 59 S.Ct. at 989. He expressly disagreed with the idea that standing under Kansas law could confer standing in the United States Supreme Court. *See id.* at 465–66, 59 S.Ct. at 987. He thus rejected the distinction made by *Leser* and *Fairchild* and adopted by Chief Justice Hughes in *Coleman*.[16] The Court majority's adoption of that distinction shows not only that *Coleman's* finding of standing is confined to cases where states recognize standing in their own courts but demonstrates also that the same plaintiffs would not have standing in a federal court. All nine Justices in *Coleman* agreed to the latter proposition. The case before us was brought in a federal court. *Coleman* proves, therefore, that the plaintiffs here have no standing. It is, to say the least, distinctly peculiar that the majority cites the case for its own contrary conclusion.

The majority draws from *United States v. ICC* the proposition that courts may not avoid justiciable controversies "simply because one or both parties are coordinate branches of the government." Maj. op. at 27. In whatever limited sense this statement may be true, it has no application where the only alleged basis for the plaintiff's standing is its powers as one of the contending branches, and hence the statement is not relevant to the present case. This is a suit in which the standing of appellants rests exclusively on an alleged impairment of their respective governmental powers. *United States v. ICC* was not that at all. Though the government was appealing an order of the ICC, its real opponents were railroads from which it sought reparations in its proprietary, not its governmental, capacity. 337 U.S. at

16. It may be that *Coleman* drew the distinction it did, and thus allowed review of a claim heard in a state court under state standing rules more permissive than federal standing rules, because to deny review in such cases would leave in place a body of state court interpretations of the federal Constitution that the Supreme Court could never pass upon. The result might be federal constitutional law that differed from state to state. The problem of erroneous or differing state court interpretations of the United States Constitution and laws can be avoided only if the Supreme Court accepts the state's basis of standing as sufficient for review or if it requires state courts to apply federal standing rules in order to entertain suits based on federal law.

Doremus v. Board of Education, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952), can be read as adopting the latter course. In *Doremus*, the Court characterized the state court's opinion as "advisory" and dismissed the appeal (from a declaratory judgment that a state statute was constitutional) on the grounds that "because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept *as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review*, any procedure which does not constitute such." 342 U.S. at 434, 72 S.Ct. at 397 (emphasis added). The emphasized language suggests that the Court might have vacated a state court judgment enjoining enforcement of the statute, but that the Court would simply dismiss an appeal from a state court judgment upholding the challenged statute (as the *Doremus* Court in fact did). If *Doremus* means that the Supreme Court has adopted this approach as one of general applicability, it would follow that there is yet another reason why *Coleman* lends no support to the majority's position: even *Coleman's* narrow holding would then no longer be good law because that holding expressly rests on the state court's decision that the state senators had standing to sue under state law.

428, 69 S.Ct. at 1412. Thus the government's standing did not rest on impairment of governmental powers. As the Court said, "[t]he basic question is whether railroads have illegally exacted sums of money from the United States." *Id.* at 430, 69 S.Ct. at 1413. Moreover, because the railroads were present as "the real parties in interest," *id.* at 432, 69 S.Ct. at 1414, the situation in *United States v. ICC* was essentially the same as when the United States petitions for a writ of mandamus directed to a district court. Despite the district judge's name on the petition, the real adversary is the party on the other side of the litigation. It is not an action by the Executive Branch against part of the Judicial Branch to determine their respective governmental powers. So, too, *United States v. ICC* was not a suit by the Executive Branch against an independent agency over their respective governmental powers.

Furthermore, because the ICC is an independent agency, the President had no power to terminate the controversy by ordering the ICC to reverse its decision denying the government money damages. *See infra* at pp. 65–66. That fact constitutes an additional reason for the Court's conclusion (which the Court rested on the presence of a dispute between the government and the railroads, *see* 337 U.S. at 430–31, 69 S.Ct. at 1413) that "the established principle that a person cannot create a justiciable controversy against himself has no application here." *Id.* at 431, 69 S.Ct. at 1413. It also suggests that the government's standing might not have been sustained by the Court but for the ICC's status as an independent agency.

In *Chapman*, which the majority construes as allowing standing based on infringement of governmental powers, *see* maj. op. at 25, the Secretary of the Interior and an association of rural electric cooperatives challenged the FPC's issuance of a license to a power company to build a hydroelectric station at a site that Congress allegedly "reserved ... for public development and so has placed ... beyond the licensing power of the Federal Power Commission." 345 U.S. at 156, 73 S.Ct. at 612. The Secretary claimed that both his general duties relating to conservation of water resources and his "specific interest" in fulfilling his statutory duty to market public hydroelectric power were "adversely affected by the Commission's order." *Id.* The Court neither endorsed nor repudiated that argument. Its entire discussion of standing reads as follows:

> We hold that petitioners have standing. Differences of view, however, preclude a single opinion of the Court as to both petitioners. It would not further clarification of this complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations, to set out the divergent grounds in support of standing in these cases.

Id.

It is hard to imagine a holding more confined to its facts—for the Court supplied no rationale for its decision. But, to begin with, we may observe that in *Chapman* there were private parties on both sides of the dispute, the one defending its right to the license it had been granted by the Commission, the other claiming that its right to a preference in sales of surplus power by the Secretary had been impaired. Since the court held that the electric cooperatives had been aggrieved, within the meaning of 16 U.S.C. § 8252, by the Commission's action, its parallel holding as to the Secretary, who had been allowed to intervene in administrative proceedings before the Commission, *see United States v. FPC*, 191 F.2d 796, 799 (4th Cir.1951), was not strictly necessary to decide the merits.

Furthermore, because the site was clearly within the public domain,[17] the Court may have agreed with the lower court that "the United States, representing the people of the country, may have an interest in the construction of a power project," *United States v. FPC*, 191 F.2d at 800, while disagreeing with the lower court's contention that that fact "does not confer upon the Secretary of the Interior any authority to go into court for its protection." *Id.* That would make *Chapman* an instance in which the Secretary was allowed to sue on behalf of the United States over the federal proprietary interest in a site within the public domain. In this connection, it is striking that the lower court in *Chapman* read *United States v. ICC* as "hold[ing] merely that suit by the United States to protect its interests is not precluded merely because the suit must be brought against a governmental agency. Nothing is said to indicate that an officer of the government may go into court against such agency to protect the public's interest with respect to a matter as to which he is charged with no duty or responsibility." *Id.* Thus, *Chapman* may have turned simply on whether or not the Secretary was in fact charged with the duty of representing the United States' property interest in such matters—in which event, it is clear that had the Secretary not been a proper party, the Solicitor General would have been. As in *United States v. ICC*, then, standing was in all likelihood based on the government's proprietary interests rather than on infringement of the Secretary's governmental powers.

That suit by *some* member of the executive branch was appropriate is also clear, because *Chapman* involved neither an inter- nor intra-branch dispute. The FPC was created as an independent agency. *See* 16 U.S.C. § 792 (1982) (Commissioners appointed by President by and with advice of the Senate for terms of five years); *see also* 44 U.S.C. § 3502(10) (1982) (listing the Federal Energy Regulatory Commission (the successor to the FPC) as an "independent regulatory agency"). Among other things, that means that the Commissioners are "officer[s] who occupy no place in the executive department and who exercise[ ] no part of the executive power vested by the Constitution in the President." *Humphrey's Executor v. United States*, 295 U.S. 602, 628, 55 S.Ct. 869, 874, 79 L.Ed. 1611 (1935). The dispute in *Chapman*, then, was a dispute between the Executive Branch and an agency outside the Executive Branch. That agency was a creature of Congress, charged with substantial independent responsibility and given substantial delegated powers, but not itself a coordinate branch. A solution to the dispute was not within the legal control of the President. For although no statute expressly denies that a Federal Power Commissioner can be removed by the President without cause, it is clear from the regulatory and adjudicative functions of the Commission that, as in *Weiner v. United States*, 357 U.S. 349, 356, 78 S.Ct. 1275, 1279, 2 L.Ed.2d 1377 (1958), "we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it." Since, under the rationale of *Humphrey's Executor*, the President could not order the Commission to comply with the Executive Branch's view of the public interest, a suit by the government in its proprietary capacity was the necessary means of resolving the dispute, and was clearly allowable under *United States v. ICC*.

17. Justice Douglas, joined in dissent by Justice Black and Chief Justice Vinson, pointed out that the Roanoke Rapids site was a part of the public domain because (1) the Roanoke is a navigable stream over which Congress has plenary power, (2) the water power inherent in a navigable stream belongs to the federal government, and (3) the dam sites on a navigable stream are public property even if the title to the streambed is in private hands. 345 U.S. at 176, 73 S.Ct. at 621. Justice Douglas thought that the public nature of the site suggested, on the merits, that Congress had not intended to authorize private development. *See id.* at 177, 73 S.Ct. at 622. The Court majority disagreed, not on the grounds that the site was not in the public domain, but because it viewed the pertinent legislation as "a legislative finding that the proposed projects, no matter by whom they may be built, are desirable and consistent with the congressional standards for the ordered development of the Nation's water resources." *Id.* at 163, 73 S.Ct. at 615. It is clear, then, that the Secretary was in substance alleging that rights over property in the public domain had, by the action of the Commission, improperly been vested in private hands.

It may be, then, that the fact that the Executive's dispute was with an independent agency was regarded by some Justices as sufficient to confer standing. It may be that some Justices were persuaded by the presence of a private party claiming a property right that the Secretary wished to extinguish. In this respect, too, *Chapman* parallels *United States v. ICC.* We cannot know the rationales of the various Justices, but there is certainly no basis for using an unexplained case as the reason for creating a general rule of standing for all branches and members of branches to assert their legal rights directly against one another when it is clear that such a general rule is contrary to article III and Supreme Court precedent.

The majority claims that *Nixon v. Administrator of General Services,* 433 U.S. 425, 439, 97 S.Ct. 2777, 2788, 53 L.Ed.2d 867 (1977), "indicat[es] that [an] incumbent President would 'be heard to assert' [a] claim that [a statute] unconstitutionally impinges upon the autonomy of the Executive Branch. Maj. op. at 25. The majority supposes that this means the President would have standing to sue because his governmental powers had been invaded without any other injury. That is an astonishing inference to draw from a decision that has absolutely nothing to do with governmental standing and does not in any way suggest that the President could sue Congress or one of his own subordinates in the Executive Branch to defend his constitutional powers.

Former President Nixon's standing to challenge the constitutionality of the Presidential Recordings and Materials Preservation Act rested upon his allegation that the statute disposed of materials that were his personal property. 433 U.S. at 431, 435–36, 97 S.Ct. at 2784, 2786. He raised the constitutional prerogatives of the presidency not as a basis for standing but as grounds of substantive law that invalidated the Act. The situation was no different than when any private plaintiff who has standing because of a threat to his property advances a constitutional contention on the merits of the claim.

The majority has apparently misinterpreted the Court's rejection of an argument that the former President could not rely upon rights pertaining to an incumbent President. This was a *jus tertii* argument —that, for prudential reasons, the federal courts should not allow a plaintiff to challenge the constitutionality of a statute on the grounds that it infringes the constitutional rights of others. *See generally Valley Forge,* 454 U.S. at 474, 102 S.Ct. at 759; *Singleton v. Wulff,* 428 U.S. 106, 113–14, 96 S.Ct. 2868, 2873–74, 49 L.Ed.2d 826 (1976). Thus, the passage the majority cites from *Nixon v. Administrator* states only: "We reject the argument that only an incumbent President may assert such claims [of separation of powers and the presidential privilege of confidentiality] and hold that appellant, as a former President, may also be heard to assert them." 433 U.S. at 439, 97 S.Ct. at 2788. It is far fetched enough to infer from this that the Court was saying an incumbent President could sue Congress directly, but the inference disappears without a trace when it is realized that this was a *jus tertii* discussion and that the Court was not even remotely concerned with an impingement on the autonomy of the Executive Branch as a basis for standing. *Nixon v. Administrator* lends the majority no support whatever.

The majority also makes the untenable claim that *INS v. Chadha* indicates that Congress has a judicially cognizable interest in vindicating its constitutional powers. In *Chadha,* the INS, the executive agency charged with enforcing the immigration laws, agreed with Chadha that the legislative veto authorized by section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1982), was unconstitutional. 103 S.Ct. at 2772. Agreeing that under these circumstances the court of appeals had rightly allowed both Houses of Congress to intervene, the Court said: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute

agrees with plaintiffs that the statute is inapplicable or unconstitutional. *See Cheng Fan Kwok v. INS,* [392 U.S. 206], 210 n. 9 [88 S.Ct. 1970, 1973 n. 9, 20 L.Ed.2d 1037 [(1968)]; *United States v. Lovett,* 328 U.S. 303 [66 S.Ct. 1073, 90 L.Ed. 1252] (1946)." 103 S.Ct. at 2778. There was, in *Chadha* as in the cases the Court cited, an aggrieved individual who sought relief that ran only against the Executive Branch: that satisfied the injury-in-fact, causation, and redressability requirements of article III. Indeed, the Court specifically held that "prior to Congress' intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha." *Id.* Although the INS agreed that the statute requiring it to deport Chadha was unconstitutional, but for the court of appeals' ruling to that effect, the INS would have deported Chadha. *Id.* Congress, though nominally a party, was in reality much more in the position of an *amicus curiae.* No judgment could be entered against Congress, whose position as an intervenor differed from status as an amicus only in the ability to petition for certiorari. Congress' intervention, in other words, merely heightened the "concrete adverseness" of what was already a case-or-controversy. It is a far cry from that carefully limited holding to saying that Congress suffers a judicially cognizable injury when its lawmaking powers are infringed. *See* maj. op. at 28.

The foregoing analysis demonstrates, I think, that the cases relied upon by the majority lend it no support and that some of them show its positions to be wrong. But if a construction seemingly favorable to the majority's doctrine of general governmental standing could somehow be tortured out of one of these or some other cases, those decisions would remain anomalies and exceptions that should not be used to construct general doctrine. If we begin to generalize from aberrations, taking as our model the abnormal, we will ultimately produce not a natural but a deformed thing, a doctrine that is not Jekyll but Hyde; and that is what is being built in this circuit, a constitutional monstrosity. Constitutional doctrine should continually be checked not just against words in prior opinions but against basic constitutional philosophy. When that is done it becomes plain, as I have already shown, that the doctrine of congressional, and hence of governmental, standing has no legitimate place in our jurisprudence.

B.

It is also not the case that binding precedent in this circuit requires us to hold that appellants have standing. The majority rests this conclusion on *Kennedy v. Sampson,* 511 F.2d 430 (D.C.Cir.1974), and *Moore v. U.S. House of Representatives,* 733 F.2d 946 (D.C.Cir.1984), *cert. denied,* — U.S. —, 105 S.Ct. 779, 83 L.Ed.2d 775 (1985). *See* maj. op. at 25, 26 n. 13. That, I think, will clearly not do. In *Kennedy,* this court held that a senator had standing to challenge the legality of an intrasession pocket veto because the veto nullified his vote on the bill to which it applied. In reaching that holding, the *Kennedy* court nowhere addressed the separation-of-powers considerations that pervade the standing inquiry as articulated and applied in subsequent Supreme Court cases, notably *Valley Forge* and *Allen v. Wright.* The *Kennedy* Court's discussion of article III standing turned exclusively on a party's fitness to litigate and did not depend on separation-of-powers considerations. 511 F.2d at 433. That view of standing had been endorsed by the Supreme Court a few years before *Kennedy* was decided. *See Flast v. Cohen,* 392 U.S. 83, 100–01, 88 S.Ct. 1942, 1952–53, 20 L.Ed.2d 947 (1968). But *Flast's* view of standing has proved to be an aberration, for divorcing standing from separation-of-powers considerations inexorably leads to successive accretions to the power of the federal judiciary, a result the Framers certainly did not intend. *Valley Forge* and *Allen v. Wright* demonstrate that the Court, reversing the course it took in *Flast,* has restored separation-of-powers considerations as the central premise of the constitutional standing requirement. These recent Supreme Court decisions are

flatly inconsistent with the method of analyzing the standing of congressional plaintiffs the *Kennedy* court employed. At a minimum, therefore, we are bound to abandon *Kennedy*'s rationale, and any reaffirmation of *Kennedy*, to be valid, must rest on a different standing analysis.

In view of the virtual identity, for purposes of standing analysis, between *Kennedy* and the litigation now before us, an effort to supply an alternative basis for *Kennedy*'s result is essential if *Kennedy* is to continue to be regarded as binding precedent.[18] Indeed, because none of this court's congressional standing cases, including *Moore*, rests on the premise that separation-of-powers considerations must inform the article III standing inquiry, those cases cannot possibly be binding precedent.[19]

Although the majority views *Kennedy* and *Moore* as binding precedent, it offers no real defense of the standing analysis employed in those cases, or of the equitable discretion doctrine itself. Instead, the majority suggests that it need not consider the doctrine of equitable discretion here because that doctrine applies only to "actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view, and who seek the court's aid in overturning the results of the legislative process." Maj. op. at 28.

Thus the court now holds, for the first time, that Congress, or either of its Houses, has standing to sue the President for allegedly infringing its lawmaking powers, and that even the limited prudential role that the equitable discretion doctrine assigns to separation-of-powers considerations is inapplicable in such cases. That is tantamount to adopting a *per se* rule that Congress has standing to sue the President whenever it plausibly alleges an actual impairment of its lawmaking powers. But if Congress may sue under these circumstances, it should follow that a congressional plaintiff may sue whenever he plausibly alleges an actual impairment of his lawmaking powers. The harm, in each case, is of the same kind—an injury to lawmaking powers. *Kennedy* stated in dictum that the injury suffered by Congress was "direct," while the injury suffered by an individual member of Congress was "derivative" and "indirect." 511 F.2d at 435, 436. But that distinction has consistently been treated as immaterial in this court's congressional standing cases, and the majority does not purport to rely on it now. That is quite understandable, for once impairment of governmental powers is deemed sufficient to confer standing it is obvious that an individual member of Congress suffers immediately rather than remotely, as those concepts are employed in the causation branch of the article III standing inquiry. Moreover, the harm to an individual legislator is much greater, for his ability to engage in political struggle with the President is far less than the ability of an entire House or of the entire Congress. The majority, if it applied the rationale for its *per se* rule consistently, would therefore abandon the equitable discretion doctrine altogether.

Instead, the majority confines that doctrine to cases in which the court believes that congressional plaintiffs are not attempting to "overturn[ ] the results of the legislative process." Maj. op. at 28. The legislative process, of course, is implicitly and quite arbitrarily defined as a process that ends when "Congress has passed an Act." Maj. op. at 28. That was far from obvious to the Framers, who debated at some length whether the veto improperly gave the Executive a share in legislative power. *See, e.g.*, 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 73–80 (1st ed. 1911). Thus, The Federalist had to defend the President's qualified veto power against the charge that it violated the principle of separation of powers. That defense took the form, not of denial that the veto power was a legislative power, but of an argument that separation of powers was not an absolutist principle, but one which was "entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected." *The Federalist* No. 66, at 445, 446 (A. Hamilton) (J. Cooke ed. 1961) (applying this reasoning to the Senate's power to try impeachments and to the President's veto power). *See also* 2 M. Farrand, *supra*, at 75 (remarks of Gerry) (arguing against the Council of Revision on the grounds that "[i]t was making the Expositors of the Laws [the Judiciary], the Legislators which ought never to be done"); *id.* (remarks of Gouverneur Morris) (responding to Gerry with the observation that "the Judges in England had a great share in ye Legislation"). Would the majority contend that the Vice-President's tie-breaking vote is not part of the legislative process? Of course, if the alternative definition of the legislative process as including the veto (and, on the same reasoning, the pocket veto) were accepted, it would follow, on the majority's own reasoning, that neither Congress nor the congressional plaintiffs have standing to bring this action, for they would, on that definition, be attempting to overturn the results of the legislative process.

Apart from that, the majority offers no explanation of why a legislator who has "failed to persuade [his] fellow legislators" to enact a bill should be treated differently from a legislator who has failed to persuade them to reenact the bill to which the "pocket veto" had been applied. If "the principle that a legislator must lack collegial or 'in-house' remedies before this court will confer standing," *Riegle*, 656 F.2d at

18. Concurring in *Vander Jagt*, 699 F.2d at 1177, I suggested that we adhere to the "distinction between diminution of a legislator's influence and nullification of his vote," 699 F.2d at 1180, which the en banc court had adopted in *Goldwater v. Carter*, 617 F.2d 697 (D.C.Cir.), *judgment vacated on other grounds*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979). Under the *Goldwater* test, congressional plaintiffs have standing only if "the alleged diminution in congressional influence . . . amount[s] to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity." 617 F.2d at 702. By contrast, the position adopted by the panel opinion in *Vander Jagt* treats any substantial diminution of a legislator's influence on the legislative process as a judicially cognizable grievance. *Vander Jagt*, 699 F.2d at 1168; *see also Riegle*, 656 F.2d at 880. Upon further reflection, it seems to me that not even the *Goldwater* "nullification" test is adequate to the standing inquiry. When the interest sought to be asserted is one of governmental power, there can be no congressional standing, however confined.

To begin with, it is impossible to find in the structure of the Constitution a limited doctrine of congressional standing. The history and structure of the Constitution rule out the possibility that the Framers intended article III jurisdiction to extend to intra-branch or inter-branch disputes over infringement of official powers. That being so, there is no room to argue—nor any suggestion in the text of the Constitution—that they intended to single out the nullification of a legislator's vote for special treatment. The ultimate question is whether the provisions in the Constitution that confer powers on the [illegible] opinion, that is unquestionably not what the Framers intended. As I have shown in Part I, if their intentions are to be overridden in the name of vindicating constitutional grants of governmental power, they must be overridden wherever the Constitution or other law makes such a grant. The results of that rationale, as I have shown in Parts II and III, are incompatible with binding Supreme Court precedent on the subject of standing. The conclusion must be that even the *Goldwater* test allows us a jurisdiction and a power that article III forbids.

19. The panels in *Riegle* and *Vander Jagt* explicitly refused to consider separation-of-powers implications in connection with the standing inquiry. *See Riegle*, 656 F.2d at 880; *Vander Jagt*, 699 F.2d at 1170 & n. 5. In *Harrington v. Bush*, 553 F.2d 190 (D.C.Cir.1977), the court did suggest that separation-of-powers issues should play some role in its standing inquiry, *id.* at 215, but it also stated that "we do not rest our denial of standing on these separation of powers grounds." *Id.* The opinion for the *en banc* court in *Goldwater*, 617 F.2d 697, at most assigned only this supportive, nondispositive weight to separation-of-powers considerations. In *Moore*, the panel opinion acknowledged that *Valley Forge* "reinforces the principle that where separation-of-powers concerns are present, the plaintiff's alleged injury must be specific and cognizable in order to give rise to standing." 733 F.2d at 951 (footnote omitted). But there was no discussion whatsoever of whether impairment of a legislator's official powers could be treated as judicially cognizable injury without violating that principle. The panel contented itself with the bare assertion that "[t]he injury alleged by appellants here is to an interest positively identified by the Constitution." *Id.*

879, is, as the majority appears to think, the sole basis for the equitable discretion doctrine, and if that principle is applied consistently, then the equitable discretion doctrine must be applied to the congressional plaintiffs in the suit before us today. That being true, the doctrine of equitable discretion should have barred the suit by Senator Kennedy in *Kennedy v. Sampson*: as the *Riegle* court pointed out, he "had collegial remedies ...; Senator Kennedy's power to reintroduce the relevant legislation in the next session of Congress and to vote thereon remained unimpaired." 656 F.2d at 880. The principle, moreover, would seem to apply even more strongly to Congress itself—for Congress surely is in a better position to reenact the vetoed bill than is any congressional plaintiff. One can therefore as easily derive from the majority's arguments the proposition that neither Congress nor the congressional plaintiffs are properly before us as the proposition that each is properly before us. That is a fitting commentary on the coherence of this court's governmental standing doctrine.

The majority's position is also inconsistent with the treatment of the equitable discretion doctrine in *Riegle*, which first invoked that doctrine. In *Riegle*, a panel of this court said that "[w]hen a congressional plaintiff brings a suit involving circumstances in which legislative redress is not available *or* a private plaintiff would likely not qualify for standing, the court would be counseled under our [equitable discretion] standard to hear the case." 656 F.2d at 882.[20] Thus, the *Riegle* court justified the result in *Kennedy v. Sampson* (which it had already explained as a case in which legislative redress *was* available) on the grounds that in that case a private party would not have had standing to challenge the pocket veto. *See id.* In this suit, as in *Kennedy*, we have before us legislators who could obtain legislative redress. If the majority were applying *Riegle*, it would therefore dismiss the action by the individual appellants in their capacity as legislators, unless it determined that a similar action could not be brought by a private plaintiff. Since the legislators here are also suing in their individual capacities, there would seem no excuse for not making that determination. If the majority believes that *Riegle* is no longer good law, it should say so, in order that our district courts may at least know what the law in this circuit is—however uncomfortable it may be to apply.[21]

20. *Riegle* explained the need to invoke the equitable discretion doctrine in cases where legislative redress is available on the grounds that in disputes between a member of Congress and "his fellow legislators," "separation-of-powers concerns are most acute." The reason *Riegle* proposes for this claim is that in such cases "[j]udges are presented not with a chance to mediate between the two political branches but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic decisionmaking." *Id.* That distinction is factitious. The "processes of democratic decisionmaking" are circumvented and the will of one of the political branches thwarted when this court adjudicates the lawmaking powers of Congress vis-a-vis the President no less than when it adjudicates the lawmaking powers of a congressional plaintiff vis-a-vis Congress. In either situation, what is objectionable—for purposes of the standing issue—is not the question being adjudicated but the fact that the plaintiff is allowed to sue on the basis of an alleged impairment of its or his lawmaking powers.

21. In *Melcher v. Federal Open Market Committee*, C.A. No. 84-1335, now pending in the district court, a United States Senator has brought an action the district court has characterized as identical to Senator Riegle's suit in *Riegle*. Mem. order at 1 (Sept. 28, 1984). Relying on *Riegle*, the district court in *Melcher* has stayed that action pending this court's decision in *Committee for Monetary Reform v. Board of Governors of the Federal Reserve System*, C.A. No. 83-1930, which will determine whether another district court correctly held that "a group of over 800 plaintiffs seeking the same relief that Senator Melcher seeks" lacked standing. Mem. order at 2. As the district court in *Melcher* explained, if this court holds that the private plaintiffs have standing, then Senator Melcher's action should be dismissed under *Riegle*. If, on the other hand, this court holds that the private plaintiffs lack standing, "then in light of *Riegle* and subsequent cases, a decision may have to be made whether the instant case should be decided on the merits or dismissed for separation of powers reasons." Mem. order at 2-3 (footnote omitted).

It is clear, then, that neither Supreme Court precedent nor binding precedent in this circuit supports what the majority does today.

VI.

It is rather late in our history for courts to rearrange fundamental constitutional structures. But, even if one hypothesizes that to be proper in some small class of cases, and I do not, nonetheless, shifts in the constitutional relationships of the three branches of government should be examined carefully to determine whether they are legitimate. That, of course, depends on whether these shifts represent the working out of implications already inherent in real constitutional principles or whether they are mere innovations, reflecting perhaps no more than the tendency of the judiciary, not least of this court, to expand its authority in a mood of omnicompetence. It seems plain that the creation of congressional (and hence of general governmental) standing falls into the latter category.

The legitimacy, and thus the priceless safeguards of the American tradition of judicial review may decline precipitously if such innovations are allowed to take hold.

> [W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens. The irreplaceable value of the power articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

United States v. Richardson, 418 U.S. 166, 192, 94 S.Ct. 2940, 2954, 41 L.Ed.2d 678 (1974) (Powell, J., concurring). Yet when federal courts approach the brink of "general supervision of the operations of government," as they do here, the eventual outcome may be even more calamitous than the loss of judicial protection of our liberties. Gradually inured to a judiciary that spreads its powers to ever more aspects of governance, the people and their representatives may come to accept courts that usurp powers not given by the Constitution, courts that substitute their discretion for that of the people's representatives. Perhaps this outcome is also the more likely of the two because excesses such as this court's governmental standing rationale, shrouded as they are in technical doctrine, are not so visible as to excite alarm. This case represents a drastic rearrangement of constitutional structures, one that results in an enormous and uncontrollable expansion of judicial power. I have tried to make that fact visible. There is not one shred of support for what the majority has done, not in the Constitution, in case law, in logic, or in any proper conception of the relationship of courts to democracy. I have tried to make that fact visible, too.

I dissent.

UNITED STATES of America

v.

Fred B. BLACK, Jr., Appellant.

No. 85-5287.

United States Court of Appeals, District of Columbia Circuit.

March 28, 1985.

Defendant, who was convicted of various criminal charges under one indictment,

SAN LUIS OBISPO MOTHERS FOR PEACE, et al., Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and United States of America, Respondents,

Pacific Gas and Electric Company, Intervenor. (Three Cases).

SAN LUIS OBISPO MOTHERS FOR PEACE; Scenic Shoreline Preservation Conference, Inc.; Ecology Action Club; Sandra Silver; Gordon Silver; Elizabeth Apfelberg; and John J. Forster, Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and United States of America, Respondents,

Pacific Gas and Electric Company, Intervenor.

George DEUKMEJIAN, Governor of the State of California, Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and United States of America, Respondents,

Pacific Gas and Electric Company, Intervenor.

Nos. 81-2035, 83-1073, 84-1042, 84-1410 and 84-2034.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 3, 1985.

Decided April 25, 1986.

[illegible] for nuclear power plant. A panel of the Court of Appeals, 751 F.2d 1287, affirmed, but the full court vacated in part and granted rehearing en banc, 760 F.2d 1320. The Court of Appeals, Bork, Circuit Judge, held that: (1) NRC regulation dealing with emergency planning did not require Commission to consider potential complicating effects of earthquakes on emergency responses in deciding whether to license nuclear power plant; (2) Commission did not act capriciously or arbitrarily in failing to consider earthquakes; and (3) petitioners were not entitled to supplement record with transcripts of closed meeting of NRC.

Affirmed.

Mikva, Circuit Judge, filed opinion concurring in part and concurring in result in part.

Wald, Circuit Judge, filed dissenting opinion in which Spottswood W. Robinson, III, Chief Judge, and J. Skelly Wright and Ginsburg, Circuit Judges, concurred.

1. Administrative Law and Procedure ⇐413

Courts are not at liberty to set aside an agency's interpretation of its own regulations unless that interpretation is plainly inconsistent with language of regulations.

2. Administrative Law and Procedure ⇐413

Degree of deference due from courts on an agency's interpretation of its own regulations is great; courts need not find that agency's construction is only possible one, or even one that court would have adopted in first instance.

3. Electricity ⇐8.5(2)

Nuclear Regulatory Commission regulation dealing with emergency planning did not require Commission to consider potential complicating effects of earthquakes on [illegible] with control [illegible] privacy

emergency responses in deciding whether to license a nuclear power plant.

4. Electricity ⇐8.5(2)

Nuclear Regulatory Commission's interpretation of its emergency planning regulation, to not require it to consider potential complicating effects of earthquakes on emergency responses in deciding whether to license nuclear power plant, did not contradict Atomic Energy Act. Atomic Energy Act of 1954, § 1 et seq., as amended, 42 U.S.C.A. § 2011 et seq.

5. Electricity ⇐8.5(2)

Nuclear Regulatory Commission did not act arbitrarily and capriciously in excluding from nuclear power plant's licensing proceedings consideration of potential complicating effects of earthquakes on emergency planning.

6. Electricity ⇐8.5(2)

Petitioners objecting to licensing of nuclear power plant were not entitled to supplement record with transcripts of closed meeting of Nuclear Regulatory Commission, as judicial examination of those transcripts would have represented an extraordinary intrusion into the realm of the agency, and there was no showing of bad faith or improper behavior, but only an assertion that the transcripts alone were sufficient to establish the requisite bad faith and improper conduct.

Joel R. Reynolds for petitioners, San Luis Obispo Mothers for Peace, et al. in Nos. 84-1410, 81-2034, 81-2035, 83-1073 and 84-1042.

David S. Fleschaker entered an appearance for petitioners in Nos. 81-2035, 83-1073 and 84-1042.

Herbert H. Brown, Charles Lee Eisen and Lawrence Coe Lanpher entered appearances for petitioner in No. 81-2034.

William H. Briggs, Jr., Sol., Nuclear Regulatory Com'n, with whom Herzel H.E. Plaine, Gen. Counsel, E. Leo Slaggie, Deputy Sol., Nuclear Regulatory Com'n, Peter R. Steenland, Jr., Jacques B. Gelin, Attys., Dept. of Justice, Richard L. Black, Sheldon L. Trubatch, E. Neil Jensen, Carole F. Kagen, A. Laurence Ralph, and Lawrence J. Chandler, Attys., Nuclear Regulatory Commission were on the brief for respondents in Nos. 84-1410, 81-2034, 81-2035, 83-1073 and 84-1042.

Mark E. Chopko and Richard A. Parrish, Attys., Nuclear Regulatory Commission entered appearances for respondents in Nos. 81-2034, 81-2035 and 83-1073.

William T. Coleman, Jr., with whom Aaron S. Bayer, Malcolm H. Furbush, Douglas A. Oglesby, Joseph B. Knotts, Jr., Scott M. DuBoff and Daniel F. Stenger were on the brief for intervenor, Pacific Gas and Elec. Co. in Nos 84-1410, 81-2034, 81-2035, 83-1073 and 84-1042.

F. Ronald Laupheimer entered an appearance for intervenor in Nos. 81-2034 and 81-2035.

J. Michael McGarry, III entered an appearance for intervenor in Nos. 81-2034 and 83-1073.

Barton Z. Cowan entered an appearance for amicus curiae, Atomic Industrial Forum, Inc., in No. 84-1410.

Peter B. Kelsey, Edward H. Comer and William L. Fank entered appearances for amicus curiae, Edison Elect. Institute, in No. 84-1410.

Before ROBINSON, Chief Judge, and WRIGHT, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges.

Opinion for the Court filed by Circuit Judge BORK.

Concurring opinion filed by Circuit Judge MIKVA, concurring in Parts I and II of Circuit Judge BORK's opinion and in the result reached by Part III.

Dissenting opinion filed by Circuit Judge WALD, in which Chief Judge SPOTTSWOOD W. ROBINSON III, and Circuit Judges J. SKELLY, WRIGHT and GINSBURG concur

BORK, Circuit Judge:

This case presents two questions. The first is whether the Nuclear Regulatory Commission ("NRC" or "Commission"), before issuing a license for the operation of the Diablo Canyon Nuclear Power Plant, is required to hold a hearing concerning the potential complicating effects of an earthquake on responses to a simultaneous but independently caused radiological accident at the plant. The risk of that happening is calculated as being one in several tens of millions. The second question is whether this court should examine transcripts, not a part of the record, of a closed meeting of the Commission.

In *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C.Cir.1984), a panel of this court affirmed a decision by the NRC to allow issuance of low power and full power licenses for the Diablo Canyon plant. In so doing, the panel majority considered and rejected petitioners' claim that the Commission improperly excluded from licensing hearings specific consideration of the potential complicating effects of an earthquake on planned emergency responses at the Diablo Canyon facility. The same majority refused to examine the proffered transcripts. *See id.* at 1323–29. Subsequently, the full court vacated a portion of the original opinion and judgment and granted rehearing *en banc* to consider the questions more fully. *See* 760 F.2d 1320. We now affirm the Commission's decision.

I.

Licensing proceedings for nuclear power plants are typically long and complex and the Diablo Canyon proceedings were no exception. In this section, we set forth only a skeletal history of those proceedings, taken largely from the panel opinion. *See* 751 F.2d at 1296–97. Additional facts relevant to the specific issues we consider are set forth throughout the opinion.

[illegible] tive in the Commission's proceedings related to the licensing of the plant.

The Atomic Energy Commission ("AEC"), the predecessor to the NRC, issued construction permits to the Pacific Gas and Electric Company ("PG & E") for Units 1 and 2 of the pressurized water reactor plant at Diablo Canyon in 1968 and 1970. *See* Docket No. 50–323, 4 A.E.C. 447, 460 (1970), *aff'd*, ALAB–27, 4 A.E.C. 652, 664 (1971) (Unit 2); Docket No. 50–275, 4 A.E.C. 89, 98–99 (1968) (Unit 1). Construction began shortly thereafter, based on the assumption that the nearest significant earthquake fault was eighteen to twenty miles away. *See* ALAB–519, 9 N.R.C. 42, 45 (1979). Four years later, offshore exploration for petroleum revealed the presence of the Hosgri Fault within three miles of the Diablo Canyon site. *See id.* Petitioners, who had intervened in the administrative proceedings, requested that construction at the facility be stopped until the implications of the discovery could be assessed, but the AEC permitted construction at the plant to continue. *See* 4 A.E.C. 914 (1972). Following an extensive reexamination, the Commission's Appeal Board approved the plant's seismic design on June 16, 1981. ALAB–644, 13 N.R.C. 903 (1981).

On September 21, 1981, the Commission rejected claims that the emergency planning program at Diablo Canyon was deficient and issued a license to PG & E to load fuel and conduct low power testing at Unit 1. *See* CLI–81–22, 14 N.R.C. 598 (1981). Investigation by PG & E and the Commission's staff, however, soon uncovered various design errors, *see* CLI–81–30, 14 N.R.C. 950, 951 (1981), and on November 19, 1981, the Commission suspended PG & E fuel loading and low power test license. *Id.* at 950. To ensure that the plant would be adequately protected against seismic disturbances, the Commission ordered PG & E, as a condition of reinstatement of the license, to institute an independent design verification program. *See id.* at 951, 955 [illegible] In addition, certain requirements concerning [illegible] design verifica-

tion issues were imposed on PG & E as conditions of its eligibility for a full power license. *See* CLI–84–13, 20 N.R.C. 267 (1984).

Professionals expended more than 2,000,000 hours on the reanalysis and modification of the plant's design, which were completed in October 1983. CLI–84–5, 19 N.R.C. 953, 971 (1984) (views of Commissioner Bernthal). The NRC staff undertook an independent review of the results of the Independent Design Verification Program after which the Commission progressively reinstated elements of the suspended low power license in late 1983 and early 1984. *See* CLI–84–5, 19 N.R.C. 953 (1984); CLI–84–2, 19 N.R.C. 3 (1984); CLI–83–27, 18 N.R.C. 1146 (1983). Reinstatement of the license was consistent with the Appeal Board's findings that "[t]he applicant's verification efforts provide adequate confidence that the Unit 1 safety-related structures, systems and components are designed to perform satisfactorily in service and that any significant design deficiencies in that facility resulting from the defects in the applicant's design quality assurance program have been remedied." ALAB–763, 19 N.R.C. 571, 619 (1984).

On August 10, 1984, the NRC approved issuance of a full power license for the Diablo Canyon plant. CLI–84–13, 20 N.R.C. 267 (1984). Petitioners appealed both the low power and full power orders to this court and, before the license had issued, the court granted petitioners' motion for a stay. On October 31, 1984, after oral argument, the court lifted the stay, thereby permitting issuance of the full power license and the commencement of operations at Diablo Canyon. On December 31, 1984, the court affirmed the Commission's decision to permit issuance of the low power and full power licenses. *See San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C.Cir.1984). The court found that the Commission made two legal errors (not related to the issues considered in this *en banc* proceeding), but that neither warranted judicial relief since one was harmless and the other had already been remedied by the Commission. *See id.* at 1311–12.

Specifically with regard to emergency planning, the panel majority held that the Commission did not err by excluding consideration of the effects of earthquakes on emergency responses at Diablo Canyon. In addition, the majority denied petitioners' motion to supplement the administrative record with the transcripts of a closed meeting of the NRC. *See* 751 F.2d at 1323–29. Judge Wald, dissenting in part, thought that the Commission's exclusion of consideration of earthquakes was arbitrary and capricious and that the court should make an *in camera* inspection of the transcripts in deciding whether to grant petitioners' motion to supplement the record. 751 F.2d at 1329–35.

II.

Petitioners argue that the Commission's decision to exclude from the Diablo Canyon licensing proceedings consideration of the potential complicating effects of an earthquake on emergency responses "has deprived Petitioners of their right to an on-the-record hearing on a material safety issue ... in violation of § 189(a) of the Atomic Energy Act as applied by this Court in *Union of Concerned Scientists v. [NRC*, 735 F.2d 1437 (1984), *cert. denied*, — U.S. —, 105 S.Ct. 815, 83 L.Ed.2d 808 (1985)]." Supplemental Brief for Petitioners on Rehearing En Banc ("Pet.Supp.Br.") at 11 (citations omitted).

Section 189(a)(1) of the Atomic Energy Act provides that "[i]n any proceeding under this chapter, for the granting ... of any license ..., the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1) (1982). It follows from *Union of Concerned Scientists*, however, that the "interest" which entitles a person to a hearing is defined by the Commission's rules and regulations. In that case, we invalidated an NRC amendment to its rule on emergency preparedness. The amendment eliminated the requirement of a hearing on the results of

emerg[illegible]aredness exercises as a prerequisite to authorization of a license. But those results remained a factor that the Commission was required to consider in its licensing decision. "Since the NRC, by its own regulations, has made correction of deficiencies identified in emergency exercises a requirement of its ultimate licensing decision, it would seem to follow that results of these exercises must be subject to the § 189(a) hearing requirement." 735 F.2d at 1442; *accord id.* at 1445.

Union of Concerned Scientists holds only that the Commission cannot exclude from a section 189(a) hearing issues that its rules of regulations require it to consider in its licensing decisions. As the opinion stated: "Today, we in no way restrict the Commission's authority to [limit the purposes for which it considers emergency exercises relevant] as a substantive licensing standard." 735 F.2d at 1418 (footnote omitted). Thus, to establish, on the rationale of *Union of Concerned Scientists*, that the Commission in this case impermissibly refused a hearing, petitioners must show that NRC rules or regulations required the Commission to consider the potential complicating effects of earthquakes on emergency responses in deciding whether to license Diablo Canyon. Petitioners have made no such showing.

Petitioners assert that "the Commission's interpretation and application of its own regulations are entitled to no weight," Pet.Supp.Br. at 20, because "the Commission's conclusion is undermined both by the language and prior application of the NRC's regulations," Pet.Supp.Br. at 12, and also because "'the Commission's outright refusal to make explicit provision in emergency response plans for an earthquake in a nuclear plant within three miles of a major, active fault in California is by definition an arbitrary and capricious act,'" Pet. Reply Br. at 3 (*quoting* 751 F.2d at 1335 (Wald, J., dissenting)); *see also* Pet. Supp.Br. at 15–21. We think these contentions do not survive analysis.

A.

We consider first the question whether the Commission's regulation requires consideration of earthquakes and thereby triggers section 189(a)'s hearing requirement.

[1, 2] 1. *The Commission's interpretation of the regulation.* We note at the outset that courts are not at liberty to set aside an agency's interpretation of its own regulations unless that interpretation is plainly inconsistent with the language of the regulations. *See United States v. Larionoff*, 431 U.S. 864, 872–73, 97 S.Ct. 2150, 2155–56, 53 L.Ed.2d 48 (1977); *National Association of Regulatory Utility Commissioners v. FCC*, 746 F.2d 1492, 1502 (D.C.Cir.1984). The degree of deference due is great.[1] We "need not find that the agency's construction is the only possible one, or even the one that the court would have adopted in the first instance." *Belco Petroleum Corp. v. FERC*, 589 F.2d 680, 685 (D.C.Cir.1978). As stated by the Supreme Court:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.... [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Bowles v. Seminole Rock Co., 325 U.S. 410, 413–14, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945).

The only NRC regulation relevant to this case is the regulation dealing with emergency planning. Promulgated in 1980 following the accident at Three Mile Island, that regulation provides in pertinent part that "no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.47(a)(1) (1984). Though that regulation represents a departure from the Commission's previous policy of requiring little or no emergency planning, the Commission has consistently interpreted that regulation not to require specific consideration of the potential complicating effects of earthquakes. *See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2)*, CLI–84–12, 20 N.R.C. 249 (1984); *Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3)*, CLI–81–33, 14 N.R.C. 1091 (1981).

Petitioners' claim that the Commission's interpretation contradicts the language of the emergency planning regulation is supported only by a quotation of the regulatory language. That language, however, does not contradict, but amply supports, the Commission.

[3] The regulation does not address any particular emergency or natural hazard; rather, it sets forth a general standard that envisions judgment and implies discretion: the Commission is to satisfy itself that there is "reasonable assurance" of "adequate" protective measures. In this case, we think that the Commission's view—that it need not consider the potential effects of earthquakes to determine "that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency"—is not, by any stretch of the imagination, "plainly inconsistent" with the regulatory language.[2]

Petitioners assert, however, that the Commission's interpretation is "undermined" by an NRC staff report referred to in the emergency planning regulation. Subsection (b) of the regulation sets forth sixteen specific standards which the onsite and offsite emergency response plans for nuclear power reactors must meet. A footnote to subsection (b) states: "These standards are addressed by specific criteria in NUREG–0654; FEMA–REP–1 entitled 'Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in support of Nuclear Power Plants—for Interim Use and Comment', January 1980." 10 C.F.R. § 50.47(b) n. 1 (1984). NUREG–0654 was a joint project of the NRC and FEMA staffs "to provide a common guidance and reference source for ... State and local governments and nuclear

1. Courts show deference to an agency's interpretation of its governing statute. "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965)

2. Nevertheless, the dissent insists that the Commission's interpretation of its emergency planning regulation is entitled to no weight because it "is inconsistent with the fundamental purposes of those regulations." Dissent at 5. This requirement is found nowhere in the controlling Supreme Court precedent and we decline to adopt it here. Given the dissent's view of the regulation's purpose—to plan for the unexpected—any Commission interpretation that declines to require consideration of any particular occurence, no matter how improbable, would be invalid. The dissent repeatedly stresses that the Diablo Canyon plant is "located only three miles from an active geological fault." Dissent at 32; *see id.* at 31. But under the dissent's own approach, a plant's proximity to a fault is irrelevant. Every plant must plan for the disrupting effects of an earthquake regardless of the likelihood that one will actually occur.

Even the dissent, however, stops short of following its analysis to its logical conclusion. For example, at one point it states:

> [T]he Commission can exclude from consideration [initiating or complicating events] with such low probabilities that they would not warrant prudent risk reduction methods While drawing the line between probabilities will sometimes prove difficult, the Commission clearly does not have to consider an event as unlikely as an earthquake greater than the 7.5 magnitude SSE for Diablo Canyon.

Dissent at 51 n. 7 (citations omitted). In this the dissent is obviously correct. But once the dissent concedes that there exist some contingencies which the Commission is *not* required to consider, it cannot at the same time maintain that the Commission's refusal to consider an occurrence because of its improbability conflicts with the purpose of the regulation. It follows that the Commission is left with a comparison of relative probabilities—a matter of line drawing. In this circumstance, we think the only inquiry open to us is whether the Commission's decision that the regulation does not require consideration of earthquakes was rational. The dissent might wish to draw the line elsewhere, but, as will be shown, petitioners have not met their burden of demonstrating that the Commission's decision was irrational.

ar fac s in the development of radiological emergency response plans and preparedness in support of nuclear power plants." NUREG–0654 at 1.

We do not think NUREG–0654 undermines the Commission's interpretation of its emergency planning regulation. Petitioners state that NUREG–0654 contains "general references to 'natural hazards.'" Pet.Supp.Br. at 13. But we can find no reference, general or specific, to "natural hazards" in the body of the document. Petitioners quote two statements from the report in support of their assertion. The first is that "[e]ach State and local organization should have procedures in place that provide for emergency actions to be taken which are consistent with the emergency actions recommended by the nuclear facility licensee, taking into account local offsite conditions that exist at the time of the emergency." NUREG–0654 at 42. The second statement is that "[t]he organization's plans to implement protective measures for the plume exposure pathway shall include ... [i]dentification of and means for dealing with potential impediments (e.g., seasonal impassability of roads) to use of evacuation routes, and contingency measures." NUREG–0654 at 61–63. Petitioners' argument is that these sentences constitute "references to 'natural hazards'" and that the Commission is therefore required to consider the effects of earthquakes on emergency planning. This argument is unsound.

It is not at all clear that the phrases, "local offsite conditions" and "potential impediments .. to evacuation routes," were intended to suggest specific consideration of all conceivable "natural hazards." Taken in context, these phrases constitute broad references. They might suggest some consideration of natural phenomena reasonably anticipated at the plant such as seasonal rains, fog, or "seasonal impassibility of roads." But petitioners' reading of these references to require specific consideration of such highly unlikely and infrequent events as an earthquake at the plant sweeps much too broadly. If we accept petitioners' argument, we can think of no potential natural or unnatural hazards, regardless of their improbability, that the Commission would not be required to consider. That is a prescription for licensing proceedings that never end and plants that never generate electricity. Petitioners themselves attempt to disavow that logical conclusion of their argument. For example, at oral argument petitioners conceded that the emergency planning regulations (and presumably NUREG–0654) do not require the Commission to consider the potential complicating effects of a meteorite striking the plant. Yet we do not see why NUREG–0654 would not require just such consideration given a holding that it requires consideration of potential simultaneous earthquakes and independently caused radiological accidents at the plant. As we will show, the latter is not significantly more likely than the former.

Moreover, our conclusion that NUREG–0654 does not counsel specific consideration of earthquakes is more in keeping with NUREG–0654's stated policy that "[n]o single specific accident sequence should be isolated as the one for which to plan because each accident should have different consequences, both in nature and degree." NUREG–0654 at 6, than is petitioners' contrary assertion.

Petitioners also claim that a reference to earthquakes in NUREG–0654's appendix undercuts the Commission's interpretation of the applicable regulations. *See* Pet. Supp.Br. at 13. The appendix contains a list of "example initiating conditions" that could lead to a "site area emergency" that includes: "Severe natural phenomena being experienced or projected with plant not in cold shutdown." NUREG–0654 app. 1 at 1–13. It is to be noted that this example refers to an earthquake that causes a radiological emergency, not an earthquake that complicates emergency responses. The former risk, to which the example pertains, was the subject of extensive hearings and is not under review here. Under this example is listed: "Earthquake greater than SSE levels." *Id.* "[T]he SSE is the most powerful earthquake ever expected to occur at the plant site." ALAB–644, 13 N.R.C. 903, 911 (1981). For Diablo Canyon, the SSE was calculated to be an earthquake of 7.5 magnitude. *Id.* at 910. Far from being "projected" for the Diablo Canyon, an earthquake greater than SSE levels, by definition, is *never* expected to occur at the plant site. Indeed, the Commission has noted that the probability that an earthquake *at the SSE level* will occur has "typically been estimated to be on the order of one in a thousand or one in ten thousand per year." CLI–84–4, 19 N.R.C. 937, 948 (1984). Evidence before the Licensing Board indicated that "there have not been recurrent earthquakes above 6.5 magnitude on the Hosgri in the past 17,000 years." LBP–79–26, 10 N.R.C. 453, 482 (1979). The fact is particularly significant because the Hosgri is 90 miles long, *see id.* at 472, and only a small portion of it is near the Diablo Canyon plant. As the panel majority stated in a portion of its opinion not vacated by our May 1, 1985 Order: "We must assume, therefore, that the likelihood that an earthquake will trigger a nuclear accident at the facility is so small as to be rated zero." 751 F.2d at 1304 (footnote omitted).

Moreover, even if we agreed with petitioners' claim that NUREG–0654, in its body or appendix, suggests consideration of earthquakes, the emergency planning regulations' reference to NUREG–0654 makes plain that it is a *staff* document intended simply to provide *guidance* to parties in complying with the standards set forth in the emergency planning regulations: "NRC staff has developed ... a joint NRC/FEMA report, NUREG–0654 ... to provide guidance in developing plans for coping with emergencies." 10 C.F.R. Part 50 app. E n. 1 (1984). Under the regulations, the Commission is required to make its own finding that emergency plans "provide reasonable assurance" of "adequate protective measures" and meet the specified regulatory standards. *See* 10 C.F.R. § 50.47(a)(1) & (b) (1984). These regulatory standards contai eferences to "natural hazards," to say nothing of earthquakes. To accept petitioners' argument, therefore, we would have to hold that NUREG–0654, a staff document intended as guidance, supersedes the regulation itself. The only virtue of that approach is novelty.[3]

2. *The Commission's applications of the regulation.* Petitioners' next argument is that the Commission's interpretation conflicts with "prior application of the NRC's regulations." If petitioners suggest an inconsistency with prior Commission applications, their assertion is false. The Commission has never applied its regulation in any way except the way it did here. Indeed petitioners' only support for their claim is apparently that the Commission's *staff* has called for emergency plans to consider the potential complicating effects of earthquakes. The position of an agency's staff, taken before the agency itself decided the point, does not invalidate the agency's subsequent application and interpretation of its own regulation.

The facts are as follows. In December, 1980, a member of the NRC's staff sent PG & E a letter requesting that it evaluate "the potential complicating factors which might be caused by earthquakes which either initiate or follow the initiation of accidents," Record, vol. 69, exh. 117 (Letter from Tedesco (NRC) to Furbush (PG & E) (Dec. 16, 1980)). *See* Pet.Supp.Br. at 5, 13. A staff member wrote a memorandum on November 3, 1980 requesting that the Federal Emergency Management Agency review the adequacy of state and local capabilities for emergency response to a radiological accident occurring during an earthquake. *See* Pet.Supp.Br. at 5–6 (*citing* Record, vol. 69, attachment to exh. 117 (Memorandum from Grimes (NRC) to McConnell (FEMA) (Nov. 3, 1980))). Petitioners ignore the fact that both of these documents were written *before* the Com-

3. Our conclusion is buttressed by the fact that the emergency planning regulation cites a preliminary version of NUREG–0654 "for Interim Use and Comment," issued in January 1980 before the regulation itself was adopted in August 1980. *See* 10 C.F.R. § 50.47(b) n. 1 (1984).

mission itself had interpreted its emergency planning regulation.

The regulation was promulgated in 1980 and the question whether it required consideration of earthquakes first came before the Commission in 1981, after it was raised by the Atomic Safety and Licensing Board in the context of licensing the San Onofre Nuclear Generating Station. The Commission decided "that its current regulations do not require consideration of the impacts on emergency planning of earthquakes which cause or occur during an accidental radiological release." *San Onofre*, CLI-81-33, 14 N.R.C. at 1091.[4] In so interpreting its regulation, the Commission stated:

> A review of the rulemaking file associated with the Commission's emergency planning regulations reveals that ... [t]hree commenters suggested that the NRC specifically require the occurrence of earthquakes or severe natural phenomena to be part of the basis for emergency response planning, but the comments were not accepted in the final rule. The current regulations are designed with the flexibility to accommodate a range of onsite accidents, including accidents that may be caused by severe earthquakes. This does not, however, mean that emergency plans should be tailored to accommodate specific accident sequences. ..

San Onofre, CLI-81-33, 14 N.R.C. at 1092 (citations omitted). Thus, the 1980 staff documents on which petitioner rely in no way affect the legitimacy of the Commission's subsequent decision not to require consideration of earthquakes on emergency planning at Diablo Canyon. The positions of an agency's staff do not preclude the agency from subsequently reaching its own conclusion.

The *San Onofre* rule has been followed since. The Appeal Board relied explicitly on *San Onofre* to reject a challenge to the Licensing Board's authorization of low power testing at Diablo Canyon on the ground that it should have required consideration of earthquakes in emergency planning. *See* ALAB-728, 17 N.R.C. 777, 792-93 (1983), *aff'g* LBP-81-21, 14 N.R.C. 107 (1981). The Commission itself then summarily declined review. *See* CLI-83-32, 18 N.R.C. 1309 (1983).

Prompted in part by two staff memoranda, the Commission in 1984 decided to consider whether "the circumstances of [the Diablo Canyon] case ... provide a basis for departure from its decision in" *San Onofre*. *See Diablo Canyon*, CLI-84-12, 20 N.R.C. at 249. Specifically, the Commission requested that petitioners, PG & E and the NRC staff submit comments addressing "whether NRC emergency planning regulations can and should be read to require some review of the complicating effects of earthquakes on emergency planning for Diablo Canyon." CLI-84-4, 19 N.R.C. 937, 938 (1984). After receiving and considering these comments, the Commission reaffirmed its original interpretation "that the NRC's regulations 'do not require consideration of the impacts on emergency planning of earthquakes which cause or occur during an accidental radiological release.'" *Diablo Canyon*, CLI-84-12, 20 N.R.C. at 250 (*quoting San Onofre*, CLI-81-33, 14 N.R.C. at 1091).[5] Thus, there can be no doubt that the NRC's position has not only been consistently applied by has been thoughtfully reconsidered in this very proceeding.

Petitioners cite the two staff memoranda just referred to for the proposition that "[s]ince 1980, the Commission's staff has frequently advocated the view that consideration of the effects of earthquakes on emergency planning 'may be warranted' for reactor sites in California because of their 'relatively high' seismic risk." Pet. Supp.Br. at 6 & n. 15 (*citing* Memoranda of Jan. 13, 1984 and June 22, 1982, attachments 1 & 2 to CLI-84-4, 19 N.R.C. 937 (1984)). Petitioners support their assertion that the staff "frequently advocated" a view contrary to the Commission's with the following parenthetical: "('planning for earthquakes which might have emergency preparedness implications may be warranted in areas where the seismic risk to offsite structures is relatively high (*e.g.*, California sites ..)')." Pet.Supp.Br. at 6 n. 15. This is a single occasion, not a frequent event. Worse, the claim that it constitutes "advocacy" is completely misleading. Petitioners have taken the quoted language out of context.

The language in question comes from the January 13, 1984 memorandum. The memorandum first recounts the substance of the Commission's *San Onofre* decision and the Commission's statement that it would consider whether its regulations should be changed. The memorandum then states that the Commission's Secretary directed the staff to undertake such consideration and that the staff responded in a memorandum dated June 22, 1982. In a footnote, the memorandum then states:

> To very briefly summarize the Staff's position as expressed in its June 22nd response, the Staff concluded that the Commission's regulations do not require amendment since (1) for most sites there is only a very low likelihood that an earthquake severe enough to disturb onsite or offsite planned responses will occur concurrently with or cause a reactor accident, and (2) while planning for earthquakes which might have emergency preparedness implications may be warranted in areas where the seismic risk to offsite structures is relatively high (*e.g.*, California Sites and other areas of the Western U.S.), current review criteria set forth in NUREG-0654 (which are derived from the Commission's regulations in 10 C.F.R. § 50.47) are considered adequate.

Attachment 2 to CLI-84-4, 19 N.R.C. at 947 n. 2.

Petitioners substantially mischaracterize the staff's views. The staff was summarizing its reasons for *rejecting* an amendment to the Commission's emergency planning regulations that would have required specific consideration of the effects of earthquakes on emergency planning. Similarly, since the staff was expressing its views about an *amendment* to the regulation and not the regulation itself, there can be no suggestion that the staff was expressing an opinion about the correctness of the Commission's interpretation of the existing regulation.[6] Moreover, since both memoranda were written after the Commission's *San Onofre* decision, the staff was well aware of the Commission's interpretation.

We have now reviewed the sum of petitioners' arguments and find disingenuous petitioners' assertion that the Commission's refusal to allow consideration of the effects of earthquakes on emergency responses for Diablo Canyon was "in disregard of its own technical staff's longstanding practice of considering earthquakes in their emergency planning reviews for California nuclear power plants." Pet.Supp.Br. at SA 3. By petitioners' own admission, "the earthquake risk affects only two nuclear plants, Diablo Canyon and San Onofre." *See* 751 F.2d at 1308; Opening Brief for Petitioner at 44-45. With respect to the licensing of the San Onofre plant, petitioners' claim that the NRC staff "considered earthquakes" is unsupported. Further, it appears inaccurate. In *San Onofre*, the Commission stated that the issue "whether

4. The Commission noted, however, that it "will consider on a generic basis whether regulations should be changed to address the potential impacts of a severe earthquake on emergency planning." *San Onofre*, 14 N.R.C. at 1092. On the basis of this consideration, the Commission decided that the regulations should not be amended to require consideration of earthquakes and has proposed instead a rule providing explicitly that earthquakes need not be considered in emergency planning. *See* 49 Fed. Reg. 49,640 (1984).

5. The Commission in addition determined that petitioners made no showing of special circumstances within the meaning of 10 C.F.R. § 2.758 (1984) warranting a waiver of the regulations to permit consideration of the effects of earthquakes on emergency planning at Diablo Canyon. *See* CLI-84-12, 20 N.R.C. at 253-54.

6. We note that even if petitioners were accurate in their assertion that the Commission's staff "frequently advocated" the view that emergency plans should consider the effects of earthquakes, the Commission would be under no obligation to accept the staff's view and either interpret or amend its regulations to require such consideration.

emergency planning should be concerned with earthquakes" was "raised *sua sponte* by the Atomic Safety and Licensing Board." CLI-81-33, 14 N.R.C. at 1091. After concluding that its current regulations do not require consideration of earthquakes, the Commission "directed [the Licensing Board] not to pursue this issue." *Id.*

In the case of Diablo Canyon, it is true that the NRC staff requested PG & E to consider the effects of earthquakes in its emergency plans. But as already noted, this request came before the Commission's *San Onofre* decision. There is no indication that the staff persisted in requiring consideration of earthquakes in Diablo Canyon emergency plans after *San Onofre* was decided. Indeed, it seems unlikely that they would have done so given that the Commission's Appeal Board and then the Commission itself specifically rejected challenges to Diablo Canyon licenses on the ground that emergency plans failed to consider earthquakes. We do not believe that the one instance cited by petitioners constitutes a "longstanding practice."

3. *Consistency with Atomic Energy Act.* Though petitioners make only a cursory assertion that the Commission's interpretation of its emergency planning regulation contradicts the Atomic Energy Act, we consider this contention briefly since the Supreme Court has stated that "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *See United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156, 53 L.Ed.2d 56 (1977).

Enacted in 1946, the Atomic Energy Act provides that "[i]n the performance of its functions the Commission is authorized to ... make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this chapter." 42 U.S.C. § 2201(p) (1982). This is a broad grant of authority. One of the stated purposes of the Act is to provide for "a program to encourage widespread participation in the development and utilization ... to the maximum extent consistent with the common defense and security and with the health and safety of the public." *Id.* § 2013(d).

[4] Petitioners' argument must be that emergency planning regulations that do not specifically require consideration of earthquakes are inconsistent with "the health and safety of the public" as those terms are used in the Act. But this argument disappears when it is recalled that prior to 1980, there were *no* emergency planning regulations at all. Apparently the Commission did not think the Act required such regulations and, so far as we can tell, no litigant claimed that the Act did so. It would be a strange reading of the statute to say that it permits no emergency planning at all (the situation for over thirty years), but that, once an emergency planning regulation is promulgated, it must mandate consideration of earthquakes. The current regulation does not contradict, but furthers, the Act's stated purposes. Under these circumstances, we cannot say that the current emergency planning regulation, as interpreted by the Commission, is in any way inconsistent with the Atomic Energy Act.

The Commission has consistently interpreted its emergency planning regulation not to require consideration of earthquakes. This interpretation contradicts neither the regulatory language nor the Atomic Energy Act and is therefore controlling. Thus, we must uphold the Commission's decision to exclude from the Diablo Canyon licensing proceedings consideration of the potential complicating effects of earthquakes on emergency planning unless we find that the action was arbitrary, capricious, or an abuse of discretion.

B.

Petitioners' final argument that the Commission's exclusion of consideration of earthquakes is arbitrary and capricious is somewhat difficult to follow. The argument appears to take two forms. The first is that the danger of simultaneous but independent events (an earthquake and a radiological emergency) is so great that it must be considered in licensing, and hence be the subject of a hearing. In that form, the argument goes beyond anything said in *Union of Concerned Scientists* and has already been answered. If the Atomic Energy Act and the emergency planning regulation do not require such consideration, then petitioners may not ask this court to rewrite the statute and regulation to deal with their concerns.

[5] The second form of the argument is that the Commission already interprets its regulation to require consideration of such complicating phenomena as fog and heavy rain. It follows, petitioners contend, that it is arbitrary and capricious to refuse to consider earthquakes. This contention rests upon the assumption that the probabilities of fog, heavy rain, and an earthquake are similar. If the probabilities are not similar, it is rational to consider some but not others. At some point the probability of an occurrence becomes so infinitesimal that it would be absurd to say that a hearing about it is required. Thus, no one would argue, or so we assume, that the Commission had to consider the possibility that a space satellite might fall on the Diablo Canyon plant. And, as we have already pointed out, petitioners agree that no hearing is required on the possibility that a meteorite might strike the plant. It can be shown that the danger posited by petitioners here falls into the same range of improbability. We will first establish that this case concerns only the likelihood of the simultaneous occurrence of an earthquake and a radiological emergency arising from an independent cause. We then turn to the probability of such an event and show why the Commission's decision to exclude its consideration was by no means arbitrary.

The Administrative Procedure Act, 5 U.S.C. § 706 (1982), made applicable by 42 U.S.C. § 2231 (1982), establishes the scope of our review: "The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary [and] capricious...." *Id.* § 706(2)(A). This "standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971). Moreover, the party challenging an agency's action as arbitrary and capricious bears the burden of proof. *See, e.g., National Association of Regulatory Utility Commissioners v. FCC*, 746 F.2d 1492, 1502 (D.C.Cir.1984). We note that in determining whether agency action is arbitrary and capricious, the Administrative Procedure Act directs that "[t]he court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706 (1982). Thus, that the Commission did not include citations to specific pages of the record in its *Diablo Canyon* decision provides no basis for overturning the Commission's decision.

Under its emergency planning regulations, the NRC cannot issue an operating license for a nuclear power reactor unless it makes "a finding ... that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.47(a)(1). Thus, the Commission's decision to exclude consideration of earthquakes from the Diablo Canyon licensing hearings was in effect a decision that it could find that emergency plans for Diablo Canyon that do not plan specifically for the effects of potential earthquakes provide the requisite "reasonable assurance" of "adequate protective measures."

The Commission cited three considerations in support of its decision. We turn to these now.

1. *Earthquake-initiated radiological emergency.* The Commission considered the possibility that an earthquake might cause a radiological emergency at Diablo Canyon and observed: "For earthquakes up to and including the Safe Shutdown Earthquake (SSE), the seismic design of the plant was reviewed to render extremely small the probability that such an earthquake would result in a radiological release. While a radiological release might

result from an earthquake greater than the SSE, the probability of occurrence of such an earthquake is extremely low." *Diablo Canyon*, 20 N.R.C. at 251 (footnotes omitted).

The Commission's reasoning is rational and supported by the record. "[T]he SSE is the most powerful earthquake ever expected to occur at the plant site." ALAB-644, 13 N.R.C. 903, 911 (1981). For Diablo Canyon, the SSE was calculated to be an earthquake of 7.5 magnitude. *Id.* at 910. The Licensing Board found that value to be "very conservative." LBP-79-26, 10 N.R.C. 453, 485 (1979). Thus, the Commission could properly conclude that the possibility of an initiating earthquake of a magnitude greater than 7.5 is so low that specific consideration is not justified.

Similarly, the Commission could rationally exclude from consideration earthquakes of magnitudes 7.5 or smaller. The Commission determined that Diablo Canyon's seismic design is more than adequate to withstand the forces of an SSE without releasing dangerous quantities of radioactivity. *See* CLI-84-12, 20 N.R.C. at 251-52. This means that such earthquakes pose no material threat to the plant. Since petitioners have not challenged this conclusion on appeal, we have no grounds to conclude that the Commission's exclusion of such consideration was arbitrary and capricious. As the panel majority stated in a portion of its opinion not vacated by our May 1, 1985 Order: "We must assume, therefore, that the likelihood that an earthquake will trigger a nuclear accident at the facility is so small as to be rated zero." 751 F.2d at 1304 (footnote omitted). The original panel was unanimous on this point. As Judge Wald stated in her partial dissent, the Commission's first conclusion "is adequately supported by findings in the record." *Id.* at 1332. Thus, the only risk to be considered here is that of the simultaneous occurrence of an earthquake and a radiologic release for reasons unrelated to the earthquake.

[illegible]

radiological emergency. The Commission determined that "earthquake[s] that would complicate emergency response" as well as occur contemporaneously with "a radiologic release from the plant caused by an event other than an earthquake" are "so infrequent that their specific consideration is not warranted." *Diablo Canyon*, CLI-84-12, 20 N.R.C. at 252. This determination is supported by the record, not merely adequately but, we think, conclusively.

The NRC estimates the representative probability of a serious core melt accident with offsite radiation release requiring protective action (sheltering or evacuation) to be one in a hundred thousand per year. *See* Technical Guidance for Siting Criteria Development, NUREG/CR-2239, SAND 81-1549 at iii, 2-11, 2-12 & table 2.3.1-1 (1982). In 1981, the Commission's Appeal Board considered evidence relating to the Diablo Canyon operating basis earthquake ("OBE") and rejected the claim that the Diablo Canyon plant is located in an area of high seismicity. The OBE is defined as "that earthquake which, considering the regional and local geology and seismology and specific characteristics of local subsurface material, could reasonably be expected to affect the plant site during the operating life of the plant." 10 C.F.R. Part 100 app. A § III.(d)(1984). By definition, less severe earthquakes are not expected to affect the Diablo Canyon plant site.

Petitioners argue, however, that earthquakes of a magnitude smaller than the OBE might complicate emergency response and therefore should have been considered. Petitioners have cited no support for this assertion. Moreover, the record supports the Commission's decision to exclude consideration of earthquakes of *any* size. Record evidence indicates that seismic activity of any magnitude occurs infrequently along the Hosgri Fault and more particularly, in the San Luis Obispo area. For example, in reviewing the geologic setting of the Diablo Canyon plant site, the Atomic Safety and Licensing Board observed that "[i]n the main southern part of the Coast Ranges province no [faults other than the

San Andreas] show evidence of more than minor seismic activity during Holocene time (the last 10,000 years)." LBP-79-26, 10 N.R.C. 453, 469 (1979). Evaluation of the site prior to the discovery of the Hosgri Fault "established that it is an area of relatively low seismicity." *Id.* at 470. Indeed, a major reason the Hosgri was not discovered sooner was "the absence of seismic activity that would indicate a nearby significant fault." *Id.*

Petitioners have cited nothing to contradict the Commission's conclusion that earthquakes of sufficient magnitude to disrupt emergency responses occur very infrequently. On this point, petitioners cite only a portion of Commissioner Asselstine's dissent, *see* Pet.Supp.Br. at 18 n. 39, which states:

> Publicly available information compiled by the U.S. Geological Survey (USGS) would seem to indicate that earthquakes of sufficient magnitude to cause possible damage, obstruction or disruption to roads, buildings, bridges and communication networks occur throughout many parts of California, including the San Luis Obispo area, with some regularity.... According to this information, four earthquakes have occurred in the immediate San Luis Obispo area since 1830....

CLI-84-12, 20 N.R.C. 249, 263 n. 2 (1984) (dissenting views of Commissioner Asselstine).

Petitioners' citation of Commissioner Asselstine's information does not contradict, but amply supports the Commission's conclusion. The source on which Commissioner Asselstine was relying indicates that only four earthquakes of any magnitude have occurred at or near San Luis Obispo during the last 200 years. *See* National Oceanic & Atmospheric Administration, U.S. Dep't of Commerce, Pub. No. 41-1, Earthquake History of the United States 155-86 (Rev.ed.1973). Moreover, none of these earthquakes is reported to have caused any damage that would interfere with emergency responses. The earthquake of 1830 damaged a church. *Id.* at 156. The earthquake of December 17, 1852 knocked down part of an adobe dwelling and fractured the walls of two others. *Id.* Although the earthquake of June 11, 1903 was felt at San Luis Obispo, the only damage (fallen chimneys) occurred near San Jose. *Id.* at 162. Similarly, the earthquake of December 6, 1906 was felt at San Luis Obispo, but the damage was limited to a cracked lighthouse at Piedras Blancas. *Id.* In short, the information on which petitioners rely in no way undermines the Commission's observation that "earthquakes of sufficient size to disrupt emergency responses at Diablo Canyon would be so infrequent that their specific consideration is not warranted." CLI-84-12, 20 N.R.C. at 252.

The probability of any size earthquake occurring in San Luis Obispo in any given year is about one in fifty. If the operating life of the plant is forty years, the probability that any size earthquake and an independent radiologic emergency both will occur at Diablo Canyon during a single year during the life of the plant is one in 125,000.[7] The probability that the two events will occur contemporaneously in a single week during the life of the plant is approximately one in 6,500,000.[8] Thus, it is no objection that the Commission did not hold hearings to determine the size earthquakes required to interfere with emergency responses since earthquakes of any size are very infrequent events in the San Luis Obispo area.

The probabilities are even smaller when we consider the OBE, a somewhat larger earthquake that might more conceivably interfere with emergency responses. For

7. The probability that the two events will occur in a particular year is 1 in 5,000,000. The probability that the two events will occur during any year during the life of the plant is obtained by multiplying the above probability times 40 years, the life of the plant.

8. This probability is derived by multiplying one over 52 times the probability that the two events will occur in any single year during the life of the plant.

Diablo Canyon, the OBE was calculated to be an earthquake with maximum vibratory ground acceleration of 0.2g. *See* ALAB-644, 13 N.R.C. 903 (1981). The Appeal Board observed that for the Diablo Canyon OBE, "the *lowest* average return period computed by any of the methods used in the analyses is 275 years." *Id.* at 992 (emphasis added). Based on its review, the Appeal Board concluded:

> The record ... does not bear out the claim that the Diablo Canyon site is one of "high seismicity." The term refers to the frequency of seismic events. Drs. Anderson and Trifunac plotted for the years 1950 through 1974 the known epicenters in the region, centered around Diablo Canyon, between 33° and 37° north latitude and 119° to 123° west longitude. That plot, and the calculated low recurrence rate of an earthquake of the magnitude assigned the OBE, indicate that *the region is at most one of low to moderate seismicity.*

ALAB-644, 13 N.R.C. at 993-94 (emphasis added) (footnotes omitted).

Based on these figures, the Commission could properly conclude that the probability of the two events occurring contemporaneously is extraordinarily low. The record establishes that the probability of an OBE at Diablo Canyon in any given year is, at most, one in 275. The probability that an independent radiological emergency will occur in a given year is one in a hundred thousand. Since the operating life of the plant is forty years, this means that the probability that an OBE and a radiological emergency will both occur at Diablo Canyon within the space of a single year during the life of the plant is one in 687,500.[9] The probability that the two events will occur contemporaneously (say, within the space of a single week during the life of the plant) is approximately one in 35,750,000.[10] The possibility that an earthquake would disrupt a response to a radiological emergency is so extremely low as to be, for any practical purpose, non-existent.[11] If the NRC is required to hold hearings on the emergency plans to deal with contingencies of that level of improbability, we can think of no speculative danger that would not require a hearing. Such a conclusion would serve no purpose other than to enable petitioners to hold up licensing for many more years, and probably for a period long enough to make the construction of nuclear power plants entirely economically unfeasible.

Perhaps petitioners' real objection is not that the Commission erroneously concluded that the probability is exceedingly low that an earthquake and an independent accident will occur contemporaneously, but that the Commission acted arbitrarily in refusing to consider earthquakes while permitting consideration of other natural phenomena. *See* Pet.Supp.Br. at 17-18. "Hence," petitioners argue, "[the Commission's] exclusion of earthquakes in the context of emergency planning is not only arbitrary, but irrational." *Id.* at 18. Despite this assertion, it is clear that the Commission's differential treatment of these phenomena is entirely rational.

Petitioners assert that "the Commission *does* consider ... volcano[es], hurricane[s], [and] tornado[es]," and then state: "Notably, with respect to Diablo Canyon, the Commission allowed Petitioners the opportunity to litigate the potential impacts of tornadoes and hurricanes on emergency response, but provided no basis upon which

9. The probability that the two events will occur in a particular year is one in 27,500,000. The probability that the two events will occur during any year during the life of the plant is obtained by multiplying the above probability times 40 years, the life of the plant.

10. The probability is derived by multiplying one over 52 times the probability that the two events will occur in any single year during the life of the plant.

11. For an earthquake to complicate an emergency response the two events would probably have to occur closer in time than one week. If a period of 48 hours were chosen, for example, the odds against a simultaneous occurrence would be far higher even than those mentioned in the text.

to conclude that their occurrence is any more probable than an earthquake—the potential impacts of which were excluded from the hearing process." Pet.Supp.Br. at 17-18 (emphasis in original). These are strong statements, and so it is remarkable that petitioners offer no support in their initial brief for either of those assertions. In their reply brief, however, petitioners cite as support, and their only support, Commissioner Asselstine's *Diablo Canyon* dissent. The only possibly relevant portion of that dissent states:

> The probability that a tornado will travel through a particular 10-mile area and thereby initiate or disrupt response to an emergency at a nuclear plant must be quite low; yet, the Commission requires consideration of that issue for certain plants. Similarly, the probability of a hurricane striking the San Luis Obispo coastal area and initiating or disrupting an emergency response must also be quite low; yet the Commission considered that very issue in the Diablo Canyon case.

Diablo Canyon, CLI-84-12, 20 N.R.C. at 263 (dissenting views of Commissioner Asselstine).

With respect to tornadoes, petitioners simply misstate Commissioner Asselstine's position. His dissent clearly states that "the Commission requires consideration of [tornadoes] *for certain plants.*" *Id.* (emphasis added). It does not, as petitioners assert, state that the Commission considered tornadoes in the case of Diablo Canyon or that the Commission considers tornadoes for most plants.

Commissioner Asselstine does assert in his dissent that the Commission considered the possibility of a hurricane striking the Diablo Canyon plant. *Id.* But Commissioner Asselstine, like petitioners, provides no record citation to establish that such consideration in fact took place. Indeed, PG & E asserts that Commissioner Asselstine was simply mistaken. PG & E Brief at 17. Thus, petitioners' reliance on Commissioner Asselstine's dissent does nothing to advance their claim. At oral argument, petitioners repeatedly emphasized Commissioner Asselstine's dissent. Petitioners were then specifically asked whether *they* could produce any citations of instances where the Commission had required consideration of infrequent natural phenomena other than earthquakes. Petitioners' reply was that they could not. As a matter of law, petitioners' reliance on Commissioner Asselstine's unsubstantiated assertion is insufficient to establish that the Commission considered any highly infrequent natural phenomena in its review of the Diablo Canyon emergency plans, and therefore acted arbitrarily in excluding consideration of earthquakes.[12]

In its *Diablo Canyon* decision, the Commission observed that "[w]ith one exception, the focus has always been on frequently occurring natural phenomena." CLI-84-12, 20 N.R.C. at 252. "The one exception is Trojan, for which consideration has been given to the effects of volcanic eruption due to the expectation that another explosion is imminent at Mt. St. Helens." *Id.* at 252 n.4. The Commission's consideration of a volcanic eruption at Mt. St. Helens on emergency planning at the nearby Trojan plant does not render arbitrary the Commission's decision not to consider earthquakes at Diablo Canyon. A major

12. The dissent states that we unfairly refuse to look at Commission decisions not cited by petitioners, yet "unquestionably accept[ ]" the Commission's assertion that it had previously considered only frequently occurring natural phenomena. Dissent at 55-56. "Fairness would seem to dictate that both parties cite cases to support their opposing claims before the court accepts either. Here, unfortunately, neither party did so." *Id.* In addition to requiring that the Commission prove a negative, this objection ignores the more basic point that the burden of proof is on the petitioners and that, consequently, they bear the risk of nonpersuasion. Moreover, the cases cited by the dissent (involving, for example, the possibility of severe winter storms), while they may consider occurrences that are to some degree "infrequent," do not compare in degree of rarity with the event whose occurrence is considered here. These are judgments of degree and wherever the spectrum is cut it will always be possible to point out that events on opposite sides of the line are not vastly different.

eruption occurred at Mt. St. Helens in May, 1980, and there was scientific evidence that there was a probability of further volcanic activity in the near future. This is in significant contrast to the situation at Diablo Canyon. Petitioners have pointed to nothing in the record to suggest that there has been an earthquake near Diablo Canyon in the recent past that would have posed any threat to the plant or to emergency responses. As we have already discussed, the Commission reasonably concluded that the possibility that an earthquake would occur at the plant contemporaneously with an independently caused radiological release is too small to require specific consideration. Under these circumstances, the Commission's decision to consider volcanic eruptions at Trojan, but exclude consideration of earthquakes at Diablo Canyon, was entirely rational.

Petitioners correctly point out that "on-the-record consideration was given to complications resulting from other natural phenomena, such as fog and heavy rain." Pet. Supp.Br. at 18–19. In *Diablo Canyon*, the Commission itself stated that "[i]n prior cases, such frequently occurring natural phenomena as snow, heavy rain, and fog have been considered." CLI–84–12, 20 N.R.C. at 252. The Commission went on to stress, however, that "the focus has always been on *frequently occurring* natural phenomena." *Id.* (emphasis added). Thus, the Commission may require consideration of snow for a plant in Pennsylvania where snow occurs frequently. This does not mean, however, that the Commission acts arbitrarily if it excludes consideration of snow for plants in southern Florida.

We cannot say that the Commission decision to consider such frequently occurring natural phenomena as rain and fog, but not to consider the infrequent phenomenon of a major earthquake, was arbitrary and capricious. There is record evidence that dense fog (visibility of less than a quarter mile) occurs, on average, approximately eighty-eight times a year, *see* Evacuation Time Assessment for the Diablo Canyon Nuclear Power Plant at 7, Sept. 1980, Record, vol. 102, applicant's exh. 78 at 7, at Operating License Hearing, Jan. 19–26, 1982, and that heavy rainfall (greater than .31 inches per day) has occurred up to twenty-five times in a given year. *See* Diablo Canyon Units 1 and 2 Final Safety Analysis Report at 2.3A–44, 2.3A–45 table 7 (applicant's exh. 5 at Operating License Hearing, Oct. 18, 1977). This establishes that rain and fog are far more likely to occur at the plant than a major, disrupting earthquake.

It is of no significance that the Commission did not announce a general standard for determining what constitutes frequently occurring and infrequently occurring natural phenomena. We are reviewing the Commission's action *in this case* to determine if it is arbitrary and capricious. To conclude that the Commission did not act arbitrarily and capriciously in this case, it is sufficient that the record establishes that fog is 24,200 times more likely to occur, and rain is 6,875 times more likely to occur, at Diablo Canyon than is a major earthquake. (Contrary to the dissent's charge, this comparison relates the frequencies of rain and fog to that of earthquakes and does not involve multiplying either by the chances of an independent nuclear accident.) Under these circumstances, the Commission certainly drew a rational distinction between rain and fog, on the one hand, and earthquakes, on the other. Given the relative probabilities, this court cannot conclude that the Commission's decision was arbitrary and capricious.

3. *Flexibility of emergency plans.* The Commission gave a third reason for excluding consideration of earthquakes:

> The Commission's view that it need not give specific consideration to the complicating effects of earthquakes on emergency planning in this case is bolstered by the following consideration. Specific consideration has been given in this case to the effects of other relatively frequent natural phenomena. The evidence includes the capability of the emergency plan to respond to disruptions in communication networks and evacuation routes as a result of fog, severe storms and heavy rain. In the extreme, these phenomena are capable of resulting in area-wide disruptions similar to some of the disruptions which may result from an earthquake. Testimony in the Diablo Canyon record indicates that adverse weather conditions such as the effect of heavy fog could increase evacuation time to approximately 10 hours. Thus, while no explicit consideration has been given to disruptions caused by earthquakes, the emergency plans do have considerable flexibility to handle the disruptions caused by various natural phenomena which occur with far greater frequency than do damaging earthquakes, and this implicitly includes some flexibility to handle disruptions by earthquakes as well.

Diablo Canyon, CLI–84–12, 20 N.R.C. at 252–53.

Petitioners argue that "the Commission majority provides no support whatsoever for its third assertion" and that therefore the Commission's conclusion about the flexibility of the emergency plans "is complete speculation and nothing more." *See* Pet. Supp.Br. at 18–19. Petitioners' argument is both irrelevant and wrong. The Commission expressly stated that it was citing the inherent flexibility of the emergency plans only to "bolster" its conclusion that specific consideration of earthquakes is not warranted. *See* CLI–84–12, 20 N.R.C. at 252. At the outset of its decision, the Commission set forth the positions of the parties, attributing the flexibility argument to PG & E and the argument based on probability to its staff. *See id.* at 251. The Commission then began its analysis by stating: "The Commission agrees with the NRC staff's analysis in this case." *Id.* Thus, even if petitioners' attack on the flexibility rationale were successful, that would not damage the Commission's basic argument, which was that the coincidence of two highly improbable events was so radically improbable as not to require a hearing.

In any case, the Commission's observations about the inherent flexibility of emergency plans does, in fact, support its decision not to consider earthquakes. Those remarks are also entirely consistent with the emergency planning regulation. Both of these conclusions are easily demonstrated. The regulation sets forth sixteen general standards with which emergency plans must comply. For example, these standards require emergency plans to provide and maintain "[a]dequate emergency facilities and equipment to support the emergency response," as well as to use "[a]dequate methods, systems, and equipment for assessing and monitoring actual or potential offsite consequences of a radiological condition." 10 C.F.R. § 50.47(b)(8) & (9). The regulations make no reference to specific conditions or accident sequences. As early as 1981, just one year after the regulations were promulgated, the Commission observed in another context: "The current regulations are designed with the flexibility to accommodate a range of onsite accidents, including accidents that may be caused by severe earthquakes. This does not, however, mean that emergency plans should be tailored to accommodate specific accident sequences...." *San Onofre*, CLI–81–33, 14 N.R.C. at 1092. Thus, the Commission's observation in this case that the Diablo Canyon emergency plans contain a measure of inherent flexibility is supported by the fact that the plans were designed and approved in accordance with the standards of flexibility set forth in the emergency planning regulation.

As the NRC points out, the emergency response plan already in place to deal with frequent natural phenomena has the capacity to be of assistance in coping with problems that may be expected to occur as the result of an earthquake. For example, in the event that commercial telephone lines go down, the plans provide for back-up communications, including radio transmission and telephone lines dedicated specifically to all critical facilities and organizations. *See* LBP–82–70, 16 N.R.C. 756, 775, 817–18 (1982). Similarly, if roads become unusable, the plan specifically contemplates the use of helicopters, overland vehicles, and boats. *Id.* at 773, 814–16, 834–35. Petitioners' argument is that the Commission should have held a hearing to

deter... ...er these alternate facilities will be useful in the event of an earthquake. But the Commission is not required to hold a hearing to prove what common sense shows, that such backup communication and transportation plans and facilities are likely to prove helpful in the event of an earthquake as well as in the event of a heavy rain. It was, therefore, entirely rational for the Commission to bolster its conclusion with the observation that the emergency response plan already in place has flexibility that would aid in dealing with disruptions caused by earthquakes.

We conclude that petitioners have failed to establish that the Commission's refusal to require emergency response plans to consider earthquakes was arbitrary and capricious or irrational.

C.

In short, petitioners have been unable to advance any reason why the deference normally accorded to an agency's interpretation of its own regulations should not be given to the Commission's interpretation in this case. The Commission has consistently and repeatedly interpreted its emergency planning regulation not to require consideration of the effects of earthquakes in emergency planning and this interpretation is neither plainly inconsistent with the regulatory language nor arbitrary and capricious. Under these circumstances, the Commission's interpretation is controlling. *See United States v. Larionoff*, 431 U.S. at 872–73, 97 S.Ct. at 2155–56.

Because the NRC was not required by its regulations to consider the potential complication effects of earthquakes on emergency planning in its decision to license Diablo Canyon, and in fact affirmatively excluded such consideration, there is no merit to petitioners' claim that they were denied a hearing on this issue in violation of section 189(a) of the Atomic Energy Act. *See Union of Concerned Scientists*, 735 F.2d 1437

III.

Petitioners ask this court to supplement the record to consider transcripts of a closed meeting of the Nuclear Regulatory Commission. Petitioners claim that "[t]he illegitimacy of the Commission majority's decision to exclude earthquakes from emergency planning at Diablo Canyon is confirmed by an examination of the closed meeting transcripts." Pet.Supp.Br. at 21.

[6] Judicial examination of these transcripts would represent an extraordinary intrusion into the realm of the agency. These transcripts record the frank deliberations of Commission members engaged in the collective mental processes of the agency. In a case reviewing action by the Secretary of Agriculture, the Supreme Court had this to say about the district court's authorization of deposition of the Secretary:

> [T]he Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." Just as a Judge cannot be subjected to such scrutiny, so the integrity of the administrative process must be equally respected.

United States v. Morgan, 313 U.S. 409, 422, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1941) (citations omitted).

As the Supreme Court has stated, "there must be a strong showing of bad faith or improper behavior before [inquiry into the mental processes of the administrative decisionmaker] may be made." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971). Petitioners have made no such showing in this case.

Petitioners offer nothing but the ... scripts to support their motion to sup... ment the record. Apparently unable ... point to any independent evidence of ... proper conduct by the Commission, peti-

tioners simply assert that the transcripts alone are sufficient to establish the requisite bad faith and improper conduct on the part of the Commission. We reject this approach. Petitioners must make the requisite showing *before* we will look at the transcripts. We will not examine the transcripts to determine if we may examine the transcripts.

There may be cases where a court is warranted in examining the deliberative proceedings of the agency. But such cases must be the rare exception if agencies are to engage in uninhibited and frank discussions during their deliberations. Were courts regularly to review the transcripts of agency deliberative proceedings, the discussions would be conducted with judicial scrutiny in mind. Such agency proceedings would then be useless both to the agency and to the courts. We think the analogy to the deliberative processes of a court is an apt one. Without the assurance of secrecy, the court could not fully perform its functions.

We deny petitioners' request to supplement the record in this case since petitioners have failed to make an independent showing that the Commission acted improperly or in bad faith.

The Commission's decision is, therefore,

Affirmed.

MIKVA, Circuit Judge:

I concur in Parts I and II of Judge Bork's opinion and in the result reached by Part III. I write separately, however, to emphasize my understanding of the showing necessary before a court may supplement the record by examining transcripts of a closed commission hearing. I cannot accept the view, *supra* at 44–45, that a petitioner asking a court to review transcripts of this nature must always make a prior and independent showing of agency wrongdoing before the court will examine the transcripts. Like a bank policy of offering loans only to borrowers who do not need loans, this view suggests that the transcripts can serve only as cumulative evidence to support a claim already independently established. The plurality claims support for this notion from the Supreme Court's observation that a strong showing of bad faith or improper behavior must precede examination of the administrative decisionmaker's mental processes. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). *Overton Park* based this rule, however, on the availability of administrative findings "made at the same time as the decision." *Id.* at 420, 91 S.Ct. at 825. The Court then immediately added, "But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves." Id.

The *Overton Park* rule protects the administrative decisionmaker's mental processes from routine judicial scrutiny. In other appropriate cases, a court may examine agency transcripts without entering this sensitive terrain of the decisionmaker's thought patterns. The most fruitful yield from agency transcripts may well be information about the tangible ingredients that entered the agency's decision, not inferences about the decisionmaker's biases, motivations, and human weaknesses.

In reconciling the concerns of *Overton Park* with the potential uses of agency transcripts, my view is that the showing demanded of a petitioner is an allegation, strongly supported by the record, affidavits, and specific references to the transcripts, that the agency has acted in bad faith or with improper purpose. If the court decides that review of the transcripts is called for, it can devise *in camera* procedures to ensure the sanctity of the administrative process. But the plurality's attempt to safeguard agency deliberations by an absolute judicial refusal to inspect transcripts at the threshold of inquiry sweeps too broadly. In practical effect, the plurality's rule may deprive petitioner of the only available, and perhaps the most complete, evidence of agency wrongdoing. Moreover, it creates incentives for concealment from the public and reviewing courts by announcing to the agency that any improp-

er act iring their proceedings will be ie so long as no tangible evidence of these improper actions escapes from the meeting room. Only by leaving open the possibility of at least *in camera* judical inspection of transcripts can the legitimate interests of petitioners and the public in judicial review of agencies and their procedures be vindicated. By stating that a petitioner must produce a "smoking gun" before the court will even look at closed agency proceedings, the plurality insulates the agency's deliberations far beyond the protection contemplated by *Overton Park* or any other controlling precedents.

In this case, I agree with the plurality that petitioners' request to supplement the record with the transcripts must be denied. Petitioners have not made nearly substantial enough a showing to warrant inclusion of the transcripts in the record. Neither petitioners' allegations nor the portion of the transcripts disclosed to us suggests that the agency acted in bad faith in excluding earthquakes from its consideration of emergency planning at Diablo Canyon. For this reason, I concur in the result.

WALD, Circuit Judge, with whom SPOTTSWOOD W. ROBINSON, III Chief Judge, and J. SKELLY WRIGHT and GINSBURG, Circuit Judges, join, dissenting:

Today a majority of the *en banc* court upholds the Nuclear Regulatory Commission's conclusion that its emergency planning regulations neither require nor permit consideration of earthquakes as events which could initiate or complicate an accident at a nuclear power plant located three miles from an active fault.[1] The court reaches this conclusion by narrowly limiting its focus to Commission decisions dealing with earthquakes and emergency planning and by relying on a deceptive set of calculations based on the numerical probabilities of a radiological emergency and an earthquake occurring simultaneously at the Diablo Canyon plant. This case must, however, be viewed in the context of the broader purposes of emergency planning and against the backdrop of the Commission's other emergency planning decisions. The majority's opinion upholding the Commission's rationale *in toto* effectively nullifies emergency planning as an effort to predict what actions would be needed should an accident occur. Instead, under the majority's view, the Commission can avoid the public commitment it made in its regulations simply by declaring that the probability of any accident occurring is too low to bother with. Had the majority surveyed the wider picture, it should have realized that the Commission's decision is woefully inadequate as a piece of logical reasoning, lacking in record support, and patently inconsistent with other interpretations of the emergency planning regulations as well as the underlying purposes of those regulations.[2]

I. Scope of Review

Petitioners argue that the effect of earthquakes on emergency planning at Dia

1. The original *San Onofre* decision on earthquakes and emergency planning held that the regulations do not require consideration of earthquakes and indicated further that such consideration would not be permitted barring amendment of the regulations. *Southern California Edison Co.* (San Onofre), 14 N.R.C. 1091, 1091–92 (1981) [hereinafter cited as *San Onofre*]. Similarly, in the *Diablo Canyon* order the Commission held both that the regulations did not require consideration of earthquakes and that it would not permit consideration in this case *Pacific Gas & Elec. Co.* (Diablo Canyon), 20 N.R.C. 249, 250, 253–54 (1984) [hereinafter cited as *Diablo Canyon*]. *see infra* at 58 n. 17 & 60 n. 19.

2. At the same time this court granted, in part, petitioners' suggestion for rehearing en banc, we granted petitioners' motion for leave to file supplementary exhibits consisting largely of transcripts of closed Commission meetings in which the Commissioners discussed the decision not to allow earthquakes to be considered in the emergency planning for Diablo Canyon. San Luis Obispo Mothers for Peace v. NRC, 760 F.2d 1320, 1321 (D.C.Cir.1985) (en banc). Because, however, I would find the Commission's order arbitrary and capricious on its face, and in view of the lack of evidence supporting it, I do not reach the second question posed in our unpublished order dated August 12, 1985, on the degree of consideration the court may give to those transcripts.

blo Canyon is a "material safety issue" requiring a hearing under § 189(a) of the Atomic Energy Act as interpreted in *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C.Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 815, 83 L.Ed.2d 808 (1985). Because the materiality of a safety issue is in large part a function of the Commission's regulations,[3] this claim reduces to a charge that the NRC's interpretation and application of its emergency planning regulations is arbitrary and capricious. *Cf. GUARD v. NRC*, 753 F.2d 1144, 1150 (D.C.Cir.1985). As the majority rightly points out, this court must normally defer to an agency's interpretation of its own regulation " 'unless it is plainly erroneous or inconsistent with the regulation.' " *United States v. Larionoff*, 431 U.S. 864, 872, 97 S.Ct. 2150, 2155, 53 L.Ed.2d 48 (1977) (citation omitted). This rule does not, however, mean that the court abdicates its responsibility to assess the arbitrariness and capriciousness of agency action. Instead, it serves to focus the court's inquiry on several discrete tasks of which one, but only one, is to assure that the interpretation is consistent with the language of the regulation.

A court also needs to assure itself that the regulations are "consistent with the statute under which they are promulgated." *Id.* at 873, 97 S.Ct. at 2156. This statutory inquiry is difficult to conduct for NRC regulations, however, because the Atomic Energy Act creates "a regulatory scheme that ... is 'virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.' " *Carstens v. NRC*, 742 F.2d 1546, 1551 (D.C.Cir.1984) (citation omitted), *cert. denied*, — U.S. —, 105 S.Ct. 2675, 86 L.Ed.2d 694 (1985). The Act does not, of course, specifically ergency planning, let alone earth

A third task for a court reviewing the NRC's regulatory interpretations is to inquire into their consistency with both the stated purposes of the regulations and other interpretations of the same regulations. The Supreme Court has held that the Commission's interpretation of its regulations must be accepted only if it "sensibly conforms to the purpose and wording of the regulations" and is "consistent with prior agency decisions." *Northern Indiana Public Service Co. v. Porter County Chapter of the Izaak Walton League of America*, 423 U.S. 12, 14–15, 96 S.Ct. 172, 173–74, 46 L.Ed.2d 156 (1975) (assessing Atomic Energy Commission regulations). A reviewing court thus must "determine if [the regulatory interpretation] is consistent with ... the purpose which the regulation is intended to serve." *Cheshire Hospital v. New Hampshire-Vermont Hospitalization Service, Inc.*, 689 F.2d 1112, 1117 (1st Cir.1982). It must also ensure that the agency has treated like cases similarly or provided a reasoned explanation for any variations. *Airmark Corp. v. FAA*, 758 F.2d 685, 691–92 (D.C.Cir.1985).

Finally, a reviewing court must insist that the agency provide a clear explanation of the factual and policy bases for its regulatory interpretation. Errors rendering an action arbitrary and capricious cannot even be spotted unless the agency has "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (citation omitted). As this court regularly points out, "[a]lthough our judicial duties demand great deference to agency expertise, we cannot defer, indeed we cannot

3. The majority mischaracterizes the holding of *Union of Concerned Scientists* when it suggests that only issues defined as material in the Commission's regulations merit a hearing. Maj. op. at 29–30. The court in *Union of Concerned Scientists* clearly stated that a court may always review, under an arbitrary and capricious standard, an agency's determination that an issue is not material to safety. 735 F.2d at 1448 n. 20. Such review would be appropriate when a party alleges that existing regulations erroneously fail to require consideration of a material safety issue.

even engage in meaningful review, unless we are told *which* factual distinctions separate arguably [similar situations], and *why* those distinctions are important." *Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C.Cir.1978). An agency cannot fulfill the requirement of an adequate explanation merely by insisting that its conclusions are rational and supported by the record. Instead, it must give the court "the rationale underlying the importance of factual distinctions as well as the factual distinctions themselves." Id. at 1332.

The NRC's order excluding earthquakes from consideration in the emergency planning for Diablo Canyon cannot stand up to this kind of scrutiny. The NRC has totally defaulted in providing any satisfactory explanation of why it interpreted the emergency planning regulations to exclude all consideration of earthquake complications in the emergency planning for a facility whose design proceedings centered on the plant's proximity to an active earthquake fault. In particular, many of the rationales the NRC has provided are inconsistent with the stated purpose of the emergency planning regulations and with earlier and later applications of those regulations.

II. Ignoring the Purposes of Emergency Planning

The majority never faces up to petitioners' most telling argument: that the Commission's interpretation of its emergency planning regulations is inconsistent with the fundamental purposes of those regulations. Petitioners' Br. at 16–17; *see Diablo Canyon*, 20 N.R.C. at 262 (Commissioner Asselstine, dissenting) (Commission's decision is inconsistent with the regulations' "judgment that adequate emergency planning is an essential element in protecting the public health and safety independent of the Commission's other regulations and safety reviews focusing on the design of the plant itself"). The requirement that a regulatory interpretation be consistent with the [illegible] for promulgating [illegible] is designed to prevent agencies from making ma-

jor changes in regulatory direction *sub silentio*—as the Commission appears to be doing here.

A. *The Purposes of the Regulations*

When the emergency planning regulations were issued in 1980, they reflected a major shift from the Commission's conception of emergency planning prior to the accident at the Three Mile Island ("TMI") nuclear power plant. As the NRC explained when it proposed the regulations,

> The proposed rule is predicated on the Commission's considered judgment in the aftermath of the accident at Three Mile Island that safe siting and design-engineered features alone do not optimize protection of the public health and safety.... Emergency planning was conceived as a secondary but additional measure to be exercised in the unlikely event that an accident would happen. The Commission's perspective was severely altered by the unexpected sequence of events that occurred at Three Mile Island. The accident showed clearly that the protection provided by siting and engineered safety features must be bolstered by the ability to take protective measures during the course of an accident.

44 Fed.Reg. 75,167, 75,169 (1979). These views were echoed in the preamble accompanying the final regulations. 45 Fed.Reg. 55,402, 55,403 (1980).

In adopting these emergency planning regulations, the NRC espoused the "fundamental philosophy" of emergency planning first proposed by the Kemeny Commission in the aftermath of the TMI accident. This philosophy requires all relevant actors to "do everything possible to prevent accidents of this seriousness, but at the same time [to] assume that such an accident may occur and be prepared for response to the resulting emergency." *Report of the President's Commission on the Accident at Three Mile Island* 17 (1979), *reprinted in* Record Volume 69 Joint Intervenors' (J.I.) Exhibit 114A (for identification only).[4] A previous Commission interpretation of the regulations similarly noted that "[t]he underlying assumption of the NRC's emergency planning regulations in 10 CFR § 50.47 is that, despite application of stringent safety measures, a serious nuclear accident may occur." *Southern California Edison Co.* (San Onofre), 17 N.R.C. 528, 533 (1983), *vacated on other grounds sub nom. GUARD v. NRC*, 753 F.2d 1144 (D.C.Cir.1985). Basing the regulations on the assumption that an accident can occur despite other safeguards highlights the importance of "emergency planning as equivalent to, rather than secondary to, siting and design in public protection." 44 Fed. Reg. at 75,169. These contemporaneous statements of the purpose of the regulations, and not the NRC's later representation to this court that "emergency planning [is] a backstop rather than a front-line defense," NRC Br. at 26, must guide the interpretation of the emergency planning regulations.

B. *Inconsistencies with the Regulation's Purposes*

Two of the most important reasons for the exclusion of earthquake effects from emergency planning cited by the majority and the Commission are inconsistent with the stated purposes of the regulations. The first is the Commission's conclusion that earthquakes smaller than the Safe Shutdown Earthquake ("SSE") need not be considered as initiators of accidents because "the seismic design of the plant was reviewed to render extremely small the probability that such an earthquake would result in a radiologic release." 20 N.R.C. at 251. The second notion relied upon primarily, by the majority, is that the likelihood of a radiological accident occuring at all is a relevant concern in deciding the scope of emergency planning, even though such planning begins with the assumption that an accident—unthinkable as it may be—*will* in fact occur.

Nuclear power plants are [illegible] withstand a variety of severe natural phenomena, including earthquakes. *See* 10 C.F.R. pt. 50, app. A, criterion 2 (1985). If the operation of these plants always lived up to their designers' hopes, no emergency planning would ever be necessary. The entire thrust of the change in philosophy reflected in the 1980 regulations, however, was to build emergency planning around the assumption "that, despite application of stringent safety measures, a serious nuclear accident may occur." *Southern California Edison Co.*, 17 N.R.C. at 533. The regulations are designed to ensure that "the protection provided by siting and engineered design features [will] be bolstered by the ability to take protective measures during the course of an accident." 45 Fed. Reg. 55,402, 55,403 (1980) (preamble to final regulations). The NRC cannot now, consistently with the stated purpose of its regulations, interpret those regulations to exclude altogether consideration of accidents initiated by earthquakes *solely* on the ground that Diablo Canyon's design makes such accidents highly improbable. Cf. GUARD v. NRC, 753 F.2d 1144, 1149–50 (D.C.Cir.1985) (finding interpretation to be irrational in part because it was based on "an assumption [not] properly indulged in an emergency preparedness regulation"). *But see infra* at 51 & n.7 (NRC may exclude earthquakes as initiators because the probability of occurrence is small). In so doing, the Commission is engaging in circular reasoning, since the very purpose of the exercise is to plan for the unthinkable eventuality that the design safeguards will not prevent an accident.

The majority and the Commission, *see infra* at 52 & n.10, repeat this mistake when they factor in the probability of a radiological accident occurring at all when evaluating whether earthquakes occur frequently enough to merit consideration as complicating factors. Here again, emergency planning starts from the assumption that an accident has already occurred. Ob-

4. All citations to the record will hereinafter refer to the volume of the record ("Rec. Vol.") and, when possible, to either the exhibit number ("Ex.") or transcript page ("Tr.").

viously the probability of an adverse event, such as heavy rain or an earthquake, complicating emergency planning after an accident must be taken into account when deciding whether to plan for such an eventuality. But the pertinent probability is that of the complicating event *alone*, not multiplied by the probability of a radiological accident. The majority eventually does compare the independent probabilities of earthquakes and other allegedly frequently occurring phenomena, maj. op. at 42, but only after downplaying the frequency of earthquakes by multiplying their probability by the probability of a radiological accident, maj. op. at 39–40. This calculation, stressed in the majority's opening paragraph, produces deceptively low figures in large part because the low statistical probability of a radiological accident ever occurring insures that the simultaneous occurrence of an accident and *any* complicating factor is concededly an extremely unlikely event. *See infra* at 55. Thus, "[t]he probability arguments used by the Commission are really arguments that we do not need *any* emergency planning, rather than that we need not consider earthquakes in emergency planning." 20 N.R.C. at 262 (Commissioner Asselstine, dissenting).

By endorsing the NRC's consideration of design adequacy and radiological accident probabilities in emergency planning, the majority invites the continuing erosion of the emergency planning standards. Little is left for the NRC to plan for once it eliminates from consideration not only initiating events the plant has been designed to withstand but any complicating event with a low probability of occurrence after it has been multiplied by a factor of 0.00001 to reflect the 1 in 100,000 chance of a radiological accident occurring in the first place.[5] These exceptions will easily swallow the whole of the plan. The NRC is, of course, free to change its regulations to make "emergency planning ... a backstop rather than a front-line defense." NRC Br. at 26. As of now, however, emergency planning is supposed to be "equivalent to, rather than ... secondary to, siting and design in public protection." 44 Fed.Reg. at 75,169. The regulations must be interpreted accordingly.[6]

III. The "Arbitrary and Capricious" Nature of the Commission's Rationales

The Diablo Canyon decision is arbitrary and capricious solely because of its fundamental inconsistency with the putative purposes of the emergency planning regulations. In addition, the Commission's three stated reasons for excluding earthquakes from emergency planning at Diablo Canyon, and the majority's acquiescence in them, provide further evidence of the decision's arbitrariness.

A. *Earthquake-Initiated Radiological Emergency*

The Commission's first rationale for interpreting the emergency planning regulations to exclude earthquake complications is that the probability of an earthquake *causing* a radiological release is too small to be of concern. This conclusion is dependent on two separate findings about different-sized earthquakes:

> For earthquakes up to and including the Safe Shutdown Earthquake (SSE), the seismic design of the plant was reviewed to render extremely small the probability that such an earthquake would result in a radiologic release. While a radiologic release might result from an earthquake greater than the SSE, the probability of occurrence of such an earthquake is extremely low.

20 N.R.C. at 251 (footnotes omitted). I agree that by definition earthquakes greater than the SSE occur too infrequently to warrant consideration, since the SSE is the strongest earthquake that could ever be expected to hit the Diablo Canyon site.[7] On the other hand, I believe that the Commission erred by excluding smaller earthquakes from consideration as accident initiators.

One of the two arguments supporting the Commission's decision to ignore earthquakes smaller than the SSE has already been addressed. The Commission's conclusion that such earthquakes will not initiate a release given the plant's design is inconsistent with "[t]he underlying assumption of the NRC's emergency planning regulations ... that, despite application of stringent safety measures, a serious nuclear accident may occur." *Southern California Edison Co.* (San Onofre), 17 N.R.C. 528, 533 (1983); *see supra* at 48–49. In the emergency planning context, design *alone* cannot justify barring consideration of a natural hazard which may initiate a radiological accident.[8]

The majority also argues that hazard need be considered as an accident initiator because the Commission's guidance document on emergency planning specifies that "[n]o single specific accident sequence should be isolated as the one for which to plan because each accident could have different consequences, both in nature and degree." NRC & FEMA, *Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants* 6 (Revision 1 1980) [hereinafter referred to as NUREG–0654]; *see* maj. op. at 32. This argument was not, however, relied upon by the NRC in the Diablo Canyon decision, 20 N.R.C. at 251–52, and was only alluded to in the *San Onofre* decision, 14 N.R.C. at 1092. In any event, the argument is based on a misreading of the guidance document, NUREG–0654. The admonition not to plan based solely on a *single* accident sequence does not preclude planning based on an assessment of the differing consequences of a range of accidents triggered by differing initiating events. The previous sentence in NUREG–0654 states that the objective of emergency response plans is to provide protection against a spectrum of accidents, NUREG–0654 at 6, and different types of accidents obviously require different types of emergency planning.[9]

5. The majority, the NRC staff, and PG & E all rely on an estimated accident probability of 10^{-5} or 1 in 100,000. Maj. op. at 38; NRC Staff's Memorandum Regarding Consideration of Effects of Earthquakes on Emergency Planning (CLI–84–4) at 4 n. 3 (May 3, 1984), *in* Rec.Vol. 168; PG & E Br. at 13–14 & nn. 14–15.

6. The majority errs in finding that it requires "a strange reading of the statute to say that it permits no emergency planning at all (the situation for over thirty years), but that, once an emergency planning regulation is promulgated, it must mandate consideration of earthquakes." Maj. op. at 36. All petitioners are saying is that once the NRC interpreted the Atomic Energy Act to require emergency planning regulations in order to protect public health and safety, it must interpret those regulations consistently with that purpose. Any subsequent change in statutory interpretation by the agency would, of course, require a reasoned explanation.

7. *Pacific Gas & Electric Co.* (Diablo Canyon), 10 N.R.C. 453, 490 (A.S.L.B.1979). The NRC adequately explained why the regulations do not require consideration of the complicating effects of earthquakes greater than the SSE. As I explain later, the Commission can consider the likelihood of an initiating or complicating event occurring and exclude from consideration those with such low probabilities that they would not warrant prudent risk reduction methods. *See infra* at 54. Here the Commission noted that an earthquake greater than the SSE was extremely unlikely to occur and would cause so much damage that emergency response would have only marginal benefits. 20 N.R.C. at 251–52. While drawing the line between probabilities will sometimes prove difficult, *see infra* at 53–57, the Commission clearly does not have to consider an event as unlikely as an earthquake greater than the 7.5 magnitude SSE for Diablo Canyon. 10 N.R.C. at 489 (7.5 magnitude earthquake will occur once every 100,000 years).

8. The panel opinion's unanimous finding "that the likelihood that an earthquake will trigger a nuclear accident at the facility is so small as to be rated zero," 751 F.2d at 1304, is thus inapposite here. That conclusion was based on an evaluation of design precautions. But emergency planning standards operate on different assumptions than design standards: in the emergency planning context, the NRC assumes that an accident can occur *despite* the plant's engineering and siting safeguards. Thus, in interpreting the emergency planning regulations the Commission cannot assume that design safeguards will be totally effective and eliminate the possibility that an earthquake smaller than the SSE will cause a radiologic release.

9. The Diablo Canyon emergency plan accordingly contains onsite procedures for plant operators to follow when any of several initiating events, including earthquakes, triggers one of four emergency action levels. Rec.Vol. 98, App.Ex. 73 at Table 4.1–1 (emergency action

Indeed, the Commission itself recently acknowledged that "the capability of the surrounding population to respond to an accident initiated by a severe external event, such as an earthquake or hurricane, would differ significantly from the capability to respond to other accidents." *Consolidated Edison Co.* (Indian Point), 21 N.R.C. 1043, 1058 (1985). This refreshing dose of common sense from the Commission suggests that the Diablo Canyon stand on earthquakes may indeed be an aberration dictated by frustration at the ten year delay in bringing the plant on-line. Be that as it may, the NRC's reasons for ignoring any consideration of smaller-than-SSE earthquakes as initiators of radiological accidents makes no sense given the purposes of emergency planning and the requirements of the regulations as explained in NUREG–0654.

B. *Simultaneous Occurrence of an Earthquake and an Independently Caused Radiological Emergency*

The Commission and the majority have also dismissed the need to consider the simultaneous occurrence of a radiologic release and an unrelated earthquake. The NRC decision distinguished such an occurrence from other off-site complications which are routinely considered in emergency response planning as follows:

> NUREG–0654 does call for some consideration of site-specific adverse or emergency conditions on emergency response. In prior cases, such frequently occurring natural phenomena as snow, heavy rain, and fog have been considered. With one exception, the focus has always been on frequently occurring natural phenomena. *The Commission believes, based on the information provided by the parties, that earthquakes of sufficient size to disrupt emergency response at Diablo Canyon would be so infrequent that their specific consideration is not warranted.*

20 N.R.C. at 252 (footnote omitted) (emphasis added). The majority has expanded upon this rationale, quantifying the Commission's qualitative conclusion that earthquakes of a size likely to affect emergency response occur too infrequently to warrant consideration and, in the process, factoring in the probability of a radiological accident occurring in the first place.[10]

None of the reasons given by the Commission—or the majority—for excluding consideration of earthquakes which coincide with a radiological accident can stand up even under the deferential scrutiny of "arbitrary and capricious" review. I have already explained why the majority's focus on the probability of a nuclear accident is irrelevant in deciding how to respond to such an accident. *See supra* at 8–9. The major failing of this portion of the NRC's decision, however, is that the Commission has totally failed to present any coherent standard for determining which natural phenomena meet its "frequently occurring" standard or to substantiate the application of any such standard to Diablo Canyon. The Commission's "frequently occurring" standard for deciding which natural phenomena merit attention as complicating factors in emergency planning is inadequately explained and justified, inconsistent with the way the Commission has applied emergency planning regulations to other offsite natural phenomena in the Diablo Canyon proceeding and in other licensing proceedings, and impossible to apply to Diablo Canyon based on the record in this proceeding.

1. *The Inadequate Definition of "Frequently Occurring"*

The Commission says that earthquakes are not the type of "frequently occurring" natural hazards to which the emergency planning regulations are addressed. The majority goes even further and purports to have difficulty in finding any references to natural hazards at all in the planning regulations or guidance document. Maj. op. at 11–15. It is noteworthy that neither the Commission's final order in this case nor the relevant staff memoranda[11] ever questioned the proposition that the emergency planning regulations, as explained in NUREG–0654, require consideration of *some* offsite natural hazards which may initiate or complicate emergency planning. *Diablo Canyon*, 20 N.R.C. at 252; *Pacific Gas & Electric Co.* (Diablo Canyon), 19 N.R.C. 937, 941–44 (1984). The critical question is *which* such phenomena require consideration. To illuminate that question, I will briefly trace the regulations' requirement that some natural hazards be considered in emergency planning.

The overall emergency planning regulation is indeed broadly worded, providing only that "no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.47(a)(1)(1985). Its scope is, however, refined by the further requirement that response plans comply with sixteen listed standards. 10 C.F.R. § 50.47(b). The relevant standard here requires the utility to develop, "consistent with Federal guidance," a range of protective actions "appropriate to the locale" to be taken in the event of an emergency and guidelines for choosing among these alternative actions. 10 C.F.R. § 50.47(b)(10). The federal guidance referred to is NUREG–0654, which provides in several places for consideration of natural hazards and other offsite phenomena.[12] The Commission and staff have themselves focussed on natural hazards by requiring that evacuation time estimates consider site-specific adverse weather characteristics, 20 N.R.C. at 252; 19 N.R.C. at 943–44; NUREG–0654, app. 4 at 4–6, which the staff defines as those "which might reasonably be expected to occur *during the plant lifetime at a particular site* and be severe enough to affect the time estimates for a particular event," 19 N.R.C. at 944 (emphasis added).

The demands of NUREG–0654, as acknowledged by the Commission, are that site-specific natural hazards be considered in emergency planning. The majority must therefore rely on its more extreme argument that even if NUREG–0654 requires consideration of natural hazards, that document is only guidance and is not binding on the agency. Maj. op. at 33. The standard at issue here, however, specifically requires plans to comply with NUREG–0654's "guidance." 10 C.F.R. § 50.47(b)(10). And in its recently proposed rule on earthquakes and emergency planning,

levels); Rec.Vol. 100, App. Ex. 75 at EP M–4 (procedures for earthquakes).

10. The Commission never quantified the probabilities involved in the manner suggested by the majority, the NRC staff, and PG & E. Maj. op. at 37–40; NRC Staff's Memorandum Regarding Consideration of Effects of Earthquakes on Emergency Planning (CLI–84–4) at 4 n. 3 (May 3, 1984) *in* Rec.Vol. 168; PG & E Br. at 13–14 & nn. 14–15. At one point in the opinion the majority assumes that the Commission adopted the whole of the staff's analysis, maj. op. at 36, but the staff analysis to which the Commission referred (20 N.R.C. at 251 & n. 1, was a January, 1984 memorandum which contained no such quantitative analysis, *see* 19 N.R.C. at 946–52. Indeed, it seems odd to infer that the Commission performed such a quantitative, probabilistic analysis when its discussion of the occurrence rates of natural hazards was wholly qualitative and never considered the probability of an accident occurring at all. 20 N.R.C. at 251–52. To the extent the NRC did not in fact rely on this quantitative rationale, the majority advances without warrant a post-hoc rationalization for the agency's decision. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983).

11. While the majority correctly points out that the staff's prior position on interpretation of the regulations normally cannot bind the Commission, the second memorandum—dated January 3, 1984—seems to have been adopted by the Commission in *Diablo Canyon*. *See* 20 N.R.C. at 251 & n. 1 (explaining that the NRC "agrees with the staff's analysis in this case" as advanced in the 1984 memorandum).

12. *See* NUREG–0654 at 42 (procedures that provide for emergency actions to be taken should "tak[e] into account local offsite conditions that exist at the time of the emergency"); *id.* at 63 (plan for implementing protective measures should identify and provide means to deal with "potential impediments (e.g., seasonal impassability of roads) to use of evacuation routes"); *id.* app. 4 at 4–6 (evacuation time estimates must consider site-specific adverse weather conditions).

the Commission described NUREG–0654 as a "document, developed jointly by the NRC & [the Federal Emergency Management Agency ("FEMA"), which] forms the basis for both NRC and FEMA regulations on emergency planning." 49 Fed.Reg. 49,640, 49,640 (1984). Further, NUREG–0654 itself notes that "FEMA and NRC regard all of the planning standards identified and contained herein as essential for an adequate radiological emergency plan." NUREG–0654 at 5. Finally, NRC licensing boards accord NUREG–0654 "considerable weight" in evaluating emergency plans because it was written by a joint FEMA/NRC committee, considered during the rulemaking process, and specifically referenced in the emergency planning rules. *Long Island Lighting Co.* (Shoreham), 21 N.R.C. 644, 652–53 (A.S.L.B.1985); *Public Service Co.* (Seabrook), 17 N.R.C. 1170, 1177 n. 5 (A.S.L.B.1983). In view of NUREG–0654's history and the stated reliance on this document by the NRC and its licensing boards, this court should accord NUREG–0654 "considerable weight" in interpreting the emergency planning regulations, rather than altogether denying its pertinence. *Cf. Community for Creative Non-Violence v. Watt*, 670 F.2d 1213, 1216 (D.C.Cir.1982) (court may rely on agency's contemporaneously issued policy statement in interpreting agency regulations).

The majority, finally, claims that reading the regulations to require consideration of *any* natural hazards requires reading them to require consideration of *all* such hazards. Maj. op. at 31 n. 2, 32. Yet the Commission has established that the regulations require consideration of some but not all contingencies caused by offsite natural phenomena. NUREG–0654 and the Commission's order in the *Diablo Canyon* proceeding both acknowledge that some such hazards must be assessed. 20 N.R.C. at 252. Allowing the Commission to draw some line between the hazards it will and will not consider is not necessarily inconsistent with the purpose of the emergency planning regulations, which is to identify "prudent risk reduction measures." *Southern California Edison Co.* (San Onofre), 17 N.R.C. 528, 533 (1983) (emphasis in original). Thus, the Commission may consider the probability of a natural hazard occurring and exclude from consideration those which occur so infrequently as to not countenance prudent risk reduction measures. I agree with the majority, maj. op. at 12 n. 2, that the only legitimate issue in this case is whether the Commission's line-drawing was rational; I conclude, however, that petitioners have demonstrated that the Commission's choice was not adequately supported.

The Commission has not adequately explained its decision to limit consideration of natural hazards to "frequently occurring" ones. The only explanation of the "frequently occurring" standard given by the Commission was to list several examples which it said had been considered in "prior cases." By failing to define what constitutes a frequent rate of occurrence—or at least to describe where the cut-off point between frequently and infrequently occurring phenomena might lie—the Commission has made it impossible to apply the standard to hazards other than those specifically listed. And the reference to "prior cases," as I demonstrate in the next section, adds nothing to the bare "frequently occurring" standard.

The majority is ultimately driven to uphold the Commission's "frequently occurring" rationale by supplementing it with arithmetical calculations designed to illustrate the absurdly small probabilities of the simultaneous occurrence of a nuclear plant accident and an earthquake of any size. There are two general problems with the majority's approach. First, as I have stressed repeatedly, factoring in the probability that an accident will occur conflicts with the fundamental principles of emergency planning, which must proceed on the assumption that a radiological accident has in fact already occurred. *See supra* at 5–9. Second, since, under the majority's analysis, the probability of *any* natural hazard under consideration must always be multiplied by the probability of a radiological accident, this exercise is of no use whatsoever in drawing the line between frequently and infrequently occurring phenomena.

By automatically multiplying the 1 in 100,000 chance of a nuclear accident by the likelihood of any natural hazard occurring, maj. op. at 39–40, the majority reduces all simultaneous occurrences to a "never-never land" beyond rational planning. For example, there is only a one in a million chance that a nuclear accident would coincide with a severe blizzard if such a storm independently has a 10% chance of occurring in any given year, and a one in ten million chance an accident would coincide with a 100 year flood. Yet the Commission has considered both severe blizzards and 100 year floods in emergency planning. *See infra* at 56–57. How then can the Commission, under the majority's approach, rationalize these as "frequently occurring" phenomena? It is not surprising that the majority quickly switches its approach when it discusses the probabilities of concededly "frequently occurring" natural hazards such as fog and heavy rain, and analyzes their occurrence in absolute terms rather than in terms of the probabilities of their coinciding with a nuclear accident. Maj. op. at 42. This differential treatment does not, however, make for a convincing rationale as to what natural hazards the Commission should or should not consider.

Thus the majority's quantitative focus cannot disguise the plain truth that the Commission has totally failed to provide any sensible working definition of its "frequently occurring" standard. While the Commission says that the emergency planning regulations only contemplate consideration of "such frequently occurring natural phenomena as snow, heavy rain, and fog," 20 N.R.C. at 252, it has failed to explain when conditions other than those specifically listed rise to the level of "frequently occurring natural phenomena." And, as I discuss next, this failure is not remedied by looking to those natural hazards considered in prior cases or in the Diablo Canyon proceeding. The Commission's failure to define and apply the "frequently occurring" standard in any comprehensible way renders its interpretation of the emergency planning regulations as excluding consideration of earthquakes in this case an idiosyncratic one, without roots in any rational criteria. *Cf. Railway Labor Executives' Association v. United States Railroad Retirement Board*, 749 F.2d 856, 862 (D.C. Cir.1984) (vacating agency's statutory interpretation for failure to both articulate and apply a standard).

2. *Inconsistency with Other Applications of the Emergency Planning Regulations*

The Commission might have rescued its unfounded "frequently occurring" standard if, as the *Diablo Canyon* opinion claimed, "prior cases" had defined and applied such a standard. 20 N.R.C. at 252. Indeed, consistency of application in prior—and subsequent—cases is a highly important element in assessing whether a regulatory interpretation merits deference. *See supra* at 47–48. The Commission's backhand reference to "prior cases," however, does nothing to identify its criteria or a cutoff point for a "frequently occurring" natural hazard.

The majority accepts too quickly the Commission's bald assertion that prior cases followed a "frequently occurring" standard; it adds that it can find no cases inconsistent with that standard. The majority's lens, however, is a narrow one; it confines its inquiry to the only two Commission opinions which specifically addressed the issue of earthquakes and emergency planning. Of course, natural hazards other than earthquakes have been considered in many cases under the applicable regulation, 10 C.F.R. § 50.47(b)(10), and those cases shed considerable light on the prevailing interpretation of that regulation. The majority refuses to look at these cases because, it says, petitioners did not provide specific citations. Maj. op. at 40–41. At the same time, however, the majority unquestioningly accepts the Commission's equally undocumented assertion that it has considered only "frequently occurring" natural phenomena in prior cases. *Id.* at 33. Fairness would seem to dictate that both

parties cite cases to support their opposing claims before the court accepts either. Here, unfortunately, neither party did so. As a result, I examined all of the available emergency planning decisions to see whether the Commission has in fact consistently interpreted the regulations to require consideration of only "frequently occurring natural phenomena." 20 N.R.C. at 252. My examination concludes it has not.

Several licensing board and Commission decisions have taken into consideration natural hazards which could complicate emergency planning, although these opinions acknowledged that such events occurred only infrequently. The NRC and its licensing boards regularly consider the complicating effects of very severe winter storms on evacuation. *Consolidated Edison Co.* (Indian Point), 21 N.R.C. 1043, 1059 (1985); *Philadelphia Electric Co.* (Limerick), 21 N.R.C. 1219, 1358–60 (A.S.L.B.1985); *Long Island Lighting Co.* (Shoreham), 21 N.R.C. 644, 815 (A.S.L.B.1985).[13] Several licensing boards, including the one for Diablo Canyon, have considered the simultaneous occurrence of peak summer beach crowds and heavy rains "even though it is doubtful that a peak vacation period would coincide with heavy rains." Rec. Vol. 102, App.Ex. 78 at 95 (evacuation time study); *see Public Service Co.* (Seabrook), 17 N.R.C. 1170, 1176–80 (A.S.L.B.1983) (allowing litigation as to evacuation times for busy summer weekend with adverse weather). Finally, as the Commission noted, the emergency plan for the Trojan plant considered the complicating effects of a volcanic eruption at Mt. St. Helens. 20 N.R.C. at 252 & n. 4.[14]

Neither does the Diablo Canyon proceeding itself provide much aid in discerning which phenomena occur frequently enough to warrant consideration. An evacuation time study admitted into the record evaluated the effects of such low probability events as the simultaneous occurrence of heavy rainstorms and peak summer crowds (an event far less likely to happen than heavy rains alone) and of flood levels projected to occur once every 100 years. Rec. Vol. 102, App.Ex. 78 at 67–69, 95. If a once in 100 years flood is frequent enough to warrant attention, why is not the once in 275 years recurrence of the Operating Basic Earthquake? Both probabilities are of the same order of magnitude.

These "prior cases" appear to follow the staff's position[15] that adverse weather conditions should be considered as complicating factors in emergency response if they

13. Indeed, the Shoreham licensing board has apparently considered offsite phenomena with only a "remote" probability of occurrence on more than one occasion.

> Once again we are called on to predictively resolve an issue generated by the postulated simultaneous occurrence of independent events. In this case, snowstorms of varying intensity occurring simultaneously with a serious radiological emergency at Shoreham. No law of nature prevents the occurrence; the record is silent on its probability (although we think it remote) ...

21 N.R.C. at 815. The board concluded that such "remote" situations must be considered but only require the formulation of general response plans. *Id.* As we have noted, the appropriate probability to assess is that of the offsite phenomenon, rather than the simultaneous occurrence of the phenomenon and a radiological [illegible] *See supra* at 49–50.

14. [illegible] Trojan opinion itself, however; the only discussion of probabilities notes that "if an accident occurred in combination with transportation difficulties due to severe volcanic ashfall, effective protecting measures can still be implemented, albeit with greater difficulty. The probability of these two events occurring simultaneously is, however, extremely low." *Portland General Electric Co.* (Trojan), 12 N.R.C. 241, 243 (Off. of Nuclear Reactor Reg. 1980).

15. While the majority correctly points out that the staff's prior position on interpretation of the regulations cannot bind the Commission, the staff's working definition of 10 C.F.R. § 50.47(b)(10) is relevant in determining what interpretation has been applied in other cases. NUREG-0654 defines § 50.47(b)(10) to require evacuation plans to consider site specific adverse weather conditions. NUREG-0654, app. 4 at 4-6. The definition quoted in the text from the 1982 staff memorandum indicates which conditions the staff believes must be considered to meet that requirement.

"might reasonably be expected to occur during the plant lifetime at a particular site and be severe enough to affect the time estimates for a particular event." 19 N.R.C. at 944. They certainly indicate that the Commission's rigid position in *Diablo Canyon* that earthquakes may not be considered in emergency planning differs from prior and subsequent interpretations of the same regulation with regard to other infrequently occurring phenomena. Without any explanation of these differences, the NRC's interpretation of the emergency planning regulations as encompassing only "frequently occurring" natural hazards does not merit deference.

3. *Misapplication of the Standard*

Even if the Commission had defined and previously applied a "frequently occurring" standard for determining which offsite phenomena merit attention in emergency planning, the Commission lacked substantial evidence in this record to support application of any such standard. In order to apply any version of this standard, the NRC would have had to compare the probability of occurrence of "frequently occurring natural hazards" with that of an earthquake "of sufficient size to disrupt emergency response at Diablo Canyon." 20 N.R.C. at 252. *This calculation was not and could not have been performed by the NRC based on the existing record.* The NRC never discussed—and indeed the record contains no evidence on—what size earthquake would disrupt emergency response and how frequently such earthquakes occur in the Diablo Canyon area.

Because the severity and frequency of earthquakes are related, the Commission cannot say that *earthquakes* are or are not frequently occurring natural phenomena. Rather it must conclude that, in the Diablo Canyon area, *earthquakes of a given size* occur only infrequently. A relevant discussion would have to include information as to what size earthquake would disrupt offsite response and how frequently such earthquakes occur near Diablo Canyon.

Here the relevant size earthquake is that "sufficient ... to disrupt emergency response at Diablo Canyon." 20 N.R.C. at 252. But the NRC did not and apparently could not explain what size earthquake would have disruptive *offsite* effects. The record does not contain *any* information on the offsite consequences of different-sized earthquakes because all evidence on offsite effects of earthquakes of any size was specifically rejected as inadmissible. *See infra* at 60 n. 19. Indeed, the only record evidence on offsite consequences of earthquakes was contained in two staff memoranda, and that evidence indicated that earthquakes smaller than the SSE *could* disrupt offsite emergency response at Diablo Canyon.[16] The majority's citation to a

16. While the staff memoranda cannot create a *legal* interpretation binding on the Commission, *see* maj. op. at 33, they do indicate the state of the *factual* record on the offsite consequences of earthquakes in California. The staff never veered from its position that the offsite consequences of earthquakes at Diablo Canyon warranted consideration. Earthquakes were a major issue throughout the Diablo Canyon licensing proceedings because the plant is located only three miles from the Hosgri Fault, a fact unknown to the utility when it selected the site. *Pacific Gas & Electric Co.* (Diablo Canyon), 16 N.R.C. 756, 760 (A.S.L.B.1982). Seismic issues pervaded the design portion of the licensing proceedings. *See generally Diablo Canyon*, 13 N.R.C. 903. Not surprisingly, before the *San Onofre* decision the NRC staff working on Diablo Canyon had requested applicant PG & E to evaluate the potential complicating effects of earthquakes on emergency planning, specifically asking about disruption of offsite communication networks and transportation routes because "[i]n California, such occurrences appear to be frequent enough to warrant consideration in your emergency plans." Rev.Vol. 69, J.I. Ex. 117.

> In the meantime, the NRC staff was considering earthquake effects on emergency planning because the *San Onofre* decision had said that the NRC would "consider on a generic basis whether regulations should be changed to address the potential impacts of a severe earthquake on emergency planning." 14 N.R.C. at 1092. The staff's resulting memorandum to the Commission, dated June 22, 1982, concluded that "[p]lanning for earthquakes which might have implications for response actions ... in areas where the seismic risk of earthquakes to offsite structures is relatively high may be appropriate (e.g., *for California sites* and other areas of relatively high seismic hazard in the

public document, not in the record, on the effects of several earthquakes that have occurred in the Diablo Canyon area, maj. op. at 39–40, cannot override the NRC's conscious decision to exclude all evidence on what size earthquakes produce what types of offsite effects.

The NRC staff, PG & E, and the Commission (in the "special circumstances" [17] portion of its opinion) implicitly assume that the appropriate size earthquake to consider is the Operating Basis Earthquake ("OBE"). They argue that such an earthquake has a low occurrence rate in the Diablo Canyon area, about 1 in 275 years. *Pacific Gas & Electric Co.* (Diablo Canyon), 13 N.R.C. 903, 992 (A.S.L.A.B.1981). The NRC has not, however, provided any reason to believe that the OBE is the smallest earthquake that could disrupt *offsite* emergency response. The OBE is simply "the strongest seismic event considered likely to occur during the operating lifetime of a nuclear power plant." *Id.* at 989; *see* 10 C.F.R. pt. 100, app. A, § III(d) (1985); *cf.* maj. op. at 38–39 (less severe earthquakes won't affect the *plant site*). The Commission and the majority seem to have focused on this size earthquake not because of its capacity to cause offsite disruptions, but because there is some record evidence on its frequency. The record is absolutely bare, however, as to whether earthquakes smaller than the OBE could cause significant offsite disruptions.

There is, on the other hand, some evidence in the record that smaller earthquakes occur much more frequently than larger ones in the Diablo Canyon area. Rec. Vol. 47, Board Ex. 2J at Tables I & II & Fig. 2 (earthquakes of magnitude 5.0 are expected to occur 45 times in the next fifty years, those of magnitude 5.5, 16 times, and those of magnitude 6.0, 6 times); *see* Rec. Vol. 47, Board Ex. 2F at Table II. This record evidence flatly contradicts the majority's conclusion, again based on extra-record evidence, that the probability of any size earthquake occurring in the Diablo Canyon area in any given year is about one in fifty. Maj. op. at 39–40.[18]

Western U.S.)." 19 N.R.C. at 941 (emphasis added). A second memorandum again noted that "[o]ffsite damage generated by earthquakes can significantly affect nuclear emergency response," especially on the West Coast where ground motion levels capable of causing severe offsite damage may be lower than the plant's Safe Shutdown Earthquake. *Id.* at 947.

17. In an earlier order to the parties in this proceeding, the Commission asked whether the regulations required consideration of earthquakes and, if not, whether such consideration should be permitted for Diablo Canyon because of "special circumstances." 19 N.R.C. at 938–39. The Commission was referring to its regulation providing for waivers of and exceptions to regulations when "special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted." 10 C.F.R. § 2.758(b) (1985). This waiver provision, however, seems to be totally inapposite to the Diablo Canyon proceeding. The "special circumstances" regulation is used to consider site-specific attributes which affect the application of generic regulations [illegible] worthy of consideration it is also not a special circumstance requiring waiver of the emergency planning regulations.

Neither does the Commission's concession that special circumstances might sometimes permit consideration of earthquakes change the fact that the Commission's decision interprets the emergency planning regulations to neither require nor permit consideration of earthquake complications. *See infra* at 46 n. 1. The "special circumstances" regulation only allows the NRC not to apply a regulation. Thus, the only way earthquakes can be considered under the Commission's interpretation of its emergency planning regulations is for the regulations not to be applied.

18. Indeed, if we are to rely on extra-record evidence on the frequency of earthquakes I would note that the last month has been marked by heavy earthquake activity in California. Three earthquakes struck Northern California between March 29 and March 31, with the last measuring 5.3–5.6, the strongest earthquake to hit the area since a 6.2 earthquake in April, 1984. The March 31 earthquake was felt in San Luis Obispo. N.Y. Times, April 1, 1986, at A18, col. 6; Washington Post, April 1, 1986 at A4 col. 4; Time, April 14, 1986, at 33. In addition, three mild earthquakes occurred in Southern California in quick succession in early April. Washington Post, April 6, 1986 at A21, col. 2.

In sum, the Commission has failed to either define or apply the "frequently occurring" standard in any rational way as it affected earthquakes around Diablo Canyon. As a rationale for excluding the complicating effects of all earthquakes from emergency planning, the standard flops badly.

C. *Flexibility of the Emergency Plan*

The Commission's last attempt at rationalizing the exclusion of earthquake planning from the Diablo Canyon licensing proceedings was billed as not an independent ground for its decision but rather a "consideration" which "bolstered" its conclusion. The Commission explained that

> [s]pecific consideration has been given in this case to the effects of other relatively frequent natural phenomena.... In the extreme, these phenomena are capable of resulting in area-wide disruptions similar to some of the disruptions which may result from an earthquake.... Thus, while no explicit consideration has been given to disruptions caused by earthquakes, the emergency plans do have considerable flexibility to handle the disruptions caused by various natural phenomena which occur with far greater frequency than do damaging earthquakes, and this implicitly includes some flexibility to handle disruptions by earthquakes as well.

20 N.R.C. at 252–53.

The NRC is correct in saying that it may—perhaps must—assess the flexibility of an emergency response plan to meet different kinds of exigencies. The Commission has previously explained that "there should be core planning with sufficient planning flexibility to develop a reasonable *ad hoc* response to those very serious low probability accidents which could affect the general public." *Southern California Edison Co.* (San Onofre), 17 N.R.C. 528, 533 (1983). Although the sufficient flexibility rationale is an acceptable one in general, however, it fails to save the Commission's decision in this case because its application lacks substantial evidence in the record.

The Commission's sanguinity about the Diablo Canyon emergency plan's flexibility is grounded in its assumption that the disruption which would be caused by an earthquake is comparable to the disruption which would be caused by other natural phenomena—such as fog, severe storms, and heavy rain—which were considered in developing the emergency plan. 20 N.R.C. at 252. To make such a finding, however, the Commission needed to compare the effects of earthquakes and the effects of the other natural phenomena. The majority is wrong in asserting that "common sense" alone demonstrates the similarity of the effects of earthquakes and these other natural phenomena on emergency responses to a nuclear accident. Maj. op. at 38. Common sense rather tells us that a factual record is needed to draw such a conclusion. For example, the Commission cites only one piece of evidence on the effects of heavy fog—that it increases evacuation time to ten hours. 20 N.R.C. at 252. Even if that isolated datum constituted sufficient evidence on the effects of natural phenomena other than earthquakes, it is meaningless by itself because the Commission has no record evidence about the effects of an earthquake on evacuation time to compare it with. The problem, in a nutshell, is that the record lacks any evidence on the offsite consequences of an earthquake because the licensing board concluded that all such evidence was inadmissible.

Ironically, the Commission's sufficient flexibility rationale assumes what the Commission goes to great pains to deny—that earthquake effects *should* be considered in emergency planning. All that petitioners seek is the opportunity to litigate the issue of whether the Diablo Canyon plan is flexible enough to accommodate complications caused by earthquakes. The Commission cannot assume that flexibility without any record evidence and parade it as an excuse for not allowing relevant evidence about the disruptive effects of earthquakes into the record. *Cf. GUARD v. NRC*, 753 F.2d 1144, 1149 (D.C.Cir.1985) (a court will not

consider even record evidence when the NRC's interpretation of an emergency planning regulation had excluded consideration of that evidence).

III. Conclusion

The NRC's absolute refusal to consider any evidence of complications caused by earthquakes which might cause or occur simultaneously with a radiologic release at Diablo Canyon is inexplicable in legal, logical, or common sense terms. The Commission's decision is inconsistent with the terms of its own regulation and guidance document and with other interpretations of the same regulations. Parts of the decision contradict the purposes of emergency planning.

I am wholly at a loss to understand why the Commission has worked so strenuously to exclude all consideration of earthquakes from these licensing proceedings, when earthquake complications could easily have been explored on the basis of previously prepared exhibits and cross-examination of witnesses already testifying in the proceedings.[19] I can only surmise that the Commission's members painted themselves into a corner from which they refused to retreat. It defies common sense to exclude evidence about the complicating effects of earthquakes from a proceeding dealing with how to respond to a nuclear accident at a plant located three miles from an active fault, a plant in which seismic concerns dominated the design and construction proceedings for well over a decade. The majority's preoccupation with probability calculations simply does not justify the Commission's stubborn refusal to do the obvious. The majority has allowed the Commission to interpret its regulations in a manner which undermines the basic purpose of emergency planning and singles out earthquakes for different treatment from other offsite natural phenomena, without giving any good reason for its neglect.

The Emperor has no clothes—earthquakes should have been considered in the emergency planning for a radiological accident at Diablo Canyon. The county government knows this and has factored them into its emergency plans; PG & E commissioned a study on earthquakes at the NRC staff's request and then was told there was no need to litigate or implement it. After more than ten years of public alarm, only a divided Commission and this divided court persist in pretending that earthquakes are not material to emergency planning for a nuclear plant located only three miles from an active geological fault. If that judgment is at fault, history will allow no rehearing.

I respectfully dissent.

19. The earthquake issue could easily have been resolved at an early stage in the proceedings. PG & E responded to the staff's initial request for information on earthquakes, *see supra* at 25 n. 16, by hiring a consultant, the TERA Corporation, to prepare a report on the complicating effects of earthquakes on emergency planning. *See* Rec.Vols. 102–03, Applicant's Exs. 79, 79(A) & 79(B) (for identification only) (TERA report). The *San Onofre* decision was handed down one week before the pre-hearing conference in the Diablo Canyon full power operating license proceeding. At that conference, the Atomic Safety and Licensing Board concluded that *San Onofre* barred any consideration of the complicating effects of earthquakes on emergency planning. Rec.Vol. 88, Tr. at 11,445–51, a holding swiftly incorporated into an unpublished order, Memorandum & Order, Docket Nos. 50–275 OL, 50–323 OL, slip op. at 2 (A.S.L.B. Dec. 23, 1981), *in* Rec.Vol. 88. Although at the pre-hearing conference the Board had noted that there was sufficient time to appeal before the hearings began if its ruling was in error, Rec.Vol. 88, Tr. at 11,450, the Board later denied a request to certify an appeal because a "decision in regular course by the Commission in response to an appeal from the Board's final initial opinion" would suffice. Memorandum & Order, Docket Nos. 50–275 OL, 50–323 OL, slip op. at 2 (A.S.L.B. Jan. 11, 1982), *in* Rec.Vol. 89.

Accordingly, when emergency planning issues were discussed during the hearings, the licensing board excluded all evidence on earthquakes. The applicant, PG & E, unsuccessfully attempted to introduce its TERA Report into the record, arguing that "just because we aren't to litigate the effects of earthquakes ... doesn't mean that it's not accepted into evidence if it's part of somebody's plan." Rec.Vol. 90, Tr. at 11,759. Judge Wolf bluntly rejected that reasoning, stating that "[w]e will not permit any evidence regarding earthquakes in this hearing." *Id.* at 11,760. One portion of the TERA Report, on estimation of evacuation times, was later admitted as Applicant's Exhibit 84, but only after all references to earthquakes were blacked out and only after Judge Wolf reaffirmed that he would permit no questioning on the earthquake-related portions of the report. *Id.* at 12,111–14, 12,186–90. PG & E was also barred from placing in evidence Exhibit 80(A), a portion of the revisions to the County's emergency plan for Diablo Canyon which addressed earthquake complications. *Id.* at 11,766–68. Thus, the record could easily have contained all of the information necessary to litigate the earthquake issue.

TENNESSEE GAS TRANSMISSION COMPANY, A DIVISION OF TENNECO, INC., Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent,

Public Service Electric and Gas Company, Southern Natural Gas Company, Intervenors.

No. 85–1201.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 10, 1986.

Decided April 29, 1986.

Gas pipeline company filed stipulation with Federal Energy Regulatory Commission settling or establishing procedures to resolve consolidated matters pending before Commission. Commission issued order and later issued clarifying order interpreting stipulation to require company to refund minimum bill charges made under rate schedule for interruptible transportation service for previous period, and company appealed. The Court of Appeals, Silberman, Circuit Judge, held that: (1) Commission's action was not entitled to usual presumption of deference; (2) later enacted policy could not be retroactively applied to support Commission's interpretation of stipulation; and (3) stipulation did not require company to refund minimum bill charges assessed against customers under previous rate schedule.

So ordered.

Mikva, Circuit Judge, filed dissenting opinion.

1. Gas ⇐14.5(6)

Action of Federal Energy Regulatory Commission interpreting stipulation filed by gas pipeline company had to stand on Commission's own reasoning, rather than counsel's post hoc rationalizations.

2. Gas ⇐14.5(7)

Federal Energy Regulatory Commission's interpretation of stipulation filed by gas pipeline company was not entitled to usual presumption of deference attending administrative decisions made in exercise of agency's delegated authority, where Commission vacillated in articulating rationale for result.

3. Gas ⇐14.3(1)

Later enacted policy of Federal Energy Regulatory Commission could not be retroactively applied to support Commission's interpretation of stipulation filed by gas pipeline company settling matters pending before Commission.

4. Gas ⇐14.6

Stipulation which gas pipeline company filed with Federal Energy Regulatory Commission did not require company to refund minimum bill charges assessed against customers prior to date of stipulation under previous rate schedule for interruptible transportation service, even though stipulation was somewhat ambiguous as to such issue, where there was no stated position obligating company to refund such minimum bill charges and there were specific provisions directing company to eliminate minimum bill and to file revised tariff sheets reflecting such change after effective date of stipulation.